

Transcription ICANN Los Angeles
IGO-INGO Access to Curative Rights Protection Mechanisms Policy Development
Process WG

Wednesday 15 October 2014

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Phil Corwin: Good morning. We're alive and broadcasting from the lovely Encino Room in Los Angeles, California. Welcome to our real participants and the virtual participants.

I'm Phil Corwin. I'm co-Chair of this working group seated next to Petter Rindforth, my co-Chair. And this is the - ours is a mouthful. It's the IGO-INGO Access to Curative Rights Protection Mechanisms Policy Development Process PDP Working Group. I think that's too long even for ICANN to create an acronym for it.

And basically what we are doing is following up on the last working group that addressed the issues of adequate protections for the full names and acronyms of International Governmental Organizations and International Non-Governmental Organizations.

The last working group came up with some recommendations that were adopted by the GNSO Council. The GAC had some different views on those recommendations. They're trying to work out some final compromise agreement on that aspect but it didn't cover the entire waterfront.

And we've - this group was created to look at - specifically the GAC asked to - us to look at whether it would be necessary as well as feasible to - for those organizations to use the current dispute resolution procedures, the UDRP, Uniform Dispute Resolution Policy and URS, Uniform Rapid Suspension that was created for the new TLD program for their full names certainly and for acronyms when those acronyms were being used in a way that was offensive to their rights.

And we have been plunging into that. The working group has just been up and running for a few weeks. We have made some substantial progress particularly by several weeks ago dividing the participants into three separate working groups that focused on different aspects of this issue.

And we're aiming to have a final report and recommendations as soon as feasible and certainly I think our target date at the very latest is June of next year. But if the work can progress more rapidly and reach a conclusion sooner, that would be I think welcomed by everyone; by ICANN, the GAC and the participants in the group.

So do we need a roll call here? As I say, I'm Phil Corwin. I'm Founding Principal of Virtualaw, LLC in Washington, D.C. I'm a member of the BC, Business Constituency, behalf of the Internet Commerce Association. I'll let Petter introduce himself. Then we'll go around the room. Then we can have staff note who's in the chat room.

Petter Rindforth: I'm Petter Rindforth. I'm (unintelligible) IPC and co-Chairing. And also for another four hours and 50 minutes I'm the GNSO Council representative in this group.

Steve Chan: Steve Chan, ICANN staff.

Kristine Dorrain: Kristine Dorrain, National Arbitration Forum.

Erika Randall: Erika Randall, ICANN staff.

John Berard: John Berard, GNSO Councilor from the BC.

David Cake: David Cake, GNSO Councilor from the NCSG and an inactive member of this group up till now but planning to become active.

Lori Schulman: Lori Schulman, Vice Chair of NPOC.

Man: (Unintelligible), a GNSO Councilor for the ISPs.

Mary Wong: Mary Wong from ICANN staff. And we also have participants as well as working group members in the Adobe chat. Of all the participants I believe at the moment the three working group members who are not able to be with us in person but participating remotely are George Kirikos, Jay Chapman and Paul Tattersfield.

And we also have other participants in the room and I don't know if we have a roving mic or if they would like to come up to the table to make a brief introduction. Can we start with Chuck maybe.

Chuck Gomes: Chuck Gomes. Not joining your working group but checking you out today. Okay.

(Christina Gergis):Hi. I'm (Christina Gergis) and I'm on ICANN staff.

Joseph Wright: Hi. I'm Joseph Wright, Bloomberg BNA working press.

Berry Cobb: Berry Cobb, assisting ICANN staff.

Phil Corwin: Our next topic is the background of the working group's formation and charter. And I made some remarks at the beginning touching on it. Petter, did

you have things you wanted to add on the background and goals of the working group and then we can ask staff to chime in as well.

Petter Rindforth: To say that we have our first meeting (on August 11) and we noticed that in our work description it was instructed that this working group shall at the minimum consider and then it was listed those 21 topics.

However we - when we went through these topics we pretty soon discovered that a great number of them were preferably to do very quickly initially to clear out the current problems and how they are solved today. And so we created three specific working groups.

Phil Corwin: And I think we're waiting for the...

Woman: (Unintelligible).

Phil Corwin: Yes. I think we can put the charter up just to look at that and go through it.

Mary Wong: And this is Mary Wong from ICANN staff again. For remote participants the document is un-synced so you can scroll through it. For everyone else in the room you're seeing what the Adobe participants are seeing except that we will do the scrolling for you.

Phil Corwin: So I'll just kind of put my phone on silence while we - that doesn't happen again.

Okay. And (unintelligible). This is - oh, here we go. If you scroll down. All right. For those of you looking at the chat room now, we're looking at the mission and scope.

As I noted on the 20th of November of last year the GNSO Council unanimously adopted all of the consensus recommendations of the prior working group touching on these issues and requested whether an issue

report - requested an issue report to assist in determining whether a PDP should be initiated for possible amendments to the UDRP or URS for the organizations we're focusing on.

I'm not going to go through all of the hysterical background going back more than a decade. So this is not a new issue. Of course ICANN wants the new TLD program in 2012 with some new rights protection mechanisms, Trademark Clearinghouse, URS.

The Board granted certain temperate protections at the top and second level for two INGOs, the Red Cross movement and the International Olympic Committee and also for International Governmental Organizations, which extends to the top level.

And the GNSO recommendations were approved unanimously by the Council in November 2013. Submitted to the Board, acknowledge by the Board in February of this year. And but the GAC had given different advice asking for much more extensive protections than the Council had recommended. So there's some internal politics attached to this group and we'll try to solve everyone's problem in that regard as best we can.

And the Board in April adopted the GNSO recommendations that were not inconsistent with the GAC's position and they're working on the other ones but meanwhile we've been - this group has been set up.

And continuing down we've been asked to provide the Council with recommendations regarding whether to amend the current dispute resolution procedures to allow access and use to those mechanisms by those international organizations.

And if not or if it's not practicable whether some new dispute resolution process narrowly tailed to their needs should be established. I'm not going to go through the differences between the UDRP and URS other than note that

the URS - (successful) URS results and suspension of the domain until the end of its current registration period and has a somewhat higher burden of proof on the complainant to - because of the quick action. It's much quicker than URDP.

