Transcription ICANN Singapore
IGO-INGO Access to Curative Rights Protection Mechanisms Working Group
Friday 13 February 2015
Part 1

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On page: http://gnso.icann.org/en/calendar/#feb

Petter Rindforth: So welcome, everybody. This is Petter Rindforth. Welcome, everybody, to this fantastic, interesting day that we have to look forward to and to hopefully make some kind of conclusions.

And I appreciate the possibility that ICANN has given us to actually have a full day to go through the specific issues and updates rather than to - when we have our weekly one-hour meetings. And we sometimes realize that it's eight minutes left and a lot of questions that we have to pass on to the next meeting.

So that being said, welcome, everybody and let's start the roll call. Thanks.

Glen de Saint Géry: Mason Cole.

Mason Cole: Here.

Glen de Saint Géry: Petter Rindforth.

Petter Rindforth: Here.

Glen de Saint Géry: Philip Corwin.

Phil Corwin: Here.

Glen de Saint Géry: Kathy Kleiman.

Kathy Kleiman: Present.

Glen de Saint Géry: Valerie Sherman.

Valerie Sherman: Here.

Glen de Saint Géry: And for staff we have Mary Wong, Steve Chan, myself, Glen de Saint Géry, and our facilitator...

Woman: Chris Robinson.

Glen de Saint Géry: Chris Robinson. And on the line we have George Kirikos, Laurie Schulman and Jay Chapman. Have I left off anybody? I don't think - just let me see on - oh yes, on Adobe Connect we also have David Heasley and I think that is all so we have quite a few remote participants. Thank you, Mary and Steve, over to you.

Chris Robinson: Over to me?

Glen de Saint Géry: Sorry.

Chris Robinson: Or Petter.

Petter Rindforth: Just for formality reasons any new Statements of Interest - updates there? No, okay. Thanks.

Chris Robinson: Right, so good morning, everybody. My name is Chris Robinson. I work with an organization called Insight Learning. I am a facilitator today of this meeting. I will not be participating in any of the content discussions; my role is purely to try and help you as a group of people get to the end of each section satisfactorily and to be able to record decisions or discussions as we go along.

So I will be, from time to time, coming in to the meeting and checking that we're all headed in the right direction and that we're all on the same page. Just wanted to check, do you want to go and do some introductions, Petter? Or do you feel that's been done?

Petter Rindforth: Yes, please, go ahead.

Chris Robinson: Okay so what I'd like to do is just go around the room and to those who are dialing into this call remotely and get from everybody their name and which part of the organization that you work with and for and how long you've been involved. So I will pass the baton to Mason to my left.

Mason Cole: Mason Cole. I've bee involved with ICANN issues since the year 2000, which makes me ancient in this world. And I currently serve as the GNSO's liaison to the GAC meaning that my responsibility is to inform the GAC on business that the GNSO is conducting on which the GAC may wan to have input at some level. This is the first sort of test case where we're having an opportunity to do that. So that's my role here today.

Chris Robinson: Great, thank you. And Petter.

Petter Rindforth: Petter Rindforth. I - actually my first ICANN meeting was back in '98 so (unintelligible). But - and what's interesting is that many of the issues we deal with the latest years are more or less the same that was discussed generally back in that time. But hopefully we'll get to some more specific conclusions.

I am representing IPC and there I'm representing the International Organization of Intellectual Property Attorneys, FICPI. Normally I'm up in the cold Sweden working at the law firm, Fenix Legal. And I also deal with a lot of domain name disputes during the years for some of the organizations. Thanks.

Phil Corwin: Good morning or whatever time it may be for you if you're not in the room but in a different room. Philip Corwin. I've been involved with ICANN matters since - well I've been coming to ICANN meetings since 2006, actually got involved with some ICANN stuff the year before. Been on the Business Constituency since 2007 representing the Internet Commerce Association which is a trade association of domain name investors and developers so they primarily be the registrants in any curative rights process.

And I'm currently - just became a member of the GNSO Council representing the Business Constituency. And I'm vice chair of this esteemed working group.

Glen de Saint Géry: Glen de Saint Géry, I'm the GNSO Secretariat and member of ICANN staff.

Mary Wong: I'm Mary Wong, ICANN staff support for this group. And I was also initially a community participant and then subsequently staff support for the prior IGO INGO working group. So I guess that means I've been working on these issues for quite some time.

Steve Chan: Steve Chan, ICANN staff. I've been on staff about 6.5 years but for most of that is actually new gTLD program so I've been on the policy support staff about - almost a year now.

Kathy Kleiman: Great. Kathy Kleiman. I wanted to thank all the remote participants having done that remote thing I appreciate you doing on at all hours. So I'm with the law firm of Fletcher, Heald & Hildreth in Arlington, Virginia where I run the

Internet Law and Policy practice. I'm not here on behalf of any clients for this particular matter but I am a member of the Non Commercial Stakeholder Group and a co founder of the Non Commercial Users Constituency. So like others at the table I've been working on many of these issues for many years. Thank you.

Val Sherman: Hello, this is Val Sherman. I'm with Smith, Gambrell & Russell, also with IPC. Our firm represents the International Olympic Committee, as most of you probably know. I have been involved in ICANN in some capacity since October of 2013 so I'm relatively new on this team. And more intensely involved since the Los Angeles meeting so glad to be here.

Berry Cobb: Berry Cobb, assisting ICANN staff.

Phil Corwin: And Phil Corwin coming back - waking up slowly to amend by prior statement just to note that I - besides being on the BC for the ICA I have a policy consultancy in Washington called Virtual Law which primarily deals with the US congress and executive branch on Internet-related issues. And I'm also of Council to the law firm of Greenberg & Lieberman in Washington.

David Cake: I'm David Cake, I am a GNSO councilor for the Non Commercial Stakeholder Group and I am a member of the Non Commercial Users Constituency. And I'm the chair of Electronic Frontiers Australia so I'm a comparative ICANN newbie, I think I've been around since about 2008.

Petter Rindforth: Great, thanks. So that's introductions from everybody in the room. Is there a way that you can go through (unintelligible) on your Adobe?

((Crosstalk))

Petter Rindforth: Sure, I'll get that, yeah.

