
ICANN Transcription

EPDP Specific Curative Rights Protections IGOs

Monday, 29 November 2021 at 15:00 UTC

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TERRI AGNEW:

Good morning, good afternoon, and good evening. Welcome to the EPDP Specific Curative Rights Protection for IGOs call, taking place on Monday, the 29th of November, 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. When using chat, please change the selection from "hosts and panelists" to "everyone." Attendees will be able to view chat only. Alternates not replacing a member are required to rename their 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

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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 wiki space.

Please remember to state your name before speaking. Recordings will be posted on the public wiki space shortly after the end of the call. As a reminder, 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 very much, indeed, Terri. And hello, everyone. Welcome to call number whatever it is of the IGO EPDP. Just before we kick off and I throw across the baton to Berry to take us through the next stage of our process, a slight logistical matter, slight change of personnel. The At-Large, Carlos has stepped down as a rep of the At-Large on this EPDP and been replaced by Justine Chew, who was an alternate and is now, for her sins, a full-blown member of this EPDP. So I guess she’ll be with us

shortly—she’s normally with us—and I’ve no doubt will be made welcome by everybody. So that’s the logistics.

The agenda and the PCRT are up on the screen. And, Berry, over to you to get the ball rolling.

BERRY COBB:

Thank you, Chris. First off, just a status update on recommendation one. We still have an outstanding action item as it relates to permanent observer status. This latest version is posted on the wiki under the recommendations page. So I don't see Brian on the call yet but that was his action item, as he was going to reach out to his UN colleagues about the use of this term, I think that there’s still some deliberation about whether the term should be capitalized or not. Absent of that, we’ll try to get that wrapped up. We’re not meeting next Monday on the 6th. But when we return on the 13th, we’ll hopefully have this taken care of for review by the full plenary.

So then, moving on to recommendation six, we sent an e-mail last week, shortly after the meeting, which was just short edits that we had reviewed in the prior call, asking if there were any objections to those edits. We didn’t see anything on the list so the leadership team considers this stable for now and staff will upload this into the next version of the report on our way to the final report.

So that takes us picking up where we’d left off from the last meeting, which is in regards to recommendation three. Before we dive into the review of the Public Comment Review Tool. Most of our discussion last week centered around the concept around the

notice of objection. I think we had very healthy deliberations about the pros and cons or the agreements or disagreements about this being a possible replacement for recommendation three.

There was one action item to Jeff and Jay, I believe, to extract out possible components that may be considered fit for purpose in the context of recommendation three. We didn't see anything on the list so I'm curious if Jeff or Jay have any updates. Did you guys come up with any possible nuggets that the group can work from? If not, maybe we can just start to review through some of the other comments. Jay, please go ahead.

JAY CHAPMAN:

Okay. Thanks, Berry. Can you hear me okay? I'm having connectivity issues with my main system so I've had to go to my phone. I hope you can hear me okay.

CHRIS DISSPAIN:

You're fine, Jay. We can hear you really well.

JAY CHAPMAN:

Okay. Thanks. Hi, everyone. I actually have been thinking a lot about this. I haven't put anything on the list, mostly because it was a holiday week and there were other things that came up, that took time away from actually getting more fully engaged.

But really, was thinking about this notice of objection and I think it's too early just to outright dismiss this. I think because we have some of these things hanging out there that continue to be clung

to, such as the arbitration—an arbitration appeal, where the registrant has to choose between either going to court or going to arbitration, regardless of what happens on the merits. The mutual jurisdiction issue is out there. I know we're about to jump into that.

But I just think all these things really ... There's just a lot of moving pieces out there and I think there's a lot of good things about this particular proposal that, again, at this point, should not be dismissed. It might even make sense, because it is a new idea, because it does resolve all the concerns with regard to mutual jurisdiction, prevents gaming, would only come down to the 1% of cases where this notice of objection would actually be asked for or invoked. It just seems like it really has a lot of features that satisfy all the criteria that we need to make something work, where it meets the needs of the IGOs and it protects the rights of registrants to go to court.

So again, just thinking through these things. I'm happy to jump into more of this, just in terms of why I think that there's a lot of good ideas here. I just think it's way too early to completely just put this aside, given all the moving pieces and where things are, and in fact, even where our group stands, the comments that we've received from other people throughout the community, those sorts of things. I think that would be appropriate at this point. Thanks.

CHRIS DISSPAIN:

Jay, thank you. I don't want to get into ... We spent a long time in discussion on this on the last call. That does not speak against your point. I'm just saying, as a fact, we spent a long time. I don't

want to spend a vast amount of time rehashing on this call what we've already discussed.

My proposal would simply be that we put aside this proposal for now—this LEAP proposal for now—and that we come back to it in the event that we find ourselves in a situation where we are not able to reach a significant level of consensus in respect to arbitration because what this effectively does is eliminate the need for arbitration.

You know, Jay, and I know, and we all know from the call last week that that's currently not an acceptable position, as far as quite a number of people on this call are concerned. But that said, I'm more than happy to not dismiss it for now. I think that's a perfectly reasonable request. And we will come back to it at the appropriate time. If that's okay with you, that's the way we'll go forward. Yeah?

JAY CHAPMAN:

Sure. Yeah. I'd be happy to keep discussing it because I just think there was a lot of things. After reviewing the call and just thinking about things, I think there's still a lot to discuss there, a lot of questions that would need to be answered. I think there were some relatively simplistic dismissals of the thing without a lot of analysis involved, in my opinion.

CHRIS DISSPAIN:

Hold on a minute. We'll stop—

JAY CHAPMAN: Again, you said you don't want to get into it. I'm okay with that. I just—

CHRIS DISSPAIN: No, no, no. Hang on. Whoa, whoa, whoa. Wait, wait, wait. Wait a second. Hang on a second. Let me backtrack for a second.

JAY CHAPMAN: Of course.

CHRIS DISSPAIN: If you are actually ready to take us through a discussion on why you think that this should be in and to have a full-blown discussion on the pros and cons of it at this stage, then I'm not against doing that as such. I thought your request was that we didn't dismiss it immediately, which I'm happy not to do. Sorry. On the basis that all I wanted was not to get into a discussion where people say, "I think we should dismiss it." That's what I was trying to avoid, not that we should get into a discussion about the merits of it.