UDRP is somewhat slower. Not real slow but somewhat slower, somewhat more costly and it results in the extinguishments of the domain or its transfer to the complainant; so for those of you not familiar with those differences.

But I think the key thing from perspective on this group is that an essentially you need trademark rights to be a complainant in those processes. I'm going to call on Kristine Dorrain. I see her sitting there from NAF. Are there other rights that entitle one to follow UDRP or URS other than trademarks?

Kristine Dorrain: No. But one distinction between UDRP and URS is URS requires word mark rights and the UDRP allows, you know, any trademark rights. So that could be, you know, service marks or even common law rights and also have stretched it a little bit further. But they all include trademark rights.

Phil Corwin: Right. So clearly a key initial question for this group is - has been whether these international organizations - whether - how many of them have trademarked their names and/or acronyms. Of those which have not, could they trademark and then thereby have standing to bring a UDRP or URS?

And then there are other issues with the International Governmental Organizations regarding the fact that UDRP gives either party a right of appeal to a court of national jurisdiction and that's raised concerns by the International Governmental Organizations in regard to claims of sovereign immunity. And we're looking at that as well.

So I'm not going to - all the bullet points that we've been asked to look at are on your screen. You can scroll through it and peruse them at your leisure. I'll

select a Wiki for this group so there's no point us reading them all. So that's the background on our charter.

So Petter or other participants in the room, anything to add on that or does staff have any additional comments before we move on?

Mary Wong: So this is Mary Wong from ICANN staff. And I guess before adding to your comments, the one matter of housekeeping that I should have mentioned at the start was for everyone to please state their names for the record and transcript before speaking. Although Phil, I know that you did that. So that wasn't directed at you.

So just to emphasize a couple of points that you made Phil that this group is dealing with two distinct types of organizations, the International Governmental Organizations, which are international organizations formed by governments and which have international protections and specific treaties and perhaps also some multiple national laws.

The other type of organizations, which as Phil noted, make for a mouthful for this working group. What the group before us and this group served as INGOs, which are International Non-Governmental Organizations. And like I said, the two are distinct.

I think the one note that I wanted to make on that is that the universe of IGOs and of INGOs, both groups, has been defined for this working group by the previous working group in the sense that there is a list of IGOs that has been provided to ICANN by the Government Advisory Committee. And in terms of the INGOs that that list is a different list. It is the list under the UN ECOSOC approval process.

So I just wanted to make that distinction as well as another one again underlining what you said Phil that not only are they two distinct types of

organizations but they don't necessarily face the same problems in using the UDRP or the URS.

Phil has noted and Kristine has elaborated on the issue of the requirement of trademark protection or trademark like or similar rights to use the UDRP and the URS.

The other issue, which is specific to the IGOs, the International Governmental Organizations, and Phil noted this as well, is the question of submission to a court in a particular national jurisdiction.

As many people know, under the UDRP and the URS when you file a complaint, the rules do require that you agree to submit to a jurisdiction of a national court for purposes of an appeal. And because of the nature of an IGO, they do not - they are not able to do that for the most part. So Phil, I just wanted to emphasize those two points.

Phil Corwin: Yes. And to further - that issue, we'll get into more detail on sovereign immunity. But of course these organizations to the extent they've registered their own domains have signed registrar contracts, which already obligate them to submit to the applicable rights protections mechanisms even though they may - we'll get into that.

And the last thing I'd add is that the GAC had asked specifically to look at curative rights for IGOs and Red Cross IOC. But this group has kind of discretion as to whether we want to also address INGOs and we'll get to our current thinking on that as we discuss the initial group of - the initial work of the subgroups.

So I think we've covered the charter and the background. And now we're up to progress the working group to date, which has been preliminary. I think we've only had two or maybe three calls of the entire working group and we

did skip one week of the - and people voluntarily divided some on just one, some on more than one of the subgroups to focus on particular issues.

And I'm going to pass the discussion off the Petter right now because he was heading up Subgroup A and the report's on the screen now. So I'll let him get to that.

Petter Rindforth: Thanks. (Unintelligible). We identified three basic issues for Subgroup A. One was to identify differences between the UDRP and the URS just to have a so to speak a good start to - so everybody knows what we were talking about and including to reference to both policies and roles. And got (to obtaining input) from National Arbitration Forum.

And (unintelligible) was on that meeting. Remember that Kristine gave a very good presentation on that issue. And it was also - we are preparing a chart with just a - well a short summarize on the differences that we know - everybody knows what we're talking about and sufficient with that.

The other things are to collaborate with UDRP and URS dispute resolution service providers as well as experienced panelists for input as I stated initially. And to obtain representative samples of IGOs and INGOs and their five UDRP and URS claims.

When it came to - well we have a good collaboration with the service providers and we're still working on to get input also from WIPO. Then we discussed if we should reach out directly in some way to panelists to speak up their inputs.

And this started to discuss a list of questions. But we fairly quickly came to the conclusion that it may be improper to ask panelists specifics about why cases may have gone one way or another or in a theoretical line of questioning.

So we concluded that it was kind of obvious what the panelists thought for each case when we go through the cases. And in fact so far the cases we have gone through related to INGOs, specifically the Red Cross and Olympic Committee, only one case has denied a transfer.

So they've also raised another question. If this is in fact such a specific problem for INGOs and if they still think so, what are the problems because there are a number of - great number of disputes actually that have been solved through UDRP and the URS when it comes to INGOs.

As to obtain samples, we - in the working group we're still working on going through more cases. It's obviously not time efficient to go through all the cases. So we're trying to find - (compare) the list with specific cases that are sort of (said) spread out on the list of INGOs to see if we can find any specific problems raised or conclusions raised that are related to INGOs.

Then of course we have also both in this subgroup and in the working group and generally realized that it would be very good to have input from GAC and IGOs in a pretty early stage so that we can have more conclusions on what the problems are - more specified so to speak.

And actually we had a meeting with the Council - with the Board this weekend and when we raised this question, Chris Despain replied that creating a GAC group that are updated and can be reached out to without having to be official working group members if it was a good idea and we - he stated that he would likely pass on this to the GAC.

And yesterday in fact I had the possibility to meet with Peter Nettlefold, the GAC representative from Australian government, that is leading a group within GAC dealing with the INGOs. And he said that he - he was also very positive to working this way - in an informal way to get quick general inputs from GAC.

