ICANN
Transcription
IGO-INGO Curative Rights Protection PDP WG
Thursday, 30 November 2017 at 17:00 UTC

Note: Although the transcription is largely accurate, in some cases it is incomplete or inaccurate due to inaudible passages or transcription errors. It is posted as an aid to understanding the proceedings at the meeting, but should not be treated as an authoritative record. The audio is also available at: https://audio.icann.org/gnso/gnso-igo-ingo-crp-pdp-30nov17-en.mp3
Adobe Connect recording: https://participate.icann.org/p1xtx67mmzi/
Attendance of the call is posted on agenda wiki page: https://community.icann.org/x/ZQlyB

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

Coordinator: Recordings have started.

Michelle DeSmyter: Great. Thanks so much. Well welcome, everyone. Good morning, good afternoon and good evening and welcome to the IGO INGO Curative Rights Protection Mechanisms Working Group call on the 30th of November, 1700 UTC.

On the call today we do have Petter Rindforth, George Kirikos, Paul Tattersfield, Zak Muscovitch, and Phil Corwin. We have apologies from Mason Cole and Paul Keating, who will be joining later into the meeting. From staff we have Mary Wong, Steve Chan, Dennis Chang, Berry Cobb, and myself, Michelle DeSmyter.

I would like to remind all to please state your name before speaking for transcription purposes and I'd like to turn the meeting back to you, Phil Corwin.

Phil Corwin: Yes, thanks, Michelle. And today we're in the - entering the final steps of our long 3.5 year journey and beginning review of proposed text for the final report. Before we get into that, we're going to dispense with the roll call. Is

there anyone who's just on phone and not in the chat room? Okay, hearing no one, and any updates to statement of interest?

And I do not that we have Zak Muscovitch joining us today, I believe for the first time. Zak is now taken over counsel role with the group I used to work with, the Internet Commerce Association. We welcome Zak to the discussion today.

And our plan today is to begin and try to conclude, but we'll take as much as time as necessary those portions of the draft final report which are most of them are unchanged; there is one significant change in regard to the weight to be given to an IGO filings of its Article 6ter Paris Convention notification to WIPO, that'll probably take some more time.

I believe though, you know, we're open to seeing what we have that we still have strong consensus on all of these points, but we'll - if anyone has - wants to revisit them and question support for them, we're open to that, but again, most of what we're going to be discussing is unchanged from the initial report and our - other than the 6ter notification and the effect given it did not elicit a lot of controversy within this group or in comments on the initial report.

So with that, let's see what we have on the screen here. Well, we have - this is the draft text for Recommendations 1, 2 and 4, so let's start with 1 and have a discussion noting that the draft final recommendation is on the first page and then scrolling down, I'm just seeing where there's additional - oh yes, on Page 3 there's a more expanded discussion of Recommendation 1.

So let's start with Recommendation 1 and I'll just read the text of the recommendation and then we can get into any discussion that working group members have of the summary on Page 1 or the fuller discussion that begins on Page 3.

The recommendation is, quote, "The Working Group recommends that no changes to the UDRP and URS be made, and no specific new process be created, for INGOs," those are the nongovernmental organizations, then in parenthetical, "including the Red Cross movement and the International Olympic Committee," close parenthetical. "To the extent that the Policy Guidance document referred to in Recommendation #3A (below) is compiled, the Working Group recommends that this clarification as regards INGOs be included in that document."

So let's open discussion on that. And the discussion is scope of discussion is not just on the text I just read but on the intro, which is on Page 1 and then on the more expanded discussion of how we got to this recommendation, which commences at the bottom of Page 3, and continues on through most of Page 5. So any comments on this recommendation? I see Mary has her hand up. Go ahead, Mary.

Mary Wong: Thanks, Phil. This is Mary from staff. Not so much a comment on Recommendation 1, but to note that George did submit comments about this document in an email that he's linked to in the chat. And so maybe we can address those. But one of the points I think you may have made is some of the redlining that we're showing here. So if we may explain a little bit of this, we have highlighted in this excerpted document in blue pretty much the major substantive changes from the initial report so hopefully it makes for easier reading.

I mean, all the changes can be seen in full redline in the full draft report that we also circulated. It may be that given the size of the document and the fact that staff had been, you know, going into the initial report a couple of times between the review of the public comments by the group and this current version, that there may be a few edits that we haven't been able to capture or that for some reason got accepted as changes and so forth. But in terms of the actual text of the proposed final recommendations, particularly Recommendation Number 2 here, which has been extensively changed, that

is the current proposed text and I believe that much, if not the entirety of the text of these recommendations were as displayed for the community to comment on at ICANN 60 and elsewhere. Thanks, Phil.

Phil Corwin: Okay, Mary, so to clarify, everything that we're seeing on the screen in blue is new language that's different or it's been added or edited from the initial report, is that correct?

Mary Wong: That's correct, Phil.

Phil Corwin: Okay, so on these recommendations, probably the best thing to focus on for working group members is the new language. I note in the - let me address a couple of things. On the email that George shared, and I thought a great many of those suggestions were quite useful and we appreciate his thorough review of the draft, I'm - rather than going through all of them I'm depending on George to raise them as we reach each of the relevant recommendations. So I hope George is okay with that.

And, you know, when we get to anything you want to discuss, George, where you've made comments and suggestions for changes, just raise your hand. I note that, you know, also right here on the call and as far as we know in the working group we have good consensus for Recommendation 1 but the - there's no formal determination of consensus on these calls; we do that in a final email poll of working group members.

And, Jay, I see your comment. I'm not having any trouble scrolling either when I click on the screen or use the sidebar, so I'm not sure - you might want to refresh your Adobe, when that happens it usually means you need to reopen the Adobe room.

