
ICANN Transcription

EPDP Specific Curative Rights Protections IGOs

Monday, 07 February 2022 at 15:00 UTC

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TERRI AGNEW:

Good morning, good afternoon, and good evening. And welcome to the EPDP Specific Curative Rights Protections for IGOs call taking place on Monday the 7th of February 2022 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 panelists. When using chat, please change selection from Hosts and Panelists to Everyone. That way, the attendees will be able to view the chat. Attendees will have View Only to the chat.

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Alternates are not allowed to engage in chat, apart from private chat, or use any other Zoom room functionalities such as raising hands, agreeing, or disagreeing.

As a reminder, the Alternate Assignment Form must be 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 any updates to share, please raise your hand or speak up now. Seeing or hearing no one. If you do need assistance, please e-mail 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, Terri. Welcome, everybody. Thanks for making the effort to be here. I'm going to start by asking Paul to speak since your hand is up, Paul.

PAUL MCGRADY: Thanks, Chris. I was being switched over from Attendee to Panelist when the Statement of Interest thing rolled around. I made a few technical changes to mine, indicating some small groups that I am on, on council and this or that thing. So no major [inaudible] change, but a slight change. Thanks.

CHRIS DISSPAIN: Thanks, Paul. Fantastic. Okay, so welcome, everybody. As I said on our last call, we are reaching the stage with this where we're not that far away from me calling it and saying that we need to talk about what you can't live with stuff. But we're not quite there yet. I think we need a little bit more discussion.

We have in front of us at the moment two suggested ways of dealing with Recommendation 3: Version 1 which was drafted by me and Mary and Version 2 which was submitted by the IGOs. I appreciate the comments that Matt made on behalf of the IGOs this morning to say that they're not comfortable with Version 1. And I appreciate that.

But we will need to go through both of those versions to give everybody an opportunity to explain why they are not comfortable or can't live with it or can live with it being that they might not like it very much.

And that's what I propose to do. Before we start doing that, does anybody want to say anything? Okay. So Berry, I'll just check in with you to see if there's anything that you want to cover before we start.

BERRY COBB: Nothing for me.

CHRIS DISSPAIN: Okay. Is Mary going to be on this call or is she not available today?

BERRY COBB: Yes. Her computer had to reboot. She'll be on in a few minutes.

CHRIS DISSPAIN: Honestly. Computers, huh? Okay, cool. So let's have a look at Recommendation 3 and the two versions that we've got in front of us. In essence, the first one ... The main difference between the first one and the second one ...

Well, there are two main differences. One is the nomination of a jurisdiction—or a court, rather—in the first one which is absent in second one. And the second is the requirement to go to a particular court which exists in the second one but not in the first.

And thank you, Steve. Welcome, Mary. Congratulations on rebooting your computer.

So, [what I want to do], let's deal with the first one first. (i) simply says you are exempt from the 3(b)(ix) thing about submitting. So that should be clear and easy, and shouldn't cause anybody any problems. (ii) is a clear statement, I hope, that says "an IGO Complainant should specify at the time it files the complaint which of a court in either the location of the registrant or the relevant registrar's principal office"—we know that text, that's a kind of standard text—"the registrant should use in the event that it decides to challenge the decision ... and ..."

And this is where it's slightly amended different and, I would hope, a lot clearer than it previously was. "... the registrant be required to acknowledge the specification and further acknowledge that the making of that"—so the specifying of it—"by the IGO Complainant does not constitute a waiver ... of the ... privileges or immunities" or in any way affect the complainant's right to claim its privileges and immunities and that it is not subject to the jurisdiction of the specified court.

So, let's discuss that. I understand from Matt's e-mail that there is concern in the IGOs that that still could cause an issue of them being subject to a jurisdiction. I have to say that I'm at a loss to understand why that would be. But I'm more than happy to listen with an open mind as to what that would be. Matt, I'll come to you in one second.

I noticed, not that it matters. The whole world doesn't collapse if we don't have Brian on the call. I'll just make the point that Brian isn't with us. I don't know if he's going to be able to join us today or not. But I'm just noting for the record that he's not here.

Matt, please go ahead and then we'll go to David after you. Matt, the floor is yours.

MATT COLEMAN: Hi, Chris. Just to let you know, Brian is not very well today. So I don't think he will be [inaudible].

CHRIS DISSPAIN: Oh, that's a shame.

MATT COLEMAN: So it's fallen to us to defend [inaudible].

CHRIS DISSPAIN: To defend your position.

MATT COLEMAN: So, taking [inaudible] of Version 1, that requires an IGO to specify one of two courts in case the respondent wishes to challenge the UDRP decision. So from our [inaudible], the IGO here is agreeing to appear before this court then the purposes of an appeal. And it's that agreement to have a dispute heard in a particular forum which we think could be deemed to constitute submission to jurisdiction.

CHRIS DISSPAIN: But it doesn't say that, though. Does it? Where does it say that they're agreeing to appear and for an appeal to be heard?

MATT COLEMAN: It says, “an IGO Complainant ... be required to specify at the time it files its complaint.” Now, by specifying, I think you can fairly impute that they are agreeing to go before that court to hear the appeal.

CHRIS DISSPAIN: Okay. Let's assume for a moment that that's correct. It also quite clearly states that they are entitled to claim that they're not subject to the jurisdiction of the court.

MATT COLEMAN: Right, but I think—

CHRIS DISSPAIN: So I don't understand why that doesn't ... That would be the case, irrespective of whether you specified or not. Wouldn't it? [inaudible].

MATT COLEMAN: [inaudible].

CHRIS DISSPAIN: Sorry, go ahead.

MATT COLEMAN: No. Go ahead, please.

CHRIS DISSPAIN: Well, all I'm saying was ignore the specification. If the registrant simply issued proceedings in any court at all. But let's just assume, for the sake of this discussion, that they issue proceedings in their own jurisdiction, the registrant's jurisdiction. If you want to argue, you're going to have to turn up.

MATT COLEMAN: Right. But there isn't a pre-existing agreement in that situation. I mean, here I think what you have is an agreement in advance between the IGO and the registrant for the dispute to be heard in a particular court if the registrant isn't comfortable with arbitration.

CHRIS DISSPAIN: I'll accept that, but I don't understand why that matters.

MATT COLEMAN: Because I think that agreement is the essence of a submission to jurisdiction. That's what a submission ... I mean, at least from my understanding, a submission to jurisdiction is an agreement between two parties to have a dispute heard in a particular forum.

CHRIS DISSPAIN: The disagreement says, "I'll specify a court, but you agree that you know that I'm going to say that I'm not subject to the jurisdiction." Now irrespective of the court, I could [find] the registrant. Irrespective of the course, I could turn up and argue

that you are subject to the jurisdiction, and you would turn up and argue that you're not.

