
ICANN Transcription

IGO Work Track

Monday, 26 July 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 Monday, the 26th of July 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 yourself now? Hearing no one, we have no 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, depending on your Zoom update, either select host and panelists or everyone in order for everyone to see the chat. Attendees will not have chat access, only view to the chat. Alternates not replacing a member are required to rename their

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lines by adding three Zs at the beginning of your name and at the end, in parentheses, the word alternate, which means you were 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 Doc. The link is available in all meeting invites towards the bottom.

Statements of Interest must be kept up-to-date. If anyone has any updates, please raise your hand or speak up now. Seeing or hearing no one, 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. With this, I'll turn it back over to our chair, Chris Disspain. Please begin.

CHRIS DISSPAIN:

Thank you, Terri. Good morning, good afternoon, and good evening, everybody. Welcome. I can see that there are some people who are joining at the moment who are currently in as

attendees [inaudible] across to being panelists. So welcome all. Thank you for making it to be here.

Today's agenda is up on the screen. Let's start with that, with an update on the Council and the Review Project Change Request rationale. So John and I attended a GNSO Council meeting the other day—I forget which day it was—and went through with them the three specific talks, one being the timing change request—and, Berry, I'll get you to just run through that in a second to remind everybody. The second one—okay, I'm not sure why that is. Give me one second. Can somebody speak to me, please?

BERRY COBB: Much better, Chris.

TERRI AGNEW: Hi, Chris. It's Terri.

CHRIS DISSPAIN: Is that okay now? Okay, good. Brian says it seems better. So I'll keep plowing on and see where we get. But actually, let me pause now. Berry, why don't you just give everyone a summary of where we got to with change request and then how it's dealt with in the Council?

BERRY COBB: Thank you, Chris. As anticipated, the Project Change Request, we didn't have any comments from the Council. They understood about the moratorium for the public comment forum. So our new

delivery date for the Initial Report is the 7th of September for which we'll put the paper out for public comment for, I believe, 40 days. And that ultimately takes us into, I believe, the middle of December for delivery of a final report.

I think Chris will expand on this but also on the Council's agenda where the other two aspects related to the work track, the first dealing with how we don't have a parent working group at the current time. And the secondary part is something that this work track is talked about a little bit in relation to scope and the addendum of our charter.

A summary document of the issues was delivered to the Council. It was a little bit late getting in front of them. So we don't think that the full Council had a chance to fully dive into the contents. But there was discussion on both of those topics. Both Chris and John were there. And between now and the next Council meeting, which is scheduled for August 19, we'll continue to have those discussions with the Council. And hopefully, if possible, a decision can be made about those two aspects. So I'll stop there and hand it back to you, Chris.

CHRIS DISSPAIN: Can you hear me?

BERRY COBB: Yes, very clear.

CHRIS DISSPAIN: That's better. Good. That's marvelous. Okay. So that was all good. Steve, you were on the call as well with the Council and any sort of wisdom or input you have on the other two things that we discussed would be welcome. But in essence, I think in respect to the lack of a parent, I think that they were subject to a further discussion and sort of an agreement to take the route that you've suggested. Would you say that's a fair assessment of where we got to?

STEVE CHAN: Thanks, Chris. This is Steve from staff. I think it's probably worth a discussion with Council leadership to see exactly where things landed. But you're right. I think there seem to be quite a bit of momentum to go the route that was suggested by staff. I think it was more or less validated as a potential next step for the, I guess I was going to say converted but not converting, but initiating the policy development work formerly under an EPDP. So I think leadership had wanted to provide a little bit of additional time for the councilors to take that into consideration. But I think that may be the logical next step to actually formalize that as the next way forward.

CHRIS DISSPAIN: So could you just explain to us what that what that would mean, how that would work, what the steps would be?

STEVE CHAN: Sure. So that was indeed what the Council had, I guess, want to talk through is what were the options and what would it look like to

actually formalize that as a next step. So essentially, you would need to complete an EPDP initiation request, which was actually just done similarly for an IDN EPDP. It basically talks about what the scope of the issue is and why you're doing it, and most importantly, why it's appropriate to address in the form of an EPDP, so the formal initiation request that goes to the Council. And then the other part that would be needed to initiate an EPDP is to basically take what we have in addendum and put that into the more formal EPDP charter.

So if the Council does want to go the path of having this work take place in EPDP, it would require those two things, a formal initiation request and the adoption of the charter. And if memory serves, both of those things are subject to a supermajority at the Council level.

CHRIS DISSPAIN:

Right. So in essence, that would then mean that we would move from this kind of weird work track standing to actually being an expedited policy development process, which would mean that we'd have no issues putting reports out, taking public comment, etc., etc. That's all good.

Do we have any indication of timing for when the Council is likely to make a decision?

STEVE CHAN:

There is staff and Council leadership call today where we'll try to take a closer look at the potential action items that came out of the call. I think one of the things we'll definitely want to talk about is

the next steps for the IGO Work Track, and then precisely what you're just asked about, the timing for any of those next steps. So I think we'll have much better clarity after we consult with Council leadership, and then make sure the Council also as a whole is on board with that direction. Thanks.

CHRIS DISSPAIN: Okay. Let's pause there. Susan, go ahead, please.

SUSAN ANTHONY: If the Council were to say no, what happens to the work track? Anything? Or we just continue on as we have been?

CHRIS DISSPAIN: That's an extremely good question, and I don't know the answer to that. But Steve's hand is up.

STEVE CHAN: Thanks. I can try and crystal ball gaze here a little bit and say that the agenda topic that was prior to the IGO Work Track was actually about RPMs Phase 2, which is the natural home for this work track. So that previous agenda item was talking about the scoping and re-chartering of RPMs 2, which is more of an eventuality, but it's going to take some time to get, I guess, the re-chartering completed. But it's more about a "when" not an "if" that that work takes place. So in theory, if the Council decided not to go down the EPDP path, there is another avenue. But that said, it seemed like the Council was mostly receptive to the concept of

having this work take place in an EPDP. So we'll see if we have to go thinking about contingencies. But it seemed that there was at least momentum to go with the EPDP. Thanks.

