

**ICANN Transcription**  
**Section 3.7 Appeal with the GNSO Council and the Working Group Liaison**  
**Tuesday, 20 February 2018 at 23:00 UTC**

Note: The following is the output of transcribing from an audio recording of Section 3.7 Appeal with the GNSO Council and the Working Group Liaison call on the Tuesday, 23 February 2018 at 23:00 UTC.

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<https://icann.box.com/shared/static/kve1k7d9ueo4s2e8nzmng87xf0xz0760.mp3>

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Michelle DeSmyter: . I would like to welcome everyone. Good morning, good afternoon and good evening. Welcome to the Section 3.7 Appeal with the GNSO Council chair and the working group liaison meeting on the 20th of February. On the call today, we do have George Kirikos, Susan Kawaguchi, Paul Tattersfield, Heather Forrest and Rafik Dammak. We have apologies from Paul Keating and Donna Austin. From ICANN staff we have Mary Wong, Steve Chan and myself Michelle DeSmyter

As a reminder if you would please state your name before speaking for recording purposes. And please utilize your mute button when not speaking. Thank you, and I'll turn the meeting back over to you, Heather Forrest.

Heather Forrest: Many thanks, Michelle. That's wonderful, and thanks to everyone for joining the call. I'm - let me give a brief introduction and then I'm - and then turn things over. So just by way of explanation as to who's on the call from - who's, let's say, not associated with the PDP if you like. So my name is Heather Forrest. I am the chair of the GNSO Council and I have also asked that Rafik and Donna be invited to the call. We have, since the previous Council chairs' legacy let's say, been doing just about everything where it's possible as a leadership team rather than vesting so much, if you like, pomp and circumstance into the role of chair. We very much work together as a three-part unit. So that explains Rafik's' presence on the call, and it explains Donna on the invitation. Unfortunately, Donna wasn't able to join us.

Susan Kawaguchi serves as the liaison for this PDP. And part of the role of the liaison, if I - this is something that we were discussing in great depth in Council strategic planning session in January. Part of the role of the liaison is to help facilitate when there are difficulties within the PDP. Whether it's difficulties between members or difficulties in understanding things or difficulties in coming to agreement, difficulties in reaching consensus. So Susan has a pretty natural place here on the call in terms of facilitating in terms of carrying out her role in that fashion.

And can I start as well with a question, George, may I call you George? You and I correspond by writing with formalities. But may I call you George on this call?

George Kirikos: Sure you can - everybody can call be George. May I call you Heather?

Heather Forrest: Absolutely. So we have George, yourself, and Paul. Is that right, Paul? Are you on with us too?

Paul Tattersfield: Yes, I am.

Heather Forrest: Wonderful. So here's my understanding of 3.7. Three point seven gives an opportunity to discuss issues that have arisen in PDP and issues that weren't successfully resolved between members of the PDP and the chairs of the PDP, chair or chairs. So this is that discussion. And I think the thing that would be most helpful really I think, you know, George - Susan, George and Paul. Susan and Rafik and I see this as an opportunity really to listen to you. To understand the really better understand off the documents. We've read the documents. We've seen everything that's been put together We'd like this to be as, you know, collaborative and I don't want to say informal because the 3.7 process is - yeah, constructive. Thanks George. That's what this is. Let's not devolve into, kind of, lawyer speak and that sort of thing. This is just a chance for human beings to get together and talk. That's what 3.7 is all about a discussion. You notice the work that's used in 3.7 is discussion.

So I'm coming at it from that spirit. And let's see what we can do here. And with that, I thought it would be super helpful, in that spirit. Not the formal documents and everything else. If George and Paul, you can and perhaps George, you can start because you're the one that's really raised the concern. Tell us what, you know, in plain English what you think the problem is. And when you get to the end of that discussion if you can shift to your thoughts on how we can - how we might be able to resolve it. That would be very helpful. So with that, George, over to you.

George Kirikos: Thanks, Heather. It's George Kirikos for the transcript. We should probably speak our names just to make it easier for the transcriber. Yeah, so as you know this process started back in December and we have various attempts to resolve it. But unfortunately, we were unsuccessful. Looking at things from the 40,000-foot level, the reason why we're here is to basically ensure the integrity of the PDP process. Otherwise it would undermine confidence of the entire ICANN policy-making system if deviations from the working group guidelines were to be tolerated. And that's one of the comments that was made by, I think, Zak Muscovitch, on Page 2 of the January 11 document. He was concerned about the precedent that would be set if the use of anonymous polls were to be allowed.

And so that was my main concern. And so this appeal is really talking about - really prompted by that specific act by the co-chairs to try to invoke second anonymous poll. But as you can see from the three documents, the January 11 document, the January 16 reply for the co-chairs and then the February 12 document of last week. They request several specific things namely they use the anonymous poll, both the second on that's proposed and the first one to be disallowed. And also for the co-chairs to be replaced with a new and independent chair would be neutral, because in the document I discussed various issues with the co-chairs not being neutral. And having a new chair would help to ensure the integrity of the process that no one was manipulating the outcome by so-called discretionary procedures which in my view the working group guidelines don't permit.

