ICANN Transcription

EPDP Specific Curative Rights Protections IGOs

Tuesday, 07 September 2021 at 14:30 UTC

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TERRI AGNEW: Good morning, good afternoon, and good evening. Welcome to the ePDP Specific Curative Rights Protections IGOs team call taking place on Tuesday the 7th of September 2021 at 14:30 UTC. In the interest of time, there will 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 call.

All members and alternates will be promoted to panelists. When using chat, please select "everyone" in order for everyone to see your chat. Attendees will be able to view chat only. Alternates not replacing a member are required to rename their lines by adding the Z's to the beginning of your name and, at the end in parentheses, the word "alternate," which means you are

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 functionalities, 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 update 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 multi-stakeholder process are to comply to the expected standards of behavior. With this, I’ll turn it back over to our chair, Chris Disspain. Please begin.

CHRIS DISSPAIN: Thank you very much indeed, Terri. If you could bring the attendees into the room, that would be great. Welcome, everybody. Hello. Thank you for making the call today. Not our usual day, but important to have the call. I hope all of you in the U.S. had an exciting holiday yesterday. Our goal for today is to agree the text, sign off on text that was included in the document that Mary sent out, which is up on the screen. It’s called “Draft Preliminary Recommendations IGO ePDP, 1st of September 2021.”

If we can do that, then what that means is that the staff can then work on the surrounding wrap-around bits and we can finalize those on the list and on our call next week, necessary so that we can get this report out. It's important to remember that this is an initial report. It's not a final report, not our final recommendations, and it is key—as I'm sure you'll appreciate—that we get, as soon as we can, now, public comment on what it is that we are possibly saying.

So, we're going to look at ... Recommendation 1 is effectively done but we're going to start on Recommendation 2 and move down the page. But before we do that, I'm going to ask Mary if she would please give us an overview of what she has done, what she and the rest of the team did with the document, so that everybody can understand the basis upon which it was changed, and then we can get back to looking at the words. So, Mary, over to you, please.

MARY WONG: Sure thing, Chris. Hi, everybody. Berry, if you wouldn't mind scrolling just a bit further up to Recommendation 2? As Chris says, we'll go through this, but I did want to let everyone know, and it's probably pretty self-explanatory if you've seen this, that what we've done is taken the discussions to date, including last week's call, and created what is essentially a clean—or as clean as possible—set of recommendations. You'll see that we've put in comments on the side to indicate what those updates are, when they were discussed, and, in certain cases, who proposed them.

Because, for example, there was an action item for Jeff Neuman to suggest language in specific respects at the last week's call. So, without going through all of them, I did want to let you know that

those are the comments that you see in balloons. There are some textual changes that I don't think we need to go through on the call today, but if you have concerns about that, obviously, you can raise them via e-mail or even at a time today.

And these textual changes probably relate to the renumbering and also to the note that you see here on the bottom of the page, where certain language options have been offered. But the two things that I thought were most important to draw everyone's attention to is that, for Recommendation 2, the flow remains the same in that the rest will follow from Recommendation 2.

And you see here the three bullet points. We did have an action item on the staff side to try to call out the options as much as possible without overshadowing the need to comment on the recommendations as a whole. So, that's what we've done with the bullet points. And the most important change, which is structure and format, not substance, is that we've broken out, as you can see, the process and the recommendations for the UDRP after the initial decision and the process for the URS after the initial panel determination.

So, where we had it all as Recommendation 2c and it started getting very convoluted, you have Recommendation 3a and 3b for the UDRP and you see the equivalent, with some changes due to the nature of the URS, in Recommendation 4. And with the result that the final recommendation, that also has options about applicable law, should there be arbitration in either case, is now a new recommendation, five.

So like I said, that's a structural and format change after discussion with Chris and the rest of the leadership team. We think it does make it clearer but it is worth reading through all of them because, as I mentioned, also, there are some changes that pertain only to the UDRP but not the URS due to the differences. Chris, I hope that's what you had in mind. I'll hand it back to you.

CHRIS DISSPAIN: Thanks, Mary. Okay. So, we're going to start at Recommendation 2, if we could get that up on the screen please, Berry. I've got my own copy here which I'm going to be using but [it needs to be] up on the screen, as well. And Recommendation 2, we have already looked at some of this but I think it's worthwhile going back and starting again because that will be clear because things have changed in it.

So, Recommendation 2. It says, "if the GNSO Council approves the recommendation set out below in recommendations three, four, and five, then the ePDP team recommends that the original Recommendation 5 be rejected." So, that is the same as previously accepted, with the change, of course, with the new recommendation numbers. Then, there is the italics note: "The team continues to deliberate on the text and final concept for these recommendations. While the team is in general agreement that arbitration is an appropriate solution, it has not yet reached agreement on two specific aspects relevant to such an option."

One, whether the option to arbitrate will remain available to a registrant following the outcome of a court proceeding initiated by the registrant where the court declined to exercise jurisdiction in the

matter. And two, what should be the applicable choice of law for any arbitration that the parties may agree to.

As such, the text that follows reflects proposals submitted by ePDP team members on these specific issues, as indicated by the square brackets around the relevant proposals and their text: in relation to arbitration following a UDRP proceeding, in relation to arbitration following a URS proceeding, and in relation to the options under consideration relating to applicable law. Does anybody have any issues with any of that text? Brian, go ahead.

BRIAN BECKHAM: Hi, Chris. Hi, everyone. No particular issue with this text, but I did want to just flag for your and everyone's attention, and I appreciate it came, actually, as we were starting the call, an e-mail I sent to the list that I wasn't aware that Jeff had shared any proposed text across the list, nor am I aware he reached out to any of the IGOs, which is fine. I just wanted to flag that any text that's in here hasn't really had opportunity to be considered yet.

And that goes for the entire document that's in front of us. It's a little tough to agree on the fly where we've had several versions with different markups. I appreciate this is a clean version that tries to bring this all together. But to be perfectly candid, from our perspective, it's a little difficult to sign off on a phone call without having a chance to really digest some of the textual changes that have been made, just because there is a lot of nuance in this subject matter. And frankly, I think it would, personally, be far preferable if there is a little bit more time. And I appreciate we have had this document for a few days, the holiday notwithstanding, to give it a

kind of close read with a fresh pair of eyes, versus doing it on a phone call. Thanks.

CHRIS DISSPAIN: So, two things, Brian. Thank you. One, I'm not suggesting that this document itself will be signed off on today because, clearly, the surrounding text needs to be written. I'm seeking people's input on the text that we're looking at very specifically on the recommendations. That's the first point. Secondly, in respect to Jeff's e-mail, I had a ... I don't know what the status was of that. I know he was asked to provide some text and he did so.

But I can't get ... Mary can answer where what went. And thirdly, fine, but, if I understand it correctly, then what you're saying is that you haven't had an opportunity to review this document since it was sent out and you want more time, which I don't have a problem with. I'm just saying that's what you're asking so that I'm clear.

And that's fine. I mean, we did agree to get it out as quickly as we could last week and, in fact, I think it would be fair to say that staff bend over backward to get it out as quickly as possible. And most of these changes are in fact, with the exception of a couple, I acknowledge, entirely pursuant to the discussions that we had last week. Mary, do you want to just deal with that first, and then I'll go to Paul? Thank you.

MARY WONG: Sure, Chris. And I did start to do that in the chat, but it's probably easiest if I just mention it briefly. Jeff's suggestions did not go to the list separately. There were two reasons for this, as you've already

alluded to, Chris. One is, obviously, in the interest of time, to really get one set of proposals to the whole group as soon as possible. And secondly, related to the first, at that point we were really dealing with something like three, maybe four different versions of redlines, and it didn't seem that it would be helpful to pick one and to incorporate the other redlines and send it out as a further redline, especially with the structural change with the UDRP and URS.