CHRIS DISSPAIN: Susan, does that answer your question?

SUSAN ANTHONY: Yes.

CHRIS DISSPAIN: Okay. I think my gut feeling is that I think there is a status of this momentum to move it into an EPDP. And I think everybody recognizes that to wait for the other one to be set up is going to be problematic from a timing point of view. So I think it'll all be okay but we'll find out more in the next few days.

The third piece was a discussion about whether or not there is a need to amend the scope. We basically said, "Look, we're comfortable that what we've done is subject to where we end up." But looking at the sort of the general direction in which we are currently heading, we are comfortable that we can say that what we have done, what we are going to say is within the general scope and is generally consistent with the previous recommendations, but that it is entirely possible that in the public comment period, some people may say that this is out of scope and we wanted to give the Council a heads up on that and to say to them that if they felt that they needed to do something about that, then they should.

Steve, are they going to take that into a separate discussion over a longer period of time? Is that basically correct?

CHRIS DISSPAIN: Thanks, Chris. I believe so. As you'll probably recall, most of the conversation focused more on the proper venue to develop policy development. And I think it was more just a cursory discussion on the scope aspect of it. So yeah, I think you're right, there's more conversation needed on that aspect.

CHRIS DISSPAIN: But again, that doesn't affect our timing. That was merely a courtesy and see whether or not they felt the need to do anything, whether they do or they don't, no doubt someone will let us know.

Okay. Any other questions on that sort of update on where we got to? All right, Steve, Berry, did I miss anything that's needed to be said in respect to that? All good. Marvelous. Well, before we move to the next item on the agenda, I think most important thing we must do now is to welcome Mary back from holiday. It's been incredibly quiet without you, Mary. Welcome back.

MARY WONG: Thanks, Chris.

CHRIS DISSPAIN: Did you have a good time?

MARY WONG: I did. A holiday is never long enough, is it?

CHRIS DISSPAIN: Well, no. That's a very fair point. All right. So that's that done. Let's then look at the documents.

Just to refresh everybody's memory, this went out, it was in Google Drive. It also went out in Word format. We have had some input on that document from Brian, which we're going to get to in a second. But in essence, this document, as it currently sits, attempts to set out where we are, where we have got to, or be it to that it's quite clear that we haven't yet necessarily agreed everything. This forms the crux of what it is that we would be trying to corral around and put out as our initial set of recommendations. And to be clear, the rationale for the second recommendation is missing and that's something that needs to be worked on. But that, of course, is something we can do once we've had the discussion today.

What I would like, if I may, to start us with, however, unless there are any burning questions, is the flowchart that you guys put together. Steve, Berry, do you have that? There it is. Marvelous. So this attempts to set out—did you not amend this after our conversation last week? Was this the amended version, guys?

STEVE CHAN: Hi, Chris. Yes, it should be.

CHRIS DISSPAIN:

Okay, cool. Super. Okay. So this attempts to just effectively very simply set out the process that we would be recommending. So the first blue box just says IGO complainant, and we know that that's as defined in the document files a complaint. The complainant is not required to submit to mutual jurisdiction but must agree to binding arbitration to resolve the challenge to the panel's determination if the need arises. That's the complainant. That's the IGO that has to agree to that. We go across the series of white boxes, administrative check, domain name locked, proceedings formally initiated, single-member or three-member panel. That's all the normal stuff.

Then panel carries out review, taking into account the draft rules amendments where the complainant is an IGO complainant. It may show right to the mark by demonstrating that the identifier which forms the basis of the complaint is used by the IGO complainant to conduct public activities in accordance with its stated mission, as may be reflected in the treaty charter or governing documents. You'll recall that that is a definition that we came to in discussion between a small group of this work track Paul McGrady, Susan, and Brian, I think, we're involved in that. We sort of accepted that we think that that's an acceptable definition of what an IGO is for the purposes of this piece.

The assumption then is the panel finds in favor of the complainant. And if that happens, then you go down to the next, to the white diamond, losing registrant files a case in competent jurisdiction or select arbitration or does not respond. So you recall that we discussed that there's nothing that—we said, in this case, the losing registrant can go to court if they choose to do so. So if you

follow the right-hand arrow that says court, there is an assumption that the IGO complainant asserts immunity. That, of course, is a battle that will be fought out in the court. But if the court confirms that immunity, then again, the current proposal that we've been discussing is that the matter would then be dealt with. Clearly, if there's no response, the registrant transfers a customer domain. I mean, that would be the case no matter what the situation is, so I don't think there's any difficulty there.

Then on the left-hand side, you have a situation, what happens if the registrant agrees to go to arbitration. That's the case the parties mutually agree to binding arbitration. The arbitration is conducted in accordance with the law as mutually agreed. So the suggestion is this. Suggestion is that the parties have an opportunity if they wish to do so, to agree a law for the arbitration. If they are unable to agree, if the IGO complainant's choice is to whether it is the law of the registrar or the respondent—it's not jurisdiction, by the way, Berry and Steve, it's law—the registrar or respondent's law.

So that chart summarizes the discussion that we had when we last met and where we think we have got to as what is on the table, not necessarily what's agreed but what is on the table. Now, that is reflected, what's in that flowchart is reflected in the document. Brian, I know has put forward some suggested changes to the document, some of which are, I would say, merely wordsmithing changes. But there is a very substantive suggested change under the arbitration thing, which we're going to get to in a second. But before we do that, may I ask if anybody has any comments or questions at this stage that they want to raise,

please? Okay. So there are no hands up at the moment. So if we can go to the document, please. Susan, your hand is up. Go ahead, please.

