ICANN Transcription

EPDP Specific Curative Rights Protections IGOs

Monday, 13 December 2021 at 15:00 UTC

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TERRI AGNEW: Good morning, good afternoon, and good evening. Welcome to the EPDP Specific Curative Rights Protections for IGOs call taking place on Monday, the 13th of December 2021 at 15:00 UTC.

In the interest of time, there'll be no roll call. Attendance will be taken by the Zoom Room. If you're only on the telephone, could you please identify yourselves now? Hearing no one, we have no listed apologies for today's meeting. All members and alternates will be promoted to panelists. When using chat, please change the selection from host and panel to everyone in order for all to see the chat. Attendees will be able to view chat only. Alternates not replacing a member are required to rename their line by adding three Z's beginning of your name and at the end in parentheses the word alternate, which means you're automatically pushed to the end of the queue. To rename in Zoom, hover over your name

and click Rename. Alternates are not allowed to engage in chat apart from private chat or use any other Zoom Room functionality such as raising hands, agreeing or disagreeing. As a reminder, the alternate assignment form must be formalized by the way of the Google link. The link is available in all meeting invites.

Statements of Interest must be kept up to date. If anyone has any updates to share, please raise your hand or speak up now. Seeing or hearing no one, if you do need assistance, please e-mail the GNSO secretariat. All documentation and information can be found on the wiki space.

Please remember to state your name before speaking. Recordings will be posted on the public wiki space shortly after the end of the call. As a reminder, those who take part in ICANN multistakeholder process are to comply with the Expected Standards of Behavior. And with this, I'll turn it back over to our chair, Chris Disspain. Please begin.

CHRIS DISSPAIN: Thank you, Terri. Good morning, good afternoon, and good evening to everybody. Welcome to our EPDP on Specific Curative Rights Protections for IGOs meeting according to this agenda #33. It seems like only yesterday that we started.

We have an agenda, a status update on Rec 1. Then we go back to Rec 3. Jay, I'm going to ask you when we get to Rec 3 to talk to the e-mail that you sent out. Thank you for that. I appreciate it enormously. Also, Alexandra sent an e-mail. Assuming she makes it on to the call, I'll get her to talk about what she has said, and

then we'll continue our discussion as a group. That's good. We've got a possibility of moving on to Recommendation 4 if we have time. And then we're going to talk about next steps, etc. So, Berry, do you want to start us off by giving us a status update on Rec 1, please?

BERRY COBB: Thank you, Chris. I see that our small team is not present on the call. So it will just be an update. As noted on—

CHRIS DISSPAIN: Brian is actually in the attendee room on the telephone only at the moment, just so you know.

BERRY COBB: Well, it's still just an update. So as noted on the prior call, there was still one last remaining item as it pertains to the definition of an IGO complainant and that's item B. In particular, we were waiting on some homework about the term or use of permanent observer status. Brian has reached out to some UN colleagues that are more in tune with the topic and has distributed some information to the small team. But the small team hasn't yet been able to digest that. So there's really nothing new to update other than we'll continue to try to resolve this through e-mail in preparation for our next call. But I'll just leave it at that for now.

CHRIS DISSPAIN: Okay.

BERRY COBB: I should add, so hopefully on our next call we'll be able to provide an update and distribute the latest text to the list for confirmation or input.

CHRIS DISSPAIN: Fine. Anything else you want to cover, Berry, before we move on?

BERRY COBB: Not with respect to Rec 1. We're good.

CHRIS DISSPAIN: Okay. So that brings us round then to recap of where we are on Recommendation 3. Where we left this was that we were discussing the Business Constituency's comments. Perhaps on behalf of the Business Constituency, but in any event, that discussion from that side of the fence, if you will, was being led by Jay. And I did ask for everyone sort of go in and look at the situation. Jay undertook to go back to the Business Constituency to talk to them about what their suggestion was, and if you could add anything to that because I had said—and I think I don't think I was alone—that I wasn't clear. Whilst I was clear what their interpretation of the advice from Swaine was, I wasn't clear what the compromise suggestion was. Or rather, how the suggestion was in fact compromised. And so we asked Jay to do that, which he has done, and I'm going to throw it to him in a minute.

We also asked the INGOs if they would consider the position in respect to Mutual Jurisdiction and what their position was in respect to that, their position being boldly stated as we're not subject to, we can't agree to Mutual Jurisdiction, etc. Alexandra has very kindly come back to us on the list with comments on that. So if Alex does join the call, and if not, then perhaps one of the other members of the IGO group would like to talk to her e-mail.

And then after that, we're going to have a discussion about what has been said and hopefully, at some point today, reach an understanding of where we are with Recommendation 3, even if we can't sign off on Recommendation 3 at this stage. And I should say, I'm saying that because I do realize that one's position in respect to Recommendation 3 may in fact be affected by the path that Recommendation 4 takes. If you look at the Business Constituency's input, for example, I'm using [inaudible] as an example, they say in the event that Recommendation 3 proceeds as possible, then we can only countenance one particular way of dealing with Recommendation 4. So those two things are clearly interlinked.

So that's where we're going to go and see where we get to, basically. Jay, are you comfortable to talk to us about the e-mail that you've sent and to put a bit of flesh, if you will, on the bones?

JAY CHAPMAN: Sure, Chris. Can you hear me okay?

CHRIS DISSPAIN: I can hear you really well, Jay. Thank you.

JAY CHAPMAN: All right, fantastic. Good morning. Hello, everyone. Well, I think, really, I mean, I'll just try and make it as concise as possible, which really, if you're looking at the e-mail there—and I appreciate it being put up—that second paragraph—making sure I'm looking at the right thing. Yeah. Thank you for highlighting that. So Swaine's point was as is, as it as it stood then with the Mutual Jurisdiction provision in place as it is today, Swaine's position is still likely wouldn't violate their privileges and immunities. So the compromise is too specific for ICANN to specifically state that those immunities aren't being waived. And to some extent, I guess you could say that has as much effect as—if you can say, on one hand, if ICANN says we agreed a Mutual Jurisdiction, well, then that's effective. But why can't ICANN say where your Mutual Jurisdiction is still here but you're not waiving any rights that you have to claim your immunities and privileges? That's the distinction. Thanks. I appreciate that highlight as well, just a little further explanation on that. But that's pretty much it. It's really very, very simple. Thanks.

