
ICANN Transcription

EPDP Specific Curative Rights Protections IGOs

Monday, 24 January 2022 at 15:00 UTC

Note: Although the transcription is largely accurate, in some cases it is incomplete or inaccurate due to inaudible passages or transcription errors. It is posted as an aid to understanding the proceedings at the meeting, but should not be treated as an authoritative record. Attendance and recordings of the call are posted on agenda wiki page: <https://community.icann.org/x/loH3Cg>

The recordings and transcriptions of the calls are posted on the GNSO Master Calendar page <http://gnso.icann.org/en/group-activities/calendar>

TERRI AGNEW: Good morning, good afternoon, and good evening. Welcome to the SCRIP IGO Call taking place on the 24th of January 2022.

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 audio, could you please identify yourselves now?

Hearing no one, I would like to remind all, members and alternates will be promoted to panelist. When using chat, please the selection from Host 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 Z's to the beginning of your name, and at the end in parenthesis the word "Alternate" which means you are automatically pushed to the end of the queue. To rename in Zoom, hover over your name and click Rename.

Note: The following is the output resulting from transcribing an audio file into a word/text document. Although the transcription is largely accurate, in some cases may be incomplete or inaccurate due to inaudible passages and grammatical corrections. It is posted as an aid to the original audio file, but should not be treated as an authoritative record.

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.

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:

Thanks, Terri. Hi, everybody. Welcome. Thanks for making the effort to be here. I've got a few things to say about Recommendation 4 and Recommendation 3, but before I do that let's go to Berry and get Recommendation 1 sorted. And then I'll come back and talk to Recommendation 4 and Recommendation 3. Berry, over to you.

BERRY COBB: Thank you, Chris. So the small team wasn't able to meet, but they did have a few exchanges over the e-mail list. I still don't believe that there's a final agreement about item (b) of (i). And I'll actually turn it over to Brian since he's probably the bigger expert here than I am. And unfortunately, I don't see Paul on the call yet.

BRIAN BECKHAM: Hi, everyone. Can you hear me?

CHRIS DISSPAIN: Hey, Brian. Yeah, we can hear you.

BRIAN BECKHAM: Good, good. I will do my best. So, yeah, we did have some changes and we were stuck a little bit, given some of the feedback I had received from some UN colleagues that this term that which we had been sort of seeking as a defined term didn't seem to be defined in a way that really matched what we were seeking to accomplish. So that potentially put us back towards the text that's in ~~strikeout~~.

And there I think the thing that we had not quite finalized was the concept of actively engaging. And we wondered whether this comes from the UDRP and trademark notion of use and commerce which is something ongoing and proactive versus UN Assembly meetings might happen annually and one's participation or not in a meeting wouldn't ...

In other words, if you're an entity that's been created by governments through a treat and you're invited to participate in a

UN Assembly, there may be no topic that would require your participation from one year to the next. And it didn't seem that that would necessarily impact the standing of the institution as such. Sorry, I know I'm kind of presenting this on the fly. But we kind of wondered if that notion of active participation could somehow be addressed so that there's ...

I think the general notion is that the entity continues to exist, but the question is, does that require the same types of active use in commerce that we're, I think, using in common trademark parlance. I think the clear answer from IGO's perspective is no. I think a good case in point is that not enough of use have been physically in a conference room for an ICANN meeting in a couple of years now. That doesn't mean that we're not here or that our day jobs or our employers cease to exist. It just means we haven't had occasion to join up in a meeting.

So the question is whether, with that understanding, we can still sort of salvage, let's say, the concept that's covered there in (b). And unfortunately, I think this was something, somewhere along the way it was introduced by Kavouss, who's not, I believe, on the call. So we're, I think, kind of collectively in the dark a little bit as to where to go with that.

CHRIS DISSPAIN:

Brian, thanks. I'm fine with that. I appreciate the effort. I propose that we'll leave it until next Monday if nothing's happened between now and then. And I'm not saying that anything either would or should, but there's still a bit of time for you guys to talk. Then I'm

going to revert to the definition which I think we've already agreed, and agreed some time ago amongst the group.

