
ICANN Transcription

EPDP Specific Curative Rights Protections IGOs

Tuesday, 22 February 2022 at 15:00 UTC

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TERRI AGNEW:

Good morning, good afternoon, and good evening, and welcome to the EPDP Specific Curative Rights Protection for IGOs call taking place on Tuesday the 22nd 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 from Jeff Neuman. All members and alternates will be promoted to Panelist. When using chat, please change the selection from Host and Panelists to Everyone, which will allow all including the attendees to see the chat. Attendees will have view to the chat only. Alternates not replacing a member are required to rename their lines adding three Zs at the beginning of your name and at the end in parentheses the word alternate, which means you are automatically pushed to the

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end of the queue. To rename in Zoom, hover over your name and click Rename.

As a reminder, 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 way of the Google link. The link is available on all meeting invites towards the bottom.

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 email 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 processes should 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 very much, Terri. Hello, everybody, welcome to a Tuesday for once. The 22nd of the 2nd, '22, apparently that's meaningful to some people. It just looks like a lot of twos to me but there we are. Today we're going to hopefully reach a point where we can call some or all of these recommendations as relatively stable. That's our goal, anyway.

So the first thing I'm going to ask to have happen is for Berry, if he wouldn't mind, take us through the dates that, all being well, we should be able to adhere to if we can manage to coalesce around the work that we've done so far. Berry, I was going to do it myself but I think it's better if you do it.

BERRY COBB:

Thank you, Chris. I don't have our workplan ready to share on the screen. I'll send out a summary version of what we're stating verbally here after the call. So we are meeting again next Monday on the 28th. As Chris noted, today our goal is to hopefully exit out of this call with a stable assignment to all of our draft recommendations. Next Monday we aim to hopefully be able to kind of review all of the recommendations together as a package to make sure that we're in the place that we need to be as it pertains to our schedule, noting that ICANN73 is the week of March 7th.

And I'll just go ahead and announce it but, if you haven't noticed, our session for IGOs was cancelled given conflicts with members of our representative groups and having to work with your respective groups and all of that. So nothing on ICANN73 week for IGOs and Chris will talk more about that at the end of the call.

For the 14th of March is when we'll reconvene. On the 14th, we aim to have the first draft of our final report that will have imported the stable recommendations so that the group can begin to review through those and that'll be the substance of our call on the 14th.

After that call and assuming, as Chris noted, we still seem to be heading towards general agreement, is when the chair will

determine preliminary consensus levels for each of the recommendations and so essentially this is a formal kick-off of the consensus call. That will then lead us into the 21st of March meeting where we'll review through those consensus designations, we'll address or deliberate any issues with some of those consensus designations, but essentially using that call time to work through those.

After the call on the 21st will kind of be the second round of confirming those consensus designations but will also kick off any, if there are still remaining concerns about the consensus designations, is the start time for which groups if they wish to submit a minority report against the final report.

And then on the 28th of March is when we'll be moving into the final consensus designations from the chair.

In parallel, from the 14th through March we will be allowing non-substantive edits to the report. There's always certain levels of edits required, certain wording updates or misspellings, whatever, but the point is that the substance of the draft recommendations won't be changing but there may need to be additional rationale statements connected to the recommendations and so forth.

And then finally that takes us into the 4th of April. We'll have a call scheduled if we need it but the 4th of April is when we would submit the final report to the GNSO Council. And, as I noted, sorry for stating this verbally but I will send out the workplan after the call so that you can see it in written form.

CHRIS DISSPAIN: You've no need to apologize for stating it verbally. It's fine. Thank you. We'll talk a little bit about emergency dates, if we need them, towards the end of the call. So thank you for that, Berry, I hope everyone's clear.

The next thing we're going to do is ask Steve to take us through the flow chart. This is the flow chart that was sent out to everybody a while ago and is intended to act as a guide, if you will, to how the two recommendations, 3 and 4 and, I suppose 5 as well to an extent, hang together. Once we've gone through the flow chart then we're going to go to the recommendations themselves, specifically 4, and look at it in clean text to make sure that it does everything that we want it to. So, Steve, go ahead please.

STEVE CHAN: Thanks, Chris, this is Steve from staff. So the purpose here, as Chris and Berry also kind of alluded to, is just to capture everything at a high level and see how the recommendations fit all together, so it's always nice to have that visual. I will emphasize that this is definitely at a high level. If it was more detailed, you'd probably see swim lanes where you have all the responsible parties and every single step along the way. But this is intended to really target in on the recommendations that this group is potentially making.

So, with that in mind, the blue boxes are the ones that are relevant to this group and they're modified, I suppose, to the way that this group is going to make their recommendations or likely to. And then the white boxes are the ones that are more or less copy-and-paste from the existing process. So with that, I'll run through the whole process. You can stop me along the way or we can chat at the end.

But the first box is actually one of the ones where you have a little bit of difference. Box 1 includes the recommendation from 1 about the definition for IGO Complainant. It also pulls in some language from Recommendation 3 where it notes that the IGO Complainant, when submitting its UDRP or URS is exempt from mutual jurisdiction.