And so everybody's read the documents. If there's anything specific in them that you have questions or concerns about, I can go through

them. But if you'd like I can perhaps go through the document or how do you propose we, kind of, go into the details if the details that you want to discuss or is that introduction sufficient?

Heather Forrest: Thanks, George. That's a helpful introduction. I really - I hesitate to go into the documents only because, you know, the documents are together in a very formal almost legalistic kind of way. And that's not really what 3.7 envisions. Three point seven really deals with discussion and it's not this, sort of, formal nature of, you know, a complaint and write a reply. And so on and so forth. I don't want to have a battle of documents here. I just don't think that that's helpful. And it's also not really, in my mind, it's not really the spirit of the multi-stakeholder models. So I think to the extent that we can - I appreciate the documents record things. And make a full record, but I think to the extent that we can just, you know, talk about things that's going to be helpful.

What I might do is say, Paul, you know, by way of introduction, is there anything that you would like to add? And perhaps, Paul, one thing that would be helpful for us, so we - it wasn't known to myself or Rafik or Susan prior to this call, prior to receiving invitation to this call, that there - who the supporters were of this action. So Paul, your identity and indeed Paul Keating's were only just made known to us, to protect the integrity of the process. So Paul, perhaps a bit of an introduction from you as to how you see things, and why you believe there's issue would be a helpful way to start. Thanks.

Paul Tattersfield: Thank you. I think George amazing amount of time and energy that he puts into things and I mean to do several issues. They were several months and where those issues are not aligned with the chairs' chosen

direction of travel, they seem to have fallen on deaf ears. I think that the anonymous poll is just the head if you'd like of an underlying problem that's gone on for several months. And some of these are fundamental misunderstandings on all sorts of issues that influence the outcome of the report in a massive way. And whenever they've been put to the chairs, they haven't really been an acceptance of them. And I think something has to be done at some point, and that's why I support George in what he's wanting to do.

Heather Forrest: Thanks very much, Paul. That's helpful. So I think one thing to see before we progress further, and I do know - I get the sense from George's, and you know, George just putting that in the chat. So I started to write down here in my notes the use of the anonymous poll, but then a broader, if you like, a broader concern about how things have been progressing. And I suppose my question is, having been involved in the PDP, albeit not, you know, as regularly. I think I've been there as an observer. We're in the very end stage of the process. So I understand that the use of the anonymous poll which was proposed in December was the catalyst, but what - I suppose why now is not my question. But here we are just, you know, if you like moments, contextual moments before producing a final report. Is this the opportune time to raise these sorts of concerns? Could they potentially have been raised earlier at a time that it would be much easier to deal with them? How do we handle the timing factor, George?

George Kirikos: George Kirikos here. Well back on December, on December 27 the co-chairs actually sent a document discussing their view of what the options were in the working group. And so similar kinds of concerns were raised back then. Because they reproduced a one-sided document and unilaterally narrowed the options available for

discussion. And I, kind of, forced the issue - attempted to force the issue at that point. And it wasn't necessarily perfectly resolved at that point because they said oh, well we'll be changing things when we get to the final report. This is some interim attempt to graph the level of consensus. But as you can see from the transcript, they, you know, mischaracterized that as a vote despite the working group guidelines. And while it created it, we're near the end of the process. I don't think we're close enough to actually reaching the full consensus that people perhaps think we are.

Like I think this (unintelligible) needs to be more work to actually get to a final report on that recommendation. If indeed, that recommendation is even to be allowed to be put into the report. Because one of the arguments I made in the document is that the recommendation might violate our charter because it's actually been positioned as an improvement for the benefit of registrants, not for IGOs. I don't want to go deep into the policy issues, but if you take at face value what Phil Corwin had said, then by definition it's not consistent with the working group charter. And so that would have supported the view that the issue should have been sent to the RPM PDP of which I think probably everybody here is a member, except maybe Rafik. And it's, kind of, tied in with another underlying issue that I've mentioned on the RPM PDP dealing with regards to the cause of action in the yoyo dot email issue. They both caused by the same - both are, kind of, quirks of process. And they both caused the same underlying issue with the reversal of the plaintiff and the defendant in the lawsuit versus the EDRP. How the EDRP causes that reversal to happen.

And so I would think that any actually full solution to the problem would require a EDRP change for both issues, because they both have the

same underlying cause. But regardless of the actual nature of the policy issue. It has to be consistent with the charter. So we would actually be finished our work if we just stuck to the argument that this works process isn't even within our charter. So we should just finish up our work and hand it off to the RDM PDP. Sharing what our research has discovered. So that would be one resolution which seems to be what many of, which Zak Musocovitch proposed, give to the RDM PDP, seems to be what several of us are supporting. But the co-chairs disagree, and so that's one of the reasons we're still in this dispute.

In terms of the timing, like if we decide to actually go forth with the process, despite the charter, I think it would still take several meetings to reach a consensus, if a consensus can actually happen. Thanks.