CHRIS DISSPAIN: Can I bounce that back to you, Jay, to make sure that I've understood correctly? What you seem to be saying or what we think the Business Constituency seems to be saying is, instead of saying there is no requirement to submit to Mutual Jurisdiction at the beginning of the process, the process would be changed to say there is a requirement for the IGO to nominate a jurisdiction at the beginning of the process. But an acknowledgement and an acceptance that by nominating that jurisdiction, they are not

abandoning their rights to claim that they are not required to go to court. Or rather, they could still claim that if they went to court. And then when you get down to the next piece, so just take an example of a claim that's made against you, Jay, you as a registrant had lost. You have the right to go to court and in the mutually agreed jurisdiction. And the IGO still has the right to turn up and say, "We're not subject to this jurisdiction because we have immunity." Is that correct?

JAY CHAPMAN: It is.

CHRIS DISSPAIN: So the only difference then is that at the beginning of the process, rather than submitting to Mutual Jurisdiction, the IGO is merely saying, "If you choose to go to court, we agree this is the jurisdiction that you will choose to go to court, but we reserve our right to argue that we are not subject to that jurisdiction." Is that correct?

JAY CHAPMAN: That's right.

CHRIS DISSPAIN: Okay, good. Thank you. I understand that now.

JAY CHAPMAN: Again, I want to harp on the fact that the distinction is—I mean, again, the objection here the whole time has been, well, basically, because ICANN says we agreed a Mutual Jurisdiction, we agreed a mutual—it's like that's just going to be dispositive matter of court, right? So why can't ICANN say … That's the main point here, Chris. I don't want to cast it over and over.

CHRIS DISSPAIN: No, I got it. I got it. I got it. To follow your line of thinking and then I'm going to throw it open for discussion, to follow your line of thinking, it's not so much ICANN saying, [inaudible] part. It's the party saying that "At the beginning of this process, we agree that the jurisdiction will be…" Should a party go to court, the jurisdiction will be Monrovia. The IGOs will say, "But by agreeing that we are not abandoning our rights to argue that we have immunity and we're not subject to that jurisdiction and we're entitled to argue that." That is, in essence, what I now believe this to be saying. And if I've understood that correctly, then my question for everybody would be, what do you think? How does that sound? Is that feasible? Is that something we could countenance? And if not, why not? Over to the floor to ask questions or make comments. Anybody has any?

I know Brian's in the attendees' session. I don't know whether he can actually speak or if he wants to, but I guess I've mentioned about this in there. Making sure he's got speaking rights. Thank you. So, David, your hand is up. Please go ahead.

DAVID SATOLA: Good morning, everybody. I don't know whether Brian does want to speak or can speak or not. It sounds the way that we've discussed it just now, it's more like a governing law provision than a jurisdictional provision. I don't think there's any support, like there's any authority to suggest that if we as IGOs agree to Mutual Jurisdiction, that we can then sort of carve out a downstream immunity. That is not our understanding of how it would work.

I also think that that's not an accurate—but it's an interpretation, I suppose, of Professor Swaine's memo. I think what he did avert initially was that to submit a Mutual Jurisdiction would be a waiver. And then he constructed an argument that he called a legal argument that without any authority for it—so it's his personal opinion, he's entitled to that. I don't know what the legal authority for is, that IGOs could do this thing and somehow then preserve immunities downstream, and that's just not how it works. If the proposal is should it ever get to a court and we want the governing law to be this—and that's a different discussion we can have—but it's not a Mutual Jurisdiction, I don't think. That's my reaction at the present time.

CHRIS DISSPAIN: Thank you, David. I've got a couple of comments to make but I'll keep those back for a second. Mary, go ahead.

MARY WONG: Thanks, Chris, and thanks, David. I think as this group has dived a little deeper into this, I think we understand certainly that where Professor Swaine started was to say that by agreeing to the

Mutual Jurisdiction clause as is, in effect, that would be a waive of immunity for IGOs in most cases. The part that the BC and the ICA cite as a later part of Professor Swaine's memo where he talks about whether that clause would amount to an infringement, an incursion, a violation of the immunity principle, which is different from waiver, as we tried to point out. I think we're understanding that distinction. Clearly where the Business Constituency is coming from is trying to thread that needle and to find a middle ground. We did want to clarify that the BC's proposal is not one of the options that Professor Swaine, as David is saying, had looked at in his analysis. And he had offered a couple of options, one of which was to amend the Mutual Jurisdiction clause but not necessarily in this way. These are not options that, as David said, we have looked at in a legal way since they were proposed.

So I just want to make that clarification as to first the distinction in Professor Swaine's memo between what is a waiver versus what is a violation of immunity. Secondly, that this is not necessarily one of the options that Professor Swaine proposed. I'll end by saying that in thinking through and appreciating what the BC and other commentators in this vein have suggested to try to find that middle ground, one of the questions that the staff had was that while appreciating the premise, amending the clause in the way that's suggested, would that not still require that the court in question, deal with the question of immunity? In other words, an IGO saying—

CHRIS DISSPAIN: Yes, it would.

MARY WONG: So in other words, we're still back to where we are, which is, we're still going to go to court. There's nothing to stop the respondent from filing proceedings than any case. And in every case, the court will deal with immunity anyway.

CHRIS DISSPAIN: Yes, Mary, that's true. Let me see if I can pick up on what you've just said and what David said and lay out a possible way forward. Paul, do you want to go first? I'm happy if you go if you've got something to add to the discussion. Please go ahead.

