
ICANN Transcription

EPDP Specific Curative Rights Protections IGOs

Monday, 10 January 2022 at 15:00 UTC

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TERRI AGNEW:

Good morning, good afternoon, and good evening. Welcome to the EPDP Specific Curative Rights Protections for IGOs call taking place on Monday the 10th of January 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 yourself now? Hearing no one, we do have listed apologies from Osvaldo Novoa. No alternates formally assigned at this time.

All members and alternates will be promoted to panelists. When using chat, please change the selection from host and panelist to everyone. Attendees will be able to view the chat only. Alternates not replacing a member are required to rename their lines by adding three Zs beginning of your name, and at the end in parentheses the word alternate, which means you're automatically

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

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

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

CHRIS DISSPAIN:

Thank you, Terri. Hello, everybody. Happy new year. I hope everybody had a great rest over what the Americans refer to euphemistically as the holiday season. But whatever you were celebrating, nothing, Christmas eve, whatever, I hope it all went well and everybody's relaxed. Looking forward to an exciting—and let's face it, it couldn't be much worse than 2021—2022. Good to see many of you here. And I think there'll probably be some more joining us. Hopefully some more joining us relatively soon. Also, I

recognize the number of people in the attendees room, including John, Terri. John, you need to make sure you're upgraded to panelist.

I'm going to start by giving you a quick update on a couple of things or one specific thing that has happened. So that is that last week, John McElwaine and I and Berry had a call with some representatives of the Registrars Constituency Stakeholder Group, the stakeholder group which Ashley Heineman and I organized. At that discussion, I explained to the Registrars that were at present part of their policy group why there had been some concerns expressed regarding the comments made by the Registrars. They explained that perhaps the interpretations that have been put on those comments weren't intended and I'm perfectly fine to accept that. I hopefully put their mind at rest that their comments were irrespective, taken seriously, and that the substantive comments that they had made will be dealt with in the same way as everybody else's substantive comments and that they would be taken into account. I did invite the Registrars to observe our meetings, which of course anyone could do anyway. And I note and thanks for being here that Owen Smigelski from Namecheap is in the attendees room. So, Owen, thanks for making the effort. Good to see you here and delighted you're able to come along and observe.

With that, today we are going to do a quick check in on Rec 1, and then we're going to move on to the start of our discussions on Rec 2. Remembering that we had long, deep, and meaningful discussions in respect to Rec 3 which we have put to one side for the moment with the agreement of us all that we would move to

Rec 4 and come back to Rec 3. On the Rec 3, you will have seen that I sent a note to Jay, which Jay has acknowledged and Jay has responded to with a clarification. Jay, thank you. I very much appreciate it. We will get to that when we get back to discussions around the relevance of that point. But if anybody has any questions or comments about the e-mail from Jay relaying the Business Constituency's position, it would be fantastic if you could put those into the list, much like Jay's response to us put into the list. It would be great if you could do that. It would be nice to have a heads up before we get to discussing it, which won't be at this meeting but maybe the next one or possibly the one after that. It would be nice if we had a heads up beforehand if people have questions or clarifications or responses to that. So please use the list for that purpose.

One final thing which I had forgotten to mention in respect to the Registrars conversation, the Registrars raised with me a point which they have also raised through their council reps at the GNSO Council when we asked for an extension of time and that was in respect to scope. I just wanted you all to know that I assured the Registrars that were remaining in scope is top of our minds the whole time, that we have in fact had numerous discussions about scope that we return to the discussions about scope all the time, that we're constantly assessing what we are saying and doing to make sure that we believe that we are in scope. Obviously, at the end of the day, we don't make that final decision. Others will decide but that we will only make recommendations that we believe to be in scope, and that so far, all of our discussions we think have been. And we've in fact amended certain things that we've talked about based on input on

scope. So I just wanted to put that out there so that everybody is aware that that came up in our discussion with the Registrars.

So with that, unless there are any burning questions or comments—and I don't see any hands—let's go to Berry and let's get started. Berry, over to you.

BERRY COBB:

Thank you, Chris. So we're just going to kick off on Recommendation 1. The group will recall we had our original small team that created, refined the definition for an IGO complainant prior to the initial report. After the public comments that we received, some of which were suggested changes from the IPC, that original small team reformed. What you see on the screen now is kind of the latest draft. I believe there's still a little bit of lack of agreement about specifically item i.b about what an international intergovernmental organization is. So this has been pretty quiet since before the Christmas break. I'm not sure if maybe Brian or Susan wants to say anything. I don't see Paul on the call. But the crux of it is specifically this phrase here about permanent observer status. And the back and forth basically was whether this particular phrase should be capitalized or not. Brian reached out to a few UN colleagues to try to get some better clarity around it. But based on that interaction and what was shared from Brian back to the small team, I think there's still lack of agreement about the specificity of this particular term. So probably what needs to be determined here very shortly is whether we can get to agreement on the proposed red line or something else to consider is whether or not we can revert back to

what was contained in the initial report, which was a little bit less specific about item i.b

Then secondarily, before I open it up, there's also a change in regards to touching on the original Recommendation 2 from the previous working group that was adopted by the GNSO Council. I think the point here is based on the proposed definition of what an IGO complainant is that there's momentum for moving away from some sort of list that contains the possible IGO complainants and sticking with the definition, but the small team seem to think that the Recommendation 2 may confuse things, and so there's offered up red line text here. So with that, I'll turn it back to you, Chris. It's kind of a summary of where we're at.

CHRIS DISSPAIN:

Well, thanks, Berry. I need to say for me, just to check in with Brian and just to see if they do actually want to say anything. No pressure to do so but if you do, now's the time. If not, we'll let you take it up. Brian, I can see you unmuted. So go ahead if you'd like to say something.