And then it also captured the point that I think this group discussed not too long ago where, up front, the IGO Complainant is expected to agree to resolving any challenges at the arbitration as a final mechanism. With that you have a couple of standard processes where the domain gets locked and then the proceeding is formally initiated, in which case the copy of the Complaint is sent to the Respondent.

Then the next box here is another bit of Recommendation 3 pulled in where Berry is helpfully circling it. This also I think was discussed very recently. It's about adding some additional clarity for the Respondent so they have some upfront knowledge as they receive the complaint, reemphasizing, I suppose, that they have a right to challenge in court. Two is that they're notified that the IGO Complainant under discovery may assert their privileges and immunities. Then 3 actually is not included here but it should be. It's in the draft text. It notes that the Respondent can go to arbitration, this is probably a little bit loose in saying this, but at any time. They're not required to go to court first. They can actually go to arbitration directly.

Moving on, again another basic element of the UDRP and URS is the examiners are appointed. The next one is when they're actually

completing the proceeding, they take into account the definitions identified in Recommendation 1.

Then we assume that the decision is made or, in this case, the examiner finds in favor of the IGO Complainant and the domain name is suspended. Here we return to the recommendations from this group. Here the Respondent is informed of their possible actions and you'll see in the decision box here there are actually three outcomes. Well, actually, just to stop on the box for a second. So they're notified that they can go to court or they can go to arbitration. That's when the registrar's going to wait 10 days before they implement a decision unless they're told by the parties that they're going to pursue one of these two options of the courts or arbitration.

So the three outcomes and the very simple one is, if there is no response from the Respondent, then the registrar carries out the decision and implements the decision in 10 days. That's on the far right side. The decisions here now is if the Respondent wants to go to court and the court declines to hear the merits of the case. You'll see that Berry is again helpfully circling that. That's directly down. And then the subsequent to that, if the case is not heard on the merits of the case, is they can then go to arbitration, which is on the left-hand side.

Then again, stating the elements that this group discussed is that the Respondent can also go directly to arbitration, which is the third outcome on the far left. So it's either no response, directly to arbitration or straight down court, the court declines to hear the merits of the case, and then subsequently arbitration if the Respondent elects to pursue that. So the arbitration is dependent

on mutual agreement but in this case, on the very first box of this process flow, the IGO Complainant will have already agreed so it's really just dependent on the Respondent agreeing to arbitration to have the arbitration proceed.

Then the last box here on the very bottom is about the choice of law and then it follows the recommendation text in 6 and the cascading levels of ways in which the applicable law is determined. I don't think I need to go into that detail but it's all there in the text.

Then, of course, everything ends up with the decision being carried out by the registrar accordingly. So again very high level. I think that's what this group wanted but hopefully that'll make sense and hopefully it puts everything in context of what this group is potentially recommending. Thanks.

CHRIS DISSPAIN:

Steve, thank you, and, yes, I think that is exactly what we asked for and appreciate the work that's gone into doing that. Obviously the key is now to look at the recommendations themselves but just before I do, bearing in mind that we going to be going into this in some detail over the next 45 minutes, does anybody have anything specifically to say that's thrown up by the flow chart?

Okay, let's go to 4. And let's make that big, shall we? Ditch 5, give me 4, thank you. Okay, Mary, are you prepared to walk us through this? I think you're probably the best person to do it if you're happy to do it.

MARY WONG:

I can try and the important thing is to make sure that everyone has the chance to review the text currently. We think that the text captures, or we hope it captures, the group's deliberations to date, including some of the latest discussions and proposed changes. But the one area where we will probably update the text is in (ii), the second sentence, because the arbitral rules and the framework and the policy principles that should apply to those arbitral rules is still being worked on by a small team that will be meeting again next week.

CHRIS DISSPAIN:

Mary, thank you for bringing that up. Just before you start, I should have briefed everybody before, my apologies. So there is a small group as you know that's working on providing some overarching guidance in respect to arbitral rules. That group is due to meet next week. There is some work going.

Jeff has undertaken ... He's not on the call, unfortunately, today. Jeff has undertaken to do a bit of research and will be coming back to that small group with some suggested helpful input in the next few days so that, when that group meets next week, hopefully before our full call, they'll be able to discuss the things that we will be suggesting and then report in to the call on the 28th. So, yes, we should mark at the end of (ii) as still subject to input from the small group and agreement by the PDP. Thanks very much for bringing that up, Mary.

MARY WONG: Not at all, Chris. Berry had highlighted that part on the screen. If anyone were to go back to the redline version, you'll see that there's a note there as well, but we're looking at the clean version here, as Berry's noted, because ... There you go, the beautiful, colorful redline version that's probably hard to read.

CHRIS DISSPAIN: Take it away.

MARY WONG: We thought it was important to maintain that until the text is stable just so that everyone can go back and track where we've been, what we did in the last few weeks, and so here we are at this clean version as of today.

I should also precede this part, Chris, by reminding everyone that you had previously reviewed Recommendation 3, obviously. And a couple of the clarifications that we had made to that preceding Recommendation 4 is that when a Respondent, a registrant, is first notified that a complaint has been filed against it by an IGO Complainant as defined, that Respondent is under the current, I think it's Recommendation 3, also provided information or at least notice of the various routes and options available to it, including arbitration at the end of the process should it wish to pursue that route.