PAUL MCGRADY: Thanks, Chris. Apologies all to be late. I had a surprise call this morning. So there's one little tweak to what Mary said, which was the one thing that it does is that while in theory, the court would still have to look at the issue of immunity, it does waive an argument by the complainant that that particular court is the right place to hear that argument. In other words, if I say I'm prepared to have an appeal of this UDRP go to the courts where the registrar is located, if we can find a way to make that not be a waiver of the immunity, then great, I suppose, although I'm with Mary, I don't really know what it accomplishes. But then as a complaint, I won't later be able to say, especially if that court where the registrar is located gets it wrong, in my opinion, on the immunity question. Hey, wait. This isn't even the right court because they don't have personal jurisdiction over me. They don't have subject matter jurisdiction over me, blah, blah, blah. I've

already given that up. So that's a little tweak to keep in mind. So something is happening here. It's not that nothing is happening by this. There is a thing that's happening in relationship to which court gets to make the decision. Hope that's helpful.

CHRIS DISSPAIN: Thanks, Paul. I think it is. Let me see if I can make sense of this. The current situation is a claim is made and there is an agreement up front that the parties choosing one jurisdiction, and that's agreeing to Mutual Jurisdiction. Part of the issue all along has been IGOs, rightly or wrongly, I'm not talking about whether they're right or they're not at the moment. Say that they are immune and that they should not have to do that.

What we suggested in our recommendation was that we abandon that Mutual Jurisdiction. If we had a situation in Recommendation 4 where the registrant went to court, either in option two, went to court with the right to come back to arbitration if the IGO argued that they weren't subject to the jurisdiction, or last full stop, we've got some stuff in there that talks about what jurisdiction they can go to or where they can go to court. Am I completely off beam here to say—and one of the things this thing seeks to do, the suggestions, is to make that decision at the beginning. So, in other words, it gives the complainant the right to say, "We're going to retain our rights to argue that we're not subject to the jurisdiction if you go to court. But we're not stopping you from going to court. We can't stop you from going to court. And if you do want to go to court, this is the jurisdiction that you go to court in." Does that make sense? Is that a correct simplistic way of putting it? Either I've lost the will to live or no one's hearing me or no one has

anything to say, which I suppose is possibility. Am I making sense?

BERRY COBB: We can't hear you, Chris.

CHRIS DISSPAIN: Can you hear me now?

BERRY COBB: Yes, we can hear you. I think people—

CHRIS DISSPAIN: You can hear me, yes. So people are thinking about what I said. David, go ahead.

DAVID SATOLA: Yeah. Thanks, Chris. What I appreciated about your remarks was steering us back to the recommendation, because I think what has happened a little bit is that we've veered off towards relitigating the issue ab initio. What I'd like to suggest is that in the recommendation and consistent with the spirit of compromise, I think that we, the IGOs, did come to yet another compromise in agreeing to put forward that recommendation. It was in the comments by some who said, "No, we don't like that so we're going to go back to the beginning." If I understood Mary and Paul correctly, I think that the proposal does just put us back to where we started from, which was a submission to Mutual Jurisdiction as

a waiver. This isn't authority to suggest that an IGO can, on the one hand, submit to the jurisdiction without it being a waiver. And the authority for that is that once waived, immunities cannot be reasserted or haven't been reasserted. So while ICANN can make a provision and suggest that as far as it's concerned, that's all cool. I don't know how ICANN can then support a proposition downstream and enforce the courts to allow the IGOs to then reassert their immunities. I mean, I think that's a very practical problem. A) There's no authority for it, B) I don't think it's going to work. Thanks.

CHRIS DISSPAIN: David, thank you. If I could just push back on that a little bit. Counting the terms that you've just said it, I agree. You said it's a waiver. If I understand it correctly, it wouldn't be a waiver. It would be an understanding that if at point X in an agreed process—so you've got an agreed process, you go through the UDRP, the result is the registrant loses. The next step in that process is that, if this were the case, the registrant has the right to go to court. If the registrant has the right to go to court, the IGO complainant has the right to argue that they are immune and that they haven't waived their immunities. At that point in the process, the jurisdiction in which the registrant can go to court has been pre-agreed or pre-nominated. What's wrong with that? If it's going to happen anyway, why does it matter if it happens at the beginning?

DAVID SATOLA: Sorry, I thought it was on mute. I don't see that that's not a submission to jurisdiction, which it's a facto a waiver.

CHRIS DISSPAIN: Fine. The alternative to that then is that when we get to that point in the process and in the event that the registrant decides to go to court, they are, in effect, able to go to court wherever they want to.

DAVID SATOLA: I don't think any of the IGOs have ever said that the aggrieved, the registrants, can't pursue whatever remedy they want to pursue. That's always a possibility. It's just the practical realities of what would happen. I don't think that we have any problem with a statement of governing law. I think that we've already did that somewhere else in these recommendations, but it seems like this is something slightly different than just an agreement to what law governs.

CHRIS DISSPAIN: Yes. Okay. Understood. Thank you. Of course, to be fair to everybody—Alexandra, I'm going to come to you in one second—of course, I may be massively oversimplifying this. It may be sensible to go back. We can do this, Berry, after Alexandra's spoken, is to go back to the actual words that the Business Constituency used in its comment, and just go through those and see if those words do fit in what it is that both Jay and I seem to be saying. Alexandra, over to you.

ALEXANDRA EXCOFFIER: Thank you, everyone. I understand what you are saying, Chris and Jay and Paul. I think that—and obviously what David is

saying—we can come go back and take this back to the IGOs and see whether that might work for us in the sense that—I'm not sure that the language proposed by—was it IPA or BC?

CHRIS DISSPAIN: It was the Business Constituency.