Heather Forrest: Thanks, George. Two things there, so one is the question about the charter. But in terms of the substance, and when we say - I think it's helpful to be super precise here. In terms of consensus, when you say it's a number of meetings that could be needed to reach consensus, if that's even possible. That's consensus on what? I wonder if I might ask staff. I'm sorry to do this on the fly. Mary, Steve, could you help us? Could you pull up the working group charter, the (unintelligible) rights charter? And we can actually look to see what language is there. that's there. That'll help. Thanks very much, Mary. I appreciate that.

But I'd also, let's say, in light of our concerns about the charter, George. I think it's helpful that we also just all of us ground ourselves in what exactly the charter says. And you're right, George. You know, it's not - we just had a call with other PDPs where there were questions about the charter and this charter needed to be modified and so. I mean these things happen. You know, we do a document and now it's



some years since the charter was drafted. But I see your point, George. But let's - I'd like if we just hang on for staff to pull up the charter itself rather than, you know, work through individual documents. Let's work through the actual charter.

And it's certainly the case that along the way, sometimes we, you know, end up with a charter that we say, oh, we didn't anticipate that. So George, in the charter here, what we see. We've got - apologies, you can hear my scrolling. We've got background mission and scope. Mission scope, this curative rights protection for IGOs and IGO's PDP working group. But it's important to know that this PDP actually was, if you like, a next generation out of an earlier PDP dealing with IGOs and INGOs. And in fact, we've revitalized part of that based on a board request to do so. So George is asking is this the amended charter? And I have - it says at the top working group charter as amended 16 April 2015. Yeah?

So it says, "This curative rights protection for IGOs and IGO's PDP working group is tasked to provide the Council with policy recommendation regarding whether to amend the EDRP and URS to allow access to and use of these mechanisms by IGOs and INGOs. And if so, in what respects or whether a separate narrowly tailored dispute resolution procedure at the second level, modeled on the EDRP and URS takes into account the particular need for specific circumstances of IGOs and IGOs should be developed?"

So I read that as saying that the working group has to one, determine whether or not to amend the EDRP and URS to allow access. Or two, to consider if (unintelligible) to consider whether it's appropriate to develop a separate mechanism, let's say. And what then - I mean

certainly I if I understand the group's work and having read your documentation, George, it seems to me that the discussions have been around that. Whether to amend the (unintelligible) or whether to have a separate narrowly tailored dispute resolution procedure. Now George, you're pointing to the bottom of Page 2. George, take us through. You tell us exactly which part of the charter you feel is problematic here.

George Kirikos: Put it on Page 11 of the January 11 document. It says provide the GNSO Council, so the last part of Page 2 says, "It's tasked to provide the GNSO Council with policy recommendations regarding whether to amend the EDRP and URS to allow access to use these mechanisms by IGOs and INGOs. And if so, in what respects? Or whether a separate narrowly tailored dispute resolution procedure at the second level modeled on the EDRP and URS that takes into account the particular needs and specifics or consensus of IGOs and INGOs should be developed?"

So basically we've decided we're not going to create a separate tailored - narrowly tailored dispute resolution procedure. So that's off the table. And we're not planning to modify the EDRP or the URS. Like we're only going to provide policy guidance. That they can use, for example, an assignee or licensee or an agent if they wanted to avoid the immunity question entirely. And so what this recommendation Number 3 is only talking about is this quirkish process where the, in this rare scenario - in this hypothetical scenario because it's never actually happened. Where an IGO files a complaint. They win the EDRP and then the domain owner files a court case. But then the IGO asserts immunity, knocking that - and wins on immunity. Like the case is dismissed and so that - we deprive the registrant of review on the

merits of the dispute in court. And so all recommendation Number 3 is discussing is what to do in that scenario. Like right now, if we do nothing the registrant is out of luck and the EDRP has no further court case. So the domain name would be transferred.

And so what recommendation Number 3 is attempting to do is to create a new process perhaps. That's the position of the co-chairs to give the domain owner an arbitration option. That's their preferred solution. Other people preferred different options to handle that quirk of process. But none of this has anything to do with IGOs having access to the EDRP or the URS. So to that extent, it's not consistent with the charter.

Heather Forrest: Thanks, George. So what I will ask is this, right. It seems to me that - so am I right in saying that you said that the group talks about whether or not to amend the EDRP and the URS and came to the answer no?

George Kirikos: Correct, well there's two different aspects of the EDRP and (Mary) has a comment in the chatroom.

Heather Forrest: Yeah.

George Kirikos: There's the EDRP itself as decided by (Wi Po) and then there's the procedure around the EDRP in terms of how it's handled by the registrar afterwards. So the procedure is -

Heather Forrest: But George.

George Kirikos: Go ahead.

Heather Forrest: Let me. I'm sorry I don't mean to cut you off. But let just focus here today. I have a - I'm just - I'm trying to get my head around a particular point. It is the case that the group considered whether or not to amend the EDRP and the URS. Let's say leave aside, you know, what we can - I mean I think we have an EDRP that's in force and maybe URS that's sitting in the applicant guidebook describes there and now set out on ICANN's web page. But the group talked about those two things, right? And whether or not those could fit an IGO?