And as I understand there is a group of like five people that are dealing with these issues and also have specific contacts to INGOs. So we will reach out to them during the next few days to see what kind of input and assistance we can get. And I think that so far we have coming Group A.

Phil Corwin: Thank you Petter. And I asked Mary to just leave this up for a minute just to point something out. Mary, it's not on this report but if you can refresh my recollection. In the world of existing IGOs, of course there can be more added in the future, but what number of IGOs are we talking about in the world? It's a relatively low number.

Man: Was is five or was it just you hand?

Mary Wong: Well, it was my hand and it's not five although five would make the research a lot easier. This is Mary Wong from ICANN staff again. And it is a relative - it's a very limited universe.

The GAC list that was sent to us contains I believe is 192; so definitely less than 200. And my belief is that these are the IGOs that would qualify under the International Legal Treaty, which is the Paris Convention.

And so if I may speak a little bit more to that because this was not something we really covered in prior meetings but we do have the materials up on the Wiki. That in order to have that protection and therefore be on that list, the - and organization for us has to be an International Government Organization formed by governments and so forth.

And secondly, it's not an automatic protection under the Paris Convention. That particular type of organization has to request a notification for protection under Article 6ter. So while it is certainly true that the list can and likely does change over time, it probably would be something that would be relatively easy or at least it would be possible to track and to know when that is happening.

Phil Corwin: Yes. Thank you Mary. Again, Phil Corwin for the transcript. I should have said that earlier. And I wanted to bring up that point because as you can see, on the bottom of this sheet in the world of International Non-Governmental Organizations if we were to be discussing a new curative rights procedure for them, we'd be dealing with a much larger potentially universe of organizations.

One hundred and forty on the general list but more than 3000 on the special list. So that's something that the working group is factoring into their consideration of whether we want to consider a new rights process for the Non-Governmental entity.

So I think that concludes our discussion of Subgroup A's report. And if we could put up B's, I chaired that group - that subgroup and can take us through that. Yes Steve.

Steve Chan: Just a quick comment while those - this is Steve. So quick comment while the slides come up. Regarding the last item of that subgroup, we're looking at the usage of the UDRP and the URS by IGOs and INGOs.

One of the difficulties in doing that analysis is that the list that we have are in PDF. So staff is actively working on trying to get those in something a little more usable, likely a CSV, to make it easier for NAF and WIPO to help us do that research.

Phil Corwin: Great. And that of course goes to up to now how significant is the problem, how many attempts were made to do something similar to infringement with their names or acronyms to establish domains that might - that are not formally associated with the groups but that might mislead the Internet users into thinking that they are Web sites of the group and we're trying to get a handle on that.

Subgroup B. Well here we are. We did look at the universe of potential organization and as we just mentioned, 192 IGOs on the list provided to ICANN by the GAC. So that's the ones we'd be considering for the potential curative rights to in the governmental organizations.

That list could grow but it's not likely to grow by much very quickly. So we have a fairly limited universe to consider there. And then as we just mentioned, there's 140 plus INGOs on the general consultative ECOSOC list but more than 3000 on the special consultative list.

And the - to get on those lists the INGO has to submit an application that's vetted by the ECOSOC before being admitted to one of the two lists. And that's the universe for which the original working group was looking. Let me scroll down here.

And the original working group's recommendations relating to IGOs the Board has accepted those that recommend protection for IGO full names but not their acronyms via reservation at the top and second level. So essentially they can block the registration of those names at the top and second level in new TLDs.

But the issue of appropriate protection for their acronyms other than through curative - potential curative rights dispute resolution remains unresolved and the Council is considering the GAC advice on that and the Board's request to amend the original recommendation. We don't know what the Council is going to do on that. But our work will continue nevertheless as there'll still be remaining issues to consider.

The Board had asked the GNSO recommendations to be amended so that IGO acronyms would be entered into the Trademark Clearinghouse for the life of the Trademark Clearinghouse. And I guess we generated trademark claims notice to anyone trying to register any of those acronyms as domains or perhaps even a domain name that contained the acronym.

But this can - there are in that list - there are such words (at least) in English as WHO for World Health Organization and IDEA - I forget the - what that organization as it stands for. And there are many other acronyms that could be in common and legitimate use by all kinds of other business or other types of organizations.

So the mere fact that one is using an acronym doesn't mean that one's trying to do anything unsavory on the Internet with that domain or in any way trying to mimic that group. So that's an issue we have to consider. So - but of course on the Trademark Clearinghouse that'd be an exact match to generate a trademark claims notice.

So for the acronyms the full extent of protection will therefore only be known after the GNSO and the Board and the GAC resolve their current impasse and also after our working group completes its work. So we're - creates a bit of a challenge when we're trying to focus on an issue when we don't quite know what the resolution is. That's a significant part of it but hopefully that will occur soon to better inform us.

Now significant for our working group the GAC has not issued any advice or requested any protection for any INGO except for the Red Cross and the International Olympic Committee.

So as I noted, for this group the question of whether to create a new curative rights process for all the other INGOs, the more than 3000 that we've identified, is basically an optional choice for us.

And while we have not made a final decision, and Petter correct me if you think I'm wrong, but I think our group right now is leaning toward thinking that because we haven't been asked to do so and because it's such a large universe of organizations and because we have not so far identified any barrier to those Non-Governmental Organizations trademarking their names

and perhaps even their acronyms in certain cases and thereby gaining access to the current right protection mechanisms I think we're learning toward not getting into creating a new curative rights process for them just because we haven't been asked to.

It's optional and it's a big group and we - they could use the current processes if they're a trademark and they don't have the sovereign immunity question. So for all of those reasons we may not go very far down that road for the INGOs rather than the Red Cross and the Olympic Committee.

Kristine Dorrain: And Phil, I just wanted to mention...

Phil Corwin: Yes.

Kristine Dorrain: ...that the Red - this is Kristine from NAF. And the Red Cross and the Olympic Committee are two examples that have successfully used the UDRP many instances. So even though they are specifically called out here, those two groups have already used the UDRP successfully.

Phil Corwin: Yes. Thank you Kristine. That's a very helpful comment to note that. Now the main problem that we've heard for IGOs in using the current RPMs even if they have trademarked their names or could trademark them is that the jurisdictional immunity issue. And we're looking at that.

