
ICANN Transcription
Review of all Rights Protection Mechanisms (RPMs)
Wednesday, 08 July 2020 at 17:00 UTC

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JULIE BISLAND: Hey, everyone. Welcome. Good morning, good afternoon, and good evening. Welcome to the Review of All Rights Protection Mechanisms (RPMs) in All gTLDs PDP Working Group call on Wednesday, the 8th of July, 2020.

In the interest of time, there will be no roll call. Attendance will be taken by the Zoom room.

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With this, I will turn it back over to Phil Corwin. Go ahead, Phil.

PHIL CORWIN: Welcome, everyone. Anybody have any updates to their statement of interest?

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All right. I don't see any hands and I don't hear anyone, so we'll get into the substance of the meeting. We've got a lot of individual proposals scheduled for today.

Let's start with #1. Julie, we're going to have to shrink that down a little. We can't even read the full proposal. Okay. All right. This is Individual Proposal 33. The proposal is that all current and future URS providers to be brought under formal fixed-term contract with ICANN instead of the current MOU and they should not have presumptive renewal clauses. I guess that means the implications is that they will be for fixed terms and require—I don't know what would be required—reapplication or what but they would not be contracts in effect, long-term, I assume. If that's the implication of that statement, they're have to be some review process/reapplication process—something.

Then there's an associated question. What additional elements, if any, need to be included to enhance ICANN's MOUs with URS providers and enforce their compliance. That question is about enhancement of MOUs, which are a form of contract. Yet, the proposal is to replace MOUs with a more formal contract. So the question is a bit disconnected from the proposal.

When we look at the donut, we see that about half of those who did comment support it as written. 12% didn't support, and a remaining 37/38% had nothing to say about it.

Most of the highlights are either saying there's no real problem that this proposal is addressing or I'm not supporting the proposal. The non-supporters include WIPO, the FORUM, which is the largest U.S. provider, [an IP coalition, the Com Laude company,

the Intellectual Property Constituency, and INTA, which [are] pretty much focusing on saying there's no reason for this and that the MOU as is is okay.

I don't know if it's on the screen. I'm looking at the actual document on a separate webpage. The BC supported this. The NCSG supported it. We already went through the opponents.

I guess let's look at the answers to the question and then we can get into a discussion of what to do with this proposal [Basically], what enhancements are needed that the MOU doesn't have? Performance standards, complaint procedures, panelists complaints, procedures for de-accreditation. Some say [there's got to be] an application for renewal for license after a fixed period. Then a whole lot of people didn't respond to the question.

All right. We've got a proposal here at a 4:1 ratio of support to opposition. Had about 40% not commenting. The principle enhancements are various procedures and a contract that's not for a fixed term that would only terminate if there were complaints or non-compliance with the contract but something that requires actual reaccreditation or renewal—something of that sort. It's not very specific.

Open for discussion. What should we do with this proposal?

Mr. Muscovitch?

ZAK MUSCOVITCH: Thank you, Phil. You can hear me?

PHIL CORWIN: I can hear you fine, Zak.

ZAK MUSCOVITCH: Okay. I guess the question that we're fundamentally asking with this procedure is whether this individual proposal could get the consensus of the working group. Is that basically the question, Phil?

PHIL CORWIN: Well, at this point, the question we're asking is, do we send it along to the working group to be [part of] something that's addressed in the consensus call. We're not going to decide today if there's going to be consensus. Basically, at this stage, we're deciding which of these individual proposals go no further, which needs substantial work, and which go forward pretty much as-is for consensus call consideration.

ZAK MUSCOVITCH: But, Phil, isn't on the yardsticks we're supposed to apply here whether this can conceivably get consensus on the working group. I seem to recall that that's one of the yardsticks we used previously.

PHIL CORWIN: Well, we're looking at the community comments, Zak. Some of the commenters are also on the working group. Again, our practice has been, with something like this where there's just over 50%

support—there's some substantial opposition—much to say that this will go up to the consensus call. Whether it can get consensus within the working group I don't know at this point. We would need to fill in some details of what, if we were to recommend in the final report that the MOU be replaced with a more robust contract ... We're going to have to agree on some elements for enhancement of the MOU to give guidance to the IRT. But we're really not at that stage today. We're really at the stage of, should this go forward to the consensus call, and with what considerations?

ZAK MUSCOVITCH: Okay. Thank you, Phil.

PHIL CORWIN: [inaudible]?

UNIDENTIFIED MALE: Not yet. I'll hear what other people have to say. Thank you.

PHIL CORWIN: Okay. Next up is Kathy.

CLAUDIO DIGANGI: Phil, it's Claudio. Can I get in the queue?

PHIL CORWIN: Sure, Claudio. You're just on phone?

CLAUDIO DIGANGI: I'm on double. I think I'm connected online and also on the phone.

PHIL CORWIN: All right. Well, I don't see your hand up. If you're online, always raise your hand rather than a vocal intervention.

CLAUDIO DIGANGI: Oh. I gotcha.

PHIL CORWIN: Okay. All right. Zak, you can put your hand down. Kathy?

KATHY KLEIMAN: Thanks, Phil. Just for the purpose of moving the discussion along, let's take a closer look, if that's okay, at the support. So 59% support as written, which is a big group. What's interesting is it's a combination of academics. BC supports. Non-Commercial Stakeholder group supports, as you pointed out. So what I'm wondering is whether it would help to sever just a little bit and whether there's a basis for this. The proposal is actually two parts—that all current and future URS providers should be brought under formal fixed-term contract with ICANN instead of the current arrangement's MOU. That was actually one of the original recommendations of the STI. Then those contracts should not have any presumptive renewal clauses.

So let me raise it to the group. Is it really the second part—the no presumptive renewal clauses—that’s giving groups the concern?

Obviously, my personal view is, if you’re doing a good job, as some of our providers are—they’re doing an outstanding job—why not continue? But the idea of making it a formal fixed-term contract seems to have enormous report. So would it make sense to sever these two parts of the proposal and go forward with one? But I do think this goes forward to the full working group because of the statistics that we’re looking at. And the diversity of support. Thanks, Phil.

