

**ICANN
Transcription
IGO-INGO Curative Rights Protection PDP WG
Friday, 25 May 2018 at 16:00 UTC**

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Terri Agnew: ...and good evening to all and welcome to the IGO INGO Access to Curative Rights Protection Mechanisms call on the 25th 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?

Paul Tattersfield: Paul Tattersfield.

Terri Agnew: Thank you, Paul. That is noted. I would like to remind all to please state your name before speaking for transcription purposes and to please keep your phones and microphones on mute when not speaking to avoid any background noise. With this I'll turn the meeting back over to Petter Rindforth. Please begin.

Petter Rindforth: Thanks. Petter here. And first of all thanks all that you can join us today instead of yesterday. I think that also some of our working group members have been traveling; I definitely was on travel yesterday and came back just more than – a little bit more than two hours ago back in Sweden so it's appreciated that we could have this call this week anyway. And also thanks for all the comments that have been sent out from working group members.

So from that, of course we should have this formal question, if there is any new statement of interest? And well I see no hands up. So I presume we can proceed to today's agenda. And as we see on the screen, the agenda is – well is fairly short, discuss brief document for discussion. I don't know if we can have this document up on the screen to better see its – excellent. So if we start with that, our recommendation draft text and as you see on Recommendation Number 1, there are no suggestions received on to change that text. And I see no hands up so I think we can stick with that.

And then we go to Recommendation Number 2. You have the full text, you all know it very well since before. And I notice that George Kirikos had suggested some additions to be highlighted that – that we can see highlighted in yellow. And, George, your hand is up and I was also going to pass over to you, please.

George Kirikos: Thanks, Petter. It's George Kirikos for the transcript. Yes, I'm just – the two words added were to just to clarify that we're still – that the UDRP is still a procedure for, you know, trademark, you know, cyber-squatting, and so I think the two words added are consistent with what the changes we've made from the initial draft report that was sent out for public comments and then captured the spirit of the public comments where I think it was the IPC in particular that wanted to make sure that this is still a trademark dispute resolution procedure. And so where they said unregister, you know, we want to make sure that they're trademark rights, not just unregistered rights in general.

And I think some people might be considered that the word “trademark” necessarily means, you know, a big commercial enterprise but you know, lots of noncommercial entities also have trademark rights; you can be a nonprofit and still protect a trademark or a service right. So I think that's the reason why. And I think Paul Keating last week had mentioned the same thing so I think that hopefully captured his comments. I don't know if he's here today but

he can perhaps opine on the mailing list if he hadn't seen the document, this document obviously came in the past 12 hours. Thanks.

Petter Rindforth: Thanks, George. Anyone else that want to comment on this? Susan.

Susan Kawaguchi: Thanks, Petter. So one of my – one of my only concerns is is, you know, is globally is “registered” a term that each and every trademark office uses, so each government. I mean, that makes sense from a US perspective and English-speaking perspective probably but I was wondering what the team – working group thought on whether or not that would be recognized in Asia, for example, or, you know, South America. So that would be my only concern because before without the registered and it does reference unregistered without George’s edits so maybe it’s fine but that would be one of my concerns.

Petter Rindforth: Thanks. And before I leave it over to George, frankly I looked at this and I noted something that we may have missed and should if we talk about trademarks and we’re referring to the UDRP and the URS, it’s in fact in both referring to trademark or service mark. So I’m okay with this a registered or unregistered trademark addition if we actually add the text that is used in the policies that we’re also talking about so trademark, service marks, because then also everybody that’s reading this can understand what we are referring to. So that’s my suggestion. George.

George Kirikos: Thanks, Petter. George Kirikos again for the transcript. Just go back to how this originated, originally we were going to with the recommendation that if a mark – if a phrase, like an acronym or term, I don't want to use the word “mark” because of its connotations and so on, but if a term appears in the Article 6ter database, originally we were going to say that that was sufficient as proof of rights – proof of standing for the first prong of the UDRP. And I was perfectly happy with that because usually the things are determined by the second and third prongs of the UDRP.

But then we got this backlash saying that, you know, it should be evidence of and not necessarily proof, that was one part, and so we made the changes accordingly to make sure that it's evidence but not necessarily proof, the (unintelligible) will decide whether it's proof of not. And the second thing was also that it was for trademarks but I think the IPC in particular was strong in that because let's look at the second column and take out the word "registered marks" like what does – an IGO may consider this to be an option where it does not have trademark rights – if we just look at the first part of the sentence.

If it doesn't have trademark rights then the UDRP is the wrong procedure, period, I think that's why we need to make sure we say the word "registered" there because the IGO may believe it has trademark rights but they're just not registered. And so we're saying that the Article 6ter is evidence of an unregistered trademark right.

And then the second part of it – but believes it has certain unregistered" and then make sure it add the word "trademark rights" because to be consistent with that first fix, to make sure that we're only talking about trademark rights and not other kinds of rights that might exist like copyright rights or rights of publicity, you know, there's all kinds of obviously intellectual property rights that aren't trademark rights that people might want to use the UDRP for, but it's not a procedure designed for that. So I think that's what the language is trying to capture by making those two changes and I think that was consistent with what Paul and others had said during the public comment period. I was happy with the weaker standard but I'm just trying to reflect what people were saying in the public comment period. Thank you.

Petter Rindforth: Thank you, George. Petter here. And, yes, as I said, you're right in that we should not extend the UDRP to include copyright and other similar rights if needed for that, we'll be in need for creating another separate dispute resolution policy. And I think also when we have discussed this informally longer back in time with, for instance, with WIPO, they also didn't want to see

a lot of if we talk about copyright and other that kind of protection for this. So it's – we talked about name rights here.

And as I said, I'm fine if we also use the words – the description that is actually in the – both in the URS and in the UDRP talking about trademark and service marks rights. And I think that what the description of service marks in the UDRP for instance, can actually be covered, that can actually cover what some IGOs name rights are. And as we also know, in most jurisdictions, you have – you can have trademark service marks rights even if they're not protected but then you have to show that you have used it and it has become known in the market.

So can we – I heard no specific no's on this, can we take this text and use the text as this in the URS and in the UDRP when they refer to trademarks so it's trademark or service mark rights or has certain unregistered trademark or service mark rights because then it's also, as we refer to the UDRP and the URS. Yes, George.