And one of the debates we're having is sovereign immunity simply a defense that you can't be sued or does it also - for kind of an optional process like this where you're trying to protect rights, should they be able to go in and say well we want access but we don't want anyone to have access to a national court in terms of appeals process.

And of course this group has to recognize and give reasonable protections to the rights of registrants of domains that may be targeted in these disputes. We have noted, as I said, that many of these International Governmental

Organizations have registered domains and in doing so have probably used registrars where they agree to the registrar terms of service, which includes submitting to the current rights protection mechanisms, which they may not want to but they had to do that to get a domain.

And we've also noted that all these organizations have physical presences in which they enter into various types of contracts, which are - may have provisions that have a jurisdictional choice, which (unless) they're all subject to just arbitration. We don't know the nature of those contracts.

We're looking at whether that sovereign immunity claim is relevant to the question of providing them to access with a process to protect their domains - their names against abuse in the domain name system. We haven't reached a final conclusion on that.

Now we're trying to get a handle on which ones have trademarks, which ones don't and whether there's any barrier doing so. We don't have records on that right now.

We identify - well we noted that the ICANN General Council report to the original PDP Working Group highlighted 11 jurisdictions that provide protection for IGO identifiers, which of course has national law protection in those jurisdictions.

And those - that legislation either refers to Article 6ter of the Paris Convention or otherwise specific to a particular IGO or IGOs. So there's a mosaic of different protections out there for these organizations at present.

And subgroup notes as I already covered, we noted that the full working group should at the appropriate juncture, which may be fairly soon, discuss whether or not INGOs should be dropped from our consideration based on general principles and the observations of the data we've already uncovered.

And we also noted that while we're dealing with specific lists right now that the organizations on those lists may of course change over time, the organizations - although it's rare, organizations may go out of existence and new ones may be created by governments or by non-governmental parties and for the INGOs.

Our action items for the full working group and I'm going to go through these and then let staff comment with any additional observations they'd like to make.

On trademark searches we're focusing initially on the IGOs and we're - it's a fairly reasonable universe to search for the 192 names. On that list we noted that the one thing that the search TM view is largely European based database and that some important countries are not in that database. And this is just the various options we have for looking at existing trademark registrations.

We also may search the WIPO 6ter database for all 192 IGOs on the GAC list to see if they register protection under the Paris Convention. And staff is going to approach their colleagues in the General Counsel's office to seek assistance with the database search. Meanwhile we have various options for proceeding. I'm not going to read every detail here.

So I'm going to - I think that covers it. And if - Petter, if you have additional comments and Mary if you want to add any detail to follow up action based on this subgroup work, we would welcome that.

Mary Wong: This is Mary Wong from ICANN staff. Not so much adding to your summary Phil, which was very thorough and obviously the subgroups still has some more research to do.

I do want to note that a couple of subgroup members have already very helpfully taken upon themselves to do some of the searching because the

fortunate thing is some of these databases like the WIPO 6ter database is searchable online and for free. So thanks to them very much for that.

I guess one question that the subgroup would have for the full working group as well as for non-working group members but who are here remotely or in person is are we going along the right track. Do you have any thoughts on the summary that Phil has put forward on behalf of the working group?

And I guess I would add that the same questions probably would be put forward for both Subgroup A that Petter summarized and Subgroup C coming right up.

Phil Corwin: Phil again. Do we have any comments for anyone in the room right now on what we've reported so far or should we just proceed? And George Kirikos in the chat room - he's saying it'd be good if we get feedback from those not on the working group. And we may have some folks in the room in that position.

I do want to note that Mary noted the members of the working doing additional research and in particular George has been very helpful. He does a great deal of research and has provided links to information we may not have uncovered as easily otherwise. We have a comment here?

Lori Schulman: This is Lori Schulman. I'm new to the working group so this is my first exposure to the reports. I have a couple of thoughts about the INGOs. And I'm not sure I'm reaching a conclusion yet. So these are comments.

Firstly, NPOC, and this may be a bit of a - of interest to the group and I will write it up and submit it to the Wiki. NPIC did research on those 4000 names that came off the ECOSOC list. We actually looked at every name to see whether or not they had registered domains.

And apart from the trademark issue we wanted to understand how these organizations are using the Internet. And we had some astounding results in

that less than a quarter actually had active domains. And those that had registered domains many of them had lost them and those domains were now on like snap lists and corralled for sale by other domain suppliers.

How that's relevant to this group I'm not exactly sure but I think it's good information to have to understand what the Web presence of these INGOs may be. And I understand that's different from the trademark issue because whether or not they have a Web presence, they certainly would have trademark rights regardless of their online presence.

Secondly, I think it's interesting to think about drop them or why drop them because I guess I would want to understand what was the thinking behind adding them in the first place because I would wonder on one hand you can certainly make the argument that you made about them having the ability to register trademarks having the ability to submit to jurisdictions and essentially function like any other entity that is running a business albeit a non-profit business.

On the other hand, are there special considerations, special needs regarding resource allocation or some other measure of why there's a particular need in that community as apart from any other segmented group of the non-profit community.

Phil Corwin: Yes. Thanks. Thanks for those comments and I'm not sure that we were aware of that work that you had done. If you could forward it to Petter and I and to Mary so we can share it with the full working, that'd be very helpful.

A couple comments here. One, of course one does not have to register a domain name to have access to the existing RPMs when it (singularly) needs to register.

A trademark is not a requirement to have an Internet presence although it's fairly - I find it fairly astounding that in this day and age less than 1/4 of these

organizations would not even have a basic Web site so that people just wanting to communicate with them could find basic contact information on the Internet. But if that's the reality so be it.

Second, in regard to if one of the concerns is the cost of access to the current RPMs, I don't know much - I don't know that we can come up with a cost free solution unless ICANN or some GAC members or some philanthropist wants to fund that.

The present cost barrier to URS is very low. It's \$500 I believe to file with NAF. Filing a basic single member panel for the UDRP is about \$1500 in most places. So it's not an - it's not like the rights protection process at the top level that would create the new TLD program. We're talking about tens of thousands of dollars in filing and other fees.

And third, one of the reasons we're reluctant to go down that path aside from the fact that there's so many of these organizations and we may - there may be thousands more we're not even aware of is that at least with trademark we're - you've got to the Madrid Treaty or you've got a rights protection mechanism based on existing internationally recognized legal rights.