PHIL CORWIN:

Thank you, Kathy. David McAuley, you’re up next.

DAVID MCAULEY:

Thanks, Phil. I was struck by this because I tend to agree with Kathy. There is support to have a formal contract. So we ought to in fact kick this to consensus call, it seems to me. But the request for support really had: with no presumptive right of renewal and no other guidance on what a contract would look like. You rightly pointed out, Phil, that we could use the answers to the question that’s part of this thing to look at elements that might be thrown into a contract.

There I get to a point that Paul Tattersfield raised in a chat. That is, is there a discussion on consensus call or do we simply take a vote? When it comes to the elements, if we were going to recommend that there be a formal contract and we were going to give implementation guidance, I think we would want to have a

discussion about some of the elements because there's at least one in there that I would like to comment against, and that is George Kirikios' comment about expanding the ability to sue providers for mere negligence. I tend to agree with Kathy's point that they're doing a good job, which they are. Why even have no presumptive right of renewal?

In any event, I thought Paul Tattersfield's question was a good one about, what does consensus call look like? Will we be able to comment on some of these individual elements? Thank, Phil.

PHIL CORWIN:

Thank you, David. Quick response. At some point in the discussion, someone other than me, since I'm administrative, should be—I think Kathy almost did it—should be making a suggestion/a motion that this be sent on with some highlights or instructions for consideration of the consensus call. I haven't been through a consensus call in quite a while, but, in the consensus call, of course, there's some degree of negotiation/bargaining where it might require some greater clarification or, as Kathy noted, lopping off of the no-presumptive renewal to get full consensus. But we're not at that stage. We're at the first review of community comments and deciding whether, based on the community's support or objection, whether these individual proposals, which did not go out as full working group recommendations, should go on and be considered in a consensus call.

With that, Kathy, your hand is still up. I think you've already spoken. I'm going to go to Susan Payne and, after that, Claudio, and then see where we're at. Susan?

SUSAN PAYNE:

Thanks, Phil. This is interesting. I think some of the comments in the chat and some of the comments that are being made on the actual call are reflective of all of our slight confusion about what the process is. For example, you've mentioned a couple of times: should this go onto the full working group or should it go on for a consensus call? Of course, we're sitting here [on there] and thinking, as Kathy just said, we are the full working group. So perhaps what we're really meaning is, does this look like it's got a sufficient level of support for it to need a bit more time spent on it and a bit more work, either with perhaps, as we've suggested on some of the other recommendations with some people who are supportive of it, putting together a straw person? Or maybe even we discuss it as a full group and see if there's some way to make this workable whereby, if there were a consensus call, it would get consensus. Because I don't think, as currently written, it would get consensus. Indeed, the very fact that we asked a question surely means that we can't simply vote on it as is because we have done nothing with that feedback in response to that question.

Personally, I'm not particularly in favor of this. I think made a presumption that the MOU is unenforceable and that it couldn't be terminated for fault, which I think is wrong. So I'm unclear what the need for this is, but it's clear that some people think it is needed.

So is the point about this that this does look like one—albeit I don't particularly agree, but it does look like one—where maybe if we do some more work on this we might come up with a solution that all of us think is workable, as in, if we think the MOU needs beefing up, then perhaps in what way does it need beefing up? Indeed, in some of the actual recommendations for our working group, we've talked about things like that we feel that there should be more enforcement. We've talked about, if ICANN Compliance isn't the right party within our organizational structure to hold a provider to account, should that need arise, then who is that person? So an MOU or a contract—I think the terms could be used interchangeably, arguably—could address that in some way/could perhaps be a bit clearer and therefore look like it was more enforceable. But I can't see we vote—not vote; we don't vote—can call consensus on it [as is] because we clearly asked for more information. I think, as a group, maybe that information will help us.

PHIL CORWIN:

Yeah, I agree, Susan. And thank you for noting that we don't vote. I was going to say that if you hadn't. I remind everyone we don't vote. I think the basic proposal here is that the current MOU should be beefed up in some way and be more formalized. I agree that this might have trouble as proposed—getting consensus in the consensus call—but with some work and some compromise, some enhancements of the current MOU might well be agreed upon at the consensus level.

Claudio, I'm going to call on Mary Wong and then get back to you because I think Mary is probably going to want to speak to our process here. Mary?

MARY WONG:

Thanks, Steve. Hi, everybody. I stuck my hand up really for all three of us—Julie, Ariel, and myself. Thank you for all the questions. We think that perhaps some of the questions arise because this is really the first time or one of the first few times we're using a tool that shows all the comments in this format. But nevertheless, and of course, the rules, remain the same and they're governed by the working group guidelines.

To keep it brief—Julie or Ariel might want to jump in if I miss anything—this point where you are as a working group is exactly where you would need to discuss all the ramifications of the proposals of any proposed changes so that, in your decision to move a proposal forward to the final stage, which is the consensus call, you are not then postponing any discussion until that point, first of all, because that risks reopening discussions or issues that either were closed or should have been closed.

Secondly, there's many of them on this call and in this group that have participated in other PDPs. Leaving aside the format and the tool, what you're probably recall is that, once a working group has reviewed to its satisfaction the public comments received, staff normally then takes what your preliminary agreements are, what your sense of any changes might look like—Ariel and [Julie] have certainly captured this as you go along—and then we provide draft final recommendations—in other words, the text of what could

become your final recommendation. Then you would look at that draft text and say, “Yes, this captures all we discussed,” [or] “No, this captures most of it, but you missed out that one point we agreed needed to be changed from a previous text.” Once you have that discussion around what the scope of those final recommendations look like, that is what the consensus call is about.

So our point is that, at this stage where you are as a group, all the variations, the consent, and the possible modification are the things that need to be discussed at this stage. I hope that’s clear. Thank you.