Paul, your hand is up. Go ahead.

PAUL MCGRADY:

Thanks. I'm sorry to join late. Brian, I'm sorry that I missed your summary, but this is one where I raised the question of what does (b) get us? Is there anything that is a (b) that would not be an (a)?

So for example, would there be a ... First of all, we don't know what Permanent Observer status is. Nobody can define it. It's used in UN documents, but it's not defined and it's not always used in [inaudible]. So that's been the stick. We don't know what that means.

And so my question to the group was, is there a (b) that is also not an [(a)]? Is there an intergovernmental organization that is not established by treaty that would fall into whatever we end up with as (b)? And I don't know. Brian, did you address that and I just missed it?

BRIAN BECKHAM:

Yeah, thanks. Thanks, Paul. No, I didn't get into that. What I had recalled was that we were wondering if we couldn't somehow keep the spirit without the active participation part. And I think the reasons for that are reasonably obvious, which is that merely missing a meeting wouldn't mean that one's corporate, or in this case IGO status, goes away.

The example that came up in the past, and I confess to not being an expert on all the ins and outs of their formulation, was one of Interpol which, as best I understand—I guess I can put it, Paul, for you and maybe others on the call, in trademark parlance—it kind of emerged through common law and agreements between police forces and nations as opposed to what I think we more commonly understand as a treaty-created or a treaty-based organization.

So the idea was that if there was an organization like that ... Which, I think, we would mostly agree that that's the type of organization we're talking about here. If they emerged through, let's say, a common law treaty, if you will, then would they be covered by (a)? If so, great. If not, then that was, I think, the intent behind (b).

PAUL MCGRADY: [inaudible].

CHRIS DISSPAIN: Go ahead, Paul.

PAUL MCGRADY: Yeah, thank you, Chris. So (b) is what's causing the consternation because there is no Permanent Observer status. It's a defined term without a definition. And so maybe we should be looking at scrapping (b) and enhancing (a) because if there are these common [law], international organizations that have come about by way of common practice between countries, then we should account for them. But nobody knows what Permanent Observer status.

So anyway, Chris, that's where we are. A little ripple. We'll try to knock this thing out.

CHRIS DISSPAIN:

So thank you, Paul. Thank you, Brian. It would be useful if the original agreed ... So Paul, Brian, and Susan, I think agreed the original definition. And then that was accepted. And then I think a couple of issues were raised which I'm not sure most of the people on this group particularly care about or believe are real issues. We seem to have managed to tie ourselves in a bunch of knots ever since then.

So what was the text of the original definition? Can we have that up on the screen? There we go.

When I mean the original definition, I mean the definition that was brought back to us by the small group. If that's the one that was brought back to us by the small group, then that's fine. Because you guys were all happy, assuming that what's in the chat now from Mary is the actual wording. You guys all have to use that because you brought it back to us as an agreed definition. Susan, go ahead.

SUSAN ANTHONY:

I just wanted to say that while perhaps the UN does not have a definition of Permanent Observer status, you either have it or you don't. It's on the UN list. If you have a Permanent Observer status, you show up in the UN records as having a Permanent Observer status. For example, Interpol does. So, I don't know.

CHRIS DISSPAIN:

So I'm happy here to take it away, as I said, for another week. I take the point about it being a term without a definition. However, if there is a list and if that list is clear, then maybe we could rely on the list. Although I know what Paul says. Though to be fair, Paul, this is not an amorphous list put together by a bunch of disparate governments. It is a list created by the UN specifically of whatever the term is, which I've now forgotten.

That said, perhaps you could go and think about it, consider it, and work on it. But to be fair, what's currently up on the screen—(a), (b), and (c)—was what we originally agreed, and I think everybody accepted at that time. So let's use that as a backstop because I think, worst-case scenario, we know that works.

Good, okay. I'll leave it with you. Let's revisit it next Monday and see if we can make any progress on it. Otherwise we, as I said, we have a backstop. Okay.