BRIAN BECKHAM:

Yeah. Hi, Chris. Hi, everyone. Just to, I think, mainly marry what Berry said, which was we had reached out to some of the colleagues in the UN to try to get a little bit of clarity over whether this notion of permanent observer status was something that would be defined in relevant documentation or not. And unfortunately, we didn't, I think, achieve the clarity that we were seeking. So I think mindful that Paul's not on the call and he was

part of the small group, we had a little bit of an exchange over the break but I think we all sort of went off and spent some time away from work. And so maybe we can try to circle the wagons and come back to this. I'm just seeing a note that Paul's on the call. So certainly I welcome any discussion on this. But I wonder if it's not a good use of time if we try, the small group, to bring a little bit of clarity and come back to the group.

CHRIS DISSPAIN:

Sure. I think that's probably sensible, Brian. It's fine with me. Just a reminder to everybody that, unless I'm wrong here, you guys effectively had already ages ago actually reached an agreement. This current discussion is because of a suggestion to include something different from the original agreement. I forget. I think it might have been Kavouss who suggested it but I can't remember. So at the end of the day, let's not lose sight of the fact that you guys had set a recommended definition that we can always settle on if necessary, assuming that there is consensus around that. But as you say, Brian, why don't you and Susan and Paul take it away and come back to us? And with that, Berry, I will give it back to you to take us to the next part of the agenda. Thanks.

BERRY COBB:

Thank you, Chris. Just to bring up closure on this. I'm going to go ahead and spoil the good news with bad news. But it's sounding like our next week's plenary call will be canceled due to conflict for Chris.

CHRIS DISSPAIN: Just to be clear, that call was supposed to be taking place on the Tuesday rather than the Monday, right?

BERRY COBB: Correct. The 17th, ICANN offices are closed and that's why we had scheduled for the 18th. But that conflict exists on the 18th now, and so I might propose that the small team for Rec 1, if we can't resolve the issue over the list between now and then, that we can use that time for you to meet so that we can get this ironed out and return it to the plenary on the 24th.

Okay. Next part of our agenda item is to begin Recommendation 4. Like previous reviews of the public comments, we have our Public Comment Review Tool. However, from a higher level, it's the same but it's different in terms of the comments that we received from the groups and individuals. Most of the comments that were submitted by individuals are, I guess, from the domain investment community. We're pretty much against this particular recommendation. But if they had to choose an isolation, typically it would center around option one. But in many cases, it was also connected back to the outcome of Recommendation 3. The other comments that were submitted by mostly the groups, specifically the IPC had some targeted types of suggestions or raised the flag about areas of this recommendation text that needed to be improved.

So for today's call, instead of going through the Public Comment Review Tool like we've done in the past, I think on our last call of 20 of last year, Chris had asked that staff create a new tool to try to help review through the comments, but at the same time, try to

break down each part of the recommendation and highlight the areas that we're going to focus on. So we sent this out to the list I think before the end of the year, as well as with the agenda item and basically walk through each component of the original recommendation text, and then review through the comments, especially those that are suggesting a possible change or an update.

CHRIS DISSPAIN: Berry, sorry to interrupt you, but I realized that it's gone out on the agenda and it's up on the screen. Does anybody need access? It's a Word document that you can open either looking at the screen or ... Why don't you send it out to the list or someone could send it out to the list now, Berry, just so that it's on top of people's inboxes? It might be helpful. Sorry to interrupt you. Carry on.

BERRY COBB: I just posted a list to the document that's out on the wiki.

CHRIS DISSPAIN: Cool. That'll do. Even better. Well done. Thank you.

BERRY COBB: So at any rate, column one over here on the left is the original text. And column two over here on the right is a very targeted extract of those particular comments that seem to be assigned or prescribed to each of the subcomponents of the text, and just

basically start from top to bottom and work through each one of these as we go.

So at the very top basically is the general header of the recommendation, the EPDP recommends that the following provisions be added to the UDRP. And in this specific case, let's kind of just put a slash URS as a reminder practically all of the comments that were submitted focused on Recommendation 4. And if there was any notation of Recommendation 5 which was for URS, basically they all refer back to see comments in Recommendation 4, mindful that URS is slightly different than UDRP and that it does have an appeal mechanism and those kinds of things. But, by and large, I think we're going to be able to work through the primary issues here from the public comments in the context of UDRP but keep URS in the back of your mind as we go through this.

So the header of the recommendation, as I noted just a few minutes ago, that basically the comments that were submitted where there was no support for the recommendation, I just really wanted to not to leave anybody out but to point here that there is a considerable amount of no support for the recommendation as a whole. And also noting that within the comment from the leap of faith that referred back to the previous working group about how IGOs could possibly use an agent or assignee. But at the end—

CHRIS DISSPAIN:

Let's just stop there for a second, Berry. I don't want us to lose track. If we go piece by piece, it'll just make it easier. So just to be clear and so that it's in the record, this group has considered the

leap of faith agent, assignee, or licensee approach. And the general feeling was that that was challenging and it didn't actually solve the problem that we were trying to solve. That's the first point.

The second point is acknowledging that a number of public comments do not support Recommendation 4 in general, i.e., the insertion of arbitration. I think it's worth again stating that the reason why we came up with it, as a suggestion, was because there was an understanding, and this understanding I think was across this working group. I don't think there was any disagreement that the current situation in which the IGOs would be required to nominate a jurisdiction—and I'm going to treat that as a separate matter—but nominate a jurisdiction and be bound and agree to a court hearing. A, let's call it an appeal. I know it's not an appeal, but rehearing a claim where UDRP decision had already been made is the reason why we're here. In other words, because it's not workable, because the IGOs say that does not even remotely solve our problem, that's why we're here. And that's why we considered the possibility and came up with, draw up a recommendation that we should insert arbitration. It's important to remember that—and we will get to this now in the subsequent comments—that is not an issue that if you choose option one is forced and in fact doesn't prevent or wouldn't prevent a registrant from going to court. But I'm getting ahead of myself now. I did want to make those statements as to why we ended up coming out with an arbitral review for the record. So, Berry, back to you now.

