

IGO-INGO Curative Rights Protection Mechanisms PDP Working Group

Everything Wrong with the Summary Report from the Liaison

By: George Kirikos, April 26, 2018

A. INTRODUCTION

1. On April 13, 2018, a gravely flawed Summary Report¹ prepared by GSNO Council Liaison Susan Kawaguchi was sent to the IGO-INGO Curative Rights Protection Mechanisms PDP Working Group (hereafter “IGO PDP”) mailing list, outlining the intentions and reasoning for the path forward of the working group as recommended by herself and GNSO Chair Heather Forrest. It is replete with errors of fact and reasoning, and is inconsistent with the requirements of GNSO policymaking. I’ve brought my concerns to their attention (during a conference call of April 19, 2018 and in emails), to no avail.

2. In December 2017, I initiated an appeal of the actions of the Co-Chairs of the Working Group, as permitted by Section 3.7 of the GNSO Working Group Guidelines (“WGG”)². Relevant documents from that appeal are:

- Appeal document dated January 11, 2018³
- Response⁴ from the Co-Chairs dated January 16, 2018
- Reply document dated February 12, 2018⁵

3. After the matter could not be resolved directly with the Co-Chairs, a conference call was held on February 20, 2018 with Ms. Forrest and Ms. Kawaguchi, which, consistent with the transparency requirements of the WGG was posted to the Wiki after being recorded.⁶ A similar call was held by Ms. Forrest and/or Ms. Kawaguchi with the Co-Chairs, but has **not been made public (Error #1)**, which is inconsistent with the transparency requirements of ICANN (which are detailed at length in the appeal documents above).

4. As a result of those calls, Ms. Forrest wrote to me on March 7, 2018 (“3.7 Update”) which included the following pertinent text:

As was said on the call, it’s not possible to go back in time, but we can take stock now to record all views, including those that previously may not have been expressed or recorded

1 See: <https://mm.icann.org/pipermail/gns0-igo-ingo-crp/2018-April/001111.html>

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

3 See: <http://mm.icann.org/pipermail/gns0-igo-ingo-crp/2018-January/001035.html>

4 See: <http://mm.icann.org/pipermail/gns0-igo-ingo-crp/2018-January/001057.html>

5 See: <https://mm.icann.org/pipermail/gns0-igo-ingo-crp/2018-February/001091.html>

6 See: <https://community.icann.org/display/gns0icrpmpdp/2018-02-20+Discussion+Call>

earlier, to fuel a robust and comprehensive determination of recommendations going forward. To that end, I have asked the PDP support staff to prepare a strawman as a starting point to capturing all of the possible articulations of the WG's conclusions. This approach has proven a useful tool in other ICANN WGs where views as to the group's conclusions differ among group members. We have useful precedent in a previous WG, in which the group presented in its final report a set of recommendations as comprising 3 recommendations agreed upon by all WG members, plus a fourth recommendation, articulated in Option A, B, and C, while recording varying levels of support for each option. What this process allows for is a more detailed articulation of the level of consensus after an opportunity for all views to be recorded **and deliberated upon in a transparent manner**.

To address your procedural concerns, Susan and I have agreed that as a first next step she, as PDP liaison, will lead the process of refining the strawman through input from the WG members. The success of this effort naturally depends on WG members' willingness to participate. In my previous experience with this approach, the opportunity to be heard was seized enthusiastically.

Susan will be available during the PDP's scheduled meeting time at ICANN61 and then at designated other time/s outside of this meeting time to consult privately with WG members to record their proposed modifications/additions/subtractions to the strawman. Staff will be on hand to help Susan record the views expressed. The co-chairs will not be involved in the facilitation of these meetings.

She will then compile all input received and **present it to the PDP as a revised strawman of possible articulations of the WG's recommendations**. All possible conclusions will be recorded and presented by Susan for the **group's subsequent deliberation**. I believe this approach blends the best attributes of a facilitator and the role of a PDP liaison with the concerns you have raised, with which Susan is now familiar. [**emphasis added**]

5. In particular, the deviation from transparency was only for the purpose of preparing a revised strawman, one that would subsequently be openly and transparently deliberated by the working group in accordance with the WGG, to attempt to move towards consensus using the established procedures.

