ICANN Transcription

IGO Work Track

Monday, 17 May 2021 at 15:00 UTC

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ANDREA GLANDON: Good morning, good afternoon, and good evening. Welcome to the IGO Work Track Call taking place on Monday the 17th of May 2021 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 are only on the telephone, could you please let yourselves be known now?

Than you. We do not have any apologies for today. All members and alternates will be promoted to panelists for today's call. Members and alternates replacing members, when using chat, please select All Panelists and Attendees in order for everyone to see chat. Attendees will not have chat access, only View Chat access.

Alternates not replacing a member are required to rename their line by adding three Z's to the beginning of their name and add, in parenthesis, "Alternate" at the end of the name 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 the chat, apart from private chats, or use any of the other Zoom room functionalities such as raising hands or agreeing and disagreeing.

As a reminder, the Alternate Assignment Form must be formalized by way of Google Assignment Form. The link is available in all meeting invite e-mails towards the bottom.

Statements of Interest must be kept up to date. If anyone has any updates to share, please raise your hand or speak up now. If you do need assistance with your Statement of Interest, please e-mail 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 the Expected Standards of Behavior.

Thank you, and over to our chair, Chris Disspain. Please begin.

CHRIS DISSPAIN: Thank you very much. Good morning, good afternoon, good evening, everybody. Welcome to another IGO Work Track call—call #12. So, we've got a full agenda. We're going to start with …

Hopefully, everyone will have seen the e-mail from Susan and Brian and Paul setting out where they got to in their discussions on getting IGOs into being able to use the UDRP into the funnel. They sent a note to the list, and I can see that Brian and Paul are both on the call. And Susan, not yet.

Brian, do you want to just briefly take us through it since you were the one who sent the e-mail—just very briefly in case anyone hasn't had a chance to read it?

BRIAN BECKHAM: Sure. Thanks, Chris. Hi, everyone. I think the e-mail—and hopefully people have had a chance to see it. It's not long, and hopefully it's reasonably self-explanatory. I think we all recognize that one of the concepts we've been wrestling with is that IGOs , for different reasons, had typically not undertaken trademark registrations like a “normal” trademark owner would do. And so, there was a question of how do they, as we've been saying, get in the funnel or have standing to file a case?

So, we had a good call with good assistance from staff and a bit of a brainstorming exercise, if you will. And while we didn't actually put specific pen to paper on proposed text, we very much landed on a good page to where we think that this will not present a roadblock for this working group. So, good progress. Sorry to not

have specific texts to share yet, but in any event, I think we have a good topic for today and we can come to this at another juncture.

I don't know if Paul or Susan have anything to add or we can briefly answer questions, but I think probably no sense in going too much into the details since we do have good topics to cover today.

CHRIS DISSPAIN: Yep, agreed. Thank you, Brian. Paul, Susan—you're welcome to say something if you'd like to.

Thank you, Paul, in the chat. Just to be clear then, you are going to … You are intending to provide us with some draft text which is great. Thank you. And I know I speak for everybody in the group by … Even I say that's extraordinarily good progress, and thank you very much for being prepared to put in the extra effort to have meetings outside of the normal cadence. And I'm looking forward to seeing the text when you have a chance.

Okay, thank you. That's fantastic. So, today we need to do, really, two … One very specific thing we need to do towards the end of the meeting is just to get clear on what is the update to the GNSO Council is going to be. And we will come to that. But certainly, the encouraging input from Susan and Brian and Paul means that, I think, we can go to the Council and say, "You know, we are making some progress." So, that is excellent.

And then we have two possible items for discussion today. If we can get through to both of them, that would be great. The first on the list is the waiver of mutual jurisdiction when filing a complaint.

And the second is arbitration/a super panel in cases where an IGO prevails.

I'm going to suggest, unless anybody has any strong objections, that we actually start with #4 because I suspect that discussion about #3 will be easier once we have a solution for … If we know what the final thing is going to be, it makes it easier for us to figure out what steps, if any, need to be taken beforehand.

So, if that's okay with everybody and nobody objects—and I don't see any hands objecting, so that's good—let's just take stock of why we need to talk about arbitration or a super panel. It's because Recommendation 5 says, "Where a losing registrant challenges the initial UDRP or URS decision by filing suit in a national court of jurisdiction and the IGO succeeds in a certain jurisdictional immunity in that court, the decision rendered shall be set aside."

In other words, Recommendation 5 from the last PDP says if a registrant goes to their local court and the IGO turns up and wins the argument that they're not subject to that jurisdiction, then everything goes back to the beginning again and you start all over again. And clearly, the GNSO Council believe that that was unworkable, and specifically asked us to figure out a way of mending Recommendation 5 so that there was an end to this matter. And that end would obviously need to be some form of final decision.

Now one way of ending it would be to say that if the IGO prevails [at] the UDRP and then the registrant decides to go to court and the IGO successful in claiming that they're not subject to the

court's jurisdiction and so the Court doesn't hear it, then the decision of the original panel prevails. But we'll accept, I think, that that's not a fair conclusion and that that's not going to fly as a way of solving Recommendation 5.

And so, therefore, there needs to be some form of second hearing, some form of appeal—call it what you will. And we have discussed in outline, but not in any great detail, the two possibilities on the table. One is an arbitration, and the second possibility is to remain within the confines of the UDRP itself—and process itself—but to have a super panel.

It seems to me that there are advantages and disadvantages to both sides of the argument, and we can go through some of those in our discussion. But right now, having set that up, I'd like to see whether or not, today, we can reach some level of consensus about which one of those two would be the agreed way forwards. And I think it's pretty clear that there's a leaning towards arbitration, but I think we need to go into a little bit more detail, talk about it a little bit more, and see if we can coalesce around the concept of arbitration as a way forward.

So, perhaps I could ask anybody who is really in favor of arbitration as being the method if they would be prepared to put their hand up and to talk to why they think arbitration is the best way forwards for finally closing off the avenues of appeal or discussion where a UDRP decision is being, if you will, appealed.

Who'd like to start the ball rolling? Alexandra, please do go ahead.

