ICANN Transcription

EPDP Specific Curative Rights Protections IGOs

Monday, 14 February 2022 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 14th of February 2022 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 do have listed apologies for Mary Wong.

All members and alternates will be promoted to panelists. When using chat, please change selection to everyone, allowing attendees to see the chat. Attendees will be able to view only to the chat. Alternates not replacing a member are required to rename their lines by adding three Z's at the 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 on 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. With this, I'll turn it back over to our chair, Chris Disspain. Please begin.

CHRIS DISSPAIN: Thank you, Terri. Welcome, everybody. Thanks for making the effort to be here. It is appreciated. We are making good progress. Today we're going to look at the balance of the comments in the Public Comment document and the ones that are not assigned to particular recommendations. We're going to go through those. Berry is going to take us through them and hopefully everybody's

had a chance to read them because that was the homework. And then we're going to look at Recommendation 3 where I believe we are in danger of coalescing around some words. Then we're going to move on and look at Recommendation 4 and we have a little bit of work to do there to deal with the timing of when agreements are reached as to arbitration and so on and so forth. But mostly I think the work on Recommendation 4, if we can do Recommendation 3, is going to be about just knocking it into shape so that the two recommendations make sense and hang together. That may need to be done after this call in readiness for a call next week when we can hopefully finalize everything.

So, on that note, why don't we go to Berry and start going through the comments that are not, as I said, assigned to a particular recommendation? Berry, over to you.

BERRY COBB: Thank you, Chris. As Chris just noted, this Public Comment Review Tool is an extract of those comments that weren't attributed to any one of our six original recommendations. Nonetheless, we're still required to review and consider the comments. Hopefully, most, if not all, have read through them in detail. The process that I'm going to go through is basically try to provide a quick summary statement about what the comment's intent was. And if anybody on the call wants to pause, please raise your hand and we can talk about it in more detail.

I think the good news in reviewing these is that we've kind of moved past some of the concerns or many of the concerns that are raised here based on how we're coalescing around the current

state of our recommendations moving towards the final report. One final thing I'll say is, for those of you that will work on future policy development topics, I'd encourage you to recommend to that particular group, whatever it may be, about suggesting the more targeted type of public comment versus a general open nature one. We were fortunate here that because of our six recommendations and the way that we communicated, asking or soliciting for input on those that a good portion of the comments were targeted specifically to each of the recommendations but it was still a general format. And as you'll see here, there's a fair amount of content that is more general in nature and is more challenging for this particular group or any particular group to apply the comment in terms of enhancing or changing any of the recommendations moving towards the final report. So, again, I'm not going to read anything, I'm going to highlight a very quick summary statement. And if you want me to pause, please raise your hand or speak up on the mic.

The first comment submitted by Ted Chang. Essentially, his concern here is that the recommendations were eliminating registrant's rights to due process. But I think in large, while mostly against it, and where the group is coalescing around Recommendations 4 and 5 is that right to go to court is still maintained.

Moving on to the second comment from Mike Rodenbaugh, this was submitted very early on in the proceeding. He was asking for more time. We did not adjust the timetable for the public comment. But I'll note that Mike is also a part of the IPC. And I suspect that the IPC has had substantial discussions about the draft

recommendations and likely is in the know, but he did not submit a follow-on comment with respect to the initial report.

Dan Runido was basically against all of the recommendations and really nothing specific provided here.

Michael Zachery also was against all of the recommendations. But I believe that the intent of his was pretty much the same or consistent, that there's a concern about removing the right for registrants to be able to go to court versus forcing them into arbitration.

Philip Busca was also against the overall recommendations. He did take note that he did review some of the other comments that had been submitted at that particular time, and did take note about some of the immunity concerns. And I think one of the things that we've all acknowledged here is the IGOs set up through international law, by nature, have this immunity. So it's not something that is within this working group's control to not acknowledge that.

Next comment from Aarti—I know I'm not pronouncing his name correctly—also against the recommendations. I think the comment here was more to do with the impacts of free speech and probably even more pointed towards issues with the UDRP in general. But the substance of his particular comment is that I think there's a concern about false positives or exact matches of the acronyms and the names in this group has talked about basically from Recommendation 1 about first defining what an IGO complaint it is, the aspect of moving away from any particular list that would allow an IGO through the front door seems to compensate for that.

That's not to say that a direct match of any of the IGO acronyms within a particular string of domain name can still be submitted for UDRP, but that's exactly what the UDRP is about and the three prongs of when they go through that particular case. I see Jay's hand up. Please go ahead, Jay.

JAY CHAPMAN: Thanks, Berry, everybody. I just think this a very real concern that hasn't been raised by a lot of people. But it really rang through again, just rereading it. The fact that we are basically allowing now a whole—we're working on trying to provide this avenue for IGOs to come in and come after acronym domains. Not just acronym domains but now it kind of stretches beyond that. If you know anything about UDRP jurisprudence or where things go, there doesn't appear to be restrictions, just to their specific term, their specific moniker, or the acronym. So here, where he points out just simple everyday English words, right, like unfair or unfelt or unseen, these are very valid concerns that I think need to be highlighted. I'm not sure, as I sit here, how we combat that or what we do, but I just think these are real concerns. Again, just from a free speech perspective or a fair use perspective, I know that ultimately we have the rules and things like that that say there's got to be confusion, all the all the prongs of what a UDRP complaint should be. I just want to raise the fact that I think this a very legitimate concern. It happens where you've got existing rights holders. Even today, there are attempts where that are seen. Again, they're not every day but just situations where there is overreach. I just think this an important comment to highlight, point out, and to do whatever we can to make sure that this—I

don't know. Jeff, I'm reading your comment now. Yes, yeah. Something like that. Again, I just want to highlight that it's very important and I hope we do figure out some way to kind of note that. Thanks.