So it's up to you. If you would like us to have a discussion on the merits of it now, at this stage, and you're ready to effectively lead that discussion, in the sense of put your case, I'm really happy for us to do that if that's what you'd like to do.

JAY CHAPMAN: Yeah. I think where I wanted to go is ... I haven't really changed my mind on that. I think there are more questions to ask. I think there's details within what the proposal would be, how it lines out.

I think there's things to talk about there as well, that can potentially help as well. I'm not convinced one way or the other. I'm just saying, again, at the beginning, this is not something we should dismiss or put aside—just completely say, "This is out of the question," because I don't want to say again what I said before.

So yeah. I'm okay with not getting into the details now. I guess I want to put the pin in having the opportunity at some point down the road to bring this back up and have that discussion. Is that okay?

CHRIS DISSPAIN: Fine. Absolutely no problem at all. That's where I thought we were and I'm happy to be there. Excellent.

JAY CHAPMAN: Thank you.

CHRIS DISSPAIN: Good. Okey dokey. So, Berry, where does that take us to now?

BERRY COBB: To continue on with our review of the comments, we'll turn our attention, really our first time, to the Public Comment Review Tool. Unlike prior attempts or reviews of the PCRT from the other recommendations, in the spirit of continuing forward with talking through substance or possible new ideas, I thought I would start from near the bottom of the PCRT. And apologies for the scrolling. I'm trying to get down to it.

First, I thought what we'd do is ... Hold on just a second. Here's a link to the wiki page. And in particular, we're going to be reviewing through the recommendation three, PCRT doc that's listed here. That's what I have up on screen. As of right now, staff haven't provided any edits about the responses because we just mostly focused on the leap of faith idea.

But what I thought would be, maybe, appropriate here is to take a look at the Business Constituency's input, and afterwards, also take a look at the IPC's input. I wouldn't necessarily call them new ideas but they are a possible suggestion for the group to consider with respect to recommendation three.

There's basically some background about their comment, about the privileges and immunities of IGOs. But in particular—and I will read this one out, just for the record and to help start some of the discussion—essentially, they're basically stating that a blanket rule that does not take into account the facts and circumstances of each case.

Accordingly, one potential compromise alternative to exempting an IGO from the mandatory submission to a mutual jurisdiction would be amending UDRP Rules, section 3(b)(xii), with an explicit caveat as follows. "State that the complainant, without prejudice to an IGO complainant's privileges and sovereign immunity, will submit, with respect to any challenges, to a decision in the administrative proceeding canceling or transferring the domain name to the jurisdiction of courts in at least one specified mutual jurisdiction."

They go on to basically say that, “as part and parcel of an IGO deciding to proceed with a UDRP or URS instead of court litigation, an IGO should, as it’s currently required to do, submit to the jurisdiction of at least one location for subsequent court proceedings brought by a registrant,” and that, “this ensures that a registrant who has a bona fide case to overturn an errant UDRP or URS decision has unfettered access to either, as provided by current UDRP procedure, the courts of the registrant’s location or the location of the registrant’s registrar.”

They basically state that, “recognizing such cases would be extremely rare, by completely removing the requirement to submit to a mutual jurisdiction, trademark owners, businesses, and individuals who are on the receiving end of an errant UDRP or URS decision would be denied even the simple ability to contest IGO privileges and immunity in a court of competent jurisdiction under applicable law.”

So I’ll stop there. But essentially, the suggestion here is to try to find middle ground in terms of updating UDRP Rules, section 3(b)(xii).

CHRIS DISSPAIN: Berry, I’m going to come back to you in a second with a question. Before I do, I understand that Brian, who is only on the telephone, has been trying to speak but can’t be heard. Brian, can you try?

BRIAN BECKHAM: Let’s try now. Can you hear me, Chris?

CHRIS DISSPAIN: Yeah. Absolutely.

BRIAN BECKHAM: Great. Thanks so much. Sorry, everyone. Troubles unmuting the line.

CHRIS DISSPAIN: Just so that you know, what I can't do is see if your hand is up.

BRIAN BECKHAM: No problem. That's my dilemma because I'm on audio only. So thanks for Susan alerting you. I appreciate that the conversation has moved on so I don't want to take us back. But given that Jay had mentioned the hope to keep alive this ... I think it was recommendation four. Because we had discussed it on a couple of phone calls and on the list, what I think would be helpful is if there are particular aspects of the proposal that Jay or others would like to see kept alive or held back for a future discussion ... Again, because I think we did give it a reasonable airing. So if there's things that we specifically overlooked, that would be very helpful for any future conversations. Thanks.

CHRIS DISSPAIN: Thank you. I appreciate what you said. And I think, to some extent, it's a given, in the sense that if we're going to bring in back in, then those who want it brought back in would need to lead that

discussion, by explaining what the key points are and why it should be brought back in. So thank you for that. Appreciate it.

Berry, I just want to go back to your point for a second. Did I hear you right when you said, essentially, what this is, is a suggestion that we rewrite some of the existing UDRP rules?

BERRY COBB: That's my impression from the BC comment.

CHRIS DISSPAIN: That would not be something we could do, would it? Or have I misunderstood?

BERRY COBB: I'll defer to Mary about scope.

CHRIS DISSPAIN: Yeah. Let's do that.

BERRY COBB: But I think, in general, because we are talking about the mutual jurisdiction clause, recommendation three as it stands would already amend that part of the rules.

CHRIS DISSPAIN: Okay. Well, let's see what Mary has to say. Mary, go ahead.

MARY WONG: Thanks, Chris and Berry. Yeah. Essentially, I was just going to say that to the extent that any amendment to the rules that this team might propose is limited to IGO complainants, that would be within the remit because, as Berry said, we're already making those proposals, for example, with regard to a definition of IGO complainant. We certainly cannot be amending the UDRP or URS rules for everything or everybody else.

I had a comment about this suggestion.

CHRIS DISSPAIN: Yes. Please go ahead.

MARY WONG: Chris, just to get things started with the group, staff has been trying to understand, obviously, all the suggestions that have been made. For this particular one, I think one question that we had is whether this actually does solve the problem because in reading it, it's clear that the attempt here is to say, "We don't have to get rid of the mutual jurisdiction clause for IGO complainants altogether. Here's a way to fix that."

