ICANN Transcription
Review of all Rights Protection Mechanisms (RPMs)
Thursday, 29 October 2020 at 17:00 UTC

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JULIE BISLAND: All right. Good morning, good afternoon, and good evening, everyone. Welcome to the Review of All Right Protection Mechanisms (RPMs) in All gTLDs PDP Working Group call on Thursday the 29th of October, 2020. In the interest of time, there will be no role call. Attendance will be taken by the Zoom Room.

And I would like to remind everyone to please state your name before speaking for the transcription and please keep your phones and microphones on mute when not speaking to avoid background noise. As a reminder, those who take part in ICANN multistakeholder process are to comply with the Expected Standards of Behavior. With this, I will turn it over to Phil Corwin. You can begin, Phil.

PHILIP CORWIN: Thank you. And good morning, afternoon, and evening to all our participants. I want to note that this is a day that some of us felt might never come—that after four and a half years, this is the final regular meeting of this working group. We may have one more meeting if the working group members wish to discuss the co-

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chairs' designation of the consensus levels for each of the recommendations. We can schedule that in a few weeks. We'll be going through that process later on this call.

So, I want to thank all the members of this working group, those with us on the call today and all those who have participated over these many years, for their diligent efforts. I want to thank my co-chairs. Kathy is with us. Brian has family matters and may not be on the call today but we thank him. And of course, we thank our dedicated and diligent staff for their untiring efforts on our behalf and we thank our Council liaison, John McElwaine.

We couldn't have done it without everyone. So, we all deserve to give ourselves a round of applause. And you all have to find something else to do with three hours of your week after this working group ends. I'm sure you can find something equally or more productive and certainly more enjoyable. So, thanks to everyone.

And with that, let's get rolling. Does anyone have updates to their statements of interest, after which I'll review our brief agenda? So, I'm hearing no SOI updates. Our agenda is quite short. So, maybe we won't need to spend the full 90 minutes on this call but we'll see. We're going to review two final sections of the final report, which I believe are all worked out and all we'll have to do is review that for our information. Can we go back to the agenda so I can finish reading it? Thank you.

Following that—and those items, hopefully, will take no more than a few minutes each, those two items—staff is going to take us through the consensus call process, which is set out in the GNSO

Working Group Guidelines. It's somewhat flexible. The co-chairs will answer any questions that working group members want to raise about that. But we'll say more about that when we get to item number three. And does anyone anticipate any AOB at the end of the call? Well, that's good.

So, let's get right into reviewing the two final draft final reports sections that needed to be agreed to. And I think they're all worked out, since the last call, but staff will take us through that. Go ahead.

ARIEL LIANG: The final added to the background section is related to the EPDP-related deliberations by the working group. And that's mainly to incorporate Kathy's proposed edits and present the text that's effectual and also concise. So, I'll just walk you through what has been changed.

On page 11, the bottom, and top of page 12, the crossed-out sentence is that, "and provide no objection to incorporating the staff-proposed approach in finalizing relevant recommendations relating to the URS and their contextual language." So, based on input from Kathy, that's what we propose, is to delete this phrase here.

And then, after that is … Sorry. Just one moment. Let me pull to the right page. And after that is on page 19. The second paragraph has gone through some revised changes. And we have crossed out the similar sentence here. It's to delete, "and provide

no objection to incorporating the staff-proposed approach in finalizing relevant recommendations relating to the URS."

And then, adding a couple of new sentences here. It's, "When finalizing its Phase 1 recommendations, the working group confirmed that its final recommendations are consistent with the EPDP Phase 1 recommendations, as well as the analysis in the Wave 1 report. Specifically, the working group provided further notes regarding the consistency in the contextual language of the URS final recommendations number one, number two, number four, number 5, and number 11." Actually, we need to put a "and" here. So, that's all for this revised content in the background section.

And I still just want to double check. Do you want staff to also walk through the final agreed text related to the geographic indications recommendation?

PHILIP CORWIN: Yeah. Just briefly take us through it so everyone understands what the final resolution is. And if anyone has any questions or comments, they can make them at that time.

ARIEL LIANG: Okay. Sounds good. So, I will just quickly go through the final agreed contextual language related to TMCH final recommendation number one. And as you can see, the redlines are in green and pink color on this Google Doc. And I will just read the changed part.