B. Error #2 – no revised strawman, no further deliberations by the working group

6. Despite the above, Ms. Forrest and Ms. Kawaguchi have not presented any revised strawman to the working group for deliberations, nor are any future deliberations scheduled, as per the March 7, 2018 letter. Instead, the work towards consensus of the PDP has been hijacked by the Summary Report.

7. By violating the March 7, 2018 procedure **after** seeing the results of the consultations with members of the PDP, Ms. Forrest and Ms. Kawaguchi call into question their own commitment to neutrality and integrity of process. Ms. Forrest should certainly know better, given that she was called upon as an

Expert⁷ by Amazon in relation to their IRP for the .AMAZON TLD. In her report, she stated that:

Such an outcome is not consistent with ICANN's Core Values, which require decision-making “by applying documented policies **neutrally and objectively, with integrity and fairness**”. ICANN’s duties of **fairness, transparency and accountability are integral** to the Guidebook. [p. 43, **emphasis added**]

and

By acting on GAC advice that contradicts and circumvents the Guidebook and, in particular the Expert’s Determination in the Community objection raised by the Independent Objector, to prevent the .AMAZON Applications from proceeding, ICANN has failed to satisfy the requirements of **fairness, equity, transparency and accountability imposed upon it by its governance documents**. The .AMAZON Applications should not have been prevented from proceeding by GAC consensus advice or individual GAC members’ concerns that are **inconsistent with or avoid the rules expressly stated** in the gTLD Applicant Guidebook. [p. 45, **emphasis added**]

8. Here, the WGG are the relevant rules (rather than the Applicant Guidebook), yet the principles are the same. They unilaterally, without any objective standard, decided to do exactly what Ms. Forrest criticized ICANN and the GAC for doing, not only violating the WGG but also the March 7, 2018 procedure. An objective standard must be set prior to seeing the results. Instead, how can one not question the integrity of the process, when they’re instead making up the rules as they go along, and changing them to avoid the choice preferred by the majority (Option #4), which is not the choice of the Co-Chairs (who have backed Option #3, which is now a small minority)?

9. In particular, I’m not asking for a tilted playing field or for the process to be rigged. All I’ve sought (through the Section 3.7 appeal, and continuing with this document today) is for the documented rules and procedures to be followed without deviation. To do otherwise is to be subject to the exact same criticism which Ms. Forrest made above. She can’t have it both ways, without undermining her own credibility.

C. Error #3 – non-transparent/private meeting with Co-Chairs prior to Summary Report being issued

10. Ms. Forrest and Ms. Kawaguchi were certainly aware that the Section 3.7 appeal called into question the prior behaviour of the Co-Chairs, due to their violation of the WGG’s requirements of transparency, and attempted manipulation of the PDP’s procedures. Despite that, another meeting was held between them and Co-Chairs (see page 2 of the Summary Report) prior to the Summary Report being completed, which was private and not recorded.⁸ This is inconsistent with ICANN’s and the WGG’s requirements of transparency (as per paragraph #3 above, this is the second such non-transparent call between them, a pattern that is different from the call I had, which was recorded and

⁷ See: <https://www.icann.org/en/system/files/files/irp-amazon-export-report-forrest-02mar16-en.pdf>

⁸ See: <https://mm.icann.org/pipermail/gnso-igo-ingo-crp/2018-April/001121.html>

publicly posted).

11. After seeing support for their preferred option (Option #3) collapse, and the ascension of Option #4 (which they oppose), is it merely a coincidence that the new procedure going forward (changing from the March 7, 2018 procedure), which they had the opportunity to impact via their private meeting prior to the Summary Report being finalized, works to the advantage of the Co-Chairs, as it halts any procedures that would recognize Option #4 as the Consensus policy? Frankly, that's one of the reasons transparency exists, to prevent even the *appearance* of the process being manipulated by closed-door backroom meetings. The parallels with the controversial secret meeting between Bill Clinton and Loretta Lynch aboard an airplane⁹ during the 2016 US election campaign are striking.

12. It was poor judgment by Ms. Forrest and Ms. Kawaguchi to have any such meeting with only one side prior to the Summary Report being issued, given the heightened scrutiny and high stakes of the procedures due to the Section 3.7 appeal. Add to this the lack of any recording made public (in accordance with ICANN's transparency requirements) and the mistake is inexcusable.

