ICANN Transcription
IGO Work Track
Monday, 02 August 2021 at 15:00 UTC

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TERRI AGNEW: Good morning, good afternoon, and good evening and welcome to the IGO Work Track call taking place on Monday, 2 August 2021, at 15:00 UTC.

In the interest of time there will be no roll call. Attendance will be taken via the Zoom room. If you're only on the telephone, could you please identify yourself now? Hearing no one, we have listed apologies from Juan Manuel Rojas. No alternates have been put forward.

All members and alternates will be promoted to panelists for today's call. Members and alternates replacing members, when using chat please select panelists and attendees or everyone if your Zoom has been updated in order for everyone to see the chat. Attendees will not have chat access, only view to the chat.

Alternates not replacing a member are required to rename their lines adding three Zs at the beginning of your name and in parentheses at the end 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 [inaudible] the Google link. The link is available in all meeting invites toward the bottom.

Statements of interest must be kept up to date. If anyone has any updates to share, please raise your hand or speak up now. Seeing or hearing no one, if you do need assistance, please email the GNSO secretariat.

All documentation and information can be found on the IGO Work Track wiki space. Recordings will be posted on the public wiki space shortly after the end of the call.

Please remember to state your name before speaking.

As a reminder, those who take part in ICANN multistakeholder process are to comply with expected standards of behavior.

Thank you. And with this, I’ll turn it back over to our chair, Chris Disspain. Please begin.

CHRIS DISSPAIN: Thank you, Terri. And welcome, everybody, to our IGO Work Track call. First item on the agenda apart from the roll call, etc., is welcome and chair updates. I don’t have any updates at this

stage, but I want to check in with Berry and Mary and Steve to see if they have any updates. And also, John, whether you have anything, any updates at all from the Council. Berry, Mary, Steve, anything to update us on?

BERRY COBB: Nothing from me.

CHRIS DISSPAIN: Go ahead, Mary.

MARY WONG: Just to say that there's nothing from the staff side that we can think of, Chris.

CHRIS DISSPAIN: Okay, super. And, John, anything?

JOHN MCELWAINE: Chris?

CHRIS DISSPAIN: Yes, go ahead.

JOHN MCELWAINE: Yeah. No, nothing from the Council side either. So nothing to report.

CHRIS DISSPAIN: Marvelous. Okay, well, that's good, I suppose. So that brings us then round to our continued discussion on the working proposal. There were two items that we left our call with last week. One was for Brian to consider specifically the arbitration point which is on—I'm not sure what page it's on—but anyway, it's there. And Jay also to talk to us about having had a chance to look at everything, any red flags that he has and why that might be.

So I think probably we should tackle those points given that they are going to inform any further discussion that we may be having. Could we move, or we may already be there. It's hard for me to see on this screen. Is that? Oh, yes, it is. There you go.

So, Brian, the text that you were going to talk about is highlighted there. It starts, "If the parties raise concerns, etc." And we were going to ask…you were going to think about why you think that was a specific matter for IGOs rather than a general matter which is where we kind of headed in our discussion last week. Have you had a chance to think that through, and is there anything that you have to say?

BRIAN BECKHAM: Hi, Chris. Hi, everyone. Just checking you can hear me.

CHRIS DISSPAIN: Yeah, I can hear you fine. Thanks, Brian.

BRIAN BECKHAM: Great. Great, thanks. I'm afraid I don't have an answer to the more specific question around the general applicability of this for IGOs versus in UDRP generally except to say that, of course, the genesis of this Work Track is that IGOs face different realities when it comes to finding themselves in courts than normal litigants, which I think does make a difference here.

But I did want to just confirm after having had a chance to consult with the IGOs that when this question was put to some of the people that have more direct experience, so when we asked the lawyers if you will, the concern that they raised was that without having some clarity around this topic it really was an undesirable situation because you are potentially going into a court situation without knowing what the substantive procedural parameters are and that should be avoided. Which of course makes sense to me.

So I think it kind of affirms the hope that we can't find a way to, whether nudge the parties toward agreement in the first instance or have some sort of a safety valve for the event that that's not possible, then I hope we can find a way through that still.

CHRIS DISSPAIN: Thank you. I assume you'd agree, would you, that the point that you've just made and the input you've had from the lawyers while true from a legal point of view is not specific in this instance. It's general. I mean, the rules of the UDRP put all of the parties in that situation inasmuch as they have a limited choice of jurisdiction, i.e., the registrant or the…I know we're talking about law in this instance rather than jurisdiction, but for the sake of this discussion remain [at] the law. Everyone who enters into UDRP agrees that if

it ends up in court, it ends up in the court of law of the registrant or the law of the registrar. So that situation is [the same] for everyone.

BRIAN BECKHAM: Yeah, strictly speaking that's true, of course. But again, the normal parties to a UDRP proceeding don't face these complexities that IGOs do in terms of finding themselves potentially in front of a court. So I do think that's a fundamental difference.

CHRIS DISSPAIN: This is not finding your in front of a court though, is it? That's the whole point. If we can reach a consensus on this, we've removed that finding you're in front of a court. Or at least effectively removed it in that if you win the argument that you're not subject to the jurisdiction. So therefore we're actually talking about law rather than finding yourself in front of a court. So that is slightly different, isn't it?

BRIAN BECKHAM: Yeah, I see what you mean. I also see that—sorry, don't mean to take your role—but that Alex has her hand up so maybe she can help here.

CHRIS DISSPAIN: Yeah, I know. I'm going to go to her. Let's go to Alexandra and see what she has to say. Hi, Alexandra. Please, go ahead.

ALEXANDRA EXCOFFIER: Hello, everyone. You can hear me fine? Because there were some issues last time.

CHRIS DISSPAIN: We can hear you.

ALEXANDRA EXCOFFIER: Okay, great.

CHRIS DISSPAIN: No, we can hear you fine this time.