And I see Petter's hand up. Go ahead, Petter.

Petter Rindforth: Yes, Petter here. Just a short note that George corrected me right that - because (unintelligible) by the mailing list. But what I wanted to say is we have - this is a recommendation that we have discussed in several meetings and that we actually arrived to a consensus in this working group in a previous stage, so there might be some final changes in the language so to speak, but I'm pretty sure that also when we have the full mailing list on this this is one of the recommendations that we have no problems with that we can actually get and have in fact full consensus on. But of course we will formally vote on this afterwards. Thanks.

Phil Corwin: Yes, thanks Petter. All good points. And I also wanted to note in regard to the chat where George pointed out that we had a dialogue with the Council on this, if you'll note at the top of Page 4 there is some new language which I added to the initial draft that was circulated to the cochairs by staff which in fact states that after reaching its concussions in regard to INGOs the working group - excuse me - conveys on the GNSO Council which subsequently amended the working group's charter to remove INGOs from its scope. So that is noted in the text.

So are there any other comments on Recommendation 1? I'm guessing not. And if not we can proceed to Number 2. George, go ahead.

George Kirikos: George Kirikos for the transcript. Yes, actually for Recommendation Number 1, you have to jump down to Page 3 because my comments were sequentially like by the document. I noticed that my comment on the language in - on Page 3, which is actually part of the preamble, the point about the arbitration is new. That's Page 3 above Recommendation Number 1 where it says, "The working group's recommendation that where an IGO successfully asserts jurisdictional immunity against a losing respondent in national court, the case may be brought to arbitration instead at the registrant's option…"

((Crosstalk))

Phil Corwin: Okay.

George Kirikos: Page 3 in Section 3. I know Mary has her hand up so I don't know whether I should comment on that now or whether we should - it's like above Recommendation Number 1.

Phil Corwin: Yes, I think now is the time to comment on that. And I agree that we should hold somehow bracket and note that that language is not final, we're not discussing…

George Kirikos: It should have been in 2, I think.

Phil Corwin: And we can go through the - maybe the next thing we should do before Recommendation 2 is go through this text which goes from Page 2 to most of Page 3 and just get that out of the way. But I agree that while that may well be where we wind up based on the preliminary consensus call, it should be at least noted that this is not finally accepted. Mary, a comment on this?

Mary Wong: Yes, and Mary from staff here. I think the only comment is that we will just go back and check to see what the language we had for this particular sub paragraph in the initial report. It may be that it was changed over time and it wasn't highlighted or it may have been some usage of language in the initial report that really isn't intended to say what it seems to say now in light of our further discussion. So we'll look that up and we'll make the note as requested, Phil.

Phil Corwin: Yes, so that Number 3 on Page 2 that should be marked as meriting further discussion or at least not being final pending our final decision on the Option A versus Option C.

                  So let's look at the other new text on Page 2 and 3 in the - which is kind of a background to all of this. And I'm going to give working group members about

30 seconds to just read through the new language in blue on Page 2 and 3 and see if we have any further comments. I'm doing the same. Yes, and I'm noting on Page 2 that again, there's a reference to possible use of an arbitration procedure. And again, that should be highlighted as not being final language until we reach a final decision on the arbitration proposal if there's a successful assertion of judicial immunity.

Okay, I don't have any further comment on that language on Page 3. George, is that a new hand or an old one?

George Kirikos: George Kirikos, it's a new hand.

Phil Corwin: Okay.

George Kirikos: On Page 3 Point Number 1, this is my Comment Number 4 from my email. The new text in Point Number 1 talking about, "Thereby avoiding any direct concession on the issue with mutual jurisdiction," I don't know that concession maybe not the best word, I was thinking perhaps using the word "exposure" because they are conceding mutual jurisdiction by agreeing to it but maybe not being exposed to it because they're using the assignee, licensee or agent. But I'm, you know, that's a smaller point but I don't know whether anybody else…

((Crosstalk))

Phil Corwin: Yes, thanks, George. You know, that's language I inserted in my review of the initial draft that staff provided the cochairs. I have no author's pride on concession or a different word. The point I wanted to make is that it was a way for IGOs to gain some insulation on the immunity issue, so I don't know if, you know, concession is what I put; you said exposure. I don't know what the best word is. I think the key is that it's just giving a little more explanation of why - of what the benefit is to IGOs of using such an avenue to bring a CRP complaint.

So why don't we - I don't know - this is a minor point, why don't we just bookmark that and that the - whether the word should be concession, exposure or something else is smoothing we may want to return to until - before we have a final draft final report.

And with that I'm going to move onto Recommendation 2. And first I'll read the text which is on Page 1 and onto Page 2 and then we'll get into discussion. George, were you done or - are we done on 1? I still see your hand up.

George Kirikos: George Kirikos again. This is for Point Number 2 so it's a new hand.

Phil Corwin: Well why don't we read it first before we initiate discussion? Okay?

George Kirikos: Yes, I'm in queue. That's all I wanted to…

Phil Corwin: Okay. Okay, you're first in line, George. Okay, the recommendation is a little longer than the first one. "An IGO may elect to fulfill the requirement that a complainant must have standing to file a complaint under the UDRP and URS by demonstrating that it has complied with the requisite communication and notification procedure pursuant to Article 6ter of the Paris Convention for the Protection of Industrial Property. The working group believes that this recommendation may be an option in a case where an IGO has certain unregistered rights in its name and/or acronym and must adduce factual evidence to show that it has the requisite substantive legal rights in the name and/or acronym in question."

