ICANN Transcription

IGO Work Track

Monday, 24 May 2021 at 15:00 UTC

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TERRI AGNEW: Good morning, good afternoon, and good evening. Welcome to the IGO Work Track call, taking place on the 24th 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're only on the telephone, could you please identify yourselves now? Hearing no one, we have no listed apologies for today's meeting.

All members and alternates will be promoted to panelist for today's call. Members and alternates replacing members, when using chat, please select "panelists and attendees" in order for everyone to see your chat. Alternates not replacing a member are required to rename your lines by adding three Zs to the beginning of your name and at the end, in parentheses, 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 functionality, such as raising hands, agreeing, or disagreeing.

As a reminder, the alternate assignment form must be formalized by the way of the Google link. The link is available in all meeting invites towards the bottom. Statements of interest must be kept up-to-date. If anyone has updates, 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 the Expected Standards of Behavior. With this, I'll turn it back over to our chair, Chris Disspain. Please begin.

CHRIS DISSPAIN: Thank you, Terri. Good morning, good afternoon, good evening, everybody. Welcome to call number 13. On today's call, we're going to concentrate on the subject of consent. How can we fix the problem of getting to consent to go to arbitration and having binding arbitration? We started to address that issue on our last call. But before we do that, we're going to get an update from John about his report to the GNSO Council meeting and deal with any other logistic matters that there may be. So, John, if you're

available, why don't you tell us how the GNSO Council meeting went.

JOHN MCELWAINE: Sure, Chris. It was a brief update. I pretty much reported back that we were making good progress. I gave a hint to the GNSO Council on two topics that everybody on this call is well aware of, the first being that we were struggling a little bit with the narrow scope of the charter and that we could need to address an expansion, though I didn't go into that level of detail with the GNSO Council.

On the second thing, I mentioned that there may be the possibility that we could be coming back to the Council to ask for some funds in case we needed to get any legal advice concerning some of the issues that we'll be talking about, likely today.

It all went very well. No questions, no discussion. It was really just an update to the Council. And then I closed by saying that I had—let them know that currently we're on course to produce the reports and hit all the timelines that were currently set forth in the work plan. So with that, I'll turn it back over to you.

CHRIS DISSPAIN: Thank you, John. Excellent. Thanks for that. If anyone has any questions or comments, of course please raise your hand. Before we go on to item number three, just a brief update on the small group work that Brian, and Susan, and Paul are undertaking. I can see all three of you on the call. Does one of you want to just give

us a very quick update as to where you're at with the discussion on IGOs getting into the funnel?

BRIAN BECKHAM: Go ahead, Susan.

SUSAN ANTHONY: No. I was about to say I think Brian, as the representative of [IGO]s is the best-positioned.

CHRIS DISSPAIN: Well done, Susan. Brian, go ahead.

BRIAN BECKHAM: Fair enough. Thanks. Hi, everyone. We shared a message last week to the list that we seem to be more or less landing on the same page. And we've just been exchanging some emails, trying to iron out a few kinks with some specific language. I think the main thing that I would just report back is we have, ourselves, a call scheduled for Wednesday. We've been exchanging some emails, I think, where—as I say, just ironing out a few kinks. But what we come back to you guys with, obviously, may not be a final product—may have a couple of items that we have a little bit of discussion on. I suppose it's self-evident but just to mention that.

CHRIS DISSPAIN: Super, Brian. Thank you. We don't have a call next Monday, as far as I'm aware, because it is pretty much a holiday everywhere. But

it would be fantastic if there were some things that you could put out onto the list for discussion if you are able to do so. That would be fantastic. So thank you very much. I don't think it could be said too often that it's really appreciated that the three of you are prepared to take on extra work and work on this together. So really very much appreciated. Thank you for that.

All right. We got ourselves involved in a discussion last week about consent. And if I remember correctly, we were talking about how you would bind anybody to be involved in arbitration. And we talked about the issue of you can't stop people going to court. They can always go to court and so on.

And we said irrespective of whether or not someone has gone to court, in order to fix the problem, at the end of the day, Recommendation 5, we need to have some kind of final binding mechanism because at the moment, Recommendation 5, which is in front of you in the Zoom Room says that if an IGO succeeds in saying that it's not subject to a local court jurisdiction, that it all goes back to the beginning again and the process, effectively, would have to start again.

The reason we're here, or rather the trigger for the reason we're here, is that that is unworkable. So the question becomes are we prepared to put in place a mechanism, either through arbitration or a special panel, that becomes the final call on this matter? And what we were talking about last week, and what I'd like to open up for discussion about now, is that question of how do you ensure that registrants consent to this final and binding process, given that there won't be a contract between the IGO and the registrant?

So I appreciate that we started the discussion last week. I have no doubt we're going to need to recover some of the ground that we talked about. And I would be interested if anybody is prepared to make an initial statement about what they think the current situation is and if anybody has any bright ideas about how we might be able to fix it. Brian, thank you.

BRIAN BECKHAM: I'm not sure a bright idea. But at least to relay a little bit of information. I checked in with some colleagues who are more involved in arbitration and mediation work in their day jobs. What I've learned was we explored—or there was, I think, maybe some chat in of recent calls around third-party beneficiaries. So I think as a threshold matter, I'm still not sure that there's an issue if whatever mechanism to address, let's say, the second potential layer of these disputes, whether it's an arbitration or a super panel. I still feel we're on very solid ground, given that this would be flowing through a consensus policy and we all know that the various cycle of ICANN contracts binds the registrant to consensus policies like the UDRP.

But what I learned, which I thought was interesting to relate to this group and dovetails on what I've just said about if there's actually an issue, so to speak, is that in this situation that we're looking at, which is that you have the contract between the registrant and the registrar, which is what we have today and that's how people are brought into the UDRP, it would actually be the IGO, in our scenario, who would be, in cases that this has been explored … By the way, I should mention that this still seems to be an unsettled area of law, although I'm happy to share an article that

was provided to me by a colleague, that increasingly, nowadays, there is actually a preference by courts to move people towards arbitration. There's different reasons for that.