So, to your question, Brian, as to what you're looking at and whether Jeff's changes were sent out, that's the answer. What we would suggest on the staff side is I think everyone, including we, are very aware of the concerns and the suggestions that have been made. If everyone could look at this language with fresh eyes, just to see whether this language, or some tweak thereof, would address the concerns that you raised over the past few weeks ... And as Chris said, we're not looking for sign-off today. We're not going to public comment today or tomorrow but we're hoping that we can have everything done by next week.

CHRIS DISSPAIN: Thank you, Mary. Before I come to you, Paul, just to clarify, I may be wrong but I'm fairly sure that what I asked at the end of the call last week was exactly what has happened. I asked that the staff incorporate the suggestions that people had made. So, for example, Kavouss made a suggestion regarding the necessity to possibly separate out URS, and I think Justine had agreed with that. There was talk about toning down some of the language and I asked staff to do that. Jeff had said that he was going to provide some text. So, this document is intended to try to cover everybody's points of

concern. If it doesn't, then that's the purpose of going through this now. Paul, please go ahead.

PAUL MCGRADY: [inaudible].

CHRIS DISSPAIN: You're a bit choppy, Paul.

PAUL MCGRADY: I need to get back and get a bit closer to the microphone. Is that any better?

CHRIS DISSPAIN: That's a bit better. Yes, that's much better, Paul.

PAUL MCGRADY: Awesome. So, I just had a quick little question about the original recommendation number five, we rejected. But I thought the council already voted to reject that. I'm not sure ab what we're [inaudible] is really accurate, but I prefer to be wrong. Thanks.

CHRIS DISSPAIN: Super, Paul. Thank you. Mary, do you want to answer that question?

MARY WONG: Yes, if I may, and that's a really good question, Paul. The council, as we know, did not approve Recommendation 5 but the language of the resolution was to refer the question to what became the work track in this ePDP. So, this is really to close that loop and to make it absolutely clear that, even if the council had to confirm that what they meant was to reject Recommendation 5, we have this clarity at the end of this process.

CHRIS DISSPAIN: Thanks, Mary. Let's move on. There don't seem to be any other hands up. So, we now come to the substance, Recommendation 3a. The ePDP team recommends that an IGO complainant—and, as we know, that's defined in Recommendation 1, which we've already dealt with—be exempt from the requirement to state that it will submit with respect to any challenges to a decision [inaudible] proceeding canceling or transferring the domain name to the jurisdiction of the courts in at least one specified mutual jurisdiction. That is a direct quote under the UDRP and I believe that that's the language that Jeff suggested we use because it is a direct quote.

Does anybody want to talk about that or comment on that? There was, if you recall, some discussion—and this is where I think we stopped at the last call, if I remember correctly—about a concern that this was described properly and there was talk about whether they were submitting or not submitting, and so on. And so, I think the suggestion was that we use this very specific language, which is directly quoted from the UDRP rules. Anybody got anything that they want to say? Seemingly not. Excellent. So, do we then move onto Recommendation 3b? Sorry, Brian, go ahead.

BRIAN BECKHAM: Yeah. No, sorry, Chris. I wanted to just say, on the face of it, of course, it seems perfectly fine. But again, just ... And especially in light ... And thanks, Mary, for the explanation and Chris and Mary for the summary of where we are in terms of what we're here to do today. Certainly, that seems acceptable. But I just wanted to, again, reiterate the thanks that we can ...

Again, not talking to this particular clause but have time to digest the full document a little more fully so that ... I guess the reason I'm saying this is, although this seems perfectly fine and I don't anticipate on this particular clause to come back with anything that ... Wouldn't want anyone to feel like we've surprised them, for example, if we were to come back and say, "Would we be able to change this word?" or something along these lines. Thanks.

CHRIS DISSPAIN: Brian? Thank you, Brian. And I'm fine with that. However, I think we do need to put a peg in the ground somewhere. So, let me ask you: what would you be ...? If we assume just for the sake of discussion ... And let's see how we go. But we can assume for the sake of discussion that we are anticipating on having a call next Monday, on which the wraparound stuff will have been prepared and we'll be able to look at. And it would be ideal if, at least, this call had been poured over and at least we had in place ... We'd had time to consider any comments that you might want to make, Brian.

So, what would you be prepared to commit to for the extra time that you would require to look at this and comment on it? Because if we

leave it until next Monday, that's another week that has gone by and we'll be way out of time. Which if we are, we are. And don't get me wrong, I'm not a stickler for the timing. We can always ask for more time. But I am concerned that we try and do our job properly. So Brian, what would you suggest would be fair for your comments? A couple more days? What do you think?

BRIAN BECKHAM: Yeah, thanks. Of course, this is unique to me. I don't think it's even a European thing. But of course, Thursday is a holiday in Geneva. But I think ... Look, I don't want to be unfairly ringing alarm bells that aren't there. I think we're largely in agreement on the kind of big picture. But of course, some of the particular language can be important. So, I would think that in, yes, a couple of days, by the end of the week should be sufficient.

Again, I don't want to signal the wrong thing, but just to say, at least for me, having a time to ... And I'm going to have to kind of do a little bit of a compare version with a couple of different documents on some different screens, just to see what exactly has been changed. So, just to make sure we haven't overlooked anything, the specific legal substantive terminology, for example, around privileges and immunities. And I think by the end of the week should be just fine. Again, don't want to unduly raise alarm bells, but just grateful for an opportunity to give this a once-over. Thanks.

CHRIS DISSPAIN: David, go ahead.

DAVID SATOLA: Thank you, Chris. I actually had my hand raised for a later purpose but in respect to the discussion we'll have about getting back to you this week, I'm happy to commit to that, as well. Over.

CHRIS DISSPAIN: Did you want to ...? That's fine. Did you want to raise the other point that you wanted to talk about?

DAVID SATOLA: No, it's later in the document. I can come back to it.

CHRIS DISSPAIN: Okay, no worries. We'll come back to it later. Thank you very much. Okay. Thanks. So, that's 3a. 3b, now, is the next step in the chain. Recommends that the following provisions be added to the UDRP: (i), when submitting its complaint, an IGO complainant shall also indicate whether it agrees the final determination of the outcome of the UDR proceeding shall be through binding arbitration in the event the registrant also agrees to binding arbitration. So, presumably, we're okay with that. That seems to me to be merely a logistical point.

(ii), in communicating a UDRP panel decision to the parties where the complainant is an IGO, the provider shall also request that the registrant indicate whether they agree that any review of the panel determination will be conducted via binding arbitration. The request shall include information regarding the applicable arbitral rules, which will be determined by the Implementation Review Team. Existing arbitral rules, such as those of the ICDR, the WIPO, the

United Nations Commission for International Trade Law, and the Permanent Court of Arbitration should be considered.

And again, the addition there was a suggested text by Alexandra of the Permanent Court of Arbitration. Anyone want to say anything about that? Good. (iii), as provided in paragraph 4k of the UDRP, the relevant registrar will wait ten business days before implementing a panel decision and will stay implementation if, within that period, it receives official documentation, if the registrant has either initiated proceedings in court or agreed to arbitration.

So, again, logistical standard and shouldn't really be a problem. Could we move the screen, please? Jay is requesting quite fairly. We're on (iii). And perhaps you could move it up a bit further so we can see as much of that page as possible at the moment. A bit more. Okay. A bit more, please. Thank you. So, that's (iii).

(iiii), if it receives a request for or notice of arbitration, the registrar should [inaudible] stay implementation of the UDRP panel decision until it receives official document concerning the outcome of an arbitration or on the satisfactory evidence of settlement or other final resolution of the dispute. Again, that's fairly standard. If the UDRP provider receives notice that an arbitration proceeding has been initiated, it shall promptly inform both parties and the relevant registrar. Again, I imagine that that has been moved up from another section and, again, it's logistics and shouldn't cause us a problem. Now, we move onto (v), which is, obviously, key text. Alexandra, please go ahead.