So why does the fact that you've agreed a) we'll do it in Court A, and b) you acknowledge that I'm going to turn up ... Sorry, I acknowledge that you're going to turn up and argue that you are not subject to the jurisdiction. What are you giving up?

MATT COLEMAN: Sorry, I'm not quite sure I understand your question.

CHRIS DISSPAIN: Okay, let me stop there. Let's go to David. Otherwise, I think the ball's going to bounce around just between you and me. Let's go to David and see what David has to say. And then we'll come back if that's okay. Is that all right with you?

MATT COLEMAN: Yeah, of course.

CHRIS DISSPAIN: Okay, let's do that. David, go ahead.

DAVID SATOLA: Thank you, Chris. Good morning, good afternoon, everyone. So just in response, Chris, to your battery of questions, I would say the difference is that it's not up to the registrant to agree that our action is not a waiver. That's for a court to decide. So I appreciate

that you've attempted to draft that in here, but I don't think that's how it would work.

As we have said over the past year, it is the right of the IGO to waive or not its privileges and immunities. I think the other problem with this formulation is, I don't see anywhere in it the reality of the statutory requirement that we know applies under the Bretton Woods Act, for example. And that's just one example of potentially other laws or binding judicial decisions that [would have] already established in other jurisdictions for other IGOs.

To further answer your question, I don't have any case law were jurisprudence or hornbook kind of knowledge, speculation or otherwise, that would suggest that the mechanism that you have provided there would in fact not be a waiver. I know that you have drafted it and that it is your belief that you have provided that with us. But I don't have any legal comfort that that's what would happen.

I do have cases that are clear that agreement to submission to a jurisdiction is a waiver of our immunity. So I do have that. So I don't know what my incentive is to agree to this when we have provided in Version 2 below, I think a solution that gets you to the same place where the registrant gets its day in court if it wants to, it recognizes the statutory reality that applies currently, and it doesn't force us to take an act or to render a decision which would get us perilously close or into a vague area, at least, where we waived our immunities. It's just not going to work for us.

I actually think that what ... And I know we're not talking about Version 2 right now. So in Version 1, very happy with (i). Maybe

keep that for a revised Version 2. But I think that what we what we've attempted to do in version 2 is provide all those things—recognizing those realities, giving the registrants there right in court, acknowledging our rights as IGOs to waive our immunities, and all the same result in the end. Thank you.

CHRIS DISSPAIN:

Well, okay, so given that you've raised it, let me ask you a comparative question between the two. And Matt, I know your hand is up. And both of you may want to try and deal with this.

Why is it that you can say that it is for a court to decide whether you have waived your rights or not, on the one hand, but on the other hand say it should not be for a court to decide whether it has jurisdiction or not? And that that matter should be agreed up front and a designated code should be used.

Surely, the same rules applies to both. It's for the court to decide that it doesn't have the jurisdiction rather than for you to say, "Well, there's an act says that says it has to be in the federal court in Washington. Therefore, it does.

What's the distinction between those two things that makes one of them acceptable and the other one not?

DAVID SATOLA:

I don't think that's the question, Chris. I think the question is, because of the way that privileges and immunities work, it's up to the IGO to decide whether to waive it or not. Courts can have an opinion and registrants can have an opinion. And I don't mean

anything by this, but it doesn't matter what the registrant thinks. And it doesn't matter what ICANN think about our waiver or not. It's a nice kind of expression and I appreciate that, but it doesn't provide me with the kind of legal certainty that I would need.

CHRIS DISSPAIN:

No, I understand that. And I'm saying [I might not] agree with you, but I take the point you're making. And yet on the other side of the fence, you seek to say that rather than saying, "We're going to agree that the registrant's court or any court ..." Sorry, I'll start again.

You are prepared to say, "There is a court in which we'll go to." You are prepared to designate that court. You're just not prepared to—

DAVID SATOLA:

We didn't designate the court.

CHRIS DISSPAIN:

Well, okay. Let me put it another way, then. You are saying that a court should not ... You are saying that it is up to the court to decide whether you have waived your privileges and immunities or not. And I'm accepting that for the moment. So in other words, you're saying that Point B on Version 1 which says "the registrant acknowledges" is all very well but—and if I'm getting this wrong and I'm paraphrasing you incorrectly, obviously tell me—but you're saying B is all very well, but actually it doesn't mean

anything because at the end of the day, it's for the court to decide—on the one hand.

But on the other hand, in your Version 2, you're saying it's not for a court to decide that it has jurisdiction or not. We're saying up front, "Only this court has jurisdiction, and this is the only court you can use." I don't understand why it's not okay for any court to make its decision about whether it has jurisdiction or not.

DAVID SATOLA: Well, any court can say that.

CHRIS DISSPAIN: right.

DAVID SATOLA: But I think one distinction is that in all those other cases, it's not the IGO saying, "Yeah, we're going to go to that court and duke it out." Okay? It's some other person saying it. So we haven't had to waive our rights. We can choose to go to whatever court we want to or not want to. That's up to us. That's how the waivers work.

Then the courts will evaluate that. And as I've said in the past, in the case of IGOs we have functional immunity. The court will analyze whether in the case of trying to defend a domain, that that is within our mandate and therefore withing our functional immunity. That's what it will decide. If it decides that, yeah, the activity of defending your domain in this fashion is critical to your mandate as an IGO, therefore if you want to maintain your

privileges and immunities then we don't hear the case. That's what they'll decide. They won't decide whether we have the immunities or not. We have them. They'll decide whether they apply in a case.

CHRIS DISSPAIN:

I accept that completely. And you would turn up and argue ... I suppose you could choose not to turn up. But assuming you did, you'd turn up and argue that those immunities do apply. Or you would turn up and argue that, actually, the court doesn't even have jurisdiction. Right? So no one is disagreeing with that. That is your right.

But I want to try and move the discussion [inaudible] a little bit and see ... Because my goal is to try and solve the problem. So [inaudible].

DAVID SATOLA:

Yeah, so [inaudible]. Sorry, Chris.

CHRIS DISSPAIN:

Go ahead.

DAVID SATOLA:

My point is that in Version 1 (ii), you're assigning to the IGO the responsibility of identifying a court to which it's going to go and make this claim. And that's, for us, a nonstarter. What we've said is—in the second version—"Fine, if the registrant wants to go to the court where it has its home office or the registrar has its home

office, that's fine." Or it should do the responsible due diligence thing and check out whether there's some other court that's been designated for the claimant to go to to raise its issue.

But we're not involved in that. We're not involved in saying, "Oh, yeah. We're going to go to that court." We don't have to take any act to waive our privileges and immunities. That's the difference. You've—

CHRIS DISSPAIN: Yeah, I completely understand that. Yep, got it. Sorry, I didn't mean to stop you [inaudible]. I apologize.