ALEXANDRA EXCOFFIER: Hi, Chris. Hi, everyone. Well, the thing about arbitrations is that it's a known thing. And it's known to courts. It's accepted. Decisions are accepted. And I'm not sure how the super panels play out. I don't particularly have an objection to a super panel, but I'm wondering whether decisions of the super panel can be final and binding and will be not appealable and not—and then we get into the whole thing of going back to court and going back to …

So, that is my one main advantage of arbitration. I think also there are examples in the ICANN policy of arbitration. I think if it's between, not the registrant, but the registry and an IGO—for example, a dispute—there is a reference to arbitration. And I think we can tailor it to our needs. For example, the selection of arbitrators can be from a list which knows the UDRP and ICANN processes. So, I don't see many disadvantages. You will need probably lawyers in any case because of those … Yay, or not. [inaudible] because it won't be in-house lawyers. It will be law firms.

So, the costs. I'm not sure whether they'll be much of a difference in cost. So, that's where that's just a logical discussion. I don't have anything specifically against a super panel as a matter of principle. It's just that I think arbitration is a safer way to go. [inaudible].

CHRIS DISSPAIN: Fair enough. Thank you. And, Paul, I note your … Thank you, Alexandra. And I note your notes in the chat, Paul, about the plus

one to the point about the courts and also the small change to the policy.

ALEXANDRA EXCOFFIER: And I agree with Paul.

CHRIS DISSPAIN: Thank you, Alexandra. Thank you, Paul. So, let me turn it on its head. Is there anybody on this call who would like to argue in favor of a super panel? Or shall we move on to a discussion on more detail about an arbitration? Anybody want to argue in favor of a UDRP super panel?

Jay, go ahead.

JAY CHAPMAN: Thanks, Chris. I'd just like … Maybe, perhaps we could just review some of the bigger distinctions between the two because I think sometimes it's a little bit—

CHRIS DISSPAIN: Sure.

JAY CHAPMAN: It's a little hard to really kind of get a sense of what we're talking about between … I don't know. Maybe it's a finer line. Maybe it's a big wall. I don't know. But, anyway. Thank you.

CHRIS DISSPAIN: Yeah. Perfectly good question, thank you. Let me take a stab at a few thoughts, and then perhaps some others could come in. But it seems to me that, as Paul has said in the chat, referring a dispute to arbitration is a common thing to have happen in various arenas. It's not a new thing, etc. And arbitration, within the confines of whatever rules you agree to abide by is a universally—or perhaps not universally—globally, mostly, effective and acceptable way forward.

With a super panel, they would be being set up [as a] new process within the current UDRP. It is questionable how you would make it completely binding, as has been said. Whereas, there is precedent for being bound by arbitration, as we all know. And the one advantage that I could see— and I'm not suggesting it's enough of an advantage … But one advantage would be that you are dealing—with a super panel—is that you're dealing with a bunch of people who know their stuff already in the sense that they would already be panelists and that, therefore, they would be used to dealing within the scope and the rules of the UDRP.

But that said, part of the purpose of the secondary hearing, or whatever you want to call it, may well be to have it decided in a more judicial manner than in a UDRP manner. An arbitration can provide you with that. But that's just my rough and immediate take on it without having any further detail.

I can see some stuff coming up on the screen. I don't know whether everyone can see that, but I'm guessing that's from the original document that we set out what we thought the differences were, or what we thought the advantages and disadvantages might be. I'm going to ask …

Kavouss, I can, see your hand. One second. If others would like to weigh in after we've heard from Kavouss about any comments/input that they would have for Jay about possible differences, that would be immensely helpful.

Kavouss, please go ahead.

KAVOUSS ARASTEH: Thank you. Everybody, good morning, good afternoon, good evening. Could you please remind me, at least, from where you conclude that a super panel decision is not enforceable? Panel is something that we have already used. In the bylaws, we have reference to the IRP and the panel. And why we could say, categorically, that any type of panel or super panel is not enforceable? Is it not possible to foresee that? Just, I am not in favor of either, but I just want to be [clarified].

You remember, sometimes [inaudible] ask that please clarify [a sort of] the table, very simple pros and cons of each of these. But someone says that it is not enforceable, and you also implicitly refer to that. Where this comes from that it is not enforceable? Thank you.

CHRIS DISSPAIN: Thank you, Kavouss, for what is, in essence, an exceptionally good question. Would anyone like to tackle Kavouss's question, especially anyone who has expertise in arbitration? Or perhaps expertise may be putting it a bit high.

But, Alexandra, please go ahead.

ALEXANDRA EXCOFFIER: I don't necessarily have expertise in arbitration. I definitely don't have expertise in the super panel which is a new thing. So, just to answer Kavouss—I think he was referring to what I was saying about enforceability—is that we don't know if it would be enforceable because it would be a new thing. And we could say that it's binding and final, but we don't have the same certainty as we have for an arbitration proceeding, I think. That's [inaudible]—

CHRIS DISSPAIN: Thank you, Alexandra. Kavouss, I'll come back to you in one second. Would it be right to say, then, that there is precedent for findings in arbitration to be binding and to be held to be binding, but there is not currently—obviously, because it doesn't exist—no precedent for agreement to be bound by a super panel, actually, being truly binding and accepted by a court as binding? It doesn't mean it can't be, but I think it means that there is no current precedent.

Would that be a fair assessment, [presumably]?

ALEXANDRA EXCOFFIER: Yes, absolutely. The UDRP, the original decision, can be reopened, so why not the super panel decision? Maybe not. Maybe it will be absolutely binding, but unless we try it, we don't know. And I'm not one for trying something unknown like that. I would prefer, and I think many …

CHRIS DISSPAIN: Okay.

ALEXANDRA EXCOFFIER: May cat is interfering here.

CHRIS DISSPAIN: Well, that's glorious. That's glorious.

ALEXANDRA EXCOFFIER: But she agrees.

CHRIS DISSPAIN: Excellent. Well, it's important to know that all members of your household agree. Thank you.

Kavouss, go ahead, please.

KAVOUSS ARASTEH: I made a reference to the bylaws. I made reference to the IRP. One board panel or three board panels. And you may be more, I would say, expertise on that. It doesn't mean that those panels also the decision is not binding. This is one point.

Nevertheless, according to my experience in similar cases, it is up to the legislator, [one]—perhaps we are that, or anyone—that could decide that the decision of the panel would be mandatory/enforceable. It could be foreseen. I have seen many legislation, many laws mentioned. The decision is enforceable. It's mandatory. So, it is not excluded. Thank you.