ALEXANDRA EXCOFFIER: So, it's on (v). I don't have a problem with (iiii).

CHRIS DISSPAIN: Oh, okay. Super. Thanks. Well, leave your hand up and, as soon as I've finished, I'll call you first. Proposal under consideration as regards maintaining an arbitration option following initiation of court proceedings by the registrant. Where the registrant initiates court proceedings and the IGO complainant has not agreed to submit to mutual jurisdiction, and if the result is that the court is unable to proceed further, the registrant may submit the disputes to binding arbitration within ten business days from the court order declining jurisdiction over the IGO by submitting a request for or notes of arbitration. I'm going to stop there because I think the rest of it is probably boilerplate. Alexandra, you are first in the queue.

ALEXANDRA EXCOFFIER: Thank you, Chris. A couple of points on this one. I had raised one a few times. It's this considers that the arbitration option remains available.

CHRIS DISSPAIN: Yes, that's right.

ALEXANDRA EXCOFFIER: But the other option—and it's not indicated here—is that, if IGOs assert jurisdiction and the court is unable to proceed further ... And I'm okay with Jay's proposal, there. That that's the end of the line. That option is not indicated, here. It should be two—

CHRIS DISSPAIN: You have raised that. You have raised that before.

ALEXANDRA EXCOFFIER: I have.

CHRIS DISSPAIN: You are correct. You are. You are correct. I'm not quite sure why that hasn't been picked up. Mary, do you want to address that?

ALEXANDRA EXCOFFIER: In fact, if I may finish the—

CHRIS DISSPAIN: Sorry. No, I apologize. I thought you had. My apologies.

ALEXANDRA EXCOFFIER: The brackets are not in the right place. Again, where the registrant initiates court proceedings, etc., that should be normal text. It's what happens after the court makes it determination. There, you need bracketed text. Option one or one option, arbitration, possibility. The second option. That's it. The original determination stands. And I also have something to say about the mutual jurisdiction here, Jeff's proposal, but maybe we can—

CHRIS DISSPAIN: Can we deal with ...? Can we come back to that in a second and deal with the first point first?

ALEXANDRA EXCOFFIER: Yes, of course.

CHRIS DISSPAIN: So we don't lose the thread. Thank you.

ALEXANDRA EXCOFFIER: Of course.

CHRIS DISSPAIN: Mary. Thanks. I'll be back to you in one second. Mary, go ahead.

MARY WONG: Thank you, Chris, and thank you, Alexandra. Yes, we have noted and we have not forgotten about this point that you had raised. It's just that, with the flow of the text that we have discussed in the last few weeks, where we thought ... And I get your point about maybe it just needs to be clearly called out. We did not have text on that. What we have ... Berry, if you wouldn't mind scrolling up just a little bit to, probably, the end of (iii). If you look at (iii), (iiii), and (v) together, our thought was that that accomplishes the purpose in that—

CHRIS DISSPAIN: No, it doesn't, Mary. It doesn't, Mary. It doesn't.

MARY WONG: Okay.

CHRIS DISSPAIN: Alex is right. Alex is right. It absolutely needs to be called out that there are two suggestions on the table.

ALEXANDRA EXCOFFIER: (iii) is acceptance to a bit after, just after, the UDRP decision, whereas (v) deals with what happens where the registrant initiates court proceedings. So, it's the second choice, here.

MARY WONG: I see what you—

CHRIS DISSPAIN: Yeah. I think the best way to deal with this, Mary, is to say, under the ... It's proposals for consideration in respect to arbitration, and the first proposal is ... I'm using very simple words, here. The first proposal is it's registrant goes to court and the court ... And we'll come back to what the right wording is in a minute. And the court—right wording—isn't going to look at it, then that's [an end] to the matter. That's one proposal. And the second proposal is, in essence, what's here. So, we need to get that into two separate branches, and I think that will answer Alex's problem on that specific point. That's right, isn't it, Alex, if we do that?

ALEXANDRA EXCOFFIER: Yes, sure. We could also bracket just what happens afterward, but either way is okay. I mean, either way is okay.

CHRIS DISSPAIN: Yeah. I just want to ... My goal, I think, is to make it as clear as possible to people who are providing public comment what the alternatives are, and I appreciate that as an example. I just think it's important that we make it clear. So, Mary, does that give you sufficient scope to know what ... To look at that and recasting ... Not the wording, as such, but recasting the ... We'll get to the wording in a minute. Recasting the structure.

MARY WONG: Yep, and I think that that's right, Chris. It's about recasting the structure and making it clear but not actually changing the text of the proposals.

CHRIS DISSPAIN: Well, we don't know yet. We may be able to ... We may need to change the text for different reasons but I agree. Okay. I want to come back to Alex, who now has ... Paul, is your point on what we just discussed or something different?

PAUL MCGRADY: It's related [inaudible].

CHRIS DISSPAIN: You're really breaking up at the moment, Paul. Yeah, okay. You dial in and we'll talk to you in a minute. Alexandra, what's the point you want to make about the suggested text on mutual jurisdiction, please?

ALEXANDRA EXCOFFIER: Well, I tried to wrap my brain around that one but it's not ... Is the registrant—might be a question—limited to submitting a court proceeding in a court of mutual jurisdiction, since, taking everything together, the IGO is not obligated to select a court of mutual jurisdiction? So, why complicate it here? I would like to see what the previous Recommendation 5 said. I mean, from the previous PDP. But I think it just referred to IGOs asserting their immunities and not necessarily back to mutual jurisdiction. I think it complicates things. It's not very clear, here. We can presume that we will not agree to submit to mutual jurisdiction through any court, for that matter, and a court—

CHRIS DISSPAIN: Really? Can we really?

ALEXANDRA EXCOFFIER: And if ... Probably, unless we decide to proceed on the substance. I mean, that's a possibility. But I think that, if you ... Last time, you said that there's wooly language, so I'm happy to, and I think the other IGOs are happy to, work with, make it less wooly.

CHRIS DISSPAIN: Yeah.

ALEXANDRA EXCOFFIER: But I think having mutual jurisdiction here, agree to submit to mutual, is also wooly. It's not very clear what that means. I mean, if the IGO is not going to select one of the mutual jurisdictions, then ... And is the registrant bound, now, to use one of those courts? And if I were the registrant, I would always choose my own court. So, it seems kind of ... And if you bring this to a court, saying that the IGO hasn't agreed to mutual jurisdiction, they don't know what mutual jurisdiction means. So, I would ...

CHRIS DISSPAIN: So what we're talking about is, just to be clear, at the end of that first and at the beginning of the second line. So if it said, "Where the registrant initiates court proceedings and ..." If you take that out, if you take out "and the IGO complainant has not agreed to submit to mutual jurisdiction," you're saying that would make it clearer. Is that right?

ALEXANDRA EXCOFFIER: Take it out or keep some of the original language, which can be made less wooly, something like ... And I'm speaking off the top of my head. Something like, "The IGOs assert their immunities and, as a result, the court is unable to proceed further," that should be simple enough and clear enough to understand.

CHRIS DISSPAIN: Yeah, I agree. But I think the point about mutual jurisdiction is a different point. But I understand exactly what you're saying. But I think the language about exercising immunities is a different point from the initial point that this is trying to deal with, which is to say it is feasible that an IGO could have agreed to submit to mutual jurisdiction, and that ... But I'm more than happy to accept that it's redundant because, if they have agreed to mutual jurisdiction, then that should be clear.

ALEXANDRA EXCOFFIER: Then we don't need arbitration or anything like that, anyway, if we have agreed to mutual jurisdiction. At the risk of making it more wooly, we could say "has not agreed to submit to mutual jurisdiction or otherwise waive its immunities," or something like that. But I think that just complicates language.

