ICANN Transcription

Review of all Rights Protection Mechanisms (RPMs) in all gTLDs PDP WG

Thursday, 01 October 2020 at 17:00 UTC

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ANDREA GLANDON: Good morning, good afternoon, and good evening. Welcome to the Review of All Rights Protection Mechanisms in All gTLDs PDP Working Group meeting, being held on Thursday, the 1st of October at 17:00 UTC.

In the interest of time, there will be no roll call. Attendance will be taken by the Zoom room. If you are only on the audio bridge, could you please let yourselves be known now?

Thank you. Hearing no names, I would like to remind all participants to please state your name before speaking for transcription purposes and to please 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 will turn it over to our Co-Chair, Phil Corwin. Please begin.

PHIL CORWIN: Thank you, Andrea. Welcome, everyone. We have a lot to do today.

Anyone have updates to their statements of interest?

Okay. Our agenda today is dense. We are going to review three working group recommendations in their final form. Then we're going to review the final text of the overarching data collection recommendation, and then we're going to look at several individual proposals on URS that made it up to working group recommendations in our review of public comments. So it's a hefty agenda. I don't want to cut anyone off, but I would ask, in the interest [of time,] since some of these items are carried over from Tuesday because of the robust discussion we had on sunrise recommendations and two on that day. So we need to make up some time, so I would say to feel free to comment but, unless something is really important, think twice about whether you need to speak up, and try to be as succinct as possible when you do speak.

With that, let's go on to our first: URS Recommendation #3. If staff could just confirm that what we're reviewing here is the language showing up in green on this screen, that this is the new proposed final language based on prior discussions. Is that correct?

ARIEL LIANG: Phil, what the working group needs to review is the green language in the context under the recommendation. The recommendation language has already been confirmed, but there's some revision to the contextual language, namely regarding how the working group is going to refer to the analysis of the EPDP Phase 1 recommendations. So we just need to review this green paragraph here to make sure the working group is okay with the wording.

PHIL CORWIN: Okay. So just this paragraph showing on the screen now—the stuff that's not struck out. I'm going to give everyone a chance to read through it.

Basically is says that we agreed that this recommendation does not conflict/contradict the EPDP Phase 1 recommendation, especially numbers 23 and 27, as well as no contradiction of the EPDP Phase 1 Recommendation 27 Wave 1 report.

Are there comments on that language? Kathy?

KATHY KLEIMAN: First thanks to staff for updating this and bringing it back to us. I thought our agreement was that all of this language was going to be stricken, and this paragraph in particular was going to be moved to the recommendation below: #2. If I remember correctly, it was a refrain of then idea that none of this really applied to the translation concept that is the basis of this recommendation.

That's my recollection. And I think this paragraph has been moved to the section below. So is it easier and cleaner just to take it out [inaudible]? Thanks.

PHIL CORWIN: Ariel, can we scroll up so we can see what the recommendation itself is and what the subject matter is? Yeah, it is about translation. Kathy is correct. Have we put the same language that we're now reviewing in the next recommendation?

ARIEL LIANG: If I may, I'd like to provide a quick clarification on why we still kept this paragraph here: because, in the recommendation, it also says[:] the method of transmitting the notice of complaint via e-mail, fax, and postal mail. So, from staff's point of view, we think this still has some implications related to the EPDP Phase 1 recommendations. So that's why, just for the comprehensiveness and that we cover all the bases, we put this paragraph here. The same paragraph is indeed repeated in Recommendation 2 down below. So that's the rationale for having that paragraph here: because the method of transmitting the notice is also mentioned in the recommendation.

PHIL CORWIN: Okay. Do others have a view on that? I see that Paul McGrady has put in a chat comment that he's somewhat uncomfortable with this reference. I don't know if Paul wants to speak to that.

PAUL MCGRADY: Thanks, Phil. I was trying not to speak. I was taking your advice upfront. Seriously. But we're making some big, sweeping statements in this, and I don't know what, as a working group, we've actually looked at all these little nooks and crannies of the EPDP report. I don't know that I'm an expert of the EPDP either. And there's some support for my hesitancy in the chat as well. So I think we can either have to do the work and look at them and make sure that we all think this is correct, or we need to find out whether or not we really need to be saying this or saying something else, like, "As far as we know, but we're not EPDP experts. This seems fine." I don't know. But I don't like to say things unless I … I don't … Anyway, you got it. Thanks.

PHIL CORWIN: All right. Ariel, can we scroll back down where we can see all the language in green we're reviewing? Okay, stop right there. I wonder if we're going to keep this language. I wonder if we might strike the word "agreed" and put in the word "believes," which still indicates we don't think we're in contradiction but it's not as strong as "agreed," which implies that we've really done a side-by-side comparison of each of the references to terms.

Would that satisfy your concern, Paul; make it a little softer? It's just commentary anyway.

PAUL MCGRADY: Yeah. Softer is better, but we could say, "The working group is unaware of any contradiction of this recommendation with EPDP Phase 1." That enshrines our ignorance, which seems to be where

we really are, unless we're going to dig through these other sections. Thanks.

PHIL CORWIN: Yes, but it's good-faith ignorance.

PAUL MCGRADY: The best kind.

PHIL CORWIN: Yeah. All right—

KATHY KLEIMAN: Phil, new hand from Kathy. Which is why of it makes sense: because EPDP didn't deal with translations, as we talked about last time, outside the bailiwick. I understand the reference to methods of notice, but that's exactly what we're going to talk about in the next recommendation: to whom these notices are going, not what format, not what language. So I don't think any of it makes sense here because we're in one part of the discussion, and EPDP is in another part of the discussion. So I think it's cleaner just to take it out, but I'm not going to die on that hill, to quote on of our favorite phrases.

PHIL CORWIN: All right. Kathy, let me suggest we leave it in for now and see what the corresponding language is for the next recommendation. Then maybe this is something the Co-Chairs should decide at our next

meeting. I'm not hearing a lot of either support or objection to your concern. Again, it's commentary, so it's all narrative. But it's not a direct implementation guidance to the IRT, so they can take it into context or ignore as they're wont.

KATHY KLEIMAN: [Sounds good.]

PHIL CORWIN: Not seeing any further hands, I'd suggest we just, unless there's other language in this recommendation for review, leave it at that. We've substituted the word "believes" to indicate slightly less certainty, and we should move on.