But the point is that in this scenario that we're looking at, it would actually be the IGO that would be—and this is how it typically tends to work in the third-party beneficiary scenario—that there would be an objection to being brought in. The objection would actually be raised by the IGO. They would say, "Hey. We're not actually a part to this contract. Why are you trying to force us into arbitration? The contract is between the registrant and the registrar."

Of course, the fact that the IGOs actually have been advocating for an arbitral appeal I think safely takes that off the table, at least as far as I've understood it. So I personally found that illuminating and also very pertinent for our work. Again, it's something that seems to be an area of law where there are different courts looking at this differently. But it would be, in our scenario, the IGO that would be objecting to be brought in as a third-party beneficiary. Hope that's helpful.

CHRIS DISSPAIN: Thank you, Brian. I've got Jeff next.

JEFF NEUMAN: Yeah. Thanks. I did some research as well. Let me just state first that I'm not against arbitration but we do have to do this legally. And I think, Brian, respectfully, registrants are not bound by consensus policies at all. In fact, registrars and registries are. And

registrars and registries then update their contracts because they are bound by consensus policies. And a registrant is only bound to the extent that the registrar and the registry are able to amend their contracts with the registrants and at the appropriate point at which a registrar can update their contracts with the registrant. So simply because the ICANN world, we come up with a consensus policy, does not mean that it's enforceable against the registrant. It has to go though a couple steps.

And that takes me to the contract. The contract for a Registration Agreement is solely between the registrar and the registrant. There are no third-party beneficiaries and, in fact, I would say most Registrar Agreements, though I have not done a complete sampling, do provide no third-party beneficiary clauses. So the only contract a registrant enters into is with the registrar.

And at least in the United States, the United States does require or does basically state that non-parties to an agreement cannot be compelled to arbitration expect under three general circumstances. One is the third-party beneficiary, which Brian was talking about. But again, registrars generally sign … Registrars and registrants state that there are no third-party beneficiaries. In theory, that could change, at least at this point.

The second is agency, where a third party, or the party entering the contract is actually an agent for another party. So the principle can then enforce an arbitration clause but that doesn't apply here.

And then, the third one is called estoppel argument, which generally states that if you're receiving benefits under a contract, and you're a third party, and you are trying to enforce those

benefits under someone else's contract, then you can't really pick and choose. If that contract has an arbitration clause, if you're suing for benefits under a contract, you have to also take the "negative" with the contract, which would be the arbitration. And that doesn't really apply here.

So the question is how can you force an arbitration. Brian's correct than an IGO would have to agree to arbitration but so would the registrant because the IGO is not a third-party beneficiary of the contract between the registrar and the registrant. And similarly, when an IGO files a UDRP complaint—and that's where it currently agrees to the mutual jurisdiction—that is, in essence, a contract between the … I guess in theory, it's a contract between the IGO and the UDRP provider. The respondent does not necessarily agree to any terms and conditions simply by filing a defense.

So that's what would need to be thought about is whether a registrant that files a defense or responds can be made to agree to an arbitration clause, simply by filing its response. If that can happen, then maybe we can do this. But otherwise, I don't see how that would happen.

CHRIS DISSPAIN: Jeff, surely the registrant … Is it not possible for the registrant to be bound because of their contract with the registrar? Because that's what policy—

JEFF NEUMAN: Right. The registrar can have an arbitration clause requiring that it arbitrates any disputes it has with the registrant. And of course, that has to be presented in certain ways, and has to be conspicuous, and all that other stuff. But a registrar cannot compel an arbitration with a third party unless that is specifically—certainly not in a clickwrap agreement. Whether it's possible to do so in a fully-negotiated arms-length agreement, I don't know.

CHRIS DISSPAIN: Just to be clear, you're saying that the basis of the license or the terms and conditions under which a registrant gets the domain from the registrar, cannot say, you believe, "In the event that someone disputes your entitlement to this domain name … Don't worry about just limiting it to IGOs at the moment. Just talking general terms. In the event that someone disputes your entitlement to this domain name, you agree that that dispute would be settled using the following processes, the end process being arbitration. You're saying that that's not possible.

JEFF NEUMAN: It's not possible to require that to the exclusion of a legal remedy. Correct. It cannot be a binding arbitration. The way the UDRP works is technically, it's not a binding arbitration—technically and legally—because a registrant can always go to court and even can go to court after the name is transferred.

CHRIS DISSPAIN: I understand what you're saying and I think we're being … This is incredibly difficult and fine slicing. But let's just talk this through.

Paul, I can see what you're saying in the chat. Your input would be welcome. The current situation is that the registrant … I assume that there is something in the contract between the registrar and the registrant that says disputes are handled through the UDRP. I agree that the registrant can always ignore the UDRP, go and get a court order, etc. But there is something in the contract that says that disputes are dealt with through UDRP.

JEFF NEUMAN: Yes. But it's not the same as binding arbitration. It's not considered binding arbitration.

CHRIS DISSPAIN: What you're saying is that you cannot use the terms and conditions that the registrant holds the domain name under to say you will agree that the finding of this arbitration or this panel, whatever it maybe, is final and binding because that usurps the right to always go to court. Is that what you're saying?

JEFF NEUMAN: Yes. Just to add to … You're saying you cannot force a binding arbitration for a third party, right? The registrar can certainly force a binding arbitration for any disputes that it has—the registrar has with the registrant, assuming again all the conspicuous language and all that other stuff. But what I'm saying is that absent one of those three generally-recognized exceptions, I don't—at least upon my cursory review, don't see it. But again, hence why we need someone who specializes in this area of law because there are certainly things that I do not know.

CHRIS DISSPAIN: Okay. Thank you, Jeff. Paul, would you care to take a tilt at this particular windmill and see …? Because you're saying you don't agree.

PAUL MCGRADY: Yeah. I'm not so sure that I don't agree. It's that I don't understand the distinction between why a party is stuck with the UDRP. That may not be binding but it still can affect your rights, especially if you are subject to it and you don't show up. So I guess I don't understand the distinction between binding versus non-binding and why that matters contractually.