DAVID SATOLA: Okay. I'm good for now, thanks.

CHRIS DISSPAIN: Okay. Paul, I'll come to you in one second. What I want to try and do is to concentrate on the key points. I don't care whether or not it's an explanatory text to Recommendation 3 or part of Recommendation 4 or whatever. What I care about is specifically this, I think. There are two distinct things here. One is whether it's necessary, it is correct to say that Version 2 ... Sorry, I'll start again.

In Version 2 it reads to me as if it's saying you must use a particular court if there is a court that is designated to hear the client. That's one point. The second point is that in Version 1, it is the IGO that's saying, "We're specifying this court."

So my question, I think, is why do we think it is necessary for the IGO to specify? Why not just say a registrant can go to court, and make it clear that they can go to any court that they like? In other words, you kind of smash the two of those things together. You take out the specification by the IGO, but you acknowledge that the registrant can go to court and you take out the reference to any designated court to make it clear that the registrant can go anywhere it likes.

That's kind of where my head is at right now, but I just wanted to put that out there. And I'm very interested to hear from people such as Jay. But Paul, your hand is up. You're next. Go ahead.

PAUL MCGRADY:

Thanks. I guess I keep going back to the purpose of all this, and I think this is about the registrar not implementing a decision to transfer while the parties work all this out. It's not really about the complainant submitting to a court. Yeah, the real UDRP requires the complainant to consent to a particular court, but we've already agreed in principle that for IGOs, the complainants aren't going to have to do that bit.

So what we really need is not so much a consent or an agreement or a whiff of an agreement or nonobjection or any of that other stuff from the complainant. What we really need is something that says if the losing registrant files a complaint in their own home court or in the court of the registrar, then the registrar will not implement the decision, pending the outcome of that complaint.

And that, I think, does it. Because that's what we're really after here. And that sort of takes it out of the realm of whether or not the IGO consents or not. It becomes irrelevant. It's about the UDRP decision not being implemented. And then these two parties—the IGO and the Losing Registrant—can fight all day in court or they can agree to go to ...

If the Losing Registrant loses because the court says, "Yeah, I don't have jurisdiction over the IGO," then they can go to arbitration or not depending on how we end up working that issue out. But it's really not about, at this point, whether or not the IGO consents. It will still be that way for the brand owner, which is a bum deal. But this isn't Phase 2A. This isn't Phase 2 of the RPM.

We're looking at very something very narrow here, so I really think it's about how do we instruct the registrar, not how do we get some kind of agreement of some sort from the IGO. So just a thought. Thanks.

CHRIS DISSPAIN:

Thanks, Paul. And David, I can see your hand. I'll get to you in a second.

Let me ask others to think on that. Is that what it's about? I'm not saying it isn't. I'm just asking. To me, at least in part, it's about ... It seems to me that the Business Constituency suggestion and the subsequent clarification of that suggestion was built around, for whatever reason, getting it clear in the policy that a registrant has the right to go to court and that they were comfortable to make it clear that the IGO ...

And I'm acknowledging that it might not make it clear for the IGOs, but they were comfortable to make it clear that the IGOs could claim they had privileges and immunities and say that they were not subject to the jurisdiction, but that it was necessary to state clearly that the registrant was entitled to make that application to court.

And again, acknowledging that if we stick with our current version of Recommendation 4, that would be a step because if the court refused to hear the substantive case because the IGOs were successful with their claim of immunity and privileges, etc., then arbitration could follow. And I'm just wondering if that's the case, in addition to what Paul is just said.

But David, you're up next. Go ahead, please.

DAVID SATOLA:

Thank you, Chris. I rather liked what Paul said, and I think there was a lot of sense in it and sense behind it. And it might be interesting to see some drafting around that. In a general sense it sounds quite reasonable, and I think it gets us closer to the original recommendation that we had when this went out for public consultation.

I think where we've gotten our knickers in a twist a little bit is in trying to respond to some of the comments that came in, and in particular to the Business Constituency's language about privileges and immunities and submission to courts and stuff like that which I think is where we've gotten tied up. I think it is about that that sort of interim period where the registrant and the IGO

are duking it out and trying to resolve it and the inactivity or the sort of state of suspension that occurs while that is being resolved.

If we can reflect that in a way which is quite neutral, then fine. And of course, the registrant can go to whatever court it wants to. What we were talking about, I think, were the practicalities of it in that, in certain cases, if it wants to go to the ... And I'm from Wisconsin, so I'm not saying anything bad about Wisconsin. I'm just saying if the registrant wants to go to the court in Wisconsin, great. Go for it. That's your right. But the Wisconsin court's going to kick you over to the district, so why waste the money? [inaudible].

CHRIS DISSPAIN:

To be clear then, David, would you be comfortable with ... And I know Jay's next. I'll come to Jay in a second. Would you be comfortable, or do you think you might be comfortable, with a circumstance where what we simply said was, at this stage—the stage we're at where the UDRP has found for the complainant—the registrant has an option to bring court proceedings?

I have to be honest and say that I had assumed it was a given that the registrar would do nothing with the domain name, pending that. Which maybe that's just me being over simplistic, but I'd certainly assumed that that was all of our understanding. So that the registrant could go to court and then say nothing else it's all about your immunities or otherwise. And simply just say the registrant could go to court and if ...

I think we have to say something about the about the immunities because the alternative would be to have a situation which I think

we've all accepted is not correct is. Because if you did go to court and if you did have a substantive argument—either because you agreed to or because it was, whatever—you ended up having a substantial argument on the [inaudible]. I don't think anyone is suggesting, are they, that after there should be an opportunity to go to arbitration.

I think that the understanding with respect to arbitration was only in the event that a court refused to hear the actual issue because of the claim that there were privileges and immunities and therefore they didn't have jurisdiction. So if we said that, is that enough and would that be okay?

DAVID SATOLA: Since my mic is still open Chris [inaudible].

CHRIS DISSPAIN: Yeah, that's what I'm asking. I was asking you to respond or think about it. Whatever you want to say.

DAVID SATOLA: Well, a quick response and then I'll go on mute. I think you're right that there should be some notification somewhere to the registrants who might now know necessarily about the privileges and immunities. And maybe it's in a footnote or the explanatory text which would say, "You can go to court, but the IGO might raise its privileges and immunities and you might not get the relief that you want."

So just to signal to registrants that you can exercise this right, but it doesn't mean that you're going to get what you want. And that's something that we can discuss further. I think the more neutral language or the neutral approach that you're suggesting does have some appeal, but we'd need to look at it obviously. Over.

CHRIS DISSPAIN: Thank you, David. Jay, go ahead.

JAY CHAPMAN: Thanks, Chris. Hi, everyone. I just want to celebrate the fact that David said something earlier that I completely agree with, which is the idea that the ... No, I don't mean to make fun of it. I'm always glad when we can agree. I'm not making light of it. Please understand.