Mary Wong: We have participants in the Adobe Connect meeting room. And if you're dialed into the phone bridge you should be able to speak and be heard in this room. Are they all on the phone bridge? So - if I may if I could ask those on the phone to introduce themselves, perhaps starting with Laurie?

Laurie Schulman: Hi, I'm Laurie Schulman. I've been involved - I've been following ICANN since its inception in the late 1990s, however, I've only been active for the last four years as one of the original members of the Non Profit Operational concerns Constituency. And for my day job I am general counsel to a non profit organization in Washington DC - oh I have muted them, I'm sorry. Can you hear me clearly now? Oh good, I'm sorry.

Mary Wong: Yes, Laurie, go ahead.

((Crosstalk))

Laurie Schulman: Yeah, in my day job I'm general counsel for the Association for Supervision and Curriculum Development, which is an international organization devoted to K-12 education.

Mary Wong: Thanks, Laurie. And, we have several other participants and so I guess I'll go in order of how they appear on my screen. We have Alexander Lerman who's just joined us. Are you able to introduce yourself orally, Alexander? We're not able to hear you, Alexander. So if you want to let us know we can dial out to you. But in the mean time we can go on to David Heasley.

Glen de Saint Géry: (Unintelligible).

Mary Wong: Who is not on the audio? So perhaps I could ask Alexander and David to type their introductions into the chat and we will read it out. George, I think I heard you so I'm sure you're on the phone. Can we go to you, George?

George Kirikos: Hi. My name is George Kirikos. And my company is Leap of Faith Financial Services, Inc. And we own and develop a number of domain names and Websites used by millions of users, including math.com and school.com. My background is economics and finance.

I guess I first got involved in ICANN issues in 2001 and 2002 regarding the weightlifting service proposed by VeriSign and SnapNames. And I've been a regular participant in ICANN matters since then including membership in the Business Constituency in the past, although I've withdrawn from that organization. So I'm participating in this working group on behalf of myself and my own company.

Mary Wong: Thanks, George. Jay, are you on the line?

Jay Chapman: Yes, hello. I'm Jay Chapman and I'm with Media. We're also a registrant and I'm just heading on behalf of the company. We own a portfolio of generic domain names. I came aboard in 2000 as general counsel, now serving as president of the company. I've been following ICANN matters probably since the late 90s but now coming aboard for the first time this is my first opportunity and pleased to be working on this working group for the first time for me.

Mary Wong: Thanks very much, Jay. And we're still not getting Alexander. But, David, I think you had asked Val to introduce you?

Val Sherman: This will be pretty short. David Heasley works with me on the same matters at Smith, Gambrell & Russell.

Mary Wong: So welcome, one and all whether veteran or more lately coming to the ICANN universe. If I may before I turn it back to Chris I would like to remind folks physically in the room to turn off their mics when they're not speaking as well as to turn off their speakers and mics on their laptops if they're in Adobe Connect because we believe that may be what's creating the echo.

And on that note, Chris, back to you.

Chris Robinson: Thanks, Mary. So just briefly my name is Chris Robinson. I have been living in Singapore for nine years, originally from South Africa to Singapore via 12 years in London. I've held various global Board director jobs in - and drinks companies, manufacturing companies and in media and advertising.

I am a clinical psychologist by training and part time and professional. I work as a consultant in Singapore and I'm an associate of the company Insight for Learning run by David Cole in the US. And in fact do a fair amount of work with ICANN around the world on various committees and development programs. And I have been asked to join this meeting for the day. I have no real connection with ICANN other than that I have worked with ICANN before in Singapore in a couple of different guises.

As I said earlier on, my role today will be purely to try and keep the assembled group on track and heading towards a conclusion on each of the events on - each of these items on the agenda.

For those you who are not in the room, which is about roughly half, by the sound of things, is there a way that we can understand when people are wishing to join the conversation so that we don't all end up talking over each other? Mary?

Mary Wong: Yeah, this is Mary from staff. And so as with the regular working group meetings, for the folks in Adobe Connect, please raise your hands and we will signal Chris so that he can recognize you to speak. And as such, it would also be helpful if you're able and not yet on the phone bridge, if you could be on the phone bridge as well because of the sound quality. Thank you.

Chris Robinson: Great, thank you very much. So thanks, everybody, for introductions that was helpful and suitably brief so thank you for doing that. Do we need to talk at all

about ground rules and how the meeting is going to run? Who has some suggestions for ground rules?

((Crosstalk))

Chris Robinson: No, I don't - this is your meeting. Mary - Mary Wong.

Mary Wong: Mary from staff. And this is not in any way a suggestion but the intent of the meeting, I think, as was said previously, is to really focus on the topics that we want to discuss. Typically I think, as Phil and others who participated in the first iteration of this pilot project in Los Angeles, typically because we - it would be having almost everybody in the same room there would actually not have been an Adobe Connect meeting room. But because we wanted as many people who are not able to join us to do so as possible, it does mean of course that everybody has their laptops up.

I will say that on the staff side we will monitor the chat and the hand raising and everything so that everyone can focus on the discussion. And I won't mention whether or not we think we should be Facebooking on this side.

Chris Robinson: Right. So there's a suggestion that we try and stay off Facebook and that we stay focused and engaged in the topics. We'll trust those of you that we can't see. Petter.

Petter Rindforth: Yes, add a note that as you can see from our proposed agenda there are actually breaks, email times, during the day. So you have your possibilities.

Chris Robinson: Okay so we're trying to stay off Facebook, we're trying to limit emails to the break scheduled on the agenda. I will try and see that we don't talk over each other and if there's a problem with the remote people please let us know. Please also don't be offended if I try and move you along or keep the conversation heading in a straight line rather than in too many deviations. I will be guided by you on that.

And with that I think if nobody has any other suggestions - Kathy?

Kathy Kleiman: This is Kathy. Do we have any hard copies of anything? I was just wondering, okay, nothing to kind of mark up or play with. Okay.

Chris Robinson: Good so let's move on to the meeting. Just before we kick off with the first item on the agenda, Mason, you have an update on some events of the last couple of days.