George Kirikos: George Kirikos again. So you're basing – you're accepting the changes for registered trademark rights and the word “registered” in the trademarks that I suggested but adding on top of it service marks just in addition to it? Like I would find that acceptable so we go with the second column's version but just add “service marks” and any other language that's in the UDRP or URS, correct?

Petter Rindforth: Yes, yes, the phrase I raised you probably have it open also but for instance in the UDRP Chapter 4A when it comes to applicable disputes, and you see the first sentence that, “Your domain name is identical or confusingly similar to a trademark or service mark in which the complainant has rights,” and also in the URS in Chapter 1.2.5, it sets that a specific trademark slash service marks so then we use the same text as in the current UDRP and URS in the description. Good. Is that a new hand or an old hand? Okay. Thanks.

So let's proceed to – yes, you find it agreeable, good. Then let's proceed to the next one – okay, I can – so Part 3, no suggestions received and Recommendation 3 remains unchanged. And I see no hands up so I proceed to Recommendation 4 and the same there, no suggestions and Recommendation 4 remains unchanged. But George hand is up.

George Kirikos: George Kirikos again for the transcript. You know, there were no suggestions in terms of hanging that recommendation but I think I and others were probably going to vote against that recommendation so I think it's still a topic that might be of some concern to people. I don't know whether this is the appropriate place to discuss it or we should discuss it on the mailing list. But I don't know whether people might want to haggle or trade like for example if we were to get Option Number 1 for the next recommendation and the price of that being, you know, subsidizing the IGOs, that's something I could see as a tradeoff to try to, you know, get a full consensus if possible.

Because I know some people feel that the IGOs should get some special treatment in terms of the costs but on principle I'm opposed to that but so I don't know whether now is the right time to be talking about that or whether we want to talk about variations of this recommendation or for example people suggested that the registrant should also get an equal subsidy so that, you know, they're not disadvantaged but the IGO getting their fees covered. Thank you.

Petter Rindforth: Thanks, George. Well, and this is – as we all know when we discussed it in the beginning of our work, we decided in the early stage that we should not make a specific recommendation on the price and the costs as such as we didn't see that as part of our work; it was more of something that ICANN or even ICANN Board has to decide upon. And as you said, we can discuss this online or if, yes, otherwise another group will, yes, talk about that later. But we can discuss this further online or perhaps this is just an idea that right now if we could say something that the working group recommends that ICANN

investigate the feasibility of providing IGOs and other parties involved in such a dispute with access to the UDRP and URS at no or nominal cost...

((Crosstalk))

Petter Rindforth: Oh, having said that, sorry, I think we should discuss it further online. Yes, please, go ahead.

Reg Levy: Sorry, this is Reg Levy for the transcript. I personally am opposed to recommending that anybody look into paying or subsidizing these things, so I just wanted to get that on the record.

Petter Rindforth: Can you rephrase that? You said that you were – you would like to see a more general...

Reg Levy: I am opposed to...

Petter Rindforth: Okay.

Reg Levy: ...recommending that anybody be subsidized, whether IGO or an adverse party to the IGO. If someone needs to bring a case to protect rights they think they have they should pay for that; that's part of the cost of attempting to protect those rights and asserting that they have them in the first place. It's not our job to make determinations about whether or not those are valid rights, that's up to the court or the panel.

Petter Rindforth: Okay I'll see what – open the chat here. What's willing to trade this off if it can mean full consensus on the next recommendation. Yes, well, we can use it in a more general way and I have not a perfect vocalization of it right now but we could rephrase it in a way that we recommend that ICANN investigate the feasibility of providing the UDRP – or the domain dispute policies in – as low cost as possible referring to all parties involved...

Reg Levy: But we already know that they're not capable of that.

((Crosstalk))

Petter Rindforth: Yes, but I mean, if it is that we need to make a statement on this point.
Okay...

((Crosstalk))

Reg Levy: I don't understand, on which point do we need to make a statement?

Petter Rindforth: Well we have a specific question that we need to reply upon and that was upon the costs so some kind of conclusion. I presume that we are expected to make some kind of conclusion there.

Reg Levy: I would prefer that we say that we don't support subsidizing costs.

Petter Rindforth: Okay.

Reg Levy: And if I get voted out that's fine but I wanted to make sure that that was on the record.

Petter Rindforth: Oh, okay. George and then Phil.

George Kirikos: George here. I think Phil and Susan were before me so I'll wait until them.

Petter Rindforth: Okay sorry. Yes, make it over to Phil.

Phil Corwin: Yes, thank you. Phil for the record. Phil for the record. I don't think we should be silent on this point. I think we might consider some change in the wording. I'd have to look back to see whether the charter for this working group required us to look at this cost aspect but certainly we're aware that the

consistent GAC advice on this has – part of it has been that IGOs should have access to curative rights protections at no or nominal cost.

I think rather than recommending, which seems to imply that the group endorses the concept, we might dial it back a bit and simply say that we're not taking a stand on whether or not ICANN should do this; we're just recognizing that we have no authority as a working group to commit ICANN budget resources and this is a topic that if IGOs wish to – or the GAC wishes to pursue it, should do so directly with ICANN and we should also note that some members of the working group believe that if there's any instance in which an IGO is subsidized to bring an action that the respondent should receive similar subsidizes to balance the equities.

That's all I had to say on it, I think we should say something but might take out the words "to recommend" which seems to imply an endorsement of the concept rather than simple recognition that this is out of our bailiwick. Thanks.

Reg Levy: I think...

Petter Rindforth: Thanks, Phi..

((Crosstalk))

Reg Levy: ...the middle part of what you said is very pertinent; that if parties want ICANN to consider those subsidies, they should take it up with the Board.

Petter Rindforth: Yes, I think Phil, please, send it out to the full group. What I heard was kind of pretty good way to at least reply to the question so that everybody can see that we have considered it but instead of just be completely silent, but also making sure that this is not something for us to comment or decide upon. And now I think Susan, do you want to squeeze in here?