When he said that ... In Version 1 (2)(b), he kind of objected that the registrant had to make some sort of affirmative, agreeing to that. I agree with that. Whatever we come up with here, it's ICANN policy. It's stated. And that probably should be sufficient. So I don't like that.

I really appreciate Paul's idea. It's really got me thinking and I think it is something to consider. Ultimately if what we're saying is that the registrant can decide for itself what court it goes to, ultimately Paul's right. All we're talking about is ... Or what's really happening here is, is the domain going to be frozen while all of this is being hashed out. Right? I think Paul's idea is something worth thinking about. I think that's where I'm at, at this point.

CHRIS DISSPAIN: Thanks, Jay. I'm just typing in the chat, but I can say it now. Berry/Mary, can we get our original wording—the wording of the original, the recommendation that went out for public comment—up, please? So we can have a look at what we originally said. Because it seems to me that—if I can sort of interpret what everybody's saying—if we end up in a situation where what we're saying is if the registrant loses at this stage of UDP, then the registrant can bring court proceedings if it wants to do so. The registrant is aware that the IGO has the right to claim that it's not subject to the jurisdiction. No specification's been made. Nothing. It has to be said somewhere, I think, that subject to its privileges and immunities the IGO may not be subject to the jurisdiction. And in the event that the court doesn't hear the issue at hand but refuses to do so because of that reason, then there's arbitration. Then I think that would actually solve the problem.

So is this the original stuff that we had? I guess it must be. So it recommends that “an IGO Complainant be exempt from the requirement to state that it will submit ...” Yes, but where did we deal with the ... did we not have anything in the original recommendation that dealt with what happens with the court proceedings? Or did it just say that?

Mary.

MARY WONG: Hi, Chris. We did not in this Recommendation 3. In terms of what happens in court proceedings, I think that fell under

Recommendation 4, as I tried to confirm in the chat. Because, as you recall, for the team it was a matter of proceeding from Recommendation 3 and then what happens. So chronologically, Recommendation 3 deals with the situation at the point in time when the IGO Complainant files. And then Recommendation 4 goes on to deal with what happens after a UDRP or URS decision is rendered.

CHRIS DISSPAIN:

Take us to Recommendation 4 as we have it currently, semi-agreed, if you can and let's have a look at that up on the screen. Just for the sake of it, Berry, can you take out all of the changes and just product the final text. I know we're not formally agreed on it yet, but let's at least be able to read it properly. All right, can you make it ... That's brilliant. So let's just have a read of that for a couple of minutes.

BERRY COBB:

Chris, while people are reading, just to note that this version is what was sent out on last Thursday, I believe. This is Recommendations 4 and 5 in the same document. The two primary changes ... One, there seems to be momentum towards Option 2, so this updated text reflects Option 2, as there are no more option possibility.

And then secondarily, Mary made some edits with respect to some of the comments that we reviewed from the public comment proceeding in attempts to clarify some of the proposed provisions here. Thanks.

CHRIS DISSPAIN: So unless I'm missing something what this doesn't seem to cover is dealing with ... Okay, so it's (v) that deals with this issue, it seems to me. So "the registrant initiates court proceeding with the result that the court decides not to hear the merits of the case, the registrant may submit ..."

So what's missing is a reference to immunities. But ignore that for a minute. Assume that there was there somewhere so that it was clear why they would not hear the merits of the case because [inaudible] doesn't seem to be clear.

"... the registrant may submit the dispute to binding arbitration within 10 days ..." So that is the crux of it from the point of view of what would happen if the jurisdictional requirement to go to the registrar or the registrant's jurisdiction were removed and if there was an explanation somewhere that IGOs have these immunities, etc., and are likely to argue that they're not subject to the jurisdiction of the court.

And then there was this this piece about, in the event that the court decides not to hear the merits of the case. Would that deal with the issue?

Mary.

MARY WONG: Thank you, Chris. And I see David, so I'll keep it brief. From the staff perspective thinking about this, that is of course on the assumption that Recommendation 3 does make it clear that

Paragraph 3 or whatever it is in the UDRP and URS do not apply to the IGOs.

CHRIS DISSPAIN: Yes, of course.

MARY WONG: In which case, then being able to explain, to have the recommendation here that you see on screen explain the chronology and the consequences, but then have some other checks that talk about the possible implications so that, as David was saying earlier, the registrant—and as Jay agrees—understands. That would seem to work, for what it's worth.

CHRIS DISSPAIN: Yeah. David, go ahead.

DAVID SATOLA: Thanks, Chris. Thanks, Mary. Yeah, I think that broadly would cover it. I recall over the late spring/summer when we were discussing this issue and I was rightfully accused of proposing wooly language by our distinguished chair. It was intentionally wooly because I think that, to get into some of these practicalities and details and to try and do it in a sensible way that would cover all the situations was just really hard. And I think we've now had a couple months rehashing this and trying to do it again, and I think we've come around to conclude that it's not a straightforward proposition.

So I'm still of the view that if you if you plop in privileges and immunities somewhere in the text, then it ... I don't know if that helps. [inaudible].

CHRIS DISSPAIN: I think we're going to need to do that. We're going to need to do that.

DAVID SATOLA: There might be other reasons why a court doesn't decide to hear it on the merits. Who knows? I'd be happy, as I think Mary suggested, to look at how an explanatory text might flesh that out. [Thanks].

CHRIS DISSPAIN: Thanks, David. I think it needs to probably ... And I really came to get feedback on this, as I said. I think it needs to probably be a little bit more than that. It seems to me where one puts this, I'm not entirely sure. But I'm worried about explanatory text because there needs to be ...

We're making recommendations, and the recommendations need to become the policy. And explanatory text about what might happen isn't necessarily going to cut it. So I think we're all agreed—if we agree to the whole thing, and I'm acknowledging that for a minute—that we need to make a very clear statement about an IGO's not being subject to the Mutual Jurisdiction stuff and all of that. So I think that's covered.

What I think probably needs to happen ... And I think we can probably say if a registrant goes to court ... No, I'll get to that in a second. I'll do it chronologically. So we can say that it's about Mutual Jurisdiction and submitting and all of that.

I think our recommendations need to say that—the policy needs to say—a registrant can go to court at this stage if the registrant chooses to do so, number one. Number two, that because IGOs have privileges and immunities, they are likely/will—whatever the right words are—argue in court that they are not subject to the jurisdiction of that court. Or it is open to them that they are not subject to the jurisdiction of that court. And in the event that they are successful in their argument and the court does not hear the case, then the registrant can avail themselves of the right to go to arbitration.