And everyone from Steve Crocker down has noted numerous times that ICANN is not a legislature. It's not in the business of creating rights. It has a responsibility to particularly in trademark to help protect rights and has done so by creating RPMs.

But if we're going to start creating a new system aside from UDRP and URS, the threshold question is what is the basis - what are we protecting if it's not a legal right like trademark? Are we going beyond the bounds of really ICANN's power in creating some new right (at a full clock)?

Now, you know, we may be doing that with IGOs but we're very hesitant to do that for groups which seem to have no barrier to trademarking their names

and where we have existing RPMs that are pretty readily accessible. And I'm not sure we have a lot of history of abuse of those INGO names either aside from a few very well known ones like the Red Cross and the IOC.

Petter, did you have any comments?

Petter Rindforth: Just if - Petter Rindforth here before I (unintelligible). I echo that it would be very interesting to see that report. And I see it as - even if it's not 100% the legal topics we're dealing with now but it would be very interesting to see if we can draw some conclusions about why we don't see IGOs in the disputes.

It may turn out to be that it's - that the main part is, as you say, their marketing practices. And then we can sit here and say that oh, they should be out on the Internet for informative and marketing issues.

But if there could be other reasons why we don't see them using the current domain dispute resolution systems. And that could be one of the points for that. Thanks.

Phil Corwin: And one thing to add and then we'll get into the report of Subgroup C. It may be covered there. I forget the scope of their work. But if we do go down the path of considering the creation of a new curative rights process for IGOs to give you an idea of the issues we'll be grappling with, if it's not based on trademark rights aside from the appropriateness of ICANN creating new rights, you get into well how are you going to determine when something akin to -- let me just finish the thought -- infringement has occurred.

And let me give you an example. I mention WHO. That's World Health Organization. So certainly anything - you know, when you register a trademark you register for protection relating to certain classes of goods and services in every country when you register with the United States patent and trademark.

You have to pick which areas of goods and services you're registering to protect because entities can have the same name or the same acronym for different goods - classes of goods and services and not be infringing one another's names. You have united being used by all kinds of companies.

So it would require how do we set up a classification system for these IGOs? What are the categories and how much - and how do we create a system that pre-identifies some type of - do we have to create a registration system where they register in advance a particular goods and services or are we going to - or are the panelists let's say for World Health Organization - I know they're involved with health related activities.

I don't know. They may be active in other areas and we don't - so do we need to create a system where they pre-register for protection for whatever new rights protection mechanism we might set up.

Or do we put the burden on the panelists to have the additional burden of trying to determine what activities they're engaged in because they have to look at what the registrant of the potentially infringing quote unquote domain is involved with to see whether there's been any trespass on the rights of the IGO.

So that gives you an idea of the complications in that. I know you wanted a talk on that.

Lori Schulman: Yes. I wanted to respond to that because I want to clarify that my comment earlier was exactly to all of those clients that I - and in just to full disclosure, I've been a trademark examiner. So I'm aware of the system in place for the U.S. anyway that that's my point exactly that the INGOs were grouped with the IGOs.

And I'm not clear in my own mind about why they were added. I might come to a different conclusion just personally about whether or not given the

situation of how they work, how they run that there may not be at some point a need to address that issue separately.

But I agree that it is a separate issue. But I'm just trying to clarify here when - I mean they're included and now there's being talk about dropping them and I guess I don't understand the rationale for the inclusion. That's all.

Phil Corwin: And I see Mary raising her hand and I recognize her to comment on that aspect.

Mary Wong: Thank you Phil. Mary Wong from ICANN staff and thanks Lori. I think it goes back to the summary that Phil provided at the beginning of this meeting that the origin of this PDP and therefore this working group was in the work of the previous PDP working group.

And it's that working group they were considering protections for IGOs and INGOs. And they came up with recommendations with regards for both types of groups including the request to the GNSO Council to look further into the curative rights question, which is what we're looking at.

And so in chartering this group in some ways you could say that there was not much room to maneuver in that sense. But in the issue report that was presented to the Council and the Council's deliberations and I think that's carried forward into this group's work that the recognition of the origin - the recognition of the problems faced by both types of groups, which may be different, and therefore the ability for this group to go back and say we would like to make this set of recommendations for IGOs.

We would like to make this set of recommendations for INGOs. Or we might like to make a certain set of recommendations on top of that for both or none.

Woman: (Unintelligible).

Phil Corwin: Let me...

Woman: (Unintelligible).

Phil Corwin: ...yes. Let me just say George's entire comment. I think he said - here we go.

Woman: (Unintelligible).

Phil Corwin: I think George commented that the inclusion of INGOs was a political thing without much rationale into all that. Much of what ICANN gets involved in is a political thing. I would agree. But - and I said this group is not compelled to go very far down the road considering a CRP - new acronym, CRP, curative rights process added to the ICANN acronym list.

For INGOs if we just decide it's just too much and there's no need because they can use the existing ones. So we'll be coming to that fork in the road soon and as Yogi Bear once said, when you come to a fork in the road, take it.

And with that comment, let's go onto the report from Subgroup C. And I want to note he's not with us in the room today. I know he's at the meeting but Subgroup C was chaired by Mike Rodenbaugh who's a member of the working group and a Internet and Intellectual Property attorney based in San Francisco. And I'm going to go through the highlights of that working subgroup report. And let me just increase the zoom a bit.

Okay. Okay. So first question they dealt with is what did the second WIPO Internet domain name process WIPO-2 recommend and on what basis? They noted that existing international law Article 6ter of the Paris Convention provides clear principles prohibiting the use of IGO names and abbreviations as trademarks or elements of trademarks with an exception we're used to the IGO name or an acronym is not of such a nature as to suggest to the public

that a connection exists with the organization concerned or is probably not of such a nature as to mislead the public as to the existence of a connection.

So basically they said out - entities other than the IGO cannot trademark their names or acronyms except when it wouldn't confuse the public, which of course is a subjective judgment after the fact. So I'm not sure how that works in trademark registration practice. Perhaps after this presentation someone can chime in on that.

However, that legal basis isn't sufficient to deal with a whole range of (bad face) registration and use of IGO names and especially their acronyms. As to domain names, they also note that the (.int) domain does not adequately IGO names and acronyms for abuse.