PHIL CORWIN:

Thank you for that information, Mary. I must say I’m rather dismayed. I think, if we’re going to try to get to some agreement on this on what might get through the consensus call, we could spend the rest of this call just on this proposal. When you look at what people have suggested, without the debate—this presumptive renewal thing because that’s in the main proposal—I’m not sure personally, just speaking in a personal capacity, that that even makes any sense. That’s a concept taken from registry agreements. I’m not sure how it applies to a dispute resolution provider. When we look at the individual proposals, I look at [ICA’s] [inaudible] a trade group for trade investors representing more than one party. But all of this membership suggest performance standards, application for renewal and license, panelists selection, accreditation revocation procedure, complaint procedures, etc. If you just scroll down. But are we really going to debate each and every one of those elements now about what

should be in this to make it capable of consensus? I have to say we have not been doing that with other proposals.

CLAUDIO DIGANGI: Phil, it's Claudio. I might have some thoughts on that.

PHIL CORWIN: Yeah. Claudio, go ahead. Maybe you can suggest something workable here.

CLAUDIO DIGANGI: Thank you. I appreciate all the comments made so far. I've missed the last few calls, so I apologize. I'm coming in a little hamstrung. I think that's causing the complexity is that, generally, when we put out something for public comment, the working group has had some substantive discussion of the proposal, whether it's a working group recommendation and it has reached that threshold or maybe the working group decided we're going to put these out as individual proposals—that there was still some discussion made about the substance of what was being proposed—and then the public comments come in and if further informs that discussion and the direction that the working group wants to take. I may be mistaken in recalling the history that we took, but I recall that we didn't have those substantive discussions, or at least not much of them, on the actual proposals before they went out for comment.

So what it sounds like to me—again, I missed the last few calls—just almost an observer that we're looking at the public comments almost as a substitute for the substantive discussion that we

would normally have and reacting off of that to see whether there would be a potential for a consensus.

The topic that I had, maybe as a way forward, is to have the discussion on the proposal because, as Susan mentioned, we are on the full working group. We're on the call. We could have some discussion on it, taking public comment into account, and then maybe make a determination, if there's enough legs there, to keep this proposal open for further discussion and a potential consensus call, depending on how that further discussion plays out.

So that was my thoughts on the process aspect.

In terms of the substance, I agree with a lot of what Susan said. I wanted to hear what the providers said since they're a party to the contract. I think their views are particularly important here on whether they would be interested on signing this type of agreement with ICANN. But that's about it. So thanks a lot. I hope that helps.

PHIL CORWIN:

Okay. Kathy, Julie wants to speak. Let's hear from Julie and then I'll hear from you.

KATHY KLEIMAN:

Sure.

JULIE HEDLUND:

Thanks. Just to emphasize—I'll just note the points that Mary and Ariel have added into the chat—essentially, even if ... Let me back up a little bit. We put these proposals out for public comment. We got comments on them. We had some questions related to them. As Ariel notes, this particular proposal is related to URS Recommendation #4, which also talks about a compliance mechanism. So we might need to take that into consideration as well. The idea behind the public comment on these proposals is that, for reviewing the public comments, if we find that there's support in the comments as well as in the working group for a proposal to go forward as a recommendation, either in its current form or modified, then it's that recommendation that would go to the consensus call. The consensus call is simply a consensus call. It's not an in-depth discussion. It's time for the working group to weigh in on the preliminary recommendations that staff have gleaned from this deliberations.

So, as it well may be that there's more work upfront here and now for the working group to do, it does have to happen before the consensus call. So whether you do it today or you do it another day, it does have to happen in a working group meeting so that you all decide what you want to do with this proposal, if anything. Thank you very much.

PHIL CORWIN:

Okay. With that—Claudio, that's an old hand, I assume; if you could put it down—I'm going to call on Kathy and Zak and see where we're at. Basically, we're being told by staff that we would have to agree today based on community comment elevated to a—staff, intervene if I'm stating this incorrectly ... If this is going to

go on to consensus call, we would have to agree on this call or on a subsequent call prior to the consensus call portion of our work that this would become a working group recommendation with more definitive elements. We'd have to look at the suggestions for how to enhance the current MOU and get some agreement on which elements which should be added. We'd have to deal with this presumptive renewal idea which, as I said, as an individual, I don't think make sense—taking that from registry agreements to these contracts—but we'd have to discuss that.

So I'm going to open the floor to discussion of whether we should make this a working group recommendation and in what form. But, given our agenda for today and given the complex nature of this, I may, in a few minutes, table the discussion and say we're going to come back to this on the next call and give everybody a chance to think more about this and try to agree on a more definitive version of a recommendation based on the community comments rather than trying to wordsmith on the fly on this call.

With that, I'm going to hear from Kathy and Zak. Then, if you want to speak to this, put your hand up now because I may close the queue after that once I see where we are. Kathy?

KATHY KLEIMAN:

Thank, Phil. I agree with something you said earlier: we seem to be changing procedures somehow. So let me try to introduce some thoughts consistent with how I think we've addressed our other URS individual proposal because I know we want to move on. First, the question. I'm not sure the question holds us up here because I'm not sure the question changes the proposal because

the question is, what additional elements, if any, are needed to enhance ICANN's MOU? As much as I respect some of the commenters here, there's no groundswell. This is not the stakeholder group responding. I think the proposal can move forward without any of the additional elements. It was a broad question opened up, and I don't think we have to analyze all of this.

So what I think could and should go the full working group is the first part of the proposal, which is the idea that current and future URS providers would be brought under a fixed-term contract with ICANN instead of the current MOU. I think that should go to the full working group. If people want to enhance it and do further research, they can. But there seems to be the strong cross-community support that we look for as we bring something up to the working group. Here we're not making it a recommendation yet. We're just saying that this URS individual proposal seems to have the cross-community support to move up to further discussion to live to see another day. And I think [we've passed that].

PHIL CORWIN: Well, Kathy, that's how I'd like to do it, but staff has told us we have to do more than that, unless I'm misunderstanding them.

KATHY KLEIMAN: I just don't think Q1 pulls us into ... I don't think it's necessary. I don't see it converging on anything specific, and I don't think it's

necessarily to move forward the proposal, as some questions which really are necessarily. Thanks, Phil.