ALEXANDRA EXCOFFIER: I'm not sure that that's sufficient. But if we can make clear, on the one hand, that if the registrant is more or less bound to use one of these jurisdictions, if it brings a dispute, and on the other hand, it's very clear that the IGOs are not waiving their immunities by accepting this modified clause, then this is something we could bring back to the IGOs after this call and reconsider. But it would have to be very clear that we're not waiving our immunities by accepting something like this. So we have to think about it some more. We understand now what you're trying to say, what you did say, and I think it's clear. But again, we're not prepared today.

CHRIS DISSPAIN: No, of course not. I didn't expect you to. I completely understand that. Also, Alexandra, before I go to David, and then Paul, perhaps you could just comment. Berry, could you put that highlight back, please, where it was? Thank you. This wording doesn't work in the sense that it doesn't go far enough along the line that that if Jay is right about what the meaning is. Because it states that the complainant without prejudice to the complainant's privileges and immunities will submit with respect to any challenges to a decision in the administrative proceeding. So the challenges to that

decision, to the jurisdiction of the court in at least one specified Mutual Jurisdiction, that does not do what Jay has suggested is meant to do. Because what that implies at any rate—if it isn't intended to imply this, then it can be it can be changed. If it is intended to imply it, then it's something different. It implies that you will actually agree to be bound by that jurisdiction. And it doesn't say that you would have the right to turn up and argue your immunities. Now, the practical result of it would be that you could do that if you hadn't abandoned them, of course, but it would need to be worked on to be more specific in my view. But I appreciate your willingness to at least look at it. Thank you. Perhaps we'll come back to you. Well, we can come back to this on the next call anyway. I've got a queue. So, Alexandra, did you want to say something else first before I move on? You're welcome to do so.

ALEXANDRA EXCOFFIER: No. Just that I agree with you, that this language as it is is not sufficient. Really clear because it does say that we submitted jurisdiction and that in itself is a waiver. So we have to be more clear and might need several sentences to clarify this.

CHRIS DISSPAIN: Understood. Okay. Super. Thank you for that. David, go ahead.

DAVID SATOLA: Thanks. Sorry to take the floor again.

CHRIS DISSPAIN: That's all right.

DAVID SATOLA: I have another problem with this. Not the highlighted formulation but with this notion that an IGO would submit—I don't want to use the word submit—but would agree to a governing law, stroke jurisdiction kind of thing. I've said this before in this work track that there are hundreds of IGOs out there and we don't know the nature of all of how their immunities would be construed. What I mean by that and I'll use the example of the World Bank, in addition to the treaty that establishes us, there is a federal law in the U.S. that says with respect to suits brought against the bank and people are allowed to sue the bank, the district court of the Federal District of the District of Columbia has exclusive jurisdiction to hear those cases.

So I don't know. So, on the one hand, for us it's a non-starter because we've got a place where people can go to sue us if they want and that court will determine the application of the immunities and the analysis that they will use, whether the activity that we've been engaged in that we're being sued for is within our mandate. Again, I would say that there's no way that they're going to say the application of our domain is not integral to our mandate. So I'm convinced that it would be okay.

But the other the other point is I don't know how many other IGOs enjoy similar treatment in this country or other countries, and so each one would need to analyze whether they could do that because there may be a treaty provision or a statute that would prevent that from happening. Again, I would say that we have to

rely on because just the range, the number, the diversity of IGOs out there, we have to have something that is going to be generic enough to apply. And I think that while I understand the motivation of the business community and the IPC for wanting to get this, I don't think it attains that level of generic application. That's another reason why I think it's not a compromise that we can make. Thank you.

CHRIS DISSPAIN: Thank you very much, David. Paul, go ahead.

PAUL MCGRADY: Thanks. A good segue from David because he brought up the BC and the IPC. I want to explain my silence on the list. It wasn't that I was ignoring, taking this back to the IPC, but what I can say after a little bit of time to sort of distill it down is that our public comment appears to me to be primarily one of trying to show solidarity with the BC, and if a compromise can be reached along the lines of what the BC is suggesting, I think the IPC would support that compromise. But like with folks on this call, it's not abundantly clear 100% across the Board within the IPC that the BC proposed language does that, basically picks a jurisdiction without waiving. And so I'm basically following along, trying to figure out if there is a way for—glad to hear that the IGOs are prepared to take this back and work on language. But that's kind of where it seems to be falling out within the IPC. So watch, help, support, and if the compromise can be reached, get behind it. I think that's where we are. Thanks.

CHRIS DISSPAIN: Thank you, Paul. I appreciate it. Mary?

MARY WONG: Thank you, Chris. Following along this conversation and seeing if we can make some progress on a compromise, just to summarize, and then come up with an idea, clearly, if any compromise starts from the IGO's perspective that they cannot and should not be made to agree up front to waive immunity, that is a very important principle and that this is something that is a matter for the court, not for ICANN. Although it could be something the parties might well agree to. From the registrant's perspective, obviously, the opportunity should always be there to go to court and that if the registrants recognize as they should that the IGOs could, and in many cases, will have immunity from some courts, how do we get to a point where there's sufficient certainty while still allowing for recognition of these principles?

In an earlier conversation or discussion, at a concern was raised that IGOs would not want to be dragged into court in any possible jurisdiction. Because at the moment, even with a Mutual Jurisdiction clause, a losing registrant could file suit in any court convenient to it. At the same time, on the other hand, we also know that the registrants want some certainty that whatever the legal question is that they know when how and where it's going to be answered. So taking the track of today's discussion, maybe it's not so much about amending the Mutual Jurisdiction clause, which is about submitting to jurisdiction. And as you said, Chris, the outcome of this discussion may depend on our discussion in Rec

4. Maybe it is about finding a solution where the IGOs do not waive their immunities up front, but perhaps that they know that a registrant in any one case can only or will only bring its suit in one of two jurisdictions, which I understand is what the BC's and IPC's comment is trying to get to. So that when an IGO, looking at a case in front of it, as David says, there's hundreds of IGOs all over the world different circumstances, it looks at a case, it decides whether or not it wants to follow UDRP or URS proceeding. And in looking at that case, it will know who the registrant is, where it's located, and it will also know what jurisdiction that registrant will have to bring suit in. I don't know if this is workable but I'm trying to get this conversation to the next part where we're looking not so much at submission or not submission to Mutual Jurisdiction but defining a jurisdiction where the question of immunities can be heard.