That criteria I assume for registration is too restrictive. It's not universally adopted by all IGOs. They don't choose to register domains in (.int) and it doesn't prevent registration of their names or acronyms in other top level domains of which there are more very week.

Woman: (Unintelligible).

Phil Corwin: What is the existing evidence of harm? They say evidence was provided throughout the second WIPO process of a sizeable problem of abuse of the names and acronyms of IGOs. Let me go through this before commenting.

They found problems in areas relating to public (unintelligible) labor practices, peacekeeping operations, nuclear test bands, proliferation of chemical weapons, trade disciplines, children rights, refugees, aids, et cetera, et cetera. So we certainly don't want people mimicking IGOs and those very sensitive important areas that offends many public policies.

The WIPO report found the existing situation with respect to the names and acronyms of IGOs is unbalanced. Anyone can register the name or the

acronym of an IGO in an unrestricted TLD, which is true. The registrars don't do any vetting.

Everything is left to after the fact intervention through a rights protection measure other than the trademark claims notice generated by - in the new TLDs but that does not block registration. It simply puts the registrant on notice that they may be committing infringement if they go forward with the registration.

And of course we'll be looking at - I believe there's a session later this afternoon on - for people to chime in on what they think of the new RPMs. I'll be attending that to see what the response is.

But the question of whether -- the RPMs aren't going to change for the current round -- the question of whether they should be changed in any way for a subsequent round is a decision that's probably off several years. It looks like the next round of new TLDs would not occur prior to 2017. So we're dealing with the existing rules and they're not going to change for the next few years. That was my editorial comment.

Back to the report. The WIPO report said the existing situation was unbalanced. I covered that. Let me scroll down. Okay. The subgroup noted that the two options presented in our working group were expressly - have already been expressly considered by the World Intellectual Property Organization, which is in itself an International Governmental Organization and is on that list of 192 names.

The first would be modification of existing UDRP specifically designed for (bad face) misuse of the names or acronyms as IGOs. WIPO said this is unacceptable because insofar as ICANN might be considered for the introduction of modification of the UDRP in the subsidiary (advice) and not have any constituency pertinent to the international intergovernmental organizations.

I'm not sure I agree with that first one given the very active participation of the GAC in this and the fact that these organizations are creative by governments.

Mary Wong: (Written in 2001).

Phil Corwin: Right. It's a very - we're in the time machine here. This is 13-years-old - these (finance) letters. Historic background. And the UDRP - and this is the sovereignty issue contains within this design an unacceptable deviation from the established principles of immunity of IGOs from the jurisdiction of national courts.

And the other one they looked at 13 years ago was an administrative procedure similar to the UDRP but independently developed and managed within the framework of international administrative tribunals. And that of course is the very option that this working group is tasked with looking at.

Mary Wong: (Do you want me to speak on it)?

Phil Corwin: Yes Mary. It looks like you want to comment on that. So jump in.

Mary Wong: Thank you Phil. And this is Mary Wong again. And just a note to folks my (unintelligible) this side to Phil with just a note that of course this is a report that was produced by WIPO back in 2001.

And those recommendations were presented and Phil will note to the general assembly of WIPO that these underlined bits were underlined by staff in preparing this summary because while the two options under consideration by a working group were indeed considered.

You notice that in terms of some of the specific elements it may not necessarily be the one that has been talked about subsequently within ICANN itself. And I think it goes through that.

But what I wanted to say on that is that the working group can consider a separate mechanism. I think you were talking about this earlier Phil about there are ways to do it that really may be quite different from what's been recommended in the past including in this particular report because this I think in 2001 (conceived of it) as within an international (arbitrol) tribunal wholesale versus ICANN.

You kind of see an either or in that - in those two options. And that may not be the case in 2014.

Phil Corwin: Thank you for that illuminating comment Mary. I'm going to speed up my review of this because I've noted this report is seven pages long and I'm only on Page 2 and I want to leave time for questions and discussion.

But I will note that - and this is relevant to an issue we're dealing with I mentioned a few minutes ago. The WIPO report recommended Option 2, creation of a new rights protection mechanism specifically for IGOs but noted that it would involve at least in cases not involving the use of domain names as trademarks, creation of new international law.

So that brings us right back to the issue of even if we conclude that a new CRP for IGOs is needed, does ICANN have the authority to create the underlying rights quote unquote that would be the basis for claims in such a system or do we need to go back to the GAC and say hey guys, you need to create some new international law for IGOs as the basis for that new rights process? So not sure yet what we're going to do with that one.

WIPO general assembly. What did they adopt? They - okay. I wish Mike was here because this is complicated stuff. And they wanted a - they

recommended a UDRP be modified to provide for complaints from IGOs - consideration of complaints based on the grounds that the registration or use of the name or appreciation of the IGO as a domain name is of a nature to suggest the public - that a connections exists between the domain name registrant and the IGO where it would mislead the public as to such a connection or on the ground that the registration or use as a domain name is protected under international treaty and violates that treaty.

They also recommend the UDRP be modified to take account in special respect and respect the (unintelligible) of IGOs and international law that does not submit to jurisdiction of national courts.

That is another challenge for this working group because, as I said, we must - while we want to protect IGOs, we must make sure that registrants of these domains have a meaningful appeals process and that's provided now in the UDRP though the option of appealing to a national court.

You can even intervene immediately and file a suit international court and vacate the UDRP before any decision is reached. So we have to consider what is needed to protect the substantive and procedural rights of the registrant to make sure that if there's a mistake made by a new panel that they have a meaningful right of appeal because domain names should not be taken away without adequate rights for the registrant.

Okay. Then we - accelerating the time machine coming up to 2004 there was an ICANN President's Joint Working Group. And they reached no consensus on adopting the WIPO-2 recommendations.

So there is precedent for this issue being looked at and no conclusion being reached on what should be done about it. And the report goes through the arguments pro and con but in the end it didn't matter. They had no consensus for one going one way or the other.

Then the GNSO issued a report on dispute handling for IGO names and abbreviations in 2007. So we're now - you can see we're being asked to solve problems that none of these previous groups were able to solve but perhaps we'll have more insight and perhaps things have changed enough to permit us a solution to be created.