So not going to detail but, by way of background, we have an IGO Complainant as defined, when that Complainant submits a complaint to the provider in (i) you see that at the same time that IGO Complainant agrees, assuming that the registrant at the right

time also agrees, that arbitration can be a way of settling the dispute in a binding and final manner.

So then all the stuff that Steve went through in his flow chart, it happens and flows through this text, we hope. So assuming we go through and we have the panel decision, then here is probably the change that some of you may recall. If you haven't been following, this is one of the changes from a very early version in that, under (ii) we had previously required or prescribed that the registrant would have to agree to arbitration at the point it's notified of the initial UDRP decision, even if that arbitration only happens after the registrant chooses to go to court. We have changed that in accordance with this group's wishes and, as I said, that's probably the major change here in that the registrant now is no longer required to agree upfront to considering arbitration. That's in (ii).

Chris, I see that Kavouss has his hand up and you look like you wanted to say something. Should I keep going?

CHRIS DISSPAIN: No, I was fine. Keep going. We'll get to questions in a minute. Thanks.

MARY WONG: Okay, and in fact the rest of Recommendations 3, 4, and 5, there is really no substantive change to previous versions. There's some language changes really just to clarify again that we are not requiring the registrant to agree upfront to arbitration. But all the time limits from before do apply as well as the option for the

registrant to first pursue a proceeding in court before opting to go to arbitration.

CHRIS DISSPAIN: Okay, thanks for that for now. Hi, Kavouss, your hand is up. Please go ahead.

KAVOUSS ARASTEH: Yes, thank you very much. Good morning, good afternoon, good evening. Could you go back, please, to the chart?

CHRIS DISSPAIN: To the chart, sure.

KAVOUSS ARASTEH: Yeah, flow chart.

CHRIS DISSPAIN: Yeah, no worries. It's on its way. Here we go. Which bit do you want to see?

KAVOUSS ARASTEH: I just see that a lot of thing is not good here. When you say losing registrant initiative, that means you lose something. Put it in the basket or you will [have lost it]. It's not losing. Either not accepting or ignoring and so that's not losing the registrant initiative.

CHRIS DISSPAIN: No, it's not.

KAVOUSS ARASTEH: There are many mistake like this.

CHRIS DISSPAIN: No, it's not a mistake. That's correct. Berry, could you just scroll back a little bit so that the diamond isn't ... Thank you. Kavouss, if you look, that diamond follows from the UDRP panelist finding in favor of the IGO Complainant and so that means that the registrant is the losing registrant in the UDRP. If the registrant—

KAVOUSS ARASTEH: No, Chairman, it's not losing. You insist. It's not losing.

CHRIS DISSPAIN: It is.

KAVOUSS ARASTEH: Registrant initiative is not carried forward. It's not losing. No one lose nothing because you have something in your hand, you go walk in the street, you lose something, fall on the street. This is losing. It's not this one.

CHRIS DISSPAIN: Respectfully, respectfully, Kavouss—

KAVOUSS ARASTEH: No, Chairman, I don't agree with this sort of the language. There are many mistake here. There are many, many mistakes here.

CHRIS DISSPAIN: So, Kavouss, thank you. I appreciate the input. This is merely a chart that is being used at the moment to help us to understand the process. It doesn't form a part of any documentation and arguing about the individual choice of words here isn't going to achieve anything because at the end of the day this chart will disappear. It's on the table merely as a useful reminder to everybody of how the process works. So parsing the individual sections doesn't affect the documentation in our final report.

If we end up with a chart in our final report and, at the moment I don't know if we will or we won't, then we can argue the semantics of whether or not it is a losing registrant who initiates the court proceeding. It's a shorthand for the purposes of this chart. But if you look at the policy documentation, which is Recommendations 3 and 4, that has far more specific text in it. Do you want to respond?

KAVOUSS ARASTEH: Chairman, in fact you don't listen to me. That's all. And you insist of what you're saying and what the group says. I'm sorry, I have also some views. I should be respected. Either you put at the beginning of this chart that the following chart is of informative nature, I have no problem.

But we are not writing for ourself. People look at this chart, they should understand. Losing registrant initiative, that top one, lose that in the street or in the table or in the room or in the basket. It's

not correct. Okay, if you want to be happy with what you've done and you don't allow anyone else to comment, put at the beginning of this chart that the following chart is of informative nature only. Could you agree with that? Thank you.

CHRIS DISSPAIN: Thank you, Kavouss, and no. Two things, one the chart is merely up in front of us today and doesn't form part of the documentation, so it isn't necessary to title it at all. And, secondly, the phrase losing registrant is the correct phrase and is a phrase that is used consistently across the relevant documentation across ICANN in respect to the policy. So it is in fact correct to refer to the registrant in this context as the losing registrant. And indeed we have been referring to that status, if you will, of the losing registrant consistently throughout our deliberations. So I appreciate your view but I don't agree with it.

KAVOUSS ARASTEH: But, Chairman, if it appears in the documents I would not agree with that. Please—

CHRIS DISSPAIN: But it doesn't appear in the documents. That's my point.