"For the avoidance of doubt, the working group emphasizes that, A, this alternative mechanism for standing will not be needed in a situation where an IGO already holds trademark rights in its name and/or acronym, as the IGO would in such a case proceed in the same way as a non-IGO trademark owner; B, whether or not compliance with Article 6ter will be considered

determinative of standing is a decision to be made by the UDRP or URS panelists based on the facts of each case; and, C, this recommendation is not intended to modify or affect any of the existing grounds which UDRP and/or URS panelists have previously found sufficient for IGO standing for example, based on statutes and treaties."

And then there's a note, which is also new language so I'll read it. "This recommendation is significantly different from the working group's preliminary recommendation in its Initial Report, where it had recommended that compliance with Article 6ter can, in and of itself, satisfy the standing requirement. For a full discussion of the working group's deliberations on the changes to the original recommendation as a result of community input received, see the discussion at," and then we're going to reference the relevant page.

So let's - that's the gist of the recommendation. Let's address that and then we'll scroll down and get into the - all the further background language which explains why in this case we modified the recommendation contained in the initial report.

And so, George, go ahead and right now comment on the language on Page 1 and 2 and then hold any comments on the further language until we scroll down, okay? Thanks.

George Kirikos: Will do. George Kirikos again for the transcript. Yes, looking at Page 1 I actually agree with the intent of Recommendation Number 2; the intent is to shift it from Article 6ter being proof of rights to instead being evidence of rights. But the very first sentence seems to be a little bit confusing. My reading of it an IGO may elect to fulfill the requirement that a complainant must have standing to file a complaint under the UDRP and URS by demonstrating that has complied, blah, blah, blah.

So it makes it seem like it can completely fulfill their requirement by having complied with Article 6ter, which doesn't - which seems to be, in my view, saying that it's proof. And later on in that section it's clarified, you know, for the avoidance of doubt section, but that very first sentence still seems to be very, very confusing so I would suggest changing it both here and then later on in the document where it's expanded upon. This was my comment Number 1 in the email if people are following that.

So I would suggest, you know, using language that directly says, you know, that we're changing it from evidence of standing and not proof of standing. Thanks.

Phil Corwin: George, we may have to - I agree with your point that the language - the initial sentence seems to create an impression which is not accurate and may confuse people when they read the rest of it. Just thinking on the fly but noting that we may have to work out exact language on the email list, what if we said an IGO may seek rather than elect, must have standing in the following - you know, and after URS put comma "subject to panelists for review" comma. So that would show that it's conditional rather than absolute that there is a - it is a path toward establishing those rights but it's not - doesn't satisfy them in and of itself, it's a way to go but there's going to be a panelist review to determine whether it's sufficient.

I'm just thinking out loud but - and I'll defer now to my cochair for his comments. Go ahead, Petter.

Petter Rindforth: Thanks. Yes, I don't have in my mind now the perfect text, but I agree that Article 6ter we changed that from when we first discussed it to be the one single way to identify to be one of the ways and one way that could be clear and acceptable for both courts and more internationally rather than, I mean, when we started to compare it to the GAC list of IGOs. So I agree that Article 6ter should be - it should be read here as one specific example on the way to provide evidence of their name rights that is not the traditional trademark

registrations. But as said, I don't have a perfect suggestion for language on that.

Phil Corwin: Yes, thanks Petter. And I note that - I'm going to call on Mary next, but I note that George has suggested attempt to demonstrate, that's another good suggestion, that we use - that he's suggested we use the terms evidence rather than proof somewhere just to clarify this. I think we're all agreed on what we want it's just about what's the right wordsmithing to make it crystal clear.

Mary, go ahead.

Mary Wong: Thanks, Phil. And thanks, everyone, for highlighting this and providing suggestions because staff did try to look at this and come up with language and I should say that we were not entirely comfortable with what it is at the moment so this is helpful. And we will, you know, try and put something in along the lines perhaps of an IGO may seek to demonstrate standing by showing it has complied with 6ter, etcetera.

I did want to note that it's important I think as everyone knows that we get the text of the recommendation clear and that it accurately captures exactly what it is that the working group is recommending because since this is a PDP what will happen if our recommendations are adopted by the Council and the Board, is that while the whole report goes to our Global Domains Division to form the implementation team with community members, the starting point and the primary reliance that they will have is the text of the recommendation. So that's why it's important to get it right and so thank you for that.

But the second point in relation to that is that we would not recommend in the text of the recommendation itself making a reference to an initial recommendation that was then changed. That is something that we would probably want to put in the body of the explanation perhaps in the next paragraph, again, for reason being that this is the text that will be sent for

recommendation. So hopefully that's some helpful context and thanks, everybody.

Phil Corwin: Yes, Mary, thanks, that was very useful. On the top of Page 2 here there is this note noting that this was - this new - Recommendation 2 is substantially changed from the - what was contained in the initial report. You're not suggesting we eliminate that, are you? That note that's on Page 2 here.

Mary Wong: Not at all, Phil. I was simply saying that the - no, the recommendation itself just needs to be very specific and very clear; anything else we want to put in notes or guidance is entirely up to the group to insert or to add as the case may be.

Phil Corwin: Okay, and one further comment based on my experience with the US Congress, I think you made a good point that the most important language of the entire report is the final text of the actual recommendations, that's kind of like the legislation; everything else is more like a committee report where it provides legislative history that hopefully will be looked at by the implementation team if the recommendations are adopted by Council and then by the Board and provide some background guidance. But the key language and the one we have to give the most attention to is actual text of the recommendation.

                 So I think we concluded discussion of the text of the recommendation or what we can think of as the legislation, and now we can proceed to looking at the legislative history background which starts on Page 5. And let's see how far it goes. And that continues on through I guess Page 7. So there's a lot of new language here, so I'm going to again give working group members about - so let's go to - everyone scroll to Page 5, let's give everyone about a minute to review this and then let's open discussion of the language particularly all the new language in blue and which is - there's more blue than black in this background section. So we'll be back for open discussion in about 60 seconds.