I think if you had a straightforward explanation in the policy that that is what can happen ... So in other words, Step 1: not required to do this—Mutual Jurisdiction, submission, etc., submission, etc. Step 2: win. Step 2: registrant has the right to go to court. And then all of those things follow. And then if they lose or if there's no hearing—arbitration. Or skip Step 3 and go straight to arbitration which, of course, is the other alternative the registrant has.

Paul, Jay, others, is that making sense to you from—if I could put it this way—the other side of the fence as a way that we could deal with it so that it's clear that the registrant can go to court, it's clear that the IGOs can argue that they're immune, and it's clear that the final step in that event is arbitration? Thoughts/comments?

Jay, go ahead.

JAY CHAPMAN:

Thanks, Chris. So again, I'm more than willing to go down this conceptual path and just see kind of where things land. Get some other people's thoughts on this. So I'd kind of like to see it as we draft out the idea and put it on paper. Then we can share and try and assess it from that standpoint. That certainly makes sense. I do appreciate the discussion.

There's some other things. And again, I want to make sure. I don't want to get ahead of ourselves. So if we're just purely talking about Recommendation 3 or if now we've gone into the Recommendation 4 look as well. I mean, just kind of in the drafts, if we're talking about those. There are some ...

No different than the IGO says, "Well, we don't want to say we agree to this or we don't want to say we agree to these two locations." Maybe we're past that already. I don't know. There are some other things. I just don't where we're at in the discussion.

CHRIS DISSPAIN:

Locations are out of the games. In the current structure that I'm proposing, locations are out of the game. It's entirely up to the registrant.

JAY CHAPMAN:

Okay.

CHRIS DISSPAIN: Does that make sense?

JAY CHAPMAN: Yes, it does. Well then I'd just like to speak ... Maybe if I can just step to another concern [inaudible]—

CHRIS DISSPAIN: Yes, go ahead.

JAY CHAPMAN: —talking about ... So we're not talking about location. Now we're just talking about what everyone is agreeing to, and specifically within this new Recommendation 4. I think it's (ii).

CHRIS DISSPAIN: Yes.

JAY CHAPMAN: It's, again, requiring an affirmative, express ... Or have to affirmatively agree about binding arbitration prior to going to court. And I don't want the idea that, because the registrant had to agree prior to going to court that it would go arbitration, I don't want that to be an impediment for the registrant to go to court. I hope I'm making sense here.

CHRIS DISSPAIN: Yeah. You mean you don't want the other party to turn up at court and argue that you shouldn't be heard because you've already said you've agreed to go to arbitration.

JAY CHAPMAN: Well said. Thank you. Yes.

CHRIS DISSPAIN: Okay, that's fine. I accept that. I don't think there's ever any intention that that would be the case, but I would ask Mary and the team to make a note of that and make sure that we made that clear because that was not the intention. It's not the intention that ...

It's the intention that an IGO can turn up at court and fight the case on its merit if it chooses to do so. And David has indicated that there may, indeed, be occasions when they choose to do that. [inaudible], but they can do that.

JAY CHAPMAN: Yeah [inaudible].

CHRIS DISSPAIN: And secondly ... Sorry, go ahead.

JAY CHAPMAN: No, no, no. Forgive me for interrupting. Go ahead. I do have something else, but go ahead, please.

CHRIS DISSPAIN: Okay. And then secondly, they can argue that they're immune and they're not subject to the jurisdiction But I take your point, and I think we can fix that relatively simply with the wording.

So let's assume ... Let's say Mary and the team have taken note of that. Let's assume we're going to deal with that. What was your other point?

JAY CHAPMAN: Actually, it was just kind of in furtherance of that because there are situations, and we've seen those before, where registrants actually haven't been notified. For whatever reason, they didn't get notified. And when you're asking for an affirmative agreement in the situation where there's been a default and someone either didn't get the notification or whatever and then shows up in court and it's, "Well, you didn't agree so we can't go down this path." I just don't want some of those procedural things to [inaudible].

CHRIS DISSPAIN: You're going to have to go back and explain that second bit to me because I don't understand that. If you don't know about it, how could it be suggested that you've agreed to anything?

JAY CHAPMAN: Well, I'm just saying what happens—

CHRIS DISSPAIN: You lost me.

JAY CHAPMAN: It doesn't speak to that. Maybe that's the best way to say it. It doesn't speak to that kind of situation. It doesn't speak to the fact that if there's a situation ... I mean, this is just an example that I came up with. But in the example where a registrant doesn't get notification of the UDRP, there's a default, they lose, then they want to go to court. I mean, there's not really a provision for something like that.

But taking out this idea that there's an affirmative agreement by the registrant prior to going to court, if we remove that, it kind of eliminates that concern. That's all I'm saying.

CHRIS DISSPAIN: So hold on.

JAY CHAPMAN: [inaudible] not making sense?

CHRIS DISSPAIN: Absolutely. And Paul, I can see your hand and I'll get to you in a second. So what you seem to be saying is ... Here's the change. Right? If you don't agree that if you lose in a court because they won't hear it that it will finally be decided by arbitration, then

there's no endgame. There has to be an endgame by which a registrar can know what to do with the name.

So if you don't agree up front, what would happen? You'd go to court. The court would say ... Let's assume the court says, "Sorry, Jay. The IGO is correct in this case. Don't have jurisdiction. Can't deal with it." If there is then no forced step—i.e., either give up or agree to go to arbitration—how do you let the registrar know what to do with the name?

JAY CHAPMAN: Sure. It's a good question. I guess what I'm saying is that agreement by the registrant comes following court, not prior to court. That all.

CHRIS DISSPAIN: Well, what happens if they don't agree? Then you're happy to accept that if they don't agree, that an end to the matter?

JAY CHAPMAN: Well, I mean you have ... Again, Paul's the expert on the ... And everyone else is more of an expert on the specifics, but I think if there's no notification within 10 days, then the domain transfers. I think, maybe.

CHRIS DISSPAIN: Yes, but that's not the same thing. I agree, but that's not the same thing as ... Have a think about it. I'll go to Paul in a second, but have a think about it. It's not the same thing.

So you go to court. The court says, "IGO is correct. We don't have jurisdiction." You could then do what? Because you could continue to go ... You could say, "I'll go to another court." Or, sorry, "I've tried the jurisdiction of ...". And I'm just going to use Wisconsin because David has constantly referred to it. "I've been to Wisconsin. I'm now going to turn up in London." I'm not suggesting this would ever happen and I appreciate that we're chasing our tails here. But at the end of the day, from a purely legal point of view—and you'll accept this, I assume, given your position as a lawyer—there has to be an endgame. You can't just let it keep bouncing around forever.

JAY CHAPMAN: I understand [inaudible].

CHRIS DISSPAIN: I'm not much fussed about whether you agree at the beginning or you agree at the end. I'm just concerned to ensure that, absent you not agreeing, there's an end to the matter. I think is my point.

