ICANN
Transcription
IGO-INGO Curative Rights Protection PDP WG Meeting
Thursday, 14 December 2017 at 17:00 UTC
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Attendees:
George Kirikos
Petter Rindforth
Paul Tattersfield
Philip Corwin
Jay Chapman
Nat Cohen
Zak Muscovitch
Osvaldo Novoa
Mike Rodenbaugh
Gary Campbell

Apologies: none

ICANN staff:
Mary Wong
Steve Chan
Berry Cobb
Dennis Chang
Terri Agnew

Terri Agnew: Thank you. Good morning, good afternoon and good evening and welcome
                 to the IGO-INGO Access to Curative Rights Protection Mechanism Working
                 Group call on the 14th of December 2017.

                 On the call today we have Petter Rindforth, George Kirikos, Zak Muscovitch,
                 Phil Corwin, Paul Tattersfield, Jay Chapman and Nat Cohen. I have no listed

apologies for today's meeting. From staff we have Mary Wong, Berry Cobb, Steve Chan, Dennis Chang, and myself, Terri Agnew.

I would like to remind all to please state your name before speaking for our recording purpose and to please keep your phones and microphones on mute when not speaking to avoid any background noise. With this I'll turn it back over to our co-chair Phil Corwin. Please begin.

Philip Corwin: Okay, thanks Terri and we're not going to take roll call. Any change in SOIs? Didn't think so. All right so item - could people indicate by a green check how many were on Tuesday's call with the folks from Nominet just so we know. And I should do that as well.

Okay, so a little more than half the group that's on the phone. I don't want to dominate the conversation of what they said. What I would - you know, let me start the discussion -- and we'll discuss that as long as folks want to -- is that Nominet offers an appeal process which is internal.

I believe it's the same cost as the original filing. And actually the appellees might have to pay where they didn't pay the first time around. It's decided by their own internal experts under the same standards as the prior decision. And I forget the results or the outcome on that. There were some reversals but I'm going to stop there and let other people chime in with what they thought was salient from the discussion.

But since we had earlier discussed an arbitration of that type and there didn't seem to be much support for it, and the arbitration option that's on the table and Option C would be under the - an arbitration under three-member panel under the national audit. The original judicial appeal was brought under. I'm not sure it's relevant but if people want to -- based on that presentation -- want to say it's worth considering that type of arbitration option, this is your time to say so.

So I'm going to be quiet now and let anyone else speak up who wants to discuss the presentation. I see George's hand up and then Petter. So George if you go first.

George Kirikos: George Kirikos for the transcript. I don't see it really as a viable option for a file determination because it's averse from many of the same problems of the UDRP or URS in that there's no discovery. There's no discovery of documents. There's no cross-examination. There's no oral hearing. In other words it doesn't have any of the due process protections that exist in the court process.

And also the panelists or the so-called experts are, you know, the same usual suspects who normally are presenting to trademark complainants as panelists as opposed to the way judges work or, you know, truly independent or on salary and so on. Thank you.

Philip Corwin: Okay, thanks for that George. Petter go ahead.

Petter Rindforth: Yes just Petter here. Just some quick comments. Initially it was -- if I remember the reply to my specific answer on that. Unfortunately there are no cases involving IGOs. They referred to a couple of cases with INGOs. But so we cannot get any specific guidelines on our topic involving IGOs when it comes to this process.

But a couple of other things that I think was kind of interesting. It's - and this is of course related to UK and could be different in other countries. But what I refer to it sounds quite similar relation as a Scandinavia place that the appeal process was the less expensive than a court action.

And could be also because there was no physical meetings with the parties it was treated on the papers. But what I also think was interesting to hear that could be useful when it comes to you in the future discuss how to select when -- now I refer to Option C -- how to select panelists and keep them updated.

They had a yearly updated interview with the panelists who have very (strength) to keep them updated on the topics. And they were all also very experienced on this kind of dispute. And well there's also part of the Nominet procedure was of course mediation that we had talked just briefly about. But…

And here is my own - talking from my own personal experience with this kind of (path) of domain dispute procedures that are used in at least when it comes to Scandinavia, Denmark, and Norway and Finland. It's - most of the cases are more oh yes, we have to go through this mediation process. Done. And then the parties proceed to the real dispute resolution procedures.

So even if it's - when it comes to more business agreement disputes mediation is - and still I talk from my personal view. Mediation is a very good way to start, try to solve the dispute instead of going directly to a court when it comes to these kind of disputes. Also talking about the time frame and so I don't think mediation as such is something to add to it.

But in general it was an interesting, very interesting presentation. And we got some - at least some examples of how arbitration can be used as a final way to solve disputes when it comes to domain names instead of going through a court or - and also to not spend that much on time on the disputes resolution. Thanks.

Philip Corwin: Yes thank you Petter for those comments. I see in the chat room there's some discussion that mediation seemed to have some merits. I think, you know, just personal view, mediation requires two willing parties. I think that might be something that the larger RPM Review Working Group might want to look at when it gets to UDRP reform.

That is encouragement of mediation prior to taking it to a panel. I think one of the issues there will be is there a cost for that, that a professional mediator needs to be compensated in some way.

And my understanding is the dispute providers may (unintelligible) us any profit now on providing the UDRP. So I think asking them to do that at no charge would be something that we'd have to look into.

But I see that as an issue for the big group, not for this group. And Mr. Tattersfield I see you just wrote, "This is ridiculous, Phil." I'm not sure what you're talking about. What is ridiculous? Are you referring to something I have said or done on this call?

Paul Tattersfield: The idea - oh, Paul Tattersfield for the record, sorry. The idea that we can't put mediation into the process and we have to wait until the main working group to do so. I mean, it solves - according to Nominet it solves 30% of their disputes. What we have here with Options A, B, and C, we're talking about probably zero, perhaps one case ever.

And we have a unique opportunity here to actually solve those problems as I put in the proposal I e-mailed the working group.