Susan Kawaguchi: Yes, I did. Thank you very much, Petter. Susan Kawaguchi for the record. So at the end of this meeting we will start the consensus process so everyone will get to weigh in and I think that was Reg's point that everyone's position is known and that we will, you know, record that. So but that will be part of the consensus. And considering these recommendations have not changed in months, and we haven't received suggestions to date, we should try – if there are any changes (unintelligible) minimal so just in trying to move this whole working group forward with – to the final report.

Petter Rindforth: Thanks. And I see no hands – taking down but I think George was the next here.

George Kirikos: Thanks. George Kirikos again for the transcript. Yes, if you go back to the initial draft report, this was kind of one of those like maybe a throwaway recommendation because one of the things is that we don't necessarily have to just have recommendations, we should go further, we should have a justification for each of the recommendations so like a recommendation by itself is kind of meaningless unless you actually can support the reasoning for it. And there's very little reasoning for this.

If you actually look at the recommendation it just says, "In accordance with GAC advice." We already know that IGOs have used the UDRP successfully what I think 10 times according to the Swaine report so they have access to the UDRP, they've paid the fees just like everybody else.

So the question is, is there any evidence that fees are some barrier to the use? I don't think we actually have any evidence of that other than, you know, everybody wants something for free because if you – it's a slippery slope if you start giving people something for free, you know, they don't get free hotels, free travel, free salaries for their employees, you know, there's an economic cost because for example, registry operators should they be giving IGOs free domain names? Like that's one possible domino effect if you start giving them free UDRP complaints because they probably spent far more on

domain name registrations than UDRPs given that there's only been 10 of them in the history of you know, the UDRP 19 years.

You know, they have other costs, you know, they obviously get some free travel from ICANN already...

((Crosstalk))

George Kirikos: So that's my concern that there's no justification in the report that – for that recommendation is just in accordance with GAC advice. Everybody has a wish list. Thanks.

Petter Rindforth: Thanks. Phil. New hand?

Phil Corwin: Yes, actually it was an old hand but I'm just typing in the – I did find the charter and the charter does require this working group to consider the issue of cost to IGOs and INGOs. So it was responding to a charter requirement. That's all. Thanks.

Petter Rindforth: Thanks, yes, that's what I remembered also, even if it was sometimes since I read that text. But I think from what we have heard now something similar to what you suggested here by our meeting day, Phil, if you can put that text out for everybody to read so that we at least have replied to the topic but also stated that this is noting for us to decide upon or recommend upon. And as we all know, it's the dispute procedures are not of high costs anyway and there are maybe other groups of interest that also – (attacked) in many disputes that also would have interested in lowered the costs. So that's something for – rather for the ICANN Board to further discuss.

Okay, good. So we'll see that in a more – yes, Phil, you had anything? No, okay. And then we are coming to – just change the – oh yes. Then we have the possible recommendation text for what we are apparently – well apparently the most favored options. I'm not so sure that I agree with this

because we have – there has been an informal discussion on the – all the options we had and here we may see two options that again if I speak it on my personal view, are the two options that are the ones that actually say that all the work we have done during these years should not be taken into consideration.

If we go out then with only some of the – or the options that were out for a while ago, I definitely also want to have the Option 3 to be considered by the full working group when we vote on the specific options. George.

George Kirikos: Yes, George Kirikos here. I just wanted...

((Crosstalk))

George Kirikos: ...to address some of the staff notes that were written in this option, for the first option, Number 1. They had problems with this option because it means resolving a procedural question can automatically reverse a substantive panel finding. This is actually what Option Number 1 is designed to actually do because, you know, people that support Option 1, you know, support the law so strongly that they want the court to decide the dispute and not have the – have the dispute decided on the merits, that is and not have it decided, you know, through procedural (quirks).

And, you know, in the law you know, there's long-standing cases where a substantive panel findings are thrown out, for example, here in Canada we have something called the Jordan Decision by the Supreme Court of Canada, where there were unreasonable delays in criminal court cases which meant that a whole slew of cases, you know, were thrown out because of, you know, of the importance of due process for the accused.

And so it's perfectly right to have that done in my view. I don't know why staff continues to have concerns with that option, perhaps it's not something that they've thought about in depth. But Option 1 is actually designed to do that to

ensure that the court hears the case on its merits. Because why is the registrant actually appealing the case? It's because they – they actually disagree with the panel decision in the UDRP or URS and so they want the court, you know, we don't want ICANN creating a policy – the URS in the first place – that was above the national laws; it was some parallel process that streamlined and could handle, you know, the vast majority of cases.

But there was this, you know, failsafe protection that parties that disagreed could go to the courts de novo and have it decided. And so that's what Option 1 does, it preserves the rights of all the parties and makes sure that the UDRP URS decision doesn't interfere with it. It basically puts the parties back to square one, if the IGO wants to press the issue, you know, you have the registrant who's gone to court and obviously would defend if it need be. So that was the concern I had with the staff notes on Option Number 1.

And if I have more time later I'd like to discuss the rewritten version of Option 4 because that's a very drastic change compared to what Zak's original language was, and I don't think it's necessarily good – like a friendly amendment. The amendment that I had made on the mailing list simply added “UDRP and URS” but this – the changes here went far beyond that. I'll give up my time to somebody else and then get back into the queue. So the hand I'm putting up now is a new hand to go in the queue. Thanks.

Petter Rindforth: Thanks. Phil.

Phil Corwin: Yes, I had a couple of clarifying questions. Number 1, my understanding – and I certainly want to be corrected if I'm wrong – is that all six options will be listed in the final report with some – with an estimate of the degree of consensus or lack thereof for each of them. So is that correct, that these will not be the only two options listed in the final report, because I would strongly object to that since I support Option 3 and plan to file a minority statement explaining my support for that. Can we have staff clarify that?

Petter Rindforth: Yes, I turn over to...

Susan Kawaguchi: I can clarify that, Phil or Mary, go ahead, Mary.

Phil Corwin: Yes.

Susan Kawaguchi: And then I'll talk after.

Mary Wong: I didn't mean to jump ahead of you, Susan. I just can't raise my hand in WebEx because I'm on my phone and it's not letting me.

Petter Rindforth: Okay, Susan.

Susan Kawaguchi: No, no, no, go ahead, Mary. I'll talk after Mary.

Mary Wong: Okay, so to specifically answer...

Phil Corwin: Not hearing you.