ALEXANDRA EXCOFFIER: I want to take it from a different viewpoint, not necessarily IGO versus non-IGO. But if you do the current UDRP process for everyone, there is a selection of a jurisdiction. But let's say you go to court in that jurisdiction, you could still argue that different law, substantive law should apply. Let's say you go to a state court—and somebody mentioned Florida once—you could still say that for some questions it should be, for example, U.S. federal law that should apply if you're talking about trademarks. You could still say the question is about international law, that international law should apply. So it's not necessarily the substantive law of that state which will apply. The parties can still argue that different laws should be applied. This is kind of similar. You're going in front of an arbitral tribunal, and you should be able to argue that the substantive law should be, I don't know, New York law because it deals better with arbitration. I'm just giving you

examples. I don't know exactly what the question will be. If it's a contract question, it might be fine.

CHRIS DISSPAIN: I understand your point.

ALEXANDRA EXCOFFIER: So taking even IGOs out of the equation, it's the same. You could always argue that different laws of different jurisdictions have decided this and that. That's my point is that we're making it narrower in this case than it would be if it did go to an actual court.

CHRIS DISSPAIN: Thanks, Alexandra. Who would like to respond to that or comment on that point? If I remain silent long enough, somebody will put their hand up.

ALEXANDRA EXCOFFIER: I've confused everyone.

CHRIS DISSPAIN: Noting. So, David, I've got your chat, and I'll get you in a second. Just let me see if there's anybody from the sort of other side of the fence, for want of a better way of putting it, who would like to respond to Alexandra's. Perhaps you want to consider that briefly while I ask David. David, you're welcome to take the microphone now if you'd like to.

DAVID SATOLA: Thank you, Chris. Can you hear me?

CHRIS DISSPAIN: Yes, they can.

DAVID SATOLA: Great. In addition to what Brian and Alexandra said, I think for the IGOs it's also a question of legal certainty. So I take your point, Chris, that we're not talking about the jurisdiction or being in front of a court, but we're in front of an arbitral tribunal and that's well recognized and thank you.

But for purposes of if the parties can't agree on what substantive law will apply, I think for the IGOs as a matter of legal certainty we would prefer to be able to say in the event that we're not able to agree with the registrant that there's only one law that will be applied as default for substantive [and] procedural purposes, the registrant when it registers is only going to do the registration once that might affect an IGO acronym, but the IGOs may be confronted with different applications from around the world. And so we're trying to limit the expense that we would need to incur in order to go through the arbitral process.

So as I said last week, I'm trying to understand a little bit the universe of problems that we're dealing with here and for the purpose of preserving the flexibility and the rights of the registrant whether we're overdesigning something here. And it would seem to me that if we can agree on what that default, for lack of a better

word, law would be, I think it would help for the purposes of assuring the IGOs that GNSO and ICANN have done what they can to reduce the burden of cost of the IGOs having to defend these registrations where and when they might occur. Over. Thank you.

CHRIS DISSPAIN: Thank you, David. Everything you said, I accept everything you said and I also accept what Alexandra had to say. The point that we reached on the last call was not, I think, a necessity to convince people of the common sense about what is being said but rather trying to distinguish this as an IGO-specific point on the basis that, as a number of people said on the call last week, this is a universal problem for UDRP rather than an IGO-specific one.

And one of the things that I'm personally very concerned about—I'll get to you in a second, Jeff. I can see your hand. One of the things that I'm personally very concerned about is the response we're going to get from this when we go out for public comment. And the more we do, that encroaches on the general rules and regulations for the current UDRP system and carves out a different status for the IGOs that is not specifically required.

And you can argue that the point about mutual jurisdiction is specifically required. The more we do that, the more likely we are to end up with pushback of such a heavy nature that we will stand no chance of getting this across the line. And I really don't want to lose that opportunity.

It's an incremental step that we would be taking. Bearing in mind that I think everybody acknowledges that UDRP itself is subject to review and needs to be reviewed. And once the overarching IGO issues have been solved, then I think everybody sits in the same boat, if you will, and the review can look at UDRP as a whole. But that's just my personal opinion.

Jeff, go ahead, please.

JEFF NEUMAN: Yeah, thanks. I think Jay has pretty much said what I was going to say in the sense that you can make a lot of arguments to the courts, but the courts generally follow their own law when they have law that deals with those types of situations. And when you're talking about intellectual property, domain name disputes, and Alexandra was using Florida. Florida would use U.S. law as applied in the Florida courts.

So I understand the issue. I understand. From a trademark owner's perspective I don't like it either. When I go after—on behalf of my clients, I don't like that fact that I have to consent to that jurisdiction. But in one way it is predictable in the sense of you know it's going to be one of those two jurisdictions, and you get to pick it when you agree to the arbitration. So I think that I suppose if there's a really strong reason why the law of the registrant or the registrar shouldn't be used, you can hopefully get the registrant to mutually agree.

We're just really trying to make it as close as we can for the reasons Chris just said. There's already enough. We have to go

back to the GNSO. And I just think this is one of those that's one step too far. Although a perfectly ripe issue for the RPM review when Phase 2 gets launched. Thanks.

CHRIS DISSPAIN: Yeah. And I think…I mean, let us not lose sight of the possibility that there will be those who will be pushing for this matter to not be solved by this Work Track but to be left to the reconstituted RPM, which I believe the intention is to have done toward the end of the year or early next year. And that I suspect is not something that the members of this Work Track would be particularly happy with. I'm going to….

JEFF NEUMAN: Could I just follow up on that?

CHRIS DISSPAIN: Fine, go ahead. Yes. No, please, absolutely.

JEFF NEUMAN: Yeah. Well, I was going to address Brian's point in the chat, but he might make it. So maybe I'll just go after Brian.

CHRIS DISSPAIN: Okay, Brian, go ahead.

BRIAN BECKHAM: Sure. I'm so happy to hear from Jeff. But I guess I was just curious, Chris. You alluded to the concern that there may be some parties who would have an issue with this Work Track trying to address this problem. And I was just wondering if you could share a little bit of the background of where that concern comes from. It's not something that I've heard articulated, so I don't know maybe if this was something that came up with a conversation with Council leadership or otherwise. But it just struck me as a concept that hadn't been raised before.