CHRIS DISSPAIN: Thanks, Mary. David?

DAVID SATOLA: Thanks. Hopefully, it will be the last comment on this one, at least from our side. I was with Mary up until the very last thing that she said about the court deciding on the immunities No, that's not quite right. It's that the IGO would submit or agree to go to trial. And there are cases where IGOs do that, it's within our discretion, whether we want to waive immunities to go to trial. Usually, it's in instances where the matter before the court would be of such great precedential value that the IGO has an interest or it has a strong enough case and an interest in establishing a precedent

then that would apply. So that opportunity exists in I think most, if not all, cases. I know that there's a strong view that there should be this right to go to court and have one stay in court. The day in court, though, may settle in hard precedent an issue that may not be in the interests of the registrant community. So I don't know that it's such a great idea to pursue. The arbitral results are not always binding, and so there's a lot of opportunity for sort of case-specific resolution without necessarily adhering to strict precedent. So for us to make that decision, we would have to evaluate the case for ourselves and say there is no way that the court would rule against us. We have a very strong case, we're going to go to court, and we're going to settle the issue. And then that's done. That would prevent then other similar cases being brought or it would guide the result of those cases. So I'm really not so sure how beneficial it is.

Where I was with Berry was in this conception, if that's the way we're going, a restatement more as a governing law provision, which we would have in arbitration as well, rather than a submission to Mutual Jurisdiction. I think if that's what we're being asked to go back with to the IGO community, that's okay. But it would be good to understand a little bit what the question is that we need to go back to. So I'll throw that hand grenade over to you, Chris. Over.

CHRIS DISSPAIN: Thanks, David. A couple of things arising, really, from the discussion so far. First of all, currently, whatever option we choose in Recommendation 4 envisages a right to go to court. Unless I've misunderstood, I'm fairly sure I'm right about this. The options in

Recommendation 4 are either that the registrant can go to court. And if the IGO argues that they haven't waived their immunities and the registrant loses, that's an end to the matter. And the other alternative is that if the registrant loses, then they can come back and go to arbitration. Those are the two options on the table in Recommendation 4. Whichever end you look at it, there is an opportunity to go to court.

What we've discussed at some length in Recommendation 4, it was jurisdiction for that hearing and so on. Leaving aside the BC suggestions or not suggestions for a moment, whether one makes that decision in the moment that the registrants decided to go to court or beforehand should the registrant decide to go to court, strikes me as being the crux of this discussion so far. However, that said—if you could go back to the BC's comment that we had up before, please. Thank you. That said, not only does the sentence that is highlighted not actually say what Jay and I had said. The subsequent paragraph also isn't aligned with that because the subsequent paragraph talks about ending up in court and ensures that a registrant has a bona fide case to overturn an errant decision has unfettered access to either the courts in the registrar's location or the registrant's location.

I'm a bit lost now as to—I can understand why the wording in quotation marks currently highlighted could be taken to mean what Jay has said and what I have interpreted. But that's not the same as what is in the subsequent paragraph, which appears to be something different. It does seem to be saying that there should be a right to go to court, which I think is where I got confused about what the compromise was in the first place. Now, that's not

to say that Jay is wrong and that my interpretation is wrong. I've listened to what he said and I've done my best to interpret it. So it strikes me that there's a couple of things that we could do.

Mary, how would you feel about grasping the point that Jay has outlined as being the crux of what the Business Constituency is trying to achieve? And seeing if you can put some wording together that would achieve that, and then asking everyone to have a look at their wording and see whether that's viable or not. Is that helpful?

MARY WONG: I can certainly try, Chris.

CHRIS DISSPAIN: If that's not what the Business Constituency means, then, Jay, if I could suggest to you that you might want to circle back and double check that your interpretation is correct. But if it isn't, then it's irrelevant anyway. And if it is correct, then it's worth us looking at the words that Mary and the team might want to be put together.

Well, Jay, to answer your question in the chat—and, David, I can see your hand, I'll get to you in a second—the wording on its own is not confusing. It's confusing if you say that it's meant to mean that the IGO will still have the rights to argue in that court, that they are not subject to the jurisdiction. Does that make sense now? Perhaps if we talk, it would be easier, rather than me having to read what you've said in the chat. Thank you. Go ahead.

JAY CHAPMAN: Of course, Chris. Forgive me talking about the—

CHRIS DISSPAIN: No, it's all right. Go ahead.

JAY CHAPMAN: I mean, when it says "without prejudice to," do we not understand what "without prejudice to" means? Is there some confusion as to what that means? I'm misunderstanding why the language is insufficient in your eyes.

CHRIS DISSPAIN: Okay. You may be right. Let me pause and see where we get to. The complainant, that's the IGO, without prejudice to their privileges and immunities, will submit—using the word "I would submit" is challenging. With respect to any—go ahead.

JAY CHAPMAN: I was just going to say that's consistent with existing UDRP rules, which we're trying not to deviate from as little as possible, right?

CHRIS DISSPAIN: Hold on a second. Bear with me. If you exercise the piece that says with respect to any challenges to institution in the administration proceeding, canceling, or transferring the domain name, which is not necessary for the sentence, that's just what it's

about, it would say, state that "The complainant, without prejudice to the IGO complainant's privileges and sovereign immunity, will submit to the jurisdiction of the courts in at least one specified Mutual Jurisdiction." And the way that that can be read is without prejudice to their overarching privileges and immunities, in this case, they will submit. In other words, they're not abandoning their privileges and immunities generally, but in this case, they will submit. That is how that can be read. And if that is the intention, that's not the intention that you have said is the case. Does that make sense?