All right. Let's stop and read the recommendation so we know what this about. We're recommending that providers send notices to the respondent by the required methods after the registry or registrar has forwarded the relevant WHOIS RDS data to the URS providers. We have new contextual language here. Again, it's context. It's not implementation guidance. So it's of less important than implementation guidance.

Ariel, is there anything in here—we can all read it—you wanted to point in particular about this language to focus our discussion?

ARIEL LIANG: Thanks, Phil. Nothing particular. I'll just note that the first paragraph was originally in the context of Recommendation #3 right above. Based on the working group's recommendation, we

moved that paragraph down here because it's more appropriate for this particular recommendation. Then the second paragraph is the same one that you just saw right above. So that's [all] [inaudible].

PHIL CORWIN: Okay. So this is the one. There was one—a paragraph—that we agreed to move down, and that's the first paragraph here. It was formerly in the translation recommendation. And we're going to strike the word "agreed" and put in "believes" so it's consistent with the language above.

Open for discussion.

All right. Well, I see no hands and I'm not hearing anyone, so I'm going to give this a few more seconds. If there's no one who wants to speak to it, it's going to be adopted in its current form.

Adopted. Let's move on. I like the ones that go quickly.

Okay. Here's one where we're changing the recommendation language itself. Let's read it as it now stands as amended. "The working group recommends that the IRT consider reviewing the implementation issues identified by the working group with respect to Registry Requirement 10 in the URS high-level technical requirements for registries and registrars and amend Registry Requirement 10 if deemed necessary. For clarity, the working group notes that this recommendation is not intended to create any transfer remedy for the URS. In addition, the working group agrees that a domain name suspension can be extended for one year as set out in the URS rules and procedures, but ownership of

the domain name must not be transferred during this period to the winning complainant or another registrar."

I'm going to raise a question here. The term "or another registrar" seems to modified by the term "ownership." That's a little bit confusing and needs clarification.

With that, I'm going to open this part up for comment. I see Maxim's hand up.

MAXIM ALZOBA: Do you hear me?

PHIL CORWIN: Yes, Maxim.

MAXIM ALZOBA: The last bit –"or another registrar"—might be read as that the complainant is a registrar and we speak about another registrar. So it should be clear from the text that it shouldn't be transferred to the winning complainant or registrar, or the record should not be changed. It will be more accurate, I think. Thank you.

PHIL CORWIN: Yeah. Personal comment. I'm wondering if we even need the term "or another registrar." If the ownership isn't changing, and the ownership remains with the respondent—the original registrant who lost the URS action—they have no capability to transfer at that point. Really, the domain continues to exist in a suspended

state with them as the nominal owner but with the complainant exercising the option to extend the registration period by one year. In that scenario, there wouldn't seem to be any opportunity for transfer to another registrar because the complainant exercising the extension would not become the owner of the domain name for that year and hence would have no ability to transfer [it].

JULIE HEDLUND: Excuse me, Phil. Ariel has her hand up because actually there is some new suggested text that staff has provided based on the action item from the call on the 24th of September. Ariel wanted to point that out to all of you.

PHIL CORWIN: Is that suggested text for the recommendation itself?

JULIE HEDLUND: Yes, that's right. If you don't mind, can we turn it over to Ariel so that she can explain? Because I think the new text replaces old text.

PHIL CORWIN: All right, [because] I'm surprised there's suggested text which is not up on the screen. But go ahead, Ariel.

JULIE HEDLUND: It is on the screen, but she'll explain.

PHIL CORWIN: Okay.

ARIEL LIANG: Thanks, Julie and Phil. Apologies if it's not clear. The reason why staff has a different sentence to replace the one that highlighted here is because the working group would like staff to check the actual URS procedures and rules and what the actual language looks like pertaining to the extension of the domain name suspension. So we checked the language in the URS rules and procedures and then provided an alternative sentence. That's in the comment box on the right. I will just read it. "In addition, the working group agrees that, as set out in the URS rules and procedure, a domain name suspension can be extended for one additional year, and the WHOIS for the domain name shall continue to display all of the information of the original registrant and reflect that the domain name will not be able to transferred, deleted or modified for the life of the registration." So especially the later second-half of the sentence is to accurately reflect what is in the current rules and procedures instead of using a paraphrase in the old formulation. So that's the—

PHIL CORWIN: Okay. Thank you, Ariel. Just to clarify, staff is suggesting that all the highlighted green language to the left of that suggestion be struck and that this new language be adopted as an amendment in the nature of a substitute. I don't have any objection to that new

language in a personal capacity. Does anyone want to comment on that? I see Zak thinks that the sentence looks good.

Absent objection, my inclination would be to accept the staff language as a substitute for the existing language. Does anyone have concerns about doing that?

Well, seeing no objections, hearing no concerns, that is agreed to—

KATHY KLEIMAN: Wait. Sorry, I do. I apologize.

PHIL CORWIN: Oh. I didn't see your hand up, Kathy.

KATHY KLEIMAN: Too many windows open. Trying to read the stuff in a different window. There may be legal reasons why the registrant information may need to be updated. Haven't we talked about this, that the WHOIS RDD … there are legal obligations in certain countries. So, if the registrant moves, you have to update it. Should we even be getting into that here? That was one of the things that the original recommendation was focused on: ownership and not some of the other details associated with that; ownership and registrar, that this isn't a transfer, but, once we dig down into too many details, we may trip over ourselves.

PHIL CORWIN: All right, Kathy. I'll just say in a personal capacity, as I read this staff-proposed sentence, it's simply saying that we agree with the current language of the rules and we haven't recommended any change in the rules and procedure that's relevant to this, so far as I know. Have we?

KATHY KLEIMAN: Because of adding the information about the WHOIS in the display, I don't know. We'd have to actually check it. It seems like a lot of information to add at this point. But I know there are better experts than I am on this particular issue. Maybe who has worked with this recently can talk about it. Is there any danger here with this current language? Again, I just pointed out one: should the registrant physically move locations?

PHIL CORWIN: Anyone want to comment on that?

I see Griffin's statement. Yeah, I would tend to agree. Again, at the point of the domain extension at the option of the prevailing complainant, other than still being the nominal registrant, the original registrant has lost all control over the domain. It's locked. It's suspended. Whether they move or expire or whatever, it's almost irrelevant because it's simply a suspended domain with the nominal ownership still being the name of the original registrant who committed black-and-white infringement and lost the URS case.