CHRIS DISSPAIN: Well, no, it didn't come up in a conversation with Council, but there are conversations going on outside of this Work Track in various different arena, including the—I was about to use the word activist, but that's unfair—so the active registrant arena, intellectual property arena where people are concerned about how far this goes and also the steps that get taken.

But it's not anything more than a presumption on my part that it's possible that that would happen, but that presumption or that possibility is driven by outside talk and discussion, if you will. I'm obviously not going to be specific, but I imagine there are others on this call that may well have heard similar things. Jeff, do you want to follow up now?

JEFF NEUMAN: Yeah, although not on that point. I'm not aware.

CHRIS DISSPAIN: Sure.

JEFF NEUMAN: But I was just going to add—and Brian brings up a point about how do we know? We know this is an issue. How do we know that the UDRP review will take this up? I mean, we can have a recommendation in our report that recommends we discussed this issue. We believe this is an issue for all complainants, IGOs included, and we recommend that this be taken up in the RPM review or upcoming RPM Phase 2 review. Or something like that so that we can at least make it clear that this is something that we are interested in addressing and something that, I think, if we have that recommendation in there it will make it all the more likely that the RPM review would consider it. And other PDPs have done similar types of recommendations.

CHRIS DISSPAIN: Yeah, and one other thing I…oh, sorry. Yes, Mary. Please go ahead.

MARY WONG: No, Chris, why don't you finish your comment and I'll go after?

CHRIS DISSPAIN: No, no. No, you go ahead please. Please, please.

MARY WONG: Okay. The staff have been talking about this as you all have been discussing it. So looking at the various options that have been discussed to date, we wanted to go to a slightly higher level here and focus on, I guess, two principles/concerns.

One is that in any kind of legal proceeding, whether in the courts or by voluntary arbitration, etc., it's usually advisable or preferable that both parties know as early as possible where the case is heard, by whom the case is heard, and what law is going to apply.

The second general principle/concern I think has been expressed variously by David and others is that along with this certainty one of the things that we've been juggling with in terms of mutual jurisdiction and adding a voluntary option is to try and balance the interests and the flexibilities for both the registrant and the IGO.

So one suggestion—which could be a terrible suggestion, but just to try to advance the conversation—is looking at how this particular bullet has been modified. Why don't we consider an option where we could say that the applicable law would be that either of the registrar or the registrant's location unless the parties agree otherwise within a certain timeframe?

So in other words, we're sort of flipping this bullet point around a little bit to try and get to the certainty, to still reference the ability of the parties to agree, but also to have some kind of default if that agreement doesn't materialize within a certain timeframe.

CHRIS DISSPAIN: Thank you, Mary. It may be that it is more sensible and easy to manage to flip that around, and that's fine. And I don't think that

actually necessarily solves the underlying issue which is being discussed which is that the IGO position is that they would like to be able to defer to the arbitrator in the event that, number one, the parties haven't been able to agree and, number two, and I'm not intending this to be pejorative but they don't like the jurisdiction of the registrant or the registrar.

So in other words, the default mechanism is not the registrant or the registrar. The default mechanism is the arbitrator. And as I think we've said, that has been said by many, many times last week, that is a universal issue for everyone, not an issue for IGOs.

I'm going to pause the discussion on this here. Oh, no, I'm not. I'm going to go to Brian first and then I'm going to pause the discussion. Brian, go ahead.

BRIAN BECKHAM: Yeah, sorry, Chris. I defer to your management of the work here, but I guess I'm perfectly mindful of the idea that this could impact other parties to UDRP cases. And maybe I'm just not hearing this in the words that are being articulated and it's there in spirit and just hasn't been put in these terms, but it sounds to me more that we're hearing sort of a general vague concern that this is an issue that should be addressed in the UDRP review. Not so much that people specifically object to us trying to figure this out here.

If that's the case, obviously that's something that has to be considered. But I would just offer that mindful of the idea that this might be something that the broader UDRP review looks at, if people don't strongly actually object to us trying to figure this out

here—and by the way I would say obviously whatever work we undertake would be put out for public comment, so that certainly gives us a good vehicle to test this with other stakeholders. But in the absence of a strong categorical objection to trying to figure this out, then I would hope we could at least put out, even if it's just sort of an idea for purposes of soliciting public comment.

CHRIS DISSPAIN: So to be crystal clear, Brian, I don't have any issue at all to shorthand bracketing that text as a possible way forward at all. I don't have a problem with that. I'm merely trying to…I mean, maybe I am the only person on these calls who is concerned that we are going to face issues of consistency with the previous recommendations and so on.

But one thing I was going to say when you asked me, Brian, about where was I getting information from about people likely to object which I think I've answered as best I can. It would also be fair to say that one of the issues that could be discussed at a Council level would be because the—I'm going to use the word scope and I don't mean scope with a capital S but because the wanderings of this Work Track have been so wide and covered so many areas that actually this is a matter that should be dealt with by the bigger review of the UDRP. But that said, I'm not averse to putting it in as a bracketed text.

But what I want to do now is to move on to the, if I could put it this way, the other side of the coin and perhaps ask Jay if he would be good enough to tell us his views of the points that we've got encapsulated in this document and if there's anything that he

would consider to be a red flag. Which was, in essence, the homework that he agreed to undertake after last week's call. Jay, are you in a position to be able to talk to us about those things, please?

JAY CHAPMAN: Good morning, Chris.

CHRIS DISSPAIN: Hey, Jay.

JAY CHAPMAN: Yes, I am, thank you.

CHRIS DISSPAIN: Good. Go ahead then.

JAY CHAPMAN: Good morning, everyone. I appreciate the opportunity to speak. I was rather quiet last week on the call just because I think I pretty much aligned with, Chris, kind of what you were saying on the specific issue we were just discussing just now.

CHRIS DISSPAIN: Yeah, leave that to one side. Leave that to side, Jay. Let's not discuss that issue. Let's revert to everything else that's in the document.

JAY CHAPMAN: Of course, absolutely. Will do. So if we could just go back to the beginning, this Work Track was mandated to come up with a solution that prevents vitiation of a UDRP decision in favor of an IGO when the registrant is unable to obtain jurisdiction over the IGO in court. Thus giving the IGO the opportunity to have a decision on the merits and a result while not affecting the right and ability of registrants to file court proceedings in a court of competent jurisdiction. I'm reading the quote of that.