Susan Kawaguchi: Yes, are you there, Mary? Okay, to allow Mary to figure out audio, you know, in the statement here, you know, she's already put in, "The working group may also decide that one or more of the remaining options should be added to the list of potential recommendations for the formal consensus call." This was just an attempt to sort of focus the recommendations but if – and to discuss these two – but if the working group, you know, decides that all six of those should be put, you know, included in the consensus call, you know, that's really the working group's decision.

So you know, Phil, if Option 3 was...

((Crosstalk))

Phil Corwin: Well, I don't think the working group – I think the working group by consensus can decide which of the six it supports or doesn't support. But I think to have a majority of the working group deprive those who may file – favor a minority position and not even have it in the final report where they can reference it would not be a fair procedure.

Petter Rindforth: Petter here, also talking about – we might – chair hat on, as we have discussed you'll know previously how decisions have been made and when it comes to reaching out to the working group members with questions. And so I think we definitely need to be clear and open to send out for our official voting in the working group with all the six options, otherwise it would be very strange to – for those working group members that, for instance, couldn't participate in today's call to see that suddenly some of the other options have just disappeared.

So if these are two options that are of general interest to further discuss today and as I heard from George, maybe some of the text in Option 4 should be rephrased, that's fine. But I don't – definitely don't see our capacity to limit on today's call before we send it out to the full vote to take away some of the other options even if we maybe one or two of them when we had this informal votings before and inputs, there were not – some of them not even received one vote in support but they are still out there, six options. So...

Phil Corwin: Okay well with that assurance, Petter, that the consensus call will be for all six options, that's fine. So then one other question I had was my understanding of this call is not to discuss the merits or demerits of any of these two options or any of the other four, but to discuss the language in them. And on that, if I'm correct on that understanding, I have concerns about the language of the text now purporting to represent Option 4.

I don't remember what that original language is, but I will say that the language – “The working group therefore recommends that the GNSO Council task the Review of All Rights Protection Mechanisms PDP Working

Group to examine,” I’m raising this objection in a personal way but also as part of my responsibility as a cochair of that other working group, I would have no objection if this said that the Council consult with that working group, but for this one small working group to ask Council to order another working group to take up an issue that’s no in its original charter and without any consultation with the chairs or membership of that working group, I don’t believe would be advisable procedure.

So my objection here is the – to the word “task” I would rather see something with like “consult with” in regard to examining, something along those lines. That’s all I had. Thank you.

Petter Rindforth: Thanks.

Paul Tattersfield: And Paul Tattersfield, can I get in the queue, please?

Petter Rindforth: Yes, please do so although that George was before you.

Paul Tattersfield: Thank you.

George Kirikos: George Kirikos again. Yes, several points I wanted to make. First, speaking to Phil’s point about the RPM PDP, the RPM PDP’s charter actually already allows – or tells it to coordinate with other working groups, so I think his concern about that aspect of Option 4 is not correct. I’d written – I’d quoted from the original charter on our mailing list so I can go back to that post on the mailing list later but I’m pretty sure it states.

My problem with the modification to Option 4, which went way beyond what Zak’s original language was, that it seems to almost want the RPM PDP to revisit from the beginning the whole issue of IGO jurisdictional immunity, which I don’t think is the actual intent of Zak’s recommendation – or Option Number 4. Zak’s Recommendation 4 was mostly intended to say that this limited, you know, work of progress is similar in nature to the – that

yoyo.email cause of action and it's more in line with access to the courts for registrants.

We discovered it in the context of an IGO PDP Working Group but it's, you know, a much broader issue and I think that's what the rationale was for the referencing it to the RPM PDP mainly to make sure that both issues are handled correctly from a, you know, holistic level and not just piecemeal, you know, in our PDP and then have to revisit the same issue again in the RPM PDP and get, you know, different solutions. This would obviously be based on a similar solution given that the underlying root cause is the same.

And going back to his earlier point about whether all six options should be considered, yes, I definitely agree with him on that point that, you know, I've never really, you know, withdrawn Option 5 and I don't think the people who backed Option Number 3, you know, removed it from consideration. So I think all six of the options should be still within the consensus call.

And I think there's some question about how the consensus call should work. And I've probably read the rules more carefully than anybody else because of the Section 3.7 appeal, and if you go back – people were talking about it just a couple minutes ago, things of votes, you know, obviously we don't vote on things. My understanding of how the process works is that when we're ready to do a consensus call, like after everybody's had their say, the way it works is that the chair, I guess there's only a chair now, not cochairs, but the chair is supposed to give initial designation levels to each recommendation.

So he might say that we have full consensus on Recommendation Number 1, sorry, yes, Recommendation Number 1, which might be true; same thing for Recommendation Number 2 and then similar thing for each of the recommendations, you know, there might be divergence on one of the options, there might be like a minority report on each of those. So there's actually – that opens up the period where members of the PDP can discuss

things further and say, no, I don't agree that we have divergence, I think we might have, you know, majority support or we might have full consensus.

So I think that's where the iterative process goes under the Section 3.6 guidelines. And so the voting is only happening when there's like – kind of like a stalemate in terms of everybody disagreeing on what the actual level of – what the designation is for each of the recommendations. And then as a last resort it can go to voting, but that's my understanding of how the process should be. And I think that's kind of what we talked about last week – or not last week but last time, given that it was a couple weeks ago. Thank you.

Petter Rindforth: Thanks, Georges. And considering how we have worked and discussed I'm pretty sure – not taking what's happening in the future right now but I'm pretty sure that we will need to have a vote. But I also – a thought that came on you know, we have six options and there are working group members that have suggested these option. I presume that if anyone of you are still not personally positive to or think that any of the options we have suggested will be workable, I presume that we can – we are – that person are afraid to delete it, making it the number of options a little bit less. But as long as they are there officially, I think it's important that we have the possibility to vote on them.

I don't know if staff had anything to add to this, otherwise I'm sorry, I forgot who was on the phone that wanted to make a comment but please go ahead.

Paul Tattersfield: Thanks, Petter. Paul Tattersfield for the record. Can we ask the GNSO to consult with the IGOs and ask whether they would like the RPM Working Group to look at this again in light of our findings? And that was in response to Phil's reply. And the other thing – the wording in Option 1, there was a couple of things, can we change it from "its claim of immunity" to sorry jurisdictional immunity to "a claim of jurisdictional immunity," that's slightly more neutral language. And it's not against the registrant – immunity is a

shield, it's not something you can use against a registrant, so can we remove the words "against the registrant," from that as well please? Thank you.