KATHY KLEIMAN: Okay, so on control whatsoever. Fair enough. Thanks.

PHIL CORWIN: Okay. Thank you. Then the staff language is adopted.

Okay. So we have now completed all the working group URS recommendations that were in as working group recommendations in the initial report. We're about to review the final wording of overarching data collection.

I did want to mention—I failed to do it at the beginning of this call—that it's October 1st, and this is the last full month of existence for this working group. If we stick to our timeline, the working group will complete its work before the end of November. So let's all be happy about that after this very long journey.

Let's focus on the language here. Ariel, we're reviewing the new language in pink?

ARIEL LIANG: That's correct.

PHIL CORWIN: Okay. Let's read through that. The first paragraph in pink recommends that, for future rounds, registrars provide ICANN Org with periodic reports regarding the number of claims notices they've sent out. It doesn't define the period. I don't know if staff or others have an idea about that, but let's continue going through the language. We further recommend that, in implementing the Board-adopted recommendations from the CCT-RT, ICANN Org

collect data concerning trademark owners' and registrants' experiences with the RPMs that can provided for future GNSO RPM policy review teams. That would certainly be consistent with our finding that our task would have been a lot easier if more data had been created for us to review in order to make data-based policy recommendations.

Is there additional language for review, or is that the sum total.

Okay. In this paragraph we're acknowledging that there are practical difficulties associated with obtaining specific data concerning a possible deterrent effect of potential good-faith registrants who receive a claims notice. We also understand that knowing the number of claims notices that we're not followed by actual domain registration is not evidence of a deterrent effect. Nevertheless, the working group believes it'll be useful if future RPM review teams are provided with data concerning the number of such notices that are actually sent. Then we've got some footnotes, which simply reference relevant CCT recommendation.

Anything further for us to review here before we open it up for discussion?

Okay Well, staff, are we supposed to comment on suggesting the periods that registrars must report this, whether it's quarterly, semiannually, or annually?

ARIEL LIANG: Phil, I believe that's the intent, but we will want to check with Mary, as she drafted this paragraph. But I think the intent is for the working group to consider whether you wish to specify the period.

PHIL CORWIN: Well, I'm going to make, in a personal capacity, a suggestion for that, just to put it on the table: in the blank space, we insert, after the word "of," "not less than every twelve months." So it would have to be at least annually, but it could be shorter. We'll leave that to the IRT. That's just nothing I'm going to die on a hill over. It was just to put a marker in for discussion purposed.

All the language with that addition is now open for full discussion.

I'm not seeing any hands. If I don't see any hands or hear voices soon, I'm going to assume that this language is not objectionable. That was my personal reaction: that it seems okay.

So your opportunity to comment is going … going … it is gone. We have adopted the language in pink. Thank you, staff, for a good job. Thank you, working group, for agreeing to my suggestion of not less than every twelve months. That leaves it to the IRT to decide whether a shorter period (and annually) would be appropriate for the reporting of such data.

All right. Now—wow, we're clicking through this—we're half-an-hour into this. We've finished all the final working group URS recommendations. We finished the data collection, and we're on to the remaining URS recommendations that began as individual proposals but, as a result of review of public comments on the initial report, are now elevated to working group recommendation status to be considered in the consensus call.

What language are we reviewing here, Ariel?

ARIEL LIANG: The working group should review the entire document here. Perhaps I can provide a quick overview of how this is formulated.

PHIL CORWIN: That would be great.

ARIEL LIANG: Okay. Thanks, Phil. If you recall, the working group did the preliminary review of the public comments for all these individual proposals and decided to keep several of them for another round of review and see whether there's any chance for a consensus and make them into recommendations. So the document seeks to converge these individual proposals into recommendation language and then include appropriate contextual language and also the summary of public comment review, just to be consistent with the format of the other recommendations that the working group has already reviewed. Basically, the recommendation language itself is very important for the working group to review. Then, for the contextual language, the way staff developed this is by referencing the rationale originally provided by the individual proposal proponent and also the deliberation summary of the working group when they deliberated on these individual proposals and also the summary of public comment review of these individual proposals. So we just want to provide as much information as possible so the reader of the recommendation understands the background and rationale behind these recommendations. So basically these texts should all be reviewed

by the working group, and we're happy to provide a high-level summary just to guide the working group when you review the recommendation.

PHIL CORWIN: Okay. Thank you, Ariel. What I'm going to do is I'm going to read the recommendation so we're all on the same page on what we're considering and then let staff highlight the most important parts of the contextual language that everybody knew was coming up for review today and had the opportunity to read it in detail prior to the meeting.

So we are recommending that Procedure Paragraph [6.2] be amended to clearly define the definition of default period and state that the registrants shall not change the public and non-public registration data elements related to disputed domain names during the default period. We're further recommending deleting the text: "The registrant will be prohibited from changing content found on site to argue that it's now legitimate use from URS procedure Paragraph 6.2 and incorporating it in other appropriate sections in the URS procedure as factors which an examiner may take into account in determining whether there was registration and use in bad faith." So that would be after the notice of receipt, I assume, and the domain has been locked but the registrant is trying to cover their tracks.

The implementation guidance is that the IRT should consider our suggestion that the deleted text may be incorporated in Paragraphs 5.9 or 8.1 I don't remember exactly what's in those paragraphs. So we're urging the IRT to more clearly define the

default period and that the registrant [can] change their registration data elements during that default period and also they can't change the content of the domain name once they get notice to try to argue that they're no longer infringing.

What's important, do you think, here in the context language, Ariel?

ARIEL LIANG: Thanks, Phil. For the context language, basically it's just: provide reason for all these recommendations. The first point about default period is because there's no clear definition of that, so the working group is actually just asked to clarify the definition of what default period means.

Then, in terms of what shouldn't be changed during a default period … Because, in Paragraph 6.2 of the URS procedures, it refers to WHOIS information … What the Phase 1 Recommendation 27 Wave 1 report suggests is that the working group consider clarifying what shouldn't be changed. That's the public and non-public registration data elements subject to the URS proceeding. So that's a second point of clarification here.

Then the third point of recommendation is moving this particular element. I think, basically, the registrant's action of changing website content can be considered by this examiner as to whether it will be further evidence of bad faith. So that particular action is better considered in another part of the URS procedures rather than the current part. That's why the working group is

recommending moving to another relevant section of the URS procedures.