BERRY COBB:

Thank you, Chris. Okay. So moving down basically into sub recommendation letter i. I think the point here is to go through each of these. We'll touch upon the comments over here on the right at a high level, and then determine if there's anything that is possible to be changed in terms of the draft text that is listed here. Sub i is when submitting its complaint, an IGO complainant shall also indicate whether it agrees that the final determination of the outcome of the UDRP proceeding shall be through binding arbitration in the event that the registrant also agrees to binding arbitration. WIPO noted that as an alternative to court, at minimum arbitration as a default with an opt-out provision should be considered. Such option could be complemented by providing information about the benefits of arbitration as a party-driven process compared to the potential time and cost implications of court litigation, all more when questions of immunities would be involved. I'll note that there is the potential time and cost implications, there seem to be two sides of the coin about the positions here that I believe are brought up further down in the document.

CHRIS DISSPAIN:

Sorry, Berry, I'm going to keep interrupting you through this. I hope you don't mind. I'd encourage others if you want to put your hands up and make comments as we go along rather than waiting until the end. I appreciate the point, I think you're absolutely right to highlight that there are two sides of a coin pay in respect of costs. Some people say that arbitration is more expensive than going to court, others saying court is more expensive than going to arbitration. And of course, the real answer is it's entirely

dependent. Some court processes are not expensive, other court processes are very expensive, and some arbitral proceedings can be done cheaply and so on.

I think the key point here with the WIPO suggestion—I'm interested in people's feedback—my view is that one way to look at it would be to say that we should be making as little change as possible or recommending as little change as possible or little addition as possible in order to solve a particular problem, and that therefore suggesting that inserting an arbitral proceeding as a possibility is one thing but making it a default is an additional change and requires an awareness on behalf of a registrant that that is the default, it requires an educational process and so on and so forth early on in the game. I'm not speaking for or against it. I'm just saying I think it's important that we keep in mind that if we are going to recommend changes, those changes should be kept to a minimum. That's my input on that particular point from WIPO. I'm happy, as I said, to hear others. But in the absence of hands, Berry, carry on.

BERRY COBB:

Thank you, Chris. And yes, please interject at any point in time. Basically, the GAC's comment—and this isn't a perfect connection that each of these comments is specifically tied to this particular subcomponent of the Rec draft recommendation but it was kind of a best effort to try to park some of the key components within this document. So, the GAC position, more specifically arbitration, should be an exclusive means of appeal. If it's not an exclusive means, then they note that it should at least be a default option with an opt-out which is in line with what WIPO had just

mentioned. Noting that if registrants are permitted to appeal in court, they should not also be able to subsequently commence arbitration if unsuccessful. The OECD supported WIPO and GAC. The Registrars, they noted that the wording in Recs 4 and 5 appear to imply that the complainant can utilize the appeal process or an IGO that loses a UDRP or URS could appeal that decision or determination via this route, so that they're basically noting that the recommendation should be clarified to ensure that the appeal process—I'm not sure that's the appropriate term but it is an appeal mechanism—is for registrants only and does not provide a new avenue for trademark owners to appeal—

CHRIS DISSPAIN: That certainly was our intention. For the point that Registrars raised, if that appears to be the case, we need to be clearer because that's not our intention, right? So we need to make a note of that if we end up making this recommendation, Berry, okay?

BERRY COBB: So to be clear, the instance where arbitration would be triggered is only in the instance where the registrant does not prevail.

CHRIS DISSPAIN: That's my understanding of where we got to with this, yes.

BERRY COBB: Our great staff will take note of that. I do believe that will help clarify. The ALAC supports all of Recommendation 4. So keep that

in mind as we continue moving down through this document. I think this is the part kind of what triggered the idea of trying to use this method to review through the comments. Fortunately, Paul is here.

So the IPC does not believe that this subsection has fully been thought through. What happens if the IGO does not indicate its willingness to have the final determination through binding arbitration? It seems to the IPC that the combination of this option for IGOs found in this subsection, combined with the opt-out concept in Recommendation 3 referring to the submission of mutual jurisdiction, could work together to give a registrant little or no recourse following an incorrect decision by a panelist. The IPC recommends that the EPDP take another look at this subsection and rework it. For example, make it clear that if an IGO chooses not to submit to binding arbitration that the UDRP would be handled like a regular UDRP and the IGO would have to submit to the jurisdiction of either the registrar or registrants home location for any post decision action that a losing registrant made file. Conversely, the EPDP should implement the IPCs above promotes compromised language—

CHRIS DISSPAIN: Let's leave the compromised language out of it for the moment because we're coming back to that at a later stage.

BERRY COBB: Right.

CHRIS DISSPAIN:

If I could summarize, it seems to me that leaving aside whether or not—the IPC’s point is a good point. If the wording is unclear—again please interrupt or put your hand up if I’m wrong—my understanding was that the intention was exactly that. The intention was that an IGO would either agree or say that it was happy for the thing to be determined in the final analysis by binding arbitration or would be required to submit to mutual jurisdiction. Now, it may very well be that IGOs will tell us that that’s ridiculous because they’re never going to submit to mutual jurisdiction. Maybe so, but it doesn’t change the fact that I think our intention was that the IGO would either have to agree to mutual jurisdiction and choose the thing, whichever the jurisdictions it is, or specifically say if the registrant needs to appeal this, I would say this should go to binding arbitration. Does anybody disagree that that’s our intention? Mary, I can see your note in the chat for which I thank you. On that basis, I think we can take the IPC’s comment. And we can reword to provide the clarity that they seek. Thanks, Berry.