So, after the sentence in the second paragraph on the context, "During its deliberation, the working group coalesced around the following ideas: One, mandatory RPMs should only be for trademarks, not other source designations that do not function as trademarks, including geographical indications. Two, while such other designations can be entered into an additional or ancillary database maintained by the TMCH validation provider, they are not eligible for sunrising claims. And three, the ability for the TMCH validation provider and registry operators to offer additional or voluntary ancillary services to such other designations should be preserved, e.g. via an ancillary database."

And the following paragraph, the first sentence had some redline edits. And I'll just read the final sentence. "The working group ultimately agreed that the policy principles contained in the recommendation text reflect those ideas and frame the suggested amendments to the Applicant Guidebook (AGB) text in the implementation guidance."

So, that's what has been agreed on by the working group. We see no objection to what's written—suggested in the working group mailing list. So, that's what will go into the final report.

PHILIP CORWIN: Thank you, Ariel. And I want to thank Paul Tattersfield, Professor Tushnet, Griffin Barnett, and everyone else who contributed to this final resolution of this language, which conforms to a recommendation that's pretty clear on its face. But it's always good to have background language that's consistent and correct.

So, we thank everyone who worked on that one. And you can go ahead.

ARIEL LIANG: Thanks, Phil. I'll just show, quickly, two other edits we made after Tuesday's meeting. We slightly edited the next steps content. I'll just read the final text here. "This final report will be submitted to the GNSO Council for its consideration and potential approval. If approved by the GNSO Council, the final report will then be forwarded to the ICANN Board of Directors, for its consideration and potential action, in accordance with the ICANN Bylaws." So, that's the next steps revised text.

And similarly, we made a similar edit to the conclusions and next steps in the executive summary section. And I'll just read the final sentence. "This final report will be submitted to the GNSO Council for its consideration, and if approved, forwarded to the ICANN Board of Directors for consideration and potential action in accordance with the ICANN Bylaws." So, that's the final changes.

PHILIP CORWIN: Okay. And I think everyone's fine with all of that. I think everyone's aware, from ICANN 69, that there's a discussion going on of something called operational development phase. It's just being considered now. I don't know what the outcome will be of that. I don't know if the Board will want to apply that to an interim stage before the IRT for these RPM recommendations, when we make them final. But we'll just see how that plays out. But our role in shaping the recommendations is just about done.

So, anyone have any comments on any of the changes we just went through? If not, we'll proceed to discuss the consensus call process. All right. And Steve Levy, I note your comment in the chat. And I can tell you, had I known it was going to be four and a half years when I accepted this role, much less some of what we had to go through to get to this day, I don't know if I ever would have signed up.

STEVE LEVY: That's why we didn't tell you.

PHILIP CORWIN: But once I was committed, I was committed.

STEVE LEVY: You should be committed.

PHILIP CORWIN: Sometimes I felt like I should be committed.

STEVE LEVY: Thanks, Phil.

PHILIP CORWIN: Yes. All right. Let's go on to the Working Group Guidelines to discuss the consensus call process. And I want to say one thing before staff starts speaking here. And I think it reflects a view among all the co-chairs. The top two designations for things that

are going to make it through are full consensus and consensus. And I know that personally, I'm expecting and will be extremely disappointed if all our final recommendations don't get one of those two designations. I know no one in the working group wants to disappoint me.

And I say that because, frankly, everything in our final report already has a very high level of support. It's in there because it has broad support and a low level of opposition. And I don't know of any festering controversies where there's a significant group that's very unhappy with any final recommendations. Now, you're of course free to designate any support or opposition to any recommendation, as you believe is proper. But I think we're in a good position to see our final recommendations go on to GNSO Council adoption and Board adoption after that.

So, with that editorial comment, I'm going to let staff take us through the somewhat amorphous but extremely important consensus call process. Julie, please go ahead. I see your hand-up notification.

JULIE HEDLUND: Yes. Thank you. I'm going to read through what you see in front of you, just to make sure it's clear for all, including calling out some of the footnotes. There is also important information in the footnotes. Since we do have time on this call, it's worth, I think, focusing on exactly what the Working Group Guidelines say. And then, we can try to answer any questions that you have as well. So, I'm starting at section 3.6, the standard methodology for

making decisions. This is in the GNSO Operating Procedures and the Working Group Guidelines.