JAY CHAPMAN: I do understand a little better. Thank you.

CHRIS DISSPAIN: Okay. That's the issue. If it's meant to be that they can keep their privileges and immunities, but for the purposes of this particular exercise, they will submit to a jurisdiction, and that jurisdiction is chosen at the beginning, that's not going to work for the IGOs. If the intention is that they can agree a jurisdiction but they can still argue that their immunities apply, that might be feasible. I'm sure there's lots of reasons why David and others would say it wouldn't be, but I'm saying it might be for now. That I think is the distinction. David, go ahead.

DAVID SATOLA: Thanks, Chris. Well, what I was going to suggest was—I didn't want to get into drafting here, but a suggestion to Mary and the ICANN staff team might be considering this is that if you're going

back and looking at how to rephrase this, it might be helpful to consider for IGOs where there is already either as a matter of treaty or statute, a jurisdiction to hear cases about them, then that takes care of a universe, maybe a small universe of cases, but then we'd still need to grapple with this question of what—and I agree the word submission is a non-starter—but what this other kind of agreement would be for the rest of IGOs for whom there isn't already a court assigned. That seemed to be I thought what the discussion between Chris and Mary had been about. Over.

CHRIS DISSPAIN: Thanks, David. I agree. Two things. Let's see if we can get some more wording that at least does what we think this may be intended to do on the one hand, and then at least you, the IGOs, will be considering wording that actually is clearer than this in the sense that it specifically says what we think it may be intended to do. Jay, if I could impose upon you—I'd hate to have a situation where we interpret the Business Constituency's comments wrongly and then come up with a solution which they're still unhappy with. I don't mind them being unhappy, I do mind them being unhappy if we've tried to fix it and haven't fixed it because we've misunderstood. So perhaps you could, at some point, go back to them and chat about that, I'd be grateful.

Mary, we've got a long gap now between meetings. So if we could get some wording relatively soon to be considered at some—may use the term leisure, but with a little bit of time so that we're not butting up right up to the next meeting for Alexandra and the other IGOs to go wait, consider whether it's even feasible based on our understanding of what might be intended. Alex, go ahead.

ALEXANDRA EXCOFFIER: Thank you, Chris. Just to note that the last paragraph of the comments said that "nevertheless, removal of the Mutual Jurisdiction requirement," so maybe we could park that for now. And once the discussion as to Recommendation 4 options goes through, although it's not an—like I said, although we prefer option one, but at the end of the day, it's option two, then this whole discussion on Mutual Jurisdiction, we can go back to it and agree the removal of the Mutual Jurisdiction requirement, potentially.

CHRIS DISSPAIN: Have you got a camera in my room looking at my notebook?

ALEXANDRA EXCOFFIER: Yes, I do. Exactly. Spyware.

CHRIS DISSPAIN: That exactly what was my next point. In fact, I set it up at the beginning by saying this, obviously, to some extent dependent on Recommendation 4. So what I was going to say was we should move on to Recommendation 4 and start talking about that. And then we can come back to 3 in the light of any wording that Mary can come up with, any response that Jay has from the BC, and where we get to with Recommendation 4. Thank you for that. I appreciate it.

ALEXANDRA EXCOFFIER: I apologize. I was late to the meeting.

CHRIS DISSPAIN: No, no. It's not a problem at all. Absolutely not a problem. I didn't say it in any of that detail. I just said we'd get to 4. Jay, go ahead.

JAY CHAPMAN: Well, I just want to be clear, again, from the BC's perspective that that last sentence was literally just stuck in there as—I mean, in the unlikely event that the Mutual Jurisdiction requirement was removed, then if that were to be the case, then option two of Rec 4 is what were they would put their ... This isn't a "Here's our whole comment. But by the way, forget everything we just said. Let's just go with Rec 4, option two." Please don't interpret it like that.

CHRIS DISSPAIN: Thank you. For clarity, I don't think anybody was interpreting it like that. I think more to the point is that if we know where we are with 4, it does have an effect on the discussion in respect to 3, simply on the basis that where the decision needs to be made about the jurisdiction in the court, and so on and so forth. So I think there's value in having the discussion that way. Having now spent a lot of time discussing 3 and understanding 3 as well as I think we do. Thank you. Did you want to—no? You're finished? Your hand is—no. It's down. Okay. Cool. Thanks.

I think then we have steps forward, don't we? Mary, you've got your stuff to work on and to think about. Jay, you can circle back to BC in your own time and see whether or not the interpretation of both you and I have caught on their paragraph is what is

intended to be the case. And if it is, then the wording that Mary comes up with will be useful for discussion. Let's move on. I'm conscious that we don't have a lot of time. In fact, I tell you what, Berry, why don't we do the next steps first so we dealt with those, and then roll into Recommendation 4 after that?

BERRY COBB: Just to be clear, I think that we don't really need to go through Alexandra's homework that she is—

CHRIS DISSPAIN: Not at this stage. Unless Alexandra basically wants to, I don't think it's going to add to the discussion. Because we've moved away from discussing what—we can always come back to it. It's there, discussing Swaine. Because as has been pointed out, there are different paragraphs in Swaine's advice that you can look at in isolation and claim different readings. So [inaudible] uncomfortable. Unless Alexandra wants to go through it, we'll not go through it now and we'll move on to Recommendation 4. Alex, if you want to do that, put your hand up. Otherwise, we'll move on. Cool. Let's do the next steps, Berry, and then we can go to 4. Do you want to take us through those?