So I encourage Jeff to share whatever research he came across that explains that because in my mind, it seems to me that the real question of the party that's not a party to the underlying contract is the IGO. And as Brian points out, if the IGO doesn't want to do binding arbitration, it doesn't have to. It can just take its chances in court, I guess, but we think that's unlikely.

So I guess because Jeff's a smart lawyer and has raised a substantial question, I guess we either have to figure out how to overcome it ourselves or we have to say, "We've got Brian saying one thing. He's smart. And Jeff's saying the other thing. He's smart." So we might have to take some money and some time and track that down.

Maybe this is too overambitious but I wonder if we do that, can we just plop down an assumption that it'll work out and keep working or do we have to stall?

CHRIS DISSPAIN: I'd be happy to carry on. I don't think we necessarily need to stop although conveniently, we do have quite a long break between now and the next meeting so it may be feasible, although, of course, the GNSO moves slowly so we may not be able to get it done. But let's put that to one side for a minute because I want to pursue something else. Jeff, is that an old hand or a new hand?

JEFF NEUMAN: Sorry. Old hand.

CHRIS DISSPAIN: Okay. I want to walk through the process for non-lawyers. And I'm going to ask some questions as we go and see where we get to. So anyone's welcome to respond but if those that are currently involved in the debate would like to do so, that would be helpful.

The current situation is that there is something in the registrant's agreement with a registrar that says that disputes are dealt with using the UDRP. I'm assuming that's correct. If it isn't, somebody can tell me that it's not correct. Now, there's a dispute. So someone says, "You're using this domain name wrongly and I'm going to bring a dispute to the UDRP. So they file their claim and the registrant is notified.

I understand it correctly, if the registrant ignores it and does nothing, then the UDRP proceeds through its process. And the registrant ignores it and does nothing again. And let's assume that the panelist finds in favor of the complainant and the registrant

gets notice of that and still doesn't do anything. Then, the domain name is transferred. That's correct, I think.

Obviously, if the registrant participates in the process … Say, at the end of the day, they participate in the process. Again, there's a finding. If they lose and they do nothing, the name is transferred. If they win, the thing goes away anyway.

What I want to get clear about is it correct, then, that a registrant could ignore the fact that there is a UDRP process going on and make some sort of formal court application to say that they're not interested in participating in this process and that the domain name is theirs and should remain theirs. Is that feasible? Anybody want to say whether they think that's feasible or not? Paul?

PAUL MCGRADY: Thanks, Chris. That's exactly where I was heading and I put in chat. Can we explore shifting the timeline for consent? Because right now, we're getting all wrapped up because we can't figure out how to get consent at the time of registration. But what if we said if the losing registrant doesn't consent to arbitration after a short deadline, the domain name is transferred to the IGO and then the burden shifts to the registrant to go to court or do whatever they can to try to get it back. But if the losing registrant agrees to binding arbitration within the short deadline, then the losing registrant keeps the domain name until the arbitrator rules one way or the other.

CHRIS DISSPAIN: That's certainly a possibility and it's heading in a similar direction to where I was headed because if I understand it correctly, the only time at which the starting of court proceedings has any effect on the UDRP process, other than any effect the judgment may have, is if it is started after losing by the registrant and it is started within a certain period of time. Is that correct?

BRIAN BECKHAM: Chris, I'll just jump in. I think for purposes of our conversation, it's correct. It happens very, very infrequently in the UDRP cases that a respondent or a complainant—it can go both ways—would file a court case while the UDRP is going on. And it's a very, very niche area. There's different circumstances where sometimes a panel would terminate the case. Sometimes a panelist would render a decision. But it tends to be a little fact-specific. But largely, I think, for purposes of our conversation, that's correct.

CHRIS DISSPAIN: Okay. So if we stick with that for the moment, then—and picking up on what Paul is suggesting about moving the timeline—then are we not in a situation where we could say, "You've lost. You have got 10 days to launch court proceedings, in which case the IGO is going to turn up and say they're not … You take your chances. They're going to turn up and say they're not bound. You take your chances. They might lose that, and you might get a hearing, and you might win. But equally, they might win. Or you consent to arbitration."

The problem, it seems to me, with any of that is how … If I'm the registrant, and I consent to arbitration, and I lose the arbitration, then technically, presumably, I will have agreed to be bound by arbitration, won't I? So if I have agreed, at that point … I've taken my choice and I've said, "No. I'm going to go to court and I'm going to argue it in Kentucky," or wherever the jurisdiction is, "and I'm going to take my chances," or I agree to go to binding arbitration, at that point, it must be possible, must it not, to say you're bound? Brian, I don't know if that's a new hand but if it is, go head. And, Jeff, I'm very interested in what you've got to say about it as well. Jeff?

JEFF NEUMAN: Yeah. I'm just trying to figure out. Basically, you're saying if a losing registrant of a UDRP wants to go to court and fight this, as opposed to binding arbitration—

CHRIS DISSPAIN: Which they can do, anyway. Sorry.

JEFF NEUMAN: Which they can do anyway—then you will transfer the name , simply because they didn't agree to arbitration?

CHRIS DISSPAIN: No. What I'm saying is you have a choice. You've lost.

JEFF NEUMAN: Yes.

CHRIS DISSPAIN: Right now, the situation is you've lost. You have a choice. You can do nothing, in which case the domain name will be transferred, or you can start court proceedings, in which case the domain name will remain where it is, pending the outcome of those court proceedings. Is that correct?

JEFF NEUMAN: Correct.

CHRIS DISSPAIN: That's right? Okay. So let's just assume for the moment that that remains the situation. What happens is you start the court proceedings, go off to court and this is an IGO matter. The IGO turns up and says, "Hello. We're not bound by this jurisdiction." And the court says, "You're right. You're not." What would happen then?

JEFF NEUMAN: The case is dismissed without prejudice. And if within 10 days of … I don't know. It hasn't happened. But in theory, a registrant can refile in a court that would have jurisdiction. So the answer is I don't know but I would assume, at this point, absent … If this were not IGOs and let's just say it's just regular, I'm assuming if the registrar was put on notice that it was refiling in a court that did

have jurisdiction or potentially have jurisdiction, I'm pretty sure the registrar would keep the status quo.