BERRY COBB:

Thank you, Chris. So that concludes the section i. So let’s move on to ii. In communicating a UDRP panel decision to the parties where the complainant is an IGO complainant, the UDRP provider shall also request that the registrant indicate whether it agrees that any review of the panel determination will be conducted via binding arbitration. The request shall include information regarding the applicable arbitral rules. Those rules shall be determined by the IRT which, in making its determination, shall consider existing arbitral rules such as those as the ICDR, WIPO, the UNCITRAL,

and the PCA. So I think what was noted here, the Internet Commerce Association stating that the selection of an arbitration provider and the appointment of arbitrators are not minor features of arbitration and can contribute to or even determine the outcome. The identification of arbitration provider and the rules pertaining to the selection of an arbitration panel are therefore not minor details, and therefore can't be reasonably asked of stakeholders to provide an informed opinion on Recommendation 4 until such time a complete proposal is in place, for example, if arbitration procedure was fundamentally unfair.

CHRIS DISSPAIN:

So let's stop there for a second to remind everybody that we talked about this at some length. There was a long discussion about whether we thought that this working group, this PDP, should spend time in creating a recommendation about the arbitral rules. And even as so far as to suggest or to nominate specific arbitration providers, I think we came to the conclusion that that was not a sensible use of our time, and that the Implementation Review Team, should this recommendation be accepted, was the right place for that to occur. And that very specifically—and I want to I want to make this again very specific point for the record—the listing of ICDR, WIPO, UNCITRAL, and the PCA are not intended to be in any way suggestions or heavy hints or whatever you want to call it, that those organizations should be the ones that are used or should be the rules. They're merely examples of arbitral proceedings that may be used when the Implementation Review Team is considering the rules. So I wanted to say that. I'll be with you in a second, Brian. The other thing was that I'm not sure that I

can—well, I think that actually deals with the point made by the ICA. But, Brian, go ahead.

BRIAN BECKHAM: Can you hear me?

CHRIS DISSPAIN: Yes.

BRIAN BECKHAM: Great. Sorry about that. I just wanted to mention I understand that there's a desire to sort of push some of the specifics to an implementation group. But I just wanted to recall and it might be worth recording somewhere for whatever later group would look at this, that we had proposed and discussed some potential sort of safeguards—I don't recall the exact list, I would have to go through the e-mails or chat transcripts—but some safeguards along the lines of agreed, pre-vetted lists of potential panelists, strike opportunities, things of this that would meet some of the concerns that have been raised. So maybe something to record at least for whatever later group would look at this that these were some things that were put on the table. Thanks.

CHRIS DISSPAIN: Thank you, Brian. I can't see any issue with our final recommendation. And without saying what the solutions are, setting out a number of headings, if you like, that we believe that the Implementation Review Team should consider. I think that's

perfectly fine. That is the sort of guidance that I think any Implementation Review Team would find helpful. What I don't think would be helpful is us recommending specifics because I don't think that's A) our job and B) is necessarily particularly helpful. Jay, go ahead.

JAY CHAPMAN: Thanks, Chris. Can you hear me?

CHRIS DISSPAIN: I can.

JAY CHAPMAN: All right. Hello, everyone. I just want to raise the point that, I mean, well, I appreciate the goal or at least the principle of we don't as a group maybe don't—there's this idea that we don't want to get too far in the weeds. I just want to be very careful here as we kind of go through these things to just once again kind of put up maybe a bookmark here to say under certain circumstances, it may be very wise for us to go into some of the specifics and talk about these things. Because the last thing we want to do—and I think the ICA's point here in its comment is a valid one—and that is what we don't want to do is kind of set it up to where there is, I don't know if I'm quoting an old Justice Scalia, where he talked about how Congress when they made rules, they didn't want to hide elephants in mouse holes, something to that effect. And that's kind of what I don't want us to do here, which is to go through, kind of create these broad principles, but in effect, because we skate over certain things that can be critically important in the implementation

of this that we end up ignoring what could be a big issue down the road. And I'm not ready, prepared at this point, Chris, to give you specifics on that. I'm just saying, as a general principle, I think that's something that we should keep in mind. Thanks.

CHRIS DISSPAIN:

I wasn't. Thank you. I know I have a tendency to ask you to do that but I wasn't going to ask you in this particular instance. I'll get to in a second, Berry. What I was going to say was I've now heard from you think that there is maybe merit in going a little a little way down the road. And from Brian saying effectively the same thing, they may be meriting a little way down the road. So maybe my assumption was incorrect and maybe this group does want to—I don't mean right now—but this group does want to spend some time perhaps in a separate discussion, and maybe even a small group coming up with some suggestions, of some helpful hints and principles that an Implementation Review Team would use. While you're thinking about that, let me get to Berry and then I'll come back and ask for comments from the group. Berry, go ahead.

BERRY COBB:

Thank you, Chris. The reason I raised my hand—I'd asked Mary or Steve to back me up if I get this wrong—I've had the fortune, if you call it that, to be on several Implementation Review Teams, part of which have implemented prior IGO recommendations of the consensus policy we see out there today, and I'm a little hesitant, I guess, in light of trying to dig a little bit deeper to unpack this recommendation. But thinking ahead, assuming that

this group gets to consensus recommendations, assuming that the Council adopts them, assuming that the Board adopts them, and that there truly is an IRT that is formed, which would be the case, it's going to be this group of people that are on that IRT to discuss this. This is a very niched, specialized topic, and I don't see others out in the community that would volunteer on the IRT to get this implemented. And on top of that, I'm thinking about how Org would even start to be able to address some of this in the context of establishing this particular path for arbitration. I just think that what we might find—and I definitely agree, Chris—that there is a bright line between developing policy versus implementing it. But at the same time, when it gets into the implementation of this, I'm cautious about how the final decisions would get made in this realm. I guess the suggestion here is that we are probably a little bit more prescriptive than we might normally be when it comes to this aspect because I think it will only make it harder or more difficult for the IRT to get past some of this. Thank you.

CHRIS DISSPAIN:

Thank you, Berry. I think what you've just said is that you think we should perhaps go somewhere a little way down the road. Does anybody think we shouldn't? Okay. Well, let's just put that to one side for a minute. Mary, Steve, Berry, while we're going through, carrying on, can you just have a think about the best way to deal with that? My gut feeling is that it would probably be sensible to get three or four people together to talk it through, come back with some suggestions rather than try and manage. It's an intensely legalistic way of discussion so it may be sensible to get some people to go and talk about it. Mary, go ahead.