"The chair will be responsible for designating each position as having one of the following designations: Full consensus, when no one in the group speaks against the recommendation in its last readings. This is also sometimes referred to as unanimous consensus; consensus, a position where only a small minority disagrees but most agree; strong support but significant opposition, a position where, while most of the group supports a recommendation, there are a significant number of those who do support it; divergence, also referred to as no consensus, 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's due 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."

I'm going to turn to the footnotes here. There is a link to other best practices. I won't read that out. There is an important note about designations. "The designations 'full consensus,' 'consensus,' and 'strong support but significant opposition' may also be used to signify levels of 'consensus against' a particular recommendation, if the consensus position of the working group warrants it. If this is the case, any 'minority view' will be in favor of the particular recommendation.

"It is expected that that designations of 'consensus against' will be rare and working groups are encouraged to draft and revise recommendations so that a level of consensus can be expressed

'for' rather than 'against' a recommendation. However, it is recognized that there can be times when a 'consensus against' designation is both appropriate and unavoidable as a practical matter.

"A 'consensus against' position should be distinguished from a position of 'divergence' or 'no consensus,' which is applied where no consensus has emerged either for or against a recommendation (i.e. the consensus level of the working group cannot be described as 'full consensus,' 'consensus,' or, 'strong support but significant opposition,' either for or against a recommendation."

And number four footnote, "For those that are unfamiliar with ICANN usage, you may associate the definition of 'consensus' with other definitions and terms of art, such as rough consensus or near consensus. It should be noted, however, that in the case of GNSO PDP-originated working group, all reports, especially final reports, must restrict themselves to the term 'consensus,' as this may have legal implications."

And Mary Wong notes in the chat, "This foot note on consensus against was added for clarity after a previous PDP group ended up in this position. Staff does not see it as an issue arising in this RPM PDP." Exactly.

Let me move along to the next page and the final bullet, minority view. This "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 is neither

support nor opposition to a suggestion made by a small number of individuals.

And Mary also notes—Mary Wong, in the chat— "This footnote on consensus can be contrasted, for example, in the ICANN context, with GAC 'consensus,' which uses the international law custom instead."

Moving along, "In cases of consensus, strong support but significant opposition, and no consensus, an effort should be made to document that variance in viewpoint and to present any minority view recommendations that may have been made. Documentation of minority view recommendations normally depend on text offered by the proponents. In all cases of divergence, the working group chair should encourage the submission of minority viewpoints.

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

"After the group has discussed the chair's estimation of designation, the chair or co-chairs should re-evaluate and publish an update and evaluation. Steps two and three should continue until the chair/co-chairs make an evaluation that is accepted by the group.

"In rare case, a chair may decide that the use of polls is reasonable. Some of the reasons for this might be a decision needs to be made within a timeframe that does not allow for the natural process of iteration and settling on a designation to occur," or, "It becomes obvious after several iterations that it is impossible to arise at a designation. This will happen most often when trying to discriminate between consensus and strong support but significant opposition, or between strong support but significant opposition and divergence.

"Care should be taken in using polls that they do not become votes. A liability with the use of polls is that in situations where there is divergence or strong opposition, there are often disagreements about the meanings of the poll questions or of the poll results.

"Based upon the working group's needs, the chair may direct that working group participants do not have to have their name explicitly associated with any full consensus or consensus view position. However, in all other cases and in those cases where a group member represents the minority viewpoint, their name must be explicitly linked, especially in those cases where polls were taken.

"If a chartering organization wishes to deviate from the standard methodology for making decisions or empower the working group to decide its own decision-making methodology, it should be affirmatively stated in the working group charter.

"A consensus call should always involve the entire working group, and for this reason, should take place on the designated mailing

list to ensure that all working group members have the opportunity to fully participate in the consensus process.

"It is the role of the chair to designate which level of consensus is reached and announce the designation to the working group. Members of the working group should be able to challenge the designation of the chair as part of the working group discussion. However, if disagreement persists, members of the working group may use the process set forth below to challenge the designation.

"If several participants in a working group disagree with the designation, given a position by the chair or any other consensus call, they may follow these steps sequentially: send email to the chair, copying the working group, explaining why the decision is believed to be in error. If the chair still disagrees with the complainants, the chair will forward the appeal to the CO liaison—" that's the chartering organization liaisons.

"The chair must explain his or her reasoning in the response to the complainants and in the submission to the liaisons. If the liaisons support the chair's position, the liaisons will provide their response to the complainants. The liaisons must explain their reasoning in the response. If the CO liaison disagrees with the chair, the liaison will forward the appeal to the CO.