D. Error #4 – inconsistency and miscount of feedback

13. In paragraph 2 on page 1 of the Summary Report, it was stated that 8 members provided feedback via telephone, and 2 sent input via email, for a total of 10. However, when the feedback is summarized on that same page, it only adds up to 9 (5 for Option #4, 3 for Option #3, and 1 for Option #6).

14. Not only were these inconsistent (and should have been caught prior to publication), from my own research and discussions with other members of the PDP, I believe that it was the support for Option #4 (the option opposed by the Co-Chairs) that had been undercounted (it should have been at least 6, by my count), making it look like the gap in support levels was smaller than it really was. Despite being made aware of this discrepancy last week, no updated Summary Report has been issued by its author.

15. It calls into question the integrity of the process when the numbers just don't add up. This is one of the justifications for transparency that ICANN and the WGG are supposed to follow, as it prevents such potential shenanigans (one person's "innocent mistake in counting" is another person's "vote rigging"). In this heightened atmosphere due to the Section 3.7 appeal which questioned the procedures, making such an error is again inexcusable, especially if the miscount is to the benefit of the Co-Chairs.

E. Error #5 – options were not mutually exclusive

16. Page 1 of the report mistakenly presents the options as though they are mutually exclusive, when that's not the case. This has the effect of once again undercounting the potential support for Option #4 (the leading option, and the one disfavoured by the Co-Chairs), because I've been told by the supporter of Option #6 that they would, if need be, support Option #4 if forced to choose between Option #3 and Option #4. I too also supported Option #6 (amongst other options), and some combination of options could have even greater support if given the opportunity to deliberate further (as per the March 7, 2018

⁹ See: <https://www.cnn.com/2016/06/29/politics/bill-clinton-loretta-lynch/index.html>

procedure). This would change the margin for Option #4 to 7 out of 10 (vs 3 out of 10 for Option #3). Furthermore, I know for a fact that some support for Option #4 wasn't counted (due to technical errors in emails, which was later brought to the attention of ICANN staff, Ms. Forrest and Ms. Kawaguchi after the Summary Report was issued).

F. Error #6 – feedback improperly treated as a de facto anonymous vote

17. The March 7, 2018 process was supposed to treat the feedback as input into a revised strawman, which would then be deliberated upon openly and transparently. This was supposed to be a path forward from the Section 3.7 appeal, which challenged the Co-Chairs' plans to hold a 2nd anonymous poll as the basis for gauging consensus levels prior to the consensus call. By deviating from the March 7, 2018 letter, Ms. Forrest and Ms. Kawaguchi are treating the anonymous feedback as a de facto anonymous poll, which is not allowed by the WGG (as discussed in points 11, and 16-17 of the January 11, 2018 Section 3.7 Appeal Document, as well as in paragraphs 3-7 of the February 12, 2018 Reply Document; see footnotes to paragraph 2 above for links to those documents). Section 3.6 of the WGG make it clear that in the rare case that polls are even allowed, they're only contemplated after "several iterations" of the steps in a consensus call. However, we've not even had a consensus call yet – this feedback was supposed to be input into a revised strawman, which would then be deliberated and which would precede a future consensus call.

18. Page 9 of the WGG makes it clear that even if polls are used at the *appropriate time* (and this was not the appropriate time), there is no discretion with regards to anonymous ones:

However, in all other cases ... their name must be explicitly linked, especially in those cases where polls where (sic) taken.

Thus the feedback given to Ms. Kawaguchi cannot form the basis of a consensus call, since there are no names attached to the feedback anywhere in the Summary Report.

19. Clearly, all that Ms. Forrest and Ms. Kawaguchi have done is replace one proposed anonymous poll (the one proposed by the Co-Chairs which led to the Section 3.7 appeal in December 2017) which would have been conducted by SurveyMonkey or some similar tool, with another anonymous poll (this time conducted by telephone "office hours" and by email). They've changed the form, but not the substance of the anonymous poll, and both violate the WGG. Had they simply followed the March 7, 2018 process, we'd not be in this situation.