CHRIS DISSPAIN: So two things. I've got a couple of things to say. I'd go to Brian in a second. But it seems to me that Jeff's statement is worth noting. I don't think it's strictly necessary because we're not attempting to extend any further protections. But that said, there's no harm putting it in. But, Brian, go ahead.

BRIAN BECKHAM: Thanks, everyone. Good morning. I'm not sure about the statement from Jeff. I understand the intent, but I think it may tie us up a little bit in a way that that would have unintended consequences. But I just wanted to say, for the record, this notion, it's really less about fair use, although I understand the context of the comment but it's really about coexistence. This in an "issue" that exists for trademark owners, for holders of dictionary domain names. The kind of classic example is apple, which we all know is a famous brand for computer stuff. You probably have a phone in your hand with some branding on it. It's also a dictionary word. So I think overall, this something where I'm not even sure there's a need to take notes. Coexistence is a concept that's well understood in trademark law, in UDRP cases. Nothing prevents someone from defending on that basis. The example of UN and words that begin with UN, of course, any person who files a claim, whether it's an IGO or a trademark owner has to meet the three

criteria of the UDRP. So first of all, the concept of confusing similarity gets at this question. And then of course, there has to be bad faith and a lack of rights deemed to be found on the part of the registrant.

Again, just to say, I think this is a concept that's been central to our discussions going back actually many, many years. Some of you will remember that. At some point in distant history, there was a GAC advice that was requesting actually a block of IGO names and acronyms. But in specific recognition of this coexistence principle, we've sort of shifted gears and landed into the working group that we're on. Sorry for the long intervention but I just wanted to say I think this something that we've discussed at good length. So probably unless there's a specific suggestion from someone, we can leave it at that in my personal view. Thank you.

CHRIS DISSPAIN: Thank you, Brian. I'll move on to the queue in a second. I just wanted to pick up on something that Brian said, just to be to be clear and for those listening who may not necessarily know the history. The original GAC advice was that the acronyms or the IGO should be reserved permanently. And the reason why the Board pushed back on that fairly strongly was because there are words in there. IDEA springs to mind as one particular example of an IGO acronym that isn't a word. So it seems to me that a lot of what is said in this particular comment would be irrelevant if we were actually reserving, which we're not. And that there is also, of course, the point about all the other rules applying. So I'm not sure that the IGO is putting in any more favorable situation than anyone else, unless you believe. And I acknowledge that some people

might believe that by allowing them to claim immunities and by saying that if that's successful, then the registrant's relief is in arbitration if they win in that. Because they win in that forum, we are in some way undermining the rights of registrants. But I just wanted to make the point about the history for those who may not necessarily know it. Jay, go ahead. And then we'll go to Paul.

JAY CHAPMAN: Thanks, Chris. I appreciate a lot of what Brian said. I just would point out confusion is, is the fact, especially in maybe certain IGOs, let's use just the UN, for example, because it was used here in the comment. But if there's a rights holder, an existing registered trademark owner, they have rights specific to specific categories, goods and services, right? And not only do they have that, they have that words listed. And everybody knows, here's what it is, here's what they do. I don't know. I mean, again, just one person, I don't know everything that the UN does, or I don't know what it is. I'm not sure how you really kind of quantify that. Again, I'm not trying to figure out how to work around things. I'm just trying to say, how do people know that their domain might potentially be subject to something like this if we don't even have an understanding of what the, again, "goods and services" are here. There's not a list, we don't have a list. We don't really know—you know what I'm saying? At least kind of what I'm looking at here, there just seems to be a lot more notice and ability to know with registered marks versus maybe something like this. Now, maybe some smaller IGOs that are very specific and narrow in terms of their focus or whatever it is they do, it's a different thing. But I just want to point that out. I just think it's an interesting

thing that, like I said, kind of wrapping my mind around it. But anyway, that's for what it is, there it is. Thanks.

CHRIS DISSPAIN: Thanks. Paul?

PAUL MCGRADY: Thanks. I'm a little afraid we've gone down the biggest rabbit hole we could find, because what we're talking about is substantive complaints about the UDRP. Because there's nothing going on here for IGOs that wouldn't go on without this work, at least substantively. Because what we've talked about in terms of IGOs, they're basically—and I know people don't like this phrase because it's British and American and Canadian and Australian—but we're talking about essentially showing common law use rights. And that's no different than any other complainant can do in a UDRP complaint. Arguably, it's harder than what we have a registration because panelists have a tougher time with it. But the IGOs aren't getting anything new, different, better here than anybody else. And so, while I appreciate this comment, and I think free speech concerns and keeping in mind the average registrant are important. There's an interesting conversation for Phase 2 of the RPMs when we take a look at the substance of UDRP. As far as the narrow thing we're doing here, I think it's a rabbit hole for us. And I think that we should respect [inaudible] Phase 2 of the RPMs. And if this particular [inaudible] to raise that issue in Phase 2, I encourage him or her to do so. Thanks.

CHRIS DISSPAIN: Thanks, Paul. David?

DAVID SATOLA: Thank you, Chris. Good morning all. This does seem to be a relitigation of stuff that we've covered over the years. But I do want to just push back and challenge a little bit Jay's reference to rights holders. I think what we've got here competing rights holders. A lot of the NGOs, IGOs that we're talking about have been around for decades and have been using their acronyms for decades. I defer to Paul and his expertise in intellectual property, and Brian and his expertise in how these things have been handled in the past. But the registrants may have some rights in their marks and the use of some acronyms, but I think that part of the discussion ignores the rights that IGOs have in their acronyms as well. That's a pretty fundamental question. I don't think that we can assume that the rights of the rights holders that Jay refers to are rock solid. I don't know that we can fix that in this group, either.