Petter Rindforth: And I'll turn it over to Susan.

Susan Kawaguchi: Sorry, sort of losing track in the train of thought. Well let me just go to what I was going to say. So since there doesn't seem to be agreement that these two recommendations are pulling in all, you know, it was an attempt to sort of correlate a few of those options and the ones that had the most support just to, you know, staff took a stab at drafting something that we thought maybe there could be consensus on. Then we'll just go ahead and do those original six options in the consensus call so we may not need to draft – change these, but if you feel like either – Paul was addressing the second one and wanting – but I'm confused on where those edits are. So maybe back to Paul or Steve's got his hand up too.

Petter Rindforth: Yes, thanks – I think Steve was first there. Please.

Steve Chan: Thanks, Petter. This is Steve from staff. And I just – I guess I just wanted to reflect a little bit more on the process as well. The process by which – so actually just to reflect on what George mentioned. It's – as he said, it's not necessarily a vote, it's a poll in rare cases. But it's not iterative, you can just provide objections and file minority statements. But the designation of consensus it not what necessarily triggers the iteration. I just wanted to provide that point. Thanks.

Petter Rindforth: And so I turn over to you again – Petter here – with an additional question on that. If you have it in mind, can you just rephrase or again, what levels we would need to seek to have majority or minority or different kind of levels? And also if it's – if that's counted on the number of working group members that are – have signed up to the working group because I presume it's not just – we always are a limited number that are actively participating in the

calls. But I presume that we should count on all the real numbers of our working group members.

That I know that staff at least – was it in December or at least in January went out again to all registered working group members especially to those that have not participated so much in our working groups online to ask if they still wanted to be an active member of the group and if I remember correctly, the majority if not all of them, wanted to stay as ordinary members. But back to my question, if you can just refresh our memory on the levels that is needed for decisions?

Steve Chan: Thanks, Petter. This is Steve again from staff. And so the levels for consensus are captured in Section 3.6 of the GNSO Operating Procedures or the PDP Working Group Guidelines actually. And actually as George said, they're not necessarily set on numbers of votes; it's a – takes into account the level of representation as well so it's not just strictly the number of votes for each option.

So the five levels of consensus are so the full consensus is where no one in the group speaks against the recommendation in the final readings. And the Guidelines note that this is also called unanimous consensus. The second level, lower than full consensus, is the position where only a small minority disagrees but most agree. The third level is strong support but significant opposition, and this is a position where most of the group supports the recommendation but there are a significant number of those who do not support it.

And at the bottom there is – Petter.

Petter Rindforth: Yes, sorry to interrupt you. Is there a specific percentage when we talk a significant group that votes against and the majority, so to speak, like 75% versus 25% or is it more freely to count on?

Steve Chan: Thanks, Petter. This is Steve again. It's not based strictly on percentages. It's not as prescriptive as that to say that 50% or 25% or whatever the levels might be. Yes, and as Mary just said, it's not I guess to reiterate what she said, it's not a numerical threshold.

So to continue though, the fourth level in the consensus designation is divergence and so this is a position where there – apologies for reading – but a position where there isn't strong support for any particular position but many different points of view. Sometimes this is due to irreconcilable differences of opinion and sometimes it is due to the fact that no one has a particularly strong or convincing viewpoint but the members of the group agree that it is worth listing the issue in the report nonetheless.

And then finally it's the minority view; it refers to a proposal where a small number of people support the recommendation. This can happen in response to a consensus strong support but significant opposition and no consensus, or it can happen in cases where there's neither support nor opposition to a suggestion made by a small number of individuals.

So those are the five levels of consensus. And I'll go ahead and put a link to the Working Group Guidelines in the chat after this. Thanks.

Petter Rindforth: Perfect. Thanks. George.

George Kirikos: George Kirikos. So two points I wanted to discuss. First, Susan had mentioned something about going back to the original text like the original text for Option 4 still only said UDRP so I would desire that the language for the URS be inserted into Option Number 4. And I think has been noted before, Paul Tattersfield had a suggestion change to Option Number 1, so I'd have to – I'd appreciate if he sent it in writing to the mailing list. But assuming we can agree on the language, you know, we could at least finalize the language of the six options say by Monday or Tuesday, give everybody a

chance to make sure that there's nothing, you know, seriously objectionable about the language.

Just to go back to the procedure for Section 3.6, I think it's like the chair has to decide when everybody has – has had a chance to be heard. Like the consensus period isn't really supposed to be about stating a new view, like people should – the initial designations are supposed to have been made after all the discussion has already taken place. So I think my understanding of the consensus call is that people who object to the level of the designations are then heard like they said oh well, you know, I oppose Option 3, you know, and perhaps you didn't recognize that before, so if you had said it was a majority then I want to make sure that, you know, I'm counted somebody being a voice against that option.

So perhaps, you know, that might reset the weightings, etcetera. But and so if you, you know, if Petter hasn't necessarily felt that he's heard from everybody, then perhaps, you know, he might want to delay the consensus call until next week, you know, or give people, you know, another chance on the mailing list to talk about things.

But even if he opens up the consensus call for this week like say Tuesday or Monday next week, whenever those six options are finalized in terms of language, I think we should still have a call next week and the week after like keep having those Thursday calls because I think those help move the work forward in terms of capturing any disagreement in terms of process on the – because things can I guess heated on the mailing list and not be discussed in real time and I think when we have the calls we can tend to find solutions more quickly. Thank you.

Petter Rindforth: Thanks. And I actually I had a practical question on our timelines there, and I saw Susan's hand up and I presume you have the possibility also to reply on that how many meetings we can have and when we have to make our final recommendation. Susan, please go ahead.

Susan Kawaguchi: Yes, actually staff – part of the agenda today was for staff to present the consensus call procedure. So we – if you're already to jump ahead and, you know, the text that is up for discussion we're done with, then we could have Steve present that and then discuss it from there because some of those – these questions are in that and, you know, maybe it won't respond exactly to everyone's questions but then we can work from there.