Mason Cole: Mason speaking. Really I was just going to give a quick summary on where things stand at this point. Oh, sorry. Hold on. Okay. So the purpose of this working group is to try to arrive at a conclusion about curative rights for IGOs and INGOs. And it's been - this is - in addition to this working group the issue has been discussed roundly in the community at the Board level and by the GAC.

So I would refer you to a couple of issues. I think Mary is putting them up on the screen or they're otherwise available. So the issue was the subject of a letter from Cherine Chalaby who chairs the NGPC committee of the Board to Thomas Schneider who's the new chair of the GAC.

And that letter, just to summarize, basically said, yes we're aware that you the GAC have some concerns about the direction of the working group and whether or not they're going to be able to arrive at a conclusion about curative rights. We the Board, you know, assure you that the GAC and the NGPC understand that this has to be resolved and we're keeping an eye on the working group.

The - I think I have that pretty well right. And then the - our issue about curative rights was also the subject (unintelligible) the GAC communiqué. And the GAC acknowledged the work of this working group and (unintelligible) I believe it is a little further down, Section...

Phil Corwin: Two.

Mason Cole: ...Two - thank you, Phil, of the GAC communiqué where it says the GAC will continue to work with all the parties to reach agreement on what they say - what they call permanent protections for names and acronyms for IGOs. That will include working with this working group on the issue of curative rights mechanisms and then separately within the GAC on the - there's a smaller group of IGOs working within the GAC to addressing this ongoing work.

And, Mary, have I left anything out? Is that pretty well right?

Mary Wong: (Unintelligible) covered all the recent developments. I think the only thing I would add obviously is that our work is focused on the curative rights protection but I think as folks know this is in the broader context of other protections that might be available or that might be created for IGOs, which is the subject of the earlier PDP working group. So when the GAC speaks to appropriate permanent protections it probably refers to that ongoing work as well.

Mason Cole: That's correct, yeah. And just, Phil, just - that - Chris, that concludes the summary for me but I'm happy to add color where I can.

Chris Robinson: Great, thanks. Phil, you...

Phil Corwin: Yeah, just wanted to add looking at the very short two sentence statement contained in the communiqué issued by the GAC the other day I note that they reference that they will continue working with our working group and with the IGOs and with the NGPC which is new gTLD program - but I did want to note for the record that the rights we're looking at are broader than new TLDs; we're looking at protection of IGO names and acronyms at all TLDs including legacy gTLDs.

Chris Robinson: Great. Anybody have any response or thoughts anybody wish to comment on Mason's update?

Kathy Kleiman: Question. Was there any discussion behind that that would shed more light than the formal diplomatic language?

Mason Cole: There was some discussion within the GAC on the issue. Mary and I and some others had discussions with some of the members of the GAC and trying to sort out the issue of standing and, you know, whether or not treaty authorities involved and that kind of thing. I think there's a bit of dissention on the part of the GAC about how to address this issue.

So that doesn't necessarily affect the way that we go about the work on this working group. But, yeah, there is some - there is some back and forth within the GAC.

Kathy Kleiman: Dissention meaning different opinions within the GAC or dissention with the direction they think we might be headed?

Mason Cole: Both.

Kathy Kleiman: Okay.

Mary Wong: Can I remind folks to state their names when speaking so that folks participating remotely and the record can show that?

David Cake: Sure, this is David. I just wanted to add to that summary that my understanding from the - (unintelligible) differing opinions within the GAC and so it's worth - we're not thinking about the GAC in the unitary thing, we won't - we sort of try and (unintelligible) the GAC advice about and make everyone happy.

But also note as part of that process the GAC is working towards getting a group of - a small group of experts on this issue, I understand, on IGO issues. But they were scheduled to sort of meet before this point and they didn't so the GAC will provide us with more advice I think after this point and, I think we say, they kind of messed up organizationally a little bit and didn't quite get it in time for this meeting.

Kathy Kleiman: Can you go into some detail on this? Since our job is to read the tea leaves and some of us didn't know about the meeting with the GAC, can you go into a little more detail about what you're hearing of the views of the GAC? I mean, it's just critical to know what the tea leaves said.

Mary Wong: This is Mary from staff. And first to note that there wasn't actually a meeting with the GAC. Several members of the GAC - I think including the ones that David may have spoken to, came to some of us as part of, you know, hallway type conversations that you have at ICANN meetings basically seeking clarification, as Mason noted, not just on the work of our group and how far we've gone but exactly on what type of discussions we were having on the scope of say the international treaty because obviously the GAC's prerogative, as in the ICANN bylaws, is to provide advice on public policy issues. So it was to seek clarification.

I think in terms of the other issue with regard to the ongoing discussions within the GAC on this specific issue, this is probably the reason that Mason mentioned the letter from Cherine, the chair of the new gTLD Program Committee, to Thomas Schneider, the chair of the GAC and we flashed that on the screen a while ago because that does refer to the - I don't know if I use the word dissention because I have no personal knowledge of what that might be.

But it does seem to refer to some agreement or disagreement and certainly ongoing discussions within the GAC on this issue. So our message, if you like, informally at least to those GAC members we had conversations with or

that several of had conversations with was that if the GAC is providing public policy advice in its role then to the extent that they are able to, in accordance with Cherine's letter, provide ICANN with some specific guidance or update on their understanding then it would be helpful to our group as well as we're doing a GNSO PDP.

In other words, the GAC does what the GAC does and we do what we do. And that was taken quite positively I believe.

Chris Robinson: Thank you, Mary. Are we able to move on from here? Yeah. Petter.

Petter Rindforth: Thanks, Petter here. Yeah, as we have heard and also, I mean, this specific working group (unintelligible) GAC we heard that it was created actually some while ago when I thought that they had started to work and consider this topic. But hopefully we will get some updated feedback soon because it's important for us to have some continued feedback on what we are working on so that we are on the right way so to speak even if we make our own conclusions in the working group.

And so on the next topic on the agenda as we have discussed briefly in a previous meeting, if we are going to change the UDRP or at least to make clarifications in the UDRP one way or another how could that look just to have - just to have a specific document and notes that we can refer to.