George Kirikos: Correct.

Heather Forrest: Okay, so that, from that part of the charter, we say the curative rights protection blah, blah, blah is tasked to provide the Council with policy recommendations regarding whether to amend the URS or EDRP. So an answer to yes and answer that question, whether it's yes or no or anything, that's the substance of it. But as long as we have an answer to that, whether to amend the EDRP and the URS, that seems to be very much to be within the charter. And the use of this mechanism, now what respects or whether a separate narrowly tailored dispute resolution procedure could deal with this. Now you're saying they're coming up with something that isn't a separate narrowly tailored dispute resolution procedure?

George Kirikos: Right, the other option that the IGOs have long sought is a replacement of the EDRP and the URS. That would only apply to IGOs. And the consensus is that that's not going to happen. And so this other issue is only dealing with that quirk of process that I noted earlier. I can perhaps go through the quirk of process again if - it might be new to everybody. We didn't really go into in detail in the document. But really it's a small - it's like a weird hypothetical situation that we

discovered just by talking. Because we've probably done the most thorough review of the year than even the RPM PDP at this point. and we've, kind of, discovered all these scenarios that haven't been contemplated. And so we decided, you know, we know about the situation. What should we do about it? It would happen within the context of an IGO, but it doesn't actually really involve the EDRP. It really is an issue of what happens like post the EDRP at the court level. And whether something should be done about this quirk that affects registrants.

Heather Forrest: I think, George, let's just hang on for a second. Before we go down that path. So I think I understand where you are there. I just want to make sure. So we do have the Adobe room and if anybody wants to ask a question, it's certainly not intended to be a discussion, you know, between me and George alone. Rafik, Susan, Paul, if any of you has a question by all means please feel free to put up your hand. So George - George has put up his hand as an experiment.

All right, I don't see any hands. George, I think I have a better understanding of what you're saying about the charter. But I think I'm inclined to say, you know, even in your description just now, you said that it's something that happens after the EDRP. And again, I think it's certainly the case in all our PDPs. We can open up each one of them for this sort of review, and say that along the way in our deliberations, we come up with stuff that's related. But maybe not explicitly set out. And I'm not convinced here, at least on the face of it. Maybe I'm missing something that this group has gone completely off scope here. And I just - I see Paul's hand. I just say, I put a marker down to say there's this business about the charter that we're discussing now.

I haven't lost sight of the fact that you have concerns about the use of an anonymous poll. And yeah, those are really the two that's, kind of, an over - there's a charter question. There's an overarching question about how the outcome has been reached in this PDP or the leadership if you like. And then there's a question about the use of the anonymous polls. So those are the three, sort of, you know, discreet, to the extent we can call them discreet, things that we're discussing. Paul, over to you.

Paul Tattersfield: Right, there's several other issues that are actually outside of the majority's appeal. One the mediation for example. That was something we wanted to get included. We talked to (unintelligible). They gave a brilliant example and they have a 50% settlement rate on it and at virtually no cost to the IGO which is just exactly inside the charter. It's a brilliant way of sorting out these problems.

We wanted to put that in. But the co-chairs just wouldn't discuss it. The only way I could get it in was to tag it in. An option that I wanted to discuss. Which opposed their preferred option. The even bigger issue is with Professor (Swain)'s report. Because it's not relevant to what we're considering because the IGOs are initiating the proceedings immunities for when IGOs are defending a name not when they're initiating proceedings against somebody else. And a lot of the reasoning in the (Swain) report just isn't relevant. There's some really big issues that really need looking out, but the co-chairs just will not discuss them and that's for me is a serious problem. Thanks.

Heather Forrest: Thanks, Paul. So I'm just (unintelligible). Let's say Paul you started, and you said there are a number of things that are outside of this - the, I almost said scope and that's probably the wrong word. Outside of the

3.7 action that George just raised. And I think - I don't want to open this up as tempting as it is, because we could do that to each of PDPs. I don't want to open this up to a sort of, you know, here's everything that's wrong with the PDP. I think we've got, you know, George's very clearly and thoroughly documented 3.7 intimation. And I think that's very helpful. And I think the fact that you're both raising concerns of a much broader nature makes me a bit concerned in a sense of yeah, I mean irrespective. And I know George says there would be a few more meetings to get to a final report. But we're at the end of the lifecycle of this PDP. So I find it, you know, I just think it's unfortunate that we're here now.

Paul, I suspect that's an old hand. But just check with you that it is, before I turn to George.

Paul Tattersfield: It is an old hand, but I would say we've tried to raise these issues for months. I mean George mentioned September. Some of them were raised before the first initial report and again the chairs wouldn't listen. It went out to public comment. The public comment wasn't kind. And then they corrected back to the position that we suggested before they put out the first public report. And now we have exactly the same situation again. We've asked for a second public report because these issues are pretty massive. And the chairs have just blocked it. So it's gone on and on and on. And it's only now that it's come to an absolutely head try and get it sorted out. Thanks.

Heather Forrest: Thanks, Paul. George back to you. And then I'll try and see where I can shape your comments to get us back to seeing how we can get to a resolution. Thanks.