SUSAN ANTHONY: If we could go back to the chart, please. I may have slipped a digit. Anything is possible in the summer heat. But in the lower left, arbitration conducted in accordance with laws mutually agreed; if unable to agree then IGO complainant's choice of registrar or respondent jurisdiction.

CHRIS DISSPAIN: That should say law, not jurisdiction.

SUSAN ANTHONY: Well, that's fine. I mean, I understood that part of it but I thought that there was another part of it that the parties would try to mutually agree. If they couldn't, then it would be the arbiter's decision as to choice of law. So we must have decided that that was not—

CHRIS DISSPAIN: No. We didn't decide that. My recollection is that we discussed it but that there was an objection to it. But let's put it on the table. It's still for discussion on this call. We'll get to it in a second if that's all right. So I'm just going to make a note, discuss arbitration provider's choice of law.

SUSAN ANTHONY: I just want to make sure I hadn't slipped a digit.

CHRIS DISSPAIN: No, no, not at all. Alexandra, please go ahead.

ALEXANDRA EXCOFFIER: Thank you, Chris. Hello, everyone. I don't have an issue with the chart as such. Just a question. What kind of substantive law are we talking about? Like the trademark law? Because an arbitrator in this case may just decide on the facts and the decision as it was taken by the UDRP tribunal and may not need to refer to any law. So there's something maybe a little bit missing in this notion that we have to respect a certain law. That's all.

CHRIS DISSPAIN: Thank you. My understanding of where we've gotten to as a sort of high level principle is that what we're asking the registrant to do is to agree not to go to a local court because the IGO isn't subject to that jurisdiction. But the registrant is still entitled to "their day in court," which is why we spend such a significant amount of time over the last few weeks discussing not jurisdictions per se but law and saying that the arbitrators would need to make a decision pursuant to a particular law. And that's to simply say it's a review of the UDRP provider's decision doesn't give the registrant an equivalent of their day in court, and that's the reasoning behind that. If I've got any of that wrong or if anyone's uncomfortable with how I've just explained it, please say so. Alexandra, go ahead, please.

ALEXANDRA EXCOFFIER: No. I'm just trying to think about—am I still on?

CHRIS DISSPAIN: Yes, go ahead.

ALEXANDRA EXCOFFIER: I'm just trying to think about how it happened in reality. I suppose I'm fine. I don't have a problem with referring to a lot, if need be. But a lot of the time when we see an arbitration, a lot of it is on fact rather than the law. But that's fine. I'm not saying I'm against any of this. I'm fine with this compromise. I just think that the arbitrator should have a little bit more flexibility than that. But that may be when we get in the details of what this actual clause will look like or what the parties are signing up to, maybe that will be quite clear at that point. Thank you.

CHRIS DISSPAIN: Well, I'm happy to leave it at that at this stage. But just to make it crystal clear, this is not intended to be a simple review of the UDRP decision. It is intended to be a full hearing in an arbitration environment. Because that's, in essence, the quick pro quo for asking the registrant to walk away from their current right to bring proceedings in, effectively, their jurisdiction or the jurisdiction of their registrar. But yes, I take and I understand what you'd said.

Does anyone else have anything to say at this stage before we go to the document? Okay. Let's go to the document. And, Susan, I've got your point about the arbitrator having a choice as well.

Brian, I don't think that there is anything of substance, if you will, in your initial suggested changes. But is there anything you specifically want to talk to, why you've suggested those changes? What am I looking at what appears to be a slightly different document? Okay. So yes, I see it now. Brian, is there anything you specifically want to refer us to in what's on the screen right now as your suggestions or do you think they just stand as they are? Yes. Please go ahead, Brian. You're gone again. I'm guessing you're trying to come in by another method. So while we're waiting for you to re-arrive, as I said, I don't think there's any issue with any of this stuff that is currently on the page. I'm sorry. I'm just looking at the chat. So yeah, Brian's dialing in.

So then, let's scroll back again to the beginning, please. So we've got the problem statement. I don't think the problem statement should be a challenge for us. The problem statement, give or take, the small change in wording has been on the table for quite some time and I don't think we have any issue with that. If we do, now would be the time to speak.

Welcome back, Brian. Brian, are you able to talk now?

BRIAN BECKHAM: I think so. Can you hear me?

CHRIS DISSPAIN: Yeah, I can hear you. Is there anything you want to say about problem statement brackets two which you suggested some changes to?

BRIAN BECKHAM: Yeah. Thanks, Chris. Thanks, everyone. I think nothing specific. On the one hand, it said immunities and privileges. So normally, we would say privileges and immunities. So as I think you've mentioned earlier, a teeny bit of wordsmithing. This was really just kind of on the drafting principle of less is more. I think when we get a little bit further down, maybe there would be some discussion around some of the—yeah. But maybe we could just kind of take it as we go. I'm happy to explain if useful. Again, if you look up at the first sentence under the problem statement where it said currently Phase 2 challenges, the only reason for the suggestion there was that obviously that's more specific than the kind of conceptual issue that we've been dealing with. So again, just a little bit of a wordsmithing suggestion.

CHRIS DISSPAIN: Okay, cool. All right. So the problem statement I think should be okay with everybody. As I said, if anybody has a problem with the problem statement, now is the time to speak up. Then we start with the proposed solution. So if you could scroll down, please.

So the first thing is, again, we have discussed this particular bit for some considerable time. And again, I believe there's an issue with this in the sense of an issue with how an IGO complainant is defined. So I think, again, we've dealt with that one. So unless

anyone wants to raise their hand up, we can move swiftly past that point to the next bit, which is Roman two (ii). This is the description of what an IGO complainant needs to show instead of the current situation that every other complainant needs to show. It's really quite hard to actually look at this when you keep moving it up and down. Trying to find the right notes. It's on the previous page.

BERRY COBB: Chris, you're coming in a little bit faint. It sounded like you wanted to go to Recommendation 2.