So that's the rationale behind these different elements of this recommendation. So that's pretty much it for this one.

PHIL CORWIN: Okay. And I assume the review of public comment is something we've already gone through that reflects our actual review.

Zak, I note your comment that that doesn't look controversial to you and that you're ready to accept it.

Are there working group members with concerns about any part of this proposed language for this new final working group recommendation?

All right. Last chance to comment. If not, we're going to adopt it in its entirety. And thanks, staff, for their final work on it.

All right. This one doesn't look controversial to this Co-Chair. We're recommending that the high-level technical requirements for registries and registrars be renamed as the URS high-level requirements for registries and registrars. We're also recommending that, on ICANN's webpage, the document be renamed accordingly. Then there's contextual language. We can take a quick look at it. I think the recommendation is probably so non-controversial. We just have to make sure there's nothing unrelated in this contextual language. So basically we're doing this because we agreed that it would enhance the clarity of the document scope and reduce the risk of confusion among

contracted parties who might otherwise be puzzled by the inclusion of requirements with legal implications in a document labeled as technical. I think, yeah, that is confusing, and someone might not to think to look for legal requirements in a document labeled as technical.

So does anyone want to create a controversy on this recommendation, or is it acceptable?

All right. It's accepted. I didn't think there'd be much concern about this one.

All right. It looks like this was originally two separate individual proposals combined into one. We're recommending that URS Rule 6A be amended to clarify that each provider will maintain and publish a publicly-available list of examiners and their qualifications through regular updating of publication of the examiner's curriculum vitae. I may be mispronouncing that. We're further recommending that URS Procedure Paragraph 7 be amended to add a requirement that each provider shall publish their roster of examiners who they've retained to preside over cases, including identifying how often each one has been appointed together with a link to their respective decisions.

Then there's some implementation guidance. I'll leave it to Ariel to point out anything important in the guidance.

ARIEL LIANG: Thanks, Phil. The implementation guidance basically provides some flexibility for the IRT to consider when implementing this recommendation, and that's largely based on Forum's feedback

about their practice. So the first bullet point just says URS providers cannot compel examiners to provide updates or verify if there are changes to each examiner's qualifications and professional affiliation. URS providers shall be required to request that examiners update their CVs as prescribed/keep their CVs current and submit any updates to the provider. So that's just recognizing that URS providers cannot be held accountable if examiners do not update their CV because in no way will they know that, but they are required to request such implementation and require their examiners to update their CVs. So that's the first point.

The second point is about how to indicate or find out the rotation of examiners. The implementation guidance says it will be sufficient to satisfy the objective of providing public visibility of examiner rotations for if a provider's website provides a mechanism or function where one can search for those URS decisions that a specific examiner presided over. So that's just also incorporating Forum's feedback about their practice [that] says it's sufficient to satisfy the objective of this recommendation.

PHIL CORWIN: Okay. I've reviewed the contextual language. It seems really accurate to me. Let's quickly scroll down so folks can refamiliarize themselves with it. It's basically a narrative about our review of these individual comments and the public comments on them, just providing further background for the recommendation and implementation guidance.

I'm going to open this up for discussion. Does anyone have concerns about the language—particularly the recommendation itself—and the implementation guidance?

Okay. Thank you, Renee.

Lori, yes, consensus in boring, but it's also welcome, particularly at the end of a long four-and-a-half year journey toward our final report.

I'm not seeing any hands up or hearing anyone shouting out, so I'm going to assume in about ten seconds that this is all acceptable. Again, I think staff has done excellent work here.

All right. This one is closed out. Let's move on.

Conflict-of-interest policy. We're recommending that Rule 6 be amended to add a requirement that each URS provider have a choice of effective or enforceable and published conflict of interest policy that binds examiners. I think we probably have to decide whether it's effective/enforceable or effective and enforceable. So we can't leave it in brackets. We have to agree on some final language there.

I remember some extended discussions on the topic of conflict-of-interest policy. I note, based on my remembrance that this recommendation no longer sets forth any detailed requirements for such a policy, (nor does it require that all of the providers have the same conflict-of-interest policy) the only requirement is that it has to be either effective or enforceable or both.

Let me open it up. I think we need to decide as a working group if it's going to be effective/enforceable or effective and enforceable. Do we have comments on that?

Griffin is saying that the term "bind examiners" is sufficient in regard to the concept of enforceability.

Kathy would prefer using "and" and using both terms, as does Professor Tushnet.

I'm neutral. I could go with either. I think, in the end, if it's effective and if it binds the examiners, it seems to me that an effective policy would have to be enforceable in some way.

Paul McGrady also likes "and." I see growing support for "and." "Effective/enforceable, and published."

All right. That seems to be the trend—

BRIAN BECKHAM: Hello, Phil.

PHIL CORWIN: Yes?

BRIAN BECKHAM Sorry. I have my hand up.

PHIL CORWIN: All right, Brian. Go ahead and then I'll take Maxim.

BRIAN BECKHAM: I saw a comment from George Nahitchevansky in the chat, which I agree with. Look, I know we're at the 11th hour here to know how much of a discussion you want to have about this, but enforceable by who? This is such a huge can of worms. I don't even know where to begin. There's no challenge process for panelists in the URS, nor in the UDRP. So "enforceable" is a nice concept, but I just don't know that we've really thought through the implications of how that would work out in practice.

PHIL CORWIN: Thank you, Brian. Point of information. Does WIPO have a [CLI] for its UDRP providers and, if so, how would you ensure that it's effective?

BRIAN BECKHAM: Thanks, Phil. We don't couch it in terms of a conflict-of-interest policy. By the way, it's available on our website. I'm on my phone. I can put into the chat or in an e-mail later. But basically it's a declaration of independence and impartiality, and it's drawn off of guidance from the IBA guidelines on conflicts of interest in international arbitration. That's really the lynchpin of the WIPO arbitration and mediation centers. It's the lens through which we look at this topic. So we have the declaration of independence and impartiality, which I think, for all intents and purposes, covers the same ground as intended by conflicts-of-interest policy. I don't know what other providers do. But again, I think effective … Certainly, people are more than free to look at our policy. It's on

our website. Like I say, that's guided by international best practices. "Enforceable" I completely understand. I don't meant to sound like I object to the concept, but I just think we haven't really thought through how that would work in practice.