George Kirikos: Thanks. George Kirikos for the transcript. I just caught it in the chatroom, the text from Page 3 of the working group charter to help convince people that that quirk of process more rightly belongs in the RPM PDP. Our own charter actually even refers to that PDP. It hadn't been created at the time, but - and so that really hasn't been considered whether it's more appropriate for the issue to be handled in that PDP. The co-chairs to be insistent that we deal with it. But then as Paul Tattersfield noted, when we tried to deal with it, by having various other solutions that don't mesh with their preferred outcome, they say, you know, it's better handled by the RPM PDPs. So there's a bit of an inconsistency there. Thanks.

Heather Forrest: Understood George, understood. I'm - so I'm - it's funny. I'm a little bit - I'm live to this discussion in a sense that we've just come off of a joint call with the RPM PDP and subpro co-chairs and we've been talking all morning about interplay. And, you know, I think the thing that I would summarize from those discussions, the more we talked about these things, the reality is that the GNSO's mandated has everything to do with gTLD policy. And the changes that one PDP bleeds into another are entirely likely. And it's for that exact reason that we have references to other PDPs that sit in the charter.

So, you know, subpro explicating references RPMs. It also references CCT. This PDP predates some efforts, but not other efforts. And so we have this, sort of, complicated web that we're weaving. If we had a look at as Council has recently done in January. We currently have five, it depends on how you count them 4, 5, or 6, it really depends whether you count the reopened Red Cross and so on, PDPs on foot. And they all in some way intersect with each other. So I want to be a little bit mindful of this idea of just ping it- you know, fling it to another



PDP. Because if we start flinging things to other PDPs, we're actually just going to have lots of flinging. And not getting stuff done.

I'm not in any way making light of the charter. We need a charter. But again charters, you know, I think it needs - we need to have the flexibility of the community to deal with things that are sufficiently related to a charter that our work then goes on to inform the work of others rather than just pass things on to others. So that - it's my preliminary thoughts there. And I think we need to be mindful of those sorts of things. George, you have your hand up. And then I want to focus this, you know, constructively on this business of how to move forward. Thanks.

George Kirikos: Yeah, Gorge Kirikos again for the transcripts. Yeah, I just wanted to say that, you know, part of the group actually does want to send it to the RPM PDP, because it's not just an isolated issue. As I said, there's a root cause that affects multiple issues both GO and INGO. And so if we actually came up with a solution in the IGO PDP, that would be different than that of the RPM PDP, it would really lead to a convoluted mess. Like why would there be arbitration? One in (unintelligible) but then the same scenario what the - sorry. The slightly different scenario but with the same underlying cause. The RPM PDP would come to an entirely different solution. It would, kind of be nonsensical.

So I think that's one of the reasons, but the other thing is that the co-chairs, you know, seem to be wanting to push for that one solution. But then as Paul noted, if we try to actually fix it in other ways, they'll want to send to the RPM PDP like for mediation and all the other options. We had to - various other ideas. I don't want to go through them all, but apparently if it didn't mesh with what their desires were, it would be

pushed to the RMP PDP in those circumstances. Perhaps there could be a specific discussion on whether or not the RPM PDP is the right venue for that topic or not. What the charter says, you know, we should consider. But there are all kind of other concerns with relation to the process, the anonymous polls and so on. But that was just one of the issues with regard to the chair's discretion. Thanks.

Heather Forrest: I hear you, George. I understand what you said there. Let's and you've given a perfect segue way to the anonymous poll. Because it's the anonymous poll that kicked all of this off. I understand what, you know, you and Paul have both said that the anonymous poll was the impetus for the 3.7. What in your view was needed at the time other than an anonymous poll? Let's say, you know, if you were in the position of co-chair at that time, we're back to September. Is that right? Or December? When the anonymous poll was called, what was needed then at that moment in time in your view to determine consensus? If not an anonymous poll.

George Kirikos: George Kirikos here. There was nothing that needed to actually be done in September. They, kind of, unilaterally decided that they needed to have a measure of where the working group stood in advance of the October ICANN meeting. But there was nothing that required that first anonymous poll or any poll at all back in September. They actually had cancelled a working group discussion that was scheduled or that was going to be had and replaced it with a poll thing. You know, this is how we want to proceed. And the alternative would have been to just have, you know, continued discussion. You know, do the work. Try to reach a consensus. There was no need for that first, kind of, poll in, anonymous or not, in September or early October.

The subsequent thing in December, you know, the co-chairs declared that, you know, the time for discussion was over. Everything had already been said. But they were supposedly not in a position to decide what the consensus level was. If you look at the working group guidelines carefully, it says that's the point that you actually should already know what the level of consensus is. Because you have had all the discussions. So either more discussion was needed, more outreach,. You know, they could have done a second public comment period. Something to know where the members of the working group stood. Encourage for their input from those members had been silent. Or they could have just made an initial designation and then had people voice their concerns about it. So that's where -what their options should have been in my opinion. And Susan has her hand up, so I'll defer to her.

Heather Forrest: Thanks, George. Susan, please.