G. Error #7 – no proper consensus call for the other recommendations of the PDP

20. Unbelievably, despite Recommendation #3 being the most contentious (this was what the last year has been spent debating), there is apparently not going to be a consensus call for the other

recommendations either (i.e. they're assumed to be unchanged), despite open opposition to Recommendation #4 (essentially subsidies for IGOs by ICANN for UDRP/URS disputes) by me and others. It is unclear whether anyone other than the Co-Chairs supports Recommendation #4. ICANN staff should not be preparing any report (footnote 1 of page 2) that has not gone through the documented PDP procedures, which include an open and transparent consensus call for each recommendation (for Recommendation #4, Recommendation #3, and all the rest).

H. Error #8 – biased and misleading “Brief Description of the Six Options” in March 9, 2018 email

21. In the March 9, 2018 email¹⁰ to the PDP mailing list, the six options were outlined in an attached document that was biased. This lack of neutral analysis was complained about previously in paragraph 18 of the January 11, 2018 Section 3.7 appeal document, which criticized the non-neutral analysis from the Co-Chairs in their September 27, 2017 document. The March 9, 2018 document fits the same pattern (perhaps a copy/paste of some of the same points). For example, Option #1 is criticized for potentially placing the IGO in a worse position. Yet, the same is not said for Option #3 (even though both options would do that), presenting Option #3 in a more favourable light through that omission. It had been discussed (during the Section 3.7 appeal) that any such documents should be prepared neutrally by the entire working group, rather than unilaterally, but that's never been done.

I. Error #9 – imprecise language describing office hours problems/solutions

22. In the third paragraph of page 1 of the Summary Report, it's claimed that the issues were concerned about needing to “preserve the rights of a registrant to take a case to court.” This is very imprecise. Rather, it's not just about taking a case to court (which can then be tossed out based on technicalities), but instead is about the right for the registrant to have a court decide the case on the merits. It's a subtle difference, but an important one, and the Summary Report should be precise about this. A registrant could take a dispute to court but have it dismissed for lack of cause of action (the Yoyo.email UK cause of action issue we've discussed in the IGO PDP briefly, and in the RPM PDP too) or due to immunity issues (the IGO situation), without any decision whatsoever on the actual merits of the dispute. What's trying to be preserved is the rights to court access that exist had the UDRP/URS not *interfered* with those rights for registrants, which means a court would decide the dispute on its merits.

J. Error #10 – misleading language in Option #3 concerning IGO support of arbitration

23. At the bottom of page 1 of the Summary Report, it's misleading to say in parentheses that arbitration “had been requested by the IGOs” in that context. The IGOs want binding arbitration as a

10 See: <https://mm.icann.org/pipermail/gnso-igo-ingo-crp/2018-March/001093.html>

complete replacement for the UDRP/URS, which is an entirely different content. Adding arbitration as an additional step after a UDRP/URS and after successful assertion of immunity in court actually makes IGOs worse off than the status quo. Thus, the language in parentheses is misleading and designed to suggest that this is what IGOs want, which is not the case, in order to help “sell” Option #3. All the arguments for Option #3 fail to properly disclose that the “quirk of process” is a flaw in the UDRP/URS that is to the detriment of registrants. Option #3 doesn’t actually eliminate the “quirk of process” (loss of the right to have a court decide the dispute on the merits), but instead preserves the quirk and then tries to add an improvised makeshift solution as a Band-Aid (rather than eliminating the quirk of process, via Option #1, which puts the parties back into the same positions they were prior to the UDRP/URS being initiated).

K. Error #11 – raising but then dismissing other avenues of discussion

24. The top of page 2 of the Summary Report listed various avenues of discussion, but then further deliberations were entirely suspended unilaterally by Ms. Forrest and Ms. Kawaguchi (potentially with input from the Co-Chairs; we’ll never know for sure, given there’s no recording of their meeting prior to the Summary Report). These are topics that should be explored. The first one, namely concerning scope, is particularly relevant (since it was brought up in the Section 3.7 appeal documents explicitly, paragraph 19 of the January 11, 2018 document). If certain topics are not in scope (helping registrants), that leaves only Option #4 alive (the option that already has the leading level of support, perhaps a consensus, which is disfavoured by the Co-Chairs). Furthermore, the Co-Chairs have already used the “not in scope” argument to criticize other options they disavour (e.g. the mediation aspect of Option #6, suggesting that it was suited to the RPM PDP). The Co-Chairs can’t have it both ways. Clarity on the scope issue would bring much needed focus to the discussions, and perhaps lead to an immediate consensus conclusion that even would have the (grudging) support of the Co-Chairs themselves (who are now in the minority).