And I don't know if we have that - this previous document - we could put it on the screen. You know what I'm talking about. Yeah, that one. It has a lot of pages but frankly if (unintelligible) possible to scroll down to Page 20 where we looked at - there is a (unintelligible) overview over by the panel views on selected UDRP questions which is not part of the - formally part of the UDRP so to speak; no need to amend the UDRP but to clarify for each one that would use the - this dispute resolution policy on specific questions.

And what we thought about that - because this is more a topic of the first UDRP element dealing with the - what is trademarks so that's ownership of a registered trademark to which the domain name is identical or confusingly similar automatically satisfied requirements under Paragraph 4a (1) of the UDRP.

Next question what is the test for identity or confusing similarity? And can a content or Website be relevant in determining this? One point three, is the domain name consisting of a trademark in a negative term confusingly similar to the complainant's trademark (such cases).

One point four, does the complainant have UDRP relevant trademark rights in the trademark that was registered or in which the complainant acquired unregistered rights after the domain name was registered.

And it's - the rights referred to specifically trademark so what is trademarks? And if we put in the Paris Convention here what we suggested there in this document was to add 1.5, does the complainant have UDRP relevant trademark rights in a name or abbreviation of the complainant that has been communicated under Article 6ter of the Paris Convention for the protection of industrial property.

And then (unintelligible) is the proposed reply on this question, Page 22. In the case the complainant is an international intergovernmental organization, IGO, meaning an organization with an international legal personality established by international agreement, the complainants may have trademark rights in the form of names and acronyms protected under Article 6ter of the Paris Convention (border) protection of industrial property that having duly communicated to the countries of the union through the immediately off the international bureau.

So this is a proposed clarification that if we consider that the 6ter protection can be considered as similar to trademark rights and if we use this there is no

need for specific change in the policy just a clarification that once you read the word "trademark" in the policy Article 6ter can be considered as the same.

The rest of the document - I think we - we (unintelligible) for some minute on this point because the rest of the document the first pages is if we also think it would be necessary to include this specification in the policy as such. And there I've just initially pointed on some of the articles where this reference in that case may have to be added and in what kind of language.

So I open up for others. Yes. Phil.

Phil Corwin: Yeah, Philip for the record. Yeah, I - this approach is fine with me. I don't know how much we want to get into word-smithing today or perhaps (unintelligible) conceptually and then after today's meeting, you know, if we think there needs to be some modest language.

For example, we might want to - to me at least we might want to start by saying is the complainant an international governmental organization that has - and rather using the word "trademark right" which seems to be what they use above for people who have actually registered trademarks. As we've discussed before this is not the same as a full trademark right; they're not - just to clarify that they're not required to register a trademark.

We could create some phrase like a right to protection within the trademark system or something like that so that differentiates it from - to make it clear they don't have to register a trademark or that they have a right to be protected against - within the trademark system if they're covered by Article 6ter and they've exercised their - taken the affirmative step of notifying the World Intellectual Property Organization that they wish to have that protection.

But so I'm not - the basic concept of clarifying, not creating new rights to stand but clarifying existing standing is fine with me; I'm just suggesting that we probably don't want to spend a lot of time manipulating words today but just noting for the record we may want to play with this language a little bit and come back to it in the next meeting on some more refined version of it.

Petter Rindforth: Yeah, Petter here. I fully agree with that. Just if we can, today, make an initial conclusion that this could be a way to deal with it and then we can clarify upcoming weeks what kind of specifications - wordings that's needed. Yeah.

Phil Corwin: Oh I just - while we're looking here the UDRP of course we're also conceptually talking about protection within the URS if the name or acronym is at a new TLD. And I believe the standing requirements are pretty much identical in the URS. There's not this kind of guidance that we can create some kind of - I don't know of any WIPO - or WIPO doesn't even...

((Crosstalk))

Phil Corwin: Oh sorry. I wasn't sure how unidirectional. To back up I just want to note for the record that of course for new TLDs where URS - the Uniform Rapid Suspension is also available as a protection we'll probably want to look at some similar clarification, I believe the standing requirements are identical to the UDRP, it's just the - I'll let Kathy comment on that. But there's nothing similar to the WIPO guidance for examiners for the URS so we'll have to consider how to clarify that point. Did you have something you wanted to...

Kathy Kleiman: Yeah, I'd recommend we handle URS separately because URS is designed kind of as a slam-dunk process and almost by its nature these are not necessarily slam dunk cases when we're dealing with acronyms that have multiple uses around the world.

So - and I also wanted to check the standing because I actually helped draft it but I don't remember it. So there may be - there were some real subtle

differences. Now - but I wanted to raise something different that I agree with you on something but I'll let you finish so thanks for the break in the middle.

Phil Corwin: Again, I just wanted to note that we have to, at some point, consider if we do this for UDRP how we do something similar for URS. And there might be some - for example somebody might register who.health which - and the registrant has nothing to do with the World Health Organization. So that might and depending on what's at the Website it might be a slam dunk for URS. So there could be some cases where it works.

((Crosstalk))

Chris Robinson: Can I suggest that we stick to the UDRP issue at the moment because there's a proposal I think on the table from the two co chairs that as the current position where we're talking about a clarification should be accepted I'm just wanting to check whether there are any thoughts about that from anybody else. Please state your name as we go, sorry.

Val Sherman: This is Val Sherman. I also favor educating the IGOs as opposed to modifying the UDRP with specific language at this point and especially before we can get further clarification from the GAC on what it is specifically that they consider to be the issue. So that's - I mean, at least in the case for the UDRP. Thanks.

David Cake: And I want to say, for the moment, I think we should concentrate on the UDRP where we - because of its flexibility we need to discuss it a bit. I don't actually, I mean, I don't actually think there's any reason we should rule out the URS in the future. But it's - both, you know, we need to clarify the other issues first but also the - whether there is demand for the URS from IGOs. It's a, you know, it's a special purpose mechanism.

It's essentially designed for people who get, I mean, for people who get so many - organizations that get so many issues that they're launching a UDRP

for each one is a burden. So even if there's a - and also it has advantages for speed.

Now I could certainly see, for example, if an organization like UNICEF, which is say highly, you know, its acronym is highly distinct and it may be the target of fraud, might want to use the URS because it's faster but I don't know if that's actually the case. We can leave it - I suspect the issues to do with the URS will be quite - much clearer once we have dealt with the UDRP.