CHRIS DISSPAIN: Yeah. I have to say, I'm not sure ... I'm happy to say that I'm happy to have that taken out because I don't think it necessarily achieves very much, but I'm not sure that I'm necessarily getting why it's of great concern, because it's simply making the point that if they've agreed to mutual jurisdiction then this clause won't apply, which I would argue is obvious, anyway. But, that said, your point is taken. Let's see what others have to say. Did you want to say anything else at this point?

ALEXANDRA EXCOFFIER: No, those are the two points that I wanted to ...

CHRIS DISSPAIN: Okay. Super. Let's see what others have to say, see if we can craft a suitable solution. Mr. McGrady, I'm gathering you're back on the telephone. Please, go ahead.

PAUL MCGRADY: I am, thanks. But you may want to defer me again for David, just because what I have to say is more a procedural issue related to this chunk of the document.

CHRIS DISSPAIN: Sure. I will defer you again. David, go ahead.

DAVID SATOLA: Thanks, Chris. Just building on what Alexandra just said, and following your proposal, I would be happy to delete the language "and the IGO complainant has not agreed to submit to mutual jurisdiction" because—and maybe this is an answer to your question, Chris—the key for an IGO is whether it waives its immunity or not and not whether it agrees to the mutual ... "Agree to mutual jurisdiction" is one way of waiving that immunity but, again, taking an example of the World Bank, if the registrant raised or issued a complaint, or initiated a complaint in the Federal District Court in the district of Columbia, it wouldn't be an agreement to submit to mutual jurisdiction. We're already under the jurisdiction of that court. It's then up to us to decide whether to waive our immunities or not once the ...

CHRIS DISSPAIN: Understood.

DAVID SATOLA: So, the language that's there isn't complete enough because it doesn't cover the range of activities or the range of actions that an IGO could make to go to court. And finally—and I apologize for being the author of the wooly language—I agreed last week to take out terms of art that might be confusing to people who are not experts in these things.

And I thought that what we were aiming at was putting in lay terms to cover ... I thought that last week we had agreed in the principle but we were going to look at some alternative language. I'm sorry to say that I think by taking out "waiver of immunities" and putting "substituting for that mutual jurisdiction," we're kind of at the same point where we're ... There are terms of art that—

CHRIS DISSPAIN: I'm inclined. I'm inclined to agree with you, even though I'm chairing. I'm inclined to agree with you if I take an overview of this document, and I accept your point that we did agree that we were going to try and do simple language. I'm inclined to agree with your interpretation. If anybody disagrees with that, they can please put your hand up. But it seems to me that I don't know that we actually ... Given that the factual situation, if I get this right, is that you are, as you have said ... It's actually about you waiving your immunities, and if we don't put that in then we are simply not being factually correct, even though it may be complicated language. Is that right?

DAVID SATOLA: That's right.

CHRIS DISSPAIN: Okay. Thank you. Did you want to say anything else?

DAVID SATOLA: Nope, that's it.

CHRIS DISSPAIN: Okay, cool. Good. So, I think that that is a fair interpretation. Let's get back to a solution in a second. Paul, you're up next.

PAUL MCGRADY: Thanks, Chris. So, this is a little more pedestrian, but when it comes to documents like this where there are essentially two alternatives that are under consideration, as a reader of the document and someone who then might do a public comment on it, I find it helpful if we spell that out. Or we say, "Below are two options that the working group are considering. Which do you like, and why?" or something like that, so that the reader knows what's going on. Because otherwise, it just looks like two competing paragraphs that cancel each other out. Thanks.

CHRIS DISSPAIN: Excellent. Excellent point, Paul. Thank you Mary. Steve, Berry, could you take a note of that and, in splitting that off, do exactly

what Paul has suggested, which is to say, “here are the two choices, we’re seeking comment,” etc. Before we come back to the mutual jurisdiction point, or on that point, Justine, please go ahead.

JUSTINE CHEW: Thank you, Chris. I totally agree with what Paul said in terms of presenting the alternatives. This document, the way that the alternatives are set up just doesn’t work for me. I wanted to make a point about (v). I wonder if this would solve the problem with the phrase on “submit to mutual jurisdiction.” I put in the chat that I thought the reference to mutual jurisdiction is actually more tied to the registrant.

So what if we said that, where the registrant initiates proceedings in a court of mutual jurisdiction, so put the mutual jurisdiction, more closely tied to the registrant. And then, the IGO complainant does not ... Whatever David said. Does not consent to ... He has probably got better words than I do, but by going back to not waiving the immunities. So, that might work out. Yeah. Thanks.

CHRIS DISSPAIN: Understood. No problem. So, one thing is clear, I think. We do need to go back to having the wording about immunities. So, Mary, Steve, Berry, you’ve got that wording. That’s fine. I’m not averse to having a reference into mutual jurisdiction if we think it’s necessary. I’d certainly be happy for us to have a look at that. And Mary, perhaps I could ask you to chat with Justine off-list, so to speak, and just get clear her suggestion, and see if we can incorporate that and if it makes any sense. Mary, go ahead.

MARY WONG: Thanks, Chris. So, just real quick, because I know we want to move onto substance, too, I had thought I heard David and others said that we could look at actually deleting this particular phrase, especially given the context that this language is arriving in. So, we just want it to—

CHRIS DISSPAIN: What phrase?

MARY WONG: About whether we say "has not agreed to submit to mutual jurisdiction," or, as Alexandra referred to in the original Recommendation 5, which says "the IGO succeeds in asserting jurisdiction immunity," or the IGO's proposed text, which was "does not waive its privileges and immunities," which was the phrase that Jeff was—

CHRIS DISSPAIN: So, you're suggesting we say nothing other than where the registrant is ... We say nothing other than if the registrant goes to court and the court doesn't want to hear it—

MARY WONG: Yes, I had thought that was it, but—

CHRIS DISSPAIN: With no explanation as to why?

MARY WONG: Yes. But if I misunderstood, I apologize.

CHRIS DISSPAIN: Let's see. David?

DAVID SATOLA: Yeah, thanks. I was quite happy, because I think it's factually accurate, for ... If you take into account all of the myriad IGOs that are out there and all of the myriad ways in which their immunities are constructed, it's better to leave a little bit of opening, there. And I think the way to deal with that is, as you had suggested, Chris, to delete the words in that first line, "And the IGO complainant has not agreed to submit to mutual jurisdiction." That, to me, would handle it. I think if we reintroduce the terms "mutual jurisdiction" or "waiver of immunities," we're back to where we were a couple of weeks ago.

CHRIS DISSPAIN: I'm really fine with that. I think that will work fine, whether ... I mean, it makes sense to me and it does talk about declining jurisdiction at the end of the sentence, which I think answers the point. And I'd be fine with that. It seems to me to be very clear on that basis. So, on that, Mary, perhaps we could do that in the revamped text. Are you clear? And thank you for raising it, Mary, and thank you for confirming it. Mary, are you okay? Are you clear now?

MARY WONG: Yes, thank you.

CHRIS DISSPAIN: Super. Good. Thank you, everybody. That's a very fine discussion and I'm glad we got that sorted out. I think the rest of this paragraph is, as I've said, boilerplate stuff about ten business days, etc. Then, where we have ... And we know we're going to split this up into two options, so we're clear about that. Then we have an italicized note with respect to this option under consideration.

There's a "here's a flow chart." I don't propose to go through the flow chart now but I would ask you guys to have a look at it, and anyone has any issues to raise them on the list. It seems to me that it does the job but it may need a bit of tinkering with, depending on the changes that Mary, and Steve, and Berry make to (v). And then, (vi) says the registrar shall continue to maintain the lock on the disputed domain name. So, again, I think that's boilerplate and shouldn't be a problem. Then, we have Recommendation 4a, which is Alex. Go ahead, please.