KAVOUSS ARASTEH: In no document this text appears, that losing registrant initiative. If it does not appear anywhere, I have no problem at all. I fully agree with you.

CHRIS DISSPAIN: Thank you.

KAVOUSS ARASTEH: So you ignore this chart after this meeting, very good. Thank you very much. You said that this term, losing registrant initiative, would not appear in any text. Thank you very much. I'm happy with that. But if appears anything losing registrant initiative has other meaning. That was your intent. It might have double meaning. So that is that. So I just require that you said that. It does not appear in any document and this chart will disappear after this meeting and I thank you very much, sincerely.

CHRIS DISSPAIN: Thank you, Kavouss. Justine?

JUSTINE CHEW: Thanks, Chris. Kavouss, if I may, I don't whether you are reading the text incorrectly. It says losing registrant initiates, not initiative. So I'm not sure whether you are misunderstanding the context of it and, in support of what Chris has said, the group has been discussing this for a long time and I think we all agree that losing registrant is the correct term. Thank you.

CHRIS DISSPAIN: Thank you, Justine. Can we go back now to Recommendation 4, please? Actually, no, before we do that, I tell you what, just to give us a complete picture, Berry, put up Recommendation 3 and let's

just briefly discuss that and then we can sit the two together. That needs to be bigger, Berry. Thanks. Brilliant.

So this is 3 as amended and we've discussed this for some considerable time. So where we are with 3 is the IGO Complainant as defined is exempt from the requirement under 3(b)(xii) of the rules and 3(b)(ix) of the URS rules, so the UDRP rules and the URS rules. That's the mutual jurisdiction bit.

And then the EPDP team recommends that when forwarding a complaint filed by an IGO Complainant to the Respondent, the relevant UDRP or URS provider must also include a notice informing the Respondent, one—you'll remember this is where we got to last week—of its right to challenge a UDRP decision cancelling or transferring the domain by filing a claim in court; two, that in the event the Respondent chooses to initiate court proceedings the IGO Complainant may assert its privileges and immunities with the result that the court may decline to hear the merits of the case; and, three, that it has the option to agree to binding arbitration to settle the dispute at any time, including in lieu of initiating court proceedings or in the event it files a claim in court where the court has declined to hear the merits of the case.

I think that covers all of the eventualities that we discussed. I think it deals with the issues that David, Matt, and Brian have been raising in respect to mutual jurisdiction. It may not be a perfect solution but I think it provides enough flexibility and a clear understanding of what everybody must do in the circumstances.

So, given that, if we then switch back to Recommendation 4, if you could do that, thank you. Leaving aside the end of (ii) in respect of

the arbitral rules, if we could scroll so that we have (i) and (ii) in view, thank you. I think 4 then, following on from 3, starts to make sense and sets out quite clearly what the process is in order for the dispute to be resolved.

So, with that, I'm happy for the floor to be open and anybody who has any substantive comment to make on those recommendations to do so now. Brian, welcome.

BRIAN BECKHAM: Yeah, hi, everyone. I had gone through and we IGOs had consulted last week and had a few little, I hope, housekeeping comments. Some of them, for example in clause (v) of Recommendation 4, I think actually the text that was there in the prior version worked a little bit better than what's in the new clean version. So I don't know if that may be something that is easy to knock out or we consider it best to do on the list, completely—

CHRIS DISSPAIN: Are you able to give us an overview of what the issue actually is, Brian? That would be helpful I expect.

BRIAN BECKHAM: Yeah, and, sorry, I was jumping the gun a little bit there. So the first clause which says "with the result that ..." And I think the prior version said something like "and the result is that" or it could say "and where the result is that," towards the end of that line there. Seeing it in a clean version, I think it didn't quite work as tightly as it could. So that was just a small textual suggestion.

CHRIS DISSPAIN: Okay, I think if it's that level—if we're not talking about substantive change but you really are wordsmithing, which you're quite entitled to do, let me say—then I think we need to do that on the list. I don't know about you but I get word blindness if we try and do it on the fly.

BRIAN BECKHAM: Yeah, I agree. I'll just drop something in the chat in case that's useful for staff.

CHRIS DISSPAIN: That would be helpful. Thank you very much. Did you have anything else?

BRIAN BECKHAM: Yeah, there was a couple of other things. Again, in sub (v) of Recommendation 4, the second sentence there. And maybe I was just getting a little bit lost myself but it wasn't entirely clear to me if that was needed as being duplicative or if basically just the last clause of that sentence was necessary—basically the statement that if no arbitration case was filed, then the UDRP decision would be implemented. If I'm just getting lost with the words there, then that's fine. On my reread of this it wasn't clear to me if that second sentence was helpful or maybe introducing a little bit of confusion. Thanks.

CHRIS DISSPAIN: Thank you. Let's just first of all check. You are referring to the bit that's highlighted at the moment, yes?

BRIAN BECKHAM: Correct.

CHRIS DISSPAIN: Okay. Mary, do you want to address the point that Brian's just made?