PHIL CORWIN: Okay. I see hands up from Zak and then from Rebecca. Zak?

ZAK MUSCOVITCH: Thanks, Phil. To me, the use of the word "enforceable" in this context implicitly means enforceable by the provider. So perhaps, if that was made clear … We've had a lot of conversations about enforcement in different contexts, but in this context, it's clear to be that it's enforceable by the provider against their panelists. To me, that's already obviously the case. So it doesn't seem controversial to me. But perhaps, if people have concern about using that word because it could be misconstrued and taken out of context [to] refer to some outside challenge process, we could just make it clear that it's enforceable by the provider. Thank you.

PHIL CORWIN: Okay. Thank you, Zak. Rebecca, you're still with us. I see you have to leave. You have another meeting, so go ahead.

Professor Tushnet, you're still muted if you're still with us. I see you're still listed as a participant.

REBECCA TUSHNET: Sorry. It sounds like the comments/the chat is enough to get us consensus. I'm really sorry but I do have to go. But I'm fine with what we're discussing in the chat. Thank you.

PHIL CORWIN: Okay. "Enforceable by the providers" … I see your suggestion, Ariel.

Let me propose this. Again, let's remember the IRT has discretion and flexibility in implementing these recommendations. What if it said "shall have an effective and published conflict-of-interest policy that it can enforce against examiners"? That preservers the concept that it's enforceable by the provider itself against their chosen examiners. I don't know that we need the word "binds" anymore if we're putting in the concept of enforcement by the provider against examiners.

Kathy wants the word …

KATHY KLEIMAN: Phil, what if we delete the word "can" and just say that the provider enforces—so adding an "s" to "enforce"—against the examiners? So "can" is possible. "May sometimes" … In this case, we're just saying that this is what it should do. Thanks.

PHIL CORWIN: All right. Do we have comments on Kathy's suggestion? Mr. McGrady?

PAUL MCGRADY: Thanks. I don't know how you enforce a conflict-of-interest policy against an examiner that didn't do anything wrong. So I think we're missing something. So "that provider enforces against any examiner who violates it," or something like that, just to make it clear.

Just for the record, I don't know that I'm all that bothered by it, but doing it Phil's way as opposed to the way that the trend the chat was going in does take out case workers and other people within the provider's direct employment. If people are okay with that, fine, but I just wanted to mention it. Thanks.

PHIL CORWIN: Paul, again, when I make a suggestion like that, it's just to facilitate further discussion. It's nothing I'm bound to and I'm going to go down the ship with. I'm just trying to, based on the comments I see and hear, get to something we can all agree on.

So we will need to eliminate, in the last one, the word "the." That makes no sense.

Let me read it as it now exists and see if we can reach agreement on this. Again, the IRT is going to fill in the details. We're recommending that Rule 6 be amended to add a requirement that each provider have an effective and published CLI policy that the provider enforces against any examiner who violates such policy.

Is that acceptable? Kathy?

KATHY KLEIMAN: Sorry. Old hand, but yes.

PHIL CORWIN: Brian?

BRIAN BECKHAM: I don't want to delay progress. I think we've been having a great call, but I would like to confirm with some of my colleagues. It's 8:00 here in Geneva, so I think, for the most part, the office is shut, but I would like to confirm with colleagues. But my gut reaction is no. Sorry to be a bit of a [stickler] in the sense [inaudible]. If there's a critical mass on the call, then it moves ahead. Fine. I reserve my objection at the consensus call period.

But I want to say is what I think would be useful—I apologize that this is a question coming at this late hour … What's the concern that we're looking to address here? Because the very fact that a provider has a conflict-of-interest policy—again, we call it something different—presupposes that they would take action upon it if they deemed it was necessary. I can share anecdotally as a provider that we get sometimes a panelist that would write to us and say, "The complainant is Coca-Cola and I have a huge shares in my mutual fund in Coca-Cola stock, or, "I have an Apple iPhone, and the complainant is Apple." I think any reasonable person would agree that that's not even remotely approaching anything like a conflict or a perceived conflict of interest. But, all things being equal, we normally just tell the person, "You know what? Since you've raised it, we're just going to go to the next

person on the list. We really treat these things out of an abundance of caution."

At the same time, we have sometimes people/parties in cases writing in, complaining, saying, "This person is a member of this trade group, which the brand owner also belongs to." INTA is an easy example. I don't think that's a specific example we faced in a case, but it's just to give you a hypothetical illustration. I don't think that people will reasonably find the fact that an attorney is a member of a trade association that a brand is also part of would necessarily rise to the level of conflict.

What I'm getting at is, what do we want to accomplish here? Do we want to create a vehicle for all manner of perceived grievance? Then the question is, what is a provider or a panelist or … I don't know if this eventually lands in ICANN's lap. That's what I was alluding to earlier with, what's the intent here?

Again, I think I understand the concept, but I'm not sure where people want to go ultimately with this concept that the provider would enforce it or some third party—ICANN or whomever would take up enforcement under this conflicts policy—because, again, the fact that a provider has this … I think we have to vest some reasonable level of responsibility with dispute resolution providers that if, they're going to have this type of a policy, they're going to be serious professionals and, if they think there's something that jeopardizes the impartiality in a case, then they're going to take action on that.

Sorry for the long-winded intervention, but personally I'm not really in favor of that language, and I think, maybe if there are people

who wanted to take this online, we could try to advance this a little bit or, if people feel strongly, then I can just reserve my comment for the consensus call. However you think that this is going, I'm happy to accept it. I just wanted to raise these thoughts and concerns. Thank you.

PHIL CORWIN: I appreciate that, Brian. Let me say—I'm going to call on Michael Graham and Paul McGrady in just a moment; I see their hands up—the reason I had originally suggested "can enforce"—it could be "may enforce; Griffin suggested "reasonably enforced"—is that it seems to be that you can have a policy and there can be an unintentional violation versus an intentional. There can be an intentional violation versus one that's still a violation but so minor it's of no consequence. So there's got to be some degree of discretion reserved to the provider of when they're going to take an action against an examiner. We can't foresee every possible circumstance in which even a minor technical violation that's perceived … that the CLI might give rise to some review by a provider where they just … What would enforcement be? Just saying, "Well, don't let that happen again," or, "You can never decide a future case for us"? So there's a lot here.