CHRIS DISSPAIN: So, thank you, Kavouss. You're right. But I think the difference is that … I believe the difference is that a binding arbitration is already accepted in most jurisdictions in the international arena as being a way of settling disputes in a binding way, whereas this panel would not start from that position. It would have to establish that position over time.

But that said, again, I'm not leaning one way or the other. I'm simply suggesting that we need to have a bit more detail in the discussion. But thank you. And I agree with you. It is—yes, of course, it's possible that a super panel could become binding in various different jurisdictions.

But that said, I'm still not hearing anybody particularly or specifically speak in favor of the super panel. I know that Jay has suggested that we have some more information, and I can see significant amounts of stuff in that chat about what may be some challenges in respect to arbitration as well as—sorry—into arbitration, and possibly in respect to a super panel. But certainly, in respect to arbitration.

And Jeff, since your fingers appear to be doing quite a lot of the typing, perhaps you'd like to address the points to us that you're making in the in the chat so that we can have a discussion about them. Thank you.

JEFF NEUMAN: Sure. So, first caveat is that I am not a dispute resolution lawyer, but I do draft a lot of contracts and I do consider myself an expert

in contract law. I am just trying to think of how, by contract, a registrant would agree to binding arbitration in the case where it loses a UDRP because that doesn't arise out of a contract between the registrar and the registrant like an agreement to be subject to a UDRP would be. That, for a couple of reasons.

Number one is because it's not binding. Right? I mean, a UDRP can be binding, but it can always go to court. So, it's not like a binding alternative dispute resolution mechanism. And there are lots of requirements, at least in the U.S. I can't claim to be an expert anywhere outside the U.S.

There are a lot of requirements for contracts and provisions that must be adhered to in order to agree to forego a court and go to a binding arbitration. So, there's that. And then there's just …

Again, I think we would definitely need a legal specialist in dispute resolution to come in here and help us because this is really unique. It's a dispute, not between the parties entering into a contract, but a dispute between third parties unrelated to the contract.

CHRIS DISSPAIN: Agreed. And there's no nexus between the two parties because they effectively would often have no relationship whatsoever. Is it fanciful to suggest that, as a … Let me take a step back for a second.

If I understand it correctly, in the current circumstance—and I don't think anybody's suggesting that this would change—no one is

obliged to submit to a UDRP. Or rather, someone can go to a court at any time to effectively usurp the UDRP. Is that correct?

JEFF NEUMAN: Well, someone could go to court and then, although a UDRP is not required to follow what the court is doing or even put its processes on hold, I would say generally, panels are deferential to having the court go on. And then the UDRPs I've seen usually get dismissed after that. But let me—

CHRIS DISSPAIN: So, what is the basis upon which a—

JEFF NEUMAN: Sorry, let me—

CHRIS DISSPAIN: Sorry, Jeff.

JEFF NEUMAN: I just want to add one other thing. All right?

CHRIS DISSPAIN: Yeah.

JEFF NEUMAN: It is only the third party that brings the UDRP that is subject to the mutual jurisdiction clause. In theory, a registrant could bring an

action in any court that's got jurisdiction over the defendant. It doesn't have to choose one of those locations. Now, of course, I think a registrant would choose its own home location. But, in theory, remember that the registrant is not bound by that mutual jurisdiction clause.

CHRIS DISSPAIN: Right. But is it correct [inaudible] as part of the terms and conditions under which you license your domain name, you agree to the UDRP forum? Or you don't?

JEFF NEUMAN: You agree that it could be subject to that, but you don't give up any legal rights or anything like that. You don't give up the right to bring a court action. It's just that it may be subject to this dispute resolution, and if you don't … And then the policy states that if you don't respond within X number of days, then there are things that happen. But you do not technically agree to forego any court action.

CHRIS DISSPAIN: Understood. And I can see your hand, Brian. I'll come to one second.

Why would it not be possible to agree to make it part of the agreement that the registrant has that any dispute that is heard through the UDRP can be finalized in arbitration? Why is that not possible?

JEFF NEUMAN: Because, generally, the only disputes that are like binding arbitration, it has to be something that arises out of the contract itself between the two parties to the contract, not … We would need someone to come in and help us understand whether it's possible to have a binding arbitration clause between a registrant and an unknown third party at the time of the time of that action—or at the time of signing the contract.

CHRIS DISSPAIN: Yep. Okay. So, to be clear, you're not saying it's not possible. What you're saying is that you don't know and we'd need to get some very clear advice that it was possible because it may be that it isn't. And I can see how … I mean, what you've said makes sense from a legal point of view to me. So, thank you. And we'll come back to that in a second.

Brian, you're up next. And then Kavouss.

BRIAN BECKHAM: Yeah. Thank you. Boy, I just saw a big book of text go in the chat, so I won't be able to follow that.

CHRIS DISSPAIN: That's that Paul McGrady guy again. He just keeps putting stuff in.

BRIAN BECKHAM: Just to try to offer a little perspective. I think, in terms of a couple of questions that have come up, and I don't purport to have any or all of the answers. But in terms of the applicability of the UDRP versus the registrant's ability to court that Jeff was discussing, I think that the core difference there is that the UDRP and the URS bring the registrant into that system. Whereas, I think what Jeff was trying to explain, which is exactly right, is that nothing in the fact that the registrant is brought into that system prevents the registrant from itself going to a different court system in its own backyard.

So, they're really two different systems, and the registrant is standing in different shoes in those two systems. So, that's how they … While what may be on the surface seems like a little bit of a dichotomy, actually can work in parallel.

I think in terms of the … What I'm still struggling with a little bit is whether we're talking about a super panel or an appeal to arbitration. Fundamentally, I'm struggling to understand how, if either of those concepts is endorsed through a working group and becomes part of a consensus policy, why that wouldn't be binding on registrants through the various flow of the ICANN contracts.

But Paul made a comment earlier in the chat about the kind of fork in the road that he saw in terms of arbitration versus a super panel and what that potentially meant for the charter of this working group. And while, at some level, probably there are a lot of similarities, especially if we're looking at this in a sort of à la carte fashion where we can establish certain parameters around the composition of panel rosters; in other words, the individuals who are available to act as panelists whether that's a super panel or an

arbitral panel—the number, the evidentiary rules, the procedural rules, that sort of thing.