25. With regards to the second bullet point, there could conceivably be something like the “Independent Objector” for new gTLDs that could be explored as an agent of the IGOs to bring a dispute (as we already apparently intend to endorse as consensus recommendations that there be policy guidance regarding the use of an agent, assignee, or licensee to bring a dispute as an already available mechanism for IGOs). Conceivably even law enforcement or national governments can fill the role of agents for IGOs. A second public comment period had even been suggested, to assist the process.

L. Error #12 – false claim concerning “dominance” / capture

26. The anonymous and false claim about “dominance of current discussions” of the current discussions by a “few members who largely belong to one specific set of industry interests” was made

openly by the Co-Chairs in their Response to the Section 3.7 Appeal, and already fully refuted (paragraph 10 of the February 12, 2018 reply, as well as sections 14 and 15 of the January 11, 2018 document. The “few members” aren’t identified, thus not allowing them to defend themselves from this cowardly anonymous accusation. The Expected Standards of Behaviour require PDP members to set aside their personal interests, so it’s essentially a claim that this group is violating that undertaking, an unfounded smear, without having that claim decided by an appropriate ICANN authority. Furthermore, if the claim is true (which I reject), that would undermine the integrity of all of the PDP’s recommendations (rather than just Recommendation #3), so how can one claim “capture” on Recommendation #3, but avoid coming to the same conclusion on the rest? This should be dismissed for what it was – a weak attempt to undermine the opponents of the Co-Chairs on a single topic, a weak debating tactic. It was ignored by Ms. Forrest and Ms. Kawaguchi in coming up with the March 7, 2018 process, and should be given no weight in this report.

M. Error #13 – bad proposed next steps

27. Consulting only themselves (and possibly the Co-Chairs, given they had a private unrecorded meeting prior to Summary Report being released), Ms. Forrest and Ms. Kawaguchi decided to treat the input as a de facto anonymous poll and as a basis for setting the consensus levels, all in violation of the WGG (and at odds with the March 7, 2018 process). There’s been no consensus call, but that input is being treated as such, with ICANN staff preparing a final report that’s not gone through any of the required WGG consensus call procedures. The rules are not being followed, and they’re simply being made up as we go along. See Section “B” above. Ms. Forrest certainly knows better, as it’s the exact same criticism she had in her expert report for Amazon in the .AMAZON IRP, with everything I highlighted in her quotes above.

28. The solution is to follow the March 7, 2018 process to the letter, create the revised strawman, and then follow the documented procedure that exists for establishing consensus. Given the Section 3.7 appeal, I’ve argued that either a neutral Chair should be appointed to handle those deliberations, or a facilitator, to prevent any further manipulation of procedures or violations of the WGG.

N. Error #14 – bad observations/reasoning to justify bad proposed next steps

29. To justify their bad recommended next steps (which ignore the WGG requirements as to process and transparency), as fully described in the Section 3.7 appeal documents, they claim it’s “highly unlikely” we’ll achieve consensus. That’s a false conclusion, based on a miscounting of the support levels (Error #4 above) and failing to understand that the options weren’t mutually exclusive (Error #5 above). If given the opportunity, we’re possibly closer to consensus than ever before, given that support for Option #3 has evaporated. The rest of us should be allowed to deliberate to attempt to get to consensus. Indeed, the “goal posts” keep moving, and there’s no objective standard provided in advance – we were told that we’d have the opportunity to deliberate, but now that Option #4 (opposed

by the Co-Chairs) is in a clear lead and gaining momentum, that's being blocked. The integrity of the process is at stake when the goal posts keep moving. After the first anonymous poll (which violated the WGG), the Co-Chairs were prepared to declare victory for their preferred option (with a "minority report" required for those backing other options). Now that the numbers are reversed, where they're in the minority, the standards are being changed as to what is now considered a consensus. That's a double-standard.