Mary Wong: Actually I did have a comment but I will cede to George Kirikos who has his hand raised in Adobe Connect so, George, go ahead.

George Kirikos: George Kirikos here. I just wanted to agree with Phil and Val and others who made the point that education should be the root rather than changing the text of the UDRP for the standing element. And I made that same point in the prior conference calls in case people didn't attend those. That's it.

Mary Wong: George - and so, this is Mary from staff again and I'll now insert my comment. I think we are still at the point where we're talking about the standing issue generally. And for both the UDRP and the URS that the basic requirement is that the complainant have trademark rights.

So where we were as a group was not in determining what trademark rights IGOs might have but rather whether or not given the IGOs who are they are and the fact that they have some protections under Article 6ter of the Paris Convention whether that protection is utilized, as Phil noted, by way of notification to WIPO and so forth.

So if it's an IGO that's protected by the convention and the process has been followed whether that could be the equivalent or the basis for any sort of standing requirements. So I guess my comment is that we're not necessarily being specific to one or the other process but discussing standing rather than trademarks.

Kathy Kleiman: Thanks. This is Kathy. So let me support Phil's proposal that we add some additional wording in this paragraph and talk about - you were much more eloquent, Phil, so we'll take your wording. But I'm going to call it trademark-like rights.

One of the questions I asked earlier was in specific what is it the GAC is looking for? And one thing I've heard through the grapevine is they're actually worried that we're going to wind up giving to organizations that don't have trademarks trademark rights. So these are more, as we look at the 6ter and we look at the international treaties I have to say we're looking at trademark-like rights. And again you were much more eloquent in how you phrased it, Phil.

And that may provide some comfort to the GAC that we're not expanding the rights or changing the rights of these non, you know, non profit, non commercial type organizations or giving them something more than they have already but that we're trying to reflect what it is they have within a system that has - that gives them protection but not a trademark necessarily.

Phil Corwin: Phil. And, quick response and thanks for whatever eloquence I achieve in my current state of exhaustion and residual jet lag. I think the phrase I used was rights within - right to protection within the trademark system or something like that. And I agree we should focus on the UDRP. The only reason I brought up URS was because, one, our charge from the Council is to look at possible amendments to the UDRP and the URS. I just want to remind the group not to forget the URS.

And also to note that there's no - while we're looking at possible language for the WIPO guidance to examiners on UDRP there's no similar document for URS so we'd have to - and it might just be urging the existing accredited URS providers, which is National Arbitration Forum and the group in Asia, I forget their acronym, to take note of that, you know, within URS the standing should

be treated the same as it is under UDRP. Because I believe that part is quite identical in the two processes.

Kathy Kleiman: I just love the idea of taking them one at a time.

Phil Corwin: Yes, agreed.

Petter Rindforth: Petter here. Well first of all as we all agree about is that we refer to the (unintelligible) 6ter and already there it's pretty clear that it's not the traditional trademarks. So I think the most important thing if we add this as a clarification is the reference to Article 6ter. And then of course if we can call it trademarks similar to trademarks or whatever.

I'm not sure if we need to use that word only to clarify that the rights - there are specific rights unless - that will not be extended to other organizations or to normal commercial companies or organizations because they have traditional trademark rights registered or not. These are specified to the 6ter. And there must be these international organizations that have also registered these specific rights. So I think this already kind of clear identification in the Paris Convention.

And I know that we said that we should not go into details for the URS but just to mention shortly that I think it's good to start with the UDRP because the URS is actually more similar to what's in the 6ter as there is no transfer in the URS. So, I mean, you can stop the use so to speak of a domain name which is exactly what 6ter also states compared to the UDRP where you can - where there is also the transfer of the domain name.

So, again, it's good that we start to find the solution for the UDRP. And then it's the next step I - as I see it right now, at least, it will be more easily and convenient to also make any further clarifications when it comes to the URS. Thanks.

Kathy Kleiman: A question to the gentlemen, co chairs and gentlemen facilitator, who's holding the pen right now on making changes and placeholders into the document because there's now been a proposal that has been made and seconded to amend, "The complainant may have trademark rights," to, "the complainant may have rights of protection within the trademark system." And that would seem to be worth bracketing to hold that language for future discussion because we spent some time on it now.

Mary Wong: Thanks, Kathy. Thanks, Chris and everybody. This is Mary from staff. And I just wanted to go back to the point that I was trying to raise earlier that while we can draft or, you know, put up for discussion some sort of draft language I really do suggest that we don't make this specific to the UDRP, that first we have an agreement on what is the starting point, if you like, for any kind of standing.

And on that point I think that this particular phraseology we're looking at was done before we had our last discussion on 6ter and before we discussed the IGOs response to our question. So it may not even be appropriate to talk about trademark rights in the way that we currently do. So, Kathy, you're right, we probably need to update this draft language.

But - and, Chris, I may be wrong but so listening to the discussion I'm not sure that as a group we have an agreement or any sort of consensus on what that kind of basis for protection might be in the absence of trademark rights that an IGO might or might not have.

Kathy Kleiman: Mary, I'm so sorry. I have no idea what you just said. There was a proposal to put a bracket in to hold some words that are really - that seem important for kind of the clarification that's going on in front of us. I would like to put on the table that I'd like to treat the UDRP and the URS separate. For those of you lived through both them they're very different proceedings.

And if we start mixing them up we're going to have to literally go back and lien draw and go back to some history. So we've got - we're looking at the UDRP in front of us, aren't we? I mean, am I missing something? We're looking at language in front of us right now; first UDRP element for discussion. Am I in the wrong place? I'm sorry. I'm confused.

Petter Rindforth: Petter here. Just to remind why this document was created, it was more to clarify what we were talking about and to make it visible if we were going to change or clarify to have something to look at and further discuss. So it's, I mean, it's not - I just did it to collect the comments and the discussions we had for a couple of meetings so that we have some kind of document to make it visual.

It's not - it's not a final proposal or anything to decide on but to make it visible if we're going to clarify and not change the UDRP this is how it could look.

Chris Robinson: So can I just clarify that for the purposes of the discussion today it seems as if what you're trying to do is to get to a point where you can say if we were to make a recommendation these would be the kind of things that we would want to have in it or this would be the kind of languages we would want to be using rather than agreeing today on what exactly that recommendation could be or would be. Philip.