Okay, I hope that gave everyone a chance to just review the specific language we're going to be discussing now. And I see George is, once again, in full Black Friday mode, as camped out early and is at the front of the line, so, George, go ahead.

George Kirikos: George Kirikos again. Thanks, Phil. So on the top - sorry the bottom of Page 5 it's the same text as before so it would need to be changed in the exact same way. The other new point I had was that…

Phil Corwin: Which text are you referring to, George?

George Kirikos: The first sentence of Recommendation Number 2, "An IGO may elect to fulfill the requirement," that's the discussion we just had about how to properly wordsmith that first sentence. Bottom of Page 5, four lines from the bottom.

Phil Corwin: Right, okay. Yes, I had assumed it was new language because it is in blue but…

George Kirikos: It's new language like exactly the same as Page 1.

Phil Corwin: Yes, you're correct. And let - staff should note that this needs to be amended consistent with the manner that we amend the language w just discussed up on the first page. So go ahead, continue George.

George Kirikos: George Kirikos again. The second point I had was on the bottom of Page 6, the second to last paragraph, it's actually in black because it didn't change, but it was supposed to have changed because if you look at the first sentence it says, "The working group believes that reliance on Article 6ter for the limited purpose of demonstrating standing will not necessarily result in an increased number of complaints." And obviously we've changed it now so that it's just evidence instead of proof of standing.

So we would need to adjust that paragraph to make sure that it's consistent with our new recommendation. And that was my Point Number - Comment Number 8 in the email I sent.

Phil Corwin: Okay, so, George, you're concern is about the language that's for the limited purpose of demonstrating standing. Is that correct?

George Kirikos: Correct.

Phil Corwin: Yes, so all right well staff, again, this relates to the same issue we've been discussing on this one. And it probably shouldn't be something for the limited purpose of providing evidence to support standing or something like that. Again, I don't want to be wordsmithing extensively on the call. I think it's better for everyone if staff based on the notes and discussion comes back with some proposed language that meets the concerns of the working group for precision in this language.

And again, in the second sentence there where it says, "to demonstrate standing," or to provide evidence - it should be something like "to provide evidence in support of standing," so all of that needs to be made consistent because that's the main reason for the change in this recommendation.

Now we've got a lot of new language on Page 7, all of it in blue. I'm generally okay with it but now is the time to raise any concerns about any specifics with this language if anyone has concerns with the new language. I think it's generally accurate and it explains why we modified this recommendation.

Okay, George, go ahead.

George Kirikos: George Kirikos. Do you mean the top of Page 7 or the bottom of Page 7? Because the bottom of Page 7 is Recommendation Number 4.

Phil Corwin: No, I'm talking about the new language on - all in blue at the top of Page 7.

George Kirikos: Okay, yes.

((Crosstalk))

Phil Corwin: …which is further explanation of Recommendation 2.

George Kirikos: Yes, I was fine with that.

Phil Corwin: All right, well we're just clipping along today which is great. So if there are no further comments we can, you know, Recommendation 2 is the one we expected the most discussion on because it is a change from the initial report, but it seems like other than the need to clarify that the Article 6ter filing is mere evidence that's not automatically determinative of standing to bring the CRP action, that the working group is generally okay with the rest of the language in this draft final report relating to Recommendation 2.

So are there any - before we close this matter out, are there any further comments on Recommendation 2? Okay, and I'm just going to note that, you know, if someone thinks of something and wants to come back on the email list saying oh I just had this thought and we should add this or change that word, everything is still open for editing until we get to our final consensus call.

So with that I'm going to close out discussion of Recommendation 2 and proceed to Recommendation 4, which I think we're probably going to have some discussion of based on George's email. But let's read the recommendation first and then go to the background. And this is a short one.

"In respect of GAC advice concerning access to curative rights processes for IGOs, the working group recommends that ICANN investigate the feasibility of providing IGOs and INGOs with access to the UDRP and URS in line with

the recommendations for accompanying Policy Guidance as noted in this report, at no or nominal cost, in accordance with GAC advice on the subject."

I've got a personal comment which just occurred to me, which is why are we still including INGOs when we've basically taken the INGOs out of - we've basically said that we're not making any recommendations regarding INGOs because they stand in the same position as other private parties including charitable organizations, so I'm going to raise the question of whether we should strike the words "and INGOs," from this recommendation. And, George, why don't you speak to that and then we'll get into the broader issues when we get into the background on this recommendation, okay? Calling on George.

George Kirikos: George Kirikos…

((Crosstalk))

Phil Corwin: And then Mary after George.

George Kirikos: On Page 4, Point Number 3 was exactly the point that Phil raised which was in my comments as Comment Number 6 that we had seemingly decided that INGOs, which are nongovernmental organizations, international nongovernmental organizations, don't deserve any funding and the GAC advice was only about IGOs, not INGOs. So it was kind of surprising that there was a recommendation that both IGOs and INGOs get the funding potentially. I'm opposed to all the funding but I was surprised that the INGOs were in there.

I previously looked at the document - the prior document so many times so maybe I was like kind of blind to that. I don't know if that was newly added or was it always in there? But that's something that perhaps is inconsistent…

((Crosstalk))

Phil Corwin: Yes, George, before calling on Mary, which specific language on Page - well Page 4 is an explanation of why we took INGOs out and that's unchanged from the initial report. Is there language maybe you're questioning or you're just saying that the language on Page - where is it - Page 2 is inconsistent with the explanation on Page 4?

