
ICANN Transcription
Review of all Rights Protection Mechanisms (RPMs) in all gTLDs PDP WG
Thursday, 06 August 2020 at 17:00 UTC

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TERRI AGNEW:

Good morning, good afternoon, and good evening, and welcome the Review of All Rights Protection Mechanisms, RPMs, and All GTLD PDP Working Group call, taking place on Thursday the 6th of August, 2020, at 17:00 UTC.

In the interest of time, there will be no rollcall. Attendance will be taken by the Zoom room. If you're only on the audio, could you please identify yourselves now? Hearing no one, I would like to remind all to please state your name before speaking for transcription and recording purposes, and to please keep your phones and microphones on mute when not speaking to avoid any background noise.

As a reminder, those who take part in ICANN multi-stakeholder process are to comply with the expected standards of behavior. With this, I'll turn it back over to our co-chair, Phil Corwin. Please begin.

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PHILIP CORWIN:

Yeah. Well, good morning, afternoon, and evening to everyone. Thank you for joining on a summer Thursday. I guess I should ask if anyone has updates to their statements of interest? Seeing no hands or hearing anyone, we'll check that box.

You've all gotten advance notice of the agenda. It's on the screen, so I'm not going to go through it in detail. I'm going to move right to our first item, which is to review consolidated TMCH proposals four and five. We have updated the language from Paul Tattersfield. I think staff can get that on the screen.

My recollection is ... Well, let me frame this for a discussion. We have discerned that there is broad, probably, consensus agreement within the working group that geographic indicators should not be eligible for TMCH registration for the purpose of Sunrise claims or generating claims notices.

We have been looking at the language to put that understanding in technical terms, in terms of amendment to the URS rules. We were very close, last meeting. Paul took it back and has sent a new version around. I'm going to call on him in a minute to go over this and explain what's new and who he has spoken to.

I do want to say two things. One, I want to see if we have agreement, now, on this new language. I don't want to engage in long wordsmithing on this call. So, if we can't get to agreement in 10, 15 minutes, we'll have to pull the item again.

But I wanted to ask staff, before we kick it off, since our task is to make broad policy recommendations for which there is consensus, how close do we have to get with this language?

And even if we get this working group to agree on every word, and every comma, and other punctual indication in this language, is it the final word? Does the IRT still have some latitude when they get to the implementation stage?

I guess I'm asking, how close do we have to get in our work to agree on a recommendation and send something forward to guide the IRT? I see Mary's hand up, and I was hoping she'd respond, so please go ahead, Mary.

MARY WONG:

Thanks very much, Phil. Hi, everyone. So, really quickly, that's a question that staff was going to try to address anyway. So, the advice that we'll give you is that, as long as the proposed policy principles are agreed to and are clear, then it is open to the working group to propose draft language, which is the heading I see here in Paul's e-mail, for implementation.

The IRT will look at what you provide as a starting point, but because there will be a need to align the text of the AGB, style, and so forth with other proposals that might amend the AGB, whether from this PDP, or from SubPro, or something else, it is possible that the IRT will not take every last word but will reflect in the final language what this working group proposes.

So, I'd say that you want to provide as much guidance as possible, but you don't need to say that this, down to every last dot, comma, and number, must be the final language.

PHILIP CORWIN: All right. So, just let me follow up, Mary. So, looking at what's on the screen, the most important thing here is to reach, at least, broad agreement on this call, and consensus agreement to include in the final report on the language under proposed policy principles.

And then, the proposed draft language would be something where we would want to get as close to agreement as we can, but the IRT is going to have some flexibility, anyway, when it gets to that state.

So, we want to give them clear guidance, but they're going to have latitude to change something if there is a good reason to do so at that point in the process. Am I correct on that?

MARY WONG: That's correct, Phil. And just to add to that, if folks are concerned that any changes made by the IRT might veer from this working group's agreement or intent, our expectation is, obviously, as with the prior round, that the AGB will be subject to quite extensive community consultation, anyway. And secondly, for every PDP, in the implementation stage, before something becomes full consensus policy, the actual language of the final policy is also posted for public comment, anyway.

PHILIP CORWIN: Okay. That's very helpful. So, Paul. I see Paul Tattersfield. I see you're on the phone, at least. I'm not sure. But can you bring us up to date on what is ... I believe you circulated this language prior to the meeting. Can you bring us up to date on what's new in this document on the screen? And then I'm going to kick off discussion.

PAUL TATTERSFIELD: Right. Thanks, Phil. The new language is really the proposed policy principles. I mean, hopefully, that reflects what everybody wants to do. The only other major change is the way that the marks are assessed, and we can come to that in 3.23. That means the heavy lifting is done by the national trademark offices, rather than Deloitte.

PHILIP CORWIN: Okay. So, this whole session at the top, proposed policy principles, is new language. And as Mary just explained, this is the more important part of our job, agreeing on these broad policy principles. Am I correct that we haven't seen these before, Paul?

PAUL TATTERSFIELD: You haven't, no.

PHILIP CORWIN: Okay. Well then, I'm going to just go through them, and then open the floor to discussion of these proposed policy principles to see if there is agreement or if something in them is causing heartburn for one or more members of the working group. There are four of them, here.

GI's, of course, if geographic indicators are not eligible to claiming some sunrise RPM, unless independently registered as an eligible trademark. I think just commenting on the [inaudible] independently registered in the TMCH might be something we want to add, there.

GI is another quality scheme. I think when we may have some discussion of quality schemes protected by statutes maybe held in centralized ancillary databases. I'll raise the issue of whether we need to designate where those databases exist, whether they would be something run separately by the TMCH, or whether they'd be run by registries themselves offering ancillary protections to non-trademarks.

Next point: treaty organizations and organizations protected by statute are not always able to register their word marks at a national trademark office. In some jurisdictions, their marks are reflected as a non-registration, e.g. #89 series in US PTO, which ensures no one can subsequently register and infringing trademark.

Once such words are listed with a national or regional trademark office, must be treated within the clearing house in the same way as a registered word mark or a court-validated word mark and must be eligible for claims and Sunrise. And there is no bar on the clearing house providers and other third-party service providers providing other additional ancillary services.

So, having read through that, this may need some wordsmithing. I can guess that the trademark lawyers in the group may have some suggestions, but let's open the floor and get feedback on this new language of the proposed policy principles, starting out with the one on which we know there is broad agreement that geographic indicators should be eligible for the two associated RPMs that come with TMCH registration. Anyone want to speak to this language, or is everyone very happy with it?