I want to talk briefly about Recommendation 4 and then Recommendation 3. And I just want to give you may sense of where we're at. So my sense in respect to Recommendation 4 is that whilst I acknowledge that the IGO folks on this group would prefer Option 1, my sense is that they're not going to—to use a New Zealand expression—die in a ditch if we go with Option 2.

Option 2, I think, is acceptable to a number of folks on this call. And it has the advantage to some extent of adding a right but not taking away a right. In other words, it maintains the right to go to court and adds the right—I'm using "right" in the wrong way, but you know what I mean—to go to arbitration, and therefore is less likely to fall foul of any scope issues, number one.

Number two, it cannot be said that it removes the registrant's right to go to court because it doesn't, which is part of the scope we received—or charter we received—from the GNSO Council. So my sense—and it's just my sense at this stage—is that we could probably coalesce around Option 2.

And then in respect to Recommendation 3, you will know that Jay provided us with an additional suggested explanation/clarification wording from the Business Constituency. And again, I think that is actually immensely helpful. I appreciate that we may need to do some dancing around, or finessing in respect to words because there are ... Some of the words—specifically the word “jurisdiction”—may have a meaning which makes them uncomfortable.

But the concept, I believe, of the suggested amendment from the Business Constituency seems to me to be workable in that it puts in place at the beginning of the process an acceptance of a jurisdiction to which a registrant can go if the registrant chooses to go to court but makes it abundantly clear that, in all likelihood, the IGO will turn up and argue that they are immune. And in the event that the court finds that they are immune, it bring you back to the arbitration point, assuming that Option 2 has been accepted.

So I wonder if, rather than spending time discussing the minutiae per se, we could talk about, high level, whether or not anyone is prepared to go to the wall for Option 1 as opposed to accepting that there appears to be a growing consensus around Option 2 for Recommendation 4.

And secondly, whether people wish to address, specifically, the wording and the suggested amendment from the Business Constituency which is the highlighted text in front of us now. Because if we can nail those two— if we can nail Option 2—we can then move away from Recommendation 4. And if we can coalesce around this suggested wording amendment from the Business Constituency in some form or another, acknowledging that it may need to be finessed, then we have effectively dealt with that as well.

So, the floor is open for anyone to talk about any of those particular issues. And I'll try and manage the topics and try and manage the discussion so that we deal with it in some sense of order.

David, no one else has their hand up so I'll let you go. Go ahead.

DAVID SATOLA:

Thank you, Chris. I had thought that we were ... And maybe I'm mistaken about this. I had thought that what we were going to do was drop the Mutual Jurisdiction language from Recommendation 3 and try and deal with the issue of whether the agreed registrant would go to arbitration or to court in Option 2 of Recommendation 4. But what you seem to be proposing is that we deal with the mutual [recognition] issue in Recommendation 3. Is that right?

CHRIS DISSPAIN:

No, not at all. I'm saying that I believe that this group is leaning towards Option 2, and I'd like to find out whether or not there are any who are prepared to go to the wall for Option 1 because if that's the case, then I'm going to call it. And we'll have a situation where

those who are not prepared to accept Option 2 can, if we have enough accepting Option 2, can deal with it in some sort of minority.

And then we can talk about Recommendation 3 which, obviously, the working of Recommendation 3 is only relevant if the registrant has an option to go to court in Recommendation 4.

Does that make sense?

DAVID SATOLA:

Okay. Thank you for the clarification. This would be my comment, then, to sort of frame the issue from at least the World Bank perspective. So there's a federal statute in the United States that says that for certain IGOs—and it's in the World Bank, the IMF, the IFC, the Inter-American Development Bank, and maybe a few others—that, any case that's brought against us for any reason will be heard in the federal district court of the District of Columbia.

So of course, a registrant can bring a court case anytime it wants, if it wants. If it wants to go through the pain and cost of bringing a case in, I don't know, Wisconsin and then getting it remanded to the federal district court in the District of Columbia. That's its business. But I've got a federal statute that tells me and others where to go if they want to sue me, and that's where we would have our discussion about immunities.