JAY CHAPMAN: Yeah. Well, I think that makes sense. Sure.

CHRIS DISSPAIN: Okay. Let's put that to one side for a second or not, depending on what Paul wants to talk about. Paul, go ahead.

PAUL MCGRADY:

Thanks. I wanted to talk about Mary's note in the chat which makes me a bit nervous where she says that the registrant won't be limited to one or two jurisdictions. I would invite the contracted parties to speak up if any of them are here, if any of the registrars are here.

If not, I think somebody needs to speak up for them because the reason why it's limited to these two jurisdictions in the usual UDRP is that the registrar has already agreed to the courts where they sit. So that option is harmless for them. And the registrar has already decided to do business in the place where the registrant sits. Right? Or else there would not be a drop-down menu sufficient for the registrar to register a domain name. And so that is a small universe from the registrar's point of view.

And so whatever we fashion here, really, I don't think it can be a wild, free-for-all where the registrant can just file wherever they want because the registrant ... That would put them in a pickle where they could get a complaint filed in [Andorra] and then not really know what to do with that or when a court will make a decision or anything else. Thanks.

CHRIS DISSPAIN:

That makes absolutely perfect sense to me. I just want to check that I've understood it correctly and that it makes sense to me because I've understood it rather than because I misunderstood it.

The jurisdiction, although the fight itself doesn't involve the registrar— it's the registrant and the complainant—the jurisdiction affects the registrar because they need to deal with the outcome.

And if they can't understand that outcome or they're not present in that jurisdiction and they don't understand dealing with that jurisdiction, that is problematic for them. In simple terms, is that what you're saying, Paul?

PAUL MCGRADY: That's right because they could end up with some of them being filed in a jurisdiction where they can't even read the language.

CHRIS DISSPAIN: I understand completely.

PAUL MCGRADY: Yeah.

CHRIS DISSPAIN: Yeah. I get it. And one assumes that if they're selling a domain name somewhere, then they've accepted that the registrant could use that jurisdiction. I take the point.

Okay. I think that makes sense to me and I can't see why the registrants would have a problem. It's their choice at the end of the day. We're removing the complainant from designating one, so it's either the registrant's jurisdiction or the registrar's jurisdiction. That seems to me to make sense, and I don't know that there's any benefit to the specific [inaudible] registrar to move away from that.

Plus, it has the added extra bonus of meaning that you're not making yet another change to the existing ... You're making a

change to the designation by the complainant, but you're not making a change to the jurisdictions that it would end up in if indeed one went to court.

So that seems to me to make sense. And just let me say before I go to Mary that the goal for me for this discussion is to end up with enough for us to go away and redraft something. And it would be, in fact, I think Recommendations 3 and 4.

And Jay, I know you want to talk about Recommendation 4 as well. And that's fine. We'll do that.

Mary, go ahead.

MARY WONG:

Thanks, Chris. Just to follow upon this point. And we're thinking it through on the staff side. So thank you, Paul, because that's a really important question if it actually is indeed a problem. And to check maybe with the Registrars and potentially with ICANN compliance as well because the way that we read the UDRP is that the registrar is really only required to act or not act when it receives a notice of court proceedings. It doesn't have to check its validity or that it in fact says what the registrant says it says. But we could be wrong on that, so we will check on that.

CHRIS DISSPAIN:

I wouldn't worry. That's fine, Mary, but I don't want to spend too much time and effort on it. It seems to me if we can agree amongst ourselves that it's fine to leave it as the registrant and registrar, then that's fine. But anyway.

MARY WONG: Okay. We'll take a look at everything, obviously.

CHRIS DISSPAIN: Yeah. And did you have ... Sorry, I thought you said you had two points. My apologies.

MARY WONG: Nope.

CHRIS DISSPAIN: Okay, then super. David, go ahead.

DAVID SATOLA: Yeah, thanks. So if we do that, then what do we do about this noxious federal statute that I've got?

CHRIS DISSPAIN: Well, it doesn't matter. Does it? I mean ...

DAVID SATOLA: Well, I don't know. I mean I don't ... That's ...

CHRIS DISSPAIN: Sorry, let me rephrase that. Sorry, it does matter in a different sense.

DAVID SATOLA: Yeah.

CHRIS DISSPAIN: Sorry, whether or not ... There are two distinct points here. One point is, should the registrar be limited ... Sorry. Should the registrant be limited to the current situation which is the registrant's jurisdiction or registrar's jurisdiction? That's one point.

And the second and the different point is, ignoring that, should there be a designation that the registrant has to go to court in a particular jurisdiction? Which is your separate point. So I agree with you. That is a point that we need to discuss, but it's separate from ...

It doesn't matter whether we say "no jurisdiction" or ... Sorry, it doesn't matter whether we say the registrant can choose any jurisdiction or the registrant can choose only its own or the registrar's. In both of those cases, your point still stands that you'd prefer to have your point. Is that fair?

DAVID SATOLA: Yeah.

CHRIS DISSPAIN: Okay.

DAVID SATOLA:

I don't know how it ... I can kind of foresee how the issue would wind its way through U.S. courts or somewhere else. And I appreciate wanting to sit close to UDRP and all of that. And I appreciate the practical point that Paul just raised.

But there is this other practical point, and maybe it goes in, I don't know, the explanatory note or somewhere else. But there are going to be cases, potentially, where either are other courts designated. And I guess the way to resolve that is through ... I don't know that we can resolve it in private rule making because, but I don't think we can ignore it either. Maybe we need to get the ICANN General Counsel in to give us a view on it.

CHRIS DISSPAIN:

But nobody is seeking to ignore it, David. I think the point is this. I could know about it. And I'm not saying that registrants shouldn't know. Okay? Part of the challenge, of course, is that it's completely different from the different IGOs. You have no idea. [And you've said] numerous times yourself. You don't know how it applies to any IGOs generally. You know how it applies to yours and maybe some others. But I completely acknowledge that.

So awareness is one thing, but I must have the right to ignore that if I choose and go to court. Now if I lose, I lose. In the same way that I have the right to say, "I don't care what you tell me about [you waiving] your privileges and immunities. I don't care. I'm ignoring all of that and I'm going to go to court."

And you absolutely have the right to turn up and say, “Well, this man doesn’t know what he’s taking about and we do have these waivers and the court agrees.”

In the same way, I have the right to say, “Well, I know that there’s a statute that says I should go to D.C., but I’m not going to.” And then you turn up and say, “This should be in D.C.” And if you win, you win.

Now I get that none of that makes any sense logically and that any sensible lawyer would advise their client, “This is how it’s going to end up at the end of the day.” But I just don’t see how we can designate that. It’s got to be a matter for the defendant. Otherwise, what we’re doing is handcuffing somebody and telling them they can’t bring legal proceedings in whatever jurisdiction [inaudible].