O. Error #15 – incorrect claims concerning “extremely low” participation

30. As to the claim that the number of active participants is “extremely low”, this was refuted entirely on the mailing list already.¹¹ I directly compared the level of participation in this PDP with the level of participation in the most recently completed PDP (IRTP-D) and guess what, the participation in the IGO PDP was higher! Rather than set a documented objective standard, Ms. Forrest and Ms. Kawaguchi invent their own unknown *subjective* standard, and claim that this PDP hasn't met it. That's unacceptable. An objective standard needs to be set in advance, not afterwards (see the language I quoted in the .AMAZON IRP from Ms. Forrest above about objective standards, paragraphs 7-8 above). And, unless they're prepared to throw out the IRTP-D PDP's work, they should retract their claim, rather than subject this PDP to their own different standard from that met by other successfully concluded PDPs.

31. Even if their claim about “extremely low” participation was true (which is not the case), then that would affect the credibility of the entire report (all recommendation), not just Recommendation #3. Since there's not been a final consensus call for any recommendation, Ms. Forrest and Ms. Kawaguchi would be advocating for throwing out the entire PDP's work output, which does not appear to be the case (they seem to be targeting just the recommendation whose leading option, Option #4, is that opposed by the Co-Chairs).

P. Error #16 – incorrect claims concerning “charter amendment” in RPM PDP

32. Making no citations, it was claimed that Option #4 would require an amendment to the RPM PDP (last point of page 3). Part 2 of my recent post the IGO PDP mailing list referenced above in paragraph 30 (see footnote 11) quotes the relevant text from their Charter¹²

(b) Coordination with Other Parallel Efforts

In the course of its work, the Working Group should monitor the progress of and, where appropriate, coordinate with, other ICANN groups that are working on topics that may overlap with **or otherwise provide useful input to this PDP**.In addition, the RPM PDP

11 See: <https://mm.icann.org/pipermail/gnso-igo-ingo-crp/2018-April/001112.html>

12 See: <https://community.icann.org/display/RARPMRIAGPWG/WG+Charter>

Working Group should also take into consideration the work/outcome of the TMCH Independent Review, the CCT Review, and **any other relevant GNSO policy development** [emphasis added]

Thus, it's clear that no RPM PDP charter amendment is required,

Q. Error #17 – demonstrable bias in preparation of the Summary Report

33. The language of the final point on page 3 reveals a demonstrable bias by those creating the summary report, who are supposed to be neutral. Rather than neutrally describing Option #4, the leading option (and that which is opposed by the Co-Chairs), it's instead described as “**the option preferred by those members opposed to an arbitration option.**” That phrasing shows the perspective of the document's creation is non-neutral, as only someone who supports Option #3 would ever label supporters of Option #4 as that. It's like saying Pepsi is “the drink preferred by those who don't drink Coca Cola.” Or saying that one is from the “anti-abortion” or “anti-choice” side, rather than the “pro-life” side of that heated issue.

R. Error #18 – lack of legitimacy of a staff-prepared final report, absurdity that a “minority report” would reflect the majority/consensus

34. A final report that is simply prepared by ICANN staff based on work done to date would lack legitimacy, as it would not have gone through a consensus call, and would have been a product of a process that is inconsistent with the WGG (for example, transparency). ICANN staff are not members of the PDP, and are there only to provide clerical or administrative support to the members. ICANN staff would be usurping the role of the PDP members if a final report was not a product of a consensus call and a review by the PDP participants.

35. Indeed, a “minority report” response to such a final report (if even permitted; the current proposed path forward by Ms. Forrest and Ms. Kawaguchi doesn't appear to contemplate such a report) would in all likelihood reflect the **majority** and even a **consensus**, creating an absurd situation for the GNSO.

S. Conclusion

36. In conclusion, the Summary Report is seriously deficient, repeating the mistakes that led to the Section 3.7 appeal. The appropriate path forward is to follow the March 7, 2018 letter from Ms. Forrest, with the creation of a revised strawman, and further open and transparent deliberations. Deliberations should either be conducted by a newly appointed independent and neutral chair, or by a facilitator, and not the current Co-Chairs. Then, we can proceed to an open and transparent consensus call, and a final report as per the documented and accepted procedures for a PDP working group.