

January 16, 2018

Dear Mr. Kirikos:

Thank you for the written document relating to your Section 3.7 appeal, submitted shortly before our scheduled call on January 11th. We appreciate the time that you spent on that submission, and have now fully reviewed and considered it.

This letter constitutes our response.

Satisfaction of requirement for a mutual discussion

At the outset, we note that the appeals process described in Section 3.7 of the GNSO Working Group Guidelines¹ is short on process details, stating only:

Any WG member that believes that his/her contributions are being systematically ignored or discounted or wants to appeal a decision of the WG or CO should first discuss the circumstances with the WG Chair. In the event that the matter cannot be resolved satisfactorily, the WG member should request an opportunity to discuss the situation with the Chair of the Chartering Organization or their designated representative.

In addition, if any member of the WG is of the opinion that someone is not performing their role according to the criteria outlined in Section 2.2 of this document, the same appeals process may be invoked.

It is unclear whether the discussion referenced in this section shall be oral or written, and the dictionary definition of “discuss” encompasses both meanings. We share your concern that this procedural dispute is unduly preventing the WG from concluding its final responsibility, noting that if the path proposed by the co-chairs had been followed the poll would have already occurred and the WG would now be engaged in its determination of final consensus levels.

Therefore, as we have not agreed to the remedies you seek and in the interest of time, if you wish to proceed with seeking a discussion with the GNSO Council Chair or her designated representative upon receipt and review of this response, we are of the view that this exchange of documents satisfies the initial requirement to discuss the matter with the co-chairs. However, if you still wish to proceed with the call now scheduled for January 18th we shall certainly participate.

Discretionary authority to conduct the proposed poll

¹ <https://gns0.icann.org/en/council/annex-1-gns0-wg-guidelines-01sep16-en.pdf>

The co-chairs have proposed to conduct an anonymous poll to assist them in knowledgeably performing their duty to initiate the consensus call process described in Section 3.6 of the Guidelines, which states:

The recommended method for discovering the consensus level designation on recommendations should work as follows:

- i. After the group has discussed an issue long enough for all issues to have been raised, understood and discussed, the Chair, or Co-Chairs, make an evaluation of the designation and publish it for the group to review.
- ii. After the group has discussed the Chair's estimation of designation, the Chair, or Co-Chairs, should reevaluate and publish an updated evaluation.
- iii. Steps (i) and (ii) should continue until the Chair/Co-Chairs make an evaluation that is accepted by the group.
- iv. In rare case, a Chair may decide that the use of polls is reasonable. Some of the reasons for this might be:
 - o A decision needs to be made within a time frame that does not allow for the natural process of iteration and settling on a designation to occur.
 - o It becomes obvious after several iterations that it is impossible to arrive at a designation. This will happen most often when trying to discriminate between Consensus and Strong support but Significant Opposition or between Strong support but Significant Opposition and Divergence.

While the co-chairs believe that all issues relating to our final report have been thoroughly raised, understood and discussed, the co-chairs believe they are not in a position to perform their responsibility under point i absent a poll for several reasons.

These include the fact that a majority of the members of this WG who have indicated that they are following our discussion and wish to participate in the consensus call are not active in our calls or email exchanges. Another is that, since the initial anonymous poll conducted last fall, the number of policy options encompassed by the contemplated consensus call has doubled from three to six, and at least one WG member has indicated that he will be changing his preference from that indicated in the original poll. Under these circumstances, the co-chairs believe that they require the input of a poll to develop an informed evaluation of the levels of support among WG members for the multiple policy options.

We believe that the circumstances described in the previous paragraph constitute the type of rare case contemplated by the Guidelines and that our proposal for a poll is a reasonable exercise of our discretion. In this regard we note that opposition expressed by some members of the WG is focused on the proposed anonymity of the poll, and not on the use of a poll to assist the co-chairs in fulfilling their responsibility.

We are well aware of the Section 3.6 admonition that, “Care should be taken in using polls that they do not become votes”. We did not use the prior poll as a voting mechanism but solely as a means to gauge consensus support for the policy options then before the WG, and we do not intend to use the proposed poll as a means of determining final policy recommendations through a vote². We have made clear on numerous occasions that, once we have submitted our initial estimation of consensus level designations, the remainder of the consensus call process would proceed in a fully open and transparent manner.