LORI SCHULMAN: Phil?

PHILIP CORWIN: Yeah?

LORI SCHULMAN: Sorry. I didn't raise my hand. I think your question about quality schemes is well-founded and to the drafter. So, my question is this: when you say "quality schemes," do you mean indicators of quality, or certification, or ...? I'm worried that "quality schemes," at least to my knowledge, doesn't have a legalistic meaning. But if it does, I'm open to being educated.

PAUL TATTERSFIELD: The EU tried to bring legislation together that brought all the different schemes together under one umbrella, and they did that in 2012. So, I looked at that and I did circulate that to the list a week or so ago. So, I wasn't sure whether that would be an acceptable way to group them all, rather than list individual designations. Thank you.

LORI SCHULMAN: Thank you, Paul. I'm wondering, as a follow-up, do we need to, with quality schemes, say "other quality schemes" as understood within the context of European law, or within the context of a particular jurisdictional body, or if that's going into too much detail?

PAUL TATTERSFIELD: Thank you, Lori. I'm wondering, looking at the language of the rules, and in 3.232 where the reference is to a word mark that has been validated through a court of law, or other judicial proceeding, whether we should [key out] that and just, instead of "quality schemes," say, "Any other word marks protected by statute." I'm always nervous about new terms that aren't defined and the mischief they can cause in interpretation at the implementation stage. Mary, I see your hand up.

MARY WONG: Thanks, Phil and Lori. From the staff side, we certainly don't want to wordsmith on the call, but we do have a couple of suggestions about these points. First, on the first proposed principle, we would suggest saying something like "mandatory RPMs," to make it clear that we are talking about the ICANN-mandated policy RPMs and not any other kind of Sunrise type of voluntary mechanism that might be put into place by an individual registry.

On the second point about quality schemes, as Paul said, my understanding is that that comes, largely, from usage in the EU. So, maybe one way to tighten that up is to say something like, "GIs' protected designations of origin," and other such quality schemes, as the word is used in the European Union.

We can work on that with Paul, and Rebecca, and anybody else, so as not to [take] time. We did have a question about the third proposed principle, but I'm happy to hold that question while this discussion continues, Phil, if that's better.

PHILIP CORWIN: Well, what was your question on that one, Mary? Let's get that out, and then I'll turn to Jason.

MARY WONG: Okay. So, the question is as follows: from the staff read, this is an explanation that tries to capture the types of signs and emblems, by IGOs, for example, that may have been published and communicated under Article 6.2 of the Paris Convention. The 89 series in the US PTO covers those. So, we understand that.

I'll question—and I'm sorry to be going down into the weeds, here—that article six excludes certain types of international signs; in particular, those that are already protected by other treaties.

So, for example, the Red Cross, its signs and names are protected by the Geneva Conventions. And so, they're excluded from [6.2]. Our question, therefore, is whether this language actually has the effect of excluding something like the Red Cross when it should be included.

PHILIP CORWIN: Yeah. Let me say, Mary, my intent is to let this discussion go on a few more minutes, and then pull this item. I believe we're very close to ... I know we are in broad agreement on the general principle about GIs. I think we're very close to agreement on final language to go in the final report, but I don't want to devote the whole call to that.

So, I'm going to let this go on another minute or two, and then pull it, and suggest that staff circulate this and that, Mary, you work with

working group members and bring back something. Probably the time between now and next Tuesday is sufficient time to work this out.

If, now, we can bring it up again in a week, next Thursday, and hopefully finish it off, the one comment I would make is that I'm wondering whether the third paragraph, under "proposed policy principles," even needs to be there.

LORI SCHULMAN: [My issue would help me last week. They told me they were going to defer it.]

PHILIP CORWIN: Who is talking, please?

LORI SCHULMAN: Oh, I'm sorry. There's cross-chat. I will mute. Sorry.

PHILIP CORWIN: Okay. Yeah. I was going to say, what's under "proposed policy principles," let's only put in what we need to put in for principles. This looks, to me, more like an explanation than a principle. I'm wondering whether we even need the third item under "policy principles," or whether that can just be a background explanation in the final report, explaining how we reached [their] conclusion.

The other items seem to be principles to make. I'm questioning whether that one is even is even a principle and needs to be there. But Jason, you've been very patient. Let me call on you.

JASON SCHAEFFER: Thank you, Phil. Can you hear me?

PHILIP CORWIN: Yes, hear you great.

JASON SCHAEFFER: Okay. I think you may have answered/mooted my point on saying that we're going to revisit this later, because I was going to ask ... I mean, I was hoping you could put on the screen what "quality schemes" is referring to, and I think Paul asked for that, as well.

But when we started this endeavor I thought, if I'm not mistaken, we were trying to clean up and address how to handle GI's, and I think it looks like we have done this. But I think we keep circling around in artful language and opening the door to keep expanding things.

And while, in principle, I think I'm okay with what we're honing in on, here, this just gives me pause, again, of saying, "How do we know that this is operating properly?" Now, we're talking about expanding the ancillary databases. Now, we're putting quality schemes in.

Again, I'd really like to revisit with ICANN at the appropriate time, since we said that ICANN has this audit function over the TMCH, that we do pay attention to what's going into the databases and how they're being used.

That's a separate issue, but it sounds like you solved the issue on quality schemes. We'll be revisiting that language later. But I agree that we have to be pretty precise in this language so that we don't create a new issue, again, and argue over what this term means or this term doesn't mean. Thank you.

PHILIP CORWIN:

Yeah. And thank you, Jason. Yeah. Again, my experience in both the policy and legal areas is that, any time you introduce a new term for the first time and it's not well-recognized, it's not defined, you're introducing a major potential for mischief.

So, is there further comment on this language? If not, I'm going to pull it. Mary has already indicated that staff will circulate this and that she and other staff members will work with members of the working group to clean up these policy principles.

I haven't heard any further concerns about the proposed draft language, which was we heard we can't bind the IRT, anyway. We can suggest this to them and it may be very helpful to them, but they have leeway to make changes down the road. Mr. McGrady, let me hear from you before we close this out for today.

PAUL MCGRADY:

Thanks, Phil. So, I guess my question is, now that I can see 3.2.4 in its entirety, will there be notices that go out based upon those items? I know they won't be official ICANN claims notices.

