
ICANN Transcription

EPDP Specific Curative Rights Protections IGOs

Monday, 31 January 2022 at 15:00 UTC

Note: Although the transcription is largely accurate, in some cases it is incomplete or inaccurate due to inaudible passages or transcription errors. It is posted as an aid to understanding the proceedings at the meeting, but should not be treated as an authoritative record. Attendance and recordings of the call are posted on agenda wiki page: <https://community.icann.org/x/JIH3Cg>

The recordings and transcriptions of the calls are posted on the GNSO Master Calendar page <http://gnso.icann.org/en/group-activities/calendar>

TERRI AGNEW: Good morning, good afternoon, good evening. Welcome to the EPDP Specific Curative Rights Protections for IGOs taking place on Monday the 31st of January 2022 at 15:00 UTC.

In the interest of time, there will be no roll call. Attendance will be taken by the Zoom room. If you're only on the telephone, could you please identify yourselves now. We have no listed apologize for today's meeting. All members and alternates will be promoted to panelists. When using chat, please change the selection from Host and Panelists to Everyone which will allow all, including observers, to see the chat.

Alternates not replacing a member are required to rename their lines by adding three Z's to the beginning of your name, and at the

Note: The following is the output resulting from transcribing an audio file into a word/text document. Although the transcription is largely accurate, in some cases may be incomplete or inaccurate due to inaudible passages and grammatical corrections. It is posted as an aid to the original audio file, but should not be treated as an authoritative record.

end in parenthesis the word “Alternate” which means you are automatically pushed to the end of the queue. To rename in Zoom, hover over your name and click Rename.

Alternates are not allowed to engage in chat, apart from private chat, or use any other Zoom room functionalities such as raising hands, agreeing, or disagreeing. As a reminder, the Alternate Assignment Form must be formalized by the way of the Google link. The link is available in all meeting invites towards the bottom.

Statements of Interest must be kept up to date. Does anyone have any updates to share at this time? 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, if you are a member, when first joining Zoom please accept the additional prompt to be promoted to Panelist.

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:

Thanks, Terri. It gets longer every time. Maybe it just seems longer every time. Welcome, everybody. Hello. Thank you for coming. I can see there are a few people arriving as we start. Terri, thank you. You reminded me that I should probably update my Statement of Interest and tell you guys—some of you may know this already—but I guess I can say I rejoined the ccNSO Council after 11 years.

At the beginning of January, Giovanni Seppia stood down from the Council to take up a position at ICANN, and I am filling his spot then the next 18 months or so. Once again, I find myself in the position of being ccNSO councilor, which is huge fun.

Secondly, I apologize in advance. I will not be using my video today. I am on a very, very slight Internet connection. We have Internet issues at home and I'm using my phone as a together, and the problem with that is that the phone signal is also fairly awful. So I'll do my best. And if necessary, Terri will swoop in and find another way of contacting me.

Thank you, Mary. I'm not sure congratulations are actually the right way of putting it, but I appreciate it.

Susan, go ahead.

SUSAN ANTHONY:

Yes. I was about to say I expected to see your face today because I did want to see if you, in fact, did look another year older.

CHRIS DISSPAIN: [inaudible]. The answer is yes. [inaudible].

SUSAN ANTHONY: No. No, you don't. No, you don't at all.

CHRIS DISSPAIN: And I apologize. You hadn't joined the call, but I apologize for not bringing cake. But I've said to Terri, I promise that if we ever manage to get together again at some point, we will have cake. There will be cake.

So welcome, everybody. If I remember correctly, a couple of things were meant to have happened post this call. Post our last call, sorry. One was Recommendation 1, which I think has happened. We'll go to Berry on that in a minute.

And the second one was maybe to expect to get some wording from Brian and the other IGO folks, Susan, on Recommendation 3 which I don't believe we've seen. But we'll get to that when we get to that on the agenda.

So having set that up, let's go to Berry and get going. Berry, over to you.

BERRY COBB: Thank you, Chris. So just an update, and hopefully we'll be able to consider this recommendation stable. The small team worked over the list to come to a general agreement on new item (i)(b) which now states, "an 'Intergovernmental organization' having received a standing invitation which remains in effect to participate as an

observer in the sessions and the work of the United Nations General Assembly; or ...” moving on to (c).

So that agreement was made by Brian and Paul and Susan. So that part is for review here in the working group. And I believe there was also agreement about the remainder of the redlines.

So not much more to update on that unless Brian, Paul, or Susan have any additional color commentary they want to add to this. Paul, please go ahead.

PAUL MCGRADY: I just want to say, nobody say anything. We think it works. Thanks, everybody.

CHRIS DISSPAIN: Thank you, Paul. You beat me to it. I was going to say, no, there will be no comments. If it works, it works. But I think it's a fine solution and it does the job that it's meant to do. So let's accept them, which we've reached a satisfactory response and move on.

Berry, back to you.

BERRY COBB: Thank you, Chris. I just wanted to draw to the group's attention, as well, of what we have redlined here from this small team. You'll recall our scope for the charter is pretty tight—and anybody can correct me if I'm wrong—but the whole intent of us having the definition of an IGO complainant was to move away from having to manage any particular kind of lists. And with that general direction,

what was added here was to at least provide a comment to signal to the GNSO Council, and really the ICANN Board, about the old Recommendation 2 which basically had a connection to the Article 6ter of the Paris Convention.