DAVID SATOLA:

I was with you up until that point. I don’t think we’re handcuffing anyone and preventing them from issuing legal proceedings. And I had attempted to deal with that issue by saying something anodyne about a designated court, if it designated.

So, yeah, they can go to the court. [And I] understand the rationale for why it’s the registrant and why it’s the registrar’s courts and all that. But then there is this thorny issues that we have to deal with, which is that in certain cases there are going to be designated court, and what if we just let them duke it ... Do we let them work it out through procedural process? I don’t know.

CHRIS DISSPAIN: Yeah. I think I'm saying that. Because I think what I'm saying in this is, in the same way as we're saying to a registrant, "This IGO will claim privileges and immunities and may very well win on that. And therefore there won't be a hearing on the substantive issue. Your call," the same thing applies. There is a statute that says, "This IGO hearing should be heard in D.C. Your call." As long as you know.

That's my point, I think. The alternative is for us to say "and you must." And that really does concern me.

DAVID SATOLA: Well, okay. Last point and then I'll go on mute again.

CHRIS DISSPAIN: Yeah.

DAVID SATOLA: On the theory that part of what we're trying to do here is achieve economy and efficiency and not waste either the registrant's or the IGO's resources, if we know that there's an outcome ... Why should I have to send someone out to Wisconsin to make that point? Or why should I even have to file a pleading there when I know where the case should be brought? It does seem like we're just allowing a wasteful process to go ahead.

CHRIS DISSPAIN: Yeah.

DAVID SATOLA: Okay.

CHRIS DISSPAIN: I agree with you. But then having been a lawyer for as long as I have, I came to terms a long time ago that the legal process is wasteful in the extreme. In so many ways.

Paul, go ahead.

PAUL MCGRADY: Thanks. I think we've fully tested the outer limits on this from both sides. One is the free-for-all jurisdiction theory which, as you note, really I think is a nonstarter. And now we're testing the idea that it's not enough to no longer require the IGO to consent to a particular place. But now we want the registrar and the registrant to bare the risk of knowing whatever designated courts the IGO—which they may or may not even know about or believe they're infringing on—happens to have all their stuff subject to.

Again, we're definitely in bridge-too-far territory here, and so I'm hoping we can bring it back to the middle where we were which is making this about registrar comfort and knowing what they can safely not implement, and narrowing the universe of where the registrant can take these kinds of things in relationship to the registrar.

If the IGO is no longer going to be required to consent or mildly agree or hint at a consent or anything else, then saying something

along the lines of then, “Yeah, you have to file where the legislation says we’re subject,” that’s too far, I think. We need to go back to the middle where we were. Thanks.

CHRIS DISSPAIN:

Thanks, Paul. Thanks very much. And thanks, everybody, for the dynamic way that we’ve discussed this so far, and contributions.

I want to move on slightly and test some of the other parts of Recommendation 4. I got the impression—and I may be wrong—that Jay had some stuff to say. And others may have some stuff to say.

So what I want to do try and do with this particular point is to say, Mary, have you got enough now, do you think, to take what we’ve discussed and work with me and come up with a sort of combined suggestion that builds on “not required to submit,” all the stuff that we talked about in the very beginning, a statement about the registrant’s right to go to court, a statement about—in either of those two jurisdictions—ignoring the IGOs completely? And then the possibility of claiming immunities? And then what happens in the even that there’s no substantive hearing?

Are you comfortable? Have you got enough information to work on something with me and we can put it out later in the week?

MARY WONG:

Hi, Chris, and everybody. Yes. In fact, the staff have started discussing it. We are fairly sure that we understand this discussion and the requirements, and we will start working on it.

I'll note that in the chat, Paul and I had talked about doing a follow-up call to make sure that we understand the point that he's making. So I just wanted to put that on the record.

And I did, in a surprise twist, have a second point from earlier which ...

CHRIS DISSPAIN: You see? I knew.

MARY WONG: I know.

CHRIS DISSPAIN: Just on the Paul thing, by all means. But I think we're clear. I mean, it seems to me Paul's point is accepted. But we can't [inaudible]. But anyway, go ahead. What as your second point?

MARY WONG: Thank you. And it seemed like maybe I should say it now as we go into this text for Recommendations 4 and 5. Just to clarify that some of the reasons why we suggest explanatory text or Implementation Guidance or a similar heading in the policy report is that it will also guide the Implementation Team as well as our colleagues who operationalize the recommendations in that when they come to draft final consensus policy language, it is very clear what the intention is, what the boundaries are.

And as a final point to that, we have in the past for other consensus policies—and ICANN remember the exact description—but essentially also put in footnotes or explanatory text into the consensus policies themselves that try to provide the same context for the contracted parties.

CHRIS DISSPAIN: So I'm fine with that. And my personal view is that the more specific and clear we can be in the recommendations, the better. Implementation Review Teams have a tendency to ...

Let me rephrase that. The more clear we can be ... And it's one of the reasons why I agreed that we should at least give some overview of the arbitral rules. The clearer we can be, the better. I don't want this to be relitigated in the Implementation Review Team. I just don't think that's helpful. And I think if we can be clear with both our recommendation and any explanatory text, then that would be really good.

MARY WONG: That's actually right, Chris. I just wanted to say that some of the difficulties or challenges that we've had in the past is really when recommendation text included text that wasn't recommendation. If you know what I'm saying.

CHRIS DISSPAIN: Yeah, exactly. Thanks, Mary. Berry, did you want to say something? Your hand went up.

BERRY COBB:

Just briefly, to build on what Mary was saying about the IRT. And plus one to you, Chris, about, you know, our motivation here is to make the final recommendation text/the implementation notes as clear as possible. Just as one that has lived many IRTs, and Mary is correct that there have been instances in the past where recommendation text wasn't clear and it creates confusion in implementation.

But this topic is so specialized, unlike all the other IRTs, that personally I hope that everyone that is a member on this group participates in that future IRT because anybody else from the community that's not paying close enough attention to this, they don't have ... I don't even have the legal expertise to understand all the nuances to this. So I guess kind of as a shout out or hope and desire that you all help participate on that IRT, should we get there. Thank you.

CHRIS DISSPAIN:

Yeah. Thanks for making everybody's week even more exciting by reminding us all that, even if we manage to pull this off, we're probably going to have to stick with it a bit longer. But no, you're right, Berry. And I do appreciate the point.

Okay. Recommendation 4 as amended is before us now on the screen. Jay specifically, because he might have something else that he wants to bring up, but anyone, please. Bearing in mind that we are going to make some changes to Recommendation 5, does anyone have any comments?

Jay, go ahead, please.

JAY CHAPMAN:

Thanks, Chris. I really didn't have anything else. I think we've kind of already covered it. I didn't really have anything in regard to what we're talking about here, new.