But say I'm the Roquefort Cheese Association, or whatever, and I put "Roquefort" in under 3.2.4 for an ancillary service, can that

ancillary service include writing to a registrant as they're about to register roquefort.whatever?

In other words, are we keeping GI's out of the mainstream claims notices, only to have the wild, wild west of other claims notices that could say anything? Like, "Roquefort is a geographic indication owned by the Roquefort Cheese Association of Roquefort, wherever Roquefort is, and you can't register this domain name."

So, the idea is to only alert [registrants to] actual trademarks, and not scare them out of registering anything that they really had no reason not to register. I don't know that this solves it. Maybe I'm over-reacting. Thanks.

PHILIP CORWIN:

Good point, Paul. Greg Shatan, and then Jason wants to make another comment. I'll ask you to keep it brief, Jason, because we're going to wrap up on this in a minute. Go ahead, Greg.

GREG SHATAN:

Thanks. Just on the subject of quality schemes, as far as I can see it looks like, in the EU or in the UK, this covers three schemes, one of which is not geographic. So, it seems [which is the traditional specialty are guaranteed]. And so, it concerns me that we're getting out of geographic indicators into other indicators. We could be into kosher schemes, and halal schemes, and other schemes of quality that have nothing to do with geography, as long as they are government-run. So, think that is kind of a ... In this case, I think the quality schemes embrace more than we actually want to embrace at this point. Thanks.

PHILIP CORWIN: Okay. And last brief comment, Jason, and then I'm going to propose a way forward on this.

JASON SCHAEFFER: Okay. I think we can move on. I'm just—Paul brought up a very important issue and I do want to have clarity on what kind of notices, if any, would peel out of this, because I'm not for the wild west of expanded notices. I thought this was intended to allow registry operators and others to use another database for a specific purpose but not to just allow us to then backdoor new types of notices. So I do want to hear more clarity, but I'll take that offline and I'm sure someone can clarify that. But thank you.

PHILIP CORWIN: Okay. Mr. Tattersfield, go ahead for a final brief comment.

PAUL TATTERSFIELD: Yeah, there's nothing in section 3.2.4 that can't be done already. I'd just say that. It is there already. You can already do it in an ancillary service if you wish to do it. There's absolutely nothing there to prevent them from doing what they want to do in each of these local protection periods. Thanks.

PHILIP CORWIN: Okay. Thank you, Paul. Here's what I propose we do with this. We have the broad agreement about GIs. Our difficulty is then agreeing on language on the overarching policy principles, and the proposed

draft language to be conveyed to the IRT, although as Mary has noted, we can't bind them. They're not obligated to take this as we agree upon it.

So I'm going to ask staff separate from the general notice that goes out about the—I think we need a notice dedicated just to this issue where it's not just one of many issues or a follow-up from this call, to go out in the next 24 hours and for Mary and other staff to work with members of the working group and keep that open for one week, until next Thursday, to give everybody a chance to register their concerns and their suggestions for anything that's in this language as of now. and I think we should stick to the principle that less is more. The more we minimize what's in here and ensure that it's clear and agreed upon, the less difficulty we're going to have reaching agreement and the less mischief down the road.

And so after one week, it's going to be closed out, we're going to have a final document, we're going to circulate that one more time to make sure that everyone is okay with it, and we're only going to bring this item back up again in a meeting to agree upon it. No more discussion.

I think we've come back on this item three separate times on three separate calls. We have broad agreement, but we need to bring this to a final conclusion, and I think the most efficient way to do that is on the working group e-mail list and by e-mails between working group members and with staff.

So, anyone have a problem with that as a way forward to close this item out and include a statement on geographic indicators in the final report? So that's it. The next time we bring up this item on a

call is going to be to agree formally to language that's already been agreed to on the working group list. So we're close, but let's not spend any more of our valuable time on these calls on this item, other than to validate it as agreed to. And let's move on.

So now we're going to visit some sunrise recommendations. And staff, let me ask here, I know we've gone through all of these before. What's our job now? I understand our job now is just to make sure we agree on the recommendation as it now stands. Is that correct?

ARIEL LIANG:

Staff's understanding is for the working group to look at the deliberation summary of the subgroup because the subgroup didn't propose any specific change to the recommendations but it did flag any public comment that may raise new material perspective or solutions and consider whether any amendment to the recommendations is needed or whether any additional recommendation is needed. So the key item is for the working group to look at the deliberation summary from the subgroup and consider what appropriate action would be for the recommendation.

PHILIP CORWIN:

Okay. Thank you. Much appreciated. So let's go through the deliberation summary and then see who wants to speak to the items identified in it. It says that subgroup A agreed that the recommendation should be maintained as is. That's for maintaining the sunrise period for a 30-day minimum for a start date sunrise and a 60-day minimum for an end date sunrise. But that INTA's proposal—and I'm glad we have Lori on this call—should be

referred to the full working group for possible reconsideration of its recommendation.

It also agreed that INTA's proposal is a new material perspective solution that we had not considered in making the recommendation, and that during its deliberation of the sunrise charter questions, the working group discussed the difference between start date and end date sunrise periods, noting that most registry operators have run end date sunrise periods but that the proposal of eliminating the start day sunrise was not entirely discussed, the start date being the 30-day minimum, and the end date sunrise being the 60-day one [inaudible] that observation.

And then we need to hear about this INTA recommendation, discuss eliminating start date sunrise and just having end date sunrise, and then there was a CPH proposal of exempting registry operators who are exempt from Spec 9, including .brand gTLDs, including registry operators Spec 13 from running a sunrise period, and that's a new idea to be referred.

So we've got three things here: INTA proposal, possible elimination of start date sunrise, and exempting certain types of TLDs from the sunrise period because of material attributes they have that separate them from general gTLDs. Now that I've read that, I see that my colleague, Mr. McAuley would be happy to alternate reading these, so we'll let you do the next one, David. Lori, please go ahead.

LORI SCHULMAN: Yeah, you had asked for an explanation, and I'm happy to give it. INTA members are very happy with a single period, the 60-day minimum for end date. To your point, it was the sunrise option I think that was chosen most, and we simply want to simplify things, and we picked the most popular, the one with a little bit longer period, to recommend. And again, just make things simple. There wasn't much more to that proposal than that.

PHILIP CORWIN: Okay, so the proposal was to get rid of the start day sunrise.