So I think what this groups needs to focus in on is, is this statement still necessary? It's definitely not a recommendation because that would likely put us outside of the scope of our charter. But at the same time, I think the group needs to help the Council and the Board understand the implementation of our Recommendation 1 here and understand if there's any impact or kind of a superseding of the old Recommendation 2 just to put it onto the record.

So the text of this statement is that "This recommendation obviates Recommendation 2 in the IGO-INGO Access to Curative Rights Protection Mechanisms Policy Development Process 3 that the GNSO Council approved on 18 April 2019" and a concluding statement that "Thus, the ICANN Board no longer needs to consider it."

Any comments or objections to that particular statement being included in this part of what will be this part of the final report?

CHRIS DISSPAIN: Go ahead, Jay.

JAY CHAPMAN: Thanks, Chris. Hello, everyone. I just want to throw in there that the idea that we're kind of changing it to "obviating

recommendation” from something that’s already been considered as ... I mean, that seems to me to be somewhat of a jump. So I just want to put a pin here that I’ll visit with the folks at the BC and get their thoughts on this and then come back. I just wanted to make that note for the record. Thanks.

CHRIS DISSPAIN:

Thanks, Jay. For what it’s worth, it seems to me that the two recommendations, if you like—our current one and the previous one—are, in essence, incompatible. And I think we could say nothing. If we say nothing, my understanding is that the second policy recommendation—the later one, this one, our one—would supersede it where it’s incompatible, in much the same way that some of the EPDP work on GDPR—or rather, not on GDPR, but on what used to be called WHOIS—has led to previous GNSO recommendation policies being succeeded.

But that said, please do go ahead and check in with the BC on that. But for now, [inaudible] and we’ll wait to see what response we get from you and anybody else on our next call.

JAY CHAPMAN:

Understood, Chris. Thanks.

CHRIS DISSPAIN:

Super, thank you. That’s great. And John, you are currently still an attendee, not a panelist. If you could accept the invitation to become a panelist, that would be great.

Okay. Sor, Berry, back to you.

BERRY COBB:

Okay. That concludes Recommendation 1. And so now we'll move on to Recommendations 4 and 5. I'm not as intimate with this one as other staff or the group is, but just to try to recap from our last call. The general direction for the group is going that Option 2 was where more general agreement could be found. So what staff did was to redline out the original recommendation text from the initial report, remove aspects of Option 1 and Option 2, and more particularly basically create a new subsection (v) that is the text for Option 2. We also included—

CHRIS DISSPAIN:

Berry, sorry to interrupt you but Mary's hand is up. I imagine she probably wants to talk to the recommendation. Do you think that might be sensible?

BERRY COBB:

Right. Yeah, I'm just providing the overview and I'll turn it over.

CHRIS DISSPAIN:

Okay.

BERRY COBB:

And so what we also did, again because Recommendations 4 and 5 are coupled together but we still needed to maintain two separate recommendations, one for UDRP and one for URS. So

the same approach was taken where we deleted out or redlined out the options and promoted Option 2 into the core of the recommendation text. And I think that is where we are at.

Mary, please go ahead.

MARY WONG:

Thanks, Berry. Thanks, Chris. So, I wasn't going to speak to Option 1 and Option 2 because Berry has described that and I think that is something that the group needs to agree on, ultimately, as to what the text should say.

I put my hand up because we had circulated some new language for the other parts of Recommendations 4 and 5. As Berry said, we're keeping them separate even though they touch on the same possibility because Recommendation 4 touches on what happens in and after a UDRP. Recommendation 5, on the same topic with relation to what happens during and after a URS proceeding.

So I just want to say, Chris and everybody, that the new text we circulated that's linked to the agenda reflects the group's discussion from a few weeks ago and, in particular, the request that we make it clearer how these options would work in cases where there has been agreement to arbitrate between both parties versus cases where there hasn't been agreement to arbitrate. In which case, in the latter situation it is basically a regular UDRP or a regular URS.

So that's an action item that we had, and that is the new text that we circulated with the agenda. I just wanted to clarify that.

CHRIS DISSPAIN: Thank you, Mary. That's great. So does anyone who has had an opportunity to consider the text ... Has anyone had an opportunity to consider the text? And if so, do they have any comments? One second, Brian. And I know that the answer will be that some of you haven't had an opportunity to consider it. And so therefore, we will look at this in more detail on our call next week. But nonetheless ...

Brian, go ahead.

BRIAN BECKHAM: Hi. Thanks, Chris. Hi, everyone. In regard to the text ... I guess it's coming up on screen. I thought it might be coming up on screen. Anyway, the text that was circulated last week, what I wanted to flag ... And I think this was a comment or a concern raised by the IPC, although I could be wrong about that in terms of attribution. But I believe someone had raised the question of, in the text that was circulated with proposed edits, there was the option for what happens if the IGO Complainants didn't agree to arbitrate any appeals. And then that would trigger the, let's say, normal UDRP process.

The question was raised, do we even need to go down this path? And we've had a chance to consult before the call. I think the answer is no. And this might simply add a complication that doesn't need to be there. I don't have exact language, but the suggestion would be to simply lop off option that the IGO

Complainant wouldn't agree to arbitration. I think , after all, in fairness to the group, that's really why we're here.

So the idea is that we just capture, at a textual level here, that , in effect, by submitting one of these complains, the IGO complainant would agree that any appeal could be heard through arbitration. And that could be the end of it, and we don't need to introduce language about what if they wouldn't do that. Thanks.