CHRIS DISSPAIN: What Paul is saying in the chat, which is a valid point, is if the case is dismissed without prejudice, then the domain name would be transferred.

JEFF NEUMAN: Possibly. But not if it's immediately … Yes, it's possible. I guess that's possible. Sure. Okay. Fine. It's never happened but I would assume that if … Again, if the day the order came out, a legal counsel wrote to the registrar and said, "Hey, we're refiling in Switzerland because we know there's jurisdiction there—" I'm making this up—I don't know that the registrar would actually transfer the name. But it's never happened so we don't know.

CHRIS DISSPAIN: Okay. Jay, you're next, then Paul. Jay, go ahead.

JAY CHAPMAN: Thanks, Chris. I'm having a hard time trying to understand why we're in a rush in this situation. If we're going to allow for … We're not going to be able to take away or bind a registrant from being able to go to court in the first place. So it seemed to me, the process would be losing registrant, immediately after the UDRP, before the decision is rendered … Either way, they file a court proceeding. They go to court. If the court says, "You don't have

jurisdiction," then at that point, that's when the 10 days for the registrant to file its appeal.

And we haven't really talked about this but I see it from the standpoint of the registrant having to pay for this appeal or at least have a share in paying for the appeal. But that's when that begins. That way, you're not really having the registrant having to gamble as to whether or not it will succeed in a jurisdictional issue with an IGO in court versus arbitration. I'm not sure that sounds entirely appropriate or fair. Thanks.

CHRIS DISSPAIN: Fair enough. Paul, you're next, then Brian.

PAUL MCGRADY: Thanks. I guess that's what the losing registrant who does not agree upfront to arbitration would be doing. So if I'm a losing registrant, I have an IGO as my opposing party, I lose, I don't think it was fair that I lost, and I then face a choice. I can either consent to binding arbitration and we can have an arbitrator look at this. An arbitration is many court actions so you can call witnesses, and documents, and all the things. Or I can roll the dice and file a complaint to stay the implementation of the UDRP. I've got 10 days to do that. There is no 10 more days after you file.

So I file that. The IGO shows up and convinces the court that they don't have jurisdiction. The court dismisses the case with prejudice or they don't. Maybe they just say, "Okay. I don't have jurisdiction over you but I'm going to keep the case anyways and too bad for you, Mr. IGO." That's its own issue. But assuming the

judge dismisses the case without prejudice, then the 10-day waiting period's over. At that point, there's nothing in the UDRP that gives the registrar any more time to not transfer the domain name. And there's nothing in the UDRP that says, "You can file every nine days forever.

So if I'm a losing registrant, and the IGOs on the other side, and I really think that I have a good case, and I have the money to either go to court or go to arbitration, I don't know that I would roll the dice by going to court. But ICANN doesn't want to be in the business of taking away that right.

One last thought. I don't know why, if I'm the IGO in that scenario and the case is dismissed with prejudice, at that point, I don't want to sign up for voluntary arbitration because I already won. The domain name's coming to me. So really, the choice for the losing registrant is at the moment before they choose to file in court or do nothing. Those are the three options—agree to arbitration, file in court, do nothing. So if we shift this timeframe, then we get there.

Now, whether or not that's fair, that's a good question. I know that's something we need to think through. But I think procedurally, that's how it happens. So maybe Jay could get back in the queue and talk to us again about that because I don't want to steamroll anybody. Thanks.

CHRIS DISSPAIN: No. Understood. But I think the point you make is correct in the context in which you've said it. You've lost. That's when you make your decision. You're given a choice. You've got two pathways

you can go down. It's your choice. You are the loser. No one's forcing you to go … You can go three ways, actually. One way is to do nothing, of course. So ignoring that one, you've got two alternatives. And that is a matter for you. That's the time to make it, at that point. It makes perfect sense to me that that would the time. And I'm not talking to the fairness point. I think that's a different point. So we've got Brian, Jeff, and then Jay. Brian, go ahead, please.

BRIAN BECKHAM: Yeah. Thanks, Chris. I think, actually, it's precisely that fairness point that we're trying to address. And I just wanted to make a couple of quick points. One is I agree with what Paul said. He said most of what I was going to say on one point so I will leave that.

The other thing, it's just a small clarification but I think it's important to say is that when we're talking about the registrant, if they don't show up, the UDRP … The complainant still has to prevail on the merits. So in other words, just because the respondent doesn't show up, doesn't mean that they lose the case. In fact, there are some UDRP decisions where a non-appearing respondent still, nonetheless, wins because the panelist feels that the complainant hasn't made its case. So just a small clarification.

And then, the chat has teed up the third point that I wanted to make, which was I think that … And sorry. I know maybe I, a little bit, sound like a broken record. But I think if we could unpack a little bit what this arbitration or super panel process could look like in terms of the composition of panelists, and substance, and

process, that might help us to understand a little bit and say, “Ah. Actually, we see, with the following, x, y, and z safeguards, this clearly is going to be a better process for everyone than the uncertainty that’s hanging over all these different court questions.

So I just raise that as ever a little bit of a chicken and egg place. Maybe if we explore those facets of this, that might help a little bit.

CHRIS DISSPAIN: Brian, I’m happy to do that. I’ve got Jeff in the queue and then Jay. And then unless anybody else wants to—unless something comes up in those two comments that others want to comment on—why don’t you come back at the end of that and throw some ideas on the table as to the sorts of things that we should be considering in respect to composition, and so on, and so forth. That would be immensely helpful. I’m very happy to start that discussion. I do think the two discussions can be had, effectively, in parallel. So thank you. Jeff, you’re next, and then Jay, and then Susan. Thank you. Jeff, go ahead.

JEFF NEUMAN: Yeah. Thanks. My fear here is that we’re mixing apples and oranges here again. So Paul’s talking about how things would happen today but also talking about how things aren’t happening today. In other words, what Paul says is this is how it would happen today but let’s get rid of the mutual jurisdiction consent.