I'm going to be quiet, but I think, on this one, it's important we get it right, and we may want to do the best we can and wrap this up in a minute and put it on the working group list for final discussion because I don't want to force the issue on something this important—and having effective conflict-of-interest policy is important—with some language that the working group is

unreasonably comfortable with. We don't want to regret something after the fact.

Michael Graham?

MICHAEL GRAHAM: I'm reading this, and I think, in trying to clarify what is meant, we've actually muddied the waters and taken something that is fairly straightforward and are creating pretzels out of it.

Also, I think you are right with what you were saying there, Phil: once we say that enforces, now we've opened up the question in the bag of worms of, "Well, how do you enforce and how far do you have to go? Are we pointing towards a particular [inaudible?"

My preference would be to go back, not use any of this included language, and simplify it to say—I'm reading the last line here—"URS providers shall have an enforceable and published examiner conflict-of-interest policy." [If they want to fix] standards in the IRT or otherwise, that's fine, but I think what we're trying to say that they should have a conflict-of-interest policy in regards to examiners, and it should be enforceable. Why say anything more?

PHIL CORWIN: So what is your proposed language here? That …

MICHAEL GRAHAM: The language would be, if we start at the bracketed "effective," [that] we do not have "effective." It will read, "shall have an enforceable published examiner conflict-of-interest policy."

PHIL CORWIN: I see Zak Muscovitch likes your language. So that would mean that we would be requiring the IRT to flesh out the details of a new requirement that each provider have … ugh.

MICHALE GRAHAM: Right—

PHIL CORWIN: Oh, I see. Ariel has your language on the [side here]: "have an enforceable and published examiner conflict-of-interest policy." I tell you, personally, that works for me. Kathy is saying it works. Paul McGrady says it works. He likes it.

George, your hand is up.

GEORGE NAHITCHEVANKSY: I'm not in favor of using "enforceable" in there because, again, I think, from a provider's standpoint, what does that mean; "enforceable"? I think it should be "effective" or some other word. But "enforceable" immediately starts bringing up the notion of some sort of standard as to how it should be enforced. So I'm a little bit concerned. I think the providers are going to be concerned with using the word "enforceable" in this way. Thank you.

PHIL CORWIN: All right. Michael, is that an old hand?

MICHAEL GRAHAM: No. I just put it up to address George's statement. I agree that we are creating a bit of pretty wide-open requirement here, but I think "effective" actually is maybe even worse than "enforceable" in terms of creating a standard with no guidelines. So I think what we're trying to get at is we want, in this determination, the IRT or whoever to come up with some policy and that it should be required of. For me, I think "enforceable" is what we're looking for because that says not only do they come up with something that works but something that, if there's a violation, is able to be enforced against that violator. I don't think that that's controversial, George. Maybe it is, but I would think that that's what we're trying to say. Thanks.

PHIL CORWIN: Thank you, Michael.

GEORGE NAHITCHEVANSKY: Can I just respond very quickly? I think Michael raises a good point. Why don't we just get rid of these adjectives—"effective" and "enforceable"—and just say "shall have a published conflict-of-interest policy"? Doesn't that encapsulate what we want them to have? We want them to have a conflict-of-interest policy. When we start putting all types of qualifiers in front of it, it just makes it a much more difficult situation as to what is the standard and what are we talking about.

PHIL CORWIN: Okay. Zak, your hand is up.

ZAK MUSCOVITCH: Thank you. George, I take your point. I look at it a little differently. How crazy is it that we're talking about particular words at this point? But the term "enforceable" to me doesn't command enforcement. It enables enforcement. It's enforceable by the providers. So, built into the usage of the term in this context, there's this wide discretion for the provider to enforce its own policy, which it naturally should and would, I would think. If it has a conflict-of-interest policy, it naturally would enforce it or it's meaningless. So in that sense it's not controversial. But I think at least some of the people want to see the word "enforceable" in there aside from it being implicit in a good-faith provider's practice [because] it would be pretty silly if some fly-by-night provider were one day somehow credited and they complied with the letter of having the conflict-of-interest policy but did squat about it. So I think that's why it provides a little more comfort. Thank you.

GEORGE NAHITCHEVANSKY: Here's a suggestion. What if you just say "shall have a published conflict-of-interest policy that the provider may reasonably enforce against any examiners who violate such policy"?

PHIL CORWIN: Okay. I'm going to use my Chair discretion to end this discussion here. We've lost Brian, and he has a lot of experience with—

BRIAN BECKHAM: I'm still here, Phil.

PHIL CORWIN: Oh, you're still there? Okay. But Professor Tushnet is not. I'm just not comfortable with all these. We've gone through about three different versions of this in the last ten minutes. I think we should ask staff to put the various options on then working group e-mail list, consider it without this pressure to agree on something on the fly right now, get agreement on the working group list, and bring it back in a meeting or two. It's an important issue, and I'm just concerned we're going to agree to something under time pressure here and have some buyer's regret right after the call on the part of some of us and we say, "Oh, gee. I just thought of something else. I wish I had said that." But I think it's a very useful discussion, and I think we just put those put those options on the list. We can probably reach broad agreement on common language and just spend about two minutes in a future minute agreeing to it.

Yeah, Griffin, we did have on Michael's, but we had agreement for a moment. But then we have one or two more options since then. I was personally comfortable with Michael's, but I don't think I should be the decisionmaker here. The working group should be.

Let's review this other language before we close this one out—the language that's highlighted, Ariel.

ARIEL LIANG: I just want to clarify why we have this highlighted paragraph. This should be taken out once the working group has decided on the final language of the recommendation. It's just a discussion related to "effective" versus "enforceable." We kept it here in case the working group wants to reference the reason of the debate. But it should be taken out once the language has been decided.

PHIL CORWIN: Okay. I think there would be broad agreement with that because, once we agree on final language, that will no longer be relevant. We'll have made a decision on "effective/enforceable" and everything related to them.

So we're going to put this on the list. I think it's been a good discussion, but let's give other folks who are not on the call a chance to weigh in and come back to this next week and wrap it up.

Next issue, Ariel?

ARIEL LIANG: Phil, Lori has her hand up.

PHIL CORWIN: Oh. Lori, go ahead.

Lori, you're still muted at your end.