CHRIS DISSPAIN:

Thank you, Brian. That makes sense to me, provided that that's acceptable. It will simply be the matter we dealt [with by] arbitration, subject to the agreement of the registrant. But let's check in with Mary just to see if you could ...

Mary, that seems to me to make sense and takes out an unnecessary cul-de-sac. Are you comfortable with that?

MARY WONG:

Yes, Chris. I am. I think Brian and I chatted about this previous. As you say, I think the key here is that this way of doing it is, indeed, what the IGOs in particular will support because it does change their options, limit their choices, essentially, when filing a complaint.

CHRIS DISSPAIN:

Yes, which they're fine with. Good. Okay, super. Thanks for that, Brian. I'm guessing that others haven't had an opportunity to look

at the text. And Mary, can I ask you to get ... I really do want to cover this on the call next week.

But that said, the understanding of the text that needs to come out, the stuff that Brian has just talked through, if that could be done as soon as possible, preferably today or tomorrow, and then the revamped text for consideration on the call next week sent out. Because there will be less to read if that that stuff is taken out. Does that make sense to you, Mary? Is that okay? Yeah? Good, thank you. Excellent.

Okay, so Recommendation 4, then, has been amended. There will be a slight amendment to the current amendment coming out in the next day or so. I want to try and get to address that probably on the call next week. There may be no comments, which will be fantastic. But if there are, we need to deal with them.

Berry, we've done that. Where do you want to go to now?

BERRY COBB:

Thank you, Chris. And just as a reminder, we still have a small team that needs to come together to try to define some principles regarding the arbitral rules, mostly to help a possible future supplementation review team [inaudible] working out [inaudible].

CHRIS DISSPAIN:

So where are we on that? My recollection is that a number of people said, yes, they were happy to help. I can't remember whether I've seen a Doodle poll or not. Mary, go ahead.

MARY WONG: No, there has not been a poll sent out. Thank you to those who agreed or volunteered to help. I think that the next thing, obviously, is to find a time for the group to meet and see how quickly we can move forward with that work. And we'll get on that.

CHRIS DISSPAIN: Okay, if we could get a Doodle poll out. It would be fantastic if that group could find time to meet, if not this week then absolutely, definitely, next week. And so therefore, the poll needs to go out tomorrow, really, at the latest. If we could organize that, please. It's only a small number. It won't be that hard to find a time. Okay? Okay, thanks.

Berry, go ahead.

BERRY COBB: And so moving on, returning back to Recommendation 3. And where we had left off from the last call is, I believe, there were still some general disagreements about the BC's suggested rewording here. And I believe the action was for the IGO group to come back and respond maybe with suggested edits for this text.

And I don't recall seeing anything on the list in that regard. So I don't know if Brian or somebody can maybe see if they've had any discussions about the BC's attempt here for middle ground.

CHRIS DISSPAIN: Brian, do you want to address that? We did leave it that you would do some thinking about the alternative wording. Go ahead.

BRIAN BECKHAM: Yeah. Thanks, Chris and Berry. And apologies, we did have a call Friday night and had some exchanges over the weekend and today. Apologies for not getting something to the list. We were trying to do a little bit of workshopping. David and Matt and [inaudible], of course, are on the call. So please do feel free to add clarifications or help me through this, guys.

And apologies, I was a little fuzzy myself on the intended interplay between Recommendation 3 and BC proposal and Recommendation 4. So what we came up with was that, on the understanding that Recommendation 3 remains in place as is, the core issue was whether ... And David has given us good examples where, under U.S. federal legislation, there are courts that are actually designated to hear cases involving IGOs. So the upshot was basically that, in the event that ...

It was kind of, let's say, a little bit of wordsmithing on the BC proposals to say in the event that the respondent wanted to challenge the UDRP decision in favor of an IGO, of course they could do that by filing a claim in court. And if they did so, if there is a court that's designated by a statute, for example, then they should use that court. And if not, then in one of the two courts chosen, pursuant to the Mutual Jurisdiction practice that has evolved through the UDRP.

And then just to cap all that off—and I want to say that this is somewhat fundamental from IGO’s perspective if only to preserve the record on this point—to make clear that nothing in agreeing to this should be deemed an express or implied waiver of IGO rights to assert privileges and immunities.

I hope that’s clear. Obviously, happy to talk it through or answer questions. And I see David has his hand up, so maybe he can help provide a little more precision.

CHRIS DISSPAIN:

Thanks, Brian. I’ll catch David in a second. So I’m not sure. I mean, I understand the words that you said. I think we do need to see something from you in writing. But where you lost me a little bit is at the very beginning where you said you didn’t really understand the interplay. And my understanding is that this suggested text is specifically in respect to Recommendation 3. And what it does is, in some way, it’s intended to, rather than simply say that ... It replaces the “submit to Mutual Jurisdiction” with an alternative—is my understanding.

But let’s go to David and see what he has to say and then we’ll circle back. David, go ahead, please.

DAVID SATOLA:

Thank you, Chris. Good morning, good afternoon, everyone. I put my hand up just to be able to say, as Brian was speaking, that I didn’t have anything to say because he covered it. So I don’t have anything to say. He’s covered it.

But to the point that you just raised, Chris, I don't think it's a confusion on the interplay of Recommendations 3 and 4. But from our point of view, and I think it's true for the whole work track, we're looking at Recommendations 3 and four as an integrated whole. And the way that we had been discussing them, we were looking at Recommendation 4 first and then going back to Recommendation 3.