So I would not be inclined to say, "Well, they can go to any court." There may be, amongst the—I don't know—300 or so IGOs that we're currently contending with, there may be others who have similar situations in their countries where they're situation that there's a statute or there's a binding case that says that, "Only this

court will hear cases involving this IGO.” So I think we do need to bear the reality in mind.

And we did have discussion last week amongst the IGO participants in this work track about Option 2, and I think we can go with that as long as we remove the Mutual Jurisdiction discussion from Recommendation 3. I think I’ll leave it at that. Thank you.

CHRIS DISSPAIN:

Well, I appreciate that. Thank you. Frankly, I take your point about jurisdictional—sorry—about statutes that say where decisions about immunities, etc., should be dealt with. And you may very well be right. And in fact, I’m certain you are right that there are different IGOs in different countries that, if indeed they are subject to statutes, would refer them to different courts. And [it would] be impossible for us to create a policy that dealt with that.

I think, from the other side of the fence, what the registrants have been saying is, “Fine, but that’s up to us. And if we want to go to court”—as you’ve just said—“in Wisconsin and be told, ‘You have to go back to D.C.’ well that’s what courts do.” And irrespective, I agree that it would be nonsensical in my view as a lawyer to end up going to court in Wisconsin. But if that’s what a registrant wants to do, then so be it.

So I take your point in respect to that, and I accept your point that you’re saying you would be prepared to accept Option 2, which is fantastic. I also accept the caveat in respect to Mutual Jurisdiction, but I want to do that separately. So acknowledging that that is there, we can come back to Recommendation 3 in a minute.

Does anyone else want to talk about Recommendation 4, Option 2? Which, unless I'm mistaken, we can live with.

Yrjö, go ahead.

YRJÖ LÄNSIPURO:

Thank you, Chris. Well first of all, the prime objective of ALAC being on this EPDP is that there finally will be a compromise, a consensus. And we get it finally. After, I don't know, 14 years there will be a solution to this problem. So in that sense, obviously, if Option 2 is an element of a compromise and if the IGOs accept it, ALAC will accept that, too.

CHRIS DISSPAIN:

Thank you, Yrjö. And let's be clear. All of this is caveated by this whole thing hangs together as one. So the fact that you said yes doesn't mean that you can't say no later if things don't pan out the way you intend them to. But I appreciate your willingness to come to the party on this one.

Did you have anything else? Nope? Okay. Brian, go ahead.

BRIAN BECKHAM:

Hi, everyone. I just wanted to dovetail on both what David and Yrjö have said with a small footnote which is that I believe there's ... I don't recall the recommendation number, I'm sorry, off the top of my head, but there was a recommendation that part of this package ... And I appreciate that where we're looking at a package that hangs together and each piece is necessary. But part of that was that there

was an explicit recognition that by submitting to this process, the IGO would not be deemed to have waived its ability to claim privileges and immunities.

And then in terms of the BC suggestion, and of course, probably it would be worth mentioning that IGOs had a preference for Option 1, but in the spirit of compromise we're shifting gears to look at Option 2. And I appreciate that probably we would want to wordsmith this on the list or in a small group or something. But just one thing that sort of sticks out to my mind in terms of a specific flag that we would want to work on is the use of the term "Mutual Jurisdiction" in the BC proposal. And I think this really is the core of what David was speaking of.

Of course we're familiar with the terminology of Mutual Jurisdiction from the IGO context, but what might be one particular area where we may want to use language that's more suitable to the purposes that David had mentioned, which is really the particular court or it could be the location of the principal office, something to that effect. So just to flag that that may be something where ...

And again, I don't know if you, Chris, and others think is the best way to tackle bringing together the BC proposal into Option 2 at a textual level, but that was one flag to raise.

CHRIS DISSPAIN:

Thanks, Brian. I don't think it needs to be brought in at a textual level. I think if we deal with Recommendation 3, then Option 2 of Recommendation 4 hangs underneath Recommendation 3. But that said, until we've done it, I don't know. But I don't see why it

ought not to be feasible. But let's try and work on that and figure out, as you said, it may be ... We're not going to wordsmith in any great detail on this call, although we may actually get into some wording in a minute. But I take your point.