LORI SCHULMAN: The 30-day minimum period start date, right. It's confusing, and as you pointed out, the preference for the operators have been the 60-day minimum period for the end date sunrise. INTA members are satisfied with that and would certainly support a singular option.

PHILIP CORWIN: Okay. Thank you, Lori. Now I'm going to call on Maxim followed by Kathy followed by Susan. Maxim, go ahead. You have the floor.

MAXIM ALZOBA: Actually, kinds of sunrises were discussed in great detail, and the text is misleading. The start day sunrise is 30 days of announcement and then 30 days of sunrise, and it's 60 days in total.

Second, some registries couldn't use end date sunrise because of anti-monopoly committees' concerns that basically, domains should cost the same. And with end date sunrise, you [can't] do that.

Also, we haven't seen issues around start date sunrise. Maybe some parties would be happy to eliminate some kinds of choices for registries, but I'm not sure that it's time to say that working group never discussed sunrises and it's a great idea to eliminate start date sunrise. Thanks.

PHILIP CORWIN: Okay. Thank you, Maxim. So I hear you're expressing concern about just allowing one option to new TLD registry operators in the next round. Kathy, go ahead.

KATHY KLEIMAN: Yeah. My recollection is with Maxim, that we have already discussed this at length, and at least in some of the subgroups over the years and that we decided to maintain the choice that registries currently have. And since we don't have time to go back out to the registries, I think we should stick with that. Thanks.

PHILIP CORWIN: Okay. Thank you, Kathy. Susan Payne.

SUSAN PAYNE: Thank you. I posted in the chat a link to the latest startup information, just in case it would be helpful for some people. I do agree with Lori that at the time, so many months if not years ago that we looked at this, that it did seem that most registry operators had adopted the end date version. But actually, if you look at the startup information as it currently stands, I don't think it's quite so

clear cut. I think there's a number of registry launches that used a start date sunrise instead. So that was just one thing I wanted to flag, that I'm not so sure that the data is quite so firmly in the same place as it was when we looked at this.

And then I wanted to just comment on the other aspect of this, the second issue regarding whether certain types of industry should be exempt from the sunrise. And the way the comments are referred to in this summary document, it seems to be suggesting that neither code of conduct exempt TLDs nor Spec 13 TLDs currently are exempt from the sunrise, and that's not a correct categorization of what the comments actually were.

The comments were saying that Spec 13 registries are currently exempt from the sunrise, and for the avoidance of doubt, it should be called out that we're not recommending a change to that when the recommendation is saying that all TLDs should run a sunrise. The comments in question regarding Spec 13 were saying it's probably worth calling out the fact that we know Spec 13 registries have an exemption. Separately, I know that the contracted parties have suggested that code of conduct exemptions should also have an exception. I personally think that makes a lot of sense. They don't sell to third parties and therefore there's no real reason to run a sunrise. So I'm fully on board with that, but I just wanted to make it clear that these two things are not identical. Spec 13 registries have always had an exemption and the comments were trying to ensure that that wasn't accidentally taken away.

PHILIP CORWIN: Okay. Susan, I missed the distinction. Are you saying .brands already have the exemption?

SUSAN PAYNE: Indeed, they do.

PHILIP CORWIN: Okay, and which is the other category we're considering?

SUSAN PAYNE: It's the ones that are exempt from the Spec 9 code of conduct because of the fact that they are a non-generic term and they're only allocating names to themselves for use by themselves or their affiliates. So effectively, it's a specific category of effectively closed TLDs where there are no third-party registrants, so the kind of thinking behind running a sunrise doesn't particularly apply for those TLDs. So it makes perfect sense to exempt them, to my mind. But the Spec 13 ones will already have an exemption and those of us who commented on this wanted to be assured that that didn't get taken away.

PHILIP CORWIN: Okay. Can we scroll back to the recommendation? On the basis of the discussion we've had so far, what I'm hearing is that there's concern about eliminating the flexibility for registry operators to choose between the 30-day start date sunrise, which actually as Maxim has put out, it's 30 days after 30 days' notice that it's going to be opening up, so the potential registrants should know about it

before it opens. And the other one—and there's likely no need to expand this recommendation to address an exemption for .brands because they already have it.

so unless there's violent disagreement, I think we're winding up in the same place where we're keeping this recommendation as is. I haven't heard anyone make a case for editing it, the current language, or adding any new language to it. So if anyone wants to make a statement for amending or adding, now is the time. If not, we're going to close it out.

All right, recommendation 5 on sunrise stays as is. Let's move on. And David McAuley, I'm going to take you up on your volunteering to alternate reading the recommendation and the accompanying deliberation summary of what happened in the subgroup. The floor is yours.

DAVID MCAULEY:

Thanks very much, Phil. Hi everybody. As subgroup A chair, I want to thank the members again for the work they did and also thanks Ariel for her explanation in response to Phil's question that we largely left things intact but did flag comments for the full working group consideration, pretty much as we just did with regards to sunrise recommendation number five. So I'm toggling over to a different presentation to paraphrase this, and then I'll be back to look at the queue. But sunrise recommendation six we'll probably do very quickly because it's not too much different than what we just went through with recommendation five. Let me read the recommendation.

In the absence of wide support for a change to the status quo, the working group recommends that the mandatory sunrise period should be maintained. And what we did is I think the language in the third paragraph under subgroup A deliberation is a little bit off, we did want to flag some comments, and they're essentially the same comments or very similar to what we just discussed, and I think Susan summarized very well at the end of her comments, but basically saying, look at these comments in an effort to make it clear that registries that are dealing with situations where they're not going to have third-party registrants, just make it clear that we're not changing that. Spec 9 or Spec 13 would not be required to have sunrise. The people that don't have Spec 9, the code of conduct.

So it's an easy summary in that sense, it's very close to what we just discussed with recommendation five, but I think it would be appropriate now to put it out on the floor simply saying that we didn't suggest any changes here. Just wanted to flag those comments. Susan, go ahead, please.

SUSAN PAYNE:

Thanks, David. Yeah, so I don't know how we handle this, but I wonder if perhaps what we need is some implementation guidance. Not necessarily suggesting we need to change the recommendation, but do we need some implementation guidance that just makes that point that if you're a TLD that has specification 13, that already exempts you from the sunrise, and we're not proposing any change to that, and that we also suggest that code of conduct exempt TLDs where there are no third-party registrants, equally, it seems appropriate that they need not run a sunrise.