So I would say in response to you, Chris, that we still are looking at Recommendations 3 and 4 as an integrated whole and want to continue to have the opportunity to address it as such. We did have some words on paper. We were exchanging them, as Brian said, over the weekend and as late as 9:30 A.M. this morning, and felt that we wanted to make sure that we had the wording right. So we'll it out in the next 24 hours.

CHRIS DISSPAIN: I'm perfectly fine with that.

DAVID SATOLA: I'm in North America. Most of the rest of the team is in Europe, so we've got the six-hour arbitrage to work with. But we'll hopefully get that out in a day. Thank you.

CHRIS DISSPAIN: Okay. Thank you, David. And thank you, Brian. I appreciate that. It is what it is and, yes, you're right. It's worth getting it right in your own eyes.

To go back to your point, David, about Recommendations 3 and 4, you're absolutely right. The two recommendations are interlinked, but in simple terms, and this may be overly simplistic, if you assume for the moment—and I acknowledge it's an assumption—that we've coalesced around the option in Recommendation 4 which does allow a registrant to go to court and then come back to go to arbitration if the court refuses to hear the substantive issue, then that's there and Recommendation 3 is dealing with the court bit.

Now that would actually be the same, even if it was Option 1, which is if it went to court and that was the end of the matter. You'd still be dealing with the court bit. If I understand you correctly, what you're trying to do now is to limit—and these words aren't intended to be in any way pejorative—but to limit the option that the registrant has to go to court to a specific jurisdiction where there is legislation that says the particular IGO's issues must be dealt with in a particular jurisdiction. Is that, in essence, correct? Brian [inaudible].

BRIAN BECKHAM:

Yeah. And again, as you know, David's on the call and has his hand raised.

I think the idea was more to steer the parties towards a court that would be designated rather than prevent anyone from filing a case in court. And I think that I like Justine's suggestion in the chat about the way these could be combined. The way I have all least personally looked at it is that what we're trying to accomplish is that if you look at Recommendation 3, the recommendation there

is crystal clear. Whereas the BC proposal where it says “For greater clarity, nothing in the provision abrogates or diminishes ...” that’s less crystal clear from the IGO’s perspective. If we can get into ...

And I don’t know if David wants to talk. We’ve discussed it at some length here, this assertion of a right versus the legal fact or legal status of privileges and immunities and how they operate. But really, the idea was just, at least as I’ve understood it, a little bit of wordsmithing to keep some of that clarity that’s in Recommendation 3 and kind of bring it into the BC proposal.

CHRIS DISSPAIN: That, I appreciate. And if that was to be achieved, I think that makes sense. David, go ahead.

DAVID SATOLA: Thank you, Chris. In answer to your question, Chris, no, I don’t think that was the intent.

GREG DIBIASE: Good.

DAVID SATOLA: The intent was to recognize the factual reality that there are IGOs that do have these designated venues. And so we’re not going to agree to go to a mutual jurisdiction venue because the federal statute says where to go. So we have to reflect that reality in this rule making which raises the question—and I don’t know the

answer—there may be other statutes in other countries, or maybe there are other supreme court cases in other countries that that do a similar kind of designation.

And, again, trying to create a general rule that fits all the sizes and shapes and variations of the 300 or so IGOs that we're dealing with is very difficult. But I don't think that relying on the concept of Mutual Jurisdiction—which was drafted, what, in the early 2000s before anyone was thinking about this—should be a constraint on us. I think we have to reflect the current legal reality.

And as I said last week, I don't know that a constituency within ICANN, which is a California not-for-profit corporation, can engage in private rulemaking that ignores federal statutes. I just think that's kind of a hairy problem that we don't want to get into. We don't have to if we can reflect the current legal reality somehow.

So if that's a limitation, then I guess it's a limitation. But it's not meant to be. It's just meant to be a reflection of the reality. Thanks, over.

CHRIS DISSPAIN:

Thanks, David. So I want to try and break this down a bit, if I can. And I hope it's useful. It seems to me that ... Well first of all, the question I would ask is, are we clear or are we still holding different understandings of what mutual jurisdiction is? Because the definition of Mutual Jurisdiction here with using the uppercase letters for “M” and “J” seems to me to be very clear, and is very clearly not giving anything away. It's simply saying “a jurisdiction at the location of either the registrar or the registrant.”

Ignore (3)(b) for a minute. Just looking at that main definition, that is what “mutual jurisdiction” means in the context of this document. It does not say in that definition that it's binding. It just says, “That’s Mutual Jurisdiction that you agree to.”

Okay, I'll stop there because, David, you've got your hand up. So go ahead. Let's try and deal with it point by point.

DAVID SATOLA: Carry on if you want, Chris. I mean, I—

CHRIS DISSPAIN: No, no. Go ahead. Please do. I'll lose track. You'll track. And we'll lose track.

DAVID SATOLA: So my understanding of the Mutual Jurisdiction provision is that it's not really ... It's unfortunate that the defined term is labeled that way because it's really more a venue issue than a classical jurisdictional issue. Jurisdiction is something that has to be determined at some point by a court, whether they're competent to hear it, for a variety of reasons. The variety of kinds of jurisdiction. So it's too bad that it wasn't called “mutual venue” or something like that. But it's not, so we're stuck with that defined term. I see it as a designation of venue.

And there's a conflict, I think, between what the defined term provides, which is the jurisdiction of either the registrant or the registrar as the place where the aggrieved registrant goes to file

its claim and get it's day in court, versus this federal statute which says, "If you have a claim against this IGO, that's where you go." And don't preserve a day in court for the registrant and deny me my day in court where I know I'm supposed to go. So we have to [inaudible] them both.