So where I'm at right now is, I want to put Recommendation 4 aside and say that, subject to us working out what to do now—subject to us working out what to do with Recommendation 3—we can look at Recommendation 3 on the basis that Option 2 of Recommendation 4 will be Recommendation 4, subject to any wording that needs to be changed.

So in essence, all that means—so everyone's clear—all that means is that when we're looking at Recommendation 3, we're looking at it on the basis that once an IRP Panel finds in favor of an IGO, a registrant does have the opportunity to go to court, the IGO does have the opportunity—the right—to claim that they are immune. And if that happens and they win, the registrant has the right to go to arbitration. I know that's a very broad brush. I know there's more detail than that, but that's in essence what we're talking about.

So if everyone's reasonably comfortable that we have an understanding and that's what we're talking about, perhaps we could move to Recommendation 3 and the suggested amendment from the BC which is at the top of the page.

Can we ditch the ... Just put that up slightly bigger, Berry, so that we're not having Recommendation 4 in the way. Lovely. Thank you. No, leave the rest of it. That's fine. Leave the rest of Recommendation 3 up there so we can see where it fits. Okay.

So this is what I understand the suggestion to mean. And Jay, given that you brought it in, if I get this wrong, please leap on top of me.

Sorry, David. Did you want to speak now?

DAVID SATOLA: Thanks, Chris. Whenever you're opening up the discussion, I just wanted to get in the queue.

CHRIS DISSPAIN: Fine. So, my understanding is that the intention of this suggestion is that at the beginning of the process, the two parties—or the IGO in this particular case—would specify which jurisdiction the [inaudible].

DAVID SATOLA: Chris, you've cut off.

BERRY COBB: His camera looks frozen. Chris, can you hear us?

CHRIS DISSPAIN: Sorry about that. I don't know what happened there. Something weird happened. Can you hear me?

BERRY COBB: Yes, Chris. We can hear you now. We didn't lose anything because you cut out right when you were starting.

CHRIS DISSPAIN: You mean stopping.

BERRY COBB: Or stopping, yes.

CHRIS DISSPAIN: Sorry. I was a little bit garbled, but I hope I got across the essence of what it is I'm talking about. Jay, have I effectively said what it is intended to mean?

JAY CHAPMAN: Thanks, Chris. I don't think we heard your summary, is what Berry was getting at.

CHRIS DISSPAIN: Oh, okay. I'm sorry. My apologies. In that case, you wouldn't know whether what I said makes any sense. So let me try again.

In essence, what this means is that going into the process, the complainant, in this case the IGO, would nominate one of the jurisdictions currently defined as available under Mutual Jurisdiction. So if I get that correct, in essence, the registrar or the registrant would nominate either one or both of those jurisdictions as being acceptable should a registrant choose to go to court, having lost the UDRP. And it would also be agreed, clearly stated, that the IGO would be able to raise their immunity issues in that particular court and, in fact, would intend to do so.

In essence, Jay, is that effectively what this meant to do?

JAY CHAPMAN: Yes. That's correct, Chris. And do you mind if I just kind of build on that?

CHRIS DISSPAIN: No, I'd love you to carry on and refine that and provide more clarity.

JAY CHAPMAN: Sure, thank you. So the major concern that the BC heard in trying to come up with this, Mutual Jurisdiction ... In both the original proposed recommendation as well as in this suggested amendment, Mutual Jurisdiction is capitalized as a defined term within ICANN, just the way ICANN defines things. So that specifically refers to either the location of the registrant's registrar or the location of the registrant.

It doesn't specifically—and this is the distinction I think needs to be made—it doesn't refer to whether or not that jurisdiction actually holds. Which is why the rest of the amended paragraph just talks about how the IGOs can raise their claimed immunities.

So we came away with trying to get away from that word "submit" to make sure that it was clear that IGOs could certainly raise their privilege, immunities, arguments, and claims. That's really what the purpose here was.