Petter Rindforth: Okay. Steve.

Steve Chan: Sorry, one second, trying to find my notes. Apologies. So this is Steve from staff. And so the intention is to launch the formal consensus all after this call. And the intention is for the chair of this working group to assess the level of consensus for the recommendations where there are no options, so in other words, the first four. So the one that we're all talking about right now, Recommendation 5, the intention is to provide the original text with rationale from – collected from emails and then allow for the group to provide their opinions and – about those particular – which of those options that they support.

So the intention is to allow for that consensus call to remain open until the 8th of June which is approximately the two weeks that's required to allow for a consensus call to run. And so where there is – for this option – or for the Recommendation 5 where it's not clear exactly where the consensus rests, the idea is that Petter and Susan will make a consensus level designation on – amongst those six options and allow for anyone in the – sorry, there's a lot of noise on the line. And allow for anyone to challenge the designations made by the leadership of the working group.

And if there are any then you'll have an opportunity to file an objection and/or minority statement by let's say the – Friday the 15th. So the overall intention is to try to meet a deadline of 17 June to be able to provide a final report in time for the document and motion deadline to allow for GNSO Council

consideration during its 27 June meeting. So hopefully that is helpful. Please let me know if you have any questions. Thanks.

Petter Rindforth: Thanks. Perfect. Meaning that at least we could and should have a call next week and then see if it's necessary to also have another call. But I have a feeling that it could be good to – if we in the nearest days can again make a final text of the six recommendations to be sent out and then practically discussed next week and then after that perhaps we are ready for the vote.

George.

George Kirikos: George Kirikos. I think you want to use not the word “vote” just to go back to the Guidelines. But my question was there seems to be a kind of a split consensus call from what Steve said, feel free to interrupt me, but my understanding was that there was going to be initial designation levels set for all the options, all the recommendations rather, but it seems as though they're only going to have the initial designations for the first four recommendations and then leave it open for another week of discussion before the initial designation level for the fifth recommendation, the one that has the six options. Is that's what's going to happen?

Because that's not technically following the Section 3.6 rules but it seems to still be consistent with it, you know, having, you know, another week of discussion on Recommendation Number 5. Is that what Steve was saying or what Susan was saying? Because it didn't seem to – like normally what the consensus call should be is you make a designation for each of the recommendations so for example for Option Number 1 it might be, you know, not full consensus but majority or whatever or Recommendation Number 5 might be, you know, minority because obviously I'm one of the few people that supports it.

But I thought that – so I guess we're not going to have that initially at the same time as the designations for the Recommendation Number 1, 2, 3 and

4 but we'll wait a week? Is that what Susan was suggesting? I wanted a clarification on that. Thanks.

Petter Rindforth: Susan, do you have anything to add to that?

Susan Kawaguchi: I'm not quite clear on what you're saying, George. But, you know, in my opinion since today we couldn't come to a conclusion or agreement on the language that staff provided us in an attempt to narrow the options from 6 to 2, then we would just put out the formal consensus call for all those options for Recommendation 5 at the same time as the other four recommendations and then see what happens. You know, if by miracle everybody decides, change of mind, and decides that, you know, Option whatever is in agreement, then we'd have consensus. But if not then we'd have six options with varying levels of consensus and then it would be up to Petter and I to come to a decision on the level of – the consensus level designation and publish that.

And then once we do that then you have the right to – we can have a call then and talk about that if there's objections and you can – then you always have the minority report option.

George Kirikos: George here. May I just intervene?

Petter Rindforth: Thanks. Before, George, just squeeze in to say that what I want to see – and I hope it's possible to do is when we make our comments or our support for any of the options, in our previous informal questions to the working group, there was a possibility to – and I won't use the word "vote" again but make our yes or no to each of the options, but in order to have some kind of result where we can see if there is any kind of majority or minority to some of the options, I would prefer if it's possible just to – for each working group member to decide which option he or she accepts as the best and only make a statement or a yes on that option.

Because if we still have the possibility to support several options, then it still will be a mix of possible solutions that will give absolutely no signal out to the Council what the working group wants and believe. Having said that, I turn over to George again.

George Kirikos: Yes, George Kirikos. Just to address your last point first, I'd object to having the options specified as you know, single choices because they're not single choices; they're not mutually exclusive options so, you know, some of them could work in combinations and people should be offered the opportunity to give their full views kind of like we've had on the mailing list in this past month.

Just going back to Susan's point about earlier, when she says "open a consensus call" I think the language of the Working Group Guidelines is very precise as to what it means to open a consensus call. A consensus call is opened when the chairs specify the initial designations, that's actually the opening of a consensus call. So I think what she seems to be saying is that we're just going to have more discussion about Option – sorry, Recommendation 5 and its six options for another week or so and at that point she and Phil – sorry, she and Petter, I guess it's really Petter but I guess she's involved (unintelligible) at this point, will then make the initial designations for Recommendation Number 5?

When they've actually made the initial designations, that's my understanding of what the start of the consensus call is because then when those designations are made then that allows people to object to what those designations might be so it's not trying to, you know, change the procedure in any way, I'm just trying to say what the actual Working Group Guidelines say and not gain any procedural advantages of what the Guidelines actually say. Thanks.

Petter Rindforth: Susan.

Susan Kawaguchi: Thanks, Petter. Susan Kawaguchi for the record. So, George, you know, staff does this all the time. I have actually not been part of the consensus call process before. So excuse me if I have used the wrong terminology, but my understanding of it is that, you know, we're going to launch the formal consensus call right after this call, each working group member will be free to send their view, support, do not support, on each and every recommendation. Once June 8 rolls around, we'll then – Petter and I with the help of staff – will look at all of the results, all the viewpoints, and decide on a consensus level designation, publish those and then you have the right to come back and object and file a minority report.

So if, you know, I promise to go back and read the bylaws again and – but I think that is the process. I'm a little bit skeptical of what your interpretation of the process is. But we will follow the general process that is followed in every PDP.

Petter Rindforth: Thanks, Susan. George.

Mary Wong: Hi, Petter.

Petter Rindforth: Yes. Sorry, I missed, yes.

Mary Wong: This is Mary. I think I may have audio now so can I get in the queue?

Petter Rindforth: Please.

Mary Wong: I'm happy to go after George.