But our read of it also seems to show that what this suggestion might do is simply just get rid of the possibility that the conclusion is inevitably that an IGO complainant has waived his privileges and immunities. In other words, there's nothing, regardless of what the rules say, to prevent a registrant from starting an action in court. Then it is up to that court to decide whether or not the IGO complainant in question—in this case, now the respondent—is or is not immune from the jurisdiction of that court.

What our reading of this seems to show, that it actually doesn't solve that particular problem because the registrant can always go to court. The mutual jurisdiction requirement, essentially, in many cases, simply means that the IGO has waived its jurisdiction in that court.

CHRIS DISSPAIN:

Okay. So who would like to speak in favor of the Business Constituency's suggestion or who would like to speak against it? The floor is open so let's have a discussion. Does anybody disagree with Mary's take, that this doesn't actually solve the problem, or may not, in fact, solve the problem because it doesn't do what needs to be done? Anyone want to speak? Otherwise, we will just say that we considered it and we have moved on to something else. Thank you, Alex—agreeing with Mary.

Okay, then. So I think, Berry, we can say that we looked at this. We don't think it ... Oh. Hello, Jay. Go ahead.

JAY CHAPMAN:

Yeah. Thanks, Chris. Sorry. I'm still trying to deal with connectivity issues so I hope you can hear me.

CHRIS DISSPAIN:

Yeah.

JAY CHAPMAN: Great. Okay. I'm not following, I guess, what the hang-up with a proposal like this is. Can that be explained, maybe, a little further? I'm not really following where the—

CHRIS DISSPAIN: Perhaps you might be able to speak in favor of it, then, if you think that it makes sense. It doesn't seem to me ... I would personally just need to have it explained to me as to how it actually helps the situation for the IGOs. How do you think it does that?

JAY CHAPMAN: First of all, the idea is it doesn't require them to ... It says that they maintain all the things that have been expressed as concerns and the reasons why they don't want to go to court. So it's self-explanatory. I don't know. Maybe I'm missing it.

CHRIS DISSPAIN: Okay. Fair enough. Mary, do you want to just take a stab at responding to that, given that you laid out what your interpretation of it was?

MARY WONG: Thanks, Chris, and thanks, Jay. I do want to emphasize that this is an interpretation based on a read of the comment on its face. I do note that there's members of the EPDP Team that have put comments in the chat. So from the staff ... And I do want to invite them to chime in, if they prefer.

Just to try to clarify what I said earlier, regardless of whether or not there is a mutual jurisdiction clause, regardless or not whether there is a submission to that, it is always open to a registrant, or anybody, in a matter of fact, to start a case in a court of their choosing. Then it is up to that court to decide whether it has jurisdiction over the matter.

And in this particular case, it may come down to the court deciding whether or not an IGO has immunity from its jurisdiction. What I was saying was that this doesn't change that and it doesn't actually solve the problem that the preliminary recommendation tries to solve, which is to allow an IGO to exercise its privileges and immunities in the appropriate case and not forestall it altogether.

CHRIS DISSPAIN:

Yeah. So, Jay, your hand is up. Is that an old hand?

JAY CHAPMAN:

Yeah. I don't understand that. I'm having a hard time trying to explain myself but it doesn't compute for me. Mary's saying that it doesn't resolve the problem. If the problem is under no circumstances are IGOs wanting to go to court, I don't know where that—

CHRIS DISSPAIN:

Well, no. That can't be the case because as Mary just quite rightly said, there's nothing to stop anybody from going to court. The only time you would be prevented from going to court as a registrant

would be if you agreed to go to arbitration. And you would have to agree to do that, right?

JAY CHAPMAN: Fair enough.

CHRIS DISSPAIN: But what I don't understand is as a part of ... If I look at this particular comment from the ... Justine, I can see your hand is up. I'll get to you in a second. Somebody else's hand was up but it seems to have gone down again. It says here, "As part and parcel of an IGO deciding to proceed with a UDRP instead of court litigation, an IGO should submit to the jurisdiction of at least one location for subsequent court proceedings brought by a registrant." Is that not precisely what the IGOs have said is their major problem?

JAY CHAPMAN: I'm not so sure that is. It seems to me that what the problem is, is that they just don't want to ... If it's true that they don't mind going to court, or in a case where they have to go to court, then they're going to have to argue their privileges and immunities, right? I don't know. It seems to work and scratch all the itches.

CHRIS DISSPAIN: In what way does it ...? I'm unclear. Even if you've got over the line of being able to say that an IGO was prepared to say, "We will submit to a jurisdiction," this whole discussion ... Maybe it's just

me but, as Paul has said, I don't understand what the change does.

And by saying at the beginning, "You, the IGO, must say that you will submit to a jurisdiction in the event that the matter goes to court," that is the thing by which we started this whole discussion on mutual jurisdiction all those weeks ago or months ago when we started talking about whether we were prepared to consider recommending the removal of the requirement to go to mutual jurisdiction.

And if we did, we needed to replace it. We needed to have a mechanism in place that would enable the IGO to enter into the process, would enable the UDRP to have its process, and for the panelists in the UDRP to make a decision, and if the registrant lost, enable the registrant to have the equivalent of their day in court.

What we came to was an understanding that—where we have a fork, which is some on this group have said if the registrant loses the UDRP, the registrant should have the right to just go off to court. Others have said the registrant should choose whether to go off—sorry. And the registrant can come back if the court won't hear it. Others have said no. If the registrant chooses to go to court and the court won't hear it, then that registrant has lost. We haven't got to that discussion yet.

But the whole discussion has been predicated on the fact that there is no acceptance by the IGO of a mutual jurisdiction. What does it mean if they accept a mutual jurisdiction? Unless I have

misunderstood, it means they cannot argue that they are not subject to that jurisdiction.

And what the IGO says is, “We should have the right to argue that we are not bound by that jurisdiction. If you, the registrant, choose to take the avenue of going to court, as an alternative, we, the IGOs, offer you another way, which is instead of going to court, and us arguing,” and possibly, very likely, in their view, winning—that they are not subject to the jurisdiction— “we can agree to go to arbitration. And on that principle, we can also have a discussion about what law should be used.”