I also am looking at the comments. Well, the person who wrote them obviously has an alternative perspective. I could easily say that—I mean, I find some of the use of the language here are slightly incendiary. And if you take out rights holders and insert IGO, the same arguments could be made. These are important things. Is it not a denial of the mandate of the IGOs if they're denied use of their domains? How is that free speech or common sense? I don't know that we need to entertain this. And as the person says, this is a very English language kind of perspective. United Nations in French is not Les Nations Unies. The acronym might be really sought to be protected. With those who think that

this is not a distraction, but not helpful in our discussions right now.

I'm not aware also either that of any documented or historical abuse of IGOs in respect to the acronyms that they use. I mean, there seem to be a suggestion that IGOs are going around willy-nilly picking fights with private sector entities, and I'm just not aware that that's the case. Thank you.

CHRIS DISSPAIN: Thanks, David. I'll come to you in a second, Jeff. I think Paul is right in his suggestion that we might be some way down a rabbit hole. It seems to me that we're talking about a very small bunch of acronyms. It is much harder. I would suggest to become an IGO than it is to register a trademark. There is an existing list of acronyms, I know it's not ... that we now have a definition. And that means that that list might be slightly expanded. I'm not talking about being retrospective here. So I just think we need to be a little careful that we don't get stuck deep down into this. Jeff, I'll take your comment and I'm hoping that we can move on. Jeff, go ahead.

JEFF NEUMAN: Thanks. You're right. This is a rabbit hole. Chris, people's memories of histories is definitely shaped by what they were doing and where they were. But I don't think there's any harm with putting in normally what lawyers always put into things like amendments. Accept as specifically set forth herein. Nothing is intended to change any other part of the UDRP, and then leave it

at that. I don't think there's any harm in that. There's no unintended consequences of that. I just think if that helps people then let's just put it in and then we can move on.

CHRIS DISSPAIN: Thank you. I'm going to leave that in abeyance for now. I know that Brian has expressed a possible concern about it. Let's not spend time talking about it now. Let's put it on the list of things that we need to circle back to and talk about. And if you want to discuss it at some length on the list, that would be very much appreciated, because that would mean that we're not soaking up a huge amount of face-to-face time discussing the pros and cons of that particular suggestion. David, go ahead.

DAVID SATOLA: I'm going to lower my hand, Chris, because I think you've just deferred further discussion on it. Thank you. I do have something to say at the time, though. Thank you.

CHRIS DISSPAIN: Of course. Otherwise, you wouldn't have put your hand up. Go ahead, Berry. Back to you.

BERRY COBB: Thank you, Chris. Rabbit holes aside, I do appreciate the dialogue here. And that's exactly what this is intended to do. I think it just reinforces why this is a required step within our policy development process. The next comments submitted by WIPO,

and of course, we have Brian on the call here, that if he wants to expand on anything. But in essence, this was a summary of their submission before getting into some of the targeted feedback with respect to the recommendations, and in essence, just reiterating that this has been a long standing problem for the IGOs, recognizing how IGOs are formed under international law. Basically, I don't think that there was anything specific here for the working group to address but just reinforcing the rationale on why this has been a long-standing problem.

Moving on to the Council of Europe, they endorsed the WIPO's comments submissions, as well as the ICAO, the International Civil Aviation Organization.

Then we're moving into the comment from the GAC. Just like the WIPOs was a reinstatement of the rationale around this long-standing issue, I will just note that the substance of the GAC's comment was really more focused on Recommendation 4 that we're working through now. But at any rate here, they're just making reference back to the Professor Swaine memo, which was to tee up their specific input across the core recommendations with respect to arbitration.

The next comment was from the Internet Commerce Association. They basically, I think, in general, were against the recommendations. Mostly, I believe, by reviewing through this that—again, their concern was about affecting the rights and ability for the registrants to file judicial proceedings. Secondarily, I believe that there was a comment or suggestion here about the scope or the charter here, which I believe we're addressing through the recommendations that we're advancing towards now.

Next comment from Alex Lerman, was also against the report. Just like the ICA concerns about registrant's rights to judicial review, that we're acknowledging within the current version of Rec 4 or 5.

The RySG noted the challenge of this long-standing issue, and they did suggest that if necessary about gathering input from the RPM Working Group. But as you know, we've noted, the Phase 1 team has been concluded and the Phase 2 team won't be spinning up for a while, which is part of the reasons why this is now an EPDP.

Moving on to Digimedia, basically, they supported the comments by the Internet Commerce Association and made a note that there's concern about these recommendations being considered as a package versus being independent and specifically concerned about the mutual jurisdiction requirement.

The next three or four, I believe, are from Leap of Faith Financial Services. This first one is a lengthy rationale about why he was against the proposed recommendations at the time, provides some history in terms of making note to the Universal Declaration of Human Rights issues about cyber squatters. It does recognize that that is a standing issue in the domain name space. But at the same time, that there needs to be balance of rights judicial review for registered name holders. Again, this was a lengthy comment by Leap of Faith, but he also made specific comments specific to each of the recommendations, which we have reviewed in prior meetings.

The second part of this comment from Leap of Faith, he did an analysis basically on the group's deliberations and has concerns about more broad participation on the working group. I think he went through the transcripts and went through the e-mail list and was attempting to quantify the quantity of contributions by the parties that are represented here on the group.