ALEXANDRA EXCOFFIER: So, just a question. Why are there brackets in (vi)? "Any judicial proceedings and arbitration." It would work in both, right?

CHRIS DISSPAIN: Good question.

ALEXANDRA EXCOFFIER: Just a question.

CHRIS DISSPAIN: No, a very good question. Mary?

MARY WONG: Yeah, we actually looked at that and that's a holdover from previous discussions. So, the fix here is just to remove those square brackets.

CHRIS DISSPAIN: Rip them off. Thank you very much. Thanks for raising. Thanks for noticing, Alexandra, and thanks for raising it. Right. 4a. The team recommends that an IGO complainant be exempt from the requirement. That's the same. So again, we have the same point there. Although, I must ask the question: if that's a recommendation, is it really necessary to have that as a recommendation at the top of each of those recommendations, Mary? Can we not make that an overarching recommend ...? Yeah, go ahead.

MARY WONG: Yeah, we kind of tossed this around for a bit. It may change once we look at how we want to restructure the options, as previously discussed. But in this draft, we thought it would be clearer to just totally separate out the process flow for URS versus process flow for UDRP.

CHRIS DISSPAIN: Fine. I mean, it's the same recommendation so we'll sit tight on it for now and you can consider the wording on that at a later ... When you revamp it. Yes, Alexandra?

ALEXANDRA EXCOFFIER: Well, just for clarity's sake, if we do keep it here, maybe we should have a title? Like the recommendations below, 4a, 4b, and, I guess, [4r], relate to URS to make it clear that they don't follow the previous ones. If we do need to repeat it, I'd prefer not to repeat. But again, that's a point of form, not substance.

CHRIS DISSPAIN: Thank you. Agreed. I'd prefer not to repeat it if we can find a way of doing it. But yes, it needs to be clear that it relates to URS. 4b is, again, the binding arbitration clause, and it says, "When submitting its complaints ..." I mean, these are the same wording. This is the same wording but it's in respect to URS instead of UDRP, in respect to (i). In respect to (ii), in communicating a URS determination to the parties where the complainant is an IGO, the URS provider shall also request that the registrant indicate whether they wish to file an appeal under section 13 of the URS.

So, that's different because, of course, that doesn't exist in respect to the UDRP. And/or whether it wishes to seek a review of the URS determination by way of binding arbitration. The request shall include information, blah, blah, blah, and all the other stuff about the various different choices of arbitrator to be dealt with by the implementation team. So, that seems to me to make sense. (iii). And I think, again, the same thing applies here, does it, Mary, in

respect to the split? Splitting this up so that it's clear that there's an option.

MARY WONG: Yes.

CHRIS DISSPAIN: Yes. Okay. Alexandra, please go ahead.

ALEXANDRA EXCOFFIER: I'm agnostic about this, but to raise it as a question, should we not explore the appeals process available under the URS? And only if there is, following that appeals process, if the registrant brings the case to court, then the arbitration option is maintained. It's not necessarily instead of the appeals process under the URS, as it's presented now. And if we do keep it, as Jeff proposed, then the title of (iii) ... It's not really ... I don't know. There's something missing. There was ... [inaudible]. I'm looking at this cold but maybe it's a question for the others. Do they think that the appeals option should be maintained? I mean, if we're trying to keep as much of the original ...

CHRIS DISSPAIN: I think it is, though, isn't it? Mary, could you just explain what your intention was with drafting this text so that we can be clear?

MARY WONG: Thanks, Chris and Alexandra. And again, this is a part that we kind of went back and forth on the staff side to try and get clarity while accommodating all the options. And I think what we wanted to do was to actually not foreclose any of the options but highlight the fact that there could be an extra step here, which is the appeal. Because under the URS, none of these options are precluded by the other. So, you could have appeal. You could have court proceedings. The complainant can actually, then, start a UDRP.

So, because it's so open-ended ... Not to mention under the URS. Even if you had an initial determination, let's say, as a default, the respondent has six months to come back and request a final determination. So, we didn't want to go down that rabbit hole of crafting subprocesses for each possibility. But maybe, in doing so, we might have left it a little open-ended. We did have the flow chart, Chris, if you think it will help to show why this is the case it is.

CHRIS DISSPAIN: Yes, in a second. I'll get back in a sec. If we go to (ii), which I think you can just about see at the top of the screen, my reading of that is registrant loses the URS. The provider then says, "Do you want to appeal under section 13 and/or do you want to go to arbitration?" So you could say, "I want to appeal under section 13, and if that doesn't work I want to go to arbitration," or you could say, "I can't be bothered to appeal under section 13. That's a waste of time. I'm going to go to arbitration." Is that what you intended it to be read as, Mary?

MARY WONG: Yeah. And I was trying to respond to Justine in the chat, who I think is making the same point, that we just wanted to be clear that every option under the URS remains available, plus arbitration.

CHRIS DISSPAIN: Exactly. And as Justine has quite rightly said, it's not up to us to ... We can't say the section 13 URS appeal should not be available. We can say we can't withdraw that option. That's a function of the URS rules. Alexandra.

ALEXANDRA EXCOFFIER: I'm not saying to withdraw the option. On the contrary. I'm just saying, at what point does arbitration possibility come in? And if we agree that it can come in instead of if the registrant can decide on arbitration instead of appeal, that's one point. But if they decide an appeal and, let's say, they lose the appeal, then there's a second point, potentially, where the arbitration comes in, and that's not clear from this text.

And then, there is the court option with the possibility of arbitration, which is the same as for UDRP. So, there's something missing. If either we move it and they have the right to the appeal and [IGOs] don't have an issue with appeal under the URS ... It's not a judicial proceeding so we don't have a problem with that. And then, if they lose and they have the choice between going to court or arbitration, then it's the same as the UDRP, and that follows the same scheme as the UDRP. So, I don't think that it's clear. Let's say they choose appeal and lose; what happens there? You see what I mean?

CHRIS DISSPAIN: I understand. Yes, I do. I understand. Berry, do you know—

ALEXANDRA EXCOFFIER: Thank you. You're so smart.

CHRIS DISSPAIN: Okay, well ... Okay. You mean because I understand you?

ALEXANDRA EXCOFFIER: Yes.

CHRIS DISSPAIN: Mary, do you want to ...? Can we get the ...? Is it worth bringing the flow chart up at this point, do you think? Is that going to be helpful or is it just going to send us down another rabbit hole? There, it's up. There you go. Mary, over to you.

MARY WONG: Actually, I was going to have Steve do the flow chart because it's really him who was able to put all this into a visual depiction.

CHRIS DISSPAIN: Let's do that. Let's do that. But before Steve takes us through that, I think Alexandra's point is fair. That is, I think it needs ... This is suffering from things being rammed together into larger sentences, and maybe it's just a function of breaking it down into bite-sized pieces.

MARY WONG: Right, you got it. We just wanted to preserve everything, but you can't [can't keep appeal] and go to arbitration at the same time. But there's a chunk missing after that.

CHRIS DISSPAIN: Exactly. So, if you can just break that down, I think it will fix itself once it's broken down into a series of sub-points. Steve, do you want to take us quickly through the flowchart or would it be better to just send that out to everybody on the list and have people comment on it? Which would you prefer?

STEVE CHAN: Hi, Chris.

CHRIS DISSPAIN: Hey, Steve.

STEVE CHAN: I think I can talk broadly about it and then I think we can set it out afterward, because—

CHRIS DISSPAIN: Good.

STEVE CHAN: So, one of the things we tried to do is bring in references to the relative ... Well, the recommendations that this group is proposing, at least under Jeff, that we provided to the group. So, you'll see references to each of the recommendations, so you know which of these boxes ... And they're all the blue ones. They're tagged recommendations, so it might say Recommendation 1 or Recommendation 4.