So what I don't understand, Jay, is what you think this achieves, much the same as Paul has said in the chat, although in one sentence rather than my 27 paragraphs.

JAY CHAPMAN:

Sure. I don't know that it changes anything. I think it really, basically, just gives IGOs ... It basically provides the opportunity for IGOs to say, “Yes. We submitted to mutual jurisdiction but there's a difference between jurisdiction and immunities.” And if I'm not mistaken, perhaps there's been a distinction between those two at some point, perhaps even by other members of this group. Maybe not. In conclusion, I think this is an interesting compromise. But if there is no compromise, then clearly, the BC's position on mutual jurisdiction would be they're against the removal of it. Thanks.

CHRIS DISSPAIN: Okay. I'm going to go to Justine and then I'm going to go to David. Justine?

JUSTINE CHEW: Thank you, Chris. I'll be very brief because I think you've covered most of what I wanted to say. But I'm just going to reiterate my understanding of it. And this, I will confess, that it possibly varies from jurisdiction to jurisdiction.

But if you take it on principle, the issue here is requiring the IGO to submit to a jurisdiction. It doesn't matter whether it's one jurisdiction or two jurisdictions. The principle is the same. And the argument is if you require the IGO to submit to a jurisdiction, you are forcing them to give up their privileges and immunities up front. That is the bit that I believe the IGOs are having difficulties with.

It's not to say that they don't want to go to court because we're talking about the IGOs being the respondent following a UDRP that the IGO has won and the registrant has lost. The registrant is taking the IGO to court. So it's not a question of IGO's going to court or not. They've been taken to court.

And the problem and the issue is, once they are taken to court, if they have already submitted to the jurisdiction, then they cannot ... And again, I qualify, it may differ from jurisdiction to jurisdiction. But on principle, if they have submitted to either of the jurisdictions or both jurisdictions, they cannot come back and argue that they have immunities and privileges. That is the issue, to me. Thank you very much.

CHRIS DISSPAIN: Thank you, Justine. Just before I do go to you, David, I just wanted to pick up on what you just said, Justine, and maybe give Jay an opportunity to think about this while he's listening to David.

If I look at the main paragraph, which is the third paragraph of their comment, towards the end, it says, "While recognizing that such cases would be extremely rare, by completely removing the requirement to submit to a mutual jurisdiction, trademark owners, businesses, and individuals who are on the receiving end of an errant UDRP would be denied even the simple ability to contest IGO privileges and immunities in a court of competent jurisdiction under applicable national laws."

To me ... And I would be interested if others have a different view. To me, that's not correct. To me, the fact that the IGO ... In our model, it has always been envisaged that the registrant could go to court if they chose to do so. The argument has always been whether they would lose the right to go to arbitration if they went to court.

But let's leave that aside for a minute. They do have the right to go to court. And the IGOs can turn up at that court and argue that they're not subject to the privileges—sorry, that they have privileges and immunities. So it is precisely to allow that to happen that we have that. What we have said is we remove the mutual jurisdiction.

So I don't understand why the removal of the mutual jurisdiction leads to the conclusion that is put in the end of that paragraph by

the Business Constituency. Perhaps people would like to think about that and explain to me why I'm wrong, if I am wrong. Meanwhile, David.

DAVID SATOLA:

Thank you, Chris. I would agree with Justine's comments. I would agree, Chris, with your characterization of this. The substantive issue is if we submit to a mutual jurisdiction, we have ipso facto waived our immunities so that's a non-starter for us, to say the least.

But as a point of procedural issues, Chris—and this is a question directed to you—I thought in this phase of the work, we were considering whether the proposals that were submitted would be responded to. It seems like we're in the process of doing that—relitigating issues that I thought we'd discussed months ago. So am I correct that what we're trying to discuss now is whether and how we respond to these proposals? Or are we actually going back and relitigating the issue?

CHRIS DISSPAIN:

Yes we are because it may very well be that comments that are made ... Our obligation is to consider all of the public comments on their merit and to discussion whether or not they change our view. That's the nature of the public comment. That's why, for example, any suggestion that is a new suggestion that says, "Oh. I've got an idea that might help you solve this problem. Throw everything out that you've done and do this," would be—if that were a viable and acceptable new suggestion, would be open to

discussion of this group. So yes. It is correct that we are looking at the suggestions in the comments.

And we're also, David, weighing the weight of input from the community about suggestions that we've made. There are two types of things that we've done in our initial report. One is we've put forward, in a number of cases—two or three cases—we've actually put forward alternatives. So we're looking at what people's responses are to those alternatives, if indeed there are any responses.

And secondly, we've actually said, "We think x. We've made suggestions. We've suggested that a preliminary recommendation would say this." The whole purpose of the public comment period is for the community to come back and say, "We agree," or, "We disagree and here's why we disagree," and for us to consider that.

So to take a very simple example, a suggestion that was made in a PDP that everybody should paint their computers green, were there to be 150 public comments, all of which said, "No, no, no. They should be pink," it would actually be quite hard for the PDP panel to maintain the situation that they think they should be green. So that's basically it. I hope that goes some way to answering your question.

DAVID SATOLA:

Thanks, Chris. Partly. So then, I would say ... I'd reiterate a point that Justine just made. I think you may have alluded to it earlier as well, which is that it is difficult to make a generalized view of what is probably going to be a jurisdiction-by-jurisdiction approach.

That said, most of the IGOs have what are called ... Since we are reopening the discussions, I'll say it now again for the record, even though I'm sure I said it back in February, or March, or April. The IGOs have what are called functional immunities. It's not a complete immunity. It's a functional immunity. That means as long as we're performing the functions that the countries who formed us wanted us to do, our immunities would hold.

I don't think that there's anyone in the world who, as a result of the past nearly two years of struggling with COVID, would say that maintaining a safe and secure web presence using our domains is not integral to performing our mandate or to performing our functions. So the only way that a court would say, "You can't enjoy your immunities in this case," is because it's outside of your function.

I don't think there's anyone who would say that a web presence for an IGO is not part of its function. So it would be extraordinarily difficult to make the case that the IGO has an interest in its domain and making sure that that domain is secure and stable.