George Kirikos: George Kirikos here. Page 4 Point Number 3, this was the rationale for not doing any thigh further with the INGOs. It says specifically, "Although some INGOs may be concerned about the cost of using the UDRP and the URS, because enforcement through these rights protection mechanisms involve some expenditure of funds, this is not a problem for all INGOs, nor is it unique to INGOs as among all rights holders. Furthermore, the issue of ICANN subsidizing INGOs to utilize DRPs is outside the scope of the working group's charter and it has no authority to obligate any party, including ICANN, to subsidize the rights protection of another."

                So Point Number 4, which I thought was noncontroversial and which I accept, is, you know, is inconsistent with Recommendation Number 4, because it's saying that we should do it for INGOs despite that paragraph.

Phil Corwin: Yes, okay I'm going to call on Mary and then she's had her hand up a while and then Petter. Mary, go ahead.

Mary Wong: Thanks, Phil, and everybody. Yes, so we can go back and double check, but our recollection is that this language was actually in our initial report and I guess no one - not just us but no one commenting on it noticed it. So obviously we can as a working group change that to clarify that it really is about IGOs. And the only comment I wanted to make here is that then what we should do also is add to the notes for Recommendation 4 to say that, you know, the original recommendation included INGOs; the intent however, then and now is that Recommendation 4 was to apply to IGOs.

And I think that the reason why we want to do that is because we did put out that recommendation for public comment and it did get support from quite a number of commentators so just for fullness of the record, we should add that note in. Thanks.

Phil Corwin: Okay, yes thanks for that, Mary. And I've got a thought but I want to her from Petter first. Go ahead, Petter.

Petter Rindforth: Petter here. Two notes, one is that if it's so that the text or there is no text also referred to INGOs I think it's important that we insert some comments here that as we have decided that INGOs does not need any specific regulation or arrangements to handle their domain disputes, that's why we don't recommend the policy over to the ICANN Board to check on the cost status for INGOs only for IGOs.

It's also important to have in mind that we - we have not made a specific statement here; we passed this question onto the ICANN Board to handle as the cost issue was one of the things that was raised from the start.

One completely another topic but it just struck me when I have read these documents and suggestions sometimes over and over again, Recommendation 4 is generally about the expenses. And I just had an idea that a little bit also based on George comments in one of the emails that if we decide to recommend the possibility to have a dispute if a national court is not handling it, to have a dispute settled finally by another three member panelist in an arbitration case.

And considering the issue of the costs and the uncertainty when it comes to that thing, that we could also add a recommendation to - to the ICANN Board that they should also look upon the possibility to actually offer that arbitration - a final arbitration - an arbitration phase with minimal cost for both parties so that we can have this kind of - and I know that this topic is something that we

should discuss more in details by next week, but as I had an idea right now I just wanted to throw it out so we can think about it.

But also perhaps in this recommendation or when we discuss that part to also arrange for something that the ICANN Board could decide upon a cost effective final arbitration procedure. Thanks. For both parties.

Phil Corwin: Yes, thank you, Petter. And I'm in general agreement with what you just said. I'm now going to propose I think based on this discussion that on Page 2 in the text of Recommendation 4, we strike the words, "and INGOs," that would be consistent with our previous decision approved by Council that we're not making any recommendations regarding INGOs and that the note below it would no longer say, "This recommendation is identical," but would say, "almost identical except for that change." And that on Page - let me find it - on Page 4…

George Kirikos: Page 7.

Phil Corwin: No, I'm going to Page 4, George. That the final sentence of Number 3 on Page 4 beginning, "Furthermore, the issue of ICANN subsidizing INGOs," that that entire sentence be struck. I think we should be consistent here and, you know, we don't want to create any impression that we're encouraging ICANN Board to staff to engage in discussions with INGOs about subsidizing any use of CRPs by them because that's consistent with our view that they're the same as other private parties.

So I want to put those two suggestions out on the table and then - and then we can get to the background explanation of Recommendation 4. And I think the point I want to make personally is that we need to be very clear in our language that we're not recommending subsidization, we're just saying that any commitment of ICANN funds is outside the scope of this working group. And I think that the point that George raised in his email and that Petter just spoke to about any such subsidization would in fact create a financial burden

on targeted registrants is something we might want to think about addressing in final language in this report as well.

So I'm going to hope we can have a discussion now of my proposal to - regarding striking the language so I'll call on Paul Tattersfield and then on George, and then after that we'll get to discussion of the background language regarding Recommendation 4. Paul, go ahead.

Paul Tattersfield: Paul Tattersfield for the record. I just wanted to really follow on from Petter's comments if that's possible?

Phil Corwin: Sure.

Paul Tattersfield: Could we try a different approach and could we recommend that the UDRP providers provide free confidential mediation stage prior to the determination stage? Without doubt the All Rights Protection Mechanisms Working Group will consider this for all rights holders, not just IGOs. However, implementation of that working group's findings is likely to be a number of years away. So is this a free protection mechanism we could easily implement for IGO (unintelligible) the All Rights Group work is completed?

Phil Corwin: So wait, I just want to clarify, Paul. Are you - and I can confirm as one of the cochairs of the RPM Review Working Group that we're not going to have any final recommendations on the UDRP until I'm guessing 2020 based on our current timeline, much less adoption thereof. But I think you're recommending that in regard to IGOs and this issue of potential subsidy of CRP by ICANN that if they're going to discuss that they might discuss encouragement in the - and the alternative, encouragement of mediation by the UDRP providers as a lower cost option just for IGOs, is that your - is that the point of your suggestion that you just made?

Paul Tattersfield: Yes.

Phil Corwin: Okay. All right well we can have full group discussion of that. I'm going to go onto George and then we can open this up for more discussion. George, go ahead.