That was an issue report in question by the GNSO Council pursuant to an IPC request, Intellectual Property Constituency and let me see what they concluded. The outcome. No further work was undertaken by the GNSO as a motion failed to carry in the GNSO Council due to lack of votes. So once again, another group looked at this issue and crashed on the rocks before reaching shore.

Okay. And here's comments from Mike Rodenbaugh that the subgroup's focus on identifying circumstances may have changed the need for and the scope of protection for IGO and/or INGO identifiers. Since the GNSO's work in 2007 - their unsuccessful work as we've seen, we know the new facts that we have, we know the scale and scope of the DNS expansion at least under the first round of new TLDs.

We do see an increasing activity by the GAC and their request for protections for IGOs in the new TLD program. So the GAC is responding to concerns they've heard and has asked ICANN to once again try to address this issue.

The GNSO recommendations for IGO acronyms differed from the GAC advice. And that's trying to be hashed out now. We've created a new RPS specifically the Trademark Clearinghouse and uniform rapid suspension.

And the Subgroup C report concludes by suggesting that the full working group considered these changed circumstances alongside the data gathered by the other two subgroups to discuss whether they collectively illustrate the need for or not of updating the GNSO's 2007 work by considering either

amendment of the UDRP and URS to developing a special dispute resolution procedure for IGOs and/or INGOs.

And of course if we go down the road of trying to decide a new rights process, we're going to be hitting up against those issues of what are the rights we're protecting or do we need new international law to provide a basis for a new CRP and what type of an adequate appeals process we can create for registrants or complainants if they're not satisfied with the initial result that does not involve going to a national court.

Petter, do you have anything add on any of this?

Petter Rindforth: Thanks (unintelligible). Just want to say that it was a good summary. And just say keep our fingers crossed that - let's hope that our proposed - final proposals for these will have better possibilities to be voted in the GNSO Council than the previous ones.

Phil Corwin: Okay. And I think with the completion of presenting Subgroup C's report, we've pretty much brought everyone here and in the chat room up to date on the work of this working group and its subgroups to date. And you have some sense of the road ahead.

As I said, we haven't decided yet but there's a good possibility we'll decide not to give much further consideration to the INGO question other than Red Cross and the Olympic Committee. We will be giving much more detailed consideration to the IGO situation, extent they have trademarks. What the basis of any new CRP would be, how it might be.

Designs of the extent to which any of them have used the existing RPMs and their success or not with that or whether the national jurisdiction issue is preventing them from using that.

And at this point I would invite and welcome comments, questions or any other relevant intervention by anyone in this room or the chat room to make productive use of the remaining 15 minutes of this session. And I see Kristine raising her hand and I recognize her. Thank you.

Kristine Dorrain: Thanks. This is Kristine from NAF. I just wanted to point out since we were discussing it, George did some research in the chat and posted a link to how INGOs got added to this. So if anyone wants to go look at up through the chat or whatever that you can do that.

Phil Corwin: Thanks that for that Kristine. As I noted before, George has been extremely helpful in helping us find information that we might not have found or would have found with much greater difficulty without his assistance. And we greatly appreciate that. Other questions or comments here in the room or from the chat room? And I recognize Mary.

Mary Wong: Thank you Phil. I think the - having supported Subgroup C, the last part of Mike Rodenbaugh's email what the subgroup there is looking for is maybe comments as well as additional bullet points, if you like, to list of potentially changed circumstances.

In other words, just because the work was done before there are other things now that might merit either going down a certain path or going down a certain path in a different way.

And I think two of the things that was most identified - obviously we now have seen that where we only have the UDRP, we now have a URS what was modeled on the UDRP. So there are ways to deal with specific problems perhaps.

But the other big point is the existence of several GAC communiqués that at least on the IGO issue has emphasized that for IGOs just as it was for the IOC and the Red Cross the protection should be based on international law

and the specific law that was called out was the Article 6ter of the Paris Convention. So I wanted to note that for the group as a reminder. I think we'll keep saying this every few weeks I guess so.

I think the other point about the jurisdictional immunity question that you brought up before - I had - I did have a question from a working member and I apologize, I forget who it was, about further clarification on that in light of the observation that when one registers a domain name one signs a registration agreement that has a submission to jurisdiction or choice of law clause.

And so staff thought it would be helpful to clarify that we're not talking about that agreement. We're not talking about that submission to jurisdiction. We're talking about when you file a complaint under the UDRP or the URS for example as an IGO, the rules oblige you to say that for purposes of an appeal from whatever might happen in the UDRP or URS proceeding that you submit to the jurisdiction of a national court.

So I just wanted to say - and Kristine is probably going to clarify what I said because I probably described it inaccurately. But the main point I wanted to make is that it is a different agreement that we're talking about.

Kristine Dorrain: Yes. This is Kristine from NAF. So I'm not going to clarify anything but I have a question for you. So I understand that we're talking about two completely different agreements. That is completely clear in my mind. But I want to understand how it is substantively different from the legal perspective.

So if I am an IGO and I want to register a domain name in .com, I have to submit to the registration agreement that binds me to those mutual jurisdictions in the new registration agreement.

I'm doing that by registering a domain name and I'm saying I'm amenable to that. So why could that same IGO not file a complaint against a different domain name when they again have to agree to those same - those exact

same two jurisdictions, location of the registrar - location of the registrar. I have no possible answer in my head but I want to hear what other people have to say.

Mary Wong: I'm not going to answer the question. It is not my role as staff support for the working group so what I'll say is two things. One is that that is probably one question that this working group can and perhaps should consider maybe with assistance from, you know, our General Counsel's office if necessary on specific points of legal clarity that might be needed.

The second point that I would make is to go back to what Petter said at the beginning of this meeting that because there's a small group of GAC members and interested IGOs who are willing to serve as a contact point for this group, that may actually be a question that we can bring back to them because that is one of the steps being taken for this particular working group as part of the broader GAC early engagement in GNSO PDPs. So hopefully that's at least slightly helpful.

Phil Corwin: Yes. And let me add to that. One, I'm really - this group has done very proactive outreach including with the GNSO Council and with Board members who were in the meeting when I met with the Council since this is an issue that's very important to the Board because of its political overtones to urge that everything be done to get GAC members or representatives or IGO members or some to work with this group because what we don't want to happen is do all this work and produce the final report and recommendations and then hear from the GAC or the IGO.