CHRIS DISSPAIN: Sure.

JAY CHAPMAN: The current proposal and most specifically Recommendation 2 fails in this regard as it really just provides a false option to go to court. And it's false because by electing to go to court as any other registrant and losing registrant in the UDRP is allowed under this proposal the registrant is potentially left without any remedy or even the opportunity for a remedy whatsoever if the court rules that the IGO has jurisdictional immunity.

Now you would have thought that given the GNSO's mandate not to affect the rights and ability of registrants to go to court that our group would have recognized that this was kind of a hollow option and wouldn't work because it doesn't fulfill our mandate. So that just kind of is an overview, kind of diving in and maybe even backing up a little further.

CHRIS DISSPAIN: Would you mind if I asked you a question? Is it okay?

JAY CHAPMAN: I certainly don't mind. I mean, I've got…there's a lot to say here, so….

CHRIS DISSPAIN: Okay, no. Well, thank you. I mean, it's up to you. I'm happy for you to carry on. My apologies for interrupting you. You just carry on.

JAY CHAPMAN: Sure. No worries at all. So again, just kind of going back to I guess the genesis of where some of my objections come from, generic and descriptive domain names, words, combination of random letters and numbers, they've always been extremely valuable. In addition to actual use in commerce, these domain names have inherent value. And irrespective of any potential interest, I guess any other potential interest whether if it was trademark, an IGO name, an IGO acronym, these domain names have…they've got value. And the value of these domain names, they have been, they are, and they will be protected by registrants, whether if they're individuals or businesses or organizations.

Sometimes I wonder if some people in this group that aren't specifically familiar with the UDRP kind of assume, look, just go out and [win] the UDRP. It's only applied to the most extreme

cases. They're going after the bad guys, right? And that's true, except where it's not.

Everyone here knows, or probably should know, Gerald Levine who wrote and updates the reference treatise on the UDRP. That treatise, like every industry, press member, and stakeholder across the UDRP universe, knows and has known for decades that there is no shortage of I'll say controversial UDRP decisions that would take domain names from good-faith legitimate registrants.

Sometimes otherwise reputable and substantial companies are caught and reverse domain name hijacking (RDNH) is found against them. And sometimes the complainants are just able to essentially steal a domain name from a registrant using the UDRP as the vehicle because the UDRP is relatively weighted against registrants.

And there's no reason to believe that because this has happened in the past with non-IGOs, there's no reason to believe that an IGO at some point in the future might attempt the same thing. But fortunately, for good-faith legitimate registrants when they find themselves at the wrong end of an adverse and unjust UDRP decision they know it's not the end. And they rely and have relied and will rely on the ability to seek justice and prevail in court. It happens. It's happened before, it happens now.

Courts, and certainly those here in the U.S. where I am, provide not just a process, they provide due process so that fairness is preserved. And in my opinion, fairness is a decision based on the merits and not due to disqualification based on some non-

substantive matter like jurisdiction. There are checks and balances here—the constitution, appellate courts, oversight, that sort of thing. None of these which occur in the UDRP.

So really what the problem is as I see it, the current proposal as written today, it doesn't provide for due process. It's a forced process. And at best, it seems to me to be somewhat intellectually dishonest. And I think everyone kind of knows it on the call.

With the mutual jurisdiction requirement also currently sought to be disposed of, it seems to be kind of a wink-wink on the registrant being able to find relief or at least a decision on the merits I suppose by going to court. It's kind of like the group wants to say, well, good luck with that, Mrs./Mr. Business Registrant. There won't be any jurisdiction in the court and thus no remedy for you.

Under the current proposal not only do IGO complainants get to pick the UDRP forum, have the panelists drawn from almost exclusively from the trademark bar, but now if somehow the outcome was unfair to the registrant, the registrant would be then denied the opportunity to go to court because we've taken away the requirement that an IGO submit to a mutual jurisdiction in exchange for enabling them to use the UDRP instead of going to court.

So it just doesn't seem fundamentally fair and doesn't afford the crucial right to go to court, again for an actual remedy or the opportunity to seek that remedy. Which is obviously what the GNSO contemplated rather than just merely the, wink-wink, right

to go to court where a registrant would be potentially deprived of its remedy based on jurisdictional grounds.

So, well, let me just keep going. So if the registrant then is…and again, under the current proposal, if the registrant is foolish enough to try it's "right" of going to court, this group proposes to punish the registrant by disallowing access to the arbitration procedure that we're presently working on. In such case, the registrant would have absolutely no remedy.

And with no remedy, no justice. And no justice, this is where—we've heard this before. I've heard this at least once, maybe more during these calls. We've kind of heard some people kind of say, well, there's no remedy, no justice. Well, too bad. We gave you the opportunity to accept the arbitration.

I think that when a judge discovers that there is no remedy and that this was sort of—and I'll use, sorry, a local colloquialism. I'd be happy to explain it. When a judge hears that this is kind of a shotgun wedding created and officiated by a small group of appointed interests and not the traditional bottom-up process from the community as a whole, the judge, she is going to assume jurisdiction over the domain name because it's unfair—an injustice, I guess—to deny the registrant a legitimate opportunity to seek a remedy.

And I think once that happens, this Work Track's currently proposed forced process and its subsequent very foreseeable repercussions are at risk of being deemed irrelevant. So please consider what the current proposal might smell like in this regard and be mindful about attempting to bite off more than a judge

might chew. By fashioning this procedure that so obviously guts a registrant's rights to obtain a remedy in court, you might consider that this group may be in fact inviting courts to take jurisdictions over cases and thereby not only failing registrants but IGOs as well.

So let me…Chris, do you want to ask a question? I also want to speak to the ICANN community as a whole. We were kind of getting to that at the end of the last conversation you were having with Brian and Jeff, and I'm happy to speak to that a little bit as well but also answer your questions.

CHRIS DISSPAIN: Well, so I know that there will be people who want to say something, but I just want to try and just pause that slightly if I can, Jay. And I'm happy to give you the floor in a second just to deal with the other point if you want to.