"Should the complainants disagree with the liaison's support of the chair's determination, the complainants may appeal to the chair of the CO or their designated representative. If the CO agrees with the complainants' position, the CO should recommend remedial action to the chair.

"In the event of any appeals, the CO will attach a statement of the appeal to the working group and/or board report. The statement should include all of the documentation from all steps in the appeals process and should include a statement from the CO." That is the end of section 3.6. Over to you, Phil.

PHILIP CORWIN: Yeah. Thank you very much, Julie. And while we had to go through all of that, I think it's my belief and the belief of the other co-chairs and staff that most of that is not going to be relevant to our consensus call process, again because of the working procedure we adopted where recommendations had to have broad support and low levels of opposition to make it to this point. We'd be surprised if there's significant opposition to any of these recommendations.

And let me say a few more things, based on a call that the co-chairs and the liaison had with staff yesterday. And when I'm done, staff can correct anything I misstate. After this call, we're going to open a 10-day process on the email list, in which all working group members can state on the email list their support or opposition to any of the recommendations in the final report. If any member posts nothing, we're going to presume that they support the recommendations because again, the recommendations got to this point by having broad support. So, if you say nothing, it will be presumed that you support it.

After that 10-day period, the co-chairs will review with staff all the postings to the email list and hopefully we'll be able to agree on consensus designations for each and every one of the final

recommendations in the report. We will share those preliminary designations with the working group.

If they're accepted, great. If people have issues with any of them, we can schedule a final meeting of the working group to discuss anyone who believes the co-chairs have made an error in those designations. If we can't resolve it, we might have to go to this procedure outline, in the end, with 3.6. But hopefully that won't happen because that could delay our delivery of the final report and violate our timeline.

It was mentioned here but every member of the working group has a right to file a minority statement, taking issue with any of the recommendations. Minority statements are restricted to recommendations in the final report, not to things which didn't make it into the report that you're unhappy about.

So, I'm going to stop there. Did I make any mistake, staff, in describing the process going forward or was that correct?

JULIE HEDLUND: That was correct, Phil.

PHILIP CORWIN: All right. Well, I'm glad I understand it. So, with that, let's open it up to questions, if any members of the working group have questions about the consensus call process, which takes place on the email list over the next 10 days, following the close of this meeting. Now's the time to ask your questions, if anything's not

clear. Of course, if you think of a question later, you can post it to the list. I'm not seeing any hands or hearing anyone shout out.

Yeah. And as Kathy points out, and I think was clear from the opening, this is our last regular meeting. The only additional meeting we may hold, if necessary, is a meeting of the co-chairs with the working group members, if there's significant disagreement with any of the designations of the consensus level for any recommendation determined by the co-chairs. But otherwise, we won't be getting together again on a call, just on the email list.

And that would be on the 12th of November. I believe our target date for delivery of the report is the 25th of November, the day before US Thanksgiving. And the intervening period is for—give staff an opportunity to make, if necessary, any final changes to the report and add the consensus levels and for members to draft and submit their minority statements, if anybody has any.

So, anybody have anything to ask or to say about that? Steve, on Phase 2, that's really up to Council. I anticipated that will be in the first quarter of 2021. But I think everyone's aware that Council wants to recharter Phase 2 in a matter that's consistent with PDP 3.0 principles so that hopefully the Phase 2 review of the UDRP does not take another four and a half years but can be done in a more expedited manner.

One problem they won't have in Phase 2 is that there's tons of data that the UDRP, particularly at WIPO and there's also a historic record at the FORUM. So, they won't have the data challenge that this working group faced. But it does have more

complex issues to consider. But hopefully the charter can expedite Phase 2.

Okay. Lori, I see your note. I'll be attending some of those INTA meetings, too. We may not even have to have that meeting. And if you or INTA, as an organization, have any issues with the co-chair consensus designations, we'll consider them—whatever you submit in writing—if you or a substitute can't …

Oh. Staff, one more thing. Could you just speak to the difference between the consideration of working group member views when they're submitted in an individual capacity or when a constituency or a stakeholder group designates one of the working group members to submit a statement on its behalf?

JULIE HEDLUND: Hi. I may ask Mary Wong to chime in as well. Part of the consideration, or difference I should say, is if a working group member is representing an organization, a constituency, a stakeholder group, then we would expect that they would be consulting with their group concerning their position on the recommendations. An individual, of course, will not be doing that.