Philip Corwin: And Paul, your proposal will be - we have your proposal contained within the document. We're going to go over it next, so there's no attempt. I was expressing a personal view, and your proposal for mediation will be one of the options before the full working group when we take consensus call.

Paul Tattersfield: Oh, thank you.

Philip Corwin: So there's no attempt to censor anyone or prevent an issue from being. I was simply expressing my personal view.

Paul Tattersfield: Okay, thank you.

Philip Corwin: Okay. All right, is there any more discussion of the Nominet appeals process? I'm not hearing any support for this group to consider that type of appeal as a option for the IGO immunity issue, so unless someone wants to speak to that, I would propose we move on to Item 3 on the agenda, which is review of the text.

It says, "Proposed by Zak." But I believe we also have George's and Paul's proposals in this document. We appreciate that everyone complied with the deadline and got these proposals in in writing. And what we're going to do now is just review these and primarily let the proposers confirm that this is the language that will be in the consensus call which will be the language in bold face.

Let me just ask staff -- Mary or Steve -- when we put out the consensus call, will all this background language be available in the call or in a separate document or how is that? Or do we just have the bold-faced text and then there's a place where the background discussion can be accessed by those who want more information? What's the usual practice on that Mary? And I see your hand up.

Mary Wong: Hi Phil. This is Mary from staff. And Steve and Berry can supplement what I'm about to say or correct me. There is a sort of regular practice but there isn't a mandatory prescribed form. So the idea being that for each PDP working group, whatever the information is that would be best suited to the group as the members might be their individual decisions on the consensus call.

For purposes of this consensus call for this group, we would suggest that the rationale and context be provided. For Recommendations 1, 2, and 4, you will recall that we did discuss some language that could go into the final report as the rationale. So the updated text for that can be sent out.

With respect to this particular potential Recommendation 3 and the various options, like I said, we would recommend that but we can also send out the rationale and context.

The one question that maybe we can come back to at the end of this discussion is whether you would like staff to adapt the language from say Zak's and Paul's e-mails into something that is similar in style to what we have for the others. Or we could send it out as is and then rewrite it for the final report. So hopefully that's helpful.

Philip Corwin: I'm a little - Mary what are you proposing to have staff rewrite?

Mary Wong: Apologies Phil. I think that our main recommendation is that yes it will be helpful to have the additional rationale and context because not all working group members on all our calls.

But with respect to these specific new proposals from Zak, George and Paul, to the extent that all of these are going out, our question for you and the working group members here is whether the rationale for these three proposals should simply be the language sent in as is or should staff attempt to edit them somewhat?

Philip Corwin: Yes well the full group can discuss this. This is just my personal reaction off the top of my head. Number one - and we're going to discuss that at Point 4 - - if we poll the working group, I think the poll document where people indicate support or opposition should just have the bold-faced language.

We don't want a 20-page polling document, that all statements by proponents of a particular option should be in a separate document that's sent out at the same time so that any working group members who are not familiar with the arguments for or against a particular proposal can refer to that before making their choice.

I think at this stage I would not be in favor of staff rewriting this. I think these are statements in support by the proponents of these options and we ought to let them be in here as put forward by the proponents. And then we'll see which if any of these options have significant support.

And then if they do have support we can work with the working group from the final language in the final report. If they don't have substantial support, consensus support, then proponents of them can insert their rationale as to why they should have been adopted in a minority statement. So those are my personal thoughts off the top of my head. I welcome discussion of that.

So let's see if there's any discussion on that process which is basically proposing to put the final brief bold-faced text of the format in any polling document that we use and have all the background, rationale, and discussion in a separate document for reference of working group members. I see my co-chair has his hand up. Go ahead Petter.

Petter Rindforth: Yes Petter here. Just wanted to state when I saw the chat from both Zak and George that even if we don't have the final version, the latest version on the screen, you're both on the call today so it would be good to have a quick verbal update from both of you if there is some specific changes so that we at least can hear them today.

And I don't know if that's - we will arrange for the right text in the document, the final, for the final vote upon that. Thanks.

Philip Corwin: Okay. And George go ahead.

George Kirikos: George Kirikos again for the transcript. With regards to process it's unclear to me at least exactly how the consensus voting should take place because some of these options are for example not mutually exclusive and some of them are - seems to me should be answered before others.

Like for example if you look at Zak's proposal, it's saying refer to Recommendation 3 entirely to the RPM PDP. So it's not a matter of - if that option for example had the majority support, then it removes the need to consider options A, B, C, and Number 6, which I haven't been given a letter yet.

So it seems to me that some kind of phased voting where that question is decided first might be appropriate. Or in the alternative Zak Muscovitch had asked about ranked voting. That might be another way to accommodate these kinds of proposals because they're not all mutually exclusive like Option Number 6 for example.

It's unclear to me if that's going to go into Option Number C, whether you guys – you guys being Phil and Petter who are the main backers of Option C – consider that a friendly amendment to Option C or whether it's now going to have to be in the totally separate Option D or E or F or whatever.

So a little bit concerned about, you know, how the process is going to be done going forward. And perhaps as a group we need to decide that before taking things to the final level. Thanks.

Philip Corwin: Well George let me say two things. One, after we review this document and ascertain that the bold-faced language is exactly as the proponents wish it to be, we're going to proceed to a discussion of the process that the co-chairs are going to be proposing.

But let me correct you right now and after we get to this, Mary is prepared to display the working group guidelines. You keep using the word "voting." And the PDP working group guidelines specifically prohibit voting. They permit the use of polls to assist the chairs or co-chairs in determining whether consensus exists.

But they specifically warn against any poll turning into a voting. So the use of the word "voting" is not applicable to the PDP process. It tries to work to get a consensus built. And if there is no consensus, we'll report that there's no consensus. But we do not take votes and we do not take ranked votes. In fact we're specifically prohibited from doing so.