CHRIS DISSPAIN: No, I want to go to ii at the bottom of the first page and the top of the second page. Thank you. There we go. That's it. So that is what we are now saying the complainant needs to show. So again, we've discussed this at some length and I don't think there was any issue with that as such. And the rationale—if you can scroll up a bit, Berry, please—seems to me to be fairly simple and straightforward because it simply sets out what it is that we are doing. However, we do have a chunky paragraph after the italic text, which has been amended. Again, suggested amendments from Brian. Brian, perhaps you could just explain to us why you've taken out what was a simple reference to, in other words, concentrating on the end of the process only is not meaningful if the IGO will not be in a position to use the mechanism in the first place and replace it with this text. Perhaps you could just talk to that briefly.

BRIAN BECKHAM: Yeah, Thanks, Chris. I tried to explain that in the comment. It didn't strike me that these were necessarily causally linked and that it would be kind of accomplishing the main goal without getting into that kind of dilemma about whether they're linked or not, and just kind of identifying the issue and looking at it head-on in isolation, if you will.

CHRIS DISSPAIN: Okay, fine. Does anybody have any comments on that? Okay. So I'm fine with those words. I think they're true. Therefore, they are fine to say.

Then we move to number two in bold, which is where we start to, I suspect, run into the slightly more substantive recommendations and maybe some challenges.

So 2A, again, I think is relatively simple. Because if we were successful in having these recommendations, etc., then clearly there is a process in place, which means that 5 needs to be rejected because otherwise there's going to be a conflict between what we're recommending and what is in 5, and so therefore, 5 would need to be rejected.

Recommendation 2B says that the IGO Work Track recommends that the complainants be exempt from the requirement to submit to mutual jurisdiction. Then 2C says we then bring in the binding arbitration. It strikes me, Steve, Mary—well, everyone, actually, but all specifically that we should be making sure that it is abundantly clear that these recommendations are interlinked and

that therefore it would not be appropriate, for example, to accept one and not the other. Does that make sense? Silence. Mary, could you perhaps comment on that?

MARY WONG: I can.

CHRIS DISSPAIN: Sorry. It definitely makes sense. Sorry, apologies. The chat box had disappeared. My apologies. Go ahead, Mary.

MARY WONG: Not at all, Chris. I was just saying that the staff agrees.

CHRIS DISSPAIN: Marvelous. So we can make that change. Basically, the way that it hangs together is no agreement to mutual jurisdiction but an agreement to go to arbitration. And the key points as we go down into that arbitral mechanism are—I think there are three. One is the amendment that Brian has suggested which I think is substantive and is a significant addition. It needs to be discussed. The second is—I promised Jay that we would bring this one back up to the top of the list, which is the possibility of going to arbitration at a later stage for the registration. In other words, registrant takes their risk in court and then gets the right to go to arbitration. We discussed that in outline but we need to address that. Other than that, I think those are those are the main key issues apart from the specific law clause itself, and whether we're

comfortable with what we have said. So let us have a discussion about that.

Brian, given that your red text is there or is about to be there if the party's concerned about the arbitral tribunal. It seems to me that, if I may be so bold, what that text seeks to do is to say if, I suppose, the parties can't agree on a mutual jurisdiction, I think logically, you should give the parties the right to say let's have this arbitration under a particular law and they should have the right to agree there. Clearly, that's not an issue because you can say you don't agree if you don't like it and that's fine. So that seems to me to be a no-brainer.

But what you seem to be suggesting, if I understand it correctly, Brian, is if either party is uncomfortable with the law of the jurisdiction of the registrar or the law of the jurisdiction of the registrant, they should have the opportunity to explain that to the arbitrator. But perhaps you could go into a bit more detail as to what you intend by that amendment.

BRIAN BECKHAM:

Yes. Thanks, Chris. Really, the idea here was that we had discussed on some of our prior calls what happens if the parties find the jurisdiction that they have unknowingly "elected" wouldn't normally have a cause of action for the type of dispute that they're trying to put before the court. And so to try to kind of address that situation by saying if the parties and the arbitrator found themselves there, maybe there should be an option for the parties to suggest to the arbitrator what the substantive law that should apply should be.

CHRIS DISSPAIN: I'm just going to pick sides for a minute, so no offense intended by this. How do you stop an IGO who has the choice by saying, "I want the law of the registrar or the registrant"? How do you stop an IGO from just looking at those two laws going either of those? Therefore, I'm going to say I'd like the arbitrator to pick.

BRIAN BECKHAM: Yeah. I hadn't really thought of that. Look, oftentimes, it's the same location. So you might have someone in the in the U.S. using GoDaddy or someone in Germany using key systems or something along those lines. Registrants I think tend to use registrars in their backyard but maybe they just use one where there's a cheaper registration fee that's in a different jurisdiction. But that's kind of precisely the point is that it's the decision to register a domain name with a particular registrar or the fact that someone lives in a particular jurisdiction has nothing to do with this process. And so if that happens to catch the parties and arbitrator off guard that there ought to be a way to address that. And I think maybe more specifically to your question, I suppose the answer is kind of more geared towards the UDRP and the kind of the choice that was made to allow the complainant to choose either the jurisdiction of the registrant or the registrar. Of course, that can, I suppose you could say, be subject of forum shopping on the complainant site. Now, bear in mind that they have only one of two choices to make. At the same time, there are some cases where it's become apparent that the registrant would choose a registrar in a particular jurisdiction because they know that they can cause trouble for a complainant in UDRP case.

So I suppose—sorry to put it this way—it’s not a specific answer to your question. The intent here was really just to if there’s a situation where there’s no obvious good choice of substantive law for the parties and the arbitrator to give them the opportunity to knock that on the head.

CHRIS DISSPAIN:

Jeff, I’m going to come to you in one second. So I understand that. It seems to me that what would be easy would be to say the parties mutually—should the parties have an opportunity to mutually agree a law. If they can’t mutually agree a law, they can—it is either the registrant’s law or the registrar’s law unless the parties agree that they would rather have the arbitrator pick a law. That I think would work. But I think one of those parties could say, “I don’t like your law, and therefore, I think the arbitration people are slightly overstretching,” I would have thought. Go ahead, Brian.