CHRIS DISSPAIN: Understood, Jay. Thank you. That's very helpful. Before I go to David, can we clarify what Mutual Jurisdiction is defined as in respect to ... Which is, as Jay quite rightly says, capitalized and therefore is a definition. What does it mean in this context? Can we have that in the chat or can we ... Mary, are you able to put that up in the ...

MARY WONG: Yes. Just give me a sec, Chris.

CHRIS DISSPAIN: Thank you. Because it is defined. It is capitalized because it's defined, and it therefore means what it is defined as. And if it is merely defined as ... Here we go. "Mutual Jurisdiction means a court ... at the location of ..."

Okay, is there anything written down anywhere outside of that definition that refers to Mutual Jurisdiction? Because a lot of what we've been talking about appears to be built around an understanding that Mutual Jurisdiction means an agreement to be bound by. And that definition does not say that.

I'll leave that hanging. David, go ahead.

DAVID SATOLA: Okay, Chris. I do want to thank Jay for making an effort to address this issue in a spirit of compromise. We did last week, or the week before, have a look at the underlying definition of Mutual Jurisdiction

for exactly the reason that you just proposed, Chris, to make sure what it was providing and what it wasn't.

I agree that, as a definition, it's a definition. I'm going to come back to that in a second. I think where we have the problem is in ... As opposed to what I was saying before about designating, which the Bretton Woods statute does—it designates a court. We don't, as the World Bank, for example, aren't agreeing. We can show up, but we're not agreeing.

Here, at least for the World Bank I have a doubt problem because I've got a statute that tells me and the rest of the world where to go if you have a problem with me that you want to take to me court over. And I don't even know if it would be legal or what the reputational risk would be to agree to something that would be contrary to that federal statute. I don't even want to go there. Okay.

So where I have the problem with Jay's proposal is the second sentence, I think. Again, I appreciate the spirit in which it was given, but I don't think it comports with current case law or jurisprudence about what a waiver of an IGO's immunities would be. I think it's consistent that anytime an IGO would submit to the jurisdiction of a court, it's a waiver. And I think what we've got here because we're having to agree to something that we don't have to agree to, that that agreement to be bound to go to that place would be a waiver. So I think I'm not entirely comfortable with that.

And I'll go back to something I said earlier in my first intervention which is what we'd like to build in, I think. If someone does want to take us to court, they can do so in a designated court, whether that designation is by statute or otherwise. It might be designated

somewhere else besides a statute. If there is no designation, I would argue that the court should be in the jurisdiction of the headquarters of the IGO, that headquarters office of the IGO, probably for the same reason that Mutual Jurisdiction was crafted around convenience to the registrant and giving the registrant the choice of the registrant's or the registrar's jurisdiction.

Maybe we need to go back and suggest an addition or a revision to the definition of Mutual Jurisdiction to include a court that's designated to hear cases with respect to the IGO because right now it's a bit ... In addition to all the other legal arguments that I've just raised, I think it's a bit slanted in favor of the registrants and leaves the IGOs kind of hanging.

Going back to one of the original, what I thought was, precepts of this working group which was to minimize the cost of having to defend IGO acronyms, it would be a great concession to the IGOs to have those cases brought in courts that are close to their headquarters jurisdiction. So again, I appreciate the spirit in which it was done. I think there are some legal issues and some practical issues that would make it difficult to accept that way. And maybe we need to go back and do some further work with that definition of Mutual Jurisdiction.

I guess my final point is that I'm not really clear whether we're trying to do this as a way to address Mutual Jurisdiction as a term and keep it in somehow. Whether that is for the purpose of doing the least violence to the existing UDRP, and what we're doing here is trying to craft this thing so that it's as close as possible to UDRP, or whether we're trying to do something that's workable for the IGO community in respect to protecting their acronyms. And I don't know

if we have an answer to that. When we keep coming back to this Mutual Jurisdiction thing, it strikes me that it has more to do with trying to conform as close as possible to UDRP rather than to craft something that's really workable for the IGOs. Thank you, over.