So I just want to make that clear. And after we review this document and ascertain that the language is as the proponents want it to appear in any poll, if we wish to have a poll, that we will go on and discuss the guidelines and the process going forward.

So with that I'd like to return to this document and since Zak is on the call, Zak this language in bold face, if we do polling on options, is this exactly how you want this option to appear is this final language?

Zak Muscovitch: Yes.

Philip Corwin: Okay. And I think we had extensive discussion of this general option last week without this specific language before this. Is there anything you wanted to add as justification for this to the discussion that took place last week and has taken place on the e-mail list since then?

Zak Muscovitch: Nothing at this time.

Philip Corwin: Okay, thank you very much Zak. So we have a final language of an option here which is basically that the IGO immunity issue should not be decided by this working group but should be decided in a broader context by the full RPM working group.

So we next go on to the proposal from George which I note on his chat, yes, it's not a new concept. But this particular language is a concise summary of the concept.

And again it proposes that the text of both the UDRP and UDRS rules be modified so that if a domain name dispute is initiated by an IGO as a complainant and a registration commences an in rem action in a court of mutual jurisdiction the registrars shall treat that court action the same as if it was an in persona action brought directly against the IGO.

So again I'll ask George is that the final language you wish to appear in any poll? And did you want to say anything further in support of it at this time, beyond what's already been stated in past discussions and on the e-mail list?

George Kirikos: George Kirikos again for the transcript. Yes, that final text I think captures it exactly. Basically all these options are addressing procedural quirks in the UDRP and the URS. And so to some extent they can defer to Zak's option of referring them to the RPM PDP in the sense that as a working group we found all these procedural quirks in the context of (vetting) IGOs.

But really these quirks are affecting the rights of registrants. They're - you know, they happened to be discovered in the cases of IGOs being complainants but there are much deeper underlying causes that possibly are best addressed in the RPM PDP because all of these solutions that we're proposing are actually to the benefit of registrants.

And so to that extent Zak's proposal might have priority in the sense of fixing them, fixing the underlying root causes instead of just focusing on the symptoms that happen to arise when IGOs alone are complainants. As I mentioned before, the UK cause of action arises - sorry, has the exact same root cause as the immunity issue.

And this Option Number 6 is really just addressing slopping drafting by the UDRP and URS drafters who never contemplated that an in rem action might be the appropriate strategy for a complainant. So that's my two cents on the topic. Thanks.

Philip Corwin: Okay, thank you for that George. And as noted, the additional backup explanation right now I think we'll probably - the bold face will be in any poll document if we go that way. And all the separate options can have separate rationales and backup language in a separate document for the use of working group members as they consider that.

So finally we get to Paul Tattersfield's new proposal or proposals. And Paul I'm going to just - you're on the line. Let me just state a couple of things and then allow you to respond. And these are stated in the - with the intent to just see if we can make this language a little more precise.

Let me start here Paul, let me ask do you intend - do you want these three options to be presented as one combined option or as three separate options?

Paul Tattersfield: Paul Tattersfield for the record. I'm not sure which would be the best way to proceed in that. My proposal was really for the combined one, but if you wanted to split them out then I'm happy.

Philip Corwin: Well no I'm just trying to get your intent.

Paul Tattersfield: I think the ideal solution is that they should all be - well, I would think that a solution that would work for everybody, that would be acceptable to everybody. And it seemed that all the bits that I proposed would be something that most people could subscribe to.

However if people want to subscribe to individual parts of it then I'm happy with that. I think possibly the best way would probably just group all three together.

Philip Corwin: Okay well let me make a couple questions/comments. On mediation right now it seems to be a proposal for the UDRP in general. We don't have

charter authority to recommend broad changes to the UDRP, only IGO-specific changes.

Would you be willing to amend that to say "at no cost to the parties when an IGO is the complainant," so that it's within our charter? Otherwise I think we have a problem in accommodating it.

Paul Tattersfield: Sorry, absolutely, yes that was what I intended.

Philip Corwin: Okay. So would staff note that it will read, "We should arrange for the UDRP providers to provide mediation at no cost to the parties when an IGO is the complainant"? That would be the first component of Paul's proposal, the amended version.

I think the second point on arbitration is clear. I would just point out to make sure that you want this in the mix that this is essentially what the IGOs have been urging for three years, that they would go to arbitration. It's not clear to me how this would work. Let me back up.

There's a UDRP decision. Are you saying that if the IGO loses they would take it to arbitration? Or that if the complainant loses they would have to go to arbitration rather than to a judicial resolution? Paul I don't know if you're trying to speak but I'm not hearing anything.

Paul Tattersfield: Sorry, is that better?

Philip Corwin: Yes.

Paul Tattersfield: Right. What I'm saying is that the registrant should have the right to go to a judicial hearing, and he should have the right to go to arbitration. And we should bind the IGOs when they bring the UDRP complaint that they have to participate in it.

Philip Corwin: Okay, all right, well you can check your rationale to see if that's clearly stated. I haven't read it yet because this is brand new to me. But thank you for that further explanation.

I would point out that Option C does permit arbitration by mutual consent. So that concept is somewhat encapsulated in Option C as one part of it. And on the third part, when an IGO refuses to take part in judicial arbitral proceedings I think the language should be amended any prior UDRP determination should be quashed or we could use the word vitiated.

The one thing I'd point out is that under present UDRP rules if a registrant appeals and the other party - a judicial appeal on the other party doesn't appear, generally the suit will be decided on a default basis for the plaintiff because the other party did not make an appearance and that would do away with the prior UDRP decision.

So to that extent I think it's already consistent with current UDRP practice. So, you know, to take part did you mean not showing up at all, not make an appearance in court, or asserting immunity, which is the situation we've been addressing?

