

**ICANN  
Transcription  
IGO-INGO Curative Rights Protection PDP  
Thursday, 10 May 2018 at 16:00 UTC**

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Julie Bisland: Thank you. Good morning, good afternoon and good evening everyone. Welcome to the IGO INGO Access to Curative Rights Protection Mechanism Working Group call on Thursday, the 10th of May, 2018. In the interest of time, there will be no roll call. Attendance will be taken via the WebEx room. If you're only on the audio bridge would you please let yourself be known now? And I do have Jim Bikoff noted. Anyone else?

Paul Tattersfield: Paul Tattersfield.

Julie Bisland: And Paul. Thank you very much, Paul.

Nat Cohen: Nat Cohen.

Julie Bisland: And Nat Cohen. Thank you. All right well I would like to remind all to please state your name before speaking for transcription purposes and please keep your phones and microphones on mute when not speaking to avoid any background noise. And with this I'll turn it back over to Petter Rindforth. You may begin.

Petter Rindforth: Thanks. Petter here. But pass onto point Number 2 on our agenda and there we also passing it over to Susan Kawaguchi.

Susan Kawaguchi: Thank you very much, Petter. And thank you all for joining this morning. It looks like we have a good turnout. And as you all know, I am the GNSO Council liaison to this working group and with some of the challenges we've had in the last few months I was brought in to just assist and help move this forward.

So I thank you all for all the lively discussion this week or two on the list of – on the different options for Recommendation 5 and I also thank everyone that had the time to provide input when we were doing the office hours, which gave us – gave Heather and I and, you know, the leadership team from the GNSO Council insight into the next steps forward.

So what we'd like to do today is walk through those – the recommendations that were agreed up, 1-4 first, and staff will be providing an overview of everything for us. And then we'll have a discussion of all the recommendations but I'm hoping to cover the first four in just maybe the first half hour of the call, leaving plenty of time to discuss the options for Recommendation 5. And it sounds like in the email list there's you know, people have definitely thought about this and have a point of view.

One thing we would like to do to institute today in this call is put a time limit on each person's intervention or discussion. We are not limiting how, you know, how many times you talk but we're going to limit it to two minutes per intervention. So just staff is going to kindly monitor that for us so please don't be offended if you are told your time is up; this is something that's used at every ICANN meeting and that it gives a fair and balanced use of the time for all members.

So I'm going to turn this over to Mary to give the – an overview of the previous agreed upon recommendations.

George Kirikos: George here. I've had my hand up. I don't know if anybody is monitoring.

Susan Kawaguchi: We are, George, but we're going to let Mary do her overview first and then we will – Mary – the...

((Crosstalk))

George Kirikos: A question about the agenda itself.

Susan Kawaguchi: Sure, go ahead but remember you have two minutes.

George Kirikos: Yes, on April 26 you wrote that, "It is the role of the working group, not the liaison or the Council, to drive the effort to a final document for presentation to Council." Now this was presented as a proposed agenda and now it's being called an agenda, an agenda that the membership has not had input into. And I think that as members we should be dictating what's happening and, you know, issuing a 98-page document before, you know, the day before the meeting and expecting everyone to have read it and be able to discuss it coherently, I think it's very strange.

And to expect that we're going to have it decided upon by next Tuesday in advance for a May, you know, our official May deadline that Council has supposedly created out of – without any reference to the Working Group Guidelines, to me doesn't make sense. And so I think if it's true that you want to work toward a consensus, we should start with – start the agenda with the document that I've repeatedly tried to get posted to the screen – and I'll post it again to the chat – and that really tells us where we are. Like that's the stumbling block, Recommendation 5, let's start there and then all the rest is simple. You know, do the hard stuff first; not the easy stuff first.

Everybody is wanting to finish this work and we should start at the hard stuff. And if you put up that page it's clear, Option 3 is dead; Option 2 is dead;

Option 5 is dead. We should be talking about Options 1, 4 and 6 and Option 4 obviously that the most support. Option 1 almost has the same amount of support. So we're here to drive consensus not, you know, do a history lesson of all the easy stuff. Thank you. So I propose that we modify the agenda and I'd like other people's input on modifying this proposed agenda to reflect what the needs of the actual membership is. Thank you.

Susan Kawaguchi: Thank you, George, for your input. This was a decision made by GNSO Council leadership and we're going to move forward with the current agenda. Mary, could you please actually, you know, go through these recommendations for us? We'd really appreciate that.

Mary Wong: Yes of course, Susan. And hi, everyone. This is Mary from staff. What you should be seeing on the screen here is the short document that we sent out I believe yesterday and much of what is on this document in fact I think just about everything on this document is about recommendations and proposals that have been discussed by this group for some time.

Leaving aside the open issue which we have put at the end of the document, as a potential Recommendation 5 to be filled in an completed, based on the group's agreement on any of the six policy options that have been under discussion, and we have included the text of all those six policy options at the end of the document as well.

So I believe what Susan wanted me to just briefly go through with the group for purposes of a refresher as well as to confirm that the agreement that was reached amongst the group quite some time ago on what is now the first four recommendations, still stands. What we have done in this excerpt document is bolded the proposed text of those four recommendations. We've also included a note and you will see that they are pretty much substantively identical either to what we originally published for public comment over a year ago, or that mirrors the subsequent modifications that this group made following public comments received.

So I understand what you're saying, George, about the time. Certainly after today's call we would ask that the working group focus on whether or not the text of these first four recommendations as a start and we'll come to the final issue later in this call, whether these first four recommendations reflect the agreement that was reached.

So Recommendation 1 is unchanged from what was published from the initial report. And this is the first recommendation that the group agreed on, like I said, quite some time ago. I don't propose to spend any time on that. If we move onto Recommendation 2, if we just start with the note in the non bolded part at the bottom of Page 1, I think those who have been participating for a while will recall that this recommendation is not the same recommendation as – oh, I'm sorry, somebody was trying to call me – anyway this Recommendation 2 is not the same as the one that was published for public comment. It was modified based on public comments received and reviewed by the working group and yet it still deals with the procedure under Article 6ter of the Paris Convention.