But before we lose track of that specific piece, if you walk backwards from where we currently are, you're presumably not suggesting that it's not open to an IGO to argue in court. I mean, your whole piece is built around the right to be in court. Therefore presumably the IGO has the right to argue in court that they're not subject to the jurisdiction.

So if we cut to the chase, is the fundamental—other than just throwing the whole thing out of the window, so to speak—is the fundamental point that you want an end remedy, i.e., arbitration, to be available to you in the event that you do not get a hearing in

court of the substantive issue? Is that in a nutshell where we're at?

JAY CHAPMAN: Well, I'm not sure. Hopefully, this helps. Phil Corwin toward the end of the last working group, the IGO working group, made the proposal that when he looked at the process it should be UDRP, UDRP decision, then court if desired, and then appeal mechanism if it was necessary for a decision on the merits. And I think that's kind of where I am. Does that help?

CHRIS DISSPAIN: Well, that's what I just said. I think that's what I just said. In other words, so, yes. I mean, you accept that there would need to be an understanding that even if what we're talking about was deemed to be acceptable, what you're not going to achieve is getting the IGOs to agree to a mutual jurisdiction.

So it would have to be on the basis that the first part of the tunnel has been dealt with, there's no agreement on mutual jurisdiction. If you choose to go to court, then you choose to go to court. And if the IGO chooses to argue that they're not subject to the jurisdiction, that's for them. If they win that, then there is an opportunity for arbitration on the substantive issues. Leaving aside whether that's even remotely acceptable for a moment, does that make sense to sort of solve the problem that you've been talking about?

JAY CHAPMAN: Well, I think it would.

CHRIS DISSPAIN: Okay.

JAY CHAPMAN: Let me be clear here. Paul asked the question, and it's a valid question, right? And again, this is about…we're here because at the end of the last working group Recommendation 5 said if there's no jurisdiction, there's no decision. The UDRP decision just fades away. And people said, wait, we can't do that because that's not really a decision.

CHRIS DISSPAIN: Yeah, that's right.

JAY CHAPMAN: That pushes the merits of the decision that was made, I mean, it's gone. So that's not the right decision. We want to make sure we get a decision on the merits. And that's where, Paul, my answer would be to your question which is in not assuming jurisdiction there is no…that's not a substantive issue. I guess jurisdiction is kind of its own…I don't know. It's kind of in its own world, right? I know it's not procedural, but I also know it's not substantive.

And so without a substantive decision, that's all I'm trying to seek here. Without changing the UDRP from the way it stands and still allowing for, ultimately, which is what we want. Everybody wants a substantive decision, and this provides it. And again, as I said, to

do so otherwise just seems, again, you want to play with the literal words but not the spirit and intention of the way the process is supposed to work.

CHRIS DISSPAIN: Yeah, okay. So just to…and then we'll come back. We'll circle back in a second. Just to reiterate then, what we're talking about and the bottom line what we're talking about, and this is not new because you've actually said this in the past.

JAY CHAPMAN: Yes.

CHRIS DISSPAIN: What you're saying is, step one, UDRP under the terms that we've got in Recommendation 1 which is the definition of what an IGO is, etc. UDRP, decision, right to go to court. In the event that the court does not hear it, doesn't hear the substance but rather hears an application in respect to jurisdiction and finds in favor of the person who applies for that, the IGO, then there's a right to go to arbitration.

Let's leave that there for now. I have no doubt people will want to respond to it. Are you okay if we respond to that first and then come back on the other point, or do you want to do the other point first? I really don't mind.

JAY CHAPMAN: No, that's fine. Thanks.

CHRIS DISSPAIN: Okay, so let's do that. So, Brian, your hand is up. Please, go ahead.

BRIAN BECKHAM: Yeah, thanks, Chris. I'm not going to dignify a lot of the hyperbole in Jay's intervention. But what I'm not understanding, so I apologize if I've just not heard it correctly, is what's the proposed solution that Jay is putting on the table?

CHRIS DISSPAIN: The proposed solution is that—I'm going to use "him" and "you"—if he loses the UDRP, he can go to court. And you can argue that you're not subject to the jurisdiction of the court. And if you win that argument, then there is a right to go to arbitration on the substantive issue. That's his solution.

BRIAN BECKHAM: Right, okay.

CHRIS DISSPAIN: In other words, it's exactly what we've got now with the exception that instead of when the registrant decides to go to court, currently the situation as we've got it drafted is when the registrant decides to go to court, sorry, if the registrant decides to go to court, then they lose the right to have an arbitration even if they lose the jurisdictional argument in court. That's the point.

BRIAN BECKHAM: Right. I thought we had made a little bit more progress than that because this reminds me of some of our earlier calls where I thought it was agreed. And maybe other working group members were digesting and waiting to see what the bigger package looked like. But I really thought that we had broken through that and agreed that that was not really an efficient way forward.

Part of the problem that we've been trying to wrestle with, obviously, the actual jurisdictional question is the fundamental issue. But I thought that we had long ago agreed that [inaudible] and I shared on the list a flowchart that the IGOs had worked up. Which by the way wasn't even fully complete in terms of potential forks in the road that the parties could find themselves in going down this court avenue. But I thought we had really agree that that just suffered from so much inefficiency that we weren't going down that path.

CHRIS DISSPAIN: No, I don't think we'd agreed that. I think we had a discussion about the fact that that might well be the case, that people had that view. But I don't think that we'd reached a point where we had said that we'd agreed that that was off the table. And Jay very specifically has said all along, to be fair to Jay, which is why we're having this conversation now, that he wanted to take a look at the thing as a whole. But anyway, we are where we are. I meant simply to deal with the point that you had raised. I didn't mean to stop you from continuing if you had something else to say, Brian, so please carry on.

BRIAN BECKHAM: No, no, thank you. Nothing further. I don't know quite how to react or where this takes us. I obviously had hoped for a different result. Again, this strikes me as really not in any of the parties' interests. It introduces time and costs that I think would be best avoided. But if other people don't share that assessment, then I really am kind of at a loss to where this takes us.