So I really think that this effort to preserve the right for a registrant to go to court, while important, is potentially a bit hollow because you're not ... One can go through the process but I just don't foresee a case where, in the defense of an IGO domain, a court is going to say, "Oh, yeah. You're not really performing your function. Therefore, you don't need to protect your domain." I just don't see that.

So it doesn't really get to the natural justice that Jay and others are trying to get at here. And I think that the route to a different

kind of alternative dispute resolution is going to be more effective. It's going to be done by people who understand what the industry is and how the process works and it might be a better resolution.

I also think that the—and I'll close with this—in this particular case, with the Business Constituency, I don't think what they've suggested is actually any different than what we reported in the report as being something that was a reason why we were going through the exercise in the first place. So I don't think that it's anything new. I think it's a regurgitation of an old approach and one that even the GNSO, by setting up this process, recognized wasn't going to work.

So by saying that, "Oh. It's a new approach and we're going to consider it," I don't think it is a new approach. I think it's a restatement of an old one and would only put us back to where we were at the very beginning of this process. Thank you. Over.

CHRIS DISSPAIN:

Thank you, David. Terri, I think Jay is in the attendees room, probably, and needs to be let back in again, into this room. I'm not sure. I know that he said he was going to move to his laptop so just mentioning that in passing. Anyone else want to have any say on this particular comment? I will give Jay an opportunity to have a closing word. But other than that, does anybody else want to pick me up on my point that the last paragraph doesn't seem, to me, to make sense. David, that's an old hand, I assume.

Jay, now that you're back in the panelists room, if you want to have a last word on this one, you're welcome to. No one else is

speaking in any way, other than against it. Nope? Yes? Okay. Microphone on, microphone off. Go ahead, Jay.

JAY CHAPMAN: I have some issues. Thank you. Again, I think it's one of the few comments that we have that is actually looking for a solution. And again, I can't stress this enough on all these things. It seems like every time there's an opportunity here to find something that's potentially a compromise, it just feels like we just are getting urged to just go in one direction. So I just think there's ... Yeah.

CHRIS DISSPAIN: Could you help me out by telling me what you think the compromise is? Because I can't see it.

JAY CHAPMAN: Again, I'd just say that I think there's a distinction between jurisdiction and being able to plead your immunities. Again, I'm not an IGO law expert. I'm just saying that I thought ... It looks to me like this is an interesting mutual—not mutual—a meet-in-the-middle situation. We're stuck with our original submissions then, if we can't find compromises here. And ultimately, we've got ... We dismiss with an idea like this. If that's the case, then the BC is against the proposal, the removal of mutual jurisdiction.

CHRIS DISSPAIN: What do you think the idea is? In simple terms, explain to me what the idea is.

JAY CHAPMAN:

I think the idea, at its core, is to protect the rights of registrants to be able to go to court. That's the core of it. And the original UDRP, the way it was written with the mutual jurisdiction, being able to go to court wasn't ... That wasn't allowed by accident, right? This is the way it should work. We're talking about the rarest of rare cases, where only extremely valuable domains to registrants are even going to go to this point.

And now we've expanded this into this idea of somehow the IGO can ... Again, from my perspective, it seems to be a situation where we're just being pushed to where IGOs would never go to court in any situation. That can't work.

CHRIS DISSPAIN:

But that's not the case, Jay. That's not the case. That's why I'm confused. I really am trying really hard to help here because I don't want there to be any misunderstanding about you or anybody being pushed in any direction.

Under our current proposals that we put in our interim or preliminary report, IGOs have the right to go to court. They have the right to go to court. Sorry. The registrant, rather, has the right to go to court. And the IGO has the right to go to that court and argue that they are not subject to that court's jurisdiction because they have not waived their immunities and privileges. That is an integral part of our current proposal.

Unless I've misread it, what this does is to say, one, the IGO should still consent to a mutual jurisdiction, which I believe means

that they can then not argue their privileges and immunities point because they have consented to be bound by a jurisdiction, number one.

And number two, this recommendation doesn't appear to be correct because it seems to say ... And again, I may be misreading it. It seems to say at the end that not to agree to this ... It's actually says, "Recognizing that such cases would be extremely rare, by completely removing the requirement to submit to a mutual jurisdiction, trademark owners, businesses," blah, blah, "who are on the receiving end of a UDRP decision would be denied even the simple ability to contest IGO privileges and immunities in a court of competent jurisdiction."

But that is simply not true. As a registrant, if you lost the UDRP, irrespective of the fact that the IGO has refused to be bound by—has not agreed to mutual jurisdiction—you can still go to court and you can still argue. And they can go to court and argue that they're immune. How does this, in any way, create a compromise?

JAY CHAPMAN: I just think we're going to have to agree to disagree, then, on this one because I do see it as a compromise.

CHRIS DISSPAIN: Okay. Anyone else?

JAY CHAPMAN: I don't agree, Chris, that the IGO waives its privileges and immunities by agreeing to mutual jurisdiction. I don't think that's a for sure thing.

CHRIS DISSPAIN: Okay. But would you agree with me that, under our current proposal, you, as a registrant, still have the right to go to court?

JAY CHAPMAN: Yes.

CHRIS DISSPAIN: And would you agree with me that you are not being denied even the simple ability to contest IGO privileges and immunities?

JAY CHAPMAN: You could go to court. Yes. You could.

CHRIS DISSPAIN: That's my point. That's where I get lost in this suggestion from the BC because it doesn't make sense to me. It seems to try and solve a problem that doesn't exist. But again, I don't want to cut ... As I said, I do not want us to be open the suggestion that I, as a chair, or anyone else for that matter, has been pushing in a particular direction. I want us to have an exhaustive discussion. And if we need to run through until whatever it is time next year, then so be it.

But what I'm going to ask you to do, Jay, is if you want to, is to come back to this on the list, in writing, because it's a lot easier sometimes to actually put things down, and explain yourself, and have other people understand what you're trying to say. So if you can do that and you want to put that in writing to us on the list, that says, "This is why I think it's a compromise. This is what I think it achieves and this is what ..." etc., I'd be really happy to come back to it. Is that fair enough?

JAY CHAPMAN: Thanks, Chris.

CHRIS DISSPAIN: Super. Berry, back to you. David, is that still an old hand or did you want to say something else?

DAVID SATOLA: It was a new hand. But I think if we're moving on, let's move on.