And so, we're hoping that that makes it clear where each of the recommendations applies in the process. And just to be clear, this is actually only the URS one at this point. We didn't redo the UDRP one that the IGOs proposed. The other thing that we did is ... Well, actually, I'll say it a little differently. This flow chart isn't supposed to do anything different, obviously.

And it just reflects what we expect the process to look like as written in the recommendations. So, that's why I didn't really want to say a whole lot about this. It's that you should be pretty self-explanatory and follow the process. Obviously, it's just a visual depiction of that.

CHRIS DISSPAIN: Get it sent out to the list as a separate document as soon as you can, please. Don't worry about waiting for anything else. Just get it sent out for comment, okay? Steve, is that okay?

STEVE CHAN: Sure thing. I was going to just type "sure thing."

CHRIS DISSPAIN: Super. Super.

STEVE CHAN: [In the text, I'll say] [inaudible].

CHRIS DISSPAIN: Super. Thank you very much. Well done. Thank you. Okay. Thank you, and thank you, everyone, for the comments so far. So, (iii), we know about removal of the mutual jurisdiction thing. Same text as (iii) in the previous recommendation but split with a clear understanding, as Paul McGrady has suggested, that we're asking for comment, that there are two options, please tell us what you think and why.

All of that stuff, I think, is fine and works/will be effectively the same as the previous (iii). And then, we come to 5a, and 5a is the choice of a law, applicable law issue. Any arbitration will be conducted in accordance with the law as mutual agreed by the parties. Where they cannot reach mutual agreement, the arbitration will be conducted in accordance with the law of the relevant registrars' principal office or where the respondent is resident at the election of the IGO's complainant.

So, Mary, that has to be a choice, one of the choices, rather than a ... That isn't one of those things that needs to be, "Here's our branch. This is one ... One person says this thing, another person says that thing," otherwise it doesn't look like it's a real choice. And then the next text says, "If either party raises concerns that the law of the registrar's principal office or the respondent's place of residence does not have a satisfactory cause of action related to

the parties' dispute, the arbitral tribunal may request submissions from the parties as to the suggested applicable law or principles of the law."

And then there's a note which says, "With respect to the second sentence in the immediately above bracketed option, IGO members have raised concerns that some jurisdictions may not have a substantive cause of action for the parties to invoke. However, other members of the team have noted that this concern may arise for all UDRP complaints and, as such, it will be more appropriate to address this topic as a general review of the UDRP." Okay. So, 5a is the topic for discussion. Brian, you are next.

BRIAN BECKHAM: Hi, everyone. I think if I didn't raise this before, I apologize. I thought I did. But I think, in the beginning—it's a very small detail—there were other working group members who also recognized that same potential of concern, so it would just be a simple matter of removing the reference to IGOs in the beginning. I apologize, I don't ... Okay, thank you.

CHRIS DISSPAIN: No problem. No, good point, I agree. When I was reading it, I thought it seemed a bit odd. So, yes, it should just be some members. Thank you. I hope everyone is clear, Mary, you're clear, that we need to treat this choice in the same way that we're treating (iii) in both other cases, with a clear understanding that these are choices and we're seeking input and comment on them. Is that clear, Mary?

MARY WONG: Yep. We'll work on something that is more easily understandable.

CHRIS DISSPAIN: Brilliant. That's great. Thank you. I mean, the wording itself is fine, it's just the surrounding bits. Alexandra, go ahead.

ALEXANDRA EXCOFFIER: Just as this is potential additional language, not so much an option, maybe it should be clarified, that proposal under consideration regarding additional text on applicable law. So then, we don't need to set out various options. This is just an addition to the previous text, which is agreed. So, maybe just make it clear that this is an addition to that. I don't think it's an option, necessarily.

CHRIS DISSPAIN: Yes. I'm sorry. Actually, you are correct. You are right, aren't you? Because the first part remains, irrespective. The question is, is that an end to it? It's just that choice? Or, is there a chance for you to raise something? So yes, I take your point and you are correct.

ALEXANDRA EXCOFFIER: Exactly, thank you.

CHRIS DISSPAIN: Super, thank you. Mary, Alexandra is right, so you just need to make sure that it's clear that we're seeking ... This is an option that we're seeking comment on.

MARY WONG: Right, as, basically, an additional possibility.

CHRIS DISSPAIN: Correct. Correct. Correct. Correct. Correct. Okay. And then, we got to 5b. 5b says, "The following non-exhaustive general principles, which can be further developed, will govern the arbitral proceedings. Arbitration shall be conducted as a de novo review, i.e. the parties are permitted to restate their case completely anew, including making new factual and legal arguments and submit new evidence. The tribunal should consist one or three neutral and independent decision-makers who cannot be the panelists who rendered the initial UDRP decision." Why is ...? Is "three" bracketed because we were talking about saying it must be three, Mary?

MARY WONG: As I noted in chat, Chris, this is probably something that we haven't spent a lot of time on as a group, so that was not a decision point that we reached and it was simply a suggested in the initial text.

CHRIS DISSPAIN: Jay, go ahead.

JAY CHAPMAN: I don't mind discussing Mary's specific point here in the question about the number. Mine's a little not quite related to that. It is along the same line but I don't mind pausing for a second until we have decided/talked about this.

CHRIS DISSPAIN: No, make your point and then we'll come back.

JAY CHAPMAN: Okay. Well, I just wanted to mention that we've had a lot of ... Similarly to the number of panelists, we've talked about, just in not very specifically, where these panelists or where the tribunal participants ... Who they are, where they come from, who they are, what lists, what criteria, those sorts of things.

And I know Brian has kind of mentioned some things about that in the past, and maybe some others have, as well. But I'm just reasserting the question. And maybe it's just because I've forgotten, but I'm just asking again, are we planning to get into those? Well, I think we should, I guess is what I'm saying, get into those specifics. I don't know if that's necessary for the initial report but I just want to put a pin on that. Thank you.

CHRIS DISSPAIN: Jay, I thought that we dealt with that by saying that, in the context of other recommendations, where we've said ... And I think if I could use 4b (ii) as an example, the request shall include information regarding the applicable arbitral rules, which shall be determined by the Implementation Review Team. Existing arbitral rules, such as

those of the ICDR, etc., should be considered, and I had thought that that was where you would look at whether you would simply have a panel appointed by ... Normally, you'd have a panel appointed by the organization that was being used to provide the arbitration.

It would be unusual for it to be ... Unless you're creating your own arbitral process, it would be unusual to try and ... Apart from anything else, they need to be accredited by the particular institution that is providing the arbitration services, I believe. Maybe I've got that wrong, though, but that's my understanding and that's how I thought we were going to deal with it. Does anyone disagree with my interpretation that that's how I thought we were going to deal with it? Brian.

BRIAN BECKHAM: Yeah. Hi, everyone. I think when we had discussed earlier the potential composition of a panel roster, and strike options, and things like that, that was more in the context of an internal appeals system. Obviously, we sort of took a different fork in the road, but it's exactly ... This is a little bit of a chicken and egg situation. It's exactly as you described, Chris. Normally, if someone submits to arbitration, whether that's under WIPO, or [inaudible], or [ISTC] rules, etc., they have their own rules of procedure. Of course, the rules themselves are largely similar. But they would have their own roster of experts, etc.

And so, one thing that would be possible is that a specific arbitral institutions ... We haven't really explored this but it could be possible that we sort of frame up a set of rules under the rubric of the work

that we're doing here, and have an arbitral institutions, and sort of sign up to be the go-to institutions whereby they would create a roster of panelists then. But absent us doing that, as I say, it's a little bit of a chicken and egg scenario to create these rules and say these 25 individuals should be the roster from which experts are drawn.