Susan Kawaguchi: Thanks George and Heather. I just wanted to make a comment about the poll, not the anonymous part. I'll leave that. But, you know, in the RDS working group, I was a co-chair on that until recently and I stepped down just because there's a lot of stuff going on at ICANN. But, you know, we found polls to be very helpful in really sort of bringing people together and focusing on key elements. And, you know, actually being able to, sort of, figure out exactly the working that people agree to. Because that's hard in discussions. As you go through, you know, working group people, you know, the way working group, especially in Adobe Connect, discusses things, it's difficult when it's a large group. And so therefore, we found the polls extremely helpful to just, sort of, center us. It didn't replace the discussion, it just

sort of captured the discussion at the end and focused on what we really were agreeing on.

So it seems to me like the polls were appropriate in that, you know, it could be a tool to aid the discussion. You know, it would replace the discussion by any means. But I'm not sure why there was - it's opposition to the poll, except the anonymous part. I can understand your view on that.

Heather Forrest: Thanks Susan. And George I see your hand up but let me also perhaps give a bit of context in terms of the timing before I turn to you, because I wonder if I can, maybe not, but read your mind here on a question. So the reason for doing that at the time that they did may well have been, you know, we do round ups. And indeed, that's the call that I just came off, Rafik and I both. We do round ups with the PDP co-chairs prior to each face-to-face meeting. Council leadership does. And ask them, you know, where are you? Well like what are your next milestones? Have you reached any milestones since the last face-to-face meeting? Where are you in your work?

It's an informal catch up, but it's a way for council leadership to just check in with a PDP. And we certainly would have had the call with the co-chairs of curative rights. And we certainly would have said to them, you know, where are you? Where's your group? Like how long do you think it's going to take until you get to your next milestone? And I can see how very logically, you know, in the sort of sense that Susan has just described. And I hadn't really thought about the fact that Susan also brings the benefit of having chaired one our particularly long standing and challenging PDPs. I can certainly see that Phil and Peter would have said, oh, we need provide an update to Council at ICANN

60 so, you know, we best get our heads around where everybody is, because the discussion's been so complex that you know, we're not actually sure where consensus is.

So I can see where, you know, how this might have originated. I hadn't really appreciated the timeline before. So George maybe that offers a bit of context as to, you know, what provoked it. So with that, George, over to you.

George Kirikos: Yeah, George Kirikos here. I think actually Susan used to be a member of the IGO PDP but might have left at some point. But this was a situation where they actually unilaterally reduced the number of options. So they actually crafted the poll themselves. They danger that are mentioned in the working group of how polls can be misused, and I think in this case we actually saw that in action. They crafted the poll themselves. They created a document that was one-sided that was linked to in the poll. And so this is a classic case that - of the scenario that the working group guidelines actually warned against.

And there's also a situation where only one of the recommendations was pulled. If there was uncertainty about all the positions of the members, you would think that they would have polled for all the recommendations, but they didn't do that. they just, you know, wanted to get input on the on a recommendation that they sought to advance. So it seems that, you know, that's the kind of scenario that the working group guidelines specifically warns about. We saw that in this case.  
Thanks. Oh can I -

Heather Forrest: Yeah, go ahead George, go ahead.

George Kirikos: Yeah, I wanted to add that with regards to the timing of the polls, the working group guidelines actually say that, you know, they're not supposed to be used as boats. But they were used as boats here. The guidelines in terms of actually having a consensus call say that the polls should happen if there's disagreement about the level of consensus that's designated by the co-chairs. In this case, what they want to do is they want to use the poll to actually set the level of the consensus. And so it, kind of, skips all the process steps that are actually mentioned in the guidelines. And wants to put that first. And so you can see how that would be misused because it would basically trump all further discussion. It would say, this is what the working group voted on. Even though if they decide not to use the word vote. And then anybody that disagreed with it would basically be faced with this poll that happened and would have no real justification for disagreeing with it. So but there should be an attempt before that to have made the consensus call. But, you know, that's not really been happening. Thanks.

Heather Forrest: Thanks, George. I understand that much better now. So I think, you know, a number of - we were talking about a number of discreet, you know, baskets of concern, but I think really at the end of the day and if I try and figure out we work out a path forward, it seems to me that, you know, it's around this idea of determining consensus is the challenge. And how that happened. And what I will say is so we - one of the key objectives in Council's session in January, our strategic planning session was to go through in detail Article 11 of the ICANN bylaws and the GNSO operating procedures, the working group guidelines, the IRP guidelines. So Council is much better informed about these things that are really front of mind.

And what we thought it would be very useful to do is have that same discussion. It was so enlightening that we thought we have that same discussion or a version of it with the entire cohort of PDP leadership in Puerto Rico. And one of the things that's on my desk right now is an invitation not just to the PDP leaders, but to the, you know, really the entire GNSO community to say let's get together. Let's talk about these documents. Let's talk about the fact that, you know, sometimes they give us great guidance's. Sometimes they don't give us guidance. Let's just refresh our understanding.