CHRIS DISSPAIN: Thank you. I'm going to make a suggestion as to where that takes us in a second. But, Jay, let me come back to you and let you deal with the second part of what you wanted to say which is to do with the community, I believe.

JAY CHAPMAN: Sure. I mean, I guess…and again, I'm surprised that Brian is surprised. I haven't really held back in saying that, look, we're openminded about trying to assess this entire process. There were several people at the very beginning of this that thought this was a nonstarter. And it appears to me that we are, at least as to this particular issue being discussed…and I'm not talking about or wanting to get into the fact that our mandate is very narrow. We have existing consensus GNSO approved Recommendations 1 through 4. We'll put that aside for a moment.

Just on this specific issue and discussing it, it seems to me that we're very close. And I don't understand the objections. Time and cost, those are concerns for anyone in a UDRP. It's not unique to this particular situation. It's not.

Again, just to reiterate. At the bottom, I guess the basis of the whole thing is we're here because we wanted to give a substantive result to IGOs. Or at least that's the reason why this thing was convened. And now in the process of trying to come up with how to do that, the resolution seems to be that we're going to provide undo influence to try and force registrants to say, yeah, I guess maybe we should. We kind of have to accept this arbitration idea. And in effect, gutting the opportunity to go to court.

All I'm saying is that let's still allow that. Keep it where it is but allow the opportunity for a substantive decision, a decision on the merits. And allow that for all parties. That's good for everybody. And I'd be curious to know…again, well, let me just move on.

So as to the community as a whole if we're seeking consensus, it seems to me that decisions that are made here where the rights or abilities or the realistic possibilities for 50% of the parties involved in UDRP disputes, if that's going to be affected adversely, I'm not sure where we are on the consensus spectrum. I talked about Phil's idea. I think that could work for this particular issue. I think it's much more likely to be accepted by the community as the whole, as it legitimately preserves the right of registrants to go to court and provides the backup for a decision on the merits. It works for registrants who are unable to obtain jurisdiction, and it works for registrants who have no cause of action in their court. It works for everybody.

And then we spoke, I think there was kind of some insinuation or leanings to what this might look like being proposed for comment. I mean, again, given that we're talking about 50% of the people involved, the consequences to 50% of the people that are involved

in UDRPs, the registrants, I would expect that if this proposed forced process, it's going to be met with overwhelming opposition because it changes…and especially in lieu of this idea that the proposal is to remove the mutual jurisdiction requirement. And you've said so, Chris. Others have said so. I mean, that's a big deal.

CHRIS DISSPAIN: Yep. Jay, thank you. Sorry, I thought you had finished. My apologies.

JAY CHAPMAN: No, that's pretty much it, Chris. So I just appreciate the time. Thanks, everyone.

CHRIS DISSPAIN: No, thank you for doing the work and being straightforward. Here's what I'm going to suggest. First of all, I'm going to ask the staff team if they would please take the transcript of Jay's lengthy comments and provide us with a summary as soon as possible. And, Jay, if you have any issues with what that summary says, you obviously are the one who said it, so you can go ahead and make some changes. I think it's important to get that clear in case there's any misunderstanding, and there are people not on this call. So that's the first thing.

Second thing is that I'm going to suggest we do the following. I'm keen that we continue to navigate down the path of getting an initial report ready to go out for public comment. And let's be clear.

Public comment is about putting stuff out there and getting comment on it. It's not about putting stuff out there and assuming that everybody is going to be fine with it or everyone's going to object with it 100%. Susan, please go ahead.

SUSAN ANTHONY: I'm probably going a little out of order since you are trying to corral us and move us into another sphere, but I can't leave this call with a clear mind unless I get something straight in my head.

CHRIS DISSPAIN: Yeah.

SUSAN ANTHONY: Jay spoke of an enforced process. That is the part I am missing because as I understand where we are registrants could choose to go to court, or they could choose to go to arbitration. So they are not being enforced into arbitration, so I'm missing what part is being enforced. And I don't ask my question critically. Just trying to understand.

CHRIS DISSPAIN: No, no. Thank you. That's a really good question, and I'm glad you interrupted my flow for that. I think that's valuable. So, Jay, would you like to respond to that, please?

JAY CHAPMAN: Sure. Again, and enforced might not necessarily be the right term. Again, to use the colloquialism of the shotgun wedding, you have the right when the father is standing at the doorstep with the reluctant groom, you have the right to run away, right? But it might not be the best thing to do that. And I think in this situation that's kind of the way this proposal reads. It's like, sure, you can go to court. But again, it's kind of that wink-wink, go ahead, give it a try. And if it doesn't work, well then, too bad. You're out of luck. And I'm just saying that under the current UDRP, the way things work right now, is that court's where it works.

We're trying to assist and help IGOs potentially avoid that by being able to say—or not potentially—but they'll say, well, you don't have jurisdiction. Maybe they won't, by the way, because it's been clearly established that IGOs can go to court. And I think people on this call have said it's pretty much their choice. They do go to court. They can. But for this situation, I think it's not so much that—I would say coerced perhaps, right, as opposed to maybe enforced or forced probably wasn't the right word. Yeah, I mean, I think coerced is the right word perhaps.

CHRIS DISSPAIN: Okay, fair enough. Susan, go ahead.

SUSAN ANTHONY: I appreciate Jay's clarification. Always enjoy listening to him. I just must be having a case of the Monday slows because I don't see that anything has changed in this regard. The registrant always has had the right to go to court. Nothing in this proposal affects

that right. We've always known that IGOs claim they will assert their jurisdictional immunity. And some will succeed. Probably most will succeed. That's the state of the law as I understand it today.

But I appreciate that we've also had expert opinion, mountains of papers, and hours of discussion that indicate that there may be some dispute. But that's not a dispute that this Work Track or even the At-Large or ICANN community is ever going to be able to resolve. So in many ways as I'm looking at this, nothing has changed on the right side of the page. But on the left side of the page there's a positive development for the IGOs.

But also as Jay has noted a potentially positive development for the registrant who is unable to get jurisdiction in a court or maybe even a cause of action in the court. And so I see the introduction of an arbitration option as a very positive one, and I'm just having a dickens of a time trying to figure out what the enforcement part of this is.