Phil Corwin: Yeah, let me jump in here and try to parse this a little and see if we can - what we're discussing is do IGOs have standing under the existing arbitration procedures that are available to other registrants and trademark owners to protect their rights in the domain name system against abusive domain registrations.

I believe, based on previous discussions the group had that there is a general consensus that an IGO, which has given notification to WIPO has done enough to have standing to bring an action against the existing arbitration actions.

What we're discussing is whether it's sufficient to just - we might come out (unintelligible) and says we believe they already have the standing to use them. It may not be necessary to amend anything to provide that standing. And they should be educated as to the fact that they have standing and how to protect themselves within the arbitration systems.

But if there's a general belief that something more needs to be added to clarify the fact of their standing this might be the language and the language we're looking at is not final language at all, it's just something we can wordsmith and refine for a final report. So we might just say - it might be sufficient to educate them or to make it clear we might want to add a paragraph to the existing WIPO guidance to examiner to clarify the fact that they have standing.

And also George - and a lot of our report might just be suggestions. For example, in the chat room George suggested well if governments are so concerned about protecting IGOs since there's no question that they have standing if they register a trademark that governments could make trademark registration available to IGOs either for free or at a very nominal cost. I mean, it wouldn't be a big drain on government resources to do that; there's not that many IGOs.

So a lot of what we may recommend may just be in the way of education and suggestions rather than concrete proposals to amend anything. Was that helpful?

((Crosstalk))

Chris Robinson: Any comments or - way to take that any further either in the room or those of you who are dialed in? Mary.

Mary Wong: In the absence of any hands or others, to pick up on Phil's point I think it's important to emphasize that we're talking about under what basis on what ground can an IGO file a complaint under existing arbitration systems. And that may not be - I think, Phil, what I'm taking from what you're saying is that that doesn't conclude the discussion obviously, that doesn't also lead to any specific conclusion as to what would be the substantive grounds for finding that they would win a complaint or not.

And so maybe that would be the next point of discussion assuming we are okay with the standing requirement that basically you have to be an IGO - and I'm trying to summarize this because obviously we want to go back and clarify the language that you are an IGO, that are you protected under the provisions of 6ter and that you have followed the procedures as recommended by the Paris Convention then in terms of whatever we might come up with you are able to file. And that's where we are. Is that right?

Kathy Kleiman: The procedures as recommended by the Paris Convention to seek that extra protection of your acronym or name - this is a question - in the trademark systems of the participating countries that follow the 6ter and that particular treaty. Just to fill in what seemed to be a blank. Are we all on the same page? That is when you invoke that specific protection. Because I - back on the plane I was reading some of the old IGO materials and that - they were very consistent with that, that seemed to be where they were going as well so just want to make sure.

Because there seems to be a push for IGOs generally, just anyone who has certain types of standing in front of the United Nations and we're leaning towards that treaty protection and that affirmative action by an IGO to seek that protection under the Convention, am I right?

Petter Rindforth: So Petter - yes, you're perfectly right with your conclusion there so...

Kathy Kleiman: I'm learning something.

Petter Rindforth: ...we should not extend it.

Chris Robinson: Val.

Val Sherman: This is Val Sherman. I just - I have a question. And I'm sorry if I'm getting too detailed. But in addition to this to the basis within Article 6ter they can also have standing on the basis of common law rights and other type rights. So I just wanted to make sure that that's, you know, as far as the education effort and sort of updates to these documents would, you know, ensure that they understand that this is not the only basis; they can also access - have standing on the basis of common law rights. Thanks.

Mary Wong: And this is Mary from staff again. And, Kathy and Val, I think that's exactly where we are. And it doesn't obviously preclude an IGO from filing under, say, the UDRP based on any other kind of right that's already recognized. And maybe that's something that we want to clarify of if there's an dissention about that that we might want to discuss back here.

But my understanding is that this is something that is specific to an IGO being an IGO and it's not at all dependent on it having trademark rights of any kind, registered or otherwise.

Chris Robinson: Petter.

Petter Rindforth: Petter here. Yeah, I think it will be needed to further inform and clarify, although, I don't think we should put that further clarification into this system as such. I think it would be convenient if we - if we have this addition referring to the Paris Convention.

And then as a separate document when we make our suggestions and our reply send out to the IGOs to also make these comments to clarify that of course this does not exclude them from using the traditional trademark rights

so it's rather than have a kind of formal document or additions to the regulations.

((Crosstalk))

Mary Wong: George - you have your hand up so we'll go to you and then Phil, is that okay?

George Kirikos: George Kirikos speaking. I just wanted to follow up on the point made by Val and Petter. It is important to note those common law rights somewhere because in the ICANN reserved list when I had done that analysis and that spreadsheet that was sent to the emailing list and it's on the wiki about half of the reserved names didn't appear in the Article 6ter database.

So I think, you know, we don't want to upset the GAC by simply saying, you know, that half of those names aren't protected anymore; we do want to point out somewhere that those marks - those names still have some protection if there's common law right associated with them.

Phil Corwin: And Phil, following up on that, that's exactly what I wanted to raise. We've been discussing standing based on rights arising from being listed on Article 6ter that, as George noted, the list from the GAC and the list in the reserve names is broader than Article 6ter.

So I wanted to - I'm not clear whether those other organizations who aren't covered by the Paris Convention but are considered to be IGOs would they derive their standing from common law trademarks or from registered trademarks if they had registered or from some - is there anything else that might be a basis for them to have standing?

Mary Wong: And this is Mary again. Not so much an answer, Phil, which I wish I had but that's an - I think it's a good question. And my understanding - and I need to go back and look at this - is that the GAC's list of IGOs, as George pointed

out, that are currently temporarily protected, was based not on 6ter as we now know but that one of the considerations was the dotINT registration criteria.

Which if you've looked at the background documentation was something that was discussed at - I believe as far back as WIPO 2 in '01 so it may well be something that we might need to look at if not today then fairly shortly.

Chris Robinson: Kathy.

Kathy Kleiman: But - and so maybe there are different models floating around but going back to the last time this went through as a PDP in the GNSO there was a lot of talk about 6ter. As I went back over the materials there was a lot of talk about tying it - there were working groups that...