So, if there really is a fork in the road in terms of the charter of this working group and an arbitration is seen as coloring within those lines—whereas a super panel is stretching those boundaries …

And I think, and certainly Paul would correct me if I'm misunderstanding this, that may stem from the fact that there is no existing appeal process within the UDRP system. So, this is really something we would be creating from scratch, at least in the terms that it's understood today. Whereas, arbitration is an accepted commercial way of resolving disputes. It's even something that's accounted for in the ICANN registry and registrar accreditation agreements.

And another thing is that the arbitration, of course … There is the New York Convention which describes certain parameters for the recognition and enforcement of arbitral awards in domestic courts. And so ultimately, I guess, that is to say that, at some level, there seemed to be more similarities than differences. But if, at the end of the day, at least in a commercial dispute resolution context and an international enforceability context and a familiarity context, then arbitration is more common than something that we would be creating even if it bears a lot of similarities. That, to me, points me towards leaning towards arbitration between these two options. Thanks.

CHRIS DISSPAIN: Thank you, Brian. Kavouss, you're next.

KAVOUSS ARASTEH: Yes. Chris, I don't have any reference for activities in ICANN for arbitration, but I have several other references of a non-ICANN. Arbitration is binding if it is explicitly referred to in the contract between A and B. Is there any contract between IGO and the registrant—

CHRIS DISSPAIN: No.

KAVOUSS ARESTEH: —that you could have also? Well, what the arbitration means to not to be binding, and so on and so forth? So, the situation is that this binding is something that should be referred to. You have a contract. You have many things. One of them is arbitration. Two sides to [inaudible] arbitration—three or five, and so on and so forth. Normally it's three, each party, the third one, and so on and so forth.

And the view of the majority is prevailing. But it should be in the in the contract. There is no contract between IGO and registrants, so I do understand saying that arbitration is binding and the super panel [is not.]

I'm not in favor of a super panel nor against it, mind you. But I want to be assured that we are not speaking on abstract, we're speaking on something which at least exists. So, I leave it to you and the others to clarify that.

Still, I have some doubt that the people, including Alexandra's [reference] that at least in her views, apparently, arbitration is binding and super panel may not be. She didn't say it's not. She said it may not be. So, I think everything is open.

Our task, Chris, is to find a solution. With a solution we have given, you could give the vehicle to implement that solution. And that vehicle [inaudible] should you have this or that one? Should it be mandatory or [voluntary?] So, it is up to us which [inaudible].

Once again, I'm not in favor of any one. You asked this question for everybody. I did not yet answer to that. Thank you.

CHRIS DISSPAIN: Understood, Kavouss. Thank you very much. Alexandra, go ahead, please.

ALEXANDRA EXCOFFIER: A contract doesn't have to be a complicated legal document. What is required, though, is a consent to arbitrate. So, we have to think about how we can obtain consent from the registrant to arbitrate. And what I was saying previously is that we explained to him the situation—to him or her. Sorry. I don't know why I think it's a male. Prejudice on my part. But it. We've explained to it, you know, the fact that if he goes to court to appeal, he will be faced with IGO immunities and we're proposing this alternative dispute resolution mechanism which is arbitration and ask for their consent. And if there's a consent, there's a contract form.

I'm thinking—I'm not an expert, again—an arbitration in the U.S. or elsewhere. And, in fact, we don't … [The ARCD] does not submit itself to seats of arbitration in the U.S. We'd prefer international arbitration, but where we have experience with courts looking at arbitral decisions, not particularly for us, but in general. And generally, the will of the parties has been accepted and defended by the courts.

So, I don't know, but this is … I'm thinking off the top of my head here. I don't know exactly how that would happen, but we do definitely need some kind of consent arbitrate, whether it is in the agreement, whether it's enough to be in the agreement between the registrant and the registry. But I don't know. But we could offer this other possibility of consent instead of if they want to appeal. That's the first caveat. And then, if they do, instead of going to court and being faced with immunities, they consent to arbitrate.

CHRIS DISSPAIN: Thank you. I've got a few things I want to sweep up, but Kavouss, your hand is up again, so please go ahead. Kavouss, if you're speaking, we can't hear you.

KAVOUSS ARASTEH: No, I lowered the hand. I'm sorry.

CHRIS DISSPAIN: Apologies. No problem at all. Thank you very much. Brian and others who know this really well, help me out here. Under the current situation, if I understand it correctly, we go through the

UDRP process and, let's just say, that the registrant loses. My understanding is that, the current situation is that, unless the registrant does something within a period of time, then the domain name would be transferred. And presumably it's unless the registrant makes an application to a mutually agree jurisdiction. Then the domain name, assuming that that's the order, the domain name would be transferred. Is that correct?

Well, nobody's telling me it's incorrect, so I'm going to assume that is correct. So, if we interpose our suggested process for a second …

Yes. Thank you, Jeff. That's exactly my point. In theory, the registrant still has the right to go to court even after the transfer. But what would happen then because the transfer has occurred? So, presumably the process itself, the UDRP process, has wiped its hands of the matter and it is no longer involved.

So, now what you have is a domain name has been transferred from you, Jeff, as the original registration to me as the complainant. That's one. You haven't done your 15 … You haven't made your application within 10 days or whatever to go to court. The domain name has been transferred to me. And what? You can go to court like you've always been able to do, but you're going to have to go into a jurisdiction that's binding on me? Who's going to be ordered to make the transfer back? The registrar or me? How would that work?

JEFF NEUMAN: So, at that point, obviously the registrant cannot bring an *in rem* action because it doesn't have control over the property.

CHRIS DISSPAIN: Correct.

JEFF NEUMAN: But, yeah, anywhere that they would have personal jurisdiction over you as the new registrant of the name, that would … The order would be to you to transfer back if the other party—

CHRIS DISSPAIN: Right. Absolutely no problem. And that could happen at anytime, anywhere irrespective of UDRP. And you can just launch a case where you sue me for a breach of all sorts of copyrights and trademarks. And as part of an order, the domain name is only to be transferred. I mean, it happens all the time. It doesn't have to be through the UDRP. Right?

Although Alexandra raised an interesting point about the domain names being property [or a license], but can we just … It would be interesting, but if we can come back to that in a second.