CHRIS DISSPAIN:

Okay. Yeah, I got that. I want to check in with some others before I come back to the next thing. So, does anybody want to talk against Mutual Jurisdiction in the context that we're talking about here, referring to a designation of venue? Does anybody think it's more than that or it means something more than that?

Paul.

PAUL MCGRADY:

Hi, Chris. Actually, I think it means something less than that. The function of this is not about making one party submit to a jurisdiction or waiving defenses. All it is, is a shortcut for registrars to not implement a UDRP in the event somebody sues to stop it. And the shortcut is ... I look at the header. It's in the home court of the registrar or it's in the home court of the registrant. Full stop. That's all it is. I don't think it was ever meant to have any real legal meaning. It is unfortunate that the language used calling it "mutual jurisdiction" is so sloppy.

And so I'm kind of wondering whether or not we want to get to that. That's the primary issue, which is a jurisdiction recognized by the registrar and maybe if we mess around with what we call it to

clarify that that's the real issue, then the whole question goes away. Something to think about.

And sorry this is so late in the game, but the longer we talk about this, more philosophical I'm getting. Thanks .

CHRIS DISSPAIN: Yes. Thank you. You are not alone. I want to just put that to one side for a moment. I take your point, and it may be that it is too late and maybe we can't. But let's just put that to one side.

Mary, go ahead.

MARY WONG: Yeah. So just to follow up on your question, Chris, and with what Paul said. The definition of "Mutual Jurisdiction" under the rules does indeed seem to point to a venue question. The problem seems to be the other part of the rules where, in speaking to Mutual Jurisdiction when a complaint is filed, the language says that the complainant agrees to submit to that jurisdiction. So it does create a bit of an unfortunate situation.

CHRIS DISSPAIN: Sorry. Just go through that again more slowly.

MARY WONG: The definition itself of Mutual Jurisdiction under the UDRP rules does seem to indeed point to a venue question. So the problem such as it is may not be the actual definition itself, but the other

part of the rule which actually states that when filing a complaint, the complainant agrees to submit to Mutual Jurisdiction. So we're back to the "agree to submit" language.

CHRIS DISSPAIN: That's (3)(b)(xiii). Right? That's the one that's below on the screen. Is that what you're talking about? On the screen? "Complainant will submit to the jurisdiction of the court."

MARY WONG: Yes.

CHRIS DISSPAIN: So I agree.

MARY WONG: I forget the exact Roman numeral, but yes. It's (3)(b)-something.

CHRIS DISSPAIN: It's (xiii), which is 13. Okay, so I agree with you that that subclause takes it to a different level. But the actual definition itself is, I think ... Leaving side that subclause which is a separate matter. I'm not saying it makes it okay, because it doesn't. But it's separate. The actual definition is a venue choice.

Now I want to go back now to the point that David has made about the federal court. And David, this is not just a question for you, but I have no doubt that you'll want to respond to it.

So I take your point.. There's a law in the U.S. that says if you want to take on the World Bank, you need to do so by going to the federal court in D.C., or whenever it was you said. I think that's what you said. And fine. But that doesn't stop me, if I choose to do so, from launching proceedings in the UK. You might be able to turn up and say, "This is not the correct venue." But I can, if I choose to do so, launch proceedings in the UK.

And I imagine, although I'm not 100% sure—but no doubt Jeff and Jay and Paul will confirm or deny this—that actually, there's nothing to stop an American who is bound by that federal law from starting proceedings if they choose to do so. It's for the court to say, "This is the wrong jurisdiction." And my concern is ...

I completely acknowledge it will be frankly daft for a registrant to do this, but my concern is that I'm not sure that we can comfortably preempt what is the right of a registrant to go to court in the same way that we can't preempt your right ... The whole reason why we're here is because you say the previous wording meant you had to give up your right to argue that you're exempt. And in the same way that you're entitled to argue that you're exempt, surely the registrant must also be entitled to argue in the court of XYZ that the court of XYZ should hear it.

I'm not clear why there is a distinction between those two things and why it's so uncomfortable, given that you will be able to turn up. Alex is not on the call today, I don't think, but Alex has said this—probably more than anybody else—you will win. And if you don't, you can always appeal. I don't understand why there is an attempt to move the registrant's rights away to go to any court

they choose when it's for precisely the reason of maintaining rights that we're here in the first place.

But I want to stress that I'm not trying to push this group into making any decision one way or another. I'm, to some extent, playing devil's advocate here. But I do feel that there is a disconnect here with a desire to say registrants should not be able to choose their jurisdiction.

So David, thank you very much for putting your hand up, and the floor is open to you and then to anyone else who wants to say something.

DAVID SATOLA:

Thank you, Chris. So I think Mary hit it on the head. It's not that we're trying to deny someone from going to court if they choose—and I'll get back to that in a second—or to go to any court that they want to, if they choose.

Our preoccupation has been with this submission to jurisdiction issue which does cause us huge angst because the case law is such that IGOs, if they submit to a court, have waived their privileges and immunities with respect to the issue at hand. If we can remove the reference to Mutual Jurisdiction because of this confusion that Mary mentioned, I'd be delighted. I'd be absolutely delighted.

And this if a registrant wants to go and Sue us in Timbuktu or in Hyderabad or somewhere else, that's fine. Go ahead. I'm not denying them that. When I started in private practice as a very young attorney, I had a mentor. And for those from the United

States who are familiar with our history, his name was Jefferson Davis. Great guy. Super, super guy. And he was great in dealing with clients.