DAVID MCAULEY: Thank you, Susan. And in answer to your question, what I think would be wise, if this group agrees—it's up to the whole group—would be that we do ask staff, and maybe myself since I was subgroup A chair, to do something similar to what Phil and Paul Tattersfield and others agreed with respect to the TMCH thing, and that is, in the next week just come up with a sentence or two of implementation guidance to say what we're saying here in light of the public comments is that some implementation guidance should be given to make it clear that this is not changing the fact that people that don't have Spec 9 or do have Spec 13 are not being required to run a sunrise.

So I would be happy to do that, and I think that would be the way to handle it unless somebody wants to object and offer some other guidance on that. But I think it's a fair point that you make, Susan. Thank you.

PHILIP CORWIN: Yeah, David, I'm fine with that approach. I would just suggest that staff include that in the general follow-up e-mail from this meeting rather than—I don't want to inundate working group members with multiple e-mails. the reason I suggested the separate e-mail for the TMCH four and five was because we were so close to final agreement, and it's a fairly complex matter on its own so I didn't want it to get lost in the general follow-up e-mail. But otherwise I'm fine with your suggestion on that. And I think staff can—I know they pay close attention to our discussions and reflect that in the final draft language of the report.

DAVID MCAULEY: Thank you, Phil.

PHILIP CORWIN: And Julie's just confirmed that in chat. [Because] we have other discussions on this rather noncontroversial recommendation that we not change things. Mary, let me ask—I see your comment—do we need to include that clarifying language in the recommendation, or can that just be in the report explaining the recommendation? That is, not changing things for Spec 13 and ... I guess 9 would be an addition.

MARY WONG: Right, Phil. So yeah, we're not opining on nine, but obviously, if the working group does agree that Spec 9 should be treated the same as Spec 13, then these comments go to both and not just Spec 13. So you can do it either way. Obviously, if it's in the recommendation itself, it will be the most obvious of the obvious and you could do something like simply add a phrase, "With the exception of Spec 9 and 13." If that will cause too much delay or concern or somehow cloud the consensus, then you can certainly put something in the report itself in the contextual part of it to make it very clear what is excluded, because in implementation, we don't just look at the recommendations, we look at what's around it too.

PHILIP CORWIN: Okay. Well, my personal view would be that it would be better if we noted that exemption in the recommendation itself so it doesn't get

lost somehow and that it has a high profile. The Spec 13 is already exempt, the Spec 9 proposal has come up, and that's a very small category of TLDs. I haven't heard any objection to it. Does anybody have objection to adding Spec 9 to the exemption? Kathy, go ahead.

KATHY KLEIMAN: Yeah, I have a question. What is Spec 9 and have we talked about it? Apologies if I missed it, I've been going in and out. It seems like a new category here. So, what's happening? Thanks.

PHILIP CORWIN: I know Spec 13s are .brands. Maybe Susan can—I think she already alluded to it. I see your hand up, Susan. Can you answer Kathy's question?

SUSAN PAYNE: Yeah. Thanks. I'll do my best. So obviously, this isn't my suggestion. I don't object to it, but just to be clear, this is not my proposal that I'm talking about here, it's a proposal from the Contracted Party House, I believe. But Spec 9 is Specification 9 to the registry agreement and it's the provisions of the registry agreement which deal with the code of conduct, which is the relationship between the registry and registrars. And there are some provisions in there about having separate books and about equal treatment for registrars and the like. And they're all very important provisions in a context where there are sales to third parties. It's to ensure that a registry doesn't treat one or a group of registrars in a different way to other registrars.

But they make less sense in the context of a TLD where there aren't third-party sales, because all of the names are going to the registry operator. So they are called code of conduct exempt TLDs, those particular TLDs where all of the names are only being allocated to the registry operator and for use by the registry operator or its affiliates.

And in that particular case, the purpose of a sunrise is obviously to give third party brands an opportunity to buy names in a TLD, but if there are no names going to be sold to anyone, then it doesn't seem to make much sense to run a sunrise. That's the point. But personally, I'm not going to go die in a ditch on this one. It wasn't my proposal.

PHILIP CORWIN:

Okay. Well, we're not asking anyone to die anywhere, Susan. I want to note before calling on Greg—and I'm not advocating for or against inclusion of Spec 9, but having put down the link in the chat to Spec 9, I think if we're going to—we're not really talking about every TLD is supposed to operate under Spec 9 which is the code of conduct, we're really talking about the very small number of registries which have received exemption from Spec 9 under paragraph six which provides an exemption procedure that Mary has put in the chat. And Greg, please go ahead.

GREG SHATAN:

Thanks. Spec 9 basically protects, I would call them brand-like closed TLDs. Paul put a couple in the chat, .catholic and .broadway, and a third one that I'm aware of is .gecompany. General Electric

did not get .ge because of Georgia, and it applied for .gecompany to use it as a brandlike TLD but did not get Spec 13 because it actually has no registrations for gecompany as such. General Electric Company, General Electric, yes, but not gecompany. So they are a Spec 9 rather than a Spec 13. But Spec 9 exempt TLDs really act like Spec 13 TLDs in that case, so it really, logically—and again, not my proposal, nor do I represent anybody who has an interest in it, but it's logical to group Spec 9 exemptions and Spec 13 TLDs together for this purpose. Thank you.

PHILIP CORWIN:

Okay. So we're talking about a small number, relative handful, of TLDs up to now, which the commonality between both them and traditional .brands is that they don't allow registrations by any third party, it's all done by the registry operator is also the registrant. Kathy.

KATHY KLEIMAN:

Thanks, Phil. I'm amazed that we're talking about something so interesting so late in the day, and so new. I don't see how—I thought only Spec 13 had the registry operator being the registrant. I've spent a lot of time with the registry agreement. I don't understand scope with the overlap of Spec 9 and 13, and I don't understand kind of the implementation of Spec 9 that we're talking about here.

We've got a recommendation. We don't seem to have any proponents of this proposal here in the working group. I think we go with what we've got, and I just want to note that there were those, like EFF, who didn't support the mandatory sunrise at all. But if

we're going to create exemptions and exceptions, I think we all have to understand it. Thanks. And I think that will take time.