So, based on what you've just said, Jeff—and Paul and others, I'm really interested in your thoughts about this as well—if you now start the process we're talking about, the IGO wins. Just assume for the moment that the registrant can go to court. The IGO turns up in court and says, "We're not so much in this jurisdiction," and

wins that. What else can they registrant do to prevent the transfer of the domain name subject again, other than going to arbitration?

And if the answer is that they can bring an *in rem* thing, then am I right in thinking that is very specific to a small number of jurisdictions?

Paul, go ahead.

PAUL MCGRADY: Thanks, Chris. So, yes, as far as I know, the United States is the only jurisdiction that has an *in rem* provision in its domain name laws. In fact, the United States is one of the few countries in the world that has a domain name law. So, yeah, I think that is ... It's a very narrow thing, but the domain name exists essentially wherever the registrar is or the registry is, and maybe—I don't know this for sure—but maybe even where ICANN is. Although, I don't think we've kept that ruling from any court. But it's pretty broad, and anybody can access the federal courts. You don't really have to live here. You can just say you have a federal claim. So, it's narrow but it's not—is what I'm trying to say.

CHRIS DISSPAIN: Yeah. As always, yes. So, stick with me for a second then, Paul. If the IGO turns up and wins [and it] says they're not subject to the jurisdiction, yes, in the U.S. I can bring an *in rem* action. How would the court feel if I had consented in some way to the matter being dealt with in arbitration? Is that going to be taken into account, or can I just ignore the fact that way back at the beginning of this process, I said, "Yes, I agree. We'll end up in

arbitration if this thing isn't settled another way"? What do you think about that?

PAUL MCGRADY: Yes. So, Chris, we really need to write this stuff down for the next law school class any of us teaches because that's the double-edged sword here. Say we could figure out a way to get the registrants' consent at the front end. Right? So, then we sort of bypass some of the issues being raised in the chat. Say we can figure it out. I don't know if we can, but let's assume. And then a registrant loses, goes to court, and the IGO shows up in court and says, "I'm immune from jurisdiction here. And, oh, by the way, this other guy agreed to do arbitration so that's where it should go."

I don't know how the IGO says they're immune from jurisdiction and also makes an argument that an arbitration clause be enforced. Right? That's the problem.

CHRIS DISSPAIN: Well, maybe they don't have to do that. Just assume that they just say they're not subject to the jurisdiction and we've agreed, that is a test. And that the registrant is entitled to take that test—to run that test, rather. And if the IGO wins and they're not substance to the jurisdiction, then the final solution … Currently, in Recommendation 5, is you go back to the beginning again. The final solution is that you go to arbitration. That's what I'm testing.

So, I'm saying in those circumstances, either before you actually go to arbitration or, presumably, even after you've gone to

arbitration and you've lost, you can still bring an *in rem* before you lost the name.

But my question is how seriously as a court going to take that application from you, bearing in mind that you have agreed 1) to go to arbitration, and/or 2) you've gone to arbitration and lost.

PAUL MCGRADY: So, if you've gone to arbitration and lost, I think that's a very different analysis because, at least in the U.S., there are laws that do make arbitration binding if it fits within certain parameters. Right? And that's why we're all worried about the super panel because we would have to basically build an arbitration process to make the super panel fit within the arbitration process. So, why do it. Right? So, that's a different question.

My question, I guess what I'm trying to get my arms around, is the registrant loses. They go to court. There's end-run provision. The IGO shows up and says, "I'm immune." Whatever court that is agrees. And then the IGO files an arbitration complaint at that point. And then what? If the registrant doesn't participate, how do we compel them?

Well, we can't compel them because IGOs don't want to go to court and submit to jurisdiction to compel somebody. And so, I guess the arbitration could just move forward without the registrant. That registrant could end up in a default situation, and then we're back to the enforceability of the arbitration award. So, I think there's a path forward there.

Like Jeff, I don't view myself as an international arbitration guru or anything. But it seem like it's a path forward.

CHRIS DISSPAIN: Yes, and I think you may be right. Alexandra, I'll come to you in one second.

What I'm trying to get to is to try and figure out whether the crux of the issue is the consent issue at the beginning. And if we solve that, then we're basically okay, leaving aside whether it's necessary to go to court as part of the process or not; to have the IGO turned up and say, "We're not subject." Separate issue.

I'm trying to figure out whether, if we solve the consent issue, we're okay, or whether we have another issue to solve as well at the other end. That's really where I'm at, and I think where you're—not by any means definitely—but where you're heading is that it may well be that if we can solve the consent issue, we could be okay. Although there's work to do and we need to get some expert input on that. I agree.

Alexandra, go ahead, please.

ALEXANDRA EXCOFFIER: I'm a bit confused. Were we talking about the registrant going to court after losing arbitration? Or are we talking about a registrant going to court first and then the IGO says, "Immunities." And then what?

CHRIS DISSPAIN: Okay. So, we're talking about several things. “We need a flow chart,” says Paul. And Paul is correct. We need a flow chart. So, Mary, Steve, Berry, stand by because we’ll need a flow chart next time around.

ALEXANDRA EXCOFFIER: We have a flow chart. [I just] prepared a flower chart.

CHRIS DISSPAIN: Excellent.

ALEXANDRA EXCOFFIER: It becomes complicated, though.

CHRIS DISSPAIN: Do you think? So, I think what we were talking about is—in simple steps for someone like me to get, it’s like this—you win. The registrant says, “I’m going to court. I don't care.” Goes off to court. And you go to court and you say, “No, no. We're not subject to the jurisdiction.” So far, we're in Recommendation 5. Right?

You say, “We're not subject to the jurisdiction,” and the court says, “You're right. You’re not subject to the jurisdiction. We won't hear this matter.” Now, in Recommendation 5, what happens next is that it goes back to the beginning again. That's daft. We all know that’s daft.

So, what we're saying is that what we would do in those circumstances, if that happened, we would say, “Arbitration.” My

question was what is to stop the … Could the registrant bring an *in rem*? Ignore the fact that they've got the arbitration, and bring an *in rem* at that point? To which the answer is yes. And therefore, the question becomes how do you make sure that their consent to arbitration is sufficient so that they can't do that?

And then my second question was, and if they lose the arbitration, could they then bring an *in rem* before the name was transferred? And the answer to that is, well, maybe. But there's pretty strong belief—from Paul, I think, and others—that it would be pretty hard to do that because there is precedent that says, ["by arbitrations binding"]. Therefore, it's binding.