Okay so let me propose that this be amended to read – and it's subject to your approval – "Where an IGO refuses to take part in a judicial proceeding or judicial or arbitral proceedings, or successfully asserts immunity in a judicial proceeding, any prior UDRP determination would be quashed." Is that language acceptable to you? I just want to be precise with the language. It's a bit fuzzy in the original form.

Paul Tattersfield: Yes that would be acceptable. Thank you.

Philip Corwin: Okay. And did you want to say anything further at this time in support of this new multi-part proposal?

Paul Tattersfield: No, other than I had some reasoning behind it, some rationale. And I didn't know whether that should be included at some point somewhere.

Philip Corwin: Okay. Well thank you. We thank you for submitting this. I would note that in the rest of the document we have the other options for recommendation 3 which hasn't changed. Option A, Option B, Option C, these are the same language that was polled in our preliminary consensus call.

And so this new - now we would have those original three options and these three additional options in addition to that in one combined document. And then there'll be a separate document with backup rationale for reference by working group members.

So is there any further discussion of these new texts of options? If not we'll move on to Point 4 which is talking about the path forward. Yeah George go ahead.

George Kirikos: Yes, George Kirikos again for the transcript. A week or two ago I posted a document with regards to costs of arbitration comparing those to situations where ICANN was involved and also where ICANN wasn't involved, various documents from the Internet describing how arbitration can be much more expensive than going to the court.

And so I would just want to put those into the URL discussion to be on the record as we - that folks should not be in support of Option Number C. Thanks.

Philip Corwin: Okay. Yes I believe you've previously stated those concerns George but we note them again.

And in response to Zak's question, you know, statement about "shall be vitiated," Zak I think, you know, whether it's vitiated, quashed, set aside, which is in the parenthetical, I would rather stick with the language we've had

for a long time than start wordsmithing that so that we're putting the same option before the full working group on a final consensus call rather than changing it.

I think everyone understands that the intent is that if the - under Option A is that the IGO succeeds in asserting immunity in a judicial forum that the prior UDRP decision against the complainant would be set aside and would have no effect. It would not be acted upon by the registrar in terms of extinguishing or transfer the domains.

I think everyone knows what the concept is. I think we would lose more than we'd gain by changing words to a long-settled option at this point. That would be my view.

Okay so at this point let's move on to Item 4, which is how to go on. And Mary can you - you said you had the guidelines available. Can we go through them because - so everyone re-familiarizes theirself with the point of the process we're approaching? And Mary could you point out the most relevant portion of this is for our purposes at this point in our progress as a working group?

Mary Wong: Certainly Phil. This is Mary from staff.

Philip Corwin: This is a long document.

Mary Wong: Yes it is. It's quite comprehensive. But to the extent we're talking about designating consensus levels and the use of polls and so forth, we believe the most relevant section for the moment would be Section 3.6 which starts at the bottom of Page 8 and goes on for the next two pages.

Philip Corwin: Okay, well thank you Mary. Just wanted to make sure we were focused on the right thing. So let's go - I'm going to take us through this briefly and then we can add discussion to make sure everyone understands.

It starts out the chair – in this case it'd be the co-chairs – will be responsible for designating each position. So that puts the responsibility on the co-chairs to – in the final report – to assign to each option before the working group at the end, their view as to what the support or lack of support is for each within the working group.

The first one is full consensus. I think that's one where we have on - we'll see in the final polling but I don't know if we have the unanimous consensus but we certainly - we have very high consensus for Recommendations 1, 2, and 4.

If anyone is against them at the end then we will likely have consensus which is defined as the position where only a small minority disagrees but most agree.

So my view at this point – and we'll see what the final consensus call yields – is that we - on Recommendations 1, 2, and 4 we're likely to either have full consensus or consensus based on all discussion and implications up to now.

The next level down is strong support but significant opposition. And I think that's where we're heading at best on Recommendation 3. We'll see how things shake out in the final consensus call. And this is where most of the group supports a recommendation but a significant number of those who do not support it.

Let me ask staff. Let me stop there. Mary, when the council gets a final report and there's a recommendation in it that has strong support but significant opposition, which is the level up from the next one, which is divergence or no consensus, do they tend to act on that and pass it on to the board or not or is it on a case-by-case basis in your experience?

Mary Wong: Thanks Phil. This is Mary from staff. And actually staff was going to make that point if you and Petter didn't cover it that while there is no rule saying that the council must only act on a certain type of designation, the council's consistent practice has been they typically vote only on those recommendations that have either full consensus or consensus.

The rationale for that obviously is that since we're talking about multi-stakeholder consensus building, even where a recommendation or a proposal has strong support, the fact that there was significant opposition drops it below the consensus threshold.

So while the council has the ability and the authority to vote on or even adopt that kind of recommendation, they have never done so. And just for further information, we had a similar discussion on this point in the prior IGO working group that preceded ours because in that group – as some folks who are members of this group will recall – there were some proposals that did get strong support but significant opposition as well.

Philip Corwin: Okay. Well let me make a personal statement here. It seems clear to me – and I'd be happy to be surprised, but it seems to me that when we do a consensus call on Recommendation 3 at best we're going to get strong support but significant opposition for perhaps one of the proposals on the table.

I'm personally tremendously disappointed that after 3-1/2 years of work we're not going to be able to pass on a consensus position to council. I think it's going to strengthen those who are critics of the PDP working group process. But we've done our best and so be it.

But I think what members of this working group should keep in mind is that no matter where things come out on Recommendation 3, Council is - unless they break with all past precedent - is unlikely to forward any recommendation on Recommendation 3 on to the board. And of course Recommendation 3

addresses the most critical issue that has hung us up for 3-1/2 years which is what to do about IGOs claims of immunity.

So I'm disappointed in that and I'm concerned about what that will - what the ramifications will be when - particularly what kind of reaction it will elicit from the GAC and the IGOs. But so be it. But - so it's unlikely that we're going to produce anything that the council will act affirmatively on in regard to Recommendation 3.