I don't propose to go into details about what the change was because that was discussed extensively by the group about 9-10 months ago. So our only request here, Susan and everyone, is that as you look at this draft language that's in bold this reflects accurately what the group agreed to do; in other words, that we allow for compliance with the Article 6ter procedure as one form of evidence for an IGO to demonstrate standing under the UDRP or the URS. And this can be done in lieu of trademark rights.

We do try to make it clear that two things, one, this is an alternative mechanism so if an IGO can demonstrate trademark rights like any other trademark holder, that would still be the case; and secondly, that if the IGO does not rely on trademark rights but wishes, for example to rely on compliance with 6ter, that's not necessarily determinative under this policy, it

will fall to be determined by each panelist under each proceeding. So hopefully this language reflects that understanding that was reached.

If I move on now to Page 2, the third recommendation is a shortened form of what we had published for public comment. You might recall that for public comment in addition to what is in the bolded section, we had published two policy options regarding immunity for community feedback. Because we have now since extended that discussion on immunity, we now have the six options that are being discussed. For this Recommendation 3, what staff did was to pick out that part of the original recommendation that was agreed.

And so essentially this Recommendation 3 basically says that there will be a policy guidance document, this was discussed previously, and that document will outline the various procedural filing options that are available to an IGO so that it can perhaps avoid any particular thorny questions of immunity. So we don't expect that this has – well this has not changed and we have the note there.

So lastly and then I'll turn it back to Susan for any discussion, Recommendation 4, this is about the question of cost to an IGO for using the UDRP and URS. We note that in a prior circulation of this set of recommendations, we had actually included an – IGOs in this Recommendation 4 which is incorrect since Recommendation 1 does exclude INGOs from any further consideration. So we've made that correction here.

And we also just want to point out that this recommendation does not actually say that IGOs will have free access to the UDRP or the URS, it simply says that ICANN should investigate the feasibility of providing such low cost or no cost access. And again, we believe this is reflective of the agreement that the group reached some months ago.

So, Susan, in a nutshell, those are Recommendations 1-4, which like I said, were agreed to by the group following its review of the comments to the initial

report. And we just wanted to make sure that the group has a chance to look at what is the proposed text for these four recommendations that should go into the final report. And that's it. Thank you.

Susan Kawaguchi: Thank you, Mary. That was a thorough overview and very helpful. At this time does anyone have any comments or concerns on Recommendation 1-4? And Mary, if – I am clueless on WebEx and the hands raised so if you can help me with that, that would be very helpful. I'm missing Adobe very much right now.

Mary Wong: No worries, Susan. And in respect of Adobe, our IT folks did post an update on the ICANN blog so we may be able to use it at some point; we don't know. But I can circulate the link to that blog. And, George, I noticed that you had a hand up. It does look from your comment in chat that that is indeed a new hand and not an old hand. I see also that Reg has said she doesn't how to raise her hand. Reg, if you click on the hand icon next to your name that should show a raised hand. But for now, Susan, I'll say that we have George, Paul Keating and then perhaps Reg, and then Petter. I'll keep score for you.

Susan Kawaguchi: Okay thank you very much. George and I want to remind all again, it's a two-minute time limit for discussion.

George Kirikos: Yes, George Kirikos for the transcript. I agree with 1, 2 and 3. However, on Number 4, I expressed at the time we discussed it last year that I don't – I don't support Recommendation Number 4 and I remember at the time there was also other people that were opposed to Option Number 4. If I remember correctly, Mike Rodenbaugh would have been one of those people. And that's why that Recommendation Number 4, I think should have been subject to a proper consensus call to get the feedback from the membership.

If we're still negotiating the text of Recommendation 4, I could suggest various modifications such as, you know, the – both sides would have been properly for example, it would be a three member panel rather than just a one

member panel with the IGO being subsidized. But I don't believe ICANN should be, for one, subsidizing anybody; and two, if they are going to be subsidizing it should – a lawsuit or a domain dispute, they should be providing the money equally to both sides. Thank you.

Susan Kawaguchi: Okay, and I think Paul Keating was the next up.

Paul Keating: Hi. Thank you. Paul Keating for the record. I just wanted to second George's comment about not remembering this Number 4 had been subject to consensus because I think my objection was exactly the same. ICANN shouldn't be subsidizing people.

As to Number 2, I thought that we had originally agreed that the reference to 6ter was – that in and of itself it didn't establish trademark rights but the challenge could, together with other evidence supplied, treated as sufficient to establish the equivalent of a trademark for Element 1 of the UDRP. The way it's written seems to imply that 6ter in and of itself can be sufficient, and I don't believe that's what we had agreed to. But I ask other people to confirm or tell me that's crazy.

The other one is – no that's it. Thank you.

Susan Kawaguchi: Thanks, Paul. And we will – staff is keeping you know, we have the recording of this call and we'll keep some notes on concerns with the language and the point of view of the recommendations. And Mary, I've forgotten the third – the next people in line so if you can help me with that?

Mary Wong: Sure, it is Reg and then Petter, Susan.

Susan Kawaguchi: Okay, Reg, please go ahead.

Reg Levy: Thanks. This is Reg Levy for the transcript. Based on what I've been reading on the email list, it seems that we generally have a grasp of the



recommendations so I'm not sure if this is an opportunity to discuss all the recommendations and/or have them explained or if it is an opportunity to express support and/or lack of support for some of the recommendations?

Susan Kawaguchi: So we do plan to follow the formal consensus process for a working group after this call and staff will you know, or Council leadership actually probably with staff, will send out exactly how the process works and how we're doing that so we will do a call for consensus. But we thought since this, you know, even though the email list has been very active in the last week or so in discussing at least Recommendation 5, that it would be good to sort of go over each of these recommendations and see where the challenges were and give people a voice.

And then we'll do a consensus call so that we've followed the formal process completely. But if you'd like to state what you, you know, I'm not going to prevent you from stating what you...