PHILIP CORWIN:

Thank you, Kathy. Based on what's already been said on this call, the .brands, so Spec 13 TLDs, are already exempt from sunrise. The only thing we're discussing is whether this small odd group of Spec 9 TLDs, which are essentially the same as .brands, no third-party registrations, should be exempt from sunrise as well for the sake of consistency where if we don't say anything, the implication should be that they need to run a sunrise for themselves.

So Susan and Greg, and then I don't want to spend the whole rest of the call on this issue, so I propose a way to deal with it. Go ahead, Susan.

SUSAN PAYNE:

Thank you, Phil. So as I said before, I've got no desire to die in a ditch on this, but I do take issue with the kind of procedural constraint that Kathy seems to be putting in here. I really thought that this was actually the whole point of the public comment exercise. We did a triage exercise in the subgroup where we identified some comments which seemed to raise new issues, and they got referred to the full working group. And here we are with them in front of us and we're supposed to look at them. That's surely the point. So suggesting that this is too new and too late just flies in the face of this whole public comment exercise. If that isn't what we're doing here, then why the hell do we run a public comment? We might as well just put out a report.

This makes no sense to me as a procedural matter, that we wouldn't consider exactly what this whole exercise was supposed to be about.

PHILIP CORWIN: Okay. Thank you, Susan, and then Greg, and then I'm going to speak.

GREG SHATAN: Thanks. I agree with Susan. In addition, this is really not a new issue. I remember discussing this issue at length in the past. Maybe not in this working group, but certainly, it's an issue that was well known, and I think we have to justify logically why we would require a TLD with no third-party registrants to run a sunrise. That makes us look absurd. And I assume, by the way, that the stricture that Kathy was proposing, she was proposing in her individual capacity, not in her co-chair capacity, so her opinion has the same weight as mine and as Susan's.

And I think procedurally and substantively, this makes sense, and the fact that there isn't a proponent for it in the group is a bad, bad precedent to set for how to look at comments, the idea that if you're not at the table, you're going to be part of the lunch. That makes us look like a cabal, and that's not a good idea. Thank you.

PHILIP CORWIN: Okay. Thank you, Greg. And yes, we don't want to be a cabal or any other suspect group. Here's what I'm going to say. There's no disagreement with the recommendation as it now stands, to

maintain mandatory sunrise. There's no .brands exempt from Spec 9 who operate under Spec 13 are already exempt from sunrise. The only issue is whether, for the sake of consistency, this other type of TLD which has been exempted by ICANN under paragraph 6 of Spec 9, and they've been exempted because they don't allow third party registrations in their TLD, should for the sake for consistency be also included somehow in the exemption in this final report.

And this is an issue that was properly brought before us in the public comment period on the initial report by the entire Contracted Parties House which represents half the GNSO in the council. So it's clearly something important to a major constituency. I think what we want to do, we've got agreement on the overall recommendation. We're not changing the exemption for .brands. This issue of Spec 9 exempt TLDs has come up in this discussion.

I think I'm going to ask staff to—I think let's pull this one and come back to it at a later meeting. I think when the co-chairs next meet with staff, we can discuss this. And I think we can get to closure on this one because I don't think anyone's—if we want to be consistent with the comment and the recommendation and with past and future practice, this makes sense.

I think we're going to get to agreement on this, but there will not be productive further verbal discussion at this time. We can bring it back hopefully in a forum where we can wrap it up in about five minutes. Greg, comment on that?

GREG SHATAN:

I think that's a good way to go, and I think that when we come back to discuss it, if there are logical, substantive objections to throwing the Spec 9 exempt registries in with the Spec 13 for this particular purpose, I think that's where we need to focus, is I think the only objections we heard were procedural. And if there is a substantive objection, I'd like to know what it is so I can consider it, but I can't think of it. Thanks.

PHILIP CORWIN:

Thank you, Greg. And speaking in a personal capacity for a moment, I'm not steeped in this issue, but it seems to me that it's only logical that if a registry operator through its contractual agreement with ICANN and/or receiving a specific exemption from ICANN, that it is not and never will be open to third-party registrations and there's no logical reason why it should be required to run a sunrise period when it's going to be the only registrant. But let's bring it back and close it out quickly at a future meeting. I don't like kicking things down the road, but I don't want to get bogged down on these when a short deferral and consideration on the working group list can wrap it up.

Okay, thank you for that comment in the chat, Griffin. Let's move on to the next item. We've got 26 minutes left. Let's see if we can at least close out these sunrise recommendations.

Number seven, The working group is recommending that the next version of the AGB be amended as follows, that, one, it should include the TMCH dispute resolution procedure for challenging the validity of trademark records entered into the TMCH. It notes where it's currently published and recommends that ICANN Org

should ensure that its contract with the provision of TMCH services makes the operation of the TMCH dispute resolution procedure a requirement for the service provider.

Point two, section 6.2.4, the current trademark clearinghouse model, module 5 of the AGB, must be amended to remove grounds i and iii. And I don't recall what those are, but we agreed on it, apparently, prior to this. And TMCH model of module five must be amended to include a new section 6.2.6 which h will read, the registry operator will, upon receipt from the TMCH of a finding that a sunrise registration was based upon an invalid TMCH record pursuant to a TMCH dispute resolution procedure immediately delete the domain name registration. Registry operations in their applicable SDRPs will describe the nature and purpose of the TMCH challenge process and provide a link to the TMCH for reference.

Then there's a note that registry operators should continue the option to offer a broader SDRP to include optional and additional sunrise criteria as determined.

Let's see what transpired in subgroup A. First, it agreed that the recommendation be maintained as is but several new or material perspectives and solutions raised by the public comments should be referred to the full working group for possible reconsideration of its recommendation.

Then subgroup A noted that the recommendation could entail a change to the applicant guidebook so that joint efforts between the IRTs of both RPM and SubPro makes most sense. And the CPH suggested that approach.

It noted that he IPC's suggestion is a new proposal which the working group had not discussed, considered in making this recommendation. They flagged the ICANN Org comments for the full working group to consider. Several members commented it was unnecessary to refer back to the CPH with the rationale including but not limited to ... And then there's a number of bullet points on that.

They also discussed Tucows's public comments which did not support the recommendation. The subgroup members had diverging views regarding Tucows's comments, and they're all listed. So David, this is a complicated one. Did you have any more background to offer on this one as subgroup chair before we get into open discussion?