MARY WONG:

Thanks, Chris. I think you said one of the things I'm going to say that it is something that's a very specialized complex area. I think that the fundamental question is whether it will be more appropriate and whether we will have the right folks here at the policy development phase versus at the implementation stage, and we can't answer that. But I think that your suggestion is probably the best way to do that if we do have volunteers who know the landscape and who is willing to at least come up with something based on these named series of rules that we have and the recommendation at present.

CHRIS DISSPAIN:

Thank you, Mary. I agree. Just to be clear, we're not talking about writing the rules, just in case anybody's unclear. We're not talking about writing the rules, what we're talking about is to provide some guidance. And in fact, if you think about it, we have already, to some extent, agreed to do that in the sense that we have said, whether it's actually called out specifically or it's just in the general overarching wording, we have said, if something ends up going to arbitration, it should be akin to a court hearing. In other words, we've said there should be the ability to call people, we've said certain standard rules of arbitration should maybe not in place. We've had these discussions. So that's the level that we're talking about. It's not so much to do with necessarily how long things take and procedures and so on. But that said, I do think certainly having a bash at it might very well be a sensible use of time. Paul, I can see you're unmuted. Did you want to say something?

PAUL MCGRADY: Thanks, Chris. I was just getting ready to address the next part of this round of the IPC question.

CHRIS DISSPAIN: Okey dokey. Thank you for being ready. Okay. Mary, thanks for that. We'll take this offline, and then put a call out to the group for volunteers, blah, blah, tomorrow and see where we get to. Thank you. Excellent. Brian and Jay, thank you very much for raising the point and for refocusing my assumption in the right area. Thanks for that. Berry, back to you. I guess we're on to the IPC now.

BERRY COBB: The IPC comment was pretty much connected to the previous section. Basically, what they're asking here, those still is does the provider still request that the registrant indicate its willingness to submit to arbitration? If the IGO hasn't done so, why would the registrant ... Then just asking us to take a closer look at this particular section.

CHRIS DISSPAIN: My gut feeling is that that's just about detailed wording and clarity. Paul, go ahead if you want to talk to it.

PAUL MCGRADY: Thanks, Chris. Again, tightening up the language I put into the chat. I think if we just add, after IGO complainant, something like "That is opted into binding arbitration." That way it makes it clear,

and then I think that resolves the issue from the IPC's point of view. Thanks.

CHRIS DISSPAIN: Super, Paul. Thank you very much. Berry, Steve, Mary, I guess, all of these points that we go through where we're saying what we need to do here is clarify the wording is clear to you and you'll make those necessary changes. Berry, back to you for Roman three.

BERRY COBB: Moving down, Roman three, as provided in paragraph 4(k) of the UDRP, the relevant registrar shall wait 10 business days as observed in its location of principal office before implementing a panel decision rendered in the IGO complainant's favor and will stay implementation if within that period it receives official documentation that the registrant has submitted a request for or notice of arbitration as described further below. I think generally this is in line with current practice today for normal path of UDRP, URS. The ALAC supports it. The IPC is saying that so long as the 10 business days following the stay of the decision implementation is not exclusive to filing of arbitration.

CHRIS DISSPAIN: That's not the clarification point. And I think that absolutely needs to be clarified to ensure that everyone understands that that's the case. As Paul continues to talk in the chat quite correctly, where the complainant is an IGO, complainant that has opted in to do binding arbitration is a precursor to all of those clauses.

BERRY COBB: Moving on to Roman number four. If it receives a request or notice of arbitration, the registrar content shall continue to stay the implementation of the UDRP decision until it receives official documentation concerning the outcome of arbitration or other satisfactory evidence of settlement or other final resolution. And the IPC is basically expressing the same concern here.

CHRIS DISSPAIN: Again, I'm sure we can deal with that by clarification. Now, before we get into options one and two, which is the next point, in essence, the difference between one and two is if the registrant elects to go to court, the question is if there is not a substantive hearing in court because an IGO has been successful in claiming immunity and exercising its immunities, whether a registrant can then still go to arbitration. I'm interested to have anybody who feels that—the open one, the least changed one is to say, “Registrant can go to court if they choose to do so. IGO can claim immunity if it chooses to do so. If the court finds in favor of the IGO's immunities and doesn't hear the substantive matter, it's still open to the registrant to go to arbitration.” That's the open least changed one. What I want is for anyone who feels that they can talk cogently to the other option, which is that by agreeing to go to arbitration that is it—sorry, the other way around. That by registrant choosing to go to court, if an IGO is successful in claiming its immunities, that is an end to the matter. Anybody who would like to talk cogently as to why that should be the choice as opposed to the other one, please do so. Because I think I know who's going to talk in favor of the giving the registrant both. But I

want to see if anybody wants to talk in favor of not giving the registrant both. Alex, go ahead. Happy new year to you.

ALEXANDRA EXCOFFIER: Happy new year, everyone. Well, I think we've said this in the first place. It's a question of cost. It's a question of time and fairness. I mean, if we're proposing an option to settle this through arbitration, if the registrant wants—I think registrants should be explained what immunities mean that they're taking a chance, which they would probably lose. But if they still want to go and try their hand in court, that they should—the court process is costly because it's not just going to court at one level. If they lose on the immunities grounds, they will likely appeal. If the IGO loses on immunities grounds, it will certainly appeal. So each process may cost ... and the fees, it's the lawyer's fees, basically. It's not the necessarily the court fees. And after going through that whole process—and in the meantime, there's a stay of execution. So in the meantime, the defendant or whatever they're called, registrants, are still going through and the website is still operational. And after all these costs then they go through another process of arbitration with additional time and costs.