And he pulled me aside as a first-year associate because there was something utterly—as you say, Chris—daft that was being proposed. He pulled me aside and he said, “David, the client is always right. The client can be stupid, but the client is always right.”

And so if a registrar wants to do something that’s stupid, that’s fine. It’s their right, as you say. And if it’s in the United States and if it’s against the World Bank or the IMF for the IFC or the Inter-American Development Bank—all of which are covered by the Bretton Woods statute—and they go to, I don’t know, a court in ... Where is Jay’s company located? Oklahoma?

If they go to an Oklahoma court, the court is going to know or someone’s going to figure out the statute, and it’s going to get remanded to the federal district court in D.C. So, yeah, if they want to go through that process and spend the money to do it and the time to do it, fine.

I’m suggesting to put in the language about the designated courts because it’s a fact and it would save time, but I’d be happy to take it out if we take out the Mutual Jurisdiction thing and just say, “Yeah, a registrant has a right to go to court, and then that decision can be denied.” That’s what we had in the original recommendation that we put out for public comment. So I’d be happy to return to that.

CHRIS DISSPAIN: I understand completely.

DAVID SATOLA: Okay.

CHRIS DISSPAIN: Thank you.

DAVID SATOLA: Thank you.

CHRIS DISSPAIN: No, thank you. Jay, going to ask you, and you may not know the answer to this question, but in a minute I'm going to ask you to comment—and Paul, you may have something to say as well—about why it's necessary to put in the words “Mutual Jurisdiction.” Why you couldn't just say, and I'm going to use the BC's amendment, “A respondent may challenge a decision in a court in at least one of the jurisdictions specified by the complainant (being the registrant or the registrar),” and then all the “for greater clarity” stuff or, indeed, any other wording that is acceptable to the IGOs that makes it abundantly clear that there is no abrogation or diminishment to privileges or immunities.

Why is it so critical that it says “Mutual Jurisdiction”? When, in fact, what we're actually saying—unless I've misunderstood—we are effectively saying that the registrant will bring proceedings, should

it wish to do so, in either the court jurisdiction—that is, the jurisdiction of the registrar or the jurisdiction of the registrant. That is, in essence, what “Mutual Jurisdiction” means by this definition.

Certainly the lawyers amongst us would acknowledge that that term outside of this document—not this document—outside of the UDRP document, the policy document ... That term “mutual jurisdiction” has a number of weighty meanings and is therefore open to not insignificant interpretation as to why we couldn't just be more specific and actually say what we mean rather than trying to use the shorthand.

Does anybody want to respond to that specifically? Jay or Paul? Or does anyone just want to shoot it out of the water completely and tell me that I'm wrong. Jay, go ahead, man.

JAY CHAPMAN:

Okay. Thanks, Chris. So just to be clear, we're just saying, in the suggested amendment, just taking out the word “Mutual Jurisdiction” and inserting the ICANN definition or the UDRP definition of “Mutual Jurisdiction” [inaudible].

CHRIS DISSPAIN:

Yes. I am saying that. And as a side question, I also don't ... And then again, perhaps you can explain this to me. I don't understand ... That seems to me to be a limitation on a registrant that you're prepared to accept. But in fact, if I understand it correctly, what the IGOs are saying is that you don't even have to say that. You could just say the jurisdiction is the registrant's choice. But you may want that in there. I don't know. I'm just saying.

JAY CHAPMAN: No, if that's what they're saying ... So if the registrant gets to decide, I guess that's a different perspective to consider. Sure.

CHRIS DISSPAIN: But let's go one step at a time. So to answer your first point, yes, what I was suggesting was that the ... Leave aside the accepted wording for how you deal with that no rights are being given up for the "avoidance of doubt" stuff. Just dealing specifically with the jurisdictional thing. If you said "may challenge a decision in a court in at least one of the jurisdictions of the registrar ... or the registrant ..." would that work for you?

JAY CHAPMAN: Well, at first glance that's the definition of Mutual Jurisdiction—right—as we understand it.

CHRIS DISSPAIN: Correct.

JAY CHAPMAN: So again, it seems reasonable.

CHRIS DISSPAIN: Okay. Again, this is just a call so—

JAY CHAPMAN: Sure, of course.

CHRIS DISSPAIN: —no binding agreements here. All right. Let's stop there, then. David's hand went up, so let's go to David. And then we'll come back to the next bit. David, go ahead.

DAVID SATOLA: No. Thanks, Chris. I'll lower my hand for the moment and let the discussion ensue.

CHRIS DISSPAIN: Okay, no problem. So I think I'm coming back to you guys, you and Brian anyway, because ... Maybe it's Brian. Brian, you said that you had concerns about the second sentence in the amendment. That you didn't think it was clear enough. "For greater clarity, nothing in this provision abrogates or diminishes an IGO's rights ..."

Can you explain what the issue is there, or one of you explain what the issue is there? Because that seems to me to be actually fairly clear. But I'm game to understand why that's an issue. Brian, go ahead.

BRIAN BECKHAM: I'll confess I will have to defer to David here. The IGO colleagues know much more intimately the ins and outs of how privileges and immunities working practice. I'm sorry to deflect, Chris, [inaudible].

CHRIS DISSPAIN: No, not at all. The right person to answer the right questions is not a problem at all. David, do you want to have a crack at an explanation if you can?