BRIAN BECKHAM:

Yeah, I guess the dilemma there is that you still end up potentially in the same situation where either one of the possible options for the parties to choose from wouldn’t be satisfactory. So it seems to me that in terms of giving the parties the option to agree, of course, that’s always best. But if they can’t, then I guess what I would suggest is rather than the default being that it should be one or the other, that if there’s a situation where neither of the options is satisfactory and if the parties can’t agree, then the parties should put the submissions to the arbitrator to help sort through that.

CHRIS DISSPAIN: I understand what you're saying—and I'm going to go to Jeff—but I've asked you to think about this. The challenge, it seems to me is that you can have a very simple, straightforward situation where you have a clued up registrant who knows exactly what they're doing. It's not being disingenuous in any way but knows exactly what they're doing, chooses their jurisdiction quite intentionally, choosing the jurisdiction of their registrant quite intentionally, and ends up in a situation where they believe there is a genuine—in other words, I'm saying bona fide registrant, bona fide IGO, genuine dispute. You can't then say, it seems to me, to that registrant, "We're terribly sorry but you can't use your jurisdiction just because I don't like it." That seems to me to be the challenge. But let's come back to that in a second and perhaps think that through. Let's give some other people a chance to say something. Jeff, go ahead, please.

JEFF NEUMAN: Thanks. While I agree with the concerns expressed by Brian, this is an issue that's with the entire UDRP as a whole, right? So complainants have raised this issue many times, just regular complainants. So my suggestion in the spirit of conservatism and not going beyond our scope would be that we make sure that this issue gets addressed during the UDRP Phase 2 review, because like I said, it's an issue in common with all UDRP complainants and not address this issue here because of the complexities that we have that really aren't related to whether an organization is an IGO or just a trademark owner. Given the concerns expressed

with going too far beyond the scope, I would provide some requests to not delve into this area. Thanks.

CHRIS DISSPAIN:

Jeff, thank you. And if I may say, I think that that's a very useful sort of test. Is what we're talking about solving a specific IGO problem? Or is what we're talking about a problem for others? And if it's a problem for others, this is not the place to solve it because that's not our role. So thank you for that clarity, which certainly for me has been immensely helpful.

Alexandra, go ahead, please. We can hear you but you are not clear. Sorry. We can't understand you. Alexandra, if you can hear me, we are struggling to hear you. You are very choppy. We can't hear you. We can just hear noise. So maybe you could perhaps reconnect or something. But we can't hear you. Okay. I'm going to carry on. Alexandra can come back when she returns to the call.

Susan, given the conversation we've just had, do you want to say anything regarding the concept of the arbitrator deciding on the law?

SUSAN ANTHONY:

I don't know that I do. I take on board Jeff's observation and I think he may be right. I just had hoped that we could wrap this up. Have it signed, sealed, and delivered outside of RPM 2. So now my heart is sinking because I think Jeff is not incorrect.

CHRIS DISSPAIN: No. I think he is correct. I think the key is that we need to be able to say this solves a very specific issue, and it's a very specific issue for IGOs. As he has said and as I think you are leaning towards agreeing, notwithstanding you're thinking hard, that there is a process for dealing with the bigger issue.

David has just put something in the chat. I would agree that if the issue is a more general one, if it's new, the updates may not be the place to fix the [term]. But that does not change the fact that the issue is still particular to IGOs. I'm not sure that that's right. I think the point that Jeff is saying is that the complaints about jurisdictions in respect to being stuck with the jurisdiction of the registrant—and now we're talking jurisdiction rather than law—or the registrar are a matters that are happening on the table as issues that need to be dealt with in a review of the UDRP irrespective of IGOs. But let's go through the process of dealing with Alexandra first. And then, Jeff, I'm going to ask you to just confirm what you can tell on what I said and maybe give some examples. Alexandra, hopefully, we can hear you now. Go ahead.

ALEXANDRA EXCOFFIER: I hope so. Can you hear me?

CHRIS DISSPAIN: Yes. We can hear you.

ALEXANDRA EXCOFFIER: Okay. I had to reconnect. Sorry about that. No, I was just saying that the same issue comes up in a court. Just because you're in a

certain jurisdiction, the court can decide to review different substantive law, for example, depending on what the question is. If the question is one of international law and the status of whether or not the entity is an international organization, if the question is a trademark one, it might refer to federal law rather to state law. I'm saying it's not an uncommon question even in a court. So, confusing substantive law in jurisdiction is not necessarily the point. But again, like Susan, I would be happy to move on and not deal with the issues probably because this is not very often that this would happen in any case. This is just to have a process in place.

CHRIS DISSPAIN: I hope you can hear me still because my phone was dropped out. So I'm back on the Zoom chat again on the Internet. Can you hear me okay?

ALEXANDRA EXCOFFIER: I can hear you. Can you hear me?

CHRIS DISSPAIN: I can hear you. We can hear each other. There you are. What more do we want?

ALEXANDRA EXCOFFIER: Well, that's just between us.

CHRIS DISSPAIN: Maybe, Terri, just to be on the safe side, you could call me back in again, please, because Berry said it's choppy on your side. Okay. So call me back.

Jeff, would you like to just kind of deal with the point of not being IGO-specific and that it is an issue for others? Perhaps you could just talk a bit more about that, if you wouldn't mind?

JEFF NEUMAN: Yeah. It's something I've heard complainants in general complain about. I've represented several brand owners that were forced into court in a jurisdiction that they didn't want to be in because they had to agree to either the jurisdiction of the registrant or the registrar. So this issue of being forced to deal with jurisdictions that are at the registrant and registrar level is the same issue, albeit not as bad because at least the physical jurisdiction has been taken out. But the law, it's the same thing that complainants have to deal with.