I don't think that's fair. If you remember, the GAC advice is that this whole process should be at no or minimal cost to IGOs. And I know that obviously, arbitration has a cost and we're ready to assume that cost. But this doubles the cost. And I know what I'm talking about because we're talking about the U.S. Recently, the OECD had a case dismissed in Nevada and it was upwards of \$30,000 in legal fees. This is just at the first level. So if it was appealed, it would be what, \$30,000 more and etc, etc. So, for us,

this does not represent fairness. The fairness would be if they had agreed in the first place to arbitration. If they don't do that, then they missed it.

CHRIS DISSPAIN: Thank you, Alex. That's appreciated. Yrjö?

YRJÖ LÄNSIPURO: Thank you, Chris. Actually, why ALAC has supported that option one is here on the screen. But I'll just point out that we start from the end user perspective and this would certainly be the quicker way of resolving things. Thank you.

CHRIS DISSPAIN: Thanks, Yrjö. So taking Alex's point, I'm assuming, unless anyone tells me differently, that that is the view that the IGOs would take preferably, understandably. Paul, go ahead. Paul, I can't hear you. I can see you're unmuted but I can't hear you.

PAUL MCGRADY: Sorry, Chris. I was double muted. All right. You asked if anybody that could speak to option two and I keep waiting for somebody else to do it because I think there are folks who perhaps have more to say about this than the IPC does. The IPC position on this one was that we kind of like the extra step that it provided some due process to folks who maybe they really believe that the decision is bad and they were hoping to get an outcome from their court. But they find themselves in a quirky spot because of who

the complainant is. Basically in that case, IGOs may lose a little money or time. But ultimately, it's going to arbitration, which is where IGOs wanted all this to go anyways. I don't know that the IPC—this is probably not our hill to die on. But I think as lawyers, we just like the extra opportunity for people that have a chance to have their case heard.

CHRIS DISSPAIN: Obviously, they need to pay you more money.

PAUL MCGRADY: For sure. Thanks, Chris.

CHRIS DISSPAIN: I can speak because I'm a lawyer myself, it's equal. That's the reason why I can get away with it. Thank you for that. Jay, I know you're in favor of option two, but do you want to take to the microphone and say anything before I go to David?

JAY CHAPMAN: Sure. Thanks, Chris. Well, I mean, again, time and costs. You've said so Chris, it just depends on how you want to present your case as to which is more expensive or which is more time consuming. Ultimately, what we're talking about here in this case is a substantive decision on the merits. And if you can't get it in the traditional sense through a court, then again—I've said this before—the whole point of this entire EPDP now was because IGOs couldn't get a substantive decision on their cases. Hence,

now we're trying to create that option. And yet, it is just completely ironic that the idea here is to potentially prevent a substantive decision for a registrant. I think option two is the one that makes the most sense. It's probably the only way that this—I mean, we've already seen all the comments and such. So I'm not sure we're going to get very far if we're trying to come out and say that we're just going to prevent a substantive decision. Just as a softer landing here on the IGO side, I'll keep saying this, too. This is going to be the rarest of situations where this happens. Where there's bad people and bad things going on, they're not going to want to do this because they're not going to want to be identified, they're not going to want to be tracked, they're not going to ask for an appeal, they're not even going to go to arbitration. So we're only talking about situations where you've got someone who has a substantive good faith belief that this is their domain name where there's a wrong decision at the UDRP level, who just wants to have that heard on the merits from somewhere else. So that's all I have to say. Again, I feel like I'm just repeating myself in these things. But thanks for the opportunity. I appreciate it.

CHRIS DISSPAIN:

Thank you. It doesn't matter if you're repeating. It's in the context that it's important to get clear. David and then Jeff.

DAVID SATOLA:

Thanks, Chris. Happy new year to everyone. The reason I raised my hand was I wanted to respond quickly to Paul's intervention. I mean, I appreciate the way it was couched in terms of a fairness construct. But I think there's also the economy and efficiency of

justice construct as well. But given an opportunity to get the case heard in front of experts, I think I would—again, at the risk of repetition—there may be those who would dispute that going to arbitration isn't a hearing on substance, but that's a philosophical matter for another discussion. In any case, I think in the real world, if you agree to arbitration and go to arbitration and the result doesn't come out in your favor than ... depending on how the arbitration is set up, if it's full and final, you don't get a chance to go to court. And if you go to court, you don't get a chance to go to arbitration. So it does, without diminishing this starting point of Paul's argument, I think that there is a countervailing argument that to provide an additional bite at the apple, which is I think a phrase that we've used previously in these discussions, it does cut against the economy, efficiency, and predictability of outcomes. Recognizing their competing legal, philosophical underpinnings to how justice should be meted out, I think there are other considerations to bear in mind as well. Thank you. Over.

CHRIS DISSPAIN:

Thanks, David. I appreciate it. Jeff?

JEFF NEUMAN:

A couple of points. I've been listening mostly. First thing is, because Alexander was talking about appeals and stuff, I want to make sure that when it says that the court decides not to hear the merits, it doesn't include the situation in which the court would like to hear the merits. In other words, it grants the jurisdiction but the IGO appeals and therefore it can't hear the merits until the appeal is resolved. So I just want to make sure the language isn't read to

exclude that case. In other words, if the IGO decides to appeal the finding of jurisdiction, that's not akin to the court deciding not to hear the merits of the case.

The second thing is it's interesting because Alexandra said that to save costs and efficiency, but then Alexandra says that if they lose on the procedure where the court does find jurisdiction, they're going to appeal it, and they're going to be the ones to force the registrant to more expense and more cost. It's just a little bit ironic that you could say that that you're trying to save your cost, but if you lose, you're going to rake up the costs on the registrant. That's interesting.

The other thing is I really want us to go back to the charter because I'm not sure the charter as one of the elements in there is to consider the costs or expense on the IGO. I think it is in there to make sure that a registrant can get the merits of its case heard, I believe, is in the charter. So let's just make sure we understand what the charter says we should be looking at. And we can decide to look at additional things but we just need to be aware of what that is. Thanks.