And so, the crux of the challenge is how do you deal with the consent side of it? How do you make sure that the consent at the beginning to go to arbitration is binding and acceptable, subject to whatever parameters you put in place? I accept that that's probably no clearer than it was before you started your comment, but I've done my best. And maybe a flow chart will make it easier the next time around.

ALEXANDRA EXCOFFIER: Yeah. I see the consensus here, and I think when Paul was speaking, he said, "Let's put that aside and then go through the other." But you've clarified it for me. I've just been … I had a message from Matt who's an alternate here and who's our expert in arbitration.

CHRIS DISSPAIN: [inaudible].

ALEXANDRA EXCOFFIER: Yeah. Well, ex- … Yeah, I guess he's our expert on arbitration.

CHRIS DISSPAIN: Excellent.

ALEXANDRA EXCOFFIER: Maybe if we could let him speak or I can paraphrase what he says.

CHRIS DISSPAIN: Yeah.

ALEXANDRA EXCOFFIER: Yeah?

CHRIS DISSPAIN: I'm perfectly happy for Matt to speak, and I'm the chair. So, there you go. Matt, please feel free to speak. I can see you've come off mute, so go ahead.

MATT COLEMAN: Hi, everyone. Sorry, this is just a thought that occurred to me reading your comments in the chat. And I will caveat all this by saying I'm by no means an expert in the [UDRP]. But bilateral investment treaties contain arbitration clauses of the type envisaged here. So, in essence, they contain a kind of unilateral

offer to arbitrate by a state which a private party can take the state up on if it feels it's rights under the treaty have been violated.

CHRIS DISSPAIN: Could you just say that again, Matt? Sorry. Just so we're clear, say it one more time for me.

MATT COLEMAN: Yeah. So, in essence, bilateral investment treaties are treaties between states. And they contain [an arbitration] clause which allows a private party to take one of the states to arbitration despite not being a signatory to the treaty. So, it's a similar [structure] to what we're discussing here. You have a party that isn't a party to the agreement exercising a right to arbitrate in an agreement [between] [inaudible]. And that consent to arbitration is [routinely accepted] by arbitrators.

CHRIS DISSPAIN: That's immensely helpful, Matt. And if I may, assuming that you're on the call next time around when we come back to discuss this because I'm conscious that we do need to move on to talk briefly, at least, about the new … [inaudible] the GNSO.

Matt, if you could make sure, please, on the next call if you've got something that you think you can contribute, you should take it from me that it's okay for you to at least either message me or put your hand up and we'll—

MATT COLEMAN: [That's fine].

CHRIS DISSPAIN: The point is having an expert on the call if we don't [inaudible].

MATT COLEMAN: Well, I wouldn't necessarily call myself an expert, but I've done a few years in arbitration.

CHRIS DISSPAIN: Well, I'm sorry, but you're stuck with that label now because that's what Alexandra's called you. So, [inaudible] no choice.

MATT COLEMANE: Well, she's a kind boss.

CHRIS DISSPAIN: No, no. I mean, seriously, if you've got input that's valuable, it's worth us listening to it. So, thank you. I appreciate that enormously. Thank you for that.

Okay. Look, it seems to me that we need to we need to try and figure out the answer to this consent issue. And I'm not sure quite how we can do that.

And Paul, I can assure you that you have not earned a permanent title. Any title I may call you is only temporary. Paul, any thoughts on a—and Jeff, you've also mentioned … Or anyone, actually, for that matter. Any thoughts on next steps to figure out how we could

deal with the consent issue. Is it a case of us going off and getting some advice from somewhere? Or what do we think?

Jay, your hand is up. Please go ahead.

JAY CHAPMAN: I'm sorry, Chris. I may be interrupting the chain of thought. I can ask my question later. I'll do that later. Thank you.

CHRIS DISSPAIN: Okay, no problem. What do we think as a sensible next step in dealing with the consent issue? Do we have anybody who we can go and talk …

Paul, go ahead.

PAUL MCGRADY: Thanks. So, I guess the question is whether or not we will ever feel comfortable with this on our own. If we feel like we can answer the question on our own, then I would think that the next step would be for those of us who are interested in this—I'm one—to go out and scour and see if we can find any consent clauses that are contingent on something else happening. Right? To see if we can see it out there in some other commercial context. And then bring those back and see if we can essentially borrow from others.

If at the end of the day, Jeff or anybody else … I didn't mean to call Jeff out, but he's the one that's mentioning that we should seek expert opinion. If Jeff's never going to get comfortable

without us getting that expert opinion, then we should go to Council, I guess, and ask for money.

CHRIS DISSPAIN: Well, that's a … Yes, okay. That's a …

PAUL MCGRADY: Yeah.

CHRIS DISSPAIN: Go ahead.

PAUL MCGRADY: But my personal view is that I think this is something we could get comfortable with, and so digging around might be helpful. But at the end of the day, it doesn't make any sense to waste time if people aren't ever going to be on board, absent some outside lawyer [inaudible].

CHRIS DISSPAIN: Well, I don't think the two things are mutually exclusive. Are they? Because if we do dig around and we find some stuff, that would be quite useful when referring to an expert by saying, for example, "Look at this." Maybe.

So, I'm not sure that I think the two things are mutually exclusive, and I certainly think it's worth having a dig around to see what we can find. And I'll come back to that in a second.

Brian, go ahead.

BRIAN BECKHAM: Yeah. Thanks, everybody. I was going to suggest looking at it maybe from kind of another side of that same coin which is, if I have understood, the main hesitation in terms of the arbitration appeal option have come from Jeff and Jay for slightly different reasons. And then, of course, Paul reminded us of the potential limitations in our charter.

And I've been digging around a little bit myself, and I've got a call out to some colleagues who operate in the arbitration space in their day jobs, if you will, to understand a little bit more about this concept of third-party beneficiaries or consent. And I appreciate Matt's intervention which I think gives us a sense that there's some foundation to build on.

But what I was going to suggest is, would it be worth exploring a little bit … And this is what I was alluding to earlier, and of course this takes us back to some of our initial chats in terms of maybe we're a little stuck on this and we need a little help getting through this particular side of the equation, but are there particular aspects of whether it's the arbitration or the super panel that still need to be ironed out?