PHIL CORWIN:

Well, let me say this, and I'm trying to be objective here. This is a proposal that couldn't get full working group support, which fell short of consensus for the initial report. Now we're confronting whether it should become a working group recommendation that makes it to the consensus call. Kathy, I'm just going to say that, based on the responses, if we just send something up to consensus call that says, "Take the MOU"—an MOU is a form of contract; it's a rudimentary contract—"and make it fixed-term," when the community has said, "Well, it's not just the fixed term. We want additional elements in it"—and any recommendation we put in the final report has to have sufficient detail to guide an IRT after acceptance by council and the Board—I just don't think we can get away with being that sketchy and just saying the recommendation is to go from an MOU to a more formal fixed-term contract without speaking to what additional elements should be in it.

Zak, your hand is up.

ZAK MUSCOVITCH:

Thank you, Phil. I just want to pull some threads from what you and Kathy and others have said and see if it's of any assistance to this working group.

In terms of Question 1 and the answers—"What additional elements, if any, can be included to enhance the memorandum of

understanding? [inaudible] compliance—whatever the answers are, whatever the merits of the answers are—I gave some answers—really it would take a lot of work to pull those together and incorporate them into a recommendation. It almost would involve quasi-drafting a contract. It's too much to do for this working group, let alone at this stage in the proceeding. So I think that that aspect of this URS individual proposal needs to be set aside completely. It's just impractical to deal with those answers and integrate them into a recommendation.

Then, in terms of the individual proposal itself, it seems to me that, as written, despite there being considerable report, there's notable stakeholders that are opposed to it. If we could somehow finesse this into being a working group recommendation, that's fine. But it doesn't sound like it as is. So I don't think it can be a working group recommendation as is.

Then the last part of this is—this was a suggestion from Kathy—if we excise Q1 and the answers to it and if we excise the second part of the recommendation about presumptive renewal clauses, is there support within this working group? Because we're currently the working group. This isn't a sub-team. I constantly have to remind myself of that. Is there support for just that little bit at the beginning to go [inaudible]? As Susan said, "Well, call it an MOU. Call it a contract. Whatever you'd like, they're both enforceable and everything seems to agree with that." The only difference seems to be making it a fixed-term rather than open-ended contract, as the MOU is currently. That's really, as we say in Canada, small beer. It's a very small, small change to it. It may not even be worth pushing for that.

So my question to the working group is, if we excise Q1 and the answers to it, and if we excise the second part of the recommendation, does that satisfy some of the important groups that voiced opposition to this through the public comments? Or does it not change anything at all? If it doesn't change anything at all, then my suggestion would be that we move on and discuss it and [make it] further. Thanks.

PHIL CORWIN:

All right. Well, thank you for that, Zak. I think we're at the [fisher-cut-bait] point. Let me ask this. I think Zak, considering the comments of ICA, it's just conceded quite a bit. Would the working group be satisfied with this going forward to the consensus call simply as a proposal to change the current open-ended MOU to a fixed-term MOU with the implication that ICANN would have to review the URS provider's performance and compliance with all the applicable rules and procedure at the time of contact renewal? It wouldn't get into specific elements that would have to be added. It wouldn't have this presumptive renewal idea. It would simply say the MOU would go for something completely open-ended as it is now to something that is of a fixed-term and leave it to the IRT to decide what an appropriate term would be?

I'm just reading Mary's comment. Mary is saying that, if we move it forward to consensus call, then, between the conclusion of our discussion and the consensus call, staff will [inaudible] with the working agreements [inaudible] include and compare the potentially overlapping proposals and recommendations and develop text for a draft on a recommendation and, during that

same period, working group members can go back and consider if they can propose the final proposed rec.

Zak, I think that's an old hand. I'll call on Susan in a minute. I think the question before us—I notice we're now 40 minutes into the call and still on the first issue—is whether we move this forward in a very truncated fashion, where it simply becomes a proposal to take the MOU and make it up for a fixed-term rather than an open-ended agreement as it is now.

I see Susan's hand up and Paul's hand up. I hope we can reach some agreement on this. Otherwise, I'm going to have to move this proposal to the side and we'll have to come back to it on a future call because we can't spend the whole call on it. So, Susan and Paul, if you could be as succinct as possible.

SUSAN PAYNE:

Okay. Thanks, Paul. Reluctantly, I don't think we can do that. That feels like we're taking a red pencil rather unilaterally without any discussion. This isn't a criticism of your suggestion. It just feels to me like, on other individual proposals, we've said, "Oh, it wasn't sufficiently clear. It wasn't sufficiently detailed. It's going in the bin." I think there have been times where we've said, "Oh, things aren't sufficiently detailed, but groups could work on it and bring it back." Then, on this one, we seem to be going, "Oh, well, this first sentence sounds like maybe we could take that one forward. But we're ignoring the second sentence for a reason that's not clear to me, even though, again, I don't agree with it." And we're ignoring the question that we asked people to answer. I just feel like we either do the job of reviewing the comments and see if we can

make this workable or we ditch it. I don't think there's a middle ground here.

PHIL CORWIN: Okay. Thanks, I guess. Paul, enlighten us, please.

PAUL MCGRADY: Thanks. I'm hesitant to start splintering this thing up and trying to see what parts have life and what parts don't have life. We either need to come to the conclusion that 50% is a sufficient number to send this up to the working group to decide whether or not it's going to be transformed into a recommendation that will then face consensus call, or 50% is not. So this needs to either live or die today. I'm wholly agnostic about this particular question because I'm not a provider, but I don't think we should splinter it up. If we don't think it can live, then let's put it in the bin. If we think it can live, let's send it up. Thanks.

PHIL CORWIN: All right. Well, based on the discussion we've had, if we were to say that, to move forward, it would have to contain the presumptive renewal idea and it would have to be somewhat specific about additional elements that would be to enhance the MOU, I don't think, in that form, based on what I've heard on that call, it can go forward to the consensus call. In fact—I don't want to believe his opinion—I think Zak suggested it couldn't. But Zak's hand is up again. Let's hear from Zak. Let's close this out one way or another.

ZAK MUSCOVITCH: I'm as confused as I believe many people are at this point with the process and the procedure because my understanding now, based upon staff's advice, is that this is precisely the time to see if we can make this a working group proposal by excising portions, changing portions, revising them, etc. The alternative is that, if there's no discussion and there's no changes to be made to URS proposals and they live and die exactly as they are without any deliberations on revisions, well, that's a different process entirely. I could be satisfied with that, too. But I'm confused as to which approach we take.