So I just think that this is not IGO-specific. And therefore, I think that we should defer any kind of issue that's shared amongst all users of the system.

CHRIS DISSPAIN: Okay. Thank you. Brian, go ahead.

BRIAN BECKHAM: Yeah. Thanks. I'm sorry but I'd like to push back on that a little bit, Jeff. You've been in this working group largely advocating for a

registrant's rights perspective. I really can't see the UDRP review going down a path where we had observed some behavior with the registrar lead network some years ago. We wrote letters to ICANN, INTA wrote letters to ICANN, other groups wrote letters to ICANN. They eventually brought them up for the accreditation. But I really can't imagine a situation where in the UDRP review there would be consensus signing off on an agreement that a registrant—now, in that situation, there was pretty obvious gaming and forum shopping going on. But to suggest that we could just wipe jurisdictions off the map for good faith registrants because there happened to be possibilities of gaming or observed gaming from other unrelated third parties in the past strikes me as illusory as it gets. I just don't think that it's going to address this problem in the way that we seem to be thinking about.

I guess I would just say this. Maybe let me ask this question. I think that people would largely agree based on the conversations we've had so far that if the parties can agree, then that's great. Maybe that's best, maybe that's the path of least resistance, however you want to capture it. But if they're unable to agree, shouldn't there be some way for the parties to have the arbitrator, let's say, kind of make a judgment on what the applicable law should be if they're finding themselves in a situation where there isn't an applicable law that helps them out of this solution?

CHRIS DISSPAIN:

But why shouldn't we make that change specifically for IGOs, Brian, is I think the point. The change that you need is that you get arbitration instead of court case. The change that you need is that you don't have to submit to mutual jurisdiction. The change that

you need is that you don't have to hold a trademark. All of those things are dealt with. Why is it specific to you that you should have a right to complain about the law?

BRIAN BECKHAM:

The entire genesis of the work that's in front of us is stemming from the fact that IGOs have privileges and immunities that are recognized internationally by states and courts around the world, and trademark owners and registrants don't enjoy those same statuses. And so even though there's some conceptual overlap between a complainant and UDRP case being frustrated at a registrant's choice, whether that's innocent or because of some bad faith or a registrant's inability to take a cause of action in its home jurisdiction because that's just the law of their land.

In other words, to me, they're only related in a in a highly conceptual way. And once you get past that, we're really focused on the fact that, on the one hand, for the UDRP, you're talking about parties invoking court options and here we're talking about an arbitration process which only relates to the court side insofar as if we're looking at what national law should be applied. We're not actually looking at which court to go to. We're looking at the substantive law to be applied.

CHRIS DISSPAIN:

Yes. It amounts to the same thing in the sense that—Mary, I'm going to come to you in a second—a well-informed registrar will choose the major jurisdiction because it has a law that they like or a law that they're used to or a law that they understand. It's not

that they understand the jurisdiction, it's that they understand the law. But look, we're not going to solve this on this call because apart from anything else, we've only got 30 minutes left. What I would ask you to do, Brian, is to see if you can on the list attempt to produce what you would consider to be a workable system. Because at the moment, what you're saying is there may be jurisdictions that are not satisfactory, does not have a satisfactory course of action. I'm saying if it's merely—and I'm just going to use the IGO as an example—the IGO doesn't like the jurisdiction, therefore, has a right to say the arbitrator should pick a jurisdiction. That's one thing. But if what you're saying is there is a real problem—and here's how I would explain it and describe it and this is what it would be—then it's something that we can look at and talk about. But at the moment, I don't think there's enough detail to be able to do that. Are you able to wrap your head around giving some examples of what you think would work other than pure choice? Because pure choice seems to me to just be another opportunity for a movement of the goalpost, if you will. Does that make sense?

BRIAN BECKHAM: Yeah. I'm not sure I would agree with that characterization, but I can have a go at it.

CHRIS DISSPAIN: Yeah. I think that would be immensely helpful. But let's see what Mary has to say first. David, I acknowledge your message in the chat. I'll get to it in a second. Mary, go ahead.

MARY WONG:

Thanks, Chris. I haven't a chance to discuss this with Berry and Steve so this is presumably just my view as a member of the staff here. Clearly, there are broader issues simply because we are talking about the UDRP. So I'm not disagreeing that it may be that this particular issue has implications for the UDRP review and vice versa. That said, in this particular situation, we're dealing with two specific points that don't currently exist in the UDRP. One, the basic premise that the IGO will not be required to submit to the mutual jurisdiction requirement, which therefore, for this particular situation, in and of itself, opens the door to multiple potential choice of law—choices, for lack of a better word. Secondly, we're creating an arbitration option for a very specific kind of proceeding involving IGOs.

So whatever the ultimate solution is, I think as long as what we need to do is that if we do go with an arbitration option, we do need to solve the question of the applicable law, simply because you want that certainty. And similarly, you want either default or a starting point that offers clarity and certainty. And at the moment, it looks like either the registrant or the registrar's location.

If there is a risk that that is too narrow, if Brian can articulate that, for example, then perhaps instead of prescribing a process by which the decision is made, the parties making submissions and so forth, really, it seems to me what Brian is saying here in his suggested edit is that if there is that kind of issue, then the default or the starting point of either registrant or registrar location doesn't work. Ultimately, the decision is up to the arbitrator. So there's something there that we can work with. But ultimately, I think if

we're going to go for the solution, we do need to have an answer for the choice of law situation that hopefully is as straightforward and as clear as we can get. Thanks.

CHRIS DISSPAIN: Thank you, Mary. David, as I've said in the chat, I'm quite happy to hear from you. If you'd like to open your microphone and speak, you're welcome to do so.

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

CHRIS DISSPAIN: Yes, I can.