Continuing through the document the next position down is divergence, referred to as no consensus, which is another possibility for Recommendation 3. And we'll see again how the consensus call goes, that there are many different points of view.

And then minority view refers to a proposal where a small number of people support the recommendation. This can happen in response to consensus, strong support but significant opposition or no consensus.

So in any of those cases, basically anything but unanimity, any group can submit a minority view and that minority view without editing it is the view of the signatories of the minority view will be included in the final report as a narrative explanation of their opposition to any of the options no matter what degree of support it received so long as it did not receive unanimous support.

Okay, the recommended method for discovering the consensus level designation should work as follows. After group has discussed an issue long enough for all issues to have been raised, understood and discussed, the chair or co-chairs make an evaluation of the designation and publish it for the group to review.

So basically we've had a lot of discussion. We've had extensive discussion of all these options. And once we do a consensus call, the co-chairs will

share their view as to what the level of consensus is for each of the separate options for review by the group and discussion.

Then after that discussion we'll - I note your hand George and will call on you when I'm done. After the group has discussed the chairs' estimation we'll re-evaluate and if necessary publish an updated evaluation. That continues until the evaluation's accepted by the group.

Now it says - and this is particularly relevant to what we're going to discuss next. In rare case, a chair may decide that the use of polls is reasonable. Some of the reasons might be, one, a decision needs to be made within a time frame that does not allow for the natural process of iteration and settling on a designation to occur.

Next, it becomes obvious after several iterations it's not possible to arrive at a designation. This will happen most often when trying to discriminate between consensus and strong support but significant opposition or between strong support but significant opposition and divergence.

So one when we've got time pressure, of course we have no strict deadline but we have been at this for 3-1/2 years and it's hard to know what more could be said about any of these options.

And the second one is more relevant when we're trying to get a better feel for where different members of the working group stand on particular options so we can get an accurate description of the level of consensus or lack thereof.

This is what I want to - the next sentence refers to the proposal for weighted voting. Care should be taken in using polls that they do not become a vote. A liability with the use of polls is that in situations where there's divergence or strong opposition there are often disagreements about the meaning of the poll questions or the poll results.

So there's an admonition against voting in this process. Votes are not permitted. Based upon the working group's needs the chairs may direct working group participants that they do not have to have their name explicitly associated with any full consensus or consensus view position.

However, in all other cases and in those cases where a group member represents the minority viewpoint, their name must be explicitly linked, especially in those cases where polls were taken.

Right now let me preview a bit of the chair's thinking. It's our view that just in any final consensus call just like in the original one that the input to the chairs would be anonymous and that working group members can - are free to go on the record with support or opposition to any or all of the various options considered by the working group.

We don't want to discourage some people from taking part in the poll out of concern that they might be personally criticized based on how they go, however they go.

Next if a chartering organization wishes to deviate from a standard methodology from making decisions will empower the working group to decide its own decision-making methodology. It should be firmly stated in the charter. We have no such statement in our charter and there's no plans by the co-chairs to seek an alternative means.

Consensus calls should always involve the entire working group and should take place on a designated mailing list. So I saw there were concerns the other day that consensus call might take place on a call. That's not our intent. It's not permitted by the guidelines.

We're going to take a consensus call over a multi-week period by e-mail so that every working group member is aware of the consensus call and has equal opportunity to participate it in.

Okay, it's the role of the chairs – in this case co-chairs – to designate which level of consensus is reached and announce this designation to the working group members and they should be able to challenge the designation of the chair.

So however this consensus call comes out, however the chairs propose to characterize various options, that is subject to challenge by members of the working group.

Then it says if this agreement persists – and I certainly hope we don't have a situation where it persists in regard to the category assigned to any particular option – members of the working group may use the précis set forth below to challenge the designation. So - and then it describes that challenge process.

If several participants disagree with the designation given to a position by the chair or any other consensus call, then they may follow these steps sequentially. One, they send an e-mail to the co-chairs (tapping) the full working group, explaining why they think the decision or designation is an error.

If the chairs still disagree, the chairs will forward the appeal to the CO liaisons. That's chartering order liaisons. The chairs would explain our reasoning and Heather - who's our liaison? Is that Heather Forrest? Mary, might I ask?

Mary Wong: For this working group, Phil, the council liaison is Susan Kawaguchi.

Philip Corwin: Oh, Susan Kawaguchi, okay. I confused Heather. She's the (full). So Susan's member of the gNSO council from the BC. So if that occurs, the - and the chairs decide to not agree with the challenge it would go to the liaison who would then provide a response to the complainants.

And if the complainants continue to disagree with the liaison support they can appeal to the chair of the chartering organization which in this case would be the chair of the full GNSO, which is Heather Forrest. So there is this process which I personally hope we never have to engage in. The chairs intend to be fair and objective in their evaluation of the consensus call results.

So - and in the event of any appeal the chartering organization will attach a statement of the appeal to the working group and/or board report and will include all the documentation. So any appeals process of this nature, the entire record we would be attached to the final report for the information of the GNSO council when they consider the final report.

So let me - I'm going to call on George in a second but as a segue after we hear from him to discuss the chair's preliminary determination of how we would like to proceed, I want to point out two important things.

One, lamentably in my opinion in regard to Recommendation 3, I don't - based on everything that's taken place in this working group to date unless there's a significant shift in people's opinions, none of the options for Recommendation 3 are likely to receive full consensus or consensus.

At best, one of them might achieve strong support but significant opposition. And based on all past precedent, the GNSO council would not take that recommendation and pass it on for board consideration and approval. So recommendation 3 however would come out as essentially probably dead. It's just not officially dead yet.

And second let me assure you the co-chairs are not going to favor any position of their own but are going to objectively analyze the feedback we get on all the options. But if anyone on any of them believes that we have incorrectly designated the level of support for any option, there is this official challenge procedure for doing so. And with that let me stop and call on George.