Today, what really would happen is if everything all remains the same, is that there’s a consent to mutual jurisdiction so the complainant would go to court. And likely, the court would take it

or could likely take it because there was this consent to the mutual jurisdiction, as has happened—not necessarily with IGOs but other what I'll call state actors, including one recently in Florida.

So I do see this as a fairness. You can't just say let's get rid of the consent to mutual jurisdiction clause and let's force the registrant into a choice, now, of, "If you go to court and they don't find jurisdiction, you now lose the name," because that's how it would happen today under the UDRP, because there's only this 10-day. I think this is a 100% fairness argument. I think [inaudible].

CHRIS DISSPAIN: So what would you suggest, then, Jeff.

JEFF NEUMAN: Again, I would say that you keep everything … If you're going to get rid of the mutual jurisdiction clause—and I'm not sure registrants will agree to that but let's say we get that agreement—then you have to now err on the side of being more fair to the registrants to make sure that it has the ability to get legal recourse on its rights. So, look. If the registrant didn't show up initially, it's probably not going to file a court action. You probably don't have to worry about it.

But if a registrant does show up—and let's talk about that case—and they lose, and they disagree with the panelists' decision, then the 10-day hold would be put. And if a court doesn't have jurisdiction and the registrant either chooses to appeal or then go to the arbitration. The name does not need to get transferred.

I think as a fairness argument, I think because it is the registrant's property, we should bend over backwards to … Unless there's malicious things going on with it—again, that's a DNS abuse issue, not a UDRP necessarily—I don't see the rush in transferring the name to an IGO.

CHRIS DISSPAIN: But isn't it right, Jeff, that … Move away from agreeing to a mutual jurisdiction. All that that does is to create the possibility of a hearing on whether or not you're bound by the jurisdiction. It doesn't prevent the registrant from going to court and it doesn't prevent the registrant from winning in court. What it does is allows the IGO to argue something which they believe that they're entitled to argue, anyway.

So, at the end of the day, no one's really worse off. And there is a replacement mechanism. I accept that the replacement mechanism might not be acceptable. I get that completely. Anyway, I'm sorry. I'm straying way down into the weeds, perhaps. Susan, go ahead, then Jay.

SUSAN ANTHONY: I think, actually, Jay was ahead of me.

CHRIS DISSPAIN: I apologize. You are correct. Jay, then Susan.

JAY CHAPMAN: Okay. Either way, it's fine.

CHRIS DISSPAIN: Sorry, Jay. I'm sorry about that. It's two different lists.

JAY CHAPMAN: I echo Jeff's points verbatim. It's interesting how we started this thing by saying … And I think this has been alluded to time and time again, that ultimately, when it comes to mutual jurisdiction, that the IGOs have a choice. Now we're focused on, "Well, let's turn that around. Let's make the registrant make this choice."

And to me, that's really where it gets wrong because instead of trying to find something that works for everyone, we're in a situation now where instead of making things difficult for the IGO within its context, now we're going to try to and make things tough for the registrant within its context on the appeal.

So that's why I've said this several times and will continue to say it, which is I don't know why we can't seem to find some workings within the existing recommendations. And I don't know if it's two, or three, or one, or whichever one—but when they talked about an agent—someone who could step into the shoes of the IGO. That resolution can potentially completely solve all these problems. If there is someone who could just step into the shoes of the IGO, such that there's nothing taken away from the registration and there's nothing taken away from the IGO, everything still gets worked out, that to me seems like where complete consensus can be found.

But we really haven't discussed that a lot. In fact, we just continue to pass it over—this idea of an agent or someone who could stand

in the shoes. Maybe I should just ask the question. Why hasn't there been more discussion on that?

CHRIS DISSPAIN: That's a very fair point, Jay. Let me ask the question. I know Susan is next. But let me say specifically. I would be very interested to hear from people who have an issue with the solution of an agency and providing an agent because as you quite rightly say, it certainly is a way forward and it certainly is something which could work. So your point is well-taken and we do need to have a discussion so we will do that. Let's go to Susan first and then we'll come back and talk about the point that you've raised, Jay. Thank you. Susan?

SUSAN ANTHONY: I'm not sure but as I recall my reading of the law—and it's been some years—I believe the use of an agent to stand in the shoes is legally problematic. But I'll defer to others on this distro who are more knowledgeable than I.

I take the floor to suggest something which is perhaps a little different. But I haven't heard much, if any, discussion about this. That is we all know why arbitration is interesting and attractive to the IGOs but we haven't really discussed why arbitration may be interesting and attractive to registrants.

I'd like to put forth some discussion because going to court is extremely expensive, extremely complicated, and has a wealth of unknowns, and is often a very protracted process, says this former litigator. Arbitration—at least the ideal—is much less expensive,

more expedient, generally confidential, and is equivalent to getting a fair day in court—just cheaper and faster in the ideal world. I appreciate we don't always have the ideal world. I've also arbitrated a couple of cases and was frustrated that I didn't have the ideal world. It proved to be expensive.

But the arbitrator, I thought, recognized some of the qualities and characteristics of the parties at the table and really served in a mediation/arbitration role—something that you wouldn't be able to find in court—that I thought ultimately was useful. So I just didn't want us to suggest that arbitration is all about IGOs. It also could be about registrants. That was all.

CHRIS DISSPAIN: Thank you, Susan. Thank you very much. And again, point well made and point taken. Jay, I'm guessing that's your old hand. It is. Okay. So Paul had posted something in the chat about agents. Paul, do you want to, perhaps address that? I know you've got to go shortly so do you want to perhaps just briefly address your comments about agency?

PAUL MCGRADY: Thanks, Chris. This is going to sound much more emotional than logical and I apologize in advance. But trademarks are very facty and they are tied to one party's use. I know that we are talking about, in the case of IGOs, unregistered rights of some kind. That's what the small group is working out. But it's still the IGO that is named that and is doing the thing. And the idea of

assigning some sort of enforcement right to a third-party agent is just not a common thing we see in the trademark space.

So I think some of the resistance may be because it's really an odd fit, not because it can't work. So I'm committed to talking it all the way through. Maybe it does work and maybe that is the panacea here. But I guess what I'm trying to express is that there's going to be some inertia against it, just because of how trademarks work. Thanks.