Transparency

We are also well aware that Section 4.1 of the Guidelines declares, “There is a presumption of full transparency in all WGs”, and that Section 6.1.2 states in relevant part:

6.1.2 Transparency and Openness

All Working Groups are expected to operate under the principles of transparency and openness, which means, *inter alia*, that mailing lists are publicly archived, meetings are normally recorded and/or transcribed, and SOIs are required from Working Group participants and will be publicly available.

We note that nothing we have proposed would in any way undermine the requirements that this WG’s mailing lists be publicly archived, meetings be recorded and transcribed, and SOIs be submitted by all WG members and made publicly available.

However, this presumption for transparency is not absolute and may be rebutted, and in making our proposal for an anonymous poll to assist us in our initial designation responsibilities we are relying upon the explicit language of Section 3.6 stating:

Based upon the WG's needs, the Chair may direct that WG participants do not have to have their name explicitly associated with any Full Consensus or Consensus view/position.

This provision clearly grants us discretionary authority to direct that the names of WG participants do not have to be explicitly associated with a consensus position, and we believe it is a reasonable exercise of this authority to utilize an anonymous poll to assist us in proposing consensus level designations to initiate the process for determining final consensus views and positions.

Rationale for Anonymity

Based upon the reasonable exercise of discretionary authority granted by the provision of Section 3.6 cited immediately above, we have proposed that the poll to assist the co-

² The fact that a jet lagged and sleep deprived co-chair mistakenly alluded to the first poll’s results as a “vote” in an informal presentation to GNSO Council on October 29, 2017 does not alter the fact that the prior poll was used only to gauge consensus levels within the WG and not as a determinative vote for or against any policy position, and that the intent of the proposed new poll is solely to assist the co-chairs in designating support levels in order to initiate the consensus call process.

chairs be conducted anonymously, with the names of individual WG members not being associated with their indication of preference for one of the six Recommendation 3 policy options, or with their comments indicating support or opposition for any of the other five options for that Recommendation; or for their indication of support, opposition, or proposed modification of the other Recommendations. Neither the co-chairs nor any other WG participant would know who had provided any indication of preference or opinion (although any WG member would be free to make such information public). The poll would be conducted in a manner that assures that it was a WG member who submitted a response, and that only one response was submitted by each member. A full and transparent tally of preferences and comments would be provided to all WG members and publicly archived.

There are two principal reasons why we have proposed to utilize an anonymous poll.

The first relates to the fact that some IGO members have indicated that they may allege that the final report produced by this WG reflects “over-representation to the point of capture” under Section 3.2 of the Guidelines. While we believe that the full WG encompasses a broad enough cross-section of the ICANN community to withstand such charges, the fact remains that its six most active members (other than the co-chairs) are all strongly associated with the domain investment sector. While there is nothing in the least wrong with participation in ICANN processes by individuals involved in that sector, this circumstance makes it more important that the maximum number of WG members participate in the poll so that it can be documented that the co-chairs’ initial designation and the content of and consensus levels for our final recommendations are based on broad and diverse input and have not been unduly influenced by a specific commercial interest.

The second reason relates to the fact that the aggressive personal style you exhibit in these policy debates, along with your demonstrated willingness to publicly question the knowledge, preparation, motives, and objectives of other WG members, may cause them to refrain from participation in a poll if they believe they risk such harsh personal criticism on our publicly accessible email list. Both co-chairs been targeted by you with charges that we believe to be baseless, most recently with the false allegation that seeking agreement on a reasonable time after last week’s scheduled call to respond to your written submission was a deliberate attempt to sabotage and penalize the appeals process, and that one of the co-chairs was unprepared to participate in that call. We have seen your caustic comments on other WG email lists spark extended and divisive debates, and some of our colleagues have confided to us that they hesitate to respond to you in ICANN policy discussions due to your usual manner of engagement.

Our concerns have been heightened by the fact that you have recently taken to social media about this WG and are publishing links to WG materials and characterizations of its activities, with which we do not agree, to your more than 1500 Twitter followers. We have reviewed these Tweets and found some to be concerning; for example, on December 19th you posted this message that we believe is misleading and inaccurate:

[George Kirikos @GeorgeKirikos 19 Dec 2017](#)

More Important issues of domain name registrants' rights to have their disputes decided on the merits in courts might be determined by people unwilling to attach their name to a position that deprives registrants of full due process via the courts. [#farce](#) [#accountability](#) [#ICANN](#)

You are certainly well aware that there is no policy option being considered by the WG “that deprives registrants of full due process via the courts”. The only proposal to deprive registrants of judicial access and require that all UDRP appeals from cases brought by IGOs go to arbitration came from the IGOs, and it has never been accepted by this WG nor is it one of the final policy options that will be polled.