George Kirikos: George Kirikos for the transcript. Okay if folks turn to Page 9, there's the recommended method for discovering the consensus level. I just wanted to look at Option Number 1, sorry, Step Number 1 where it says, "After the group has discussed an issue long enough for all issues to have been raised, understood, and discussed, the chair or co-chairs make an evaluation of the designation and publish it for the group to review."

So my first question is has that discussion taken place? Like when is the deadline for all that discussion to have been done because for example Option 6, the final language was just presented today. For Zak's proposal, the final language was just submitted today.

If the deadline for all that discussion to have taken place -- i.e., the co-chairs are going to make an evaluation -- is today, right now, and I've seen for example nobody speak out against Zak's recommendation and nobody speak out against Option Number 6. I see nobody speak out against the option that Paul has presented.

So, you know, by definition above those would seem to have full consensus because when no one in the group speaks against the recommendation in its last reading, if you go back to Page 8. So when - my first question is when is the deadline for that discussion to take place.

And my second question to follow up on that is if a poll is taken, which is Step 4 where we're kind of like deadlocked as to what the proper evaluation should be, all this discussion is supposed to take place on the mailing list. That seems to be totally apart from - sorry, totally opposed to the notion that people should be allowed to have anonymous opposition to a position.

So if there's going to be any poll it should be a poll by a people submitting their position directly on the mailing list, not using some third-party software where people are anonymous. I'm entirely opposed to people taking a

position that's anonymous because it means that they haven't actually discussed their position on the mailing list as a group member.

So I don't think people should sit idly by on the mailing list for, you know, three years, never state a position. They should be able to argue and articulate their position.

And position - sorry, Step 4 says that's a rare case. So I don't know whether we would even get there. We should be able to see the level of consensus by people attaching their name to a position and publishing it on the mailing list. Thank you.

Philip Corwin: Yes, thank you George. Let me give my response and then see if Petter has a response and then we can open this for discussion. Number one, I believe that we've exhausted the discussion of all of these options. The new one from Zak I don't need any further explanation to understand it. I believe last week I expressed the view that I would not support it personally.

I thought it was an abdication of responsibility by this working group. I didn't think it was realistic to think that the RPM working group with the dozens of issues they have would give any substantial focus to this IGO issue after we couldn't resolve it in 3-1/2 years.

And third, I think proponents should think carefully if the full RPM working group takes up the issue of sovereign immunity, of IGO immunity in the context of potential (4K) changes. One, I don't know where the (4K) changes would go, but it could well turn into a much broader discussion of sovereign immunity in general for not just IGOs but for governments and agents and agencies of governments who are also users of the UDRP.

So I think it would forfeit an opportunity just aside the IGO issue without getting into a bigger swamp. But having said that, oh so as far as anonymous views, the co-chairs have determined just with the initial poll.

The final poll is going to be anonymous. We want as many people participating as possible.

We don't want people refraining from presenting a view out of concern that they'll be personally criticized by other working group members for taking a particular position. Everything from the poll is going to be public other than the identity of who voted how or who contributed to a particular statement.

And every member of the working group is free to say this is how I voted. That was my statement and these are my further views that I wish to have included in the final report.

Yeah, George consensus calls - I see your thing. It's going to be on the mailing list. But just like we put out the initial poll, that's to make sure that all working group members get it and get receipt of the request for their views and that no one misses it because they're not on a particular call.

The language that the co-chairs may direct working group participants to not have their name explicitly associated with any full consensus or consensus view position would make no sense if we required every member of the working group to reveal their position on every option in the open e-mail. Does staff want to speak to that? Is my interpretation of that correct? Mary?

Mary Wong: Hello, Phil, everyone. This is Mary from staff. And yes that's right. I think one of the things is that because we are an open participation model that anyone decides to sign up for a working group either as a member or as an observer. And as a member of course they're supposed to participate.

But we do not and we cannot essentially dictate their form of participation, whether they choose to be on a call, speak or not speak, be on the mailing list, or e-mail or not. So going back to the point about how the consensus call is conducted, what we do is we – as Phil said – we formally announce the opening of the consensus call on the mailing list.

Typically staff sends out quite a few reminders that the consensus call remains open for usually a period of about two weeks. So that's distinct from the poll which is the tool that a chair can use – or in our case co-chairs can use – to help designate consensus which is their job to do as chairs.

So any member of the working group is welcome to continue to discuss on the mailing list. Certainly the notification of the consensus call, reminders of the date of the closing of the consensus call are all issued to the mailing list. And all this is designed to ensure that there is the ability and the opportunity to fully participate without dictating how a member might choose to do it.

Philip Corwin: Thank you Mary. Finally in terms of what the co-chairs have contemplated going forward, we have 27 minutes left on this call. We have all the options before us now on Recommendation 3. There are six options, none of which are likely to get full consensus or consensus.

I think the meeting next week, next Thursday, should be if working group members feel that additional discussion beyond today's call is required and beyond e-mail, if discussion is required of any of these options, I would personally be willing to hold one more call next week.

But then our plan was to poll the working group members on the six final options for Recommendation 3, starting after next week's call or non-call. That is sending it out just after December 21, giving working group members several weeks over the holidays to respond to that poll and then reconvening in probably the second week of January to look at the results of that poll.

So far as the poll, the co-chairs feel that the most - since we have the responsibility to initially designate the level of support or opposition for each of the options before the group is to ask working group members to designate one out of the six options as their top choice and be free to indicate secondary support or opposition to any or all the other options.

And all of that will be shared with the working group at the conclusion of the poll without revealing the names of those members who have voted in a particular way or submitted a particular comment.

I see the hands up but at this point since I just spoke about a process, a co-chair's proposal, I'm going to call on - I'm going to skip regular order and call on my co-chair first to see if he has any further comments as co-chair on the process I just outlined and if he thinks it's correct as to what we had preliminary determined and wishes to add any further comments before I call on anyone else. Go ahead Petter.