((Crosstalk))

Mary Wong: Sorry, Kathy, and this is not to disagree with your point but it's just to clarify for the record that the GNSO has not done a PDP on this specific point. There was a president's working group that was formed by ICANN in I think '04 or thereabouts, I may have got my dates wrong, that was chaired by Jonathan Cohen was a Board member at the time.

There was an issue report with some preliminary scoping done within the GNSO following that. But they did not actually launch a PDP which is probably partly why we're here.

Chris Robinson: Can I just check with the two co chairs? Do we have - have we got what is required on this particular issue in terms of next steps and an agreement on what we've agreed in the last half hour?

Phil Corwin: Let me see if I can sum up my understanding of where we're at. I think we've - we have general consensus that an IGO covered by the Paris Convention

Article 6ter that has exercised its responsibility to notify WIPO in regard to its name and any abbreviations it might communicate to WIPO has standing - should have standing under the existing arbitration processes provided by ICANN.

We have not decided whether any language is going to be recommended to amend the existing guidance to examiners for the UDRP. It might be something we say is an option but may not be required but it might be a useful clarification.

And we need to do some further work on IGOs which are outside the protection of the Paris Convention but which are on the reserved list and meet the dotINT requirements or whatever other basis for standing they might have. We've been focused primarily on Article 6ter and I won't say neglected but we haven't fully dealt with the other possibilities for standing.

And we're kind of noting for the record that we need to get back to that and we've been primarily focused on the UDRP and understand that there may be some other considerations or not for standing under the URS and that we need to revisit that down - so we've achieved considerable consensus but we have a few important loose ends.

Chris Robinson: Thanks, Phil. Mary.

Mary Wong: And I don't know if this is a loose end or a new corner but that would be - I think it was the staff understanding as well, Phil. And I've tried to capture some of that in notes in the Adobe room which we can obviously tweak and make clearer.

But on top of the list I think one of the things to think about - and again maybe not necessarily specific to the UDRP or the URS, since they have the same substantive grounds for winning if you file, is that the type of substantive rationale that - or grounds for which an IGO if they have standing, if they

found or whatever system might win a complaint because what we have under the existing systems is that phase then, you know, lack of legitimate rights to use that domain.

And so whether or not some of the language from 6ter might also be helpful there because the limitation in 6ter obviously is that the third party attempt to register a trademark is blocked because it is viewed to be misleadingly confusing in suggesting an association between the IGO and the unrelated third party.

I'm not necessarily suggesting we go into that today but that may be a separate follow on conversation in terms of substantive grounds rather than standing.

Phil Corwin: Let me see if I can add to that. And I believe, Petter, didn't you prepare some other language on that which kind of - if the standing is based upon - here's my take on it that if the standing is based upon Article 6ter we have to look at exactly what protection within the trademark system is provided to IGOs by Article 6ter.

And there's some specific language in there which is very similar to but a little bit different than the existing requirements for prevailing in a UDRP. And we might want to take note of that distinction. It's not a big difference. I don't remember - we need to look at the language again, I think it's identical or - I don't know if it's confusingly similar or would lead to confusion.

But again, if we're going to put out possible language on potential guidance to examiners from WIPO we might - the language might be a little bit different than the existing UDRP language to get protection under the - to get a successful arbitration result. Does that make sense what I just said? Are people following?

Mary Wong: And I would just note that George has his hand up again if I can just do a quick response to Phil...

Phil Corwin: Yeah, sure.

Mary Wong: I think that's right and I said it's a follow on conversation since we've completed the standing. And so I think, Phil, I wanted to highlight something that you just said is that instead of - that basically the ground would be the misleading confusion under 6ter rather than add on another substantive ground is instead of rather than in addition to the existing grounds. Is that right?

Phil Corwin: Yeah, and to follow up the way I think about it 6ter - a trademark registration gives you certain well understood rights in the trademark system. The protection provided by 6ter is somewhat narrower; it's not - doesn't have the same breadth and force of trademark rights but it's a type of protection within the trademark system.

And if, in my view, if they're going to have standing the standing should be to be protected within the arbitration systems to the same extent they're protected under 6ter. We shouldn't be going beyond what 6ter provides in the nature of protections.

Chris Robinson: George remotely.

George Kirikos: George Kirikos. I raised my hand earlier then put it down but (unintelligible) make no mistake - hello? There's an echo.

Chris Robinson: Yeah, we hear you.

George Kirikos: There's a big echo. Hello? Oh no that's better. Can you hear me?

Chris Robinson: Yes, we can hear you.

George Kirikos: Oh good. Make no mistake, we actually are expanding the protections that IGOs do get under Article 6ter because if you read Article 6ter strictly all it says is that it's a blocking mechanism for trademarks; it doesn't say that, for example, the remedy under Article 6ter - under the trademark system is that if somebody applies for a trademark and it conflicts with the Article 6ter database that that trademark is then assigned to the IGO or that there's cash damages or anything like that or that they can enforce the Article 6ter rights in the offline world if, let's say somebody, you know, creates a UNESCO restaurant, you know, it doesn't say anything about that at all in the Article 6ter treaty or the TRIPS treaty or whatever.

So to some extent we are improving upon what Article 6ter says because, you know, under a UDRP they'd be allowed to, you know, to win control over that domain name to obtain a transfer which is not in the treaty. And so we are kind of expanding their rights.

But I think the way we're approaching it is we're saying that they already have common law rights, and they're, you know, quasi-trademark rights. And, you know, that we don't have to necessarily use the treaty itself to determine what the rights are to say that they already have the rights under common law and that, you know, Article 6ter is just a piece of evidence indicating that they have the common law rights. Does that make sense?

Chris Robinson: Petter.

Petter Rindforth: Thanks. Petter here. Well first of all although we have summarized that we need to make some statements regarding the revised set - beyond 6ter I think also it's important to keep it - our conclusions to 6ter not to extend their rights.

And here actually - and that's why I also think that as a first step because it's a more difficult question and once we have solved that we can more easily solve the rest to start with the UDRP. Because again, as the URS compared

to 6ter there is no transfer. And it's also more straight to - that the holder - to use the domain name in bad faith and to prove that it's used in bad faith. So it's actually more in - more similar to the Paris Convention.