There is an option before this WG that would provide registrants with a right to arbitration under applicable national law if an IGO succeeded in asserting judicial immunity and thereby terminated national court review (an occurrence over which ICANN can exercise no control). The intent of that proposal is to assure that registrants would maintain an independent right of appeal in such circumstances and would not have their domain transferred or extinguished as would occur under current UDRP provisions– and in your appeal submission we note that you oppose assuring such right on the grounds that it is beyond this WG’s Charter authority. While we personally disagree with that position, we recognize that it is based on your reading of the Charter and would not use it to allege that you were opposed to expanding registrant rights.

While WG records are public materials, and you are within your rights to post Tweets that link to them, we believe that overall the possibility that WG members may be personally called out by you both on the WG email list as well as on social media if their names are linked to poll responses, and have their views characterized in ways with which they do not agree and that may tarnish their reputation within the ICANN community and beyond, may significantly suppress participation in the poll and is more than adequate justification for holding it anonymously.

Role of the Chairs

We have multiple responsibilities as co-chairs. Under section 2.2.1 of the Guidelines, we must, “preside over working group deliberations, manage the process so that all participants have the opportunity to contribute, and report the results of the Working Group to the Chartering Organization”. We believe that we have continuously carried out those responsibilities effectively and impartially, and that all WG members have had full opportunity to state their positions and have their views considered by the other members of the WG. You have probably spent more time speaking on WG calls and posting to the email list than any other member, and two of the three Recommendation Three options in the original poll were favored by you, so there can be no charge that we have in any way suppressed your input to the WG or ability to advocate for specific policy outcomes.

We are also mindful as co-chairs that the final report and recommendations of this WG are not the end of the policymaking process but only the conclusion of its first step. Once that report is completed it must be submitted for consideration by the GNSO Council. And any policy recommendations approved by Council are then submitted to the ICANN Board for its consideration in conjunction with any GAC advice thereon. In this context – and in particular because the co-chairs were invited to participate in discussions of high-profile IGO issues with representatives of the GAC, IGOs, Council, and the Board, and asked to convey the substance of those meetings back to the members of this WG – we have worked to defend the reputation of the PDP within the broad ICANN community by seeking to maximize the possibility of a WG outcome that gives recognition and fair treatment to the respective rights and interests of domain registrants and IGOs through successful resolution of the issues raised in regard to effective IGO access to CRP, and in particular the central issue of IGO immunity from judicial process.

Section 6.1.3 of the Guidelines states:

The Chair is expected to assume a neutral role, refrain from promoting a specific agenda, and ensure fair treatment of all opinions and objectivity in identifying areas of agreement. This does not mean that a Chair experienced in the subject matter cannot express an opinion, but he or she should be explicit about the fact that a personal opinion or view is being stated, instead of a ‘ruling of the chair.’ However, a Chair should not become an advocate for any specific position.

We have striven to manage this WG in a fair and objective manner. While we have expressed personal views in regard to certain policy options under consideration we have done so in accord with our view of relevant law and policy as well as looking toward producing a final report that strengthens the reputation of the PDP and has a reasonable probability of gaining approval in the remaining stages of the process.

By seeking to utilize a poll to assist in the performance of our duties, and by proposing anonymity, we are not seeking to advance any specific policy outcome but rather to maximize the percentage of WG members participating in the poll and the candor of their submissions. We have no clear idea of what the results of that poll will be, and the use of the poll is strictly to inform us of the current state of WG member views. Following the poll, the final consensus designation for each Recommendation and related policy options will be collectively determined by the members of the WG in a fully open and transparent manner.

Conclusion

We believe that this letter lays out our rationale for proposing an anonymous poll and responds to the salient points of your submission. We do not interpret the Guidelines in the same manner as you, anticipate that you will seek further discussion with the GNSO Council Chair or her representative, and will abide by the ultimate judgment rendered through this appeal process.

Sincerely,

Philip Corwin

Petter Rindforth