CHRIS DISSPAIN:

Thanks, Jeff. Alexandra, I'll be with you in a second. I've got some things to say, which I'll get to after Alexandra has spoken. Just on your point about the charter—perhaps Mary or Berry or Steve could check the charter for us—but I think it does quite clearly say is that the solution should stop a registrant from being able to seek a remedy in court. It doesn't say that IGOs should be prevented from claiming they have immunities. But it does say that the

registrant should be allowed to go to court. But I'll get back to that in a second. Alexandra, do you want to respond to Jeff? Please go ahead.

ALEXANDRA EXCOFFIER: Yes. Just on the point that if a lower court does not uphold IGO immunities then—I think we have said several times the importance of immunities to IGOs. So, yes, if we consider that a lower court makes the mistake in not upholding our immunities, we will appeal. But at the same time, we were the ones that were dragged into court in the first place. And so the cost would be not just for the registrar, it would be for us as well. And we would assume those costs, if it means fighting for something as essential as our immunities. And I don't see that Jeff's point is really relevant. We shouldn't have to be there in the first place. But if we are, then that's the case. At the same time, if the lower court does uphold their immunities and if the registrant does believe that they want to continue, they will appeal, and we will incur costs just like they will to fight this in a court of appeals.

CHRIS DISSPAIN: Thanks, Alex. I think it's a function of unlike arbitrations where it's agreed to be binding, it's a function of general court procedure that there is a ladder. A ladder of courts that one can climb should one wish to do so. Jeff?

JEFF NEUMAN: To respond, I could say to Alexandra the exact same arguments you made apply to a registrant who, as Jay said, this is going to

be so rare in the case with a registrant who really believes that the decision in the UDRP was wrong and that it should be entitled to keep its name. We could be talking about a registrant whose name is worth hundreds of thousands, if not millions of dollars. Look at the france.com case. It's not an IGO, obviously, but it is sort of a sovereign territory in France. And that registrant fought it all the way to the end, including trying to get to the Supreme Court because that name was that registrant's sole income for years and years and years. And yes, the registrant ended up losing but it had its day in court. That's what we're talking about. It's going to be so rare. So I agree with you, Alexandra, that to you, to IGOs, the concept of immunity is so important that you're going to be fighting it all the way. But I ask you to think about it from the other side for a registrant that's going to do all of this, it's actually going to take it all the way, that it could mean as much to them and their business and their livelihoods. So I think the equity is sort of on both sides here. Thanks.

CHRIS DISSPAIN: Thank you, Jeff. Alexandra?

ALEXANDRA EXCOFFIER: I don't want to belabor this point but we're not saying that they have no way out. We propose arbitration, in first place, which is something which is used, including by some of the people here like Digimedia as a way to settle disputes. If the registrant takes it to the Supreme Court, in the end, for the Supreme Court to uphold immunities, where will they be? Whereas if their option in the first place was to go to arbitration and have that dispute litigated by

third party have their day of justice, not necessarily their day in court, because the thing is with immunities, our governments decided that immunities of IGOs prevail over due process, prevail over third party individual rights to go to court, there was a reason for that. They didn't do that lightly. They did that knowingly. So we're not preventing registrants from "appealing" the UDRP decision. We're providing another channel for that.

CHRIS DISSPAIN: Okay. Thank you, Alex. I want us to have Berry take us through the comments. We've got 20 minutes left. Berry, take us through the comments briefly. And then I'm going to sum up and ask everybody go away and do some thinking and possibly make contribution on the list. Berry, please take us through briefly the comments on one and two.

BERRY COBB: I'm not sure it's going to produce anything new that we haven't already gone through.

CHRIS DISSPAIN: It's not about that. It's about hearing specifically for the record what each of the comments in outline actually said.

BERRY COBB: So option one, the ICA as well as others haven't supported it. ALAC did, and thank you, Yrjö, for confirming that. So moving on into option two. The term conditional support is maybe not even

necessarily the right term. But many of the comments were connected back to Recommendation 3. Option two where the registrant initiates court proceedings and the result is that the court decides not to hear the merits of the case. The registrant may submit the dispute to binding arbitration within 10 business days from the court order declining to hear the merits of the case by submitting a request for or notice of arbitration to the competent arbitral institution with a copy of the relevant registrar, UDRP provider, and IGO complainant. If the registrant does not submit a request for or notice of arbitration to the competent arbitral institution with a copy to the registrar, the provider, and the complainant within the 10 days from the court order, declining to hear the merits of the case, the original decision will be implemented by the registrar. So, again, no support from the ICA. But if Recommendation 3 is removed, meaning that I believe the mutual jurisdiction clause is still intact, they would support option two here.

CHRIS DISSPAIN:

Which is, in essence, meaningless, isn't it? Just to be clear, if we retain mutual jurisdiction, then arbitration becomes moot.

BERRY COBB:

Correct. The Registries support option two where the avenue of judicial challenge to the UDRP decision is not available to the registrant as a result of the IGO's refusal to submit to the jurisdiction of court, and the court thereby declines to hear the action, then the fairness would support the registrant being able to avail themselves to a proposed arbitration alternative.

Digimedia, again, conditional support to the extent that Rec 3 is decoupled from Recommendations 4 and 5 in conjunction with option two. If it's not then they would only support option two within Recs 4 and 5. Telepathy, I think pretty much the same.

The Business Constituency supports either a court or an arbitral tribunal will be able to resolve all such disputes on the merits. In other words, a registrant can choose to arbitrate instead of litigate or choose to litigate instead of arbitrary. But if the court won't hear the dispute due to the IGO immunity, then arbitration is really the only option that should proceed as otherwise there would be no avenue to effectively appeal a decision.