LORI SCHULMAN: Yeah, I see that. I have a question about a clarification in the notes in yellow where it says, “Providers should not enforce the policy, as it could drive up the cost.” That’s not exactly how I understood the conversation. I see it as that enforcing the policy could drive up costs but that any policy should be enforced. I think that’s misleading because there was general agreement that providers should enforce the policy. There was disagreement as to cost allocation. This note to me seems a little strange.

PHIL CORWIN: Lori, may I point out that Ariel that just put us on notice that this highlighted language is intended to be deleted from the final report as soon as we reach final agreement on the wording of the recommendation? So unless you think we need to keep language like this, even after reaching that agreement, it’s probably not worth parsing the language.

LORI SCHULMAN: Yeah, I know that, but I think that first bullet point is odd. If you’re going to take it to the list and people are going to read the notes, that’s a very odd first bullet point. That’s all I’m saying. I don’t want to crazy wordsmithing bullet points. I get that, but the discussion was about that enforcement could be expensive for providers but there should be enforcement of policies. I think this conflates two ideas, and I think people who are reading the notes might not understand that.

Yeah, I know that we're going to remove the note, but somebody is going to be reading the note when we put this out to the list, correct?

"Who reads the notes?" Good point, Griffin. I will stand down. Thank you.

PHIL CORWIN: Well, Griffin says that's just a joke. Lori, might I suggest that, rather than spending time wordsmithing language that we intend to delete, as soon as it's put on the list, given your concern about this, you immediately post to the list that you disagree with the phrasing of that bullet? Or we can just strike it and then, when people look at the entire document, they won't even read it because it's been struck, which is probably the best solution.

Thank you, Ariel. It is stricken. All right, thank you. The Co-Chair would observe that, when you're chairing, you never know what will get extended discussion. But it's good to have those discussions when members feel them necessary.

Ariel, just check—we've got 18 minutes left—how many of these individual recommendations are left for our review.

ARIEL LIANG: Hi, Phil. I think there's only three left, I believe.

PHIL CORWIN: All right. Well, [we'll see]. That would be six minutes each. I don't know if we can get them all done, but let's see.

In this next recommendation, we're recommending the rules be amended to incorporate in full Rule #11 of the UDRP rules regarding language of proceedings. Then it has the text of those rules, which is basically, "The administrative proceedings shall be the language of the registration agreement subject to the authority of the panel to determine otherwise." And, "The panel may order that any document submitted in a language other than the language of the administrative proceeding be accompanied by a translation in whole or in part." And, "We recommend that the IRT consider the following factors: preliminary submissions by either side regarding the language should be limited to 250 words and not counted against the overall URS word limits, [then notice] a complaint should contain a section explaining that the respondent may make a submission regarding the language of the proceeding and, if translation is ordered, exceeding the URS word limits should be permitted as long as the original submission meets the word limits in the original language."

Is there anything highlighted or new in the contextual language on this one, Ariel?

ARIEL LIANG: In fact, staff have some clarification regarding this recommendation or individual-proposal-converted recommendation. If the working group recalls, there's actually an existing URS recommendation that's related to providing guidance to the providers in terms of what language to use during a proceeding and when issuing a determination. The guidance will take into account several factors, including Section 4.5 of the WIPO over and the procedures followed under UDRP. But that's

just one factor that the guidance may consider. There are other factors as well. So we're just wondering whether this individual-proposal-converted recommendation contradicts with the existing recommendation in that aspect. We're happy to put out that particular recommendation for the working group to review side-by-side and make that determination.

PHIL CORWIN: Okay. That may be necessary. Let's hear from Brian and Kathy, my Co-Chairs.

BRIAN BECKHAM: Thanks, Phil. Thanks, Ariel, for mentioning that. I thought that we had touched on the language. I was going to ask about the suggestion for an additional word limit, but it may be a moot question in fact the early recommendation in effect overtakes this individual [inaudible] would wait until we see if these are overlapping and this isn't necessary. Otherwise, maybe we can explore a little bit that concept of the word limitation. Thanks.

PHIL CORWIN: Okay. Kathy? Then we'll review what's on the screen now. Kathy, go ahead.

KATHY KLEIMAN: Great. I actually need the other language. I printed out this language. I actually needed the other language because what staff is pointing out is that we have—can we go back to the other

screen, please; thank you—two discussion of the language of the proceedings. I think what's new here in this individual proposal is the bullet points at the bottom: the implementation guidance. Then we'll go over, but I just wanted to point out that this is additional implementation guidance where we're giving the people involved in the proceedings some ability to discuss what the language of the proceedings should be. I think that's the delta, that's the new addition. And we could add it. I propose that we add it to the three bullets in this paragraph, that we add it to the URS final recommendation, #9, that we're about to go over, too. I think they complement. They don't replace each other. But we can probably wipe out everything on the top, based on my reading. Thanks.

PHIL CORWIN: Okay. This is the related recommendation that we already adopted. This is about language during a proceeding and when issuing a determination. What does the other recommendation relate to, Ariel? I can bring it up on my own …

ARIEL LIANG: Phil, this is also related to the language of the proceeding.

PHIL CORWIN: And there's a conflict between them?

ARIEL LIANG: Yes. Based on staff's reading, this individual proposal seems to recommend using the UDRP rules, but then the recommendation

already approved by the working group is recommending to consider the UDRP rule, but that's just one of the factors for the guidance.

PHIL CORWIN: Okay. So the one we've adopted asked the IRT to consider the UDRP rules, and the new individual one requires use of the UDRP rules?

ARIEL LIANG: Yes, that's staff's impression.

PHIL CORWIN: All right. Well, let me say it's a personal view, but I think, since we've already agreed to the first one, we need to downgrade the reference to the UDRP rules in the second one and the one we're reviewing now to … Just looking at the chat. Yeah, we need to resolve this conflict.

Kathy and Brian, are those new hands?

KATHY KLEIMAN: Yes.

BRIAN BECKHAM: Mine is new, yes.

PHIL CORWIN: Okay. Kathy first.

KATHY KLEIMAN: Okay. Again, can we go back to the other screen? I think, if we can … Can staff highlight everything from the top down to [through] A and B? Based on Recommendation #9, I think we can delete all of that because I think it's redundant, and we move … But it's the implementation guidance below that I think is interesting and could just easily be ported over to add to our implementation guidance because I think—

PHIL CORWIN: Wait, Kathy.