PHIL CORWIN: All right. I think it has been a good—oh, Paul, is that a new hand? No, it's an old one.

PAUL MCGRADY: No, it's a new one. Just a two-second response to Zak, if that's okay.

PHIL CORWIN: Sure.

PAUL MCGRADY: Zak, I get that. So we have to then decide, if this is not going to move forward entirely, then do we break it in half? Do we break it into quarters? Should we change "presumptive" to something else? At some point, we have to decide, "Okay. This thing has

been broken down so far that it doesn't resemble what was put out for public comment." I don't know where to draw that line, but I do think that a line has to be drawn somewhere by someone. Thanks.

PHIL CORWIN:

All right. Thank you. I think we've had a good discussion. I'm going to table this one for now. I'm reluctant to deep-six it completely, although I also believe, based on the discussion, that, without substantial modification, it has little to no chance of getting consensus. The Co-Chairs are going to be having a call with staff next Monday to discuss a number of things. I think Kathy and Brian and I can all think about this one, discuss it with staff, and come back at a future meeting with some guidance for the working group. But we've used up have the call for this. So we're going to table it for now and come back with some greater guidance next time. Hopefully, the next one won't bog us down as much.

This is Proposal #34. The URS shall be amended to incorporate in full Rule @11 of the UDRP rules regarding language of proceedings, which says the language of the administrative proceedings shall be the language of the registration agreement, subject to the authority of the panel to determine otherwise. The panel may order that any documents submitted in language other than the language of the proceeding be accompanied by a translation in whole or part. Then there's some detail about: the proponent proposed the following.

Let's see were we came out on support on this. I'm hearing background noise. If you could mute when not talking, thank you. The FORUM had a concern that, if Rule 11 is going to replace the

existing URS requirements, there should not be any consideration by the examiner on the issue. [Marks] is concerned about the administrative and financial burden on the provider. The Contracted Party House said the working group needs to consider the question of who will bear the costs of translations while deliberating further.

Let's scroll down and see a little more detail. The BC supported going with the language of the domain name registration agreement. The IPC supported it. NCSG supported it.

Let's continue going down. If we go back to—yeah—concerns ... Yeah, let's focus on the yellow. We're back on the previous proposal for some reason. Oh, wait. Is that my screen? Sorry. My bad. So the FORUM: "Don't give the examiner any discretion." We already did the [Marks] concern. The only group that proposed or did not support was the [Chartered] Institute of Trademark Attorneys. It seems to me ... Let's go back to the proposal, and then I'm going to open it for comment in a second. Scroll up. I'm a bit confused by this. The main proposal seems to be on language for proceedings. Then there's all this additional verbiage down at the bottom, [preceded] by, "The proponent proposed the following"—which was about word limits, etc. I don't know if that's part of the proposal that people were supporting or not.

It seems to me this one, at least on language of proceedings, is clear enough and has broad support, other than the FORUM suggestion, which we might agree upon, that, if you're going to adopt a rule, then don't give the panel the discretion or the authority to override the rule.

So where are we on this? Let's hear from folks. But it seems to me that, on the basic issue of following the UDRP rule, there's pretty broad support and very little real opposition.

No comments? All right. Would there be any objections if we were to move the top-[line] proposal, which is to incorporate Rule 11 of the UDRP rules regarding language of proceedings, to substitute that for the existing language of the URS regarding language of proceedings?

I see Zak's hand up. Zak?

ZAK MUSCOVITCH:

No objection, Phil. I don't want to wade into the deep end on this, but it seems that the gist of the proposal is to apply the UDRP language of proceedings framework and that the list bit of it could be an implementation guidance or it could just be omitted entirely and left to implementation to work out that kind of procedure. Again, I'm not sure if we're supposed to be fiddling with these things or just leaving them be or letting them die.

PHIL CORWIN:

Well, we can fiddle with them to the extent of capturing the essence and moving that forward and not necessarily all the details that's in the proposal.

Let me check with—Kathy, go ahead.

KATHY KLEIMAN:

Thanks, Phil. I agree with it, and I also agree with Zak's idea of making some of this into implementation guidance, [which is what] the Subsequent Procedures Group uses, which is, basically, if the translation slightly exceeds the word count, that's okay because some languages are wordier than others. So that makes sense.

I also think we have another recommendation somewhere. So, when staff winds this up for us, maybe we can see what the language was of the recommendation that we put out—the URS recommendation—and the language of this individual proposal and make the final call as we go to consensus. Thanks.

PHIL CORWIN:

Okay. Are there other comments before we end our discussions of this proposal?

All right. Unless there's objection, we will move up to the consensus call. Basically, the first half of the topline sentence, which is a proposal to [inaudible] the current URS rule regarding language and substitute Rule 11 of the UDRP rules for language of proceedings. That's what will go forward.

Going once ... going twice ... all right. We're done with this one.

This is URS Proposal 36. Looking at the donut, I don't feel like this one has much of a chance of moving forward, but let's do it quickly. It's eliminate the existing [post-default] de novo review period and replace the current URS appeals filing period to 60 days with the possibility of obtaining an additional 30 days as a matter of right upon request made in this initial 60-day filing period.

The biggest color on the donut is red. 32%--almost 33%--do not support. only 7% report is written. Some additional support is for the concept or with significant changes. Nearly half of those who comment on the initial report are taking no position.

[Marks] wasn't complementary. IPC and Com Laude thought 90 days was too long.

I'm going to open this to discussion, but I would say, based upon the fact that this individual proposal could not even achieve broad support to become a working group recommendation in the initial report, and based upon the community comment, which falls overwhelmingly against it, that it appears to me that this proposal should not move forward beyond this point.

Does anyone want to comment on it?

All right. I'm not seeing any comments in the chat. I'm not seeing any hands up. So Proposal #36 has met its demise and will go no further.