George Kirikos: George Kirikos. I had a few points to make but I'll address Paul Tattersfield's point first. I actually agree that adding a mediation step to the UDRP process would be a positive development, not just for IGOs but for all, you know, complainants and respondents because it would lower the costs for all sides. And so I would be in favor of that kind of proposal. I don't know whether our PDP is the correct one to make that change but it could be something that we put in the document in relation to costs that, you know, this would be a way to lower costs for both sides and it would be something that, you know, we could send along to the RPM PDP as part of our, you know, process that, you know, that our work goes on to the RPM PDP later on.

The second point I wanted to address was Phil's point about removing the language in Section 3 of Page 4 starting from the word, "Furthermore." I actually like the paragraph, sorry, that sentence. "Furthermore, the issue of ICANN subsidizing INGOs to utilize DRPs is outside the scope of the working group's charter. And it has no authority to obligate any party to subsidize the rights protections of another." I actually love that paragraph because it says, you know, it applies to both INGOs and, you know, IGOs as well. You know, why should we be subsidizing anybody's complaint procedure. But I'll see how others feel about that.

Phil Corwin: Okay, thanks, George. I want to two comments. One, and if anyone disagrees and the staff thinks I'm wrong, while it's outside the charter of this working group to recommend any changes in UDRP or URS other than for disputes involving IGOs, I think it is within our ability to identify issues we have uncovered and this issue of mediation - of encouraging mediation would be one. I think the imprecision of the Paragraph 4K language in the UDRP policy that's been identified by George and Paul Keating is another.

And I think it's certainly within our scope to say, hey, we have found some issues in our work that we think have implications beyond IGOs and we're recommending that the RPM Review Working Group take a look at them. It doesn't bind the RPM Review Working Group but it brings some matters to their attention and that can be useful when it reaches the UDRP review stage.

So I think we can contemplate having a short section within the report addressing such general UDRP issues that were beyond our scope but that we think the broader PDP should delve into a little more deeply and think about addressing. So any - and on the - the other point I want to make, I still think that the - and looking at the - I would suggest that the language that I proposed for deletion in Point Number 3 on Page 4, I still think it could come out to avoid creating a mis-impression.

But we could look at striking - taking that sentence and moving it down to the background for Recommendation 4 so that it's IGO-specific. So I'm going to amend my proposal to strike the two words on Page 2, the words "and IGOs," and to move that second - that final sentence of Point 3 down to - in some form, and we can discuss the exact language in a moment, down to the background explanation on Recommendation 4. I think that would still have language that George likes and I think is consistent with this working group's general disposition but get it out of the explanation of INGOs and avoid any confusion.

So I'm going to leave that on the table and just keep that thought in mind and then let's go down to the background - let's now go to the background language explaining Recommendation 4 which appears in the lower half of Page 7. It repeats the recommendation and of course the - I think we're all in agreement that the term "and INGOs" should be struck from the recommendation.

And then I note that the first sentence of this is very similar to the language - the second sentence of Point Number 3 on Page 4, so I would - we can have some discussion now but I would hope that staff could look at that first sentence, look at the language I proposed for striking Point 3 and combine them in some way to - I think they both go to the same end that we don't have any authority to appropriate any ICANN general funds to subsidize the user of CRP by any party.

And I think we need to look at this language and make it clear that we're not recommending that ICANN take such a step, we're just saying that it's outside our scope and those discussions should be held between ICANN and these parties. And I've also heard some support from - in George's email, from Petter, from myself and probably if we discuss it now from others, that we should add some sentence here noting that if ICANN ever does such - provide a subsidy to any party to bring a CRP action they should recognize that this places a financial burden on the targeted registrant and should consider something about their costs. And we can wordsmith that.

And I'll stop there and open it to George.

George Kirikos: George Kirikos again. Yes, I wanted to agree with the statements that Phil just made, the point he made about 4K, while not the topic for today but that idea of deferring some of the topics including, you know, mediation and potentially even 4K to the RPM PDP might be a way to break through some of the log jam and give people more time to study the issue in the larger context. And I'm pretty sure almost everybody in our PDP is also a member of the other PDP, is that correct? At least the active participants, like Zak is, Phil is, Petter…

((Crosstalk))

Phil Corwin: There's a great deal of overlap I think even in the entire group including the ones who aren't on the weekly calls on a regular basis.

George Kirikos: And the other advantage is that there the IGOs are actually present and so they could have feedback on that issue as it relates to them and it has the other context with the UK cause of action. So conceivably there's some overlap that might be more efficiently handled in that group than in our group.

The other point I wanted to make is if we look - we actually look at the proposed Recommendation Number 4, which I posed, it's actually not making any decision as Phil said, so the question is, what's ICANN going to do when it receives this? Is it going to start another working group to decide the costs, like it's kind of really punting the issue to somebody else. And I guess people might be happy with that, but I'd rather decide, you know, either up or down, you know, my inclination would be obviously down, but to not support subsidization.

But, you know, if people do strongly feel that IGOs should get, you know, a free ride on the UDRP and the URS, you know, they should maybe make the tough call now rather than having somebody else decide this in five years or whenever the next working group is created.

Phil Corwin: Yes, and, George, I agree and I note Mary's comment which I agree with that appropriation of ICANN funds is not a - is really not a policy issue, it's a - it's a different - I don't see it being in scope for any working group, not this working group or any other one.

So we're about just over an hour into this call, I'm going to suggest a subject to further group discussion that rather than trying to wordsmith - I mean, I don't want to foreclose discussion, if people want to propose additional language, but that staff work on a modification of the background here on Recommendation 4 which looks at combining the first sentence or at least reconciling with the sentence proposed for deletion on Page 4. I still think we should delete it from Page 4 and put it down here.