CHRIS DISSPAIN:

Thank you, David. I've got a couple of comments to make, and thoughts. But just a straight answer to your question is actually, yes, it is supposed to be as close as it can be to the UDRP. There are a number of clauses in the charter. Charter's not the right word, but whatever it is, the explanations of what we're supposed to be doing. And they're very specific. One of which is to do with going to court.

But let's not get too sidetracked on that. And also, I don't want to get too sidetracked on the discussion in the chat about the second clause which is submission because I'm not talking about that. That's a separate discussion for the moment because it's not relevant if we can agree something built around this suggestion.

What [I'd slightly lost], David, is ... We've all acknowledged all the way along that a registrant can go to court at any time if it chooses to do so and take its chances. And a registrant can, in essence, go to any court it chooses to and to take its chances. And I'm not sure I understand why acknowledging that if a registrant chooses to go to court, they will go to court in a particular jurisdiction is in any—especially given that [inaudible] because it seems to me to be ... It couldn't really be clearer.

I hope you can hear me. Maybe you can't. I'm going to turn my video off. There you are.

MARY WONG: Yeah, Chris. We lost you in the middle and you came back in the end.

CHRIS DISSPAIN: Yeah, I'm really sorry but I'm not sure what's going on today. It seems to be I've got Internet issues. Where did I drop out, Mary?

MARY WONG: You were talking about the registrant being able to go to court in any court it chooses.

CHRIS DISSPAIN: Okay. So simply put, I don't understand ... The question goes back to David and Brian, whose hand is up as well. I do [inaudible] then the ...

Okay. I'm going to try and do a telephone login. Give me a sec. Terri, can you hear me?

TERRI AGNEW: Yes, we can.

CHRIS DISSPAIN: Can you dial me in on my phone?

TERRI AGNEW: Yes.

CHRIS DISSPAIN: You've got my number. Haven't you? I'll put it in the thing for you.

TERRI AGNEW: Yes. Okay, thank you.

BERRY COBB: If Chris doesn't join soon, we'll nominate Steve to sing for us.

CHRIS DISSPAIN: Hi, everyone. I'm back. Can you hear me?

BERRY COBB: Yes, loud and clear.

CHRIS DISSPAIN: Well, that's encouraging. Let me see if I can get myself sorted out. Hold on. [Can you guys] hear me now?

TERRI AGNEW: You seem like maybe you're [inaudible]. Try talking again, Chris.

CHRIS DISSPAIN: I'm getting double feedback here.

TERRI AGNEW: Mute your computer audio.

CHRIS DISSPAIN: I thought I'd done that.

TERRI AGNEW: Is it any better now. Chris, it's Terri just checking in. Are you still working on audio? I just want to make sure you weren't muted and speaking. Chris, it's Terri. If you are speaking, we are unable to hear you at this time.

CHRIS DISSPAIN: Can you hear me now?

TERRI AGNEW: There you are. Yeah.

CHRIS DISSPAIN: I think I've fixed it now.

TERRI AGNEW: Perfect. Continue on.

CHRIS DISSPAIN: Really sorry, everybody. My humble apologies. What was going on while I disappeared? Have we sorted it all out and can I go home now?

MARY WONG: You still have hands up, Chris.

CHRIS DISSPAIN: Okay. Hang on. Now my computer's gone haywire again. This is bizarre. Berry, can you take the interventions? [I've got to] sort this out.

TERRI AGNEW: Berry, there you are. You're unmuted now. Go ahead.

BERRY COBB: Great. So in terms of the queue, David you still have your hand up. Why don't you go ahead? If not, then Brian, please.

DAVID SATOLA: Thanks, Berry. It was in response to Chris's question. So I do have two problems. I still have two remaining problems and I'll try and put them in the context of the question.

So one of them has to do with how courts have construed IGO immunities. There's case law and jurisprudence that says that any submission to a court is a waiver. And I know what we're trying to say here in that second sentence is that, "Hey, even though we're saying it's mutual jurisdiction, we don't really mean that." What we're saying is that the IGOs, by agreeing to this, are not waiving any immunities.