DAVID SATOLA: I'm sorry, Chris. What is this specific question that we're [inaudible]?

CHRIS DISSPAIN: Brian seem to give the impression when he was talking about the suggested amendment from the BC that the second sentence wasn't clear enough about the retention of the right to claim immunities. I read it as been pretty clear.

The previous sentence finishes "... in a court proceeding an IGO may raise its claimed privileges and immunities."

And then the second sentence says, "For greater clarity, nothing in this provision abrogates or diminishes an IGO's right to claim privileges and immunities as a defense to a challenged administrative proceeding's decision, nor does the IGO's agreement to this provision constitute a waiver of any of its claimed privileges or immunities."

Now to be clear, the provision would say "choose a jurisdiction [on the side] of the registrars of the registrants."

DAVID SATOLA: Right. Okay.

CHRIS DISSPAIN: I'm not sure why that's not clear. It sounds clear to me.

DAVID SATOLA: Well, I think the stuff about the language that's there and that we're kind of batting back and forth now in response to the suggestion that Jay submitted a couple weeks ago is in response to the insertion of the Mutual Jurisdiction language there and, again, the confused way that it's used to mean both venue and submission to jurisdiction, as Mary pointed out.

But let's back up a second. So there's been an issue. The IGO prevails. The registrant has a choice to either go to court or to go to binding arbitration on appeal. Okay.

CHRIS DISSPAIN: Yeah.

DAVID SATOLA: As Paul said in the call a couple of weeks ago, there's a lot of stuff that IGOs can do. There's a lot of stuff that registrants can do. And we don't record all of them in this rulemaking. So of course, registrants can go to court. That's their right. Do we need to say that they have a right? And even in the face of a federal statute that applies to me and the IMF, the IFC, and others, they can go to Oklahoma or Wisconsin, or wherever their registrar or registrant is. And those courts are going to kick it to the district court. So

they have that choice. Or they can go directly to the district court in D.C. They have that choice.

Likewise, we can assert our privileges and immunities whenever we want to. It's a right. I don't particularly feel I need to say that because it's a right that I have. So I think we're getting ourselves tangled in knots over this stuff by trying to record in a private rulemaking a lot of stuff that just is. And some of it we are recording, and some of it we're not. And I don't know why we have to record that it's got to be a court of the registrant's headquarters or the registrar's headquarters. That seems to be almost irrelevant here.

If the idea is they can go wherever they want to .. And we get sued all the time. We get sued all over the world. Wherever we have an office that can receive service or process, we get sued. It happens all the time. Eventually, it gets to the court where it needs to get to and then we, the IGO, have the option of asserting our privileges and immunities as a defense. The case goes away. Or if we think the issue is strong enough, we take the case. And I'm really looking forward to the case where we can hear a complaint about a registrant and settle with binding federal statute once and for all what our rights are in these cases.

So if you want to go to court, go to court. Great. But I also don't think that we need to say or to restate in these provisions all of the obvious things that people can do. And so I'd be happy to take out the stuff about our privileges and immunities. We have them. But I also would be happy to take out the stuff about "You have the right to go to court." Obviously.

But by saying that and then kind of tangling it up with this Mutual Jurisdiction concept, then it makes me want to also say, “No, there’s a proper place to sue me, and everybody knows where it is. And, I have certain rights.” But I think how we get to that point will depend on how it’s expressed in Recommendation 3 and Recommendation 4.

Again, the language that we had talked about in the first half of this year before went and published for consultation on the recommendation was one that we were comfortable with. And I know we have to respond to the comments that were raised in the consultation period. It doesn't mean that we can't revert to what we were comfortable with before. Over.

CHRIS DISSPAIN:

Thank you, David. So a couple of things I want to respond to. I think the answer is, to some extent, you need to say these things because they are ... There are a number of different reasons.

First of all, we are building an explanation and a justification for changes in the current system in order to accommodate a particular claimant, and it's important that the recommendations are plain and understandable and cover all of the points. Otherwise, they will not make sense to people. That's the first point.

The second point is that I think, again, the reason why I think we need to say that a registrant has the right to go to court is because registrants will read this and need to know that. And secondly, there is actually something that follows onto that, which is that if

you follow down to Recommendation 4, then there are things that follow from going to court. You go to court. You understand that the IGOs may argue that they're immune. They win that argument, then they can go to arbitration.

So the whole thing sits together as a package, and taking out things just because they are a right, I don't think that ... I think even if they are a right, then I think they're still worth stating because they explain how this thing hangs together and what the rights of the parties are. It's important that that is as plain—and it's not always easy—as plain as it possibly can be.

So give that, I wonder if we could have a stab at taking Recommendation 3 and the suggested amendment from the BC and actually rewording it so that it comes back as a recommendation as opposed to a suggested amendment which isn't really a suggested amendment. Because how do you amend it if ... You're right about it being confusing from that point of view.

So here's what I'm taking away from this. I'm taking away the fact there is an issue with the words "Mutual Jurisdiction." Justifiable or not, it doesn't matter. There's an issue. I'm taking away the fact that the words themselves, if they're gone, as long as it's clear what replaces them and perhaps [inaudible] clarity of the definition. That's fine, too.

And I'm comfortable that although you may want to do some wordsmithing on the "for greater clarity" clause to make it abundantly clear that there is no abandonment or abrogation of any rights, that still needs to be said.