CHRIS DISSPAIN: Thank you, Paul. How would we unpack it in this group? Do we need advice? Do we have enough skill and knowledge on this group to unpack it ourselves? What do you think?

PAUL MCGRADY: I think we certainly have not gone far enough down the road to say we need outside advice yet. I think what would be helpful is if Jay and maybe a small team working with Jay could come up with what that would look like. We're talking about it in the abstract. So maybe it's time for a small group to focus on that and come back with an idea.

CHRIS DISSPAIN: Okay. So the question then becomes who is best equipped to do that? Brian, go ahead.

BRIAN BECKHAM: Yeah. Thanks, Chris. I raised my hand not to volunteer for that but to say that this is something that was discussed at some length in the prior working group. IGOs actually did submit some comments on this. Certainly, I suppose I could say that always we try to keep open minds and are happy to look at ideas that people would put on the table. But on the surface, the idea has been discussed and it's not something that IGOs found was a really a workable solution. So again, certainly happy to look at what people put forward but I think it may be a topic that's been explored and I'm not sure that there's much utility in going too far down that path.

CHRIS DISSPAIN: That may be so. But I think that at least we would need an explanation as to why it wouldn't be helpful. I think, as Paul has said in the chat, if we could have some of those older comments brought forward, that would be helpful. Mary, I don't know whether or not it's feasible to do that but I would like to see the debates because it seems to me … And I'm not suggesting for one moment that this has got any legs at all. I don't know. But it seems to me—and Jay raised it quite fairly—that if you could fit into the current process an ability for the IGOs to use the current process, then that seems to me to be fair and workable. Not saying that there is that ability.

But, Mary, is there a way that we could grab hold of the suggestions and comments from the PDP and maybe have a look at those on the list as a starting point? Jeff, I'll come to you in a second. Mary?

MARY WONG: Hey, Chris. Like I said in the chat, I think the staff can provide a summary to send to the list, maybe with links, if it will help. We actually are looking up the external expert memo now because we believe it was addressed, to some extent, there as well. But we can send those around.

CHRIS DISSPAIN: Okay. So if I could put in a plea for specificity—in other words … I know you'll do this anyway but not just a link to the memo but some designation of where in the memo so we don't actually have to read the whole thing to find out the answer would be enormously helpful. Thanks, Mary. That's great and very much appreciated.

Jay, are you comfortable that if we at least start with gathering what information we currently have, we can consider it and then see what pushback we get from IGOs specifically as to why they think it's an issue and whether others think there is a problem? Are you comfortable to start from that basis and see where we get to?

JAY CHAPMAN: Sure, Chris. I'd love to see what information is gathered and we can assess it from that standpoint. There wasn't much participation from IGOs in the prior workgroup, outside of things that were going on the perimeter. But yeah. I'd be happy to see that information and maybe—

CHRIS DISSPAIN: I think there was a high level of participation at the very beginning of the PDP. It tailed off as things went on.

JAY CHAPMAN: It was four years. That's what I recall.

CHRIS DISSPAIN: And on, and on, and on.

JAY CHAPMAN: Exactly.

CHRIS DISSPAIN: So yeah. I'm not surprised that there was a tail off in participation. But no. Okay. Good. So what we'll do on that, then is we'll gather the information that we—the previous discussion, what was suggested, what the responses were. We'll put it out there and then we will get Paul, and Brian, and those who have a knowledge and an understanding to pick up on that, and respond, and say why yes or why no. Then we can move on from there.

Jay, I wanted to ask you a question, if you don't mind, just to go back, now, to the other side of the coin because I do appreciate what you were saying about taking away the mutual jurisdiction, etc. But bear with me for a second. If you lose a case—if you lose a UDRP—currently, as we know, you've got the right to go to court and so on. And the complainants have the right to turn up, and to argue, etc. And you might win it, you might lose it. That's fine. And

I note that Jeff is suggesting that Jay never loses. That's a bold statement, Jeff.

So your point is you still want to be able to do that. I get that and I can understand that you still want that opportunity. What do you say to an IGO turning up and arguing that they're not subject to the jurisdiction? Do you accept that they are entitled to do that and that that should be an argument they can run? And if you do accept that … Sorry. Go ahead.

JAY CHAPMAN: Do I think that's an argument they could make? Absolutely, they could make it. Sure.

CHRIS DISSPAIN: Okay. So what we're really talking about, then, is if they were to win that, you would want, would you not, a mechanism to finally, finally decide. Or would you accept that they'd won that and therefore they won?

JAY CHAPMAN: Yeah. I still think when an IGO is—or anyone attempting to take someone else's property, that's where … Again, just under my general understanding, we're actually trying to make sure that we get to the right decision, not necessarily trying to get to it right away. And I don't see where the problem is of saying, look, if this were not an IGO, we could go to court. There's multiple layers. I say "multiple." There are levels of appeal, even from those—even

from a declaratory judgment action, potentially, where you could appeal.

CHRIS DISSPAIN: Go back to the name for a second—to holding onto the name. So under the current rules, at what point do you lose the name, assuming you use all of your mechanisms? You lose the name if you lose the court case. Is that correct?

JAY CHAPMAN: Right. But by deciding there's no jurisdiction, have you actually had a court case?

CHRIS DISSPAIN: No. I completely understand that. I've got that and we'll come back to that in a second. But it is correct that you may well have subsequent appeals, even if you lose the court case. But if you lose that court case, then the name is transferred under the current system. That is right, isn't it?

JAY CHAPMAN: Yes.

CHRIS DISSPAIN: Okay. Cool. So I completely understand that arguing that you're not subject to the jurisdiction is slightly different to losing a court case. I get that. But my question would be this. If you were to lose on … Again, forget the transfer of the name for a second. Now

let's look at the process. You go to court. IGO argues it's not subject to the jurisdiction and they win. Forget when the name goes for a second. You would want, would you not, some secondary hearing, now because they've argued, on a procedural matter, that they're not subject to the jurisdiction. You would then want there to be some subsequent hearing. Is that correct?

JAY CHAPMAN: That's been my place the whole time here. Yes.