DAVID MCAULEY:

Thanks, Phil. No, not really, not more background. I just will note that there was a fair amount of discussion and the things that are flagged are flagged. I don't know that we ever thought they would be persuasive enough to carry the group along, but we wanted them to be considered. And that's my recollection, basically.

PHILIP CORWIN:

Okay, and staff, can we go back up to the main recommendation? So David, just to clarify to make sure I understand it correctly, this sunrise recommendation number seven is the one that was put out for public comment and it's subgroup A's recommendation that it remain as is after consideration of all the public comments on it. Is that correct?

DAVID MCAULEY: Yes. And that's my understanding. I don't believe that any of those carried us over to suggest that a change be made, we simply wanted them to be flagged for consideration to make sure the working group was aware of them and could give them consideration, but I don't think we ever expected—and we may be wrong—that they would carry [inaudible] making a change. And I'd invite others in subgroup A to comment if they wish to, but that's my recollection. Thank you.

PHILIP CORWIN: Okay. Any other comments from subgroup members? If not, we can go into open discussion for full working group members. All right, so the subgroup after its due consideration of all the public comments received on this proposed sunrise recommendation number seven determined that none of them were convincing enough to change the language in any way and this is the language that should be in the final report.

If anyone disagrees with that conclusion and wants to suggest a modification of the recommendation, now is the time to speak up. Mary, you have insights for us on this?

MARY WONG: Thanks, Phil. I have neither objections and probably not insights. It was more of a question to follow up from the ICANN Org comment, and not about consulting the CPH. We're actually quite glad to see that the CPH submitted public comments on this and other recommendations. But on one other concern which is that—well,

concern is even almost too strong—that this recommendation talks about two different kinds of dispute resolution procedures. One is for entry and validation about a TMCH record, and another is about sunrise dispute resolution policies or SDRPs. So I think the only questions here on the working group is to make sure, in reading through this recommendation, that the distinction is clear, because when you pass this over to the IRT, if this recommendation is approved, then we want to be sure that we're implementing the right thing with respect to both dispute resolution procedures.

PHILIP CORWIN:

Okay. Thank you for that important reminder, Mary. David, I see your hand up.

DAVID MCAULEY:

Thank you, Mary. I just wanted to follow up on what Mary said because Ariel kindly put—there was a recommendation to remove subsections one and three from I think it was 6.2.4. I just wanted to go ahead and read out—and it's about the sunrise dispute resolution policy. I wanted to read out what the intro to that was so that everybody here on this call understands what the request was that they be removed from. And the introductory language in 6.2.4 said the proposed SDRP—sunrise dispute resolution policy—must allow challenges based on at least the following four grounds, and then you get to one, two, three and four, and Ariel put in the chat one and three, which were requested. There was a comment to remove them. we did not agree to that, but we wanted to flag it. Thank you.

PHILIP CORWIN: Okay, so David, you're saying someone suggested that these grounds for dispute be eliminated and that the subgroup did not agree.

DAVID MCAULEY: That's my recollection, Phil, yes.

PHILIP CORWIN: Okay. Let's go back to the recommendation. I'm just looking to see if it makes this distinction clearly that Mary was concerned about.

DAVID MCAULEY: I think when I was actually scrolling on another screen to get there, I misstated it. The sunrise recommendation number seven in section two actually says that the working group recommends that the AGB be amended for those reasons. So I misstated it. Sorry. The lead in language that I just read, that was correct, but my conclusion was wrong. It's part of the recommendation. Thank you.

PHILIP CORWIN: Okay. And that was a recommendation reached within the working group and put out for public comment, clearly. Ms. Payne, please go ahead.

SUSAN PAYNE:

Thanks, Phil. So a couple of things. Firstly, in relation to this issue about whether it's sufficiently clear in the recommendation, obviously, I can't actually remember what the text of our initial report said, but I'm assuming our initial report had some sort of background and rationale for why we were making the recommendation, and I'm fairly sure that it would have explained what was trying to be achieved here.

Yeah, sorry, thanks, that's the word I was looking for, contextual language. I don't really know how this works in the final report. Do you keep the contextual language, or does that get lost now? Because it seems to me that perhaps what Mary was referring to might be adequately addressed by the contextual language that we had. Hopefully that's the case.

The other point that I wanted to make was more addressing the new point that the IPC made in our comments, which again may be actually more of a matter of implementation guidance perhaps as opposed to necessarily requiring a full-on change to the recommendation, but it really was just a suggestion that because this is a challenge process, then there should be a sort of mechanism or a time period built in to allow for disputes of any outcome before a name was canceled, for example, so that if the registrant of the name was going to challenge the decision, they would want to pause before any decision was implemented.

PHILIP CORWIN:

Yeah. That would seem to be a matter of fundamental fairness, that if there's a dispute that the party who registered the mark and the clearinghouse have a reasonable opportunity to respond before it's

removed, and maybe that sounds more like an implementation issue, which is what the IPC said.

I think we can close this one out. No one's raised any questions about the substance of the recommendation. I think we can, with some language in the final report about implementation giving a fair opportunity for the owner of the claimed trademark to respond to a dispute and with the language clearly distinguishing the two challenge processes outside of the recommendation itself, if staff can take care of that in the text of the final report, I think we can accept the recommendation as is and move on. Any disagreement with that?

All right. We're done with that one. We have 13 minutes left. Let's go on and try to finish one more. Go ahead, David.

DAVID MCAULEY:

Okay, Phil. Thank you. It looked like when I offered to do these alternatively, it worked in my favor because this is another short one. Sunrise recommendation number eight, in the absence of wide support for a change to the status quo, the working group does not recommend that the scope of sunrise registrations be limited to the categories of goods and services for which the trademark is actually registered and put in the clearinghouse.

Subgroup A noted that there was opposition in public comments but it agreed the recommendation should be maintained as is. There's really nothing specific that we flagged here.

PHILIP CORWIN:

David, thank you, and I agree. I remember this working group having long and detailed discussions on this matter. It was clear that we could not reach even broad agreement, much less consensus on such a restriction. There was nothing new raised in the public comments that hadn't been brought up in the working group discussion, so unless someone thinks we need to discuss this further, I'm not sure there's any need for further discussion of recommendation 8, which is the status quo declaration, based on the inability to agree on any change.

Does anyone disagree with that characterization? I'm not seeing any hands or hearing anyone, so I think eight is accepted as is. Let's go on to nine, or the next one, whatever it is. We have 11 minutes left. Now we're getting to the questions, which, I'll read this. What remedy or remedies would you propose for any unintended effects of the sunrise period you have identified in your public comment?