So Mary, I'm wondering if rather than asking people to go away and do some homework, if you and the team and I could perhaps spend a little time in the next couple of days working on a suggested redraft of Recommendation 3, taking into account the amendments from the BC and this discussion that's happened today, and get that out to the group by, say Thursday, for discussion our call next Monday. It seems to me that a rewording may move the discussion along and make focus minds on the issues that actually really do matter.

David and then Mary.

DAVID SATOLA: Thanks, Chris. That sounds great. I would just say, well two things. One, I think we'll still submit to the list or to Mary—

CHRIS DISSPAIN: Oh, sure.

DAVID SATOLA: —what we were going to propose because that might help in that process. And secondly, I know you don't want to daft during these discussion, but if we adopt the suggested rewording that you made earlier, Chris, that the aggrieved registrant can go to a court and its jurisdiction or the jurisdiction of the registrar, I would suggest adding, after that, "unless a court is designated to hear cases about the IGO." Because, yeah, it will just save for everybody. It's one of those things that's obvious. It's a fact. But if we're stating obvious facts, then I'd like to include something like

that in there. If there are designated courts, then that's where it should go.

Anyway, that's it. We'll look at it. Okay, thank you.

CHRIS DISSPAIN: Thanks. Mary, go ahead.

MARY WONG: Thanks, Chris. Actually, thanks both of you because, David, one of the things I was going to say is that if you and Brian were comfortable sending what you have to us, we would certainly try to work that in because that's a really helpful starting point since it's an issue that you guys have already been discussing.

And Chris, to your point, to us it is important that there is text somewhere in the report that explains the thinking, the rationale, but also when things are changed and when they apply in certain situations and when not. Maybe the text of the recommendation itself doesn't need to do that. There are certainly ways we can include explanatory texts or Implementation Guidance or something.

From the staff's perspective, it does make sense to have that in the report because that really clarifies things for all the different audiences that we will have, including the public comments to the Board when the Board comes to consider any recommendations that Council may approve.

And the other thing was, as you said, Chris, the staff has been thinking and discussing about the fact that we're trying to accommodate two different perspectives in addressing specific problems in Recommendation 3. So, yes, we will be happy to work on something over the next couple of days with you.

CHRIS DISSPAIN:

Okay. So to be clear ... That's great. Thank you. Marvelous. I do want this out, and we'll set aside some time to do this. I do want this to be out by Thursday at the latest. I know there are like three sets of things that need to happy by Thursday, but what concerns me is that the rest of this group has enough time to actually read this stuff and consider it. So if we can manage to make that deadline, that would be great.

Berry, I'm not going to take this any further on this particular point right now. I'm happy to throw the floor to anyone who wants to say anything. But before I do, let me go back to you and see what else you want to cover.

BERRY COBB:

Thank you, Chris. Really, the only thing left on our agenda ahead of us it to review through the other comments that were submitted from the public comment. Just as a recap, these comments weren't tied to any specific recommendation within the text. And I think some of them—

CHRIS DISSPAIN:

Sure. Can we do that now?

BERRY COBB: We can start, but I haven't had a chance to review through them to try to expedite. But let me pull it up real quick. So there are 39 pages of comments here. And I think, in general, most of these are labeled as "divergence" or we're against the report. And again, specifically, they didn't ascribe any of the comment to any one particular recommendation. And so I'm not so sure about the best approach for this.

I am wondering if maybe as part of the homework for the group is for everyone to read through this particular document. And I'll do the same to get to a short list of those items that we feel is necessary to discuss during the call. Otherwise, I think most of this will not be productive in terms of advancing to get to the recommendations. And I'm not stating that these comments aren't important, but I don't believe that they'll provide substance to improve or enhance the recommendations.

And finally, most of these are just general disagreements with the whole approach and not any specific recommendation.

CHRIS DISSPAIN: Okay, fine with that. Can you get a link to that specific bunch of comments out to the list ASAP so that people could just click on that link without have to find the document elsewhere, which would be very helpful? Okay?

BERRY COBB: I will attach the document itself. Thanks.

CHRIS DISSPAIN: That's super. What else? Is there anything else that you want us to cover right now?

BERRY COBB: I think that's it for today. So to recap our action items, staff will ... We need to combine our Recommendations 4 and 5 versions. Mary made some suggested edits, but she didn't use it against the version that I had that collapsed Option 2 into the recommendation text. So we'll get that together.

Staff, as well as with leadership, will work on the next version for Recommendation 3. David will send the text in regard to Recommendation 3 of what they had been working on working on. And Recommendation 1 is now marked as stable. And then finally, I'll send the other comments PCRT out, and if anybody has any particular comment they want to flag for discussion on the call then we'll allocate agenda time for that.

So that's it. Our next meeting is the 7th of February at the same time, 15:00 UTC. Back to you, Chris. You're on mute, maybe.

CHRIS DISSPAIN: I am, indeed. Thank you. The floor is open to anyone who wants to make any other comments or cover any points. Okay. There being none, I am going to return 20 minute of your time to you— 23 minutes, actually.

There is much work to be done on the list and as homework. Please come to the next meeting next Monday having read the necessary draft of public comments that Berry is going to send you a note of, and having considered the wording that the staff team and I will put out in the next few days in respect to Recommendation 3, plus all the other stuff that needs to be done.

I appreciate your time and effort. Thank you, everybody. And, yes, happy lunar new year, Justine. Enjoy the fireworks. See you all next week. Take care. Meeting closed.

TERRI AGNEW: Thank you, everyone. I will stop the recording and disconnect all remaining lines. Happy near year.

[END OF TRANSCRIPTION]