Petter Rindforth: Well we have – actually waiting for your comment so please.

Mary Wong: Oh actually I was listening to Steve and so I'm not going to say anything different from him or from Susan. But maybe just to clarify, and apologies for any background noise, I'm in an airport. So essentially the Guidelines don't

actually have a step where it says you must open something called a formal consensus call; it doesn't define what that is. The iterative process is as described by George and Steve very generally. But the typical practice is that at a stage where – and this followed the spirit and scope of what George cited earlier – at a stage where the leaders of the group believe that the group has discussed the various proposals sufficiently, then we start the consensus process. So maybe that's a better way to describe it.

And from the staff's perspective, we actually are in the consensus process but typically, like I said, the Council does – other working groups typically have something where they write to the mailing list and say, okay this is the formal consensus call period. And as we've said this – we're suggesting that this be to the 8th of June for reasons that Steve has already explained.

One unusual aspect of this PDP, unlike most of the others, is that for these six options, despite months of discussion and various calls that we've had, it does seem like we're at a position where a few members support one or two, some members can support several with a preference for one over the others, with some conditions. George suggested that it may be possible to combine them and there are some that will only support one option. So in this kind of situation, given that the Working Group Guidelines really encourage that kind of discussion iteration, given that they don't actually specify, you know, what goes into a formal consensus call and what not, our advice based on our experience is to launch that period so that all the members are on notice, as they should have been already, but really we're looking at the last lap here.

But by 8th of June everybody should have had the opportunity to voice what it is that they really do and do not support. And at any time in this process, I think Susan said, it's possible that we might coalesce around one thing that emerge or that, you know, folks change their mind, at which point of course Petter and she can say, wow, we've got consensus on this. But if by 8th of June we're still in this position where, you know, it's not possible, it's hard to

discern any clear consensus, then of course at that point Petter and Susan will have to say, okay, this is what we're going to designate as consensus levels.

And it may be that – it may be – and I'm not, you know, saying that this will happen but it may be that for each of the six options there's strong support and significant opposition for more than one, no clear consensus for any one, or divergence for some of them, and that is exactly what Petter and Susan will have to do. And as Susan was saying, then maybe we'll have a call then before we actually close on the final report, allow people to file minority statements and that's it.

I hope that's clear, Petter, I'm sorry to go on for so long.

Petter Rindforth: Thanks. And I think it was worthwhile to actually listen to the details there again so that we know what we are going to do the upcoming, let's say, 14 days left before we actually make our conclusion. George.

George Kirikos: Yes, George Kirikos here. Yes, yes I think we're just arguing with the terminology, like the – it's really the designation of the consensus levels that really we're arguing about whether that's the start of the consensus process. Like this next two weeks or whatever, I would have just considered that a pre-designation level period, which is, you know, discussions, which is fine by me like I'm just trying to get the precision as to the terminology. In the Section 3.6 iterative process that only starts after those designation levels are set by the chair and the liaison in this case.

And so if there was to be iteration afterwards, it would be triggered I guess now staring June 7 or whatever that date in June was, two weeks from now. So obviously it depends on what happens the next two weeks but if there's no – if people don't coalesce towards options or consensus level designations that everybody agrees with, you know, they might disagree with the actual options but they agree on the consensus levels and obviously June 7

everybody is prepared to send the final report as-is. But if people actually disagree with the level of designations then it could go on a little bit longer if we have to, you know, argue about those designation levels. Thanks. That's all I wanted to point out. Thank you.

Mary Wong: Petter, this is Mary again. Can I just jump in real quick, not to disagree...

((Crosstalk))

Petter Rindforth: Of course.

Mary Wong: ...but to clarify one point?

Petter Rindforth: Yes.

Mary Wong: Yes, and George, you know, right so and that's why we're suggesting 8th of June, you know, just in case we do need to have that further discussion and of course to allow for any minority statements should that be, you know, where we end up. But I wanted to clarify that in terms of the iterative process, and I don't think that's what you meant to say but for members of the group who may not be as familiar with the Guidelines, the iterative process is, you know, is going on and will continue to go on until we arrive at our final report.

It's not that when we have objections or when there's been a change that it sort of reset the clock like goes back to the beginning; it is essentially an ongoing discussion amongst members of the working group. So this might be semantics and the distinction about a difference but I thought it might be helpful to clarify that it's not that, you know, we have time periods that go back and get reset every time something changes. Thanks, Petter.

Petter Rindforth: Thanks.

((Crosstalk))

Petter Rindforth: Is that a new hand from George?

((Crosstalk))

Petter Rindforth: Then can I also add a question to you that you can reply on the same time? We talk about all the options we have, and the possibility to make a little bit fewer, are you still in – I mean, I guess Option 2 that I think what's your suggestion is, is that still something you would like to see on the list from what I remember when we had our informal comments on all the options it was not so many that voted for that. And it's also kind of mid-suggestion. So I just wanted to – if you would like to make comments on if it's still something you think should be there.

George Kirikos: George Kirikos here. Just to address the last point first, yes, I think it's still a relevant option because I wanted to address it in a minority report on that aspect. Like I'll probably – I might be in the majority but I still thought it was an attempt at a compromise that should be mentioned somewhere in the report so I don't want to have it go into a black hole, I think it should still be in the final report. After the process, I don't know if staff can put up the actual page 9 of the link I just posted that has the exact text, which says, "After the group has discussed an issue long enough for all issues to have been raised, understood and discussed, the chair or cochairs make an evaluation of the designation and publish it for the group to review."

In my mind that's where it's – that's – in my mind that's the consensus process starting. And then step 2, it says, "After the group has discussed the chair's estimation of designation, the chair or cochairs should reevaluate and publish an updated evaluation." And then Step 3, "Steps 1 and 2 should continue until the chair or cochairs make an evaluation that is accepted by the group." So and then in Step 4, "In rare case, a chair may decide that the use of polls is reasonable." And so that Steps 1, 2 and 3 seem to be starting when the designation levels are specified.

And now it seems as though we're going to have those designation levels specified earlier for the first four recommendations, then the fifth recommendation because the fifth recommendation still has the six options. Is that correct? Because that's really what I was asking about earlier so if it's possible to put that up like Page 9, yes, there it is, you can see the Steps 1, 2 and 3, that's really what we're deciding the timing of. It seems that for Recommendation Number 5 that Step 1 will be two weeks from now but for the first four recommendations that'll be like next week, is that correct? Thank you.