Next—boy, that was quick. We're making some progress now. Time check. We still have 34 minutes left. If things keep going five minutes or less ... All right. We finished with the URS proposals and we're on to TMCH proposals. TMCH should be responsible for educating rightsholders—this is Proposal 1—registrants, and potential registrants about its services. There are questions about, should education be provided? And by whom should such education be provided?

[On] support, just over 50% for the proposal as written or conceptually. Close to 10% did not support it. The remaining 40% had no comments on it.

The staff summary here is that—let's focus on this—that TMCH should not only be actively responsible for education but provide appropriate materials. It should have the primary responsibility disseminating the information, conducting webinars and other kinds of training, and addressing questions about its role. The website should have resources of complainants and respondents. It should make available appropriate education materials. ICANN and the IRT should also be involved. Well, of course, if this becomes a recommendation, an IRT is going to have to flesh it out.

Let's look at Deloitte because they are operating the clearinghouse now. They're saying they're [inaudible] providing education. They've taken initiative and borne all the costs to actively create education materials. They actively promote the TMCH by attending ICANN and INTA meetings. Of course, they haven't been there in person this year. None of us have. They've been providing sessions and materials in various languages and various regions. They support the idea for clear documented requirements to provide more education. So Deloitte seems to be saying, "We're not opposing documentary requirements, but we're already doing a lot of what this is suggesting we should do."

CPH said, "We should consider the question of who will bear the cost of translations while deliberating further on this proposal." Well, Deloitte already said they're bearing all the costs, so, if

they're doing it, if we're not going to be adding much to their burden, it seems they could bear that cost.

Let's quickly scroll down and see who supports it as written. IPC supports it as written, as well as NCSG, some universities, and public interest groups.

Let's continue scrolling. Minor changes.

All right, well, how do we handle this one? It appears to me, based on the responses, particularly the response from Deloitte, we almost might change this one to say that the TMCH operator, which is Deloitte, should continue to be responsible for educating these various parties about the services provided and instruct the IRT to review the public comments to see what additional information was asked for by the community that Deloitte is not already providing.

I'm going to stop there and be quiet and open this up to working group comments.

Marie, please go ahead.

MARIE PATTULLO:

Thanks, Phil. I completely agree with the point of education, but, for clarity, as we said—the BC has said and as others have said—I think it would be good if we could slightly amend the wording to make it clear that we're talking about the operator, which I understand will now say, "should make available the material," because we can't actually expect Deloitte or whoever it is to go out and run lectures and educate people in the way that we would

understand education. So, if we could slightly amend the wording to make it clear that here are all the materials you need, as opposed to “We are proactively actually coming into your lecture theater and educating you,” I think it would be easier to take forward in a practical sense. Thank you.

PHIL CORWIN: Thank you for that, Marie. Well, Deloitte says it’s already doing more than just passively making information available on its website but it’s doing active promotion within ICANN and within INTA and doing things face-to-face. We used to have those kinds of things in various regions.

Professor Tushnet, please go ahead.

I think you need to unmute if we’re going to hear you.

REBECCA TUSHNET: Am I unmuted now for you?

PHIL CORWIN: You’re unmuted. We can hear you fine.

REBECCA TUSHNET: Thank you. I just want to emphasize the point that everything the TMCH is doing is basically for sales purposes. It’s telling you why you, the trademark owner, should pay to be in the TMCH, which is fine. I don’t think they should stop doing that, but one of the reasons behind this recommendation is that there should be some

stuff there to enable people who aren't that [to know what] that means, when they get a notice, for example, or when they're considering how they might respond. So I think that's the real point here. The recommendation there pretty clearly differs from that actual practice. Thank you.

PHIL CORWIN:

Okay. Any more comments on this one? Well, let me ask staff. It seems to me, based upon the public comments, and based upon the working group discussion, this one should probably go forward. It should be clarified to make clear that we're talking about the TMCH operator, which is Deloitte at this point in time, which has this responsibility and that they should enhance what they're already doing with some additional attention to domain registrants and if there was anything else the community suggests. That could be for the IRT to discuss some enhancement of the materials already being made available.

Does that give staff enough guidance to rewrite this a bit for consensus call purposes based upon comments and today's discussion?

Julie says, "Thank you, Phil. That seems clear."

All right. So I think we're done with this one. Good. 25 minutes left. We can knock off another three or four.

Ooh. Okay, this one got a lot of opposition. A lot of red on the screen. TMCH provider Deloitte should be required to comply with the TMCH rules limiting the acceptance of marks into the TMCH database to word marks.

Almost 50% nonsupport. 16.4% support as written. About 40% no response.

The staff summary of the comments/the highlights that allow trademark with textual elements. The current term “wordmark” is sufficient and means a text mark. Misunderstands trademark law. Inconsistent with scope of TMCH. Misses the term design mark/wordmarks. And somebody wants to eliminate the clearinghouse. I don’t think we’re going to get consensus on that.

Let’s open it for discussion. I see Susan’s hand up. We can look at a little more of the comments. We’ll hear from Susan, but I would say that this one is not likely to move forward. Susan?

SUSAN PAYNE:

Thanks, Phil. I agree with you. I don’t think it’s likely to move forward. But I also would say, separately, not in relation to the TMCH, per se, but I think, somewhere within the TMCH or the sunrise or the claims recommendations, we’ve talked about the treatment of wordmarks and marks with device elements separately. I’m not quite sure how this one actually ended up going out, I suppose, because we didn’t do a great deal of cross-referencing between individual proposals and what has actually been a recommendation that the working group agreed on. So I feel like we have dealt with this or we are dealing with this as part of our discussion on our recommendations and the feedback we got on them.

PHIL CORWIN:

Okay. Thank you, Susan. Staff, can we just scroll down to the nonsupport/do not support? Because I note that the BC doesn't support it. The ICA doesn't support it. The IPC doesn't support it. Scrolling down further, Deloitte has serious concerns about it. I think, based on the composition, the nonsupport, and the scope of it, this is one that was not a working group recommendation. It has not gotten robust community support. In fact, the majority of the comments have been non-support. Unless there's objection, I would think that we're going to leave this one at this point and it's not going to move forward.

Hearing no objection, Individual Proposal 2, we hardly knew ye, but rest in peace.