And essentially, to use a term that's often used in Australia, level set. Let's all get on the same page with these documents. And I think that would really help us here. What I gather we need do is do a better job in this PDP of determining consensus. And I think what would be very helpful is if Susan and I have a chat with Petter and Phil to get a sense of what they're thinking was in determining consensus. And just try and, you know, I think we need to focus on that as the means to move forward. Because at the end of the day, my role here and Susan's role here is purely to get the PDP moving again. You know, we're not here as ultimate decision makers. We're not here as the bylaws, neither the bylaws nor the operating procedures give us any special powers if you like. Three point seven says we'll have a discussion and I think this has been super helpful, super fruitful. It's certainly clarified a number of points in my mind.

But, you know, above all else it's emphasized to me that I think just as a community we need to get better with understanding this idea of how we determine consensus. And indeed you're right George. You know, we do have 3.6 in the working group guidelines that set out, you know, pretty clearly lined some other provisions in there that are a bit vaguely

worded. Three point six is pretty clear. So with that, I think there's an education campaign to happen at a macro level and we're already making that, you know, making room for that to happen.

George and then Paul, and I'm mindful just so we have a time check. It's eight minutes until the top of the hour. And a couple of us have another call immediately after this one. So George, please.

George Kirikos: George Kirikos for the transcript. I don't know if you had the opportunity to read the settlement conference that we had on January the 18th. But regardless of, although specific remedies were sought, what we tried to do because you hit the nail on the head with the word, you know, consensus. That's what basically everybody wants. And to get the working group moving forward again. What we wanted to happen was to have the professional facilitator be introduced into the working group which is allowed by 6.1.3 of the working group, sorry of the working group guidelines. That was actually the second half of the third remedy that I mentioned which wasn't really discussed. But I thought that that was a way that would gain approval from the co-chairs and be acceptable to us as, at least to me, as an alternative to you ruling in my favor for all these three remedies.

And so if there was a professional facilitator, it would basically remove Phil and Petter from the task of having to form the consensus on this recommendation Number 3. You know, everybody would get back. You know, work on recommendation Number 3 again. And not have any question about Phil and Petter manipulating the process any further. Although we disagree on whether the process has been manipulated at all. But that professional facilitator is focused on one thing and one thing on; creating consensus. And so that seemed to be



the perfect solution until we saw their interpretation of that agreement where they then tried to reintroduce another poll that would happen before the facilitator. I still think that would have been a very constructive way forward mainly if the GNSO Council kept them as co-chairs, but basically neutered them in terms of the process going forward and allow a professional facilitator to step in to try to resolve the remaining consensus issues. And they can, you know, save face to some extent by still be co-chairs, but they can just sit back as a normal member and, you know, and advocate for their point of view alongside everybody else without having that conflict of interest of being the co-chair and let the professional facilitator focus on consensus.

And our - well my proposal was if that process failed, then perhaps we'd be in that rare situation where a transparent poll, not an anonymous one, and a poll that was agreed to by everybody not one that they unilaterally created, might be an appropriate path forward. But they obviously changed the timing of that which, kind of, would have undermined the root of the, sort of, the solution of the facilitator. So that's why we're still back here talking rather than going forward with the work. So I don't know if you have pondered the idea of a facilitator. But I thought that was a very viable way forward. Thank you. Paul's next.

Heather Forrest: Thanks, George. Paul and then I'd like to respond to a few things that George has said and then wind us up, so Paul please.

Paul Tattersfield: Okay, the facilitator solved the issue I was going to raise. But what I was going to say was the issues that are outside of George's 3.7 appeal, that I've been struggling to get raised. If there's no way to

discuss them in the working group. What do I need to do? File my own separate 3.7 appeal? Because at the moment, they are really serious issues and I just cannot get any traction on them at all with the co-chairs and it is a massive problem for me. Thanks.

Heather Forrest: Paul, thanks. Let's see if I can address your question in the wrap up. You know, I think that really, you know, a lot of this emphasizes my view. And I notice Susan has had to drop off Adobe, but she's going to stay on the call. All of this comes down to how we determine consensus and how issues get raised, if you like. How and that's really part of determining consensus. So Paul, I would suggest that, you know, I think your concerns can be enveloped in some of the - in the approach here despite the fact that they're outside of the 3.7.

And I think it, you know, George, one of the things that I can maybe personally request for you is this - I just want to clarify, you know, so there's no faulty expectations on your part. Your language is - your choice of words is just so combative. And it's so litigious in nature. You know, in your last interjection you refer to ruling in favor. There's nothing in 3.7 about ruling or in favor. I have no special power. You know, Susan and I are just here to try to help facilitate and get things on track. And be sure that we can get to a consensus point.

You know, you referred a number of times to remedies and explicitly stated in documents and this kind of thing. And look, I appreciate that. I'm a lawyer in my job. But I really think in order for this to happen in the spirit of the multi-stakeholder model, to the extent that you can come out of that kind of litigation language, I think that's going to be constructive. We're all going to have to. So back to your point at the very beginning of the call. You know, we need this to be constructive.