All right, subgroup A agreed that the public comments did not raise any new or material perspectives, facts or solutions that have not been previously considered by the working group. Nevertheless, the subgroup noted that the comments calling for an open TMCH were amongst the most popular responses and the comments objecting to a sunrise period for a common dictionary word also gained traction, and there were some comments from INTA and GBOC worth flagging of the full working group.

Can we quickly look at those INTA and GBOC comments to see what they were and then see if we have any discussion on this one? All right, let's see. INTA raised concerns about registry operator practices aimed at preventing brand owners from reasonably using

sunrise. I think that was about primarily premium pricing, perhaps about reserved names. I'm not going to read every word here, it's on the screen for everyone. And the GBOC also had concerns about registry operators frustrating the utilization of sunrise, again saying it might change the base TLD registry agreement.

All right, so that covers that base. So let's go back to the question itself. So, we had this question, we got nothing new from the ICANN community in the way of perspectives, facts or solutions that hadn't already been discussed, but there were some common themes and some ideas worth flagging. We're at a late stage—does anyone think there's anything here that requires us to look at and consider a change to the recommendation or recommendations that this question would relate to? I think that's probably the issue before us.

And yeah, I'm not seeing any reason to go further on this discussion other than checking the box that we reviewed the answers to the questions, or at least the working group's—the subgroup's summary of them. So let's move on, we have six minutes left. Question two, have you identified sunrise abuses? To the extent you have, describe them and specify any documentation. And then in the deliberations summary, the subgroup noted that the BC's TM-PDDRP related proposal to address price gouging for registry operators was seen to be an immaterial solution, referred to the full working group, and that it might be—if that's compliant mechanism, I believe that should be complaint mechanism.ú

Subgroup A had diverging views regarding the BC proposal so they couldn't reach any agreement on it, and it would considerably expand the TM-PDDRP mechanism. I guess that would be to challenge pricing and not just encouragement of infringement or

active involvement in infringement. And the subgroup also noted several comments provide examples of registry operators' abusive behavior.

Okay, so David, let me ask you, do you recall in the responses to this question, other than unhappiness with pricing, were there other abuses? Do you recall other abuses being identified?

DAVID MCAULEY:

Thank you, Phil. We did want to flag comments, and you can see them in the public comment tool, to question number two on rows 55, 56 and 57. I can mention what they are. The first is from the IPC where they said they identified multiple systemic abuses of sunrise, significant external cost on rights holders. They say some primary forms of sunrise abuse include, one, the withholding reservation or self-allocation of trademark corresponding domains with the intent of circumventing or discouraging the use of sunrise, two, discriminatory pricing practices designed to leverage the need for defensive sunrise registrations, including excessive and exorbitant pricing, and things like that.

They also listed resources which the public comment question tasks responders to do, but I don't think we [need to] go through those right now. 56 was from the—

PHILIP CORWIN:

You're fading out, David.

DAVID MCAULEY: I'm sorry about that. I mentioned that the IPC had listed certain resources, but I don't think we need to go into that now. That listing of resources was in response to our question.

The 56, the global Brand Owner and Consumer Protection Coalition also listed abuses in the nature of practices adopted by registry operators that had the effect of circumventing, a couple of things that I just mentioned. Examples of registries that use practices include .SUCKS and .FEEDBACK.

And then 57 was from Com Laude, a number of abuses were identified by brand owners in the INTA survey. In the context of TM-PDDRP, brand owners identified various abusive behaviors. And they also go on and provide some more information. But that's largely it. So yes, there were a few that we flagged. Thank you.

PHILIP CORWIN: All right. What I'm hearing—and I'll call on you in a moment, Maxim—is that the public comments didn't raise any issues or examples that hadn't been raised overall within the working group prior to the initial report and that the issues they raised were addressed by either individual working group proposals or recommendations and there's nothing new to discuss—so I'm not sure there's anything more to do than check off the box that we considered this. But let me call on Maxim.

MAXIM ALZOBA: I see this as an attempt to have a second bite on an apple, because pricing, reserved list, [challenge the venue to challenge pricing,] all of those items were discussed well in depth, and the situation that

we see this, the same item again from the same group, I don't think it goes well with how PDP work. If we don't have new evidence or new information, we don't revisit items. Thanks.

PHILIP CORWIN:

I would agree that we've seen these comments or similar comments, very similar ones, in response to particular and relevant working group recommendations or individual proposals, so to the extent we would address them, we've already had an opportunity to do so in the individual proposals or the working group recommendations. so I'm not ...

Does anyone think we need to do anything with the answers to these questions that would relate to a recommendation in the final report? I think that's the issue. Griffin.

GRIFFIN BARNETT:

Thanks, Phil. I'm kind of restating some things I put in the chat, but I think in short, I don't think there's anything here that we need to compile into any kind of new recommendation. I just think there may be some ideas that I don't think are new ideas here that are either already captured or can serve as additional potential context or something like that or instruction in connection with the other recommendation that we have about recommending a new RA amendment concerning—I forget the exact wording now and I forget even which recommendation number it is, but one that we discussed before about registry practices that circumvent or have the impact of circumventing sunrise.

So I think that all of this kind of speaks more to that existing recommendation, and I don't think we need to rehash those discussions now. I think we already have sort of that bucket for them. Thanks.

PHILIP CORWIN:

Okay. Thank you, Griffin. All right, we're now one minute past the scheduled end of the call, although we started three minutes late. Thank you all. We got a lot closed out today. I believe we have one item for further follow-up that's going to be addressed in the general follow-up e-mail from staff on this meeting, so watch for that. We're going to have a separate e-mail going out and a one-week open period to wrap up the geographic indications matter and agree on the overall principles we're recommending, and to suggest language for the assistance of the IRT on that.

The next call will be next Tuesday at, I believe, 13:00 UTC, 9:00 Eastern, you know your time. So we got a lot done, we're getting closer to the finish line. Thank you, everybody, for your participation and we'll see you next Tuesday. Watch for those e-mails, and let's wrap up that GI issue once and for all.

Thank you, and goodbye.

MARY WONG:

Thank you, Phil. Thank you, everybody.

JULIE HEDLUND:

Thanks, everyone. Thanks for chairing. This meeting is adjourned.

[END OF TRANSCRIPTION]