The Registrars, the recommendation should be clarified to ensure that the default option for appealing a decision is through a court proceeding initiated by the registrant. If the final recommendations include an arbitration appeal option, it should require informed and affirmative consent from the registrant including an explanation of potential legal and financial impacts of accepting the arbitration appeal process and foregoing the court proceeding. In no circumstances should arbitration be initiated without consent of the registrant.

CHRIS DISSPAIN:

Well, it can't be anyway. So that's a moot point because it's impossible to do that.

BERRY COBB:

The IPC, they can support option two subject to a couple of caveats. Option two seems to be a reasonable safeguard

designed to prevent undue pressure for losing responded to seek relief from the courts, which in many jurisdictions is a basic human right. That said, the IPC does not support any mandatory automatic de novo appeal mechanisms for UDRP cases filed by non-IGO complainants. Moreover, such an appeal or arbitration mechanism under the UDRP such as option two must incorporate appropriate safeguards like reasonable filing fees, prevent gaining and abused by respondents, and recommend that we take another look which is an action for us to get a small team together to talk about some of these safeguards.

And lastly, I believe this was more in reference to Rec 5 for the URS, that they support this subsection of referring registrar to maintain the lock of the domain. I'm sorry, I stand corrected. Normal operation is the domain remains locked until there's a decision and implementation by the registrar.

CHRIS DISSPAIN: Good. Thanks very much, Berry. Okay. Here's my assessment.

BERRY COBB: Just really quick. So there was comments that were submitted that weren't necessarily attributed to any of the subsections of the report. The WIPO did indeed talk about their immunities, which I believe we've heard about. And with regards to cost of courts versus arbitration, which I pointed out earlier the two sides of the coin view here, those were pretty significant in the comment space.

And finally, the Registrars did have a comment about the chart that was supplied. I think maybe the action here for the group is that we have one chart for I believe what was the URS kind of process flow. And I think in terms of getting to any kind of final report, we'll probably want to replicate that for the UDRP because of the subtle nuances with URS versus the chart that was submitted by the IGOs, while still incorporating the concepts but I think it'll warrant consistency in having both charts for each dispute provider. Thanks, Chris.

CHRIS DISSPAIN:

Thanks, Berry. Okay. Leaving aside whether we get consensus on any set of final recommendations at all, my gut feeling is that it's going to be more than a little challenging to get consensus around option one, and that we're much more likely to—I'm not doing this at the moment but if I were to call a red line, are you prepared to die in a ditch or whatever expression you choose to use for this particular thing, my gut feeling is that option two is more likely to be acceptable across the board than option one further. And I could go into a whole raft of detail and I'll address a couple of points. One thing that springs to mind, for example, is that our principal all along has been to make as few changes as possible with our recommendations.

Secondly, there are arguments both ways about IGO immunities, IGOs are firmly of the view that their immunities are going to be that they will win any discussion about their immunities. So they may need to appeal but they'll win, which may well be true. Registrants equally have said, "We're prepared to take the chance on that." And the bottom line is, irrespective of all of that, that our

charter, our instructions from the GNSO Council very clearly states that our solutions should not affect the rights and ability of registrants to quality judicial proceedings, a court of competent jurisdiction, whether following a UDRP or URS case or otherwise.

So I would argue that we would be significantly challenged on scope, I suspect, if we were to make a recommendation that required an IGO to go to court and to not have a substantive hearing on the merits, which of course is what would happen if IGOs were successful in claiming their immunities.

Now, all of that said, that's just where I am right now. It's my feeling on the discussion today. So what I would like is for us to go away and to consider this point. We've dealt with the comments, I think we could deal with all of the—this is looking at four in isolation. I know we need to go back and deal with three. Looking at four in isolation, I think we've dealt with all of the comments and preceded the options. I think we can clarify what needs to be clarified for those who've asked clarifying questions. And we can answer points that have been made and rebut them if we need to and accept them if it's like fit with what we want to do. But we now need to coalesce around option one and option two. So what I would ask is that we basically use the next few days on the list, too. If you feel strongly that option one is a go, you're going to need to deal with the scope point and a few other points. I hope that we will be able to coalesce around a choice on our next call. That's certainly my goal.

Now, as Berry has indicated, we are challenged with having a meeting next week. And insofar as it's my responsibility, I apologize for that. But I think the time can still usefully be used,

especially in respect to Recommendation 1, I am keen—Brian, Susan, Paul, I know that you've put a lot of time into this and I do appreciate that and you won't be surprised to hear that I'm very keen to be able to put that one to bed. So if you could find the time to be able to deal with that one, I would be immensely grateful.

Berry, when we reconvene, leaving Recommendation 1 aside for a minute, I would like us on our agenda to finalize Recommendation 4 by which I mean coalesce around an option, and then move back to Recommendation 3 and to deal with that. In respect to Recommendation 3, everybody please look at Jay's e-mail and the clarification provided by the Business Constituency. And let's think about whether that helps, whether that is in any way helpful in us coming to consensus in respect to how to deal with Recommendation 3. Does anyone have any last minute comments, questions, things to say? Okay. Berry, Mary, Steve, anything from you?

BERRY COBB:

Thanks, Chris. Just one other item that we don't necessarily need to do on the 24th and perhaps maybe it can be taken offline, but we do still have the other comments to review through as well. None of those were attributable to any of the recommendations but they were a substantive amount of comments.

CHRIS DISSPAIN:

I would like to do those on a call. I don't want to do those offline. And I think we should put them on the agenda, get to them as soon as we can.

BERRY COBB: Understood. Thanks. That's all I have.

CHRIS DISSPAIN: I think those comments are important and they need to be to be treated in the same way as the other ones. Thank you.

Okay. If that's it, we're going to wrap. I look forward to chatting to you all on the 24th beforehand on the list. Terri, you can close the meeting now. Thank you very much, everybody.

TERRI AGNEW: Thank you, everyone. Once again, the meeting has been adjourned. I will stop the recording and disconnect all remaining lines.

[END OF TRANSCRIPTION]