CHRIS DISSPAIN: I'm very disappointed. I was going for 50%.

BERRY COBB: Try harder. As I noted, this is the mailing list participation analysis. This particular part of this comment was concerned about the scope that was defined in the group's charter, as well as making note of the previous working groups, one through four recommendations that were already adopted by the GNSO Council. And I think we still have an action here for this group about how this group might communicate any discovery that has occurred back to the Council to help inform about what this potential set of recommendations may include.

This one, I want to make note that the Leap of Faith is specifically pointing out a section of our report, which is labeled the Policy Change Impact Analysis. It's on page 17 of our initial report. This is a required section that will be included in our final report. We're not going to discuss the details of this today, but it will be something that this group will need to consider as part of preparing the final report. And the idea of it is the original intent of the impact analysis is to try to provide a forward looking view

about how the recommendations may change or impact the nature of the marketplace or whatever the particular policy topic is. And that's often difficult to peer into the future or to forecast specifically what the outcomes may or may not do. But the secondary aspect of the Policy Change Impact Analysis is at least to suggest what are some possible data points that can be used to measure the effectiveness of the policy recommendations to be analyzed down the road. In line with the prior comment about the use of acronyms and the use of UN specifically within English dictionary words, I think that this group should help to formalize or to enhance and improve the draft list of metrics that we have in the Policy Change Impact Analysis. It doesn't need to be a definitive list. But I think it is important for this group to try to list out possible metrics or data sets that we can suggest for the IRT and for Org to implement in a way so that when this policy change is reviewed down the road, there is some set of data by which we can reference to understand if the implementation of the recommendations met the intent or any adverse types of aspects. This really falls into the larger nature, which I believe is part of the bylaws, which is to make—I can't remember the exact wording—but it's about informed policy development. So I think that this will be a very important section that this group should review and refine, and we'll make sure it's part of the agenda.

CHRIS DISSPAIN: Berry, it's Chris, two things. One, can you make sure that you refer us back to this particular comment when we deal with that section?

BERRY COBB: Yes, sir.

CHRIS DISSPAIN: And secondly, I completely take everything you've said and I agree, however, I just want to counsel us to be cautious about metrics. We need to be very careful that we don't put forward a bunch of metrics that have anything to do with results but a much more to do with process. It would be one man's road decision is another man's perfectly fine decision. So I think we need to be very careful that we can find ourselves trying to metric results, but rather we're putting metrics. What about processes where people excluded, does everyone know what's going on and so on and so forth. I'm not trying to say we shouldn't do things. I'm just making sure we end up in the right place. Does that make sense?

BERRY COBB: Right. I would tend to agree, it's not necessarily metrics about the decisions of any proceedings, at the very least, more quantifying. Well, how many complaints were submitted, how many went to arbitration, those kinds of aspects.

CHRIS DISSPAIN: Thanks, Berry. I agree. Listen, we're 40 minutes in, so we probably need to speed this up a bit.

BERRY COBB: The last part was just a basically a summary that Leap of Faith had provided. Kevin Garvin submitted here that he was also

against the recommendations and also noting concerns about removal of registrant's rights for access to file judicial proceedings.

Joseph Slabaugh was in support of Leap of Faith's comments and I believe referred to a blog from the prior final report.

Pierce Dawson was also against the recommendations in general.

The same for Michael Kervevan as well as Castle Holdings, referring—I'm sorry. Michael's suggestion here was that the report should be translated into the six UN languages. That is a task that staff will take on as we conclude on the final report. In that way, it will be posted. And assuming that the Council does adopt the recommendations, there is a public comment proceeding for the Board's consideration and will make reference back to the fully translated reports.

Castle Holdings was in support of Leap of Faith's comments.

Paul Cotton also was against the recommendations and pointed to Leap of Faith as well as the Internet Commerce Association.

Telepathy also was against the recommendations. Like many others, were concerned about the issues of mutual jurisdiction as well as the arbitration component and removing rights to judicial review.

The Business Constituency, this was part of a summary for their comments that also included targeted comments to some of the recommendations. But they're summarizing here about how this has been a long-standing issue and touches on aspects of the UDRP. And I'll note that we've had some pretty significant

discussions with the BC here in our deliberations. So I believe we've covered most of the concerns raised here.

Moving down to the Registrars. They had various issues. A few of them were targeted to the recommendations. But in general, they had issue with possible scope concerns and issues with the broad participation of the group. I'll note that we have reached out to the Registrars directly to acknowledge and attempt to address some of the concerns. And as a result of that, I believe we also now have one of the Registrar representatives observing our deliberations now and as we conclude towards a final report.

We have the World Bank. They were in support of the WIPO comments.

The ALAC has also been on record here in support of—I believe it was originally option one of the 4 and 5 Recommendations, that have signaled that they're in support of what the IGOs will support here, but do acknowledge that this a long-standing issue that needs to be resolved.

Namecheap. This is a registrar. They also were against the package of recommendations, but I'll note that we did review their submissions that were more targeted to each of the specific recommendations. And based on our deliberations we've had the last several weeks, we specifically zoned in about the issues with mutual jurisdiction and still preserving registrant's rights for judicial proceedings.

We're almost done. TurnCommerce was also against the recommendations in the initial report. They did take note of the

prior working group's recommendations and noting that they do have access to the UDRP today. But at the same time, I think we've also discussed several times about the unique privileges and immunities based on how IGOs are organized and recognized by the UN and governments. I see Jay's hand up. Please go ahead, Jay.