MARY WONG: I can try, Chris, and thank you, Brian. We've noted the first correction as well. I think this language has been there for a while. So to your point, Brian, maybe I'll need to take it back because it could be that some of the changes that we made in the last one or two weeks may indeed have rendered that particular phrase that you highlighted either confusing or irrelevant. I think the phrase that you're highlighting is about whether or not the registrant does in fact request arbitration in the middle of that sentence.

I don't have a specific answer now but I think the point is that we probably need to take a look at all the text—and, Chris, you have discussed this with staff—to make sure that changes that we made earlier on are not confusing by subsequent changes.

CHRIS DISSPAIN: Yes. Again, two things. Again, I failed to mention at the beginning, and I should have done, that one of the things that you're going to

do, Mary, between now and next week is a gap analysis so thank you for that. Sorry, could you highlight that again? Thanks.

And secondly it seems to me, certainly by looking at it, that whilst some sort of sentence may be necessary it certainly doesn't need to be this one. I think that a simple statement that says if there's no request for arbitration at that stage, within X days, then etc. I think that's probably right. I think that the length of the sentence and the amount of detail provided is probably unnecessary. So, Brian, thank you for flagging that. I agree. That's not in the domain that nothing may be necessary but let's look at what that something is and certainly streamline it from that point of view. Yes, I note your comment in the chat about a clean pass.

So, Mary, if you could take that away and consider amending that to be more helpful, that would be good. Is that okay?

MARY WONG: It is and I'll add that all this was obviously before we had a flow chart and we were trying to cover all eventualities through text.

CHRIS DISSPAIN: I appreciate that. Thank you very much.

Okay, Kavouss, go ahead, please.

KAVOUSS ARASTEH: Yes, in (v) in the middle of the first line it says "with the result that the court declines to hear." We don't need to say "with the result that." We should just say "but the court declines to hear that." We

don't say "with the result that." It is not a good way to proceed or good way to draft. Where the registrant initiate court proceedings but the court declines to hear that.

CHRIS DISSPAIN: Thank you, Kavouss, I think that's probably—

KAVOUSS ARASTEH: No, I'm talking about the first line.

CHRIS DISSPAIN: Yes, I agree. I was going to get there. I think that's probably right, although it should be "and" rather than "but," but thank you, Kavouss. I think, in an attempt to streamline the text, you are correct that the words "with the result" are probably extraneous and could be replaced with the word "and" or even the word "but." So thank you for that. Did you have anything else you want? No. Okay, your hand is down.

Anybody else? Jay, I just want to address your point in the chat. I do appreciate your point that we do need to be specific about the steps. In other words, yes, if this happens or this rather doesn't happen, then the following things will happen. I just think it's too wordy and could be a lot simpler than that, so I think we're on the same page there.

Brian, go ahead.

BRIAN BECKHAM:

Thanks, and moving over to clause (vi), and I think this may come up in (iv). I just apologize. I'm going back and forth between my notes. I'm only on one screen today. But just maybe a quick background. So normally, when a UDRP complaint is submitted, a provider processes that, we say, So we see did they make the necessary assertions: that they have a trademark, that they accepted a mutual jurisdiction, they asked for a remedy, they selected a one- or a three-member panel, they paid the fee. So it's all terribly routine stuff.

In slight contrast to that, in an arbitral proceeding, it's actually the submission of the claim that starts the proceeding. So it's not necessary that the arbitral tribunal or body would undertake some sort of a compliance formalities review. So there's a slight difference there and what I wanted to just get at was where it talks about the registrant signaling its intent to commence arbitration and so on. I don't have particular language. But the point was, in arbitration. it's the submission of the claim that starts the arbitration.

CHRIS DISSPAIN:

It's joint parties, right?

BRIAN BECKHAM:

Sorry?

CHRIS DISSPAIN:

It's the joint parties, right?

BRIAN BECKHAM: Well, one party could submit the claim but more what I wanted to get at is what's the triggering event that we want to capture that would allow the registrar to say, "Okay, I'm going to not implement this decision." Is it that the arbitral tribunal has responded to say, "Yes, we've received this request to submit to arbitration?" Is it that they would be copied on the request for the arbitral claim? It could be phrased different ways but just to give the registrar something, some kind of formal event which lets them know that they shouldn't implement the UDRP decision.

CHRIS DISSPAIN: Yeah, excellent point, Brian. Thank you. Mary?

MARY WONG: Thank you, Chris, and thank you, Brian, because in highlighting (vi) it was my mistake. I should have actually highlighted that we added the language here. You're absolutely right, Brian. Amongst the staff we were thinking about the triggering events for various things to happen. I think number one, we were certainly not intending that the arbitral provider or tribunal should have any action or should be required to take any action for that to happen. That wasn't the intent.

But what we were looking at was based on the assumption that arbitration, in the way that we're looking at it, has to be voluntary and has to be mutual. And I'm glad, Brian, that you, David, John and others who are experts are on this call, because we wanted to put it out there to see whether or not it was even necessary. Because if you assume, as we did, that voluntary arbitration must

be mutual, in a normal commercial context, that would have been part of the contract between the two parties.