But still, and now I'm talking against myself now as also trademark lawyer because if I want to make any change for the UDRP would be to change the bad faith use or registration.

But in this case it's good that is still an end. So, I mean, to - in order to win the UDRP case you have to show both bad faith registration and use. And that's also more similar to the Paris Convention not just because there is a domain name that is identical or confusingly similar to a protected - under Paris Convention protected name. You also have to show that it's used in a way that - well try to create the confusion with a protected mark. So I don't see that as a problem.

Mary Wong: Thanks, Petter and George. I think that's really precisely why I asked my question because I agree that is important, and I say "I" - I mean staff. We said it is important for this working group to be very clear about, you know, its consensus and one of these seems to be that this working group is not, and has no intention of expanding the existing legal protections and rights which raises the question of what those are.

And George pointed out common law rights. And just, you know, having not thought about this I'm not sure that by recognizing that they have standing because they're protected by 6ter necessarily equates to common law rights or that might actually be an additional inquiry. And I'm not sure how we can do that to require a provider to do that.

As you pointed out, George, earlier, the 6ter protection is a - kind of like a negative block in that it protects you against third party registrations, it doesn't actually say you've got a trademark right of any kind. So like I said, first point is I'm not sure that by agreeing on standing based on 6ter that we

necessarily are saying or are in a position to say that that equates to common law rights. So one point there.

The other point going to Petter's point is, like I said, this is why I asked the question because the current substantive grounds under the UDRP and the URS are very well understood. I think Petter has just repeated what they are and they're in the document here.

This working group could say that if you have standing under Paris you still need to fulfill these grounds. Or it could go in a different direction and say instead of these grounds somehow or other you've proved that it's misleadingly confusing, which may involve the same type of proof but it's actually a different type of ground. Or we could do a hybrid or we could go off in another direction altogether.

And so that was my question as in if we come to the point that we're not intending to increase the existing legal protections we're probably reaching a fairly difficult point in our discussion. And what would be the substantive ground? You can file but what you have to prove. And then on top of that, going back to George's point then as part of that discussion is what then would be the defenses?

Phil Corwin: Yes. Phil here for the record. I think we're all in agreement that ICANN and any body that's - any body, you know, entity that's working within ICANN should not be creating - it's not our business to create rights which don't exist in the outside world but it is a responsibility where they're relevant to the domain system to protect existing rights.

Article 6ter creates some type of protection that wouldn't be there without it. And the issue between us - before us is that sufficient to provide or to serve as evidence of sufficient rights or protections to in itself without a trademark registration have standing to file a UDRP or URS? You know, we'll get to URS.

Or, you know, because if it isn't then we should just say, yeah, we recognize Article 6ter but if you want to be able to file in the existing system you need to register a trademark and we encourage governments to make that registration really free or very inexpensive so far as what you need to - if we believe that it provides sufficient standing without the extra step of affirmative trademark registration.

You know, they don't have to - whatever name and acronym they convey to WIPO they're not required to register those as trademarks to get standing. If that's our conclusion then the next question is well do they have - is the requirement for prevailing as complainant identical to the existing elements of the UDRP? Or is it a little bit different?

I don't think it's a lot - and I think that would require an exercise we haven't engaged in yet of putting the UDRP language side by side with the 6ter language. And I think they're very similar but there are some subtle differences in considering the subtle differences and deciding what that means.

Kathy Kleiman: Okay this is Kathy. Phil, I agree with everything you just said. I thought in some ways that was the document in front of us that that's what you and Petter - maybe I misunderstood the document (unintelligible) gone through that kind of incorporates those concepts out of 6ter. But I could be wrong.

Just two quick comments, common law rights, you guys are - there are people at the table much more experienced with this. But as I understand common law trademark rights they only exist in certain countries. And we can't, you know, UK, US, many countries are civil law and you have to be a registered trademark so we can't go about creating a global common law right; no one would follow that. And so just a note on that.

And then, you know, please lead us through - Mary's brought up a number of things about standing and what to prove and defenses so I look forward to you guidance through each topic as we go through so I'm, you know.

And, again I love the language that's in front of us because you've given us something concrete so please let us know when this is the guide or when we're on the larger topic.

Chris Robinson: Thanks, Kathy. Can I just check, we're done on time. Are we done in terms of substantive discussion or do we need to continue further? I'm looking at the co chairs here.

Petter Rindforth: Petter here. Just to make a summary, if we can - if we can agree about that - this outline it's something that we can use then you had some further corrections maybe. But this is a basic that we can continue to work from as a clarification and reference to Article 6ter. That's good. That's - and that is also some kind of conclusion of our first session today.

Chris Robinson: Mary.

Mary Wong: And going back again to Kathy's suggestion of having a text I think we do want to make sure we update this text because that's what we have to reflect the discussions today. And I will say I think from the staff side that we - given what we've learned since and given the discussion that one of the things that we probably want to look at amending in this current text is the words or the phrase "trademark rights."

And I know there were suggestions of trademark-like rights, etcetera, etcetera. But I don't think we're saying that 6ter equals trademark rights and so we probably need to do something with that language here.

Phil Corwin: I suggest we take a break and that - when we come back after the short break we try to reach agreement on at least our tentative consensus on

standing and what work remains to be done kind of the issues on do we even talk about common law trademarks, you know, and what do you need to prevail if there is - and kind of make a list of things that are going to have to be addressed maybe not - certainly not resolved today but just notes to ourselves other issues that derive from this tentative consensus that we're going to have to deal with. Does that sound reasonable?

Kathy Kleiman: Since I have to pack up and I may be late coming back, to the question that Mary raised replacing in the text we were looking at regarding trademark rights and my proposal had been trademark-like rights but your language is better so let me just give it to everybody again, rights of protection within the trademark system. So that's the proposal on the table; rights of protection within the trademark system, which I think may, again, solve our problem and solve the GAC's problem.

Chris Robinson: Okay so let's take a break for exactly 15 minutes for those of you who are remote and wish to log off or sit down for a while. We'll recommence in 15 minutes from now. Thanks.

((Crosstalk))

END