JAY CHAPMAN: Thanks again, Berry. Sorry if I'm getting ahead. I just wanted to note something here on TurnCommerce's comment that caught my attention as well and that is—I'm not sure which page this is. Page 36. We specifically have IGOs involved in this particular EPDP and obviously that is very much appreciated. At the same time, we don't really actually registrants involved and 50% of the parties involved in these things that they're not here, that would have been a great asset and help as well. We are what we are. I just think this a valid comment to note that registrants weren't really specifically included like IGOs were. I mean, obviously, I'm representing the BC in this context. But anyway, I just think it's a good point and also something that needs to be kept in mind, especially as we move forward with the new upcoming or soon to be coming RPM Working Group part two. Thanks.

BERRY COBB: Thank you, Jay. Susan, please go ahead.

SUSAN ANTHONY: I am puzzled by Jay's comment because there are several representatives here that have been in this process throughout

2021, who represent registrants and have done yeoman's work to ensure that registrants are adequately represented. So I'll admit to being somewhat confused.

CHRIS DISSPAIN: Thank you, Susan. I'm loathed to get involved in a dingdong, but I'm happy to give Jay an opportunity to say something if he wants to. You don't have to, Jay. Go ahead.

JAY CHAPMAN: That's okay. Thanks, Chris. Susan, I understand. I understand what you're saying. Satisfied to say I just think there should be—I don't know. I think there were specific—not requests. I'm not sure what the right word is here. But we tried to get IGOs specifically involved. The previous working group that this one has come from tried repeatedly to get IGOs directly involved in the group. That's what's happened here, and we do have that. Again, it's much appreciated. But I just think this a valid comment and I'll just leave it at that. Again, with complete respect for what Susan is saying, I understand. Thanks.

CHRIS DISSPAIN: Okay. That's fine. I think we can all take different views on comments. It's not in my view a substantive comment. You could argue that various different members of this working group represent registrants in various different guises. So point taken by both sides—I want a better way of putting it—of that discussion. Berry, let's wrap this up.

BERRY COBB: Thank you, Chris. The next comment, Domain Registrant Rights Organization. Also, we're generally against the recommendations. And talked about the balance between protecting the rights of registrants and issues around domain name hijacking attempts, I believe, from the larger aspects of what the UDRP is in that context.

UNESCO submitted their comment. In essence, they're supporting the submission from WIPO. I believe this was an error on my part of a copy and paste part from the WIPO comment. And we're done.

CHRIS DISSPAIN: Thank you very much, Berry. Let's move on to Recommendation 3. We sent out some text. It may be that we have actually got something that people can agree to. There is the text. It's been on the list for a while. Brian, I know you posted a note to the list to say at least as a sort of initial comment, you can probably live with it. I think you might have said slightly more than that. Let's see if anyone has anything they'd like to say about this other than—no need to say, "Yes, I'm fine with it," if you're fine with it. You're welcome to say that but we'll assume that. But if anybody has a problem with any of it, now would be a really good time to raise it.

It seems to me we covered all the bases. Let me be clear, however. Work is still required not so much on this but to make sure when we coalesce around Recommendation 4, the two recommendations slip properly together, make sense, there are

no conflicts between the two and read as a whole, are clear, easy to understand, and people know what it is that they're supposed to do. Berry, go ahead.

BERRY COBB: Thank you, Chris. I just wanted to add the substance of this recommendation. It did come from our last week's call. I think one of the things that I had picked up on was how there was some discussion about moving away from a recommendation but we still needed to explain what is actually happening. This was a way to bridge both of those. We still needed a tangible recommendation to show a change, and that's how it became or evolved into this additional content of a notification when the registered name holder is alerted that there is a dispute that was filed. So really, I just wanted to add that we needed something tangible as a recommendation even though it varies greatly from our prior version.

CHRIS DISSPAIN: Thanks, Berry. Okay. Now, Brian, you're next. Let's try really hard not to talk ourselves out of agreeing to this. Brian, go ahead.

BRIAN BECKHAM: Thanks, Chris. Hopefully I won't take us down that path. We just had a little bit of a conversation amongst the IGOs, and just wondered if it would be useful to add under B a new sub 3, that I don't have text. We could come up with something if people agreed. But just to note that there was the possibility—and I believe there was intended to be some sort of explanatory text in

somewhere—that the parties could if they so desired go straight to arbitration. So just a thought if—

CHRIS DISSPAIN: I'm sorry if that's not clear, it certainly should be. Whether that needs to go in there or not, let's not worry about for now.

BRIAN BECKHAM: Okay.

CHRIS DISSPAIN: But I agree, there should be a note somewhere that makes it abundantly clear that it's entirely possible for the parties to go straight to arbitration. Absolutely. I agree. That cannot be in any way controversial, I don't think. So it seems to me we just need to make sure that that is in there somewhere. Really good point. Thank you for bringing it up. It's really important that it's clear. Okay.

Berry, let's go to 4. Jay, if you could get ready to make the point that you want to deal with in respect to notification of agreement to go to arbitrational, whatever you want to call it, that would be very helpful. Jay, go ahead.

JAY CHAPMAN: Okay. Thanks, Chris. After having the discussion that we had last week, there was a large concern that IGO shouldn't have to agree. We shouldn't have anything specific about agreeing to things just because the rules say what the rules say, and the registrant can

go to court. I think the same kind of thinking applies here to 4(ii) where we have the language that says that the provider request the registrant indicate whether it agrees, and I don't think that that's necessary. My concern last week was I kind of don't like the idea of the registrant agreeing before it even goes to court, saying it could go on to arbitration. One reason being maybe that that would be used against them in court or maybe even the court itself might take that and just punt because it feels like it would just be easier for the court. So, Chris brought up the idea, though, that we don't want to allow registrants to just be able to run around from court to court to court, or for one jurisdiction to another to try and get relief.