That is not the case here. So we were looking for a place and a time where the registrant could indicate that I agree to arbitration, because you'll recall that in the earlier formulation, we had made that requirement to be upfront. That means before even doing anything the registrant says, "Yes, I agree that arbitration is the way to finally settle this." Having removed that, we were just looking for some other place to put it.

It could be that it's not necessary, in that simply by submitting a request to arbitrate, or simply by submitting a notice to arbitrate, whatever is the proper form, that that is the same thing as the registrant signaling its assent to arbitration. If that is the case then we do not need clause (vi) at all. If that is not the case, then we probably need something and clause (vi) was our attempt to build in that step before the arbitration actually starts. Does that help, Chris?

CHRIS DISSPAIN: Oh, Brian?

BRIAN BECKHAM: Yeah, thanks, Mary, it makes perfect sense and I think we're on the same page, which is just to give the registrar the comfort that they should or shouldn't do something. So that was all I had jotted down. I don't know. I was trying to look again at my notes, if it's best to scrap that or reword it.

CHRIS DISSPAIN: Just work on some text yourself and pop it in the list after the call if you can. I think that's the sensible way forward if you're okay to do that.

BRIAN BECKHAM: That's great and that was all I had. I was just, again, going over my notes. I don't know if David or Matt or Beryl had anything that I might have overlooked. Again, I'm trying to kind of go between screens here but that was all that I had jotted down.

CHRIS DISSPAIN: Okay. We'll see if any other hands go up but for now, Kavouss, your hand is up. Please go ahead.

KAVOUSS ARASTEH: Yes, I have two comments. One is paragraph (iv) and one is in paragraph (vi).

CHRIS DISSPAIN: Okay, go ahead.

KAVOUS ARASTEH: In paragraph (iv) sentence says that "where the relevant registrar has received a request for or notice of the arbitration it shall stay," very good, "or continue to stay (as applicable)." Why you have

comma? Stay what? Stay on the implementation of the UDPR panel decision. Why do you put a comma here?

CHRIS DISSPAIN: A comma where? Sorry, Kavouss. You mean after the word applicable, after the bracket?

KAVOUSS ARASTEH: No, no, applicable is okay. But if you want to say applicable you cannot say comma. You could say comma as applicable and then after that “on the implementation of,” say on what on the implementation. So the redaction of the text is not correct because either you want to say that stay or continue to stay and as applicable is the qualifier. The qualifier will continue without bracket but with a comma after that. Comma, “as applicable.” Okay. Say comma, “as applicable.”

Please delete this square. Comma, “as applicable.” and then “on the implementation.” So either “stay” or “applicable to stay” but the comma should be before the round bracket and there should be no round bracket because round bracket is the explanation to “stay.” There are two cases.

CHRIS DISSPAIN: Yeah, I understand what you’re saying. That’s fine. Thank you for that. I’m sure we will pick that up in the run-through of the text when Mary goes through it and I’m sure she’s making notes.

What’s your comment on (vi)?

KAVOUSS ARASTEH: Thank you for (iv) because I have drafted 100 or more texts like this with the qualifier as appropriate, as applicable, if appropriate—

CHRIS DISSPAIN: Understood.

KAVOUSS ARASTEH: And the way I mentioned is the right way.

Now, (vi), what do we mean by “other required forms?” What is forms? What is required forms? Required is a strong word. What is required? Applicable, options we are talking? What mean by form? Form of what? Thank you.

CHRIS DISSPAIN: Sorry, Kavouss. Just say that again, would you?

KAVOUSS ARASTEH: Yeah.

CHRIS DISSPAIN: Apologies.

KAVOUSS ARASTEH: In (vi), third line, we say “all other required form.” What we mean by other required form, such as what?

CHRIS DISSPAIN: Mary?

KAVOUSS ARASTEH: And why we use the word form but not option? And why you not use in a more clear way, or “other applicable options?” Why we say “required?” If something is required it’s mandatory. And why we use the term “form?” Thank you.

CHRIS DISSPAIN: Thank you. Mary, do you want to just take that under advisement or would you want to say something about it now?

MARY WONG: I can say something quickly but obviously we can change if it’s not clear. But the fact is that my own understanding is that, depending on the provider, depending on the rules that you use, there may be different types of forms. Not all may be called a request or a notice, so the point here really was to capture whatever requirement there is by that provider to start the arbitration.

CHRIS DISSPAIN: Okay, but if you could just take the input from Kavouss and just work through whether that needs to change or not, that would be helpful, okay?

MARY WONG: Yes, and John's put a suggestion in the chat that is perfect.

CHRIS DISSPAIN: Required form for initiation. No problem.

Okay, does anyone else have anything they want to say at this point on this? Just to recap where we're at? Yes, Brian certainly is going to work on a couple of wordsmithing bits. Mary's got some notes to take away and also is going to be tasked with, for want of a better word, checking to make sure that we don't have any gaps so that when we reconvene we can look at the text and know that everything is covered, which is obviously excellent.

Kavouss, go ahead.

KAVOUSS ARASTEH: Excuse me. Would it be possible for you go to (i), (ii), or (iii) for one minute?

CHRIS DISSPAIN: Sure, there you go.

KAVOUSS ARASTEH: And leave me one minute. I am sorry I was not able to attend when you said. Just give me one minute for all three. I just come back to you. Just a minute, please.