And then, the arbitral institution may say, "Well, that person doesn't appear on our roster." Now, it may be that they would, on an ad hoc basis, work with that person, or they would tailor some rules, etc. But I guess, long story short, I'm very mindful of the point that Jay has raised. And in fact, I've tried to touch on that myself on a few occasions. But I don't know quite how we square that circle here.

CHRIS DISSPAIN: So Brian, just to be clear, then, are you ...? We can square the ... We can say in this report there's more work to do. Are you suggesting that we should actually do some work on honing this particular recommendation so that there's more detail in there?

BRIAN BECKHAM: Yeah, thanks. In terms of ... I mean, I'd certainly be happy to hear from others on this point. In terms of if we're talking about the specifics around the roster, the under what conditions would a party have one right to strike a proposed panelist automatically, what other potential requests the strike be, for cause, etc., I think it's certainly worth exploring that. Maybe we could kind of ... I think we may be able to kind of agree on some high-level principles, and

maybe further public comment could help, and it might be even a thing which lands a little bit into implementation territory.

CHRIS DISSPAIN: Okay. So, let's go through the list, and then we'll see if we can find a way of dealing with the points. I've got Paul, then Jay, then Mary, then Susan. Paul, go ahead, please.

PAUL MCGRADY: Thanks, Chris. So, I would like to answer your question you posed to Brian in the completely opposite way, which is I don't think we should be getting into specifics that an implementation team should be getting into. I do think it's fine to have some high-level ideas, and these all seem fine. I would, in fact, bulk up the first sentence of the paragraph.

Instead of "which can be," maybe "which should be further developed," right? But to make it clear that these are principles that we want the Implementation Recommendation Team to move forward with and to explore. But that's all they are. And I don't think it's a good idea at 11:59-and-a-half-PM to be diving into "can we strike arbitrators?" and things like that. It's just too granular for what we're trying to accomplish at the policy level. Thanks.

CHRIS DISSPAIN: Paul, thank you for that. Just a point of clarity on your 11:59. Agreed, if we're ... Would you ...? But you would maintain that position, even if we said we'll look at those points once we've got comments on the initial report? You would still argue, would you,

that they're not relevant to this working group or this policy? Their implementation, not policy. Yes?

PAUL MCGRADY: Yeah. Thanks, Chris. Yes, I think that's right. I think that when we look ... Now, we're getting on my favorite soapbox. But when we look at how policy development has developed over the years, there really is a huge temptation to get pulled into the weeds on implementation details and it really leads to very complex reports that are hard for the council to understand, and then hard for the board to understand, and then really ties the hand on implementation.

I think it's perfectly fine to have a list of things that whoever wants to throw something on this list that they'd like ... I think it's perfectly fine to say, "Here are some ideas." And we don't even have to reach consensus on those. We can even just say, "Here are some ideas for the implementation team." But no, I don't think we should be getting into implementation details at this stage. I think, really, what we send out for public comment, absent a public comment that really moves the knob on some of these things, we should ... There's no consensus call. I get it. But it shouldn't be so gelatinous that we are going out and fishing. Yeah. Thanks, Chris.

CHRIS DISSPAIN: Nope, fair enough. Nope. Point taken. Mary, you're next.

MARY WONG: Thanks, Chris. You and Paul already covered quite a bit of what the staff was going to say about what this group had agreed in terms of [granularity]. I just want to point out that, for 5b, what we really wanted to capture for purposes of public comment was really the basic principle that this group had also agreed on. De novo review in presenting a case, and with respect to number of arbitrators, we could just take out the number. The whole point is that there should be an option that's more than just a single arbitrator.

CHRIS DISSPAIN: Yeah. Agreed. Thank you, Mary. Susan, hello. Welcome.

SUSAN ANTHONY: Hello. I can only say that Paul McGrady is a very fast man. We are not at 11:59. We are at 11:43. But in other ways, I do agree with him. I think what we want to capture here is just as Mary so articulately put it, the big-picture items: that we want neutral and independent decision-makers, that we want those decision-makers not to have been panelists of the UDRP or URS decision, and that we have the ability to capture ... Not capture, to have more than one decision-maker under certain circumstances.

But what's giving me pause here is that it has been a very, very, very long time since I have looked at arbitral rules. In order to ease the implementation team's burden, and in order to give reassurance to the people here in this work track, it would be helpful ... I'm not going to suggest that everybody sit down and read these rules, but if anybody really knows these rules, as the IGOs may, it would be

helpful to know, what are the big-picture items in these arbitration rules?

Because those rules may have already done the work for us and give us the flexibility that we need. But if, at the end of the day, we have cobbled together a mish-mash, I'm not sure where that takes us. So, I just could benefit by some education as to what arbitral rules already may provide.

CHRIS DISSPAIN: Thank you, Susan. We'll take that off the list, off the call, so to speak, and see if we can get some information out to you and others. David.

DAVID SATOLA: Thanks, Chris. I just wanted to find out where we were on this Recommendation 5b. Because I had a question about the last clause, the sort of standalone little paragraph at the bottom, "In all cases."

CHRIS DISSPAIN: Go ahead. Go ahead. Go ahead.

DAVID SATOLA: Yeah. Do we really need that now, since we've covered, I think, the various mechanisms of getting to court and how things are going to be reviewed? It seems that that's a sort of redundant phrase here.

CHRIS DISSPAIN: It's a fact. The question is whether it's necessary to say it and whether it sits in a recommendation when it's a fact of life, which is ... So, good point. I'm not sure. Let's look at that when the document comes back to us in a few days, in a couple of days' time. I can't see there's a reason to have it in there but there may be others who feel that there is. It seems to me to be probably redundant, but especially that it's a fact. Thank you for raising it. Did you have anything else?

DAVID SATOLA: No, that's it. Thanks.

CHRIS DISSPAIN: Super, David. Thank you. Jeff, hello.

JEFFREY NEUMAN: Hello. Sorry for being late and all. The rereading 5c, I think we need to ... It doesn't quite say what I think we mean. At least, I don't think it does. Right now, the way to read 5c, it's basically it looks like it's up to the arbitrators or the tribunal to decide whether to allow for additional written submissions, hearings, etc. I don't think we meant that. I think what we actually wanted was that presenting a complete case means the collection of evidence, the hearings, and all of the other stuff.

And Susan was saying there's a lot of stuff that's technically allowed under different arbitration rules. But I don't want ... Because right now, even the UDRP says that, at the discretion of the ... I can't remember if it's the panel or the provider. That hearings could be

held. Brian, are you aware of any UDRP that has actually had a hearing? I'm not aware of one but it doesn't mean it hasn't happened.

So, again, I want ... Because we're looking at this as a "place to have the merit heard," as opposed to because they're not in theory going to be able to have the merits heard in court, this should be a full arbitration, presentment of witnesses and everything else, and not ... It shouldn't be at the discretion of the panel but it should be built into the process. Thanks.

CHRIS DISSPAIN: Thank you, Jeff. You make a ... Certainly, that's my understanding, that we, all of us, had agreed, that this arbitration would be able to be the equivalent of a court hearing, save for the fact that it deals with the jurisdictional issues. So, I take your point that it should be said that ... Not that they should have the discretion to allow but they should allow. The actual wording itself, we can work on. But it seems to me to make sense in that I don't think that anyone would disagree with that, given that that's what we've always maintained would be the case. Mary, you're next.

MARY WONG: Thanks, Chris. So, I wanted to follow up on David's comment and Jeff's comment. To David's comment, I think we're recognizing that the question here is whether this language belongs, not just in Recommendation 5b but belongs in the recommendation in the first place. And from the staff perspective, it really is a question of just making sure that that is clearly understood by the people submitting

comments, ultimately by the council in terms of implications when it approves your recommendations, by the board, if and when it adopts those recommendations, and certainly going into implementation. So, maybe it's a question of making it clear not in the recommendation text but in a descriptive paragraph about our understanding as to the implications of these recommendations.