CHRIS DISSPAIN: I apologize for not realizing that. But let's move on, as you say. Okay. Berry, back to you.

BERRY COBB: Thank you, Chris. I'll just note that, as well, as part of the BC comment that they make note that if the mutual jurisdiction requirement were to be removed, then there would only be support for option two of rec four, which of course we'll be

reviewing in the next meeting or two. So keep that in the back of your minds.

CHRIS DISSPAIN: Yeah. Perhaps it might be worth making a note of that so that we can remember it when the time comes. Back to you, Berry, to take us to the next stage.

BERRY COBB: Copy that. I wanted to move down to the IPC's comment because it also suggested a compromise language here. And fortunately, we do have Paul on the call. But basically, I'll just read the second paragraph. "As an alternative, the IPC also supports proposed compromise language that an IGO 'will submit, without prejudice to an IGO complainant's privileges and sovereign immunity, with respect to any challenges to a decision in the administrative proceeding canceling or transferring the domain to the jurisdiction of courts in at least one jurisdiction.'"

I think I may have made an error, that this isn't necessarily a new idea like I thought it would be. They are just restating the support of—

CHRIS DISSPAIN: Yeah. I think that's right, Berry. I don't think it's a new suggestion. Do you see anywhere where you think it is?

BERRY COBB: No. It was my bad. I picked up on this particular part and thought that it was worth flagging. To Jay's comments, though, is this suggesting that this is the same as the BC's comment? Maybe Paul could ... Thank you, Paul.

CHRIS DISSPAIN: Paul, go ahead.

PAUL MCGRADY: Thanks. I think that I [inaudible] not language that I [inaudible]—

CHRIS DISSPAIN: Paul, I don't know whether or not you've got an ongoing problem with your microphone but you're incredibly choppy. Do you want to dial in? Yep. Call in. Cool. Let us take a brief moment to wait for Paul to dial back in. Berry, what's next? Do you want us to go back and go through the comments in order now, once we've dealt with this IPC one? Is that the plan?

BERRY COBB: Yes. And I believe the remainder of them are comments that were posed to the recommendation. But as noted, I don't recall ... Other than rationale for providing why there was disagreement to the recommendation, I don't recall substance for allowing the group to try to find a compromise or propose a solution to advance—

CHRIS DISSPAIN: Okay. And appreciating that it is laborious, I would still like each one of them to be read into the—not to text but just the fact that the comment has been made. So I want to do that.

BERRY COBB: After Paul’s intervention, then we’ll—

CHRIS DISSPAIN: Fantastic. Paul, I’m assuming you can turn your microphone on and we can hear you this time, with a bit of luck.

PAUL MCGRADY: Thanks. Can you hear me now?

CHRIS DISSPAIN: That is absolutely fantastic, Paul. You need to get a new microphone for your computer.

PAUL MCGRADY: Yeah. My laptop is just not the best route, apparently. So I will make it a point to dial in on these. This particular comment in the IPC’s comment document wasn’t something that I drafted. And I’m wondering, Berry, can you indulge me? Let’s go back up to the BC comment to see if it mirrors exactly what the BC said.

Okay. So to me, those do look identical. Of course, I’ve undercut the IPC’s argument in the chat—sorry, IPC—because again, I don’t necessarily know what the BC, and frankly the IPC, was

getting at here. So I apologize. I'm going to have to take this back to the IPC and get an explainer to explain it to me. I know we want to scratch it off the list but I do want to do it justice so that I can understand.

CHRIS DISSPAIN:

Thank you, Paul. Based on the fact that they are very similar, if not identical, it's clear that I would not be comfortable just bypassing them without an opportunity for a full explanation. And I acknowledge that Jay is obviously seeing something in the BC one which I don't see. And they may just be because he was involved in the discussions that they had in drafting these comments. I don't know.

But what I would ask is that both of you go back to your respective ... I was about to say "places of worship." That wouldn't have been a good thing to say. Go back to your respective places and get, as you've just described it, Paul, an explainer. And I really would appreciate it if we could try and get it into a note onto the list—not that I'm trying to strangle discussion but I want the discussion to be based on something we can refer to as opposed to just—no offense intended—you, Paul, and Jay just blurting on and then us having to try and figure it out.

So if there is a way of both of you doing that, I would be immensely grateful. Hopefully, we can do that by the time we reconvene on the 13th of December. Anyone got a problem with that or anybody want to make any more comments before we move on? No. Excellent. Paul, your hand is still up. I'm guessing that's the old one. Thank you very much. Berry, back to you.

BERRY COBB: Thank you, Chris. Starting at the top here, we received support to the recommendation from WIPO.

Moving to the second comment from the Internet Commerce Association ... Honestly, I haven't reviewed these prior to the call to give you a summary. But in essence, the ICA does disagree with the recommendation. They did point back to some of the material provided by professor Swaine in the prior working group, specifically quoting here that, "As a purely legal matter, it seems unlikely that the mutual jurisdiction provision, as it may be accepted by an IGO, establishes or occasions a violation of IGO immunity. And it may seem more appropriate to require an IGO to abide by a judicial process, given that it has elected to initiate UDRP proceedings, than it would require a domain name registrant to accept the IGO's preferred alternative."

CHRIS DISSPAIN: Yeah. So leaving aside Professor Swaine's opinion about what might be more or less appropriate, I do think that his advice needs to be addressed—his advice, as opposed to his opinion as to appropriateness. And his advice is, "it seems unlikely that the mutual jurisdiction provision, as it may be accepted ... establishes or occasions a violation of IGO immunities."

So what I would ask is our IGO friends and colleagues to come back to us with a note that actually just deals with that point and says that, in fact, that isn't the case. I do think that it's important we hold everyone's feet to the fire. I've listened over the months to

David—not suggesting anything you’ve said is wrong, David—to David consistently maintaining the position that the IGOs have privileges and immunities and they can choose whether to waive them or not, and that, for want of a better way of putting it, bowing to a mutual jurisdiction is problematic for that reason. I’ve listened to David, and Brian, and others say that.

So I do think ... And it may very well be that you answered this question in the previous version of this PDP, Brian et al. If you did, that’s great. And if you did, that’s great. And if you can point us to that, that will be fantastic. Jay, your hand is up. Go ahead.