And I see that David has also asked—he's tried to raise his hand but can't get it up. He would like an opportunity to speak [inaudible] next.

CHRIS DISSPAIN: Yeah. I'll get to David in a second, Susan. The only thing I would say is that I don't think I could characterize it as saying nothing has changed, because what has actually changed—and in fact is a fundamental principle of why we're going through this whole process—is that in the past, an IGO would be going to court to

argue that it's not subject to the jurisdiction, having had to agree in the first place that it was subject to—or that it agreed to a mutual jurisdiction, whereas the proposal before us is one where the IGOs are no longer required to do that, and that makes the argument that they would run in a court, I would suggest, more powerful than it would otherwise be, in the sense that they had not previously agreed to a mutual jurisdiction. Susan, go ahead.

SUSAN ANTHONY: I only said that there was nothing different on the right side of the chart. I do understand what you're saying about there is a difference, but the difference really is not within the control of the IGO. Or are you saying, Chris, that if the registrant decides to go to court, the IGO has not agreed to the mutual jurisdiction clause, so it could be even more challenging for the registrant to get a foothold in the court?

CHRIS DISSPAIN: Correct. That is Jay's point.

SUSAN ANTHONY: Thank you. [inaudible].

CHRIS DISSPAIN: In part. Thank you. No problem. David, you are welcome to take the microphone at this stage if you'd like to.

DAVID SATOLA: Thank you, Chris. I guess I would echo Brian's concern that I thought we were in a different place than apparently we are. I thought we as a Work Track had agreed that—I think you just said, Chris, we've taken out the mutual jurisdiction requirement and we're going on from that to try and find the arbitration path. That's where I thought [inaudible].

CHRIS DISSPAIN: Correct.

DAVID SATOLA: I thought the question was then about what happens if the parties don't agree about the substantive law to be applied in the arbitration proceeding. I'm not quite sure then what the result would be from Jay's intervention. I'm a US-trained lawyer and I appreciate a lot of what Jay said about denial of natural justice and that sort of thing. And that's a reality.

But there's a competing reality that the government of the United States has granted immunity, sovereign immunity, limited sovereign immunity on a number of IGOs that are on US soil, and other governments have also granted the immunity to IGOs existing in other places. And it may be that a registrant isn't going to go to a US court where there is due process. Maybe that registrant would be from another jurisdiction that isn't a rule of law-based jurisdiction.

So I think that that kind of needs to be taken into account as well. So I guess the challenge for you, Chris, is to balance or to find a path that recognizes these two realities, that registrants [won't go

to] court and that the governments have granted—the same governments that have established these courts and that support judicial process have also granted the IGOs the immunity.

So I return to an issue that I think Becky raised very early on in this Work Track which is that ICANN doesn't want to establish new rights in international law, but it seems that by—maybe I'm mishearing Jay, but it seems like he's saying that the GNSO or ICANN should ignore rights that are established under international law with respect to the immunities of the organizations.

I'm not saying that to be emotionally provocative, but the reality is that IGOs have these privileges and immunities. These privileges and immunities are applied in a lot of different contexts. I can't speak for the other IGOs, but the World Bank gets sued all the time, and sometimes we do say, "Yeah, this is an important issue that we're going to waive our immunities and we're going to submit to the jurisdiction of the court," but it is provided in international law that the IGOs don't have to do that. And that can be unfair, and it's not just for the registrants here. These things come up in all sorts of different contexts.

But the point is it's a reality, and we have to deal with that reality. We also, I'd like to remind the work track that what the IGOs really want is preventative relief, not curative relief. So we've already gone quite a ways, I think, in averring to the curative relief. So now we do want to reduce costs and reduce time and elevate legal certainty, and it's not just the US that's at play here, it's a global issue for us.

So I think it would be good also—I don't want to get into a point-by-point response to everything that Jay said in his intervention, and I hope that's not the purpose of putting the written intervention into the record, but I'm thinking what would be helpful at this point is if we could get from Chris and the staff what it is we're talking about as we only have a few more meetings left for—

CHRIS DISSPAIN: Which is the path that I was heading down when we took a very valuable and worthwhile sidetrack to answer a couple of questions, David. So I'm going to get back to that in a minute. Thank you very much. Paul, go ahead.

PAUL MCGRADY: Thanks. I kind of waited until some of the more substantive comments died down, but I do think that for those who may be listening to this recording and maybe not reading the chat, that somebody says, again, very gently and very kindly, that they reject the notion that there is some sort of wink wink going on here or that this group is somehow improperly formed.

I understand the importance of the discussion here, but I think it's important that we don't attempt to burn down the multi-stakeholder process when it looks like we may not get our way. Trust me, I know the temptation is real.

So for those of you who are listening, I just wanted somebody to say on the record that we think we're doing good work here and I still remain hopeful that we're going to land the jet in a good spot. Thank you.

CHRIS DISSPAIN: Thank you, Paul. I didn't get any inference that there was a suggestion that this group isn't properly formed. I think the context of the wink wink was meant to be in a slightly different context. But it brings me rather elegantly—thank you—back to my point, which is that I think it's been demonstrated by the questions and interventions we've had, starting with Susan, that there's a lot of stuff in what Jay has said. Some of it, some people will think of as being perhaps rhetoric. Others perhaps may—some of it will be substantive and important. And there's obviously, to a degree, a lack of clarity around exactly what is being suggested as a possible solution.

So I move back to where I was, which is to say I would like a summary of what Jay has said. And there's a reason for that, which I'll come to in a second—a summary of what Jay has said. And obviously, as I said to you, Jay, you can obviously look at that and make sure it's correct. The next suggestion I have is going to be the following because I am very keen that we continue to navigate a path of putting something out for public comment as an initial report.

And as everybody has said—Brian, you said this earlier on in the conversation—the whole point about going out for public comment is you put stuff in and you see what people think. So in the same way, I think I've said that you're currently … I think the highlighted text to the arbitration bullet point could quite feasibly go into our document as, "Here's a suggestion from some members of the work track. What do people think?"