So, in other words, if we agree on certain aspects of the process (the evidentiary standards, the burden of proof, the panel composition, the number of panelists, the roster, etc.) does that give—and I don't mean to certainly put anyone on the spot, but if I would use Jay as a proxy for registrants—sufficient comfort that

this would be something that a reasonably informed registrant would sign up to?

So, in other words, it may be a way to get to a safe space in terms of the process for all of the parties involved to where actually we're talking about this in slightly hypothetical terms. But if we actually understood the path in front of us, people may say, “Ah, in fact that makes sense. And I’m not so concerned, and I’m going to willingly sign up to that.”

CHRIS DISSPAIN: I think whichever way around you look at it, Brian, that's a fine suggestion once we’re clear about consent because I think consent applies whichever way around you look at it. Doesn't it? Doesn’t consent apply respective of whether you're talking about a super panel or arbitration?

BRIAN BECKHAM: Yeah. I mean, this was going to be [the question] that I asked earlier. And I, as I freely admit, I’m a little stuck on why, if the UDRP being a consensus policy flowing through the ICANN contracts can bind a registrant, why an arbitration or a super panel as a part of that UDRP process would somehow trigger [inaudible]—

CHRIS DISSPAIN: Isn't the whole point that it doesn’t bind registrant [inaudible]? Haven’t we worked on the basis that the registrant can always go to court including after?

BRIAN BECKHAM: The registrant can always go to court, but these are not mutually exclusive. Both—the registrant can always go to court, but the registrant is also at the same time bound to participate in the UDRP process. So, those aren't mutually exclusive.

CHRIS DISSPAIN: They're not bound to participate. They can just ignore it if they choose to do so.

BRIAN BECKHAM: Sure, they can ignore it, just as if they can ignore an appeal to a super panel or an arbitration. And you can have a judgment rendered on the basis of a default. But they're bound to … Sure, they can ignore the process and there's no obligation to submit a reasoned defense. But there is an impact on the registration if there's a decision going against them. So, in that sense, I mean, they're bound. I don't mean an obligation to actually mount a substantive defense if they choose not to. In fact, we know many registrants in UDRP cases ought not to.

CHRIS DISSPAIN: Except that even if they didn't participate in the UDRP and you made a decision to say that the domain name should go to the complainant, they still have their 10 days to go to court.

BRIAN BECKHAM: Correct.

CHRIS DISSPAIN: So, the point I'm trying to make is that the final binding thing is either by consent—UDRP—or it's the court. And what we're seeking to do—

BRIAN BECKHAM: But if they don't participate in the UDRP process and they don't file an appeal in court—which, by the way, is extraordinarily rare—then the UDRP decision becomes operative.

CHRIS DISSPAIN: Sure. And I don't disagree with that at al. I'm not saying it's not operative. I'm saying that is, in essence, my concern. It's by dint of the fact that they haven't decided not to take the next step. I don't disagree with you, but I think we're probably way down into the weeds here. But I'm conscious. I still think we need to deal with the consent issue, but I'm conscious that we're running out of time and I know that Jay wants to say something.

So, Mary, you're next. Then Jay. Then I'm going to suggest a way forward between now and the next call and the GNS Council meeting. Mary, go ahead, please.

MARY WONG: Thank you, Chris. And I'll keep this short because I think Brian and you covered a lot of what I was going to say. One thing that I was going to say that you didn't cover was Paul's point. If there's

going to be digging, obviously staff will be happy to help facilitate it with the research as much as you need.

But to the other points, I think, Brian you picked up on the point I was trying to make in the chat about the somewhat arcane area of third-party beneficiaries which is the point about consent. And this is something that will require definitely a little bit more digging simply because the complainant is not a party to the registration agreement. It doesn't mean that we could not recommend that something be put in a registration agreement that says, in effect, “A registrant shall agree to arbitration.”

But, of course, the enforceability of that by the complainant as opposed to a registrar is what's up in question. So, it's not so much what we can and can't put in the contract. It's the extent of its enforceability. And one reason why, I would guess, that has not come up is what Chris said; that while the registrant does agree to the UDRP in the current state of the registration agreement, it always has the option to go to court as well.

So, if we change that, that could alter I guess the enforceability question. And it's something that, like I said, we'll need to look a bit further into.

I had one more point, Chris, but I forget what it is. So, I’ll cede to Jay in the interest of time.

CHRIS DISSPAIN: Thanks, Mary. You can always come back. Jay, go ahead.

JAY CHAPMAN: Thanks, Chris. And thanks, Brian, for the explanation and some of the points that you raised.

As far as the consent and, as Mary raised, the enforceability issues are concerned, I understand the discussions here and look forward to hearing more from the people who are reached out to on that. I guess, just as important …

And I know, Chris, you've kind of said, “Look, we need to figure out this consent and perhaps this enforceability issue first.” But generally, as Brian kind of laid out, there's a lot more details here that need to be discussed in comparing the arbitration versus this potential super panel. And I guess that first one, for me, just is, if it’s arbitration, how do you get or can you get experts—people who understand UDRP, trademark, domain names—how do you do that?

But those are some of the things that are just kind of fresh on my mind, and I didn't want to distract from the discussion before. And I’m sure we’ll usually get to that, but I’m just saying these need to be weighted just as heavily as we're kind of making this assessment, as well as burden of proof and some of these other factors, in making these determinations. Thanks.

CHRIS DISSPAIN: So, Jay, I completely agree with you. And you're absolutely 100% right. There's been a lot of talk, as I said, as we started leaning towards arbitration. But that does not mean that we can't find a way to achieve exactly the same with some advantages within the UDRP super panel. So, yes, agreed that it is about …

Also, there are things like costs. And the costs, that is as important to you, Jay, as a registrant as they would be to an IGO. There's the understanding of the necessary nuances. There's all sorts of stuff.

Paul's point that he's made a couple of times now is a valid one, which is, “Yes, and we would be creating something new.” Whereas, with the arbitration, we're not. It exists. All we are doing is building a bridge from Recommendation 5 saying, “Here's an existing process that exists outside of the UDRP.” That is what we're going to say will be used to solve the issue with Recommendation 5 and to reach a final, binding finding.

But I agree completely that there is nothing to be said, to say that it can't be a separate panel. I just think that the consent issue is critical, irrespective of which one you choose. But I don't want to shut down the discussion and have everyone assume that we’re just saying that arbitration’s the right way because it may not be.