That's not good enough. You didn't give us what we wanted. And then our response would be in the absence of participation well you didn't - we didn't have your perspective as we worked because you just weren't participating. So we very much want to avoid that situation.

A question I want - you know, to the extent we get that participation what I want to know is that these IGOs in their day-to-day work how do they handle the fact that both the organization themselves and their staff in carrying out their duties must be involved in all kinds of commercial transactions which have standard clauses that refer to what's going to happen if there's a dispute?

I mean they contract for I guess all kinds of services for their headquarters buildings. They take airplanes and buy airplane tickets and they, you know, it's long legal documents attached. So how do they deal with the sovereign immunity question in all kinds of other commercial context in which they must deal because you can look at the domain registration agreement as just one more commercial contract they've entered into for specific purpose?

And as they've done that are they entitled to say we want to have these domains but we don't want to be bound to the processes that a company registering for those domains that are imposed on every other registrant, which is not an International Governmental Organization?

I don't know what the answer to that is but that's the question I'd like answered because we need to determine whether this sovereign immunity claim really requires the establishment of the new CRP. And I'll stop.

We have six minutes left. Let me check the chat room. I don't see anyone raising their hand. Anyone else in the room have anything that they want or like to say on this topic? Because if not, we can always have the option of ending a few minutes early if there's nothing more to be said other than I want to appear - Petter and I were discussing just before the meeting started.

Looking forward down the road whether we should have a working group call next Wednesday. We've been having our calls at noon Eastern Time each Wednesday, which I believe is 1400 UT - no 1600 UTC.

I think our predisposition, and correct me I'm wrong, was to skip next Wednesday because so many people will be still - just traveling back or just recovering from traveling back from this meeting and to resume the calls of the working group the following week.

That doesn't mean we won't be doing any work between now and two weeks from today. But just means we wouldn't schedule a call because there's so little time between getting back from ICANN to do anything of - any additional work to discuss on a call just one week from today.

So those on the working group and those interested in joining or following our work should - what is today? The 15th. So our next working group call will be on Wednesday, October 29 at 1600 UTC for those who want to participate or observe in that. And Mary's raising her hand.

Mary Wong: Actually I was raising my hand to volunteer my colleague and GNSO team leader Marika Konings.

Marika Konings: Thank you very much Mary. I'll remind - remember that tactic. I just wanted to note for some of you that may have been on the GNSO weekend sessions, you may be aware that we have a pilot project on facilitated PDP face-to-face working group meetings.

We ran a meeting at this ICANN meeting with the Privacy Proxy Working Group and we're foreseeing that same pilot to continue for a meeting in Marrakech as well as in the meeting that will follow after that.

And, you know, Mary and I haven't looked at the list of PDP working groups that are ongoing and the stage or phase that they're in. We thought that this group might be a good candidate to have that opportunity for a face-to-face meeting linked to the Marrakech meeting. And it would be either the day before or the day after.

But just noting as well that, you know, the support for this pilot project, you know, it's a pilot so we're trying out what works, what doesn't work is limited because it does make the assumption that people are already traveling there. So it does cover an additional hotel night.

So it basically assumes that people are arriving otherwise or usually on the Friday to attend GNSO meetings on Saturday or Sunday or are already there until Thursday so that the program foresees that we could cover one additional hotel night.

And again, we just want to flag it. We're still waiting as well for the Council to say yes, you know, we're fine with you going ahead. And then a possible next step would be of course to reach out to the group to see if indeed members are interested and available to do so and plan accordingly from there.

Phil Corwin: And thank you Marika. And two quick comments. Phil for the transcript. One, I participated last Friday in that facilitated discussion of the Privacy and Proxy Accreditation Standards Working Group and even though our facilitator had to exit the room after one hour with food poisoning and we hope he's fully recovered.

The consensus among the participants in that full day eight hour exercise was that it was extremely useful that the fact that we were - and let's admit it. Many of us are multitasking when we're on conference calls and not giving our full attention to what's happening.

That being in that face-to-face communication just communicates more than any electronic substitute. That we got more done in that eight hour period than we would have gotten in any - done in any 12 conference calls. It was really useful. And this particular working group on IGO and INGO protections may be a good candidate for that in Marrakech.

I would ask that staff and whoever is going to decide that do so as soon as possible because it's going to impact - for many of us you want to make - you want to make your hotel reservations early so you get in the venue hotel. You want to - if you can you want to make your plane reservations early so that you get the best fares.

And whether that this working group's going to be selected for that type of full day event either the day before or the weekend meetings or the day after the end of the ICANN meetings will impact on both hotel and air reservations. So it would be good to know sooner rather than later.

Marika Konings: Yes. And this is Marika. Absolutely. I think our hope is that tomorrow during the wrap up because we already flagged it over the weekend and that during the wrap up we can say look, you know, we flagged this. Are there any objections or concerns? And if there are not, you know, we'll move forward.

I think one of the fairest questions, you know, to be - may we can do a little straw poll here is in principle the preference to do it before the meeting or after the meeting. And, you know, for this meeting we were restricted because there was already a GNSO Council development session that was taking place on Friday.

And we heard some people say well, I usually don't come to the ICANN meeting until Sunday. So for me it was a bit more difficult. So one of the obvious questions is does it make more sense the Friday before or the Friday after.

And again, you know, we'll reach out back to the group. But if you already have any specific view on that, you know, let us know so we can take that into account.

Phil Corwin: Petter.

Petter Rindforth: Well that - the first thing I think it's a very good idea. And can we change the GNSO agenda to have it on the first session so I can vote yes for it? (Give) that whole Friday.

I just also just want to add quickly that, as I said, we - although we will skip the meeting next week, we will continue to work. And from what I see, I will hopefully get a summary and we'll form a summary of what we have done in my working group. And also to reach out to GAC to see what kind of initial inputs and what specific persons that we can continuously in an informal but effective way communicate the (thesis) with. Thanks.

Phil Corwin: Okay. And I think with that comment, it's - we're one minute past time. So we're going to say thank you to all of those who participated today either in the real room or the virtual room.

Once again, our next call will be two weeks from today, October 29. And we look forward to learning soon whether this working group will be selected for that full day treatment in Marrakech, which hopefully will be forthcoming shortly.

And with that, I'm going to - I think we can stop the recording and this hopefully informative meeting for those who attended. Thank you.

Man: Goodbye.

Man: Thank you.

END