And as much as I like to use that sort of language when I need it, I'm not convinced there's a place for it here. There's certainly place for it in 3.7 or indeed anywhere in the operating procedures. You know, there's nothing about right a reply and documents and all this kind of thing.

So if I can ask you to take that onboard, I think that's going to make it much easier. At the end of the day, we're all going to have to come to table. And I think that that would be a big help. Now I'm mindful of time. Paul still has his hand up. Paul, I'm hoping that's an old hand, because I'd like to get George a chance to reply to what I've just said. Okay, George. Over to you.

George Kirikos: George Kirikos. I apologize if the language was overly formal. There, you know, obviously this is a dispute of some nature. And we expect somebody to make a decision at some point. So even the co-chairs are waiting for somebody higher up to make a decision whether that's yourselves or the GNSO Council at large. This is kind of uncharted territory so there hasn't been a 3.7 before this. So everybody is, kind of, learning as we go as to what he appropriate language to call these things were. So it wasn't meant as, you know, some kind of legal dispute per se. But the language of law obviously comes in handy. I'm not a lawyer myself, but just used the language that people would understand. Thanks.

Heather Forrest: I hear you, George. But it's not just formal, it's actually - it's negative. And it's hostile. Yeah, and I don't - I just don't think that that's helpful. And really I mean yes, this is the first 3.7. But 3.7 simply says have a discussion. That's all 3.7 says, right? And the way that we do things within ICANN is, you know, I don't - I want to be sure we're in an environment where we are truly multi-stakeholder. And to take this out

of the hands of a PDP, I don't think is the right way to go. So again, Susan I are here to try and facilitate a solution that everyone can live with. That's what we do in ICANN. You know, almost nobody goes away with everybody happy. So we need to come up with a situation that with an outcome that is consistent with the operating procedures. That's consistent with the bylaws and still, you know, that is done in a collaborative and even constructive manner. Because if we start implementing this sort of top down decision making here, I really loathe to see where that goes next.

I really don't want, you know, the Council being told what to do from higher up the food chain and that kind of thing. And so in the spirit of that, you know, to the extent that we can all be mindful about how we phrase things. I think, you know, as collaboratively and constructively as possible that's going to be super helpful. Now George, your hand is still up, but I need to wind us up. So do you have a final point to make?

George Kirikos: Yeah, just want to reiterate, there was no negative intention behind this. It was meant to be constructive and attempted to be. But the language of the actual guidelines say, you know, appeal process. So it's kind of legalistic in nature in terms of that language. So this is falling from that criteria. And the only reason it's in writing is because this was expected to be an oral discussion back on January the 11th. And I had prepared my, you know, what I was going to say in writing just to be able to speak it into the record. And I forward the presentation to the other side and then they formally wanted to respond to it. So it, kind of, became overly formalistic from the get go. But, you know, I was prepared to just have an oral discussion back in December or January. And so it became more formal as the process happened because just of the way both sides, you know, wanted to defend their

position. So it wasn't by design. Obviously the working group guidelines don't say how that process should happen. But that's just how it turned out. Thanks.

Heather Forrest: Understood George. So last, you know, last point here. Let's - going forward, I get it how we go here. Going forward let's all - and I'm going to make the very same comment to Phil and Petter when I speak to them. In fact, it's going to be the first thing I say so that, you know, we don't end up in a situation sort of where we are here where we've spent an hour using pretty, you know, legalistic and antagonistic language. And I don't - I'll try and prevent them from doing that right from the get go.

Let's, in that spirit, right, you can see I'm very keen to see that we get a resolution here. I have no particular interest in what the resolution is. I just I think we need to resolve the issue for the good of the PDP and indeed for the workload of the GNSO. This is one of our priorities to try and get done this year. So I will ask Susan and Rafik to join me on a call. And they had to drop off because of the time. I'll ask them to join me in a call with Phil and Petter. It's going to be very much an informal discussion just like this one was.

We will have that discussion with a view towards trying to help this come to, you know, a solution on how better to find consensus in this group. And do that within the framework of the operating procedures. So that's the next steps as far as I see them, and we will get back to you after we've had that call. I'm mindful of the fact that we really have next week. I travel at the end of next week for ICANN 61. So I will make sure that we have that call before then. And then I think it might

be helpful if we think about maybe all of us trying to get together on the phone or in person or whoever's there at ICANN 61 to see.

I mean that's maybe a tentative thing. You know, let's see how we go with talking to Phil and Petter, but that's, you know, we're very clear that all of us have the objective here of not antagonizing each other. And just looking to find a solution that satisfies, you know, our documentation for how we get things done. And ensures that we, you know, we abide by the spirit of the multi-stakeholder process.

So with that, I am very grateful to George and Paul, you know, for your time and as always, we have a fabulous staff team that stands in the background ready help and pull up documents at short notice. So I appreciate their doing that. So thanks everyone for joining. George, thanks very much for your time, Paul you as well. And look forward to an update from me in the very near future. Thanks very much. Bye-bye.

Susan Kawaguchi: Thanks all.

Michelle DeSmyter: Thank you so much everyone. Operator, please stop the recording. The meeting has been adjourned. Have a great day everyone.

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