Mary Wong: Petter...

Petter Rindforth: Yes, George, just a quick comment on that. That's actually what Phil and I planned to do last year in December. So I'm not sure now that we have all that time to make all these steps and there I turn over to Susan to comment on that.

Susan Kawaguchi: So, you know, in my opinion as liaison that, you know, this is – this Step 1 has been in place for months and months. And maybe not – maybe we have – there's not been official designation but there's definitely been, you know, the first four were somewhat agreed upon and then those other six options for Rec 5 have been discussed and on the thread for months upon months. So I don't agree that we're going to come back next week and tell you a designation and then we go on with a discussion and discussion.

As we outlined it – as I outlined it earlier and I think, you know, Steve and Mary both said the same thing, is we're starting the consensus call today. And everybody can provide their input. We'll take that – Petter and I will make a decision on the designation – level of designation. And then we'll have one more call to decide – for everyone to provide the input and to file minority statements.

Mary Wong: May I jump in here, Petter, as well? This is Mary. And I'm sorry I can't raise my hand.

Petter Rindforth: Please go ahead.

Mary Wong: Yes, and thank you, Susan, I think you explained it much more clearly than when I tried to do it. So let me just emphasize that in this situation, which is unusual, you know, it's not a situation where we have the formal designation but the hope is that in the iteration that you've described and that has been ongoing, that there can be something that you can call consensus on. And at the end of that period of 8th of June you will, you know, take a look at all the contributions that have come in on the existing six options, you and Petter, and then, you know, you would have to say okay, for purposes of the final report, here is what we think is for each of the six options.

Of course ideally, you know, we should be at a stage where we're not talking about six options, we're talking about an actual Recommendation 5 for which Petter and you can actually say, as of today, this is our designation preliminarily, the same way that you would do for the four other recommendations. But we're not in that situation, and so that's why, you know, from the staff experience, this would be the way to allow for everyone to put in their views for the – especially for those who may not have had the opportunity so that you and Petter will have all the information you need based on all the months of discussion, and on the mailing list discussions by the 8th of June.

And then at that point, right, and going back to what George was saying, at that point certainly, you know, there will be that discussion between the 8th and the 17th as to whether or not you guys got it right, as to whether or not folks feel that even if you got it right they want to file a minority statement. So thank you for clarifying, I just wanted to supplement that. Thanks, Petter and thanks, Susan.

Petter Rindforth: Thanks. George.

George Kirikos: Yes, George. Two points. First, I think we should still have a call next week and the week after just to make sure that we're moving ahead productively. But just going back to what Susan said, I think it still kind of misstates what the actual designation level is. Like read point Number 1, it says, "After the group has discussed an issue long enough for all issues to have been raised, understood and discussed, the chair or cochairs make an evaluation of the designation and publish it for the group to review."

So there's never been a designation of the levels, like Susan has said, has been going on for months but one of the designation levels have – have been specified by the chair, that will actually be the very first time that's been done. So that puts us in Step Number 1. And then Step Number 2 is, "After the group has discussed the chair's estimation of designation, the chair or cochairs should reevaluate and publish an updated evaluation." So that, you know, might take a week, as she suggested, but it might, you know, be in dispute so – and then Step 3, you know, you iterate.

So I think we're talking about the same thing, I just want to make sure that, you know, we're actually following the process so I don't mind having another week or two making sure that everybody has their views set, but to the point that I was trying to make is once those initial designations levels are published, that puts us in Step 1 of that procedure and then the normal procedure should follow. So I don't know whether that's going to be this week or whether it's going to be two weeks from now. But that's when we enter Step 1. Thank you.

Petter Rindforth: And Petter here, noting that we only have a few minutes left on the meeting today. May I first say that I'm glad that we had the possibility to discuss the other topics and made a good decision on those that needed some slightly amendments. We will also see in the nearest day, the final suggested text on those so that we can make our decisions on that part.

And also I presume that we will, in the nearest day, we'll see again the final text of all these six options in case there are still six active options so that we next week can make – maybe focus on those and just discuss them, clear (unintelligible) that we have specific time limit on each option so that we can discuss each of them and see if we by then also can conclude that one or two or three may be is not something that is of further interest for us and conclude which options of these six – six of them that we still have to make comments and decisions on the full working group and see if we can reach a majority. And I know that there will be – I'm pretty sure that there will be at least one or two minority views also.

Phil.

Phil Corwin: Yes, thanks Petter. Phil for the record. One, I wanted to just put in the chat a few minute ago on the working group email list I circulated a proposed modified language on the subsidy for IGO issue for group consideration. Feel free to modify it as just to make clear that we're not recommending that, we're just recognizing that that's an issue to – between the Board and the GAC and IGOs.

On the consensus call, it seems to me that when you go – well two things on that. Number one, on the language being displayed, it says, "The recommended method." Recommended means preferable but not exclusive so there's flexibility within these guidelines. And second, on the next page of those guidelines, there's some more language which I think is helpful. It says, "Consensus calls should always involve the entire working group and for this reason should take place on the designating mailing list to ensure that all working group members have the opportunity to fully participate in the consensus process. It's the role of the chair to designate which level of consensus is reached and announce that to the working group."

So that language seems to imply that the exact process being contemplated to start in about three minutes, which is open up – circulate the four recommendations and then the six options on the other recommendation, among the working group, have them opine, which they support, which they oppose, and then have the chair designate the level of consensus. So I think that additional language is not being displayed is perfectly consistent with the process that's being contemplated. Thank you.

Petter Rindforth: Thanks, Phil. And Susan, you will have the last voice of today, please.

Susan Kawaguchi: Thank you, Petter. I just wanted to thank the whole working group for the lively discussion today. Petter and I and staff will regroup and as we've stated, we'll start the consensus call and each and every one of you will have the opportunity to provide that – the level of support for those six options in 5 and the other four. So we will be moving this working group on into the consensus process and forward to the final report. So I wanted to thank you all.

Petter Rindforth: Here. Here. Thanks for today and we'll meet again on the traditional working group time next week. Thanks.

END