Again, I think what the focus should be here in (ii) is just to take out the part that the registrant has to affirmatively agree to anything. The rules will be what the rules are. They're ICANN's rules. They're part of—I guess subject to a registration agreement. And if the registrant decides to go to court, we've got the procedural rules for freezing the domain name, and then if that gets kicked out, if the court decides not to hear it on the merits, then there's the opportunity. I mean, the rules are what the rules are, and the registrant doesn't have to agree. We can't control what a registrant does anyway. So the only thing that the rules will apply to is whether or not the domain is frozen or if it transfers.

CHRIS DISSPAIN: Just to be clear then, Jay, this 4(ii) does say it comes in after the decision has been made.

JAY CHAPMAN: Yes.

CHRIS DISSPAIN: So the UDRP panel says you lose. It's at that point that currently that you would say that under these rules, you would indicate that you are prepared to agree to a final review in binding arbitration. Obviously, submit to the court. What you're saying is that shouldn't be necessary. I shouldn't have to agree to that. I can go off to court, I can do my thing, if I win, I win. That's obviously clearly you win. If there's no hearing of the substantive issue, then it comes. But then what happens? Is it simply—and I'm just trying to find a way through this—the court says, "We're not going to hear it because of the immunities, whatever." And then there is very simply a thing that says, "Unless you agree to go to arbitration within 10 days, 5 days, 20 days, whatever it might be, then that's an end to the matter." Is that, in essence, what you're saying the rules would say?

JAY CHAPMAN: Well, something along those lines, yeah. The rules make the determination, not what—yeah.

CHRIS DISSPAIN: Okay, I get it. I get it. I'm not uncomfortable with it, as such. Go ahead, Jay.

JAY CHAPMAN: Sorry. I didn't mean to interrupt, Chris.

CHRIS DISSPAIN: No, no. You carry on.

JAY CHAPMAN: For example, let's get away from the idea of a decision not being made on the merits. Let's assume that you've got a registrant in Wisconsin, then the registrar is in Virginia, and they decide they're going to file in North Dakota. It doesn't make any difference, right? That's not one of the two jurisdictions for being able to freeze the domain name.

CHRIS DISSPAIN: Yes, got it. Paul, I can see your note. Do you want to speak to it briefly?

PAUL MCGRADY: Sure. Thanks. I think Jay is right on this one because the rules really are the rules. And either the losing registrant does something or they don't, right? So adding in this other thing that they'd have to do when they may have been a default situation anyway, it just adds confusion. Then what does the provider do? What does the registrar do if they don't indicate? It's extra and it doesn't really accomplish anything, because if a registrant loses, then all the balls are in their court. They can either do nothing and the decision will be implemented or they can file in a court or they can do arbitration, whatever. But I don't think we need to build on this extra step. Then PS, the extra step which we can build I think presupposes a challenge, and I don't think that's necessarily the

case. So if you build in this, we need to tweak the language, or better just [inaudible]. Thanks.

CHRIS DISSPAIN: I take point. Accepting and acknowledging that everybody will need to look at amended wording before we can reach any sort of understanding or agreement on that. Let's see if anyone else has anything they want to say. Brian, go ahead.

BRIAN BECKHAM: Hi, everyone. I'm just sort of going on the fly a little bit. I'm wondering, Paul and, Jay, in terms of what you say, I think I understand and that seems to make sense. I'm trying to whiz through the language real quick on screen here but also speaking makes that difficult. But I think the one thing is, of course, if the registrant would wish to go to arbitration at some point, they can do that. But just to make sure that there's some sort of a time limitation around once the court process, if that's a dead end for the parties, then there's some sort of I know normally there's the 10-day to file the court case, and maybe the same deadline could apply here. And then, of course, if the parties did wish to go to arbitration, then it could be useful to somehow capture that they would have agreed. So I understand the point here is maybe it's not necessary to agree at the outset but to capture that if the court option doesn't work out for the parties, there should be a time limit to trigger arbitration, and then the parties would of course agree to that and to codify that.

CHRIS DISSPAIN: Thanks, Brian. I think that's absolutely right. There's going to have to be something that says you trigger. If within next days you haven't triggered, then it's all over and done with. If you've triggered, you triggered. I've got Jay, and then David, and then Paul. Jay, go ahead.

JAY CHAPMAN: I just want to say I think what Brian says, that makes perfect sense. There's got to be procedures, right, for how it works, of course. Yes. Thanks.

CHRIS DISSPAIN: Thanks, Jay. Excellent. David?

DAVID SATOLA: Thanks, Chris. I just wanted to understand. I'm struggling a bit with this. So it's not a question of having an agreement to go to arbitration because that's what this recommendation I think is all about. Because we have in small four (iv) that the parties agreed to the arbitration, I think it's generally accepted that there has to be an arbitral agreement or an agreement to go to arbitration before arbitration could ever cease the case. So as long as there's no dispute about that then—I'm not against taking it up but I'm not understanding what the problem is here, because this whole thing is about the agreement of the parties to go to arbitration. Maybe if Jay and Paul could clarify, that would help. Thanks. Over.

CHRIS DISSPAIN: Thanks, David. I'm sure that they'd be happy to. I think, if I understand it correctly, what we're talking about is merely timing and agreeing up front. If a registrant wants to go to take their chances in court, leaving aside all of the stuff that's gone along with it, what that might mean, the registrant wants to take the chances to go to court as long as they know what the rules are. And the rules are if you don't make it through the court proceeding because the IGO wins its claim that it's not subject, then within a certain period of time, if you want to trigger arbitration, you can trigger arbitration. If you don't, then the domain they will pass to the IGO. That's fine.