CHRIS DISSPAIN: Yeah, not a problem, Kavouss. No problem at all. While we're doing that, Berry, what else, if anything, do we have outstanding that we need to ...? Make sure we leave that where it is right now. What else, if anything, do we have outstanding that we need cover, Berry, before we send you guys away to wait for just a little bit of input from Brian and do the gap analysis and come back to us for next Monday's call? Hang on just one second, wait.

KAVOUSS ARASTEH: Can I comment on (i), please?

CHRIS DISSPAIN: One second. Yes, you can but just wait one second while I just deal with a question first. Mary, go ahead.

MARY WONG: Thanks, Chris, and I know you directed it to Berry who probably has some—

CHRIS DISSPAIN: Well, whoever amongst you.

MARY WONG: Well, he probably has his own homework or observations, too, but I just wanted to close out this discussion. We've taken notes but I did want to ask the group to take a look at Recommendation 5 because, even though it follows the same track, there's one or two specificities about the URS that has meant we've put in different

text. So I just want to be sure that people don't assume it's the same.

CHRIS DISSPAIN: No worries. We'll go to that once we've dealt with Kavouss's comments on 4 then we'll switch to 5. Thank you for that.

Kavouss, sorry, back to you. Go ahead.

KAVOUSS ARASTEH: Yes, in (i), the way it's drafted it seems a little bit strange. What you want to say here is that "when submitting its complaint, an IGO Complainant shall indicate and say that it agrees in the event the registrant also agrees." This is not a proper way to say that. Both should agree to have the final determination. Am I right or wrong?

CHRIS DISSPAIN: No, you're right that both of them need to agree but the timing is different. The registrant is not required to agree until later in the process, which is why the IGO Complainant's agreement is subject to the registrant agreeing as well. Okay?

KAVOUSS ARASTEH: We would not say that in the event the registrant also agree? This is not in the event—

CHRIS DISSPAIN: But it is.

KAVOUSS ARASTEH: With the agreement of registrant at the appropriate time and so on, so on, but not with the event that registrant agree. This is not the way that I can agree, in the event the registrant also agree.

CHRIS DISSPAIN: Okay, well, again we—

KAVOUSS ARASTEH: Once the registrant also agree.

CHRIS DISSPAIN: Again, we'll take notes in the comments and we'll deal with them in the redraft that Mary's going to be doing. So thank you for that. Do you have any others?

KAVOUSS ARASTEH: Just give me one or two minutes. You can go to other element. Let me to read (ii) and (iii) in two minutes. Yeah.

CHRIS DISSPAIN: Sure. Mary, do you want to take us to 5 and take us through what the differences are in 5?

MARY WONG: I can do that. Let me just pull up my own notes just to make sure that I don't miss anything like I did with clause (vi) in the previous one.

It really is just at the end when we talk about Section 12 of the URS. And you see it here. Thank you, Berry. This is actually language from before. We didn't change the substance of it but it does matter in the sense that there is a potential intermediate or advanced step before the court proceeding and before any arbitration, because unlike the UDRP the URS has a built-in internal appeals procedure. So we simply have something here in clause (iv) that makes it clear that this is not excluded, that that is part of it, and that the arbitration option that we're introducing also works in tandem with that internal built-in mechanism.

CHRIS DISSPAIN: Yes, I think we did discuss that at the time that we talked about it but it may be that people haven't necessarily reviewed the text. But I think that was certainly the intention, excuse me, that again we would be making as few changes as possible to the normal, if I can call it that, process so that we're not seen to be operating outside of our scope. Yes, I think that's right.

MARY WONG: And if I may follow up then, Chris?

CHRIS DISSPAIN: Yes.

MARY WONG: So and therefore because of the process and because of the involvement of the URS provider, after the initial determination, you'll see that in clause (v) this is 95% a mirror of what we just discussed under Recommendation 4, the clause (vi) that Brian mentioned, but where we had the registrant informing the registrar under the UDRP-related process, for the URS we have the registrant informing the URS provider simply because of the remedy and who's involved at this stage. It will not be the registrar; it will be the provider.

CHRIS DISSPAIN: Yeah, understood. All right, well, if there are any other comments on that we'll take those . One second, Kavouss. If there are any other comments on Recommendation 5, we'll take those in a minute. Before we do, go back to 4 and let Kavouss comment on (ii) and (iii). Kavouss, go ahead.

KAVOUSS ARASTEH: Yeah, (ii), let me say. In communicating, so on and so forth, it says "that the arbiter rules shall be determined by the implementation review team in making its determination," and yet—

CHRIS DISSPAIN: Kavouss, before you start. Sorry, let me interrupt you. I know I'm interrupting you but hold on one second. Before you start talking about that sentence, that sentence is coming out and it is going to be replaced—

KAVOUSS ARASTEH: This is coming out? Okay.

CHRIS DISSPAIN: Yes.

KAVOUSS ARASTEH: Very good, coming out.

CHRIS DISSPAIN: And it's going to be replaced with another sentence which we'll look at next week, so we can stop.