On to #3. Ugh. This one is certainly wordy. Before we go through the text, let's look at what kind of support and nonsupport this got. Can we scroll down a bit to see the donut? Okay. Also overwhelming nonsupport. Let's quickly see what this was about. Let's scroll up again. This is one the same issue about wordmarks and text marks. It's extremely detailed about the TMCH guidelines being revised in very explicit ways.

Let's scroll down a bit and see who supported it and posed this. Interesting. Well, the BC supported it. The CPH prefers Proposal #3 over 2. So I guess those were separate. Pick one of those. ICA opposed. NCSG opposed.

Do working group members have comments on this proposal which, again, unless someone can make the case for why and in what form this could go forward successfully to the consensus

call, it appears to be on life support at the moment? Anyone want to take a contrary view to that?

There's a question from Michael Graham to staff. "Is Proposal #2 the one the working group approved related to the definition of "wordmark"? Well, Proposal 2 we just disposed of. That's no longer viable.

I'm seeing no hands. Unless I hear someone speak up, I would be constrained to rule as the Chair that this individual proposal based on community comment and based upon lack of any support or suggestions for moving it forward and in what form goes by the wayside. Speak now or forever hold your piece.

Okay. TMCH Proposal #3 is not moving forward.

JULIE HEDLUND: Phil, Kathy Kleiman's hand is up.

PHIL CORWIN: Oh, Kathy? Sorry. It must have just come up.

KATHY KLEIMAN: Thanks, Phil. I was just trying to remember the history of these two alternative proposals to try to handle some of the concerns that were raised. I'm wondering, could staff go down to where we were on this before? I'm not trying to hold us up here. Could staff go down to the view? A little farther. The BC. I'm looking for the BC's wording. This idea—I'm trying to decide whether this is one worth moving forward—that, if you disclaimed certain words in

your trademark that you should not be claiming those words in your TMCH registration—may be one worth considering moving forward. That seems to be a common idea across both of the proposals. Just thought I'd raise that before we close this out.

PHIL CORWIN: All right. But is that a new thought, Kathy, or was that brought up when we previously discussed this proposal and it did not make it to the level of working group recommendation for an initial report?

KATHY KLEIMAN: That I don't remember, I think in part because we were moving it out in these individual proposals. But I'm not sure. Two and three were—

PHIL CORWIN: I also got a note of support based on to continue to allow to compile the marks. We don't have to do anything to continue current practice. These are recommendations to change things. We don't need to move any recommendation to allow something to continue as it's being done.

Kathy, did you have a formal proposal that we should move something forward?

KATHY KLEIMAN: No, I guess not. I'm trying to think whether anything between these two proposals—2 and 3—is worth moving forward to

consensus call and I just thought I'd raise the question because these were so heavily discussed and debated at the time.

PHIL CORWIN:

Okay. Well, thank you for that, but I think I'm going to have to rule based on ... Again, our starting point is that these individual proposals did not have sufficient support to be working group recommendations. And there's nothing indicated by our discussion right now or by the community reaction, which was overwhelmingly "Do no support," at least by number of comments, that any form of this proposal could gain consensus support. So I think it has to go by the wayside.

With that, we're going to move on to #4. Oh, the always-non-controversial of geographic indicators.

Let's just take a quick look at the donut on this one, and then we'll get into substance. Some support but close to equal non-support. Some people want significant changes.

Let's go back up to the proposal itself so we're familiar with what's being addressed here. Basically, GIs may not be registered in the database for sunrise of trademark claims under the theory that their mark is protected by statute treaty. Other marks that constitute intellectual property—a term in quotes—are not eligible for sunrise or trade. Trademark claims. Then it says that the provider might add ancillary databases for other marks. Then [there's] the proposed amended language in the Applicant Guidebook. It's basically saying that a mark protected by a statute or a treaty must be a trademark and that trademarks include

trademark, service marks, [collective] marks, and certification marks and that GIs are not trademarks.

Basically, this is an anti-geographic indicator proposal. Let's look at it. Let's scroll down and see who supported it and objected. Okay. Oh, can we go back up the summary? And then we'll get down. The comment highlights that BC supported #5 instead. We haven't gotten to #5. [Marks] was concerned we hadn't explored the risks. Let's see what Deloitte said. Whoops, we lost it. Yeah. [inaudible] TMCH guidelines [quote] provide examples of marks protected by statute or treaty or [core] validated marks that are not registered trademarks and that they haven't had any disputes about marks they validated. NCSG supported it. Let's scroll down. Let's see. A significant change required. All right.

Nonsupport from the BC and [Marks and], again, from Deloitte. Anything beyond that?

All right. I'm going to open up discussion. Does anything think, based upon the split between support and nonsupport and these specific comments made by members of the community, that this anti-GI registration proposal in any form can move forward to be successfully moved through the consensus call?

I'm not seeing anyone who thinks it can. I'm looking at the chat. Rebecca, go ahead.

REBECCA TUSHNET: I'll give it a go. Aside from the people who really think GI should be in—an issue that I thought we were pretty much agreed on that they should not—the differences here do seem to be how you

want to word it. I think, as it does probably make sense to consider this in conjunction with #5, there's issues with the way #5 tries to get it done, too. So I would say we clearly need to work further on this but that the general idea actually does have very strong support. Thank you.

PHIL CORWIN:

All right. Well, Rebecca, your comments indicate that this is related to #5. I'm going to suggest that we not make a final decision on this one until we move on to #5. I'm doubtful that this particular recommendation, with all its specificity, would have very substantial work. Really I don't see how it has a viable path forward to survive in consensus call.

We have nine minutes left. Let's take a look at #5 and see if we can resolve all this. Proposal #5. Again, lots of words in these proposals. This would also make it clear that geographic indications or appellations of origin should not be eligible protection in the mandatory sunrise or claims period, even if they're protected by statute or treaty.

Let's look at the support and nonsupport. This one had even less support than #4 and has less comments overall. Less than half of those that commented on the initial report made any comment on this proposal.

I see Kathy's hand up. Go ahead, Kathy, and then Claudio.