Petter Rindforth: Thanks. Just - well first of all I have no corrections to you - your presentation. And I'm more of - a couple of general comments on the working order. Yes, we have what we call three new options, but at least one of them has been discussed before and the topic as such has been discussed for a very long time.

So I agree that we can actually maybe with if needed one more call. But then we are in the position to make a decision. And that was my other comment. When it comes to make decisions on the six options, frankly I think we have all done a very extensive and even if we are not concluded 100% on a specific topic we have all been involved in a very good way coming up with a lot of ideas during the years.

That work within our working group must be resulted in a specific position recommendation on our specific topics. And having said that, that would not be any (virtue) then for any of our working group members take that decision or ideas to other working groups dealing with similar topics and say, "Look, we decided in this working group on this specific topic. Maybe this could be also discussed in this other working group."

But not just to pass on our work to say that after all these years we have not come to any conclusions is better than another working group deals with the case. I definitely want to say that we can come to some sort of - well even if it's not a majority decision but some sort of a decision that is supported by a decent number of our working groups that we can actually go out with a result. Thanks.

Philip Corwin: Okay, thank you Petter. The last comment I'll make before calling on others is to note that in terms of the current makeup of the working group, we - several months ago we did outreach to all the people who are listed to determine if they were still monitoring the discussion even if not on the calls and wish to remain a member of the working group.

And we've culled the membership of the working group significantly as a result of that with - I forget the number -- but a significant number were taken off. So we have trimmed the membership of the working group for this final consensus call. And with that I'm going to call on Zak.

Zak Muscovitch: Thank you so much Phil. Zak Muscovitch for the record. So I don't want us to gloss over this issue of the rules as set out in the document we have in front of us and in particular its specific reference to a point that Phil made which is that we have to use care not to - to ensure that polls do not become votes. And that's clearly in there.

But so is (suspect) reports as in rare case - in a rare case - a chair may decide that the use of polls is reasonable. And so I don't see how we can acknowledge that polls shouldn't become votes and at the same time constantly have rare cases.

So the last poll, which was not a vote, was essentially a rare case. I don't know the basis for that. And again we're contemplating another poll that is not a vote, ostensibly because it's a rare case once again. And so I just would like to hear - if I come forth as a newcomer to this process and propose

something like a binding vote I'm sure everyone would point out to me that the rules prohibit that and point me to the rules.

But as a newcomer I also hear that we have the rules right in front of us and there's no explanation about how we've run into a rare case. And to George's point the rules also seem quite clear that the consensus call's supposed to occur on the mailing list. And so I'm similarly concerned that the rules speak to this and yet we've managed to invoke a rare case to get around them.

So I look forward to someone explaining to me A, how this is a rare case and B, how we're avoiding the language expressed in the rule regarding where the consensus (unintelligible).

Philip Corwin: Zak might I ask are you now opposing any polling of the group? I'm trying to understand your position.

Zak Muscovitch: Well it's really not for me to oppose, to make the rules. But I'd like them to be followed so I know what I have to abide by or not.

Philip Corwin: Well the rules are before you Zak. And it says, "In a rare case the chair," and in this case co-chairs, "may decide that the use of polls is reasonable. Some of the reasons," and this is not an exclusive list, but it is some of the reasons, "is that it becomes obvious after several iterations it's impossible to arrive at a designation."

That's the situation the co-chairs are struggling with and that's why we're going to use a very limited poll that is not a vote. And unless there's a big surprise then none of these options are going to get approved by the GNSO council given the lack of consensus within this working group. Anything further Zak?

Zak Muscovitch: (Unintelligible). Yes. Sorry, if you don't mind. I appreciate the point you're making Phil. But I mean on what basis have the co-chairs found that it's impossible to arrive at a designation if that's the exception that you're relying upon?

Philip Corwin: We've had a lot of further discussion since the original preliminary poll of the group and we want to - it's our responsibility to propose an original designation of support, the level of support for each of the options being put before the working group and we feel it would be helpful to us to proceed in this way. We have discretion to do so.

Zak Muscovitch: And I'll leave it with this last remark is that the discretion that you have and which I of course respect and the immense commitment that you and Petter have made and the other working group members have made, I respect that. But if it's clear in these guidelines which are really rules that there's - that it's supposed to be a rare circumstance and you're not able to clearly express why it's been impossible to arrive at a designation I feel that there hasn't been a sufficient basis laid out for a poll.

And it's not necessarily that I'm not in favor of polls generally. But we're operating within this framework apparently and so I think there needs to be consistency of application.

Philip Corwin: Okay, thank you Zak. Mary I see your hand up. Did you want to intervene on this point?

Mary Wong: Thanks Phil and everyone. So perhaps just some further information that will be helpful. The working group guidelines overall - we take a step back -- confers on the co-chairs both the responsibility as well as the authority to make the designations.

And in terms of these various steps in the process, the issue that has been under discussion for several months has been the possible scope and

direction of Recommendation 3. So to the extent that we're talking about these different steps in the process, that has been under discussion for several months.

And it is also possible that after this proposed poll when the results are published, the group may decide that they wish to discuss the designation that the chairs may attribute based on the poll, based on all the discussions that have occurred to date and based on any other factors that may be relevant.

So this - it may be that after this poll and further discussion we have to go back and do something again. The polls are going to (foreclose) that. And in terms of using the polls themselves, there is no explicit, you know, prescription or prohibition in the guidelines to say that a poll can only be used at this particular stage.

Again it goes back to the responsibility and the authority of the chairs. So if one looks at this process that this working group has engaged in especially for the last few months and noting also that participation norms and expectations of all members is that they are supposed to follow along.   And that's why we publish transcripts and recordings as well.

It does seem to staff that at this stage if Petter and Phil believe that a poll may be helpful to them to discharge that responsibility it doesn't foreclose further discussion. It doesn't foreclose working group members from continuing to discuss things on the mailing list or specifically indicating their support one way or the other for any option on the mailing list.