JAY CHAPMAN:

I just want to note for the record, Chris, that Professor Swaine was the legal expert, or was the expert employed or contracted by ICANN and is the only neutral expert that I know of that has opined on this subject. Thanks.

CHRIS DISSPAIN:

Yeah. Understood completely. And I apologize for that saying that. I assumed everybody knew. But that is, in fact, correct. So let’s see if we can tackle that point again in time for our next call because I haven’t read this today but my recollection of having read it last week or 10 days ago was that pretty much everything in the ICA’s substantial submission hangs on the premise that an IGO would still be able to argue its immunity in the event that it had not submitted to a mutual jurisdiction. I may be wrong but I think everything hangs on that. Everything of relevance, shall I say, hangs on that.

Can we move on, bearing in mind that we're going to come back to this? Does anybody want to say anything? Brian, I'm conscious I can't see your hands. I'm just going to give you an opportunity to say something if you'd like to.

BRIAN BECKHAM:

Sorry to come off mute so slowly. I obviously agree with what's been said, I think by you, Chris, and Justine, and David. So don't want to add anything there. And of course, we can come back on-list with, again, a confirmation on this waiving immunities question. Thanks.

CHRIS DISSPAIN:

Super. Thank you. And I just want to say, with my chair's hat firmly on my head, I'm not pushing. I want to be clear. Jay, I'm not saying you actually said it specifically but I want to be clear because it's my head. So let's get it out of my head and onto paper. I am not pushing this group in any particular direction, other than to try to push it towards coming to a conclusion and to a consensus-based conclusion.

But one thing I am certain of is that I do not want ... Whatever the conclusion of this PDP is, I do not want this group to be the subject of any criticism around the way that it dealt with the public comments that is remotely justifiable. I have absolutely no doubt there will be criticism. There always is. But most of the time, it's rhetoric and easily ignored. But what I don't want is for there to be any suggestion that carries any weight that we haven't seriously considered the comments that have been made.

So with that said, Berry, your call as to what you want to do next. We did have a couple of other items. No. We didn't. We've dealt with all of those. So do you want to just carry on?

BERRY COBB:

Yes. I think, for the most part, in terms of bringing conclusion to the ICA comment, I believe the rest of this is basically rationale for being opposed to the recommendation, and as you noted, based on the substance of Professor Swaine's comment.

We can move to the next comment, which is Digimedia. I think, in short, it is against recommendation three and points back to the prior working group's first four recommendations that were adopted by the GNSO Council. I don't think there's really much more to say than they don't support the recommendation, full stop.

CHRIS DISSPAIN:

Just keep going until somebody puts their hand up, Berry.

BERRY COBB:

Okay. Then, as I noted two calls ago, we do have a large submission from Leap of Faith as to the reasons for not agreeing with the recommendation three.

CHRIS DISSPAIN:

We've dealt with that one. Or rather, we've discussed it and we'll come back to it if we need to. So I don't think we need to go into any more detail.

BERRY COBB:

I think that probably the primary point or takeaway from the divergence of this is that Leap of Faith goes into great detail about talking about role reversals here, as well as the value of certain domain names. And we continue. Apologies for the scrolling. We talked about the notice of objection. And there was a final part from Leap of Faith—another final part from Leap of Faith and then I believe we get to—we reviewed the Business Constituency—the Registrars.

The Registrars Stakeholder Group had concerns and likely divergence against this recommendation. They note that while the later recommendations provide an arbitration method to appeal decisions, the interim report is silent about how a registrant can still file a court proceeding in a mutual jurisdiction to appeal an adverse outcome. It's imperative that any recommendation that may potentially impact the rights of domain name registrants should clearly specify if and how registrants are still legally protected.

CHRIS DISSPAIN:

Okay. So I think that that goes to an interesting point, which is to make it abundantly clear that the registrant is still entitled to a post ... Maybe it's not clear enough, right? It's clear to me but then we've been in the middle of this. So it's entirely possible it's unclear to others that a registrant can still go to court. So I think that's a takeaway worth taking out and noting, Berry, that we should probably make sure that there is significantly more clarity.

BERRY COBB: We'll flag that as an action for the—

CHRIS DISSPAIN: And Jay's note in the chat says, "Valid point on role reversal." I'm not sure. What was that to do with, Jay?

JAY CHAPMAN: I was just making a note of George's comment, Chris.

CHRIS DISSPAIN: Oh, sorry. Got you. Yes, indeed. That did come up. I remember we did discuss that last week. Yes. Thank you.

Berry, I want to stop for a minute and ask a logistical question. What is the situation with this EPDP group interacting? Just use the Registrars as an example. Is there precedent for a policy development group to meet with and have discussions with a constituency about comments or does that not happen?

BERRY COBB: Mary can correct me if I'm wrong. I don't recall side meetings being formed between group leadership and a specific stakeholder group or constituency. But in the past, there has been at least e-mail outreach to seek clarifications on comments. I don't think that there's anything that would prevent the leadership team here having a side call to better understand the comment that was

submitted with any particular group or commenter. But typically, it's always been done in written form in the past.

CHRIS DISSPAIN: It would be who that would reach out to do that, then, in those circumstances? Perhaps Mary could ... Sorry, Berry.

BERRY COBB: It would be you, as chair. You are the ultimate authority here. Staff can help you draft a letter of outreach or also document any clarifying questions that you're looking to—

CHRIS DISSPAIN: Understood. Thank you. That's great. Paul, the answer to your question in the chat is no. The Registrars are not on this group, which is one of the reasons why I asked the question. I'll get back to that specific in a minute. Jay, go ahead.

JAY CHAPMAN: I was just adding to that, Chris. I was just wondering if it's possible that we could still have a member of the Registrars Stakeholder Group join the EPDP.

CHRIS DISSPAIN: I think they would struggle. But as a principle, I have no problem with it. To be clear, they were asked several times and said no. It's not that they haven't been asked. They were asked as this group formed. They were then asked by me, twice, after I agreed to be

chair. And they didn't ignore it. They came back and said, "There is no interest."

JAY CHAPMAN: But they still could join, right? That's what you're saying?

CHRIS DISSPAIN: I don't know the answer to that question, other than for me to say I can't see a problem with it. But I'm not in charge of the process—or rather the rules, I should say. Berry, go ahead.