CHRIS DISSPAIN: On that basis, if that's the reason for it being there, it is in exactly the wrong place. It needs to be ... It's nothing to do with Recommendation 5b on that basis and everything to do with an overarching understanding of the way the system works. So yes, you need to excise it from there and move it to a more appropriate place earlier in the text, away from the recommendations. Okay?

MARY WONG: Will do. And then, with respect to it—

CHRIS DISSPAIN: Thanks, Mary.

MARY WONG: No worries.

CHRIS DISSPAIN: Yeah, go ahead.

MARY WONG: And to follow up on Jeff's comment, with the text you see in C, like I said earlier in the chat, it's really drawn from the principles from an early WIPO paper on what de novo arbitration could mean out of a UDRP proceeding. I think the concern here is similar to, also, what Susan voiced, that, because we have not done a comparison about the different rules, we don't want to get too much into the details of what specific arbitral rules might cover. And I think there's one concern here, too, that we might not necessarily want to create a recommendation that is in conflict with what those rules might prescribe.

CHRIS DISSPAIN: I agree with you but it is critical to bringing this group to consensus that it is clear, and, I would argue, to getting buy-in from parts of the community in respects to this process, for it to be clear that this is a jurisdictional matter, not a matter that prevents a full hearing. And so I think, whilst I completely agree with everyone, all the points that have been made, we need to ensure that we don't step into the implementation team's area and we need to be sure that we don't get down in the weeds.

What we do need to be clear on is the overarching principle, and I would argue that the overarching principle that we all understand is not currently reflected in that text because it gives a clear impression that it's up to the arbitral panel or the tribunal. So, I think it does need to change for that reason. Brian.

BRIAN BECKHAM: Yeah. Thanks, Chris. First, I like the suggestion Mary made about moving the text at the bottom to kind of an explanatory text. That seems to make sense. In terms of the question from Jeff and the discussion we've been having, this feels a little bit to me like the comment that Paul and Susan raised. Just to be clear, if we were going to have gone down the fork in the road of creating an internal appeals process, we would have much more ability to customize the process along the lines that we're discussing here.

But if we're going to ... And I think Paul and Susan make a valid point: how far down into the weeds do we want to get? If we're going to accept that that's the direction we're taking, then arguably what's there in C already goes too far. All you would need is the first sentence because, again, what's being proposed already on screen to some extent in the last parts of that clause ...

And then taken, even, a level further with Jeff's suggestion, is purporting to create a special set of rules for an arbitral institution, that it's not clear that it's within the remit of this working group to do if we want an arbitral institution to actually take these cases, should they arise, on board.

So, again, I actually would have preferred if, a long time ago, in our work, we would have gone down a different fork in the road and discussed these types of things. But if we're not, it seems to me we are articulate the high-level principles. And by the way, I don't think you'll find an arbitral institution or tribunal that wouldn't agree with this, but sort of purporting to instruct them at a level before they're even constituted strikes me as differing from the comments made by Susan and Paul, which I thought we had kind of largely agreed on. Thanks.

CHRIS DISSPAIN: Thank you, Brian. I'm conscious that we have five minutes left, so let's be brief, please, Jeff.

JEFFREY NEUMAN: Yeah. I have to disagree that this is implementation. I think it's very important, at least at a high level, that we say that the parties are able to present witnesses, cross-examine witnesses, things like ... Something like that to define exactly what we mean. We don't need to say that you need to allow two weeks for depositions or whatever. That's too far in the weeds.

But just a general principle of being able to present evidence, cross-examine other evidence. I mean, this is like general legal stuff that is policy-related. Again, if we're going to accept the fact that the mutual jurisdiction clause is gone for these matters then we need to, as Jay has been saying, make sure that this arbitration enables cases to be heard on the merits in a way that is as close to a court as possible without subjecting IGOs, of course, to a jurisdiction of a court. Thanks.

CHRIS DISSPAIN: Thank you, Jeff. Susan, you have the last word before I sum up.

SUSAN ANTHONY: Thank you. I do understand Jeff's remarks but I guess I must agree with Brian that if we were going to develop our own arbitral mechanism, which is something that I thought at one time we were

going to do, we haven't done it yet, and we would need considerably more time, and it's time we probably would have undertaken earlier in the process. Whether this is something we could push forward for continued work, I don't know.

But to me, the general principle of this section is well-stated by Mary in the chat when she said, "The specifics will be determined by the actual arbitral rules chosen." To me, that is a general principle that should be set forth, and I appreciate your suggestion, Chris, that we have some additional insight/be given some additional insight into what arbitration rules typically encompass.

CHRIS DISSPAIN: Thanks, Susan. So, I think what we'll ... Here's what I think. So, first of all, my view is that some form of additional clarity around this text is probably going to be necessary in order to give comfort to the people who are being asked to move away from the current status quo. Secondly, I think that the Implementation Review Team is more likely to thank us for providing them with a bit more guidance than not.

And the community generally, probably, given that merely just saying it's up to the arbitral rules ... Sorry. It's up to the institute that you choose to run the arbitration to decide on the rules. I appreciate that arbitrators and arbitral institutions like it to be that way but I have personal experience of circumstances where [inaudible] [effect to] WIPO where the Australian [tended to be] resolution policy, which we asked WIPO to be a provider on, was different from the way that they would normally undertake these things. And we asked them to agree to that.

So, I want to see some wording, please, for us to consider on the list. Mary, if you could take what has been said? It probably doesn't need to be quite as defined—no offense, Jeff—as Jeff has said, but I do think it needs to be clear that there should be the ability to call witnesses to have a ... Whatever the right words are, for a hearing. I'll let you guys sort that out and come back.

Now, here's the situation. We know that this current document is ... We've gone through this current document, subject to the caveat that everyone has got another few days to look at it. We are going to do summary wording. We know what that rewording is. That's to do with splitting off the recommendation so it's clear what the options are, splitting off the ... Making sure that the brackets are in the right place, etc.

There will be a couple of suggested alternatives, including in this Recommendation 5b, that we will need to look at and consider. And there will also be, separately—because I want us to look at this document as the core of what we're doing—a draft of the wraparound stuff, the executive summary and all of the other bits and pieces that wrap around these recommendations, which will come out in clean text to everybody in the next few days for you to consider.

We will reconvene on Monday next week, too, but it would be very difficult for you to be bringing substantial changes on this document on Monday, except in respect to any alterations that are made in the next couple of days. If you've got a problem with the recommendations that we've gone through today, you really need to get that onto the list in the next couple of days so that we're only talking about the setup, we're talking about the way it's numbered,

we're talking about all those sorts of things, on Monday, rather than anything else. Brian, I see your hand is up. If you could be brief, please?

BRIAN BECKHAM: Yep, super quick. I wanted to just ask, given that, of course, the majority of people that have spoken on this have kind of leaning toward the high level versus the details, maybe this could be an area where we put two options in brackets? That's on the specificity of the kind of arbitral process versus the high-level [inaudible].

CHRIS DISSPAIN: Sure. Sure. Sure. I don't have a problem with that. I just want to get some wording on paper for us to look at and then we can work out the logistics. But a good suggestion, thank you. I appreciate that. Okay. So, please look at this document. Bear in mind the changes we've discussed and come back with any red flags, and cannot-live-withs, any real issues in the next couple of days. Please look at the revamped version of this document and let us know if there is anything that sticks out and is problematic.

And please look at the second document that will come out, which will be what I'm calling the wrap-around, which I know is important ... Is less important than making sure that we have the recommendations down. I look forward to seeing everybody on the call next Monday and really appreciate everybody changing their agenda for today so that we could have this call. Thank you, all. Take care.

TERRI AGNEW: Thank you, everyone. I will stop the recording and disconnect all remaining lines as the meeting has been adjourned. Stay well!

[END OF TRANSCRIPT]