I don't have any case law or jurisprudence that would say that I'm still protected. What I do have is case law and jurisprudence that

says anytime that an IGO agrees to go to court that isn't designated, that you've got a waiver of immunity. So I'm really sticking my neck out here to say that we would agree with that. And that's part of the reason why we wouldn't.

I also return to the question of the statute. And I think in a hierarchy of laws, the private law that's developed by ICANN and that would be developed here would be trumped by federal law. I just don't see how I could agree, how the World Bank and the other organizations that are covered by the Bretton Woods statute in the United States—and there might be other statutes that cover other IGOs, there might be other statutes in other countries that cover other IGOs—how it could be expected that those organizations would agree to something that would be contrary to the rights that they enjoy under statute.

And not only that, I just don't see why we would do it and I think would be problematic for us to do it. So I do have real problems with that, and that's part of why we'd like to not have to deal with this phrase “Mutual Jurisdiction” at all. If the purpose of Mutual Jurisdiction is to create certainty over the venues where these cases might be brought, then I read out some language that might be an alternative to it. But it would have to reflect the reality that there are designated venues under statutes.

And there may be other designated venues that aren't designated by statutes that would need to be dealt with. And then if it's a matter of certainty, I don't know why it needs to be the jurisdiction of the registrant when it could equally be said that it could be the jurisdiction of the headquarters office of the IGO. That would

provide those who want to bring court cases with a certainty of where they would need to go. Over, thank you.

CHRIS DISSPAIN: Thank you. Sorry, Berry. I should be working okay now, with a bit of luck.

BERRY COBB: We can hear you. It's a little choppy, but it's good.

CHRIS DISSPAIN: I'm doing my best. So I understand all of that, but it doesn't change the fact that, as I understand it—and if I've got this wrong, again, someone will doubtless correct me; and I'll come to you in a second, Brian—that the registrant can go to court in any jurisdiction whenever it choose to do so. And the logical jurisdiction for a registrant to choose in normal cases, anyway, would be its own jurisdiction. I suppose it's possible that it might choose the registrar's.

But at the end of the day, I think to be suggesting that registrants would have to agree to go to court in the jurisdiction of an IGO isn't going to fly. It doesn't seem to me, for a number of reasons. And I'm not even sure ... At that early stage, what you would doing is tying the hands of the registrant which is exactly what this position, this group of recommendations that we've put together, is attempting to avoid doing because it's very clear from the instructions from the GNSO Council that redrafting this to create a

whole new process was not something that they were prepared to accept.

But that said, Brian, I'll go to you next and then go to David and see where we get to. Thanks. Brian, go ahead.

BRIAN BECKHAM:

Hi, everyone. David said, actually, very well what I was intending to say. And this looks back to the comment I made earlier about potentially adjusting the proposal of the BC. And I appreciate, Chris, what you mentioned about maybe there's not a need to do that. But I think the rub here is that even agreeing with the language in the BC proposal that a respondent "may challenge" in one of the courts have a mutual jurisdiction could be misconstrued as a waiver, notwithstanding the clear language that says that an IGO isn't doing that. And so that was why I raised the concern of potentially needing to wordsmith that a little bit.

And in terms of sticking as close as possible to the UDRP language, I think we can get where we want to go with a small adjustment which would just ... Either it could be a footnote to the Mutual Jurisdiction definition in the rules to say, "In the case of an IGO Complainant, that's the court of"—in cases of some IGOs like the World Bank—"the one designated by statute; or if not designated by a statute, then the court of the headquarters of the IGO." So it's just a small adjustment to reflect, frankly, what's really the central issue presented to this working group which is to come to some sort of a way to get IGOs to be able to use the UDRP process while still respecting the privileges and immunities that are granted them under international law.

And just to kind of recall, not to be a broken record here, but privileges and immunities are granted by governments to IGOs for a very important reason. They're seen as ... They are core to the ability of IGOs to fulfill their public missions. We've gone over the reasons in some detail during the course of