I want to close the discussion off in five minutes to talk about the GNSO Council meeting. So, Brian, go ahead.

BRIAN BECKHAM: Sorry to keep us going.

CHRIS DISSPAIN: [inaudible]. Don’t be sorry.

BRIAN BECKHAM: I sent to Berry—I don't know if he saw it. And I appreciate where we're winding down, but if it's possible to just flash on the screen for a moment, it might be illustrative of when IGOs … We've had some calls to prepare for these meetings, and we've kind of walked ourselves through, "Okay, what would this actually look like if there was the court process invoked?" And of course, this at a kind of abstract level, so this isn't to say this is how it would work in every jurisdiction or with every IGO.

And I mentioned this on our last call but, I was radically affirmed in the view that the potential of going through court was much more complex than suited any of the parties to this process. Again, I want to be clear that this was just a kind of a rough draft brainstorming effort.

But I think it just illustrates the point that, although there's a lot of familiarity with court processes, when we tried to think about this, we found ourselves coming time and again to the conclusion that this was more complex than suited any party in this process. I think that's really one of the reasons why we found ourselves continually coming back to the hope for the arbitration side of the equation.

CHRIS DISSPAIN: Yes. So, Brian, agreed. And thank you. And perhaps, given that, Berry, you now have this high-level very much draft-only mind map, you could send it out to the list for us all to play with and have a look at. That would be immensely helpful just so that people can study it and consider it because it is actually—looking at it now for the time—immensely helpful sending out the

necessary boxes irrespective of whether the boxes are super panel or arbitration or whatever.

Okay. Here's my ask of you, then, which is that those of you who, like Paul and like Brian and like Jeff, have people you can go to who understand and are experts in arbitration, if you could reach out to them and discuss the consent issue with them as to see whether or not that we can find a way of making that work.

My guess is, if we can find a way of making it work in respect to arbitration, we should be able to bolt that on the UDRP if we use the super panel. So, I don't think that the work is wasted, whichever way around we go.

And Matt is volunteered by Alexandra, so thank you, Matt. You've just been voluntold by Alexandra.

That will be fantastic. And if we can come back to our call next week with some thoughts about that, and if you've managed to get any input from anybody, that would be immensely helpful.

And, Mary, I don't know whether or not there's anyone that we can think of to reach out to, but if we can, we'll do the same.

Now there is a Council meeting. Just moving on now to the last item on the agenda. There is a Council meeting in three days' time. And I think, John, that we're in a position where we can simply say to them that we are actually making progress. That we have a small group working on the funnel issue, getting into the process in the first place. That we've made progress on considering possible ways of resolving Recommendation 5, and

are currently doing research on ways of binding consent. And that at this stage, that's really about all we've got to say to them.

John, does that give you sufficient … Is there anything else you'd like us to cover? Do you think that's enough? And does anybody else have any input that they'd like to provide?

John, go ahead.

JOHN MCELWAINE: Yeah. So, Chris, I do think that's a good start. I think that the Council will be keen on getting an update on the schedule, so I don't know if we at a leadership level need to see if we feel like we've got enough time and we need to adjust it at this stage. That's the only other thing I can think of adding. Thanks.

CHRIS DISSPAIN: Okay. That's fine. And we'll have a call tomorrow with Berry and his charts and go through them and see where we think we're at. And if we need to make some suggestions, we can do that.

The only other question I would have, and I'd be interested in anyone's feedback, is whether we should see to the possibility that we might be seeking expert advice. And if we did, we would obviously need to go to the Council and ask for that to be sorted out. It might be worth mentioning that as a possibility at this stage, simply on the basis that at least we will have planted a seed in case we do need to do that. I think that's probably a sensible way forward, but anyone want to comment on that?

Okay. Then I'll take that as red, and that's what we'll do. It's just a flag. We're not asking now. We're just saying we may come back and ask. It doesn't do any harm to give a little bit of pre-warning.

Is there a chance—Brian, Susan, Paul—is there a chance, do you think, that we may get some texts from you for next Monday? Or is that too much of an ask in respect to your small group work that you're doing? I won't hold you to it. It's just an estimation if you think it's likely or not.

SUSAN ANTHONY: This is Susan.

CHRIS DISSPAIN: Hi, Susan.

SUSAN ANTHONY: I'm sorry, I can't raise my hand. I've been [chat disable] and I don't know why.

CHRIS DISSPAIN: That's all right.

SUSAN ANTHONY: But at any rate—

CHRIS DISSPAIN: Well, it's a conspiracy, Susan.

SUSAN ANTHONY: It is. I think two weeks would be fair. I don't want to … If Brian and Paul are more [ambitious, that's fine]. But I really think that two weeks would be reasonable, and if we can do it sooner, we'll of course share.

CHRIS DISSPAIN: I think that's fantastic. Thank you. I appreciate that. And we'll do that. And I'm glad that Brian and Paul agree. So, thank you, Susan.

And so next week, then, we are going to continue this discussion. We're going to see where we've gotten to with the [possibility] to consent. And picking up on the point that both Brian and Jay have made, we will also, I think, drill down into the sort of structure that we think might be necessary. And so, I would appreciate it if, Brian and Jay, you could consider in your own time what sort of red flags there are in the structure that you'd be uncomfortable, and what sort of structure you think would work. And any experience from your existing WIPO work that you can bring, Brian, to the possibility of a way a super panel might work would be immensely helpful.

And, Jay, obviously you've got your own ideas about the sort of things that you would consider to be essential in order for it—whether it's an arbitration or a super panel—to work. So, if you could consider those and bring those thoughts and ideas with you to the meeting next week, that would be fantastic.

With that, I'd like to say a call for any final comments before I wrap us up. Well then, thank you all. I think it's been an incredibly productive session. I want to call out, again, Paul and Susan and Ryan for the work that they did offline, and looking forward to seeing the culmination of that in a couple of weeks' time. We will meet again in one week. Thank you all very much, indeed. And I'll call meeting closed.

ANDREA GLANDON: Thank you. This concludes today's conference. Please remember to disconnect all lines, and have a wonderful rest of your day.

MARY WONG: Thank you, Chris. Thanks, everybody.

[END OF TRANSCRIPT]