DAVID SATOLA: Thank you. So I just put a note in the chat in response to Jeff's comment. I can't speak to all the other IGOs, but in the case of the World Bank, we have a few jurisdictions that we prefer to see in our arbitration provisions. I think, as you noted, Chris, the idea is not to create uncertainty. The idea is actually to create certainty. Yes, I think if the parties can agree and as long as the arbitral rules that apply provide for it, they should agree on what the substantive law is to be applied in the arbitration. If they fail to agree, then I think we're talking about what the default is. And one option is apparently the jurisdiction of the substantive law, the jurisdiction where the registrant is.

Another alternative default would be one or two enumerated substantive laws, if the parties can't agree to the substantive laws to apply, then they agree that X law will apply. And that I think would actually incentivize the parties to agree on something that is actually mutually convenient or mutually inconvenient. If you leave it open like that, then it always will defer, I think, to the registrant.

I know from our own practice that there are a few jurisdictions in the world where we do submit or agree to the substantive law. But I would have a very difficult time selling this internally, not knowing what the substantive law is, if the parties can't agree. But I also am curious about what the universe of problem is that we're trying to deal with here. I sometimes feel that we're designing a Tesla when maybe a Chevy is adequate. I'm really not sure how deeply we need to go into this over. Thank you.

CHRIS DISSPAIN:

Thank you, David. I just want to say a couple of things to address partly what you've said and probably what everybody else had said. Look, assuming we can reach a level of acceptable consensus, we're going to be putting out an initial report. We are asking the registrant community to agree some significant changes to the way that the UDRP operates specifically for the purposes of allowing IGOs to use that mechanism. Where we're headed is a sort of understanding that the key points are the mutual jurisdiction point to get in at the top, creating a process that allows for the IGOs and the registrants to go through a legal process at the end, if necessary, but not in a court in an arbitration.

What we're now talking about is asking the registrant give up the right to that process occurring under the law of their jurisdiction. And it strikes me—I'm not commenting one way or the other or the common sense of it. We're going to get significant pushback no matter what, but it strikes me that that is a step that is going to cause even greater pushback.

Jay has been silent so far today. I've got a task for you, Jay, coming up for next week, but I'll get to that in a second. Jay has done an extremely good job of trying to represent the interests of registrants. I would argue in a relatively flexible way and I'm just concerned that we do not attempt to load the cart up with a whole heap of additional bits and pieces. That very well might be nice to have. Some very well maybe, "Wouldn't it be great ifs..." But at the end of the day, let me say again, do not, it seems to me, solve a specific problem that is created in respect to IGOs using the UDRP.

If we walk away from this, if we don't get some sort of an agreement, then the upshot is going to be that the UDRP can't be used. And I do think it's important to remember that there is a policy development process and that there is a review process and all of these things are reviewed. I'll come to you in a second, Brian. Whilst, Brian, I respect your view that it's going to be very hard to get changes made in the review of the UDRP, I acknowledge that but that is actually the way that ICANN works. And I am extremely concerned to ensure that we get at least enough of a win out of this to allow for the IGOs to participate in the process. And there's a significant advantages to IGOs being able to do that.

So that's my concern. I'm not expecting a debate about it or for us to discuss it at any great length today. Brian, I'm going to come to you and then I'm going to ask Jay if he prepared to do something for the next call. Brian, go ahead.

BRIAN BECKHAM:

Thanks, Chris. Just in terms of this question, again, of the overlap with UDRP and doing something special here. I think I would maybe put it a little bit differently, which is we've heard from Jeff and others that there's, let's say, kind of a problem lurking beneath the surface that's been raised by some parties in the context of the UDRP. So a registrant, unbeknownst to them, lives in a jurisdiction or registers to a registrant in a particular jurisdiction, where if they find themselves on the losing end of the UDRP case, doesn't really give them the court options that they thought they may have had if it comes to the necessity of filing a court case to stay or reverse the UDRP decision. That we've heard is a risk that registrants can face in the UDRP today.

I think I would say here, actually, we're identifying that problem and we're trying to figure out, "Okay, how do we address that?" and we're actually giving the parties the option to address that on their own. And if they are unable to agree, then they can make arguments to an arbitrator as to what they believe should apply. I don't want to belabor the conversation now, tried to work out some text for the list, but I guess it feels to me that we're actually putting the parties collectively in a better situation here than they may face under the UDRP.

CHRIS DISSPAIN: I accept that that is an interpretation of what we're talking about. I do not and I'm not going to suggest that it doesn't stand up as an interpretation. So let me ask you. I think you said it. If you can go away and come up with an explanation that works and some wording that works, that isn't simply at the whim of one of the parties, they can say, "We don't accept the law." You've used specific examples. In your red line you said, "Does not have satisfactory cause of action related the party's dispute." And you've said we may find a circumstance where the registrant inadvertently ends up in a situation where they can't get to stay. All of that's true. Agreed. So if you can try to wrap that into some sort of wording that makes sense and stands up against the battle of "But you're taking away my rights," then good. So maybe we can get that, as I said, on the list and discuss that.

BRIAN BECKHAM: Thanks. Sorry. Just to reiterate, I guess. We keep hearing about taking away rights and I think that's an unfair characterization because we're actually giving rights if we do this. If we allow the parties to agree, if we allow them to brief the arbitrator, we're actually giving them an opportunity to address an issue that we've identified. Otherwise, I don't know how else to put it, but we'd be putting our heads in the sand on behalf of registrants.

CHRIS DISSPAIN: You're quite right that you're giving an alternative, you're giving option, you're giving a choice. But what you're also seeking to do is to remove what is currently the ultimate decision. Again, I'm not saying that's a good thing or a bad thing. It's just a thing. And right

now, the situation is registrant knows that they have got that jurisdiction, if necessary. And you're saying, "Well, no. In certain circumstances, the IGO could say 'I don't like that jurisdiction and we'd like the arbitrator to decide.'" And that's a significant right, if you will, that a registrant has that would be removed. But I acknowledge completely that you can characterize it in a different way. I'm just channeling for the moment registrants.

Jay, I assume you can hear me. I can see—hello. How are you?