And I'm not - I think they say the same thing in a slightly different way that we should make it clear in this explanation that we're not recommending that ICANN engage in such discussions just identifying the fact that we don't have authority to do so and don't believe that any policy working group - any PDP working group would be in a position to obligate ICANN funds.

And add a sentence or two that states the working group's concern or that if ICANN engages in such discussions they should recognize that any subsidization to bring complaints places a financial burden on the registrant and to be fair, there should be some consideration of equal subsidization. So all of that I think I'm correctly restating the gist of the conversation.

And I'd also ask the staff to come back with an initial - a final report that has a new section at whatever they believe is the appropriate place, the title could be "Issues identified for further consideration by the working group to review all RPMs for all gTLDs" and have some appropriate language there regarding the encouragement of mediation and the need to clean up the language in 4K of the UDRP.

And that can be pretty bare bones and then the working group can develop that further, but I think there's sentiment to pass those recommendations along to the bigger working group which has much broader scope in its charter. So any discussion of that suggestion? I'm happy to take specific suggestions right now for changing this language but it's often more efficient to give guidance to staff on these calls, ask them to come back with some language they worked on that's provided to us a few days before the next call and then get into that, then we have something specific to focus on.

So that's my proposal. Any further discussion on Recommendation 4 or the other issues we've just identified? All right, well hearing none I'm going to take that as general consent to the path I've suggested. And with that, we - I think we've pretty much completed our work today and can give you back a little over 20 minutes of your life.

But before adjourning, I want to call on staff to discuss the next steps. And of course the next step would be to look at the revised language I just called for but then that's - I don't think that's going to take up all of the next call. So what's our path forward, staff? And what's our contemplated timeline for delivering a final report to Council? And I think Mary will probably be speaking to this but go ahead.

Mary Wong: Yes indeed, Phil. Hi, everybody, it's Mary from staff again. So first to note that we are approaching December, it'll be December tomorrow. And we are off for the week between Christmas and New Year's, so in effect it means that this working group will have three remaining meetings, at most, before the end of the year. So with that in mind, one - well the main outstanding issue and the reason why we do not have language for a Recommendation 3 is that that continues to be under active discussion on the mailing list, most recently, but also on the calls that have been taking place up to now.

So one idea that we had is for the group to coalesce if possible around a proposal or recommendation for Recommendation 3. And we do note that there are differences of opinion on what that might look like. We note also that there was the earlier poll conducted on three options and that George has come back as requested by the chairs with the reminder and language for an additional option to which I think, Phil, you have also responded on email.

So whatever the form of Recommendation 3 ultimately takes, we wanted to remind folks also that it is possible that we will not have full consensus or consensus even for that but that regardless if we do reach some form of consensus ultimately from the working group there is the possibility to file minority statements.

So our suggestion is that for next week certainly we try to come to some kind of understanding about what Recommendation 3 might look like, whether that

is or is not a majority or consensus position. And in that context, Phil and Petter, we'll note as you know, that we did reach out to David Taylor, who's an experienced panelist for Nominet, so one possibility is to invite David and perhaps others familiar with the Nominet appeal process to join our call next week or, you know, have a call with us at some point to allow us to close off on Recommendation 3.

In which case, and I'll end with this, then given the three remaining meetings, if we can get that done and launch a formal consensus call on all the recommendations before the break at the end of the year, then we could give folks a few weeks to think about all the recommendations for those representing stakeholder groups, constituencies, or other groups to consult with those and then come back, say, by the 10th of January with their thoughts on each of the recommendation, noting obviously that we will likely have four recommendations and the chairs will designate what level of consensus was reached for each.

Then if we can close off the final report after wrapping up that call, we should be in good shape to send the full final report to the GNSO Council by the 20th of January, which is the document deadline for the Council's meeting at the end of that month.

So we're looking at three more meetings, possibly opening a consensus call before Christmas, closing it out around the 10th of January and sending the complete final report to the Council by the 20th of January. I hope that's helpful, Phil.

Phil Corwin: Yes, thank you, Mary. I just want to clarify a couple of things. So we're not going to have a call the last week of December, that's Christmas week. Do we have a call the first week of January or do we pick back up in the second week? What's the usual ICANN practice? I think New Year's Day is…

((Crosstalk))

Mary Wong: Hi, this is Mary again. And - right, so technically that first week of January is a working week because the ICANN office is closed only the week before. So clearly you can have a meeting. Our thought was to not have a meeting if indeed the consensus call is still going on. We could conceivably close the consensus call and then have a meeting then, but we thought it would be better to give folks, you know, given the holiday period, another week to make up their minds on the recommendations so our recommendation here is to not have a meeting on the 5th of January unless it's needed and to reconvene after closing out the consensus call on the 12th - yes on the 12th, sorry.

Phil Corwin: Okay and yes - okay, and I noted George references to Hanukkah in the chat room. Hanukkah is not a particularly solemn holiday, it's more celebratory and I don't anticipate that any working group members of the Jewish faith would not be able to attend. It's not like the High Holy days which occur in the fall of each year, so I don't think that's going to keep anyone from attending.

               So we're aiming to basically wrap up discussion by the week of - the week before Christmas and put out a consensus call and give working group members two weeks to respond to that. Two questions, Mary, and then I think we can let everyone go. The first question is, when we - and I anticipate we're going to have very broad if not unanimous consensus on the three recommendations we've discussed today.

               But when we take the consensus call is that on the entire final draft report or do we take it on each separate recommendation or give members a chance to indicate support or dissent from particular recommendations? And presuming that there's going to be dissent on Recommendation 3 no matter which way it goes in the final consensus call, how long do we give dissenters to prepare a minority report for inclusion in the final report?