KAVOUSS ARASTEH: Okay, I'm sorry. And then—

CHRIS DISSPAIN: No problem. Ignore that.

KAVOUSS ARASTEH: - go to (vi), please. I have one small question.

CHRIS DISSPAIN: (vi) now? Okay.

KAVOUSS ARASTEH: What do you mean by “the provider?” There was somewhere talking about what was the provider. There was somewhere we talk of the provider.

CHRIS DISSPAIN: There’s no mention of the of the provider in (vi).

KAVOUSS ARASTEH: Let’s see. Because Mary referred to the provider somewhere. If I find that I come back to that because I don’t understand what you mean by the provider. Either you say you are the—

CHRIS DISSPAIN: The provider is the URS provider.

KAVOUSS ARASTEH: URS provider, yeah.

JUSTINE CHEW: Clause (v), Rec 5.

KAVOUSS ARASTEH: What do you mean by “the provider?” URS provider?

CHRIS DISSPAIN: Yes, that’s fine.

KAVOUSS ARASTEH: What is “the provider?”

CHRIS DISSPAIN: Yes, no problem. Again, that’ll get picked up in Mary’s run-through to make sure that we’ve dealt with all of the nits in the text. So thank you for that.

Anyone else? Okay, Berry. So just to be clear, I think we’re kind of ready to send you guys away to work on the gaps and putting the text together. Anything else you want to cover?

BERRY COBB: Just your comments for the groups to do during ICANN73 and then I think we’re done for today.

CHRIS DISSPAIN: Okay. Just give me one second. Okay, so our goal is to then convene again next week. When we convene next week there’s no new text per se. There will be wordsmithing changes. There will be a document that will combine all of the recommendations together. There will be a document or a note from Mary that calls out anything that she thinks or the team thinks are gaps, either in the process that we’re recommending or in the recommendations themselves. There will be some input, I hope, from the small group on the arbitral rules.

But, just so that everyone’s clear, I’m going to treat the arbitral rules guidance as a separate piece of work. I don’t think we need to worry about starting to work on the consensus call as such. I acknowledge

that the guidance is relevant and it will need to come in, but I think if that comes up towards the end that will be okay.

So the goal is that that happens next week on the 28th and that then the team goes away and drafts a first draft of the final report, which enables us to read that during ICANN Week because we will have nothing else to do and then on the call on the 14th, discuss and put me in a position to make my consensus call.

If we fall in a hole, this week or at our meeting on the 28th for whatever reason—I'm not suggesting it's likely, but I'm just saying if we do—then I think we will probably need to find time in the week of the 7th, even though that is ICANN Week, for a call. Hopefully we won't but I'm going to just flag that as a possibility and ask everyone to be flexible if we need to do that. I'm hoping that we won't.

Berry, have I covered everything you wanted me to cover?

BERRY COBB: Mostly. Berry Cobb for the record.

CHRIS DISSPAIN: So no, then.

BERRY COBB: So no. I think based on the verbal discussion about our upcoming schedule with targeting April 4th to deliver the final report, very shortly or directly after ICANN73, we're starting the consensus call process, final non-substantive edits, minority reports if they need to be made, all of that stuff.

It's going to be very important for everybody on this EPDP to also be liaising and collaborating with your respective groups about the substance of the draft recommendations that we have here, basically trying to get in front of that communication to your groups so that everybody is in the know about where we're going for two reasons. One, that's going to help inform this group as it does start to coalesce around the consensus levels on the recommendations. But, two, if for any reason your group may not have full support of the recommendations it will start to help you guide the substance of any minority report you may wish to submit.

So the takeaway message here is it's time to definitely engage with your respective group, communicate what the substance of the recommendations are, and those kinds of things which will better prepare us for our remaining work in March. Thank you.

CHRIS DISSPAIN:

Berry, I need you to do something for me. I'm conscious that there are a number of people who are not on this call and we're coming to, obviously, a very important juncture in our process. So could I ask you, the team, to put an email together that goes out to the full list that sets out effectively what you just said? Here's our timeline. I don't want complicated Excel spreadsheets. I just want a simple, straightforward, "Here's our proposed timeline. Here are the key milestones. Please be aware of the following, please reach out." Can you do that?

BERRY COBB:

Yes, sir.

CHRIS DISSPAIN:

Okay, cool. If we could get that out sooner rather than later that would be helpful so that people know the call that's coming up on the 28th is an important call and we can get people online for that if they want to be there. At the very least they'll know to expect documentation to come out after that call that it's important that they read. Thank you for that.

I'm not keen to stay on a call just because we've got 28 minutes left. I think everyone can get on with their lives unless there is anything else that anybody wants to say other than to confirm our next meeting is next Monday at 15:00 UTC.

Okay, I'm really delighted that we've managed to get through what we've got through today and I'm very hopeful that when we hit the ground running next Monday with the documents coming in from staff we'll be able to hit a significant milestone. I'd like to say thank you to all of you for being on the call and see you all next Monday. You can stop the recording now. The call is closed.

TERRI AGNEW:

Thank you, everyone. Once again, the meeting has been adjourned. I will stop the recordings and disconnect all remaining lines. Thank you all. Stay well.

[END OF TRANSCRIPTION]