BERRY COBB: Yes. Looking ahead, there's two things going on. First and foremost, it's not here on this agenda. But on Thursday, the GNSO Council will be meeting to consider our Project Change Request. I can send around links to the draft motion and the PCR document. But in short, the group will be asking for an extension

to its deadline to submit a final report. The PCR basically states that we'll try to deliver this by the first week of April. But we're aspiring to deliver this in time by ICANN73. As soon as the Council wraps, I'm assuming that it's a consent agenda item. I don't believe there will be any issues with acceptance of the PCR. But once that concludes, I'll send around links of the adoption of the motion or the outcome, at least, after the call.

What does that mean for near term? We did have a meeting scheduled next Monday for the 20th of December. But due to a conflict, the chair won't be able to lead the call. So we're suggesting that we go ahead and cancel the 20th. And in terms of homework over the break, we still have two public comment review tools to review through. I'll send this out to the list after the call. But as noted, we're basically now in a position to start on Recommendations 4 and 5. Just as a reminder that 5 is basically a replica of 4, just with a distinction for URS, practically all of the comments referred any response to URS back to their comments as it related to the UDRP under Recommendation 4.

And then finally, we just have general comments to review. The last time I reviewed it, don't necessarily have any direct connection to any of our six draft recommendations. I don't recall any new ideas in there, but we're still responsible for demonstrating that we reviewed through the comments in terms of our deliberations.

Where does that lead us into next year? We won't be having a call on January 3rd, too soon after the end of the year holiday break. We'll reconvene on January 10th, the same time, the 15th of UTC. We'll pick up where we just left off here today, trying to conclude

on Recommendation 3. As I noted at the beginning of the call, I'm hoping to have the small team on Recommendation 1 complete their homework over the holiday break. And then we'll be able to move into the substantive discussions on Recommendation 4 and review of those public comments.

CHRIS DISSPAIN: Just to interrupt you there, Berry. Actually no, we're going to reconvene on Recommendation 4. We're parking 3 for a while. I'm not saying the homework doesn't need to be done with the wording from Mary and Alexandra checking in with the IGOs, but a substantive discussion on 3, we'll come back to once we've dealt with 4.

BERRY COBB: Thank you for the clarification. That takes us into January 10th. The homework for the group is, again, please review through these last two public comment review tools. And the final thing that I'll add here is after the Council meeting on Thursday, staff will be sending out calendar invites for our remaining call schedule leading up to the hopefully approved change request into April. Even using the April date as our target to deliver a final report, I believe that's April 4, that's almost four months from now, from a calendar perspective, that sounds like a long time. But from meeting just once per week, that is not a long time. So we'll get the calendar invites sent out. But depending on our deliberations, as we move through January into early February, depending on where we're at, we may have to consider doubling up calls it as necessary and required or increasing work on list. I'm pretty

confident that we don't have a choice but to deliver the final report by April because another extension may not be well received by the Council. So that's my concluding thoughts. I'll turn it back to you, Chris.

CHRIS DISSPAIN: Thanks very much, Berry. So we've got 26 minutes left. You'll recall when we went through Recommendations 1, 2, 3, and 6, we had Berry take us through the comments. The reasoning for that is because one of the things that we had to demonstrate as a group is that we've read carefully, considered the comments, and we have taken them into account in reaching out final decision. What I think, rather than have Berry go through all of these comments, what I'm going to suggest we do is as follows. In the remaining time, Berry, if you're game, what I'd like you to do is just to give us a very brief overview of what the comments are, who's made them, and basically in very rough outline what they say. And then what I'm going to ask is that when we start our deliberations on Recommendation 4 on our next call that we all agree up front so that we can say this publicly, that our discussion has commenced as all having carefully read, considered, and thought about the comments that each of the commenters have made in respect to Recommendation 4. It saves us from going through the comments line by line as a group. But to help with the acclimatization to Recommendation 4's comments, I think, Barry, we could usefully use the time now, if you're okay with this, to just give us an overview of the comments. Is that all right with you?

BERRY COBB: Yes, sir. Starting at the top, just like any of the others, we have the recommendation language from the initial report. And predominantly, we were seeking feedback on the two options that were presented. Fortunately, practically all of the commenters did make note of a preference with certain caveats depending on the commenter. So from that perspective, it was targeted feedback that we did receive. I think at a macro level or in the aggregate, the support or non-support for the recommendation pretty much aligns with the positions that have been stated previously on the call. But as a overview, WIPO submitted their comment. And I think the biggest aspect here was recognizing their status under international law and that perhaps that the report can do a better job of emphasizing those privileges and immunities.

Moving in to the GAC. I'll note, again, these general tags where I couldn't make a general distinction as to whether it was divergent support or a new idea, I just included them all. So if you see all four of them there, I didn't try to narrow it down because I didn't feel I had enough substance to go one way or another. But the GAC did provide substantive comments. I think down, in general, though, their position is that arbitration should be the exclusive means of appeal and they did provide rationale for that particular position.

The Internet Commerce Association is against or diverges from the recommendation. They make note of the connection back to Recommendation 3 and provide rationale that I believe we've thoroughly discussed as it relates to Mutual Jurisdiction. They did take note about option two with respect to Recommendation 4, again, also noting the connection back to Recommendation 3. But

they note that from their perspective that option two does not unconscionably deprive the registrant of all recourse, and therefore, if they had to choose solely between it, it would be option two.

Moving on. The Registry Stakeholder Group, they also supported option two, basically noting that there should still be an avenue for judicial challenge. But there wasn't a whole lot of substance or rationale behind this designation towards option two. I think pretty much all of the individuals that had submitted comments had diverged against the current recommendation as proposed. And most of them either referred to the Leap of Faith or the ICA's comments that were submitted prior to that.

I believe as well as that we've just discussed from Jay from the BC but is also representing DigiMedia, noting that in isolation of the recommendation, option two would be supported. But again, that has a tight connection back to Recommendation 3.