What I think Jay is talking about is there shouldn't be a requirement to agree early on, that it should just follow naturally by the rules. And it isn't necessary for the IGO to put in an extra step that requires a registrant to do anything other than simply follow the processes. I hope I've put that reasonably sensibly. But, Jay/Paul, if you want to pick me up on it or talk to it and be more clear than me, that'll be great. I think Paul's put a thing in the chat that's helpful.

PAUL MCGRADY: To a certain extent, I'm just reading what I put in chat. If Brian and Jay think something's missing, let's explore it. It's going to be procedural only and have to do with timing. But I think the UDRP already does this because I can't imagine that there's not been a registrant out there that's filed a complaint in their jurisdiction or the registrar's jurisdiction, and that complaint was dismissed for this or that reason, and then the registrar knew what to do. Because if there's no court case, there's no arbitration case

pending, then the registrar has to implement within a certain number of days, right? That's already baked in. But if we want to say it differently or better, great, let's explore it, but I don't know if it's necessary. Thanks.

CHRIS DISSPAIN: Okay. Brian then Berry.

BRIAN BECKHAM: Yeah, sorry. I'll be very brief. I think Roman numeral five (v) there accomplishes the gist of David's comments, with which I agree. I think we're really talking about process here. I just wanted to raise one on small practical footnote, and it's not necessary to discuss but just to have mentioned it. I'm thinking from the UDRP provider perspective, and of course we've been clear that as WIPO, probably wouldn't be appropriate for us to act as a dispute resolution service provider for these IGO complaints, given our status as an IGO. I think that may have been lost over the conversations, but we've expressed some hesitation about that potential role from the beginning. So I'm just thinking, practically that might be something—and this could be for an implementation team or somebody else to look at, even ICANN and the dispute resolution service provider—but somehow to capture if there's a case and it goes towards the courts, that could take some time, just to have a little bit of clarity over what's the status of the case, what should the provider do, what should the registrar do, what should the parties be doing? Somehow to take a peek in on that and provide a little bit of clarity for everybody involved.

CHRIS DISSPAIN: Thanks, Brian. Good point. Berry?

BERRY COBB: Thank you, Chris. I almost put my hand down because I think what Brian brings up is important, and I guess I'm coming from a point of ignorance. But in today's world, a decision is found in favor of the complainant, the respondent or registered name holder has 10 days to go file a case in whatever court they wish to. The registrar is also notified that the domain should continue to be locked until the court case has concluded. Assuming that the case has concluded and the registrar needs to take action based on that outcome, how much is the dispute provider kept in the loop of that action? Does it actually go from either the registrant or the complainant, provide the evidence that this concluded back to WIPO, and then the registrar is notified to do what they need to do with the domain? Or is the dispute provider out of the loop and it's really up to the parties to go to the registrar?

I'm asking that because we're talking about procedures here that we're still following somewhat of the same process. But as Brian noted, there's going to be a long duration for some sort of court proceeding. Then assuming that an IGO prevails in declaring its immunity then it sounds like the process has to go back to notify the dispute provider what's going on, and then it moves over to another provider that's doing the arbitration.

CHRIS DISSPAIN: Let's see what Brian has to say. Jeff has posted in the chat. Let's see.

BRIAN BECKHAM: Thanks, Berry. All good questions. And maybe it's something that you and I, and if others are interested, could kind of chat offline. But strictly speaking, as Jeff has said, then once the decision is rendered, the provider's role ends. What we tend to see in practice—and this is not something that happens frequently, I should say—but what we sometimes see is the registrant would inform the registrar that they've initiated a court proceeding and they would copy us as the provider. I think just more as a kind of a habit of reply all, sometimes they wouldn't. Sometimes, they would send it to us as the provider, not aware that they should actually be sending to the registrar. So we, of course, would forward it on to the registrar. So strictly speaking, the provider's role ends, but sometimes they are involved and it's not that they should be but because the parties are kind of this uncharted territory so they would send it to the provider. So the overall thing I think we all probably agree on is there should be some clarity about whose role is active when and when that ends, and so on and so forth.

CHRIS DISSPAIN: Thanks, Brian. That makes absolute sense to me. What I'm going to suggest we do on this particular—I was going to suggest a way forward anyway. So I think that fits what I was going to say, which is that, Berry, I think what we need to do for next week is to do a really simple step-by-step chart that says step one, step two. No detail, no fancy stuff with footnotes about, and then the notice has

to be sent, sending times to various—just a simple, straightforward, step-by-step process chart that we can then look at and do a gap analysis on, and figure out whether we have all of the information that we need. So 10 days for this, 5 days for that, etc. It would be iterative. You won't be right first time around, I suspect. But have I said enough, Berry, to give you a clue as to what you need to do next?

BERRY COBB: Yes, sir.

CHRIS DISSPAIN: Okay. And I also want to come back and talk about the arbitral rules in a second. But in the meantime, Jeff, go ahead.

JEFF NEUMAN: Thanks. Can I just urge a little bit of caution when it comes to solving issues that are also present in the regular UDRP? So it's not that more clarity, is it useful? It's just that if there's going to be anything that impacts a normal UDRP, we should probably have it in the broader context. I just get nervous any time we're kind of going over the line and specifically addressing only—what? I'll just—

CHRIS DISSPAIN: No, I completely get it. I agree with you. If I was unclear, I'm not talking about setting up additional steps, I'm talking about mapping our proposed way forward for an IGO complaint to the

existing steps and making sure that all the timings arrive, that it all fits into the existing, and copying as much as possible. And if there are new steps that are specific only to this, then obviously we need to decide what those are. But they need to be as compatible with the existing process as humanly possible. But that's what I'm trying to get to. Thanks for your note in the chat, Brian. I agree.