In looking at the designations, when the chairs are developing the designations, it may be important, depending on the responses received, to consider whether a designation is from a working group member that's representing a constituency or stakeholder group or whether or not that is an individual. It may be necessary to consider, for example, if several working group members who represent groups are in opposition of a recommendation and

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maybe just a few individuals are supporting a recommendation. Then, that may change the way the chairs make their designation, given that you might have working group members, perhaps, in opposition who might represent—or in support—that might represent, really, a large group or set of groups.

So, anyway, there's a good deal of flexibility. You'll note that there isn't guidance in the Working Group Guidelines on how that decision is made. So, there's a good deal of flexibility there. I hope that's helpful, Phil. But Mary can chime in.

PHILIP CORWIN: Yeah. I think that's helpful. And I think in practical terms … Let me use an example here. I see my former BC colleague and current BC councilor, Marie Pattullo on the call here. If Marie submits a statement in an individual capacity, opposing a certain recommendation, we'll certainly take note of it—we, being the co-chairs.

If she submits that on behalf of the entire BC, it will have somewhat more weight as we try to reach our collective judgment on what the level of consensus is. And then, if you submit it for AIM, we'll take consideration of that, that it's submitted on behalf of an organization with substantial membership, just as if Lori submits a statement on behalf of INTA, rather than an in an individual capacity. We'll take note.

But again, we're not expecting significant opposition to any of the recommendations. We'll see what happens. But just if you're

submitting on behalf of an organization, or a stakeholder group, or a constituency, make that clear when you post to the email list.

And I saw Paul McGrady had a question about when do we send out the email initiating the consensus call process? I assume that's shortly after this call, later today. Is that correct, staff? Tomorrow. Okay. So, the clock starts running tomorrow. And after we deliver our report, anyone who wants to start a 12-step recovery program for working group members will have my full support.

All right. Any other questions or comments? Okay. Kathy, I see your hand up. Do you have some final comments as co-chair or any other thing to say? Go ahead.

KATHY KLEIMAN: I do, especially as this may be our last time together—our last time with many of the people on the call, due to a conflict. I just wanted to thank everyone. I will remember the data that decided we needed, the data we went out and collected, the data we worked through together, the tables we created, and then all the discussion and debate that we had. Really want to thank everyone.

And 12-step program notwithstanding, in all seriousness, I hope ICANN will allow us to have, at whatever point we get together, the traditional reception that marks the ending of a PDP process and a review team because I think we all deserve a drink or more.

And thank you. Thank you to everyone for the tremendous discussion that took place in this working group, and the

tremendous work, and the longevity of people. Everyone stayed with us. Thank you so much.

PHILIP CORWIN: Okay. Well, thank you, Kathy. And it's a shame the Brian can't be with us today but as noted, he's tied up on a family matter. But we had a good co-chair team. Even when we disagreed, we did so in an agreeable way and we worked things out, and hopefully didn't show too much of the behind-the-scenes tension out in public. The tension was rare but it did occur, as anyone would expect over four and a half years.

So, does anyone have any other business? All right. Well, I think we can wrap this call. Thank you, again, to staff, co-chairs, liaison, working group members. It's taken a long time to get to this point. I think we've got a good, solid report. Everyone's a little disappointed that something they wanted didn't get into it. But everything that is in it has good support and makes meaningful change to the rights protection mechanisms for the next round of the TLD program so we can take pride in the quality of our work and the dedication it took to get to this point.

So, we welcome all your feedback in the consensus call. Remember, if we don't hear from you, it's presumed that you support all the recommendations. That doesn't stop you from going on record, saying that you support this one or that one for some particular reason or have concerns about any of them.

So, thanks again. This is our last scheduled meeting. We'll have the meeting on November 12th if there's any significant

disagreement with the co-chair consensus level designations. Otherwise, we are done. And you'll all get a virtually-autographed copy of the final report. So, thank you and good-bye. This meeting is over.

JULIE HEDLUND: Thank you very much, Phil.

PHILIP CORWIN: And this working group is almost over.

JULIE HEDLUND: Thank you very much, Phil, for chairing today's meeting and for closing us out. And thank you, everyone, for participating and for all your hard work for all these years. This meeting is now adjourned.

[END OF TRANSCRIPTION]