BERRY COBB: To answer that question, yes. They still could join per the group guidelines. Basically, any new participants that join, it's on their own responsibility to catch up to the deliberations and to prohibit or prevent rehashing of conversations that have already occurred, especially at this point.

CHRIS DISSPAIN: Of course. Anyway, I think ... Oh. Yes, Paul.

PAUL MCGRADY: Thanks. So then, as I'm reading ... I'm being extra careful because of my prior foot-in-mouth. But as I'm reading this, it sounds to me that it's more concerns than divergence. They just want us to spell it out, that at the end of the day—because we've already been through this exercise where you asked Jay, "Can a losing respondent still go to court?" and Jay says, "Yes." I think

that's right. I really think it's more concerns than divergence. Obviously, the Registrars don't ... They are not engaged in this process for whatever reasons of their own, which we don't have to guess.

But ultimately, I think if we do just a better job explaining in the final report about how anybody can go to court at any time, including even before the UDRP is done, then that addresses this concern. I think my labeling it divergence, we're giving it more weight than it should have, given what the text says.

Ultimately, this is realpolitik and so I apologize. But if it really is a divergence, the Registrars aren't here to interfere with us getting to consensus on a final report. So to the extent that it's divergence, that would be a Council problem, not an us problem, if that makes sense. I'm not saying let's avoid the question. I'm saying let's answer the question but not overreact to what this actually says. Thanks.

CHRIS DISSPAIN:

Sure. Thank you, Paul. And I appreciate that. Irrespective, I think, given the comments the Registrars made in their comments—chose to call out that they weren't involved, and suggest that that was relevant, and chose to suggest that there were financial interests—and given that there were a couple of other comments in here that I think may well be misunderstandings, and that they're not represented on the group, it may be—that's why I asked the question—sensible for me to reach out, and perhaps along with John, have a conversation. But let me think about that and decide what I think the right way forward is on that.

And let me say that if we do do that, and if I do decide to do that, I'm equally more than happy if either you, Paul, or you, Jay, want to come back to me and say, "I think a conversation directly with the IPC or the BC would be helpful." Then I'm happy to see if we can do that. I just don't want it to degenerate into a series of push-me/pull-you events. But let's see how we go. Paul, is that your old hand or do you want to say something else? Good. Thank you.

So having dealt with that, Berry, are we through three, inasmuch as we're going to get through three today?

BERRY COBB: I think we're just about done, not including our action items. The ALAC provided support for recommendation three. And then Namecheap—

CHRIS DISSPAIN: Repeated the Registrars' comments, if I recall.

BERRY COBB: Correct, mostly, but did provide a little bit more rationale. Maybe this is ... I didn't recall any suggestion about moving the recommendation forward. But you are correct. It is in alignment with—

CHRIS DISSPAIN: That's because ... I can't remember the guy's name now. The Namecheap guy who's on the Registrar Constituency actually

wrote the Registrars’—held the pen for the Registrars’ comments. So there’s no surprise there. Okay.

BERRY COBB: So absent of that, then we’ve reviewed through the—

CHRIS DISSPAIN: Okay. So just to summarize, then, we are not dismissing the LEAP, Leap of Faith, comments completely. We are saying that we may need to pull those back in when we come to our discussion on arbitration if we run into challenges on the arbitration discussion. That’s one.

We are asking Jay and Paul to go to their respective constituencies and see if they can figure out what actually was intended or get a clearer explanation of why that is a compromise. And I’ve asked both Jay and Paul if they would post to the list, if they manage to achieve that, which would be fantastic.

Brian, I can see your hand. I’ll get to you in a sec. And we are ... No. I think that covered it. So, Brian, go ahead.

BRIAN BECKHAM: Yeah. Hi, everybody. Just wanted to say ... I couldn’t unmute myself earlier but I did receive some feedback—some documentation that I will have to go through—from the UN Office of Legal Counsel. And perhaps, what I can do is ... And apologies. That came through just before the call. So maybe what I can do is

get together with Paul and Susan and see if that doesn't help us come back to the group.

CHRIS DISSPAIN: Oh. That's in respect to your recommendation number one thing, yes?

BRIAN BECKHAM: Exactly.

CHRIS DISSPAIN: Or number two? Super. Thank you, Brian. While I've got you, where was one other thing I'd forgotten, which was that you guys will come back to us with any comments you've got on Professor Swaine's suggestion that you're not waiving your immunities by agreeing to mutual jurisdiction. That was the other third or fourth point of takeaways from this. Okay?

BRIAN BECKHAM: Okay.

CHRIS DISSPAIN: Thanks, Brian. Fantastic. Berry, I can't see any point in carrying on for another 10 minutes. Back to you to close off logistics.

BERRY COBB: Yes. In terms of rec three, PCRT, we're done. Staff will start providing responses based on last meeting's and this meeting's

discussion, which of course, will be pending updates based on the action items. As I noted in the chat, staff will send out ... I believe we have three primary action items from today's call. And the next call, as noted, won't be on the 6th. We'll return or reconvene on the 13th at the same time, 15:00 UTC.

And I think in terms of a preview of an agenda, we'll circle back to recommendation one, review through the action items completed over the next week and a half to two weeks, and then hopefully begin review of recommendation four/five.

CHRIS DISSPAIN:

Thank you, Berry. So if I can say, given that we have a gap now ... We're not meeting next Monday. We have two weeks. That is an encouragement now for everyone to please deal with the stuff that we need to deal with, and to deal with it on the list as well, and have a discussion on-list rather than just waiting for the call to turn up with a bunch of stuff.

And if, Paul or Jay, you do want to reach out, or you do think that there is a benefit to having a call with me and whoever else—John, probably—in respect to your constituencies, then let me know. And let us reconvene in two weeks, having hopefully used the list to good effect. Any last comments before we close the call? No? Okay.

Look, everybody. Thank you very much. It's sometimes challenging to appear to be making progress. But actually, I think we are making progress and I appreciate everyone's willingness to discuss and to continue being involved. Thank you all very

much. See you in two weeks. You can close the meeting now, Terri.

TERRI AGNEW: Thank you. I will stop recording and disconnect all remaining lines, as the meeting has been adjourned. Thanks, all. Stay well.

[END OF TRANSCRIPTION]