So if we can do that, Berry, if you can get that out again acknowledging—no one should take the first version of this chart as being in any way set in stone. It's an iterative process, just to be clear, so that we don't end up tying ourselves up in knots with misunderstandings. It's an iterative process that we need to work on to get right is the first thing.

The second thing is to update everybody about the arbitral rules. The small group met last week to discuss that, to discuss a high level overview of the sorts of arbitral we might look at. We're still working on that. And we will get back to this group as soon as we can. With that, I just want everybody to know about that.

Then thirdly, I think, Berry, what we need to do is we now need to take 3 and 4 in the reconstituted way that we've just talked about, and take out this stuff in 4(ii) that Jay's mentioned, and put those together to run as one read so that we can all look at it and say it doesn't make sense. That combination with the flowchart or the process chart, whatever you want to call it, it doesn't have to be fancy. It can even just be a series of steps written down in the Word document. That in combination with that will I think help us to work out whether we have actually reached something that

we're comfortable with and/or give us a clear understanding of stuff that we're not comfortable with. Jay, go ahead.

JAY CHAPMAN: Thanks, Chris. Really kind of just a fish jumped in the boat of the mind to ask a quick question here, which is we talk a lot here about the parties agreeing to arbitration. Do we have a situation where—and we know what happens, right, if the registrant doesn't? Do we have processes for where—and I'm not sure why they wouldn't. But I mean, if they didn't agree, because we put this in here where they do. Do we codify for where an IGO might not? Just a question. Thanks.

CHRIS DISSPAIN: You raise a very good point. In the circumstance where—as you say, it's extremely unlikely perhaps, but Brian and others, if you could think about this, if an IGO doesn't agree to arbitration at the beginning and goes to court and argues that they're not subject to the jurisdiction, what happens then?

BRIAN BECKHAM: I can respond quickly. I think we've gone down this road a little bit in the past, which was that the kind of presumption was that the IGO would agree from the outset. I think there's language to that effect somewhere. I'm sorry. I don't have a reference.

CHRIS DISSPAIN: Yeah, there is. It's in 4(i), but there's no requirement to agree.

BRIAN BECKHAM: Thank you, Berry. I guess maybe I could propose something or we could do something on the list. But the intent when it says when submitting its complaint, an IGO complainant shall indicate that it agrees was meant to capture that. So it could be something that is a matter of capturing in the rule, in the working documents from the provider somewhere. But if that doesn't quite hit the nail on the head, then I think we can easily accomplish that.

CHRIS DISSPAIN: Okay, super. Well, perhaps you could think about what if anything needs to be done to deal with that.

Okay. I think we've got a fair whack at stuff to take away and get sorted out before our next call. Berry, is there anything that we haven't covered that you want to cover? And what's Mary Wong suddenly doing here? How come you just arrived at the last minute to rescue a soul from a fate worse than death, Mary?

MARY WONG: Oh, dear. I think you're getting on quite swimmingly without me.

CHRIS DISSPAIN: Exactly, exactly. You turned up and put something in the chat now.

MARY WONG: So apparently, I've ruined it now. Sorry.

CHRIS DISSPAIN: Welcome. Sorry, Berry, back to you.

BERRY COBB: Just to note that next week, we're meeting on Tuesday, February 22, not our normal 21st as the ICANN offices are closed on that date, but it's the exact same time. As Chris noted, we have several action items, an update to Recommendation 3, an update to Recommendation 4, 5 section ii and i now. I'll be updating the 4, 5 and other comment PCRTs to get those concluded. And Steve will be working on a super fancy flowchart.

CHRIS DISSPAIN: Please don't do that. Please don't do that.

BERRY COBB: Flowchart and steps of source to the first draft to reconcile the recommendations and what we're talking about here.

CHRIS DISSPAIN: Thanks, Berry. There's no small group meeting straight after this, is there?

BERRY COBB: Negative. We didn't schedule one yet.

CHRIS DISSPAIN: I didn't think so. I didn't think so. I just wanted to check. Thank you. Okay. Anything else from anyone else before we all go and do the work that needs to be done? There isn't a small group meeting today, Brian. No criticism of anybody intended here. We're waiting for some work on some suggested ways forward for the guidance, and then we'll reconvene. So we'll do that. It doesn't necessarily have to be a Monday. We can reconvene later in the week if we can find time. Okay. Brian, your hand is up.

BRIAN BECKHAM: Yeah. Sorry. I don't want to keep us, but just in case, I'll try to go through my e-mails. I think it may have been something for Jeff. I know there was a little bit of exchange in the small group. I just wanted to raise my hand to say I had blocked out the time and I'll keep an eye out for any e-mails. I just wanted to raise my hand to try to help to move that small group along.

CHRIS DISSPAIN: Sure. That's super. We didn't fix the time for another meeting because we decided to wait, as I said. Because you weren't with us last week, were you? That's right. You weren't. That explains it. Anyway, we'll deal with it. And thank you very much for being ready to help. Anyone else? All right, super. Thank you very much indeed, everybody. Meeting closed. Talk to you all again soon.

TERRI AGNEW: Thank you, everyone. I will stop the recording and disconnect all remaining lines. Happy Valentine's Day to those celebrating. Meeting has been adjourned. Thanks all.

[END OF TRANSCRIPTION]