Mary Wong: Thanks for the questions, Phil. And apologies, I should probably have addressed those in my description as well. So on the first question, under the GNSO Operating Procedures each recommendation does need a consensus level designated so in our case we're probably looking at, you know, probably four recommendations. So while the final report goes out as a single document, members will be asked to indicate their support or non-support for each of the recommendations. So hopefully that's helpful.

On that note, I'll add also that the language in the Working Group Guidelines asks for a deliberative process which we have engaged in and continue to engage in and for the cochairs to make a designation which of course can either by changed up or altered based on the outcome of the final consensus call.

So what we can do in this case especially given the amount of discussion that we've had the sense of the group on these three recommendations from today, is to have Petter and Phil, when you issue the consensus call when you launch it, to have a preliminary designation in your view based on the levels in the Working Group Guidelines of, you know, what is the consensus level for each and then to revisit that when we all come back in January based on whether folks have changed their minds or, you know, clearly indicate one way or the other.

On your second question, Phil, for the timing of minority statements, if any, there is no set timeframe. But I think that we would probably all agree that we want to give folks as much time as possible, so this does mean that either if people - well I'm sorry, let me backtrack. This does actually support the idea that Petter and Phil, when you issue the consensus call, give a sense of where you think the consensus level will lie for each recommendation so that folks who think they will not support the consensus can start thinking about a minority statement.

Because if not, if we do reconvene on January - around the 11th and we want to send the report on the 20th, that really doesn't give people much time to prepare a minority statement. If need be, we can of course delay the submission of the final report on the understanding only that the only thing that will change about the text after the consensus call is the inclusion of minority statements, that is an option as well. Does that answer your question?

Phil Corwin: Yes, it does. And I just - it helped my understanding, I hoped it helped all the members of the working group. The - I have two comments. One, I'm hoping we can get this submitted to Council by the 20th so that as George noted, the next ICANN meeting is on March 10-15, that's currently scheduled in San Juan Puerto Rico and I'm happy to see it finishes on my birthday so I can celebrate the final day - my birthday in San Juan or wherever the meeting winds up being.

But I think members are aware that this has been an issue of great interest to the Board and GAC and others within ICANN so I think we can give Council time where they might want to defer - they may want to not take a position until they've heard from parties in San Juan at the face to face meeting but we want to give the community a lot of time to consider this and we -I think we're going to have assistance from the CEO and encouraging concerned parties to actually read our final report.

The other thing I wanted to note is that the minority report - and we're going to give anyone who wants to file a minority report person or persons who want to jointly sign one, as much as time possible. And just note that that's not something that's vetted by the full working group; that is the statement of the signatories for the minority report so whatever they want to say they get to say without any further review or editing by the rest of the working group.

And with that I'm going to call on George. George.

George Kirikos: George Kirikos here. You know, since it's now November 30, will we have time to have the documents - the draft documents finalized by December 21? Because I noticed there was a bunch of changes that are going to be made today and I'm probably going to go through the document from top to bottom because I only looked at the - sorry - I only looked at the excerpts section to see whether there were any immediate changes in that that were required. But presumably people will want to do a, you know, a deep dive through the, you know, the first 60 pages of the draft final report at some point. And I don't know whether you know, we're going to get to that at some point before December 21. Thanks.

Phil Corwin: Yes, you know, on the portions of the draft report that are outside the specific recommendations and the background explanation, I've looked at that in my initial review as one of the cochairs. I don't think there's anything controversial there, it's all pretty dry and boilerplate. But if - I think working group members should give the whole report a scan and bring up any concerns they have. But again, the key issues are the recommendations which are the legislation and the background description of the recommendations so how we reach them which is the akin to legislative history.

I think we really want to try to get that consensus call out in - at the end of that final meeting before Christmas so that we can come back in January and wrap it up. But we'll see how it goes. I think with what we have left we can do it. So on the next call we're going to revisit the revised language on Recommendation 4, we may hear from David Taylor to give a brief background on the Nominet appeals process so I have to say from our prior call there didn't seem to be much working group interest in pursuing that but for the sake of comprehensive treatment if David's willing to come on, we should hear him out.

And then we're going to plunge into the vitiation versus arbitration debate on which we've had a very extensive discussion so I'm not sure there's much

more to be said there. But I'm sure that some things will be said and on the next call or two regarding that before we get to consensus call. I see Mary's hand still up?

Mary Wong: Hi, Phil. Yes, just briefly to follow up on what you said about the text of the final report. As you noted, the consensus call is on the recommendations themselves, and that's why for today for example, we look not just at the proposed text but on the, you know, more specific background to those parts. So to the extent that there is a section of the reports that people should be focusing for purposes of our meeting, it will be the text of the recommendations and the background sections.

In terms of the rest of the report, we don't anticipate it changing very much unless working group members in reviewing it - and we did send it out a couple of days ago - have changes. It may be that, you know, sometime in early January there is very substantive question or proposal from someone and we may need to discuss it on a call.

But other than that our assumption is that the rest of the calls and the consensus call will really focus on the actual recommendation text and that folks will have the time between now and the time we actually close off on the report to review the entirety of the report and to send comments or questions to the mailing list with the possibility of a meeting to discuss any of those suggestions to be decided by Petter and Phil.

Phil Corwin: Okay. Thanks, Mary. And again, from my review of the other portions of the report, they're pretty much boilerplate, I don't think there's anything controversial there. It's things like the Professor's report and history of our meetings and who participated and things like that that are in every PDP final report. But with that I'm going to let everybody go. I think we made great progress today. We're close to Recommendation 4, we've wrapped up 1 and 2 and we can plunge into Recommendation 3 on the next call and move toward a consensus call several meetings after that.

So thanks again and enjoy the rest of your week and your weekend. Bye now.

Petter Rindforth: Thanks.

END