KATHY KLEIMAN: Sure.

PHIL CORWIN: Sorry to interrupt, but if we delete all of that—I'm not necessarily disagreeing with you—then there is no recommendation to be implemented.

KATHY KLEIMAN: But the implementation guidance here … The goal is, how do you arrive at the language of the proceeding?

PHIL CORWIN: What is it guiding if we strike the recommendation?

KATHY KLEIMAN: These are complementary recommendations. We're trying to get to the same end. So what the implementation guidance says—it's just as applicable for Recommendation #9—is to ask the participants and give the complaint and the respondent a chance to get involved in telling you what the language of the proceeding might be or should be. So that's what I see as the delta—the complement here … Again, it gets thrown into the bullet point for the IRT, but, if we delete the recommendation, it's not because it's wrong. It's because we've already covered it. What's missing now from our implementation guidance is this new idea that we had and that we've agreed to that we want to ask the registrant—the respondent—what language the proceeding should be in and give them that opportunity to tell us. That's what's new here, and it can easily be added to Recommendation #9 because it's completely consistent with the spirit and the language. Thanks.

PHIL CORWIN: Okay. Brian, please go ahead.

BRIAN BECKHAM: Thanks, Phil. I think, in terms of if the questions is require versus allow, certainly it's nice to see the suggestion to require reference to the WIPO overview. We obviously find it a useful guide. But I think it's important to point out that the language process whereby basically what happens is that the complainant can request that the proceedings go forward in a language other than that of the registration agreement based on, for example, prior

correspondence between the parties, content of the webpage, or what-have-you, and the respondent is given an opportunity to react to that. But basically that's something that's developed through a panel [practice in] cases. Basically, the WIPO overview just captures what's been done by panelists over the years. What I'm driving is that that's subservient to the rules, which vest ultimate discretion on a determination of the language of the proceedings with the panelists.

So I think it's important that we do steer this towards the "may." Or, if you recall, we had, in prior recommendation, the concept of some sort of a guidance for panelists. I know, particularly with the language issues, the WIPO overview was referenced. So I certainly agree that it's a useful guide for panelists, but I do think it's important that the panelists retain the ultimate discretion in keeping with what's the procedure and rules themselves. I hope that helps unlock it a little bit. Thanks.

PHIL CORWIN: Okay. Just for clarification, Brian, I think [implied in] what you said is that you wouldn't object to striking this individual recommendation, which we were considering elevating to a working group recommendation and sticking with the one we've already adopted, which recommends the IRT look at the WIPO language of proceedings/rules but not incorporate it in full within the URS.

BRIAN BECKHAM: Thanks, Phil. I think so, and apologies. I'm on the phone driving so I can't look at the screen. But from what I'm hearing in the conversation, it sounds like, yes, that's just not necessary. It's overtaken by the original working group recommendation.

PHIL CORWIN: Okay. Let me say this. It seems to me that we've adopted Recommendation 9, which directs the IRT to look at the procedures followed under the UDRP. We could be more explicit in referencing the section. We could take that explicit reference from the new recommendation. But it's incompatible with requiring all the existing WIPO language or proceedings language to become part of the URS rules. It would take away that discretion from the IRT. So, if that's the case, we would have to do away … There's just no reason to have that additional and conflicting individual proposal that we're elevating.

Then Kathy's suggestion was that we take some of that implementation language from the [inaudible] recommendation and consider adding it to final recommendation—I believe it's 9.

I see Griffin's hand up and Zak. We've got five minutes left. I think we're going to need to take this one to the list, but let's hear your comments.

GRIFFIN BARNETT: Thanks, Phil. I've become fairly concerned about this suggestion to delete what has become maybe not a presumptive recommendation but a potential recommendation that's on the screen now about incorporating Rule 11 of the UDRP rules

regarding language proceedings within the URS. I had understood before that there's was agreement that we should adopt … Sorry, can we go back to where we just were? Thanks. I had understand that there was agreement before to adopt this rule in terms of how to decide the language of proceedings. The other recommendation, Recommendation 9, talks about guidance about assisting a panelist and deciding the language, but I don't understand them to be duplicative. I understand that the baseline rule would be what's here in front of us on the screen about language of proceedings. Obviously, to Brian's point, I think, earlier, there's still that element of discretion of the panelist to determine otherwise but that we still want to keep these as the default. I understand Recommendation 9, which speaks to guidance to the panelists in terms of exercising that discretion. I see them as complementary in that way. I don't see them as duplicative or requiring us to delete anything that's in front of us here as this potential recommendation. I think both are helpful and complementary. So I would really caution against striking out the first portion of this recommendation here. Thanks.

PHIL CORWIN: Okay. Zak?

ZAK MUSCOVITCH: Thank you. Following what Griffin said, if there's a way of having them be complementary, if that would require some additional drafting revisions, that would be good.

I just want to point out to our group that it would be a shame in my view to jettison the standard default position, as Griffin put it, of Rule 11 from the UDRP and muddy up the IRT's deliberations with saying, "Well, you can look at that as one of the things to do," when it seems that we either agreed or were extremely close to agreeing on Individual Proposal #34. I think it's a more solid proposal than the original Recommendation 9 in fact. Thanks.

PHIL CORWIN: Okay. Thank you. Here's what we're going to do. Staff is going to send out a separate e-mail, separate from the other issue we just discussed about conflicts of interest. That's going to contain links to both the adopted Recommendation 9 and this formally URS Individual Proposal 34, now considered to be a candidate for final resolution, and is going to ask working group members to weigh in on two questions. One is whether these separate recommendations on language of proceedings are in conflict or are complementary and, if it's deemed that they're in conflict, whether some or all of the implementation guidance for this one should be incorporated in the implementation guidance for Recommendation 9.

This is simply too complicated to work out in the remaining 60 seconds of this call. Having a language of proceeding that works for complainants and registrants and examiners is very important. So sometimes we have to take things back to the list for further discussion, and generally they get worked out there and we bring them back. It's a very short discussion most of the time.

So that brings us to exactly 2:30 Eastern time. We didn't quite finish. We didn't wrap up two of these items, but we did make very substantial progress. I think everyone for their forbearance in keeping things short and focusing the discussion. We'll see you back on the next call next Tuesday. Stay safe and enjoy the days ahead. Thank you.

[END OF TRANSCRIPTION]