Leap of Faith, I believe, it would be a fair characterization that there was zero support for any of Recommendation 4. There is quite substantive rationale for why it shouldn't be supported. It refers to previous cases that either occurred in courts or through other routes of litigation. It does take note about concerns with the claim about the lower cost of arbitration versus courts, and it goes on quite a bit. I think that there's also a connection back to Recommendation 3 and kind of in terms of concluding on the rationale for being against this is the reference back to the notice of objection idea that was provided for Recommendation 3 from the Leap of Faith comments.

Moving on a little bit further. Again, as you can see, substantive comments. The Telepathy points back to the ICA comments. Also, making note of option two is the least objectionable.

The OECD basically supports or endorses the comments from the GAC and the WIPO organization. Preference is that the arbitration should be the exclusive mechanism. But if not agreed as an exclusive mechanism, that it becomes the default for appeals arising out of a UDRP or URS.

The Business Constituency, again, provides the rationale here in isolation of considering this recommendation how they would support option two, but again a strong connection back to Recommendation 3.

The Registrar Stakeholder Group also had concerns with Recommendation 4. It wasn't clear whether they—I don't believe they called out either option, but their primary concern here is that the recommendation seems to lessen the ability for the registrant to seek judicial proceeding. So I guess it could be construed that they could possibly accept option two. But I think we might need to reach out for a little bit more specificity with respect to how they might support or not support this recommendation.

Getting close to the bottom here, the ALAC was in support of the recommendation, and it seems as though they call out the specific items of the recommendation, which are basically to facilitate the possibility of binding arbitral review of the UDRP. They make a statement that this could likely expedite a conclusion of any kind of an appeal after a UDRP decision. And yes, that this is the quicker avenue as opposed to courts. So they are in support of

option one for both 4 and 5. Namecheap, a registrar, I believe is closely connected to the registrant.

CHRIS DISSPAIN: It's the same as the registrar, Berry.

BERRY COBB: Finally, TurnCommerce. I believe their views diverged with Recommendation 4 and basically reasserting about the registrant's rights to recourse in courts and not through arbitration.

And finally, the IPC goes into each subsection that I believe is worthy for this group to consider. They do make the connection back to Recommendation 3. They believe that further work is required for Section ii and I think are confirming here about the 10 business days should remain in place post a UDRP decision, but that this group should take another look at this subsection for clarity perspective. And the same for Section 4, as well as 5, noting that they could support option two, subject to a couple of caveats. And so maybe this might be a possibility to start with when we reconvene next year, kind of teasing out the possibility of a "new idea" and that they finally support Section 6. So that's a very high level. I'll turn it back to you, Chris.

CHRIS DISSPAIN: Thanks, Berry. Great. So here's what I want us to do. It would be fantastic if all of us and given that we got a fairly large attendance on this call, perhaps if all could send out a note to everybody with a Recommendation 4 PCRT attached so that we get everyone to

make sure that they read it and properly considered it before we reconvene. What I'd also like to suggest is that—Berry, I agree with you. I think we should concentrate on—we start out our discussion on clarifications. If people have made constructive clarifications, we think this need might need to be tweaked. We need to look at those. So if I could ask you in our time between now and our next meeting to go through and extract those particular bits that are worth discussing as clarifications you've listed, specifically the other ones from the IPC, but there may be others. I think also, if I remember correctly, was it the Registrar one that—can you go back to the Registrar one, Berry, please? Maybe it wasn't the Registrars. Okay. So let's just leave it that we're going to discuss the—anything that you and the team can pick out from any of those comments that are for clarification, and we'll do those first when we reconvene. So that we're clear that we've dealt with those, and then we'll move on. Having dealt with those, we'll move on to discussing what will effectively be the substantive issue, which is bearing in mind everything else. All other things being equal, can we live with option two? Can we live with option one, and so on? It's pretty clear to me, let me say, and without wishing to preempt anything, it's pretty clear to me that notwithstanding that there are a number of unhappy commenters generally speaking, there is a significant leaning towards if I had to choose, I choose option two, which I suspect it may well be hard to go past. So what I'm going to suggest is for those who want to push, to lobby, to suggest that we should go with option one, it would be really useful for you to come to with explanations and reasons as to why option one is better than option two. But other than that, I think it really is just a case of that we go away, we read

this carefully, we look at the suggestions, we look at all of the comments that have been made, and come back and start discussing them the next week we meet.

Does anybody have any questions or anything you'd like to add to that somewhat rambling and to Berry's guide through what people have said? No? Okay. So, Mary, just to be clear then, it would be fantastic if before we break, we could get the extracts from these comments that are worthy of consideration as either requiring clarification or possibly being considered to be new ideas. Is that feasible?

MARY WONG: Was that for us staff, Chris, not just me?

CHRIS DISSPAIN: That was for you, staff, yes. That was for you and the team, Mary. Is that okay? All I'm asking for is an e-mail to the full list that says, "Here's PCRT for 4 for consideration prior to our next meeting." Extracted from that is also a bunch of things that we've identified as being clarification questions or things that people suggest should be clarified for you to consider. So just to take an example, there's one in there that says, "We think instead of saying 10 days, you can say 27 days." That's the sort of thing we're talking about as clarification. The second extract should be anything that is considered to possibly be a new idea. And I know that Berry referred to the IPC as being one of those areas that might have something in it that could be a "new idea". Is that okay?

MARY WONG: Yes, we got that.

CHRIS DISSPAIN: Super. Anyone got any last comments that they would like to make? Everyone clear about what the next steps are? Everyone clear what their homework is? Okay, marvelous.

Next meeting is the 10th of January. There will be activity. There will be things coming up on the list before Christmas. There will be hopefully discussion on the list. But I very much hope that everybody has a relaxing break. Whether you celebrate or you don't, please enjoy yourselves. Please relax. Please take care of yourselves and your loved ones. And let's all see each other in the new year. Thanks, everybody.

TERRI AGNEW: Thank you, everyone. Once again, the meeting has been adjourned. I will stop the recording and disconnect all remaining lines. Stay well and happy new year to the group.

[END OF TRANSCRIPTION]