What I did have new is just something that I think has been said before, and it might be worthy ... And this might not be the place to put that pin on the wall, but it needs to be said at some point that because everything that we're talking about is new, it obviously hasn't been tested in any way. I think it's worthy to have a discussion as to whether or not just the issue of a sunset clause on this, or at least something to say we're not sure what kind of results we're actually going to get out of these things, so as opposed to a situation where we just kind of say, "Here are the new rules" and off we go, we have some sort of idea or provision.

And again, I don't have anything specific to kick and to bring forward. I just want to make note of the fact that we should at least consider and talk about this idea of having some sort of sunset or at least a declaration that says after a given period of time, we're going to sit back down and take a look at this and review it again. Thanks.

CHRIS DISSPAIN:

Thank you. Berry, go ahead.

BERRY COBB:

Thank you, Chris. Yeah, just to respond to that. So it's probably been a while since we've looked at that section of the initial report, but there are proposed metrics to collect and capture and analyze once the policy were to go into effect in that very nature, to evaluate down the road whether the implementation and operation of that policy met the intent of the original recommendations.

I don't recall any prior policy development putting in some sort of sunset clause, but other policy developments such as the IRTF have included recommendations that X number of months or years after implementation, an analysis should be done and presented to the GNSO Council for consideration. And in those instances, essentially it's already a defined process that a Policy Status Report is built that may include building an issue report and making a determination whether additional policy work needs to be done.

CHRIS DISSPAIN:

Thanks, Berry. And I'm not wishing to speak for Jay. I suspect that Jay probably didn't mean a sunset clause as in the policy ceases to exist, but more, as you have said, a review mechanism that ensures the metrics and the results of it are looked at and referred to the GNSO for it to consider whether changes need to be made, etc.

Thanks, Jay, for your note in the chat. So I think that's absolutely right, and I think that would be a sensible thing to do. And in any event—albeit at the speed of the world's slowest snail—these things do end up getting reviewed anyway. But that said, I think

having the think about the metrics and having it looked at in time is a sensible way forward.

Does anyone else have ... Given that now we've got homework to do in respect to Recommendation 3, given that I want to come back to Jay's point about arbitration in (ii) in a second. But before I do that, does anybody else have anything they want to say about Recommendation 4 or anything else for that matter at this stage? Okay, so I'm not seeing any hands at the moment.

Jay, do you want to have a think about the situation in respect to agreeing to go to arbitration? Bearing in mind the exchange that you and I had about there needing to be some sort of endgame and when that agreement should be reached or how the final thing is decided.

JAY CHAPMAN: Yeah.

CHRIS DISSPAIN: To have a think about that. I mean, I don't think it's actually that hard to solve as long as we all hold to the understanding that there has to be something.

JAY CHAPMAN: Yeah. And your point, you mean that we just can't expect registrant ... Or it doesn't make sense to just kind of leave it open to where registrants can bounce from one court to the next.

CHRIS DISSPAIN: It doesn't make sense.

JAY CHAPMAN: I understand.

CHRIS DISSPAIN: In essence, that's the result of ... Effectively, Recommendation 5 ended up with that because it bounced back to the UDRP again. [It was like], "That doesn't make sense, either." So I think we do need to figure it out. I think what we're talking about is ensuring that ... The give here is that ... Sorry.

One of the gives is to say, yes, okay, the registrant can go to court. You're not forced to go to arbitration. You can go to court. And if you lose in court—not on the substantive issue, on the IGOs claims—you still have another way forward. But I think you need to agree to that. Otherwise, it's not going to work.

So have a think about that and we'll bounce back to that next week, I think, if that's okay with you.

JAY CHAPMAN: I'm trying to figure out how to balance that versus exactly what we were talking about [inaudible].

CHRIS DISSPAIN: It's a fair point, but I just think there has to be a endgame. Otherwise we end up ... Well, we don't end up anywhere because there's no endgame.

JAY CHAPMAN: I'll give that a think.

CHRIS DISSPAIN: You go do that. Berry, I'm back to you to see if there's anything else you would like us to cover. I would like you to give us a timeframe, please, so that we can talk about when I start insisting that people come on a call three times a week instead of once a week.

BERRY COBB: Yes. Thank you, Chris. Just one other note. Part of the homework from last week was that the group was to review through the other comments page and send to the list if anything warranted extra discussion on the call. Nothing was sent, but I still feel compelled that [we've] at least go to run through it. And maybe we spend 10-15 minutes to do that on the next call.

CHRIS DISSPAIN: Yes, I want us to do that, please. Put that on the agenda for the next call. Make it the first item on the agenda for the next call.

BERRY COBB: That sounds good. So I'll send out the homework assignment again. So to your question, Chris, about alarm bells and three calls a week and those kinds of things. So this is our work plan here. We've committed to the Council after the last Project Change Request to deliver a final report by the 4th of April, which

you see down here at the bottom. In essence we have three calls ahead of us through the month of February as well as a tentative—but most likely—ICANN73 session three calls ahead of us, through the month of February, as well as a tentative but most likely ICANN73 session.

So that's really four working called based on our current schedule from now where, in terms of the requirements of putting together a final report, is that between now and then staff will need to put together a draft of the final report to allow for feedback and any proposed edits, and then move into what is truly required which is for the chair to make initial designations of consensus on each of the recommendations, allow time for the group to respond back to that, and also allows any time if there are minority statements that want to be included with the report. In the case if there are objections to the chair's consensus designations, finalizing the report and delivering it to the Council by that date.

I'm a stickler for dates, but I will admit that if we miss by a week or so, by the 4th, we won't be taken to the principal's office. We shouldn't be fine. But I really hope that we can try to close this up by the 4th of April.

Finally, Chris, I guess maybe towards the week after ICANN73, if we're not in a good place by then, we can anticipate maybe two-a-week calls during March to get to that deadline. Thank you.

CHRIS DISSPAIN:

I'm more than hopeful that that won't be necessary. Thank you, Berry.

Okay. I think we're done for today. Last call for comments. None? Good. Thank you, everybody. Really appreciate it. I think we're making, actually, significant progress and I'm very pleased. Thank you, all.

BERRY COBB: Real quick, Chris.

CHRIS DISSPAIN: Sorry, Berry. Yes.

BERRY COBB: Just a reminder. We've got a small team scheduled in about 40 minutes to review through the principles of arbitral rules to provide some more detail on that. So take a break and then for those that are part of that small team, please come on. Thank you.

CHRIS DISSPAIN: We'll be there. Thank you very much, indeed, everybody. Have fun.

DAVID SATOLA: Bye.

MARY WONG: Thank you, everyone.

TERRI AGNEW: Thank you, everyone. I will stop recording. Then the meeting has been adjourned. Stay well.

[END OF TRANSCRIPTION]