CHRIS DISSPAIN: No problem. Okay. So we're clear on that path. Leaving aside the court case arguing thing for a minute, we are clear that there is, in principle, some form of secondary thing so that's fine. Then the question becomes … That leaves two questions, it seems to me. One is given that you're prepared to accept a secondary arbitration hearing—let's call it an arbitration—whether you want the right to go to court in the first place or whether you could skip straight to that arbitration. My guess is you would be saying, "No. We've got to have the right to go to court. If the IGO turns up and wins the argument they're not subject and then arbitration." Is that fair? Is that what you would be arguing?

JAY CHAPMAN: Yes.

CHRIS DISSPAIN: Okay. But presumably, you would also accept that it would be possible … Well, you would have to do that court thing within the necessary time zone—so 10 days or whatever, same as now. Yes?

JAY CHAPMAN: Of course.

CHRIS DISSPAIN: Okay. And that, then, only leaves the question … I'm not suggesting that anyone else is prepared to agree to this. I'm just making sure that I know where you stand. That then leaves the question of when the name goes, if indeed the name goes at all. So we know the name doesn't go on the panelists' finding. We know the name doesn't go until—subject to you going to court in 10 days. You go to court. You're saying if I lose because the IGO says they're not subject to the jurisdiction, then it goes to arbitration. The name still doesn't go until after the arbitration hearing. Is that what you would be saying?

JAY CHAPMAN: Yes.

CHRIS DISSPAIN: Okay. I hope you didn't mind. I just wanted to make sure that we had a clear understanding of where you stood. I don't think it could be any clearer so thank you for that.

What I'd quite like to do is to see whether or not we could get an alternative view of the world, possibly from the IGO side of the fence. And if anyone's prepared to put their hand up and volunteer, that would be enormously helpful. I know you all can only speak for yourselves. But Alexandra, go ahead. You're prepared for me to ask you some questions, I hope.

ALEXANDRA EXCOFFIER: Sure. Of course.

CHRIS DISSPAIN: Thank you. And welcome.

ALEXANDRA EXCOFFIER: Thank you.

CHRIS DISSPAIN: I'm guessing that you obviously have no problem. The panel's the panel. The panel decides. You win.

ALEXANDRA EXCOFFIER: Yeah.

CHRIS DISSPAIN: If it's a given for the moment that there is a final hearing of arbitration … Let's just call it arbitration. We may have a more nuanced discussion about what shape it actually takes later. But given that we know that, what is your position in respect to the

right to go to court as an intermediate middle step? Would you be prepared to wear that?

ALEXANDRA EXCOFFIER: I think there should be one step, whatever it is. It could be at the choice of the registrant, like I said. We propose arbitration as the first appeal step. Or if they want to go to court, they go to court. But I think that we have to be conscious of what that would mean because let's say they go to court. IGOs say immunity. We win on that argument. The registrant then appeals. We win on that argument but the registrant still appeals. It could go through several layers of appeals, each time paying lawyers, obviously, to do that. Then, if the IGO loses at the lower court on immunities, then we will appeal and so on, and so on.

We have to understand that you, the taxpayers, are the ones that are going to be paying for it because the IGOs are funded with taxpayer money. So you'll be paying for our side. The registrant will be paying their lawyers, etc. And then after that, we still go back and redo the process in arbitration. I think that is not only unfair to any party but is extremely costly.

Even if you don't talk about time, okay. Fine. We don't take time into consideration, as Jay said. But time is still a factor. At the same time, I don't know what happens if the transfer … I think we're more concerned by closing the website than transferring it but that still goes on and carries out its fraudulent or whatever activities in the meantime.

So for us, it has to be you have the choice. You're a registrant. You have the choice. You don't want to consent to arbitration? Fine. You do the court. But after that, that it. One process.

CHRIS DISSPAIN: If you were satisfied that the court step was a single step because the parties agreed that this is the process and it's a binding agreement but this is the process—so lose court, arbitration—would that change your view? Because I completely acknowledge your point about forever-tumbling appeals in court.

ALEXANDRA EXCOFFIER: I'm not sure to understand the question. For me, it has to be one process. They have a choice. They want to go to court, they want to try at court, fine. But then, if they lose on grounds of immunity … Obviously, if we lose on grounds of immunity, then the case will be heard and that will be it. But chances are, they will lose on grounds of immunity. That's what we've been saying all along and that's why we're here in the first place. Then, that should be it. We shouldn't, then, restart another process. And we should definitely inform them about immunities and have them understand what they're getting themselves into.

And if they want to take a chance on court, let them take a chance on court. But we're proposing an alternative dispute resolution mechanism, which is a legal way for them to argue their case, which is final and binding and that's it. And if they don't want to take it, fine. But at some point, no. Really, we shouldn't be multiplying processes.

CHRIS DISSPAIN: Understood. Thank you. I appreciate the input. Brian, I know we're supposed to be talking at some point about what an arbitration's going to look like and whether that's going to make any difference. But did you want to address this particular point?

BRIAN BECKHAM: Yeah. Thanks, Chris. Just on the conversation and Alex's answer just now, I just wanted to be clear that the premise is that the question has to be addressed by a court an it's not on the basis of an IGO agreeing at the filing of the UDRP case on the current paragraph 4(k) of the UDRP to waive jurisdiction. So just wanted to make that clear.

But I also wanted to come back to something that Susan said earlier. I know Jeff made a comment in the chat. I don't know if it's based on some particular personal experience or maybe made a little in jest, in the ICANN context. But I can say, certainly, my personal firsthand experience working in the WIPO Arbitration and Mediation Center prior to getting more involved in the domain name space, I actually was helping with the few arbitrations.

And I can say with complete, complete, complete confidence—because we spoke to the parties afterwards—that the arbitrations that we helped these parties through were on the order of many magnitudes more time and cost-efficient than the parties would have experienced in court. We're talking about the difference of years and millions of dollars. Now, grant it, those were more complex subject matters. But I did want to just affirm what Susan's

experience was earlier, that, at least in my experience, arbitration has been phenomenally more efficient in terms of time and costs than court processes.