KATHY KLEIMAN: Following up on something Rebecca mentioned, if you look across the two recommendations, there is a strange convergence. So support for #5, for the avoidance—I'm looking at [INTA], Line 28—the doubt, [inaudible] identifiers are not to include GIs unless they registered as trademarks. The BC says geographical indications and appellations of origin are not identical to trademark rights and should not be treated the same way as trademarks, absent independent national trademark registration. There's more in the sentence. So that's the BC and INTA.

If you go back to Proposal #4, you see the NCSG saying something very similar. GIs are going into the TMCH, and future GIs should not be allowed. So there's an interesting convergence on that issue between INTA, NCSG, and BC. So I would think that's the issue, perhaps, in the upcoming meeting, that goes forward on that to see how much support that combined principle coming out of both proposals has. I don't think we can do it here right here in the next five minutes. But there does seem to be something percolating there. Thanks.

PHIL CORWIN: Thank you, Kathy. Claudio?

CLAUDIO DIGANGI: Thanks. This was the proposal I had put forward. One of the comments that came through was from Deloitte. We did have a discussion on whether the current rules were being followed. Deloitte had cited to TMCH document, which cites geographical indications and appellations of origins as being acceptable in the

database, which is something I wasn't aware of. So I find that intriguing. I don't think we discussed that as a working group: that, in one of the foundational documents, there is actually something in that that says that. But, yeah, overall these proposals are getting caught up on the wording. There's ultimately the issue of the TMCH being the administrative tool versus the RPMs. So, just because something is recorded in the TMCH, it doesn't necessarily mean it qualifies or may be protected through the RPMs. So that's just a distinction I wanted to mention. Thanks.

PHIL CORWIN:

Okay. I'm going to say two things here. One, thank you, Claudio. Two, I have to note that #5 had less overall support than #4. I'd like to ask to go back to Proposal #4 so we can look at the Deloitte comment because I made a very extensive comment on #4, which relates to both 4 and 5. Can we start at the beginning? Because they say there are factual inconsistencies in Proposals 4 and 5 on the alleged wrong inclusion of GIs in the TMCH. Deloitte explicitly states that it has never deviated or overstepped the TMCH guidelines and always had taken into account the requirements and rules defined in the guidebook. Deloitte strictly follows the following requirements and that they do follow the rule on any mark. Word mark protected by statute or treaty in effect at the time may be submitted for inclusion. I guess that's how GIs get in when they get in. Then, in the red, the approved guidelines—the one's they're operating under—clearly provide examples of marks protected by statute or treaty that are not registered trademarks and that no disputes have been filed.

Let me do this. 4 and 5 are related. 4 had more support than 5. The provider is saying both proposals are based on some factual errors or inconsistencies. I think probably, following our rule that these things were not working group recommendations in the initial report—it's hard to [see] consensus—they're not going forward. But given that we have two minutes left and the importance of this issue and the amount of time we spent debating it, we're going to stick a pin in it. These probably are not going forward—either one of them—but let's come back to it on the next call. This is another one I'd like to discuss with staff and my fellow Co-Chairs when we have a joint call with staff next Monday. If that's acceptable to the group, again, I'm saying these are probably not surviving, but let's not make that final decision now.

Claudio, very quick comment.

CLAUDIO DIGANGI:

Very quick. When you have the discussion with staff, I was just wondering if ... Because I wasn't able to present on URS Proposal 6, which, I believe, 99% of the public comments misunderstood—I'm quite okay if the working group doesn't support it of course—I just wanted to have an opportunity to present what the proposal really said maybe on the next call and just have the team think it over because, really, the public comments just miss the mark on it. That was it. Thank you.

PHIL CORWIN:

Okay. Thank you. We're at the mark. Let me say one thing. One thing that the Co-Chairs are going to discuss with staff is ... Many

of you are aware that Subgroup A completed its work yesterday on public comments on non-URS issues. Subgroup B meets tomorrow and is expected to wrap up, I believe, next week. So we're going to be discussing going to twice weekly meetings of the full working group to move forward towards consensus call and consideration of the final report.

Is there anybody on today's call—we have a lot of people; we had more before but we still have 23—who would violently object if we go to twice-a-week full working group meetings, particularly given that many of you have been on the subgroups, and one is finished and one is nearing completion? If that's going to cause heartburn for anybody, let us know now.

CLAUDIO DIGANGI: Phil, those are 90-minute calls?

PHIL CORWIN: Yeah. We've begun two 90-minute calls a week at some point this summer.

Lori, I see your hand up?

LORI SCHULMAN: Yes, Phil. As much as I'd like to get this work to get done, having been on the group since it's beginning, as many others on this call, I do have an objection. There's a lot going on in the world that is pulling our attention in many different directions. I think, to make this work meaningful, we have to stay focused. I'm not so sure

that adding an entire session to this ... 90 minutes is already long, so I would object to it.

PHIL CORWIN:

All right. Well, we'll note that, Lori. I will tell you that at least this Co-Chair does not ... We're working right now on a time table to try to wrap up by September 15th. Our project change request to approve by council requires us to deliver a final report by October 15th, which is why we picked the mid-September date: we'd have some cushion in case things bogged down. We're going to be reviewing with staff on Monday what's left to do and a realistic assessment of how many more meetings we're going to need to get that done. We can't always assume that everything is going to run super efficiently, just like today where we spent half the call on one individual proposal. But we'll take your comment certainly seriously, but we do want to deliver on time by mid-October at the latest. So we shall see.

I see Scott Austin agreeing. Paul is saying, "Are we going to meet the deadline?" That's what we're going to discuss with staff on Monday: what's left to do and how many meetings realistically do we need to get it down.

With that, we're three minutes over. We're also getting suggestions for two 60-minute calls, which could give us an extra 30 minutes a week in total.

All right. Thank you for the feedback. Thank you for staying the extra three minutes. Despite spending half the call on one proposal, we did finish all two of the proposals that were listed on

today's agenda. So we made up a lot of time. We'll see you all again next Wednesday. We'll be communicating probably to the working group before then after we have a call with the Co-Chairs, staff, and liaison on Monday. So thank you and have a good rest of the week. Stay safe.

[END OF TRANSCRIPTION]