JAY CHAPMAN: Hi, Chris. Yes, sir. Right here.

CHRIS DISSPAIN: Good man. Hey, look, would you be prepared to—I want to cut out—what I'm just going to call for the sake of this discussion, the side discussion we've just had in respect to the additional matter of the arbitrator picking the jurisdiction. I'm very keen on next week's call to have you have had a look at the substantial basis of this document, the flowchart, the Recommendations 1 and 2, and so on, and come back to this group with anything that you would—I mean, this applies to everybody but I'm saying it to you because you're the person who's I've had the most interaction with on this side of the fence, for lack of a better word of putting it—and come back with anything that you would consider to be a red flag. I'm not asking you to do it now. But I would ask you, if it were possible, to do it on the list or when we start our call next week to come back with anything that you would consider to be a red flag. Is that acceptable?

JAY CHAPMAN: Happy to do that. Of course.

CHRIS DISSPAIN: Thank you. Thank you, Jay. That's very helpful. And to be clear, I mean, I'm happy for anyone to come back with things like that. But as I said, I think Jay has been the one that I've interacted with the most. Brian, you've got homework to do. Jay, you've got homework to do. And we are meeting again next—Jeff, go ahead.

JEFF NEUMAN: Sorry. I didn't want to interrupt your flow, though.

CHRIS DISSPAIN: No, you're okay. Well, your mere presence has interrupted my flow, such as it was.

JEFF NEUMAN: I don't know how to respond to that. It sounded like we were wrapping up the meeting but I wanted to kind of go back to the last change there and why I agree on the substance of what Brian has changed. So if you go back up a little bit.

CHRIS DISSPAIN: Can we open up the document? Thank you. And can we scroll down, please?

JEFF NEUMAN:

No, no. This is right. So where it says, “Receives a notice of a filed request for arbitration.” So what this is doing—and this is fine because I think this is consistent with the UDRP—is basically changing it from saying, “Yes, I have an intent to file an arbitration” to “I’ve actually done it,” which is consistent with UDRP now, which says that you have to actually provide a copy of the actual complaint, not just an intent to file a complaint.

The question I have is on those specific words, I don’t know if those are magic words for an arbitration that different arbitrators may use different terms for what the filing of the complaint or whatever is. So can we bracket that and if someone could do some research to make sure we’re essentially putting this concept of they have to file the arbitration complaint but it may not be what’s called a request for arbitration. I think that’s what Brian was getting at.

Brian, yeah, it’s generic procedural reference. I just want to make sure it’s not a term of art that we’re misusing or that could apply to any tribunals. I’m agreeing with you, Brian, but I just want to make sure that we’re not using, like I said, a term of art that only specific tribunals may use. Thanks.

CHRIS DISSPAIN:

Thanks, Jeff. Mary, if you could. I appreciate that. I think you probably solved it. But, Mary, if you could take that play as just as an action item to check that will be enormously helpful. Thank you. And thank your attention and eye for detail, Jeff. That’s important.

Okay. I think we're probably coming to a close. Steve, could you just remind us again, you've got a call with the Council today, have you?

STEVE CHAN: Hi, Chris. That's correct. We have a coordination call with Council leadership post—

CHRIS DISSPAIN: Part of that will be to discuss some of the issues that we raised with the Council along with John and the rest of the Council on the call we have with them, yeah?

STEVE CHAN: That is correct.

CHRIS DISSPAIN: Okay, cool. So I think it would be really fantastic if you could get a note out to the list as soon as possible so that everybody knows what is relevant from that discussion.

STEVE CHAN: Noted. Will do. Thanks.

CHRIS DISSPAIN: That would be really helpful because I think it's important that everybody understands where we're at. And I think what I would like us to do is to come next week with two or three things, really.

One is obviously Brian's notes on the additional piece, which I'm going to refer to as additional in the sense of it's an additional step, etc. Jay's comments on the document as a whole and any red flags that he may have or whatever, plus anybody else's for that matter.

Berry, could you tidy up the Google Doc incorporating everything that we've claimed or accepted up until now with the additional texts of Brian's, etc., except for that main piece that we've been discussing for the last half an hour, which needs to be maintained as a separate, proposed change? And if you could get that out to the list and into Google Docs as well, please, if you wish, but out to the list with a note to say that, "This document is what we're going to be discussing next Monday. And if anybody has any red flags that they want to raise, now is the time to do it." Is that okay? Happy to do that, Berry?

BERRY COBB: Staff will do it, probably not me.

CHRIS DISSPAI: Okay. Whoever does it, I don't mind. David is quite correct. He asked if you could circulate the flowchart as well. So that would be really good. Thank you.

It's quite hard to deal with in the chat because, David, what you probably won't know, but some of you may know, is that the host of—a very, very well known chef in the UK is a lady called Mary Berry. So when I see Mary Berry written in the chat, I immediately think of cake. However, that is not fair to either Mary or Berry

because neither of those two actually made me think of cake.
Thank you, David.

Do we have any other points that need to be dealt with right now?
No? Good. All right. So Steve, Mary, you're clear on getting the
documentation out, the flowchart out. Jay and Brian, you're clear
on your homework. Anybody else has got anything they want to
say to red flags, etc., please do so. Let us reconvene at same time
in a week. With that, unless there are any last minute comments.
Seeing none.

SUSAN ANTHONY: I just wanted to say, Chris—

CHRIS DISSPAIN: Susan, yes?

SUSAN ANTHONY: You're not the only one on Mary Berry. I've thought that for a very,
very long time because I'm great fan of the Great British baking
show.

CHRIS DISSPAIN: Thank you. At least I'm not the only one out there who has that
thought. Thank you, Susan. All right, everybody, have a great rest
of your day. Good week and we'll talk again in a week's time.
Thanks all. Take care.

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

CHRIS DISSPAIN: Cheers, everyone. Bye-bye.

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

[END OF TRANSCRIPT]