And just to come back to what I mentioned earlier, I do think that there's really something to be said in the work that we're doing here. If you have parties going to a court and they're involved in these disputes, first of all, it's not immediately clear to me that the court would really be up to speed on all of the ins and outs of jurisdictional immunity, etc., nor would they be, necessarily, subject matter experts on trademarks and domain name law.

Here, we have basically a blank slate to create a process where we're basically putting in front of parties to disputes the best people to help them navigate these disputes—people who are maybe the most experienced UDRP domain name panelists, vetted lists by both sides.

So again, I really … This was the point of having shared the one-page PDF flowchart. By the way, I was reminded that actually, that was a simplistic view, was that time and time again, the more we go down to what happens in this court scenario, that court scenario, should there be an agreement to a waiver, should the court look at this jurisdictional question, which party appeals that and which subsequent court looks at that, is that we really are serving the interests of all parties if we start to look at the actual arbitration mechanism versus some of these more theoretical questions about courts, and waivers, and immunities, and jurisdiction, and so on.

CHRIS DISSPAIN: Okay. Point taken. I thought I saw Jeff's hand up but that's gone down now. So Jay and then I'm going to give us some work to do over the next few days and wrap it up. Jay, go ahead.

JAY CHAPMAN: Thanks, Chris. Yeah. I didn't anticipate us really going into the weeds on the direction that we've gone with the registrant, the appeal, some of the procedural stuff. And I'm totally with Brian. I guess I was thinking today we were going to be spending most of our time really breaking into the arbitration details—things like that—or the appeals.

CHRIS DISSPAIN: Me too.

JAY CHAPMAN: I'm not pointing fingers and I'm not disappointed. We had the discussion we had.

CHRIS DISSPAIN: No. I know you're not.

JAY CHAPMAN: You're doing a great job, Chris. I'm just like Brian and I agree with him. I think it would be good to actually break into the details of that. Again, that potentially might help us looking at some of these other issues. Thanks.

CHRIS DISSPAIN: Completely agree, Jay. Thank you. So what I'd like to do is to … I don't know whether or not, Brian, you might be the best person to answer this question. Is there some kind of existing arbitration that we could be pointed to that gives us a starting point for the way that this sort of thing might be structured and the sort of rules that you might put in place? Or would we be …? Brian, go ahead.

BRIAN BECKHAM: Yeah. Thanks, Chris. To answer your question, I think probably I would suggest it would be useful to look at the Nominet appeals process. Nominet runs the .uk country code top-level domain. That's not arbitration but just to give a flavor of what that looks like in terms of the process for the parties.

Then, on the other side of that coin, that's actually one of the things that parties find attractive about arbitration is that there are certain, let's say, norms because parties are used to ways of litigating. But at the same time, arbitration gives the option to parties to make things a big more a-la-carte, if you want to have a certain language, or substantive law, or arbitrators, etc.

So I can dig around. I think, broadly speaking, the answer to the question is I would look at the Nominet model for our particular domain name context and then probably just refer to the general proposition that arbitration … In a lot of ways, it looks like litigation but then it can be tailored to the parties' specific interests. I think that's really where the rubber hits the road for us, is that do we

want it to have features a, b, and c? Okay. Well, then that's what we agree on.

CHRIS DISSPAIN: So how about we do this, then? Could I ask Mary and the team to send out to the list, in some format or other, the details of the Nominet process? And if I could ask those of you with a level of experience in arbitration, once that's been sent out, perhaps on the list we could have some ideas as to other ingredients that might be suitable. Should we add garlic to the mix and so on. And then, we can get a discussion going about what the shape of it will look like—whether or not we can, at least, fashion it into some form of acceptable shape.

And it's a perfectly valid point that Jay has made and Brian has made. It gives you a much easier ability to commit to agreeing to it if you know the shape of it and you know what it looks like.

So, Mary, I'm guessing that that's okay and we can do that. And thank you, Brian. You can never go wrong with garlic. I agree. Mary, are we able to get something out to the list and move on from there?

MARY WONG: We certainly can, Chris. As I put in the chat, I don't recall the exact discussion but Nominet's legal counsel did meet with the original PDP working group so we can send around a session of that session as well.

CHRIS DISSPAIN: That would be immensely helpful as well. So we'll get the transcript of the discussion. We'll get a shape that sets out how the Nominet process works. And then we'll throw some ideas around and I'm relying on those of us—and I would include myself in this, although I'm chairing—those of us that have experience in arbitration, and mediation, and stuff like that to actually throw some ideas into the mix as to ways that you could adjust the Nominet thing to be more effective or more suitable for our purposes. And Jay, if you look at that Nominet thing and you think, "Clearly, there's something massively missing or something missing here that I would insist on having," please do say so.

So we have a gap now because we're not meeting next Monday. What I think that is going to enable us to do, provided we're committed an prepared to do some intersessional work—is two things. One, hopefully—no pressure, guys—but hopefully Susan, and Brian, and Paul, who's not on the call so will be feeling no pressure and all can get something out to us, at least for us to think about and read within a week, which will be fantastic and would mean that we could be prepared to come to our meeting on the 7th of June with our bunches of roses or brickbats on what they've come up with.

And at the same time, we can also be having a discussion on the list about what sort of shape an arbitral process would take and how closely we could follow the Nominet process—what sort of changes would need to be made.

And then, I think if we can solve those two endpieces—the beginning, how you get in the funnel, and what the shape of it looks like at the end, then that may be sufficient encouragement

for us to come together and do some more striving in the middle about things that we're prepared to give up and things that we are prepared to—that we insist on remaining. I hope that makes sense. It makes sense to me but that doesn't necessarily mean it makes sense.

Are there any other questions, comments, or matters that anyone on the call wants to address or to cover? If so, please raise your hand now. Okay. On that basis, then, our next meeting is on the 7th of June at the same time. I'm very much looking forward to working with everybody on the list in the manner that I've just laid out and I want to say thank you, everybody, for a really useful, collegial call. I think we've made some steps in the right direction. Thank you very much, indeed, everybody. I'm going to end the meeting. Terri, you can end the call.

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

[END OF TRANSCRIPT]