I wonder if we could, perhaps, deal with Jay's suggestion in precisely the same way, which is to draft some text which would appear in brackets to say, "Some members of the work track believe that the registrant should have the right to go to court, and if they lose the argument on jurisdiction, should still have the right to go to arbitration." I can see no reason why it shouldn't be possible to put that in as a suggestion, as I said, in the same way that Brian's suggestion in respect to the arbitrator having the final say as to jurisdiction can go in.

That, I think, would give us an opportunity to take the temperature of the community, which is, after all, what public comment is supposed to do. And what that means, if we can do that, as well as providing of what Jay has said … And I want that simply because I want everybody to be clear when they look at the text that will be in the actual draft document that that covers everything properly, because whereas other things have been done by drafting the text, Jay, quite understandably, has merely spoken is point, which is perfectly fine, of course.

Perhaps, Mary, and Steve, and Berry, you could, having done the summary, have a go at suggesting some draft text to appear in graphics that would deal with the points that Jay has raised. So let me first ask the staff whether those two asks are okay with then and then I'll ask everybody else to comment if they have any problems. Mary, Steve, Berry, are you okay with those "go away and do things" homeworks—whatever you want to call them?

MARY WONG: Yes. We are, Chris. And the secretariat has already kindly expedited the request for the transcript.

CHRIS DISSPAIN: Fantastic. Thank you. Does anybody have a problem with what I've suggested as a way forward? Let me be clear that what would mean—and I think this is really important to Mary, and Steve, and Berry—that the transcript is with us as soon as possible. Not the transcript. Sorry. The summary of the transcript is with us as soon as possible and the document—the redrafted work track-proposed recommendations document—is with us by Friday at the latest so that we've got the weekend, this coming weekend, to think about it before we meet again next Monday. Are those timeframes okay with you guys? Mary?

MARY WONG: Yes. I believe so.

CHRIS DISSPAIN: Thank you.

MARY WONG: I was just hesitating in case Berry and Steve want to jump in with something I haven't considered.

CHRIS DISSPAIN: I'm sure that they will accept what you say. Okay. Having said all of that, that's my proposed pathway between now and next

Monday. Anyone got any major red flag issues with that? I've got some "agrees" in the chat, which is heartwarming. And thank you. Okay.

Well, on that basis, I have something else that I wanted to raise, which is that the following Monday, which is the 16th of August, all things being equal and the world having not collapsed than it is in a state of collapse already, I will be traveling on that day—on Monday the 16th—to Germany, to Meissen, to attend the European Summer School on Internet Governance, where I'm one member of the faculty. So I may be challenged as to timing of the call. I'm going to work out the timings but I just want everyone to know that up front. It's two weeks away and we can make adjustments if we need to. I just wanted to flag that for everybody so that they knew ahead of time.

Berry, do you need to cover any issues with us in respect to project management at this stage?

BERRY COBB: Thank you, Chris. Nothing specific. Later this week, we'll send out the July project package for your review before we send it to Council. Thanks.

CHRIS DISSPAIN: Good. And Berry, Steve, Mary, do you have any indications of next steps from the Council and when things are likely to move forward? Is it simply their next meeting on whatever date that is? And what's on the agenda for that meeting to do with us, please?

STEVE CHAN: Hi, Chris.

CHRIS DISSPAIN: Hi, Steve.

STEVE CHAN: Hi, there. So after this meeting, what we will do is forward to the work track an e-mail that was sent to the Council, from the Council leadership, about proposed next steps. What those next steps are involving is about enabling this group to be able to properly develop consensus policy recommendations.

And the way to do that is, from the Council leaderships perspective, to recreate this group, for all intents and purposes, as an EPDP. So by doing that, the idea is to essentially transport the contents of the addendum into an EPDP charter so that the newly-formulated group would be able to operate in much the same way as this work track—that it would have the proper standing to actually develop consensus policy recommendations. So that is more or less summarized in the e-mail to the Council and we'll be sure to send that to this work track so you have an understanding of what the Council leadership team is presenting.

That still needs to be approved by the Council—or, I guess, a nonobjection to that approach. And if there is a nonobjection, the materials that would be needed to make that happen, which is an EPDP initiation request and an EPDP charter would be in

development for potential consideration as early as the August Council meeting. Hope that helps. Thanks.

CHRIS DISSPAIN: Just say that one more time. Sorry. The August Council meeting is the earliest at which the decision would be made. But if the decision was yes, do you we have any idea how long it's likely to take? I'm asking because is the intention to try … Assuming that the agreement is to do it, is the intention to try and get it done in time for us to stick to our deadline of getting out the thing for public comment as an EPDP? Or doesn't that matter?

STEVE CHAN: Thanks, Chris. I think that would be the aspirational goal, to get everything wrapped up through August. So get the request formulated and then also have the Council vote on it. But I think that's still aspirational. We haven't spoken specifically to Council about whether or not it makes sense to publish the report, regardless if the procedural elements are completed. I think maybe that's something that at least the staff team will probably want to discuss, if that makes sense. But to your point, that's the aspirational goal, is to get everything crossed, and dotted, and signed off by the Council ahead of the public comment period, which is—

CHRIS DISSPAIN: The worst case is, if we stuck to our timeline, we can put it out. Knowing that we were about to become an EPDP doesn't stop us from putting it out. But anyway, understood. Excellent. Thank you

for that. That's much appreciated. And hopefully, it'll all be smooth sailing, so to speak.

All right. I think we are probably done unless anybody has any burning issues or anything that they would like to cover before we wind up the call. It doesn't look like it. So can I ask everybody, please, to stand by to look at the summary of Jay's points in a day or so, and the draft of the proposed recommendations with bracketed text by the end of the week, so that when we come to our call next Monday, we are fully read-up and ready to make substantive comments about the text. That would be really helpful.

Once again, thank you, everybody for being here and for being so willing and happy to—well, perhaps not happy but willing—to engage in the discussion and I'll look forward to seeing you all in a week's time. Thanks, everybody.

TERRI AGNEW: Thank you, all. I'll disconnect the recording and all remaining lines. Be well. Thanks for joining.

MARY WONG: Thanks, everybody.

[END OF TRANSCRIPT]