And all of these will be taken into account by Petter and Phil in making their designation which again will be shared with the group before being declared finalized.

So this is not to say that staff is, you know, wanting to push a particular method. This is a method that the co-chairs have discussed with staff and is being proposed to the group. The working group guidelines apply to all GNSO working groups.

And so some groups may choose a certain mechanic whereas others may decide that a different mechanism may be more helpful. It does go group by group on that basis. And for this particular one, this is a tool that Phil and Petter are choosing to use in their consideration of all the different factors that they will have to consider. So I don't know if that was helpful or not but hopefully it was.

Philip Corwin: I think it was helpful Mary in that pointing out that following the polls there can still be further discussion. The purpose of the poll and the outreach to all working group members is to assist the chairs at this point in our process in designating a particular level of consensus for each of the options and then sharing that with the full working group for their review and feedback. So I think it was helpful. George go ahead.

George Kirikos: George Kirikos for the transcript. First once again I wonder (unintelligible) the use of a poll as the starting point. I don't think we're in that rare situation yet. And I don't think we actually discussed the issues long enough to have actually arrived at the ability for the co-chairs to make that initial designation that's described on Page 9, point number little I, Roman numeral I, Roman numeral one.

If the chairs are not going to make that evaluation, the initial evaluation and publish it for the group to review but are only going to wait until the use of a poll, I think that's the wrong course.

The proper course should have been to have discussed it on the mailing list and to see, you know, who is for and who is against all the various positions and be able to arrive at an initial evaluation of the designation of each

recommendation that way because then if there is a poll, is that going to be the final Step 4 or are is this poll just going to be used in form Step 1 and then we're back to Step 2 and 3 where people are going to iterate saying, you know, we accept that designation or we don't accept that designation?

And then how are things going to be decided? Are we going to have like ten different polls to decide whether things are - have reached a steady state because I don't think we're going to achieve that unless we had first had the full discussion on the mailing list.

And as I noted before, some of these options have never been voted upon. Like I don't know how the co-chairs can make an evaluation on Paul Tattersfield's proposal or Option Number 6 or Zak's proposal when the input of the group hasn't been received.

The only opposition I've seen to Zak's proposal is that of the co-chairs. Has anybody else on this participants' list that has participated on the call or on the mailing list have actually spoken against them? No. So if you look at the actual definition, then the starting point of the co-chairs has to be that there's a consensus in favor of Zak's proposal.

Like I don't know why we don't use the little voting tools that are in this Adobe chat to, you know, say agree. Do we agree to support Zak's position? Do we agree on George's Proposal Number 6? Do we agree on Paul Tattersfield? That should be the starting point. We have all these tools available to us in the live chat room. We should be using them.

And so I know Mary's saying that not everybody's on the call. But that should be used as the starting point. And then people who are not on the call could be informed that, you know, during the call we had only one or two people speak out against Zak's proposal, only one person speak out against George's proposal.

Well nobody has spoken out against Option Number 6 but let's assume that there's at least one or two. And then, you know, two people who - does anybody who couldn't make the call want to voice their support or opposition to certain proposals? That should have been the procedure.

We talk about the rules in terms of a rare case. I don't see how this is some rare case where we're up against a deadline or we're up against a deadlock when we haven't, you know, iterated through steps one, two, and three yet. So that's my position. I'd like to hear what other people feel about that. Thanks.

Philip Corwin: Well I'll say two things George. One, the co-chairs do not feel they're in a position to make an evaluation of the designation without taking this initial step of polling the working group. And second can you identify any issue before us that you don't think has been sufficiently discussed for all issues to be raised, understood and discussed? We've been discussing these issues a long time.

George Kirikos: George Kirikos here. Yeah, Option 6 was posted today. Paul Tattersfield just posted today. Zak's was posted just today. The deadline for those final things, statements were only posted today.

Philip Corwin: Right, and I have said that we can have another 90-minute call next week to further discuss that and any other new options before any poll will go out.

George Kirikos: Right but if…

Philip Corwin: I understand Paul's option quite well now without further discussion. But if others want to discuss it, they can.

George Kirikos: Right, but if a poll is – like we're about to say in the chat room – if you have a poll that doesn't have reasons why people are making such a position on the record, people are - you know, people aren't debating via poll. They're just

stating a position. It's like I'm saying something and I'm not responding to feedback. It's not a discussion. It's just a position statement.

So that's why polls are something that should be avoided and the rules say they should be avoided. One of the main reasons is it's not a discussion any more. It's just here's my position. I'm not going to react to it. It's set in stone.

And we know from past polls that positions are not set in stone. Just last week Nat Cohen said he supported Option C but no longer supports it. That's something that would happen to other people if they were polled. You know, they have no mechanism to update their views. Thanks.

Philip Corwin: Okay, thank you for that George. We're at 23 minutes after the hour. I have nothing further to say. What we've discussed will be put out on the working group mailing list to inform that full working group of our thinking at this point.

And we'll seek feedback as to whether members want another call next Thursday to have any further discussion of the six options now before us, Recommendation 3, which all appear likely to be rejected by the GNSO council because none in this co-chair's preliminary estimation without the benefit of the poll.

It appears to me that there are significant divisions within the group and there's not any option which will achieve either full consensus or consequence, that at best there might be strong support but significant opposition for one of them. But that's not even assured. And that's why we'd like to have an informal non-binding poll to better gauge where things are at. So Petter do you have anything further to say at this point?

Petter Rindforth: No I think that was a good summary.

Philip Corwin: Okay, anybody have anything further to say? Well if not, thank you for your participation and we will see if a sufficient number of members of the working group want a call next week for a substantive discussion of the Recommendation 3 options. Thank you very much.

Terri Agnew: And once again the meeting has been adjourned. Thank you very much for joining. Please remember to disconnect all remaining lines and have a wonderful rest of your day.

END