Reg Levy: I've said it on the email list; I don't see the reason to take up space. Thank you very much.

Susan Kawaguchi: Okay, thanks, Reg. and Petter. Please go ahead.

Petter Rindforth: Thanks. Petter here. Yes, as said, we made these conclusions on a very early stage and I – what we need now is to have the formal decision on it and I hope that if we're going to discuss anything there will be more of a minor rewriting of misspellings or clarifications or so. Just two comments, one is to the Recommendation Number 2, when it comes to Article 6ter, as far as I remember, when we started to discuss this we saw Article 6ter as the one and only way to identify and then we realized that there could be other ways to identify an IGO name protection.

So as I read it and as I understand it, as it is now, is that 6ter is still one of the possible and probably the most common – will be the most common way to

identify but there are also other ways. So either a complainant that is an IGO provide Article 6ter registration or some other documents or a combination.

And as to Number 4, that was more of a diplomatic way to put over the question to the Board as we decided that we didn't want to make a clear recommendation in any way. So it's – the meaning, as I remember it was more to say that we recommend that you investigate the possibilities. And if that can be rephrased in some way and still saying that, well, it's not on our Board – on our table to make a final recommendation on this or something, but to further investigate how to solve this problem. I'm fine with that. Thanks.

Susan Kawaguchi: Thanks, Petter. And actually, you know, Mary and I had a discussion on this because having not been part of the discussion for the last four years, it, you know, Recommendation 4 is just to investigate the feasibility; it's not really making the recommendation to provide IGOs access at no or limited costs. So all right, Mary, anybody else in our...

Mary Wong: At the moment, Susan, I see a hand from Paul Keating but that may be an old hand and the same with Reg so...

Paul Keating: It's new.

Mary Wong: Okay so we have a hand from Paul and, Reg, your hand is up as well so Paul and then Reg.

Susan Kawaguchi: Then Reg. okay. Paul, please go ahead.

Paul Keating: Yes, I just wanted to respond briefly to what Petter had mentioned, I believe that the conclusion we reached was that 6ter in and of itself did not establish trademark rights because, Number 1, it was simply a creation by appointment with – if you will, by the sponsoring country and it was subject to (unintelligible) from other countries. So you could have a 6ter pronouncement and you had a majority or a number of states that objected to it.

There's no process in the 6ter – in the Paris Convention for dealing with that contact, so you're left with not knowing what the status of this mark might be or this claim might be without reading all the finely ingrained objections and non-objections. And we compared it specifically to the similarity – to a US state trademark filing which in – also is summarily granted without any form of review contrary to most other trademark registration authorities.

And on that basis, we concluded that the 6ter in and of itself does not grant you trademark rights; you need other things on top of that. It's one element that could get you over the hurdle but not in and of itself regardless of what you're providing. If you're just relying on 6ter, that was never good enough. Thank you.

Susan Kawaguchi: Thank you, Paul. And Reg, please go ahead.

Reg Levy: Thanks. I just want to say that with regard to Recommendation Number 4, I do think that it would be most appropriate for us to, if we are going to pass the buck, to pass the buck with a sense of our recommendations, at the very least, a summary of the direction that we were leaning before we decided to pass the buck and – rather than just saying here, this is your problem.

Susan Kawaguchi: And then – what would you recommend – how would you recommend doing that? Do you have language for that at all?

Reg Levy: Well, I mean, it would depend on what the results are and whether, you know, whether it was 50/50 we were deadlocked, whether it was 30/40, excuse me, 30/70 we were deadlock or if we just couldn't reach any consensus, we had these five recommendations because I would assume that we would not submit Recommendation Number 4 to them – that we had these five recommendations and they were sort of equal support, like it would depend on what the actual support for each of the recommendations was.

But I think that allowing them to not have to reinvent the wheel given that I do think that this falls directly under our remit, and so if we are going to pass that buck we should at least do so with full knowledge that that is what we're doing and we are making it easy for the next person down the line to do it. Because at the end of the day this is an ICANN community issue and doesn't matter whether this group of the community deals with it or a different group of the community deals with it, it is our problem.

Susan Kawaguchi: Okay. Noted. All right, anybody else have comments or concerns with the language on 1-4?

Mary Wong: No hands raised, Susan, at this point.

Susan Kawaguchi: Okay. Then Mary, could we hear Recommendation 5 and all the options, just, you know, bring us up to speed on that.

Mary Wong: Sure. And thanks, Susan. This is Mary again from staff. And as we noted, Recommendation 5 in its current state really just first of all says – is about jurisdictional immunity for IGOs but not INGOs but the rest of it remains to be filled in. So what we do have here is a note, before we get to the six policy options, is that we explain for purposes of the final report what was published for public comment and what was done subsequently within the working group to try to reach consensus. So obviously the wording here will need to be changed and added to depending on the group's final consensus if any.

So, Susan, the six policy options follow and Option 1 is at the bottom of Page 2 and then the remaining options are on Page 3. And my apologies, I should have thought to start the options on a separate page for WebEx purposes, but essentially I think we're now at the stage where we can as a working group continue discussions on the various options, which have not changed since sometime in October 2017.

Susan Kawaguchi: Okay. And I think there's been a lot of discussion on the list of these options. Does anybody have any comments or concerns about the different options?

Mary Wong: Susan, I see George's hand raised and if I may if I can ask Paul Keating if you wouldn't mind muting your line because it's creating a little bit of noise. Thank you. So we have George with his hand up, Susan.

Susan Kawaguchi: Okay, George, please go ahead.

George Kirikos: Yes, George Kirikos for the transcript. Firstly I think Mary just said that the options haven't changed since October, I think she meant December because in October we had the three options; now we have six. Secondly, I'd like to have the PDF put up which summarizes the discussions of the past week on the mailing list. I will post the link to if it it's not going to be posted. But basically right now as things stand Option 3 is dead, Option 2 is dead, Option 5 is dead in terms of ability to reach consensus, and so we should be focusing our efforts on Options 1, 4 and 6. Nobody is posting it to the WebEx but I'll continue.

On Option Number 1 there's only one opponent and we can add Phil and Petter as basically opponents of that one and every other option except Option Number 3 as well presumably. Option 4 has no opponents but presumably Phil and Petter would be opposed to that. And Option 6 would have five...

Susan Kawaguchi: George?

George Kirikos: Yes.

Susan Kawaguchi: Please don't speak for Phil and Petter or anybody else on the working group.

((Crosstalk))

Susan Kawaguchi: That's not fair.

((Crosstalk))

Susan Kawaguchi: No, but that's not fair. If you want to – if you want to assert your own position, that's fine, but we're not going to post your doc because that does not follow formal consensus.

((Crosstalk))

George Kirikos: ...from the beginning. The formal consensus...

((Crosstalk))

Susan Kawaguchi: No, that's not true and we're in this situation because you filed the 3.7. The Council leadership has taken very serious thought about how to move forward with this and what is required in the 3.7. But I really am interested in hearing your comments and your personal position but don't attribute others. I just do not think that's fair.

George Kirikos: Okay, that shouldn't have counted towards my two minutes so I'd like to continue with the time I had left.

Susan Kawaguchi: Yes, please go ahead.

((Crosstalk))

George Kirikos: ...support every option except Option Number 3 and folks can see on the mailing list how others have felt that aren't here. Thank you.

Susan Kawaguchi: Thank you, George. Okay, anybody else have comments or concerns about the options would like to voice their opinion about these?

Mary Wong: I see Paul Keating's hand is up, Susan.

Susan Kawaguchi: Oh, I'm sorry. Thank you very much. Paul, please.

Paul Keating: I'm a little confused about what we're trying to accomplish here, Susan. Maybe you could dial this back a little bit and explain. Are we now going through and expected to discuss our pros and cons about the six options or are we trying to achieve consensus here or what?

Susan Kawaguchi: So we can't achieve formal consensus here. That will be a different process because we do want to adhere to the working group, you know, the PDP process. And this is something that the Council leadership has been very, very concerned about. And but what we did want to do is because there was not a working group meeting for so many months is to give people the voice, the time to voice their opinion, voice their concerns and then as we move on after this meeting then we'll implement the formal process for a consensus.

So and I know that a lot of you have spent a lot of time responding via the email list, which is always really good for discussion and I appreciate that, but because that's not the formal consensus process we can't accept that as the working group consensus. So if, you know, if you have any other, you know, edits to language, if you'd like to propose things, then we can take those back to the leadership, you know, and we can, you know, go through the formal consensus process after this working group meeting.

Paul Keating: Okay so what we're trying to do during this call then is to flesh out if there are any further changes to any of these options that are on the list?

Susan Kawaguchi: Yes, if you'd like to propose any that's fine, I can't say that they'll be agreed upon today or agreed upon at all; I have no idea. But if you have concerns with language then you could post those and if you would like to do that via the email list during the consensus process, that's also a possibility.

Paul Keating: So can you describe – sorry – I'm just having a couple questions.

Susan Kawaguchi: That's fine.

((Crosstalk))

Paul Keating: The consensus – the consensus process in my mind – is this in your mind is a – is there a poll that we're going to conduct? And if so, then frankly the poll – we all have to agree on the questions in respect to the questions. Right?

Susan Kawaguchi: Yes.

((Crosstalk))

Paul Keating: ...going to be one phone call and everybody just stands up and votes.

Susan Kawaguchi: No, it will be...

((Crosstalk))

Susan Kawaguchi: ...an online process.

Paul Keating: Okay so...

((Crosstalk))

Paul Keating: Then what is the process for dealing with – assuming anybody – responds by email to make suggested changes to the actual text that is in the proposed



document on my screen here, what is the process of resolving that so that we can get to consensus as to the text of each option? Because what I'm hearing in this call is we're not there yet.

Susan Kawaguchi: No, we are...

Mary Wong: Susan, this is Mary.

Susan Kawaguchi: Yes, please go ahead, Mary.

Mary Wong: Oh I'm sorry, but I didn't mean to interrupt you.

Susan Kawaguchi: No, no, no and to be honest, Mary understands these processes much better than I, so Mary, please go ahead.

Mary Wong: That's very kind, Susan. I don't know that that's actually the case. But just to remind everyone that the aim obviously is to produce a report to the GNSO Council that will document all the recommendations and the level of consensus reached for each. Typically we also in a final report proposals that could have become recommendations but that did not reach consensus. And as you recall, there are various levels of consensus and non-consensus in the Working Group Guidelines.

So it's important to document what the ultimate result was even if no consensus was reached. And where no consensus is reached, and I won't go through a definition here, but in cases where there's divergence, for example, it is possible for members to file minority statements. So part of the consensus process will allow for that as well.

Typically what we do in GNSO PDPs is that when discussions have reached a stage where the leadership team of that working group believes that we can open a formal consensus call, we do that by announcing it both on the call like in today, and on the list. Typically it's open for something like a two-week

period during which obviously people can engage in back and forth on the list. We don't necessarily or typically do votes. In fact, votes are actually discouraged under the Guidelines, although in exceptional circumstances polling to give a sense of where people may be is permissible.

So after that two week period the leadership team of that PDP then considers all the input that everyone has given and makes an initial designation of consensus. I will say at this point that for most PDP working groups by the time we reach that stage, meaning there's been extensive discussion amongst the group, meaning that a formal consensus call has been opened and like I said, typically that's about two weeks, to allow people to further discuss if they wish, to allow those representing perhaps constituency groups to consult with their membership, by the end of that two week period typically the levels of consensus as designated by the leadership team are accurate or considered accurate.

And of course as I mentioned, people can submit minority statements. We will then as staff incorporate those designated consensus levels and any minority statements into the final report.

So, Susan, the last thing I'll say here, and I notice that George has made some comments in the chat, obviously this is an iterative process. Part of the iteration really has been the discussion that we've been engaged in for some time and of course if the designations of consensus are challenged, then we can allow for additional time if need be to try and resolve that issue. But by and large, this is the process that we follow for all GNSO PDPs.

So discussions, open a formal consensus call period, have a designation of consensus at the end of that period and if there's divergence that people want to file minority statements for we allow them to do that and all that goes into the final report. And as George says, the discussions aren't just on calls, they include discussions on mailing lists, and as well as at public meetings and so forth.

So sorry, I think I took more than two minutes, Susan. And, Steve, you should have told me that. Thanks.

Susan Kawaguchi: Staff doesn't have to hold to that. I do though. So thanks for the clarification. And Paul, I do think that if you have language to propose or things, you mentioned the – you were concerned with the 6ter language, that we could, you know, take some of that language and see, you know, add that either remove part of, you know, some of these consensus or some of the recommendations, excuse me, wrong word, and, you know, I mean, change things as the working group sees fit. But we, you know, this is not a formal consensus call today. It's really just to give everybody a voice. And did we have anybody else with their hands up, Mary?

Mary Wong: I see a hand from George but I'm not sure if that's a new hand, and then we have a new hand from Phil and a hand from Paul – sorry, so it's George and Phil.

Paul Keating: And Paul.

Susan Kawaguchi: Okay.

Paul Keating: I don't know how to get my hand up.

Susan Kawaguchi: Okay. George, please go ahead.

George Kirikos: Yes, George Kirikos for the transcript. Yes, even amongst these changes there still needs to be minor changes in terms of the language for example Option Number 4 (unintelligible) only refers to the UDRP; it should be modified to be UDRP or URS. And there are similar kinds of small tweaks of the languages – language that needs to be done for each one because, you know, these were kind of done informally and they were kind of formalized without, you know, actually fixing all of the little bits and pieces of the options.

Secondly, I'm heartened that you seem to be wanting to follow the correct Working Group Guidelines process. You know, that's all I've wanted from the start with regards to Section 3.7, so if that's what's going to be happening then I'm very happy.

Can you please confirm, though, that there's not going to be a report being sent to the GNSO Council next week because everybody that got that 98-page document and from what I could tell it seemed as though, you know, we were being railroaded into this document that was going to be sent regardless of how we felt. So can you confirm there's no document that's going to be sent to the GNSO Council next week and, you know, we're just going to follow the proper Working Group Guidelines process? Thank you.

Susan Kawaguchi: Thanks, George. Those are good questions. And if you have edits to this I would suggest – I'd encourage you to do a redline. Obviously, you know, they need to be edits that, you know, don't change the whole recommendation at this point because I do think 1-4 at least the working group has – they may not be exactly word perfect but they are, you know, the general concepts have been agreed on.

We did discuss when the report and we are going to delay it to the following week so you have additional time to review the report. And to remind you, again, you know, I mean, this has been a contentious discussion, it's a contentious issue and minority reports may be appropriate so that everybody's voice is heard.

And then I think we have Phil next.

Phil Corwin: Yes, Phil for the record. And thank you, Susan, for conducting this call. I wanted to make some brief comments on Option 4. I don't agree with the option but I recognize that reasonable people can disagree. But I do have a concern and believe the language needs work. I note – I'm speaking in an

individual capacity, but I am one of the three cochairs of the RPM Review Working Group which is on its current timeline scheduled to take up UDRP matters as of mid-2019.

We just had a member of that working group raise a suggestion for going to Council with a charter change request. And after two weeks of discussion, determined that we had flexibility under the charter to handle that without burdening Council. So my concern here is that the last sentence calls for – and since this basically goes to Council for adoption as a policy recommendation, says that basically the issue that was before this working group on IGO immunity should be referred to the RPM Working Group by Council.

I believe it's inappropriate for Council to do so without at least consultation with the RPM Review Working Group. Most if not all of the members of this working group also participate in that working group. They have the ability to raise the IGO issue when we reach UDRP. So to make it short, I think if there's support for this option it should note that this can be raised within the working group and that Council should not ask that working group to take up an issue before it's been discussed within the working group itself. Thank you.

Susan Kawaguchi: Thanks, Phil. And Paul, please go ahead.

Paul Keating: Thank you. Susan, I have a question for you but first to Phil. Phil, I'm happy with that change if you want to make it. I never saw the Council's request is not an order; it's not an edict, (unintelligible) consultation with the working group but want to add language to that effect I have no problem with that.

Susan, one that you did say was extremely concerning to me and that is in light of the fact that we haven't had a formal consensus call, how is it possible to actually issue this report whether it's on the 14th as you originally suggested or a week later unless we're going to get that consensus call done

beforehand? I understand the political pressure and the desires of people, you know, above us in the organization to see that happen but I don't see how we can do that and honor the PDP consensus process which you clearly supported.

I just don't see how that happens because – my main concern is that once a report is filed it's filed and becomes then very difficult to make changes to it both from a subjective standpoint as well as from an objective standpoint, it's like trying to unring the bell. So I would very much object to the issuance of any report by this working group until consensus has in fact been accomplished and this consensus process that you've laid out has been completed. I think that could be relatively quick. I don't see that it has to drag on forever.

We could advise the Council that we are intending to file but we need to have a formal consensus call prior to doing so and Mary could send out the two weeks' notice tomorrow and we could have a call during that period of time and get this one finished and put to bed. Otherwise, you end up with a very contentious set of communications, as you probably witnessed going back and forth in this working group and everybody, you know, a large part of that is based upon concerns of lack of transparency, concerns of being railroaded, concerns of being spoken for and having positions taken by the group without having complied with the consensus process.

So I'm trying to remove that problem and I would strongly object to us doing anything that would exacerbate the preexisting condition or which would result in the filing of any form of report by this working group prior to us having concluded our formal consensus process. Thank you.

Susan Kawaguchi: Thank you, Paul. And I agree and, you know, so what we were planning on doing is we can open the consensus call after this call, you know, like I said, staff will send out exactly what the process is and the timeline and then – and then do a final call on the final report which we're trying to hit the

document deadline for GNSO Council so this can be on – at least delivered to them at the June meeting and – for consideration, probably not decided upon, you know, I mean, the Council – obviously GDPR is affecting everything right now. So we're trying to aim for that motion deadline and document deadline.

But I think we can get this one, get a consensus call going and a call on the final report fairly quickly. And in looking at the process, you know, as we went through the timeline, it looked like it would work. So I agree that this should be open, transparent and that is what Council leadership has instructed me to do is to make sure and so there is no perception of the working group being, you know, sort of pushed one way or the other, not that I am saying that that what – was what was occurring; I can't comment on that.

But so we would – we are trying to stick to the bylaws as closely as we can with the detail that the bylaws have. So in some cases it's not as clear as others for certain actions but we are doing our best to adhere to that.

Paul Keating: Okay, Susan, can you commit that you're not going to release a report for filing – or for consideration by the Council prior to us completing our consensus process? I'm asking you point blank, yes or no.

Susan Kawaguchi: Yes, point blank, yes.

Paul Keating: Thank you. That's (unintelligible) and I'm sure there are a number of other people on this call breathing a sigh of relief, okay, so...

Susan Kawaguchi: Okay.

((Crosstalk))

Paul Keating: Hopefully the anxiety levels have dropped by a factor of 10.

Susan Kawaguchi: Okay. Good.

Paul Keating: Thank you.

Mary Wong: Susan?

Paul Keating: And I just have a technical question for Mary. If you can release a Word version of the proposed document that we have on the screen because it's much easier to manipulate when you're doing redlining and sending it back.

Mary Wong: Susan, George's hand is up but I can respond to Paul either now or after George.

Susan Kawaguchi: Yes, please go ahead. George, do you mind waiting just a bit here?

George Kirikos: Yes, I can wait.

Susan Kawaguchi: Thanks.

Mary Wong: Thank you, George. This is Mary from staff for the record. And, yes, we can send around a Word document. George had asked about a redline and I will just say that when we tried to redline against the initial report partly because of the length of the document and because we moved text around and renumbered things, it looked horrible. So what we can do when send it around is to indicate where the major additions and changes were.

Our other request will be for the group to if possible you know, at least at the first go around limit your suggested edits to the substantive changes and it actually would be helpful if you did it as comments unless it really needed to be a redline within the document. The reason we say that is because it is up to staff to track all the different versions. And of course one problem with Word is that if you've got six people editing the same document we get back six different versions and it's really hard to merge them. So we would ask for most comments, you know, you can let us know if we, you know, mistakenly,



you know, got grammar and things wrong, but in terms of substance, that's really probably the best comments. And if you can put them in comments where possible that will be helpful.

The other thing, Susan, to follow up on your Paul's exchange, is that based on the staff understanding of where the Council leadership and yourself and the rest of the Council are, as part of the broader context of not just the IGO protections issue overall but also in terms of where the Council is going to manage its PDP timeframe and I see my time may be up so I'll just finish up right here, and say that the Council is very concerned that we wrap up our work so my sense, Susan, is that you really do want us to hit the 10th June document deadline and if we can't then I think we do need to think about how we can address that situation. But we should be aiming to be done by the 10th of June. Thank you.

Susan Kawaguchi: Agree, Mary. And thank you for that input. George, please go ahead.

George Kirikos: Yes, George Kirikos again. First I'd like to point out that I'm, you know, very happy again to hear what I'm hearing so that everybody's acting very constructively and that's a big positive so kudos to everybody for trying to reach the consensus. I think it's also very important that we keep the weekly calls going because those are the ones that really build the momentum and ensure that the work keeps going. So I'd ask that we continue the weekly calls until the end because if we don't have those calls we can get distracted and begin fighting. It's the calls that are actually reducing the tension rather than increasing the tension at this point. And I see Reg agrees with me in the chat room.

Lastly, in terms of the timeline, because of the allowance for the iterative process where people object to the – sorry – where people can object to the designations of consensus levels, it's very important that we actually have the best initial designations possible to start otherwise if they're, you know, very

off from what the sense of the room is right now they'll be immediately challenged.

Like I see certain things being presented as consensus when I know that they're not based on the past weeks' emails, I'm obviously going to raise an objection. So I think we should definitely put some thought into what those initial designations are based on the past weeks' calls – past weeks' emails, which I haven't used as a poll, we've talked about it on the mailing list and that would actually speed the work and allow us to get done quicker by the beginning of June hopefully.

But, yes, I hope everybody else would agree to the weekly calls. I know there's some events going on with INTA and the GDD in the coming weeks that affected the RPM Working Group, but we should still keep to the schedule and, you know, those who want to come can come and those who don't, don't. And it'll act as a complement to the mailing list and allow us to stay on track, thank you.

Susan Kawaguchi: Thanks, George. And please note Mary's message in the chat that, you know, by the Working Group Guidelines that the working group leadership designates the consensus so – but you always have an option to object and challenge but the leadership has no interest in doing anything but really evaluating consensus in this, you know. We will be able to, you know, look at what has gone on and how people have – where they have indicated their consensus and take that all into consideration so that it is a, you know, true evaluation of that.

We'll take your suggestion on the working group calls into consideration though I think the working group has a lot of work to do sort of offline by reviewing the report and determining their own consensus on these options and other recommendations. So we, you know, and then as you noted, there are several events going on that are going to be distracting to people but we'll take that into consideration. I'll go back to Heather with that.

All right, any other questions, concerns, statements?

Paul Tattersfield: Paul Tattersfield. I'm only on the phone. Can I speak?

Susan Kawaguchi: Yes, please.

Paul Tattersfield: I'm a bit concerned, and I raised it a couple of times on the mailing list that the Swaine memo isn't relevant to what the working group is considering. I've asked people to (unintelligible) and so far nobody's been able to do so. That gives me a bit of a problem because quite a lot of the final report references him, certainly in the notes and that sort of thing. And it gives the incorrect position on the actual immunities IGOs would enjoy or rather don't enjoy. So I'm just wondering how the best way to reconcile that is and how to get that removed from the final report? Thank you.

Susan Kawaguchi: So Mary, I'm going to ask you to weigh in on that. Besides the comments...

Mary Wong: Yes...

Susan Kawaguchi: ...and proposed edits, what do you think?

Mary Wong: In respect of Paul's comments here and so forgive us, Paul Tattersfield, and I see Paul Keating's agreed with you, staff has gone back to look at the Swaine memo. You'll recall that the Swaine memo was the subject of extensive discussions amongst the stakeholder group prior to publishing the initial report. The Swaine memo was published as part of the initial report. And, George, I take your point, the staff does not participate in the PDP; we are not part of the decision making process. So for what it's worth, in our view, having looked at it multiple times, we do think that the Swaine memo does address the questions.

First of all, it is predicated on an IGO filing a UDRP or URS, winning that and then the respondent who loses that filing a claim in a national court.

Secondly, the Swaine memo expressly acknowledges that that event, the outcome remains to be decided by a national court but that in many cases by submitting to mutual jurisdiction, the IGO will in many courts, be considered to have waived that immunity.

So to the extent that the objection to the Swaine memo is that it is not predicated on these bases, I'm sorry, that we just cannot see where that is the case. And on top of it, the fact that the Swaine memo was part of the initial report, no objections were raised, the group discussed this extensively, and none of this was raised at the time, we find it procedurally as well as substantively difficult to account for either removing it or changing that part of the report. So with respect that's the staff's perspective understanding we are not full members or participants of this group. Thank you, Susan.

Susan Kawaguchi: Thanks, Mary and thanks for the reminder that it was in the initial report too, the first draft.

Paul Tattersfield: Can I come back on that? Is that okay?

Susan Kawaguchi: Yes, please.

Paul Tattersfield: Well there was another mistake on the initial report as well and that had to be corrected and that involved an awful lot of rewriting and that was mentioned to the chairs before the report was issued but they still pressed on anyway and that wasted an awful lot of working group time. It is a fundamental problem, I mean, it is so massive that it calls into question the whole of the report. I mean, this isn't just a minor issue, this isn't cosmetic, it really needs redressing and it should be redressed before we even get to putting any recommendations or options in place. Thank you.

Susan Kawaguchi: Thanks, Paul. Your concerns are noted. Okay, anybody else?

Mary Wong: Susan, we have a hand from Paul Keating which may be a new hand. And just so to follow up with Paul Tattersfield, if you wouldn't mind, Paul, either sending an email or letting us know just for the record exactly what the specific fundamental error is because there's been quite a lot of emails on this so we just want to be sure that it is captured correctly for the record today. And I notice that Paul Keating's hand has gone down, Susan, so no other hands are up unless Paul Tattersfield would like to clarify the fundamental error so that we can have it on the record. Thank you.

Paul Tattersfield: The error is quite simple, if an IGO – well if the issue comes before the court, there's two ways it can come before a court. An IGO can issue proceedings against somebody who's been naughty with one of their domains; or a trademark lawyer can issue proceedings against an IGO. When the IGO issues proceedings it cannot have immunity because it's initiated the proceedings, it cannot have immunity either in the initial proceeding or any follow on proceedings. When the TM lawyer tries – or sorry, when the trademark lawyer defending the TM holder comes against the IGO then the IGO can assert immunity and block the case.

When we take – when you take it back to a UDRP hearing, or a UDRP hearing is just an administrative alternative to the court cases. So when you get back to that situation you have two cases that can happen again, either the IGO initiates proceedings or a TM lawyer initiates proceedings. What's happening with Swaine is he's taking the rights that are given when a TM lawyers issues proceedings and then he's applying those incorrectly to when a IGO issues proceedings in the UDRP. And you cannot do that because in a court case one has, one doesn't have.

What Swaine is trying to do is make it so that both of them have or both of them have partially, depending on which part of the report you refer to and that is just clearly wrong. And there is nothing, there is nowhere in the world in any jurisdiction where you can do that. And it doesn't have to be just

domains, it can be any other matter. And I've raised the question several times in the – on the mailing list and nobody anywhere can show me an example of where they would be entitled to immunity after initiating proceedings. Thank you.

Mary Wong: Susan...

Susan Kawaguchi: Mary...

((Crosstalk))

Susan Kawaguchi: ...address – can you just go ahead? I have somebody at my front door.  
Hold on.

Mary Wong: Okay, apologies, Susan. And so Paul, I think that George is suggesting that maybe you can make some suggestions to the list about changing the report because that's probably, you know, not much point of continuing this on this call. But just to note again for the record, that the Professor Swaine's memo does address the situation where it's the UDRP proceeding initiated by the IGO and as a result in his memo he does expressly say that in some jurisdictions as a result of the initiation, the IGO will probably lose its immunity where the losing registrant subsequently files a court proceeding.

So again, we're happy to take this offline, but just for also a refresher for those who have not been part of this conversation. I don't know if Susan is back yet but, George...

Susan Kawaguchi: I am.

Mary Wong: Okay and so I think George's hand just went up, Susan.

Susan Kawaguchi: Okay and I apologize everyone. I had a very persistent – I'm working from home and had a very persistent person at my front door that would not stop ringing the doorbell. So he's gone now. George, please go ahead.

George Kirikos: George Kirikos again for the transcript. Yes, hopefully I can help clarify the situation. I don't have the Swaine report in front of me, but in the Swaine report he sets up a theoretical example where the IGO is defending a case and instead of that there's the theoretical example that is relevant is where they're the ones initiating the case and I think that's what Paul Tattersfield is talking about.

And so he kind of started from a false premise in an earlier part of the report and then he went on to use that to the situation where overall the IGO is actually initiating the dispute you know, looking at it in its fuller context, you know, through the UDRP and then it, you know, the roles get reversed when it's challenged in court and that's really the (unintelligible) process that we've identified that this happens because if it was a regular lawsuit what would happen is that the IGO would be the initiator in court and obviously can't use the immunity defense because they're actually the complainant, not the defendant.

Because they go to the UDRP path first, then the roles are reversed when you actually get to court because now they're the defendant instead of the plaintiff and so that's the route of the (unintelligible) process and that's also in that yoyo.email kind of analysis, the cause of action in the UK. So I think Paul isn't talking about how Professor Swaine dealt with the (unintelligible) process part, it was the premise before that earlier in the report that set up an example that isn't actually very relevant and actually I'd emailed about that on the mailing list before Professor Swaine met with us on that day, I guess a couple years ago, and then addressed it to him during the call. And he said he'd think about but I don't think he actually modified the report.

And I think that's why Paul's concern that, you know, we should make that clarification and, you know, add appropriate language to the broader report. And I'll probably be sure to have my own language that I want to bring to the report with regards to, you know, the underlying root causes that are similar to the yoyo.email and so on. I don't think the current draft report actually captures all the kind of analysis that's been taking place on the mailing list and so – brought in some places. Thank you.

Susan Kawaguchi: Thanks, George. And any...

Mary Wong: Susan?

Susan Kawaguchi: Yes, go ahead.

Mary Wong: I see Paul Keating and Petter's hands up.

Susan Kawaguchi: Okay. Paul and Petter. Okay, please go ahead, Paul.

Paul Keating: Okay, thank you. Paul Keating for the record. I think that part of the issue, Mary, is that perhaps staff focused on the initial part of Swaine's report and pulled a lot of the wording out of the initial part of this report – his report whereas Paul Tattersfield correctly pointed out, the real issue is a (unintelligible) one as to which the primary part of the report – this was generally dealing with immunity as a whole – really doesn't apply and (unintelligible).

But I would encourage Paul to come up with his proposed draft and the rationale for that and we can deal with it as one chunk when we have our next call and so that's my suggestion, we can hash this out once we see some real text and we can then ask Mary to recirculate the Swaine memo so that those other people can actually have it in their inbox and actually compare it with what's written here. Thank you.



Susan Kawaguchi: Thanks, Paul. Petter, please go ahead. Petter, are you muted? Cannot hear you, Petter.

((Crosstalk))

Susan Kawaguchi: Are you there now?

Petter Rindforth: Do you hear me now?

Susan Kawaguchi: Yes.

Petter Rindforth: Okay good. Just short, well Professor's Swaine's report is the part of our documentation and as I remember, our conclusion was that he didn't say a clear yes or no to our questions so we still have it as a part of our report and from that we can make any possible conclusions that we want to and that can be made on his report. And I'm still pretty sure also from my own legal experiences that there is a fact if we look at the global perspective no clear yes or no if a court can take a case or will deal with it – will accept the claims for neutrality or not.

So yes, again, I hope that the changes that we find – that we need to do on the text on these options will be more or less just minor clarifications or references as we are at an early stage even if we don't have an official decision on it discussed this fairly well on each topic and decided on the recommendations as they are now. So but I'm open for minor clarifications, corrections but Professor Swaine's support needs to be a part of the base we have. Thanks.

Susan Kawaguchi: Thanks, Petter, for your input. Okay, we still have about, I don't know, about 15 minutes left of the call, maybe a little longer. Any other hand up?

Mary Wong: Susan, I see George and Paul Keating and, Petter, if that's an old hand would you mind taking it down? But if it's a new hand then we – okay, so now we have George and Paul Keating.

Susan Kawaguchi: Okay, George.

((Crosstalk))

George Kirikos: George. I just wanted to move things forward orally. We have the weekend coming up so if we can actually get the Word version and a redline version available before the weekend that would be good to allow people who want to work on things ample time, thank you. That's it.

Susan Kawaguchi: Thanks, George. Okay. And Paul.

Paul Keating: I just wanted to see where we were on this – George's suggestion about having weekly calls since now would be a good time to decide that.

Susan Kawaguchi: So on that, you know, that wasn't something we had discussed – that Heather and the Council leadership had discussed. So I'll need to go back to Heather and talk to her about that and then I'll get back to you hopefully by Monday on that if I can get a hold of Heather. You know, a lot of this work could be done on email lists but if the working group in – as a whole calls – would like to, you know, suggest continuing calls between now and then, you know, we'll take that into consideration and I'll talk to Heather about it.

Paul Keating: Well as – this is Paul Keating again. I think it would be helpful even if we just put bookmarks, you know, placeholders in the schedule and you don't have one perhaps this coming week because of the ICANN GDD conference in Vancouver but the week after we have one. Just somewhere so we can continue to make progress towards our consensus because I think that's the goal.

You know, I don't want us to lose momentum and then have this go out into some cloud-based concept where people aren't able to actually touch and speak. Email is – email is great for generating information but it's really a hard, harsh way communicating with people. It just misses the tone and every other aspect of human communication. So I would encourage us to have these – even if we just use placeholders six o'clock on Thursdays and cancellation by the leadership but we can have it and people can build it into their schedules.

And it's very difficult to deal with this in my schedule if it comes up as a last minute item (unintelligible) generally when I have all my conference calls is in the evening my time. So there's so many slots available. Thank you.

Susan Kawaguchi: Okay, I take that under advisement and the fact that next week is difficult, the following week is really difficult for me but I will – will get back to you soon with that by Monday so that we can put it – if it's possible to schedule calls then we can get them on your schedule at least a week ahead of time. All right.

Mary Wong: No other hands at the moment, Susan.

Susan Kawaguchi: Okay. So we have a couple of to-dos, you know, I will with the help of staff take your questions and concerns to the Council leadership. We'll come back to you about calls. We'll provide the redline of the report and this other document. We'll send out all the information on the consensus process and sort of a timeline of exactly when things have to be done. And hopefully we can move forward. If we don't have any other questions or concerns today, we can give everybody back I don't know, 13 minutes of their day. If not, then put your hand up now. Last calls to speak.

No, all right so we're going to end the meeting. Please stop the recording. And thanks, all, it was a good productive discussion.

Petter Rindforth: Thanks.

Susan Kawaguchi: Thanks, bye.

Mary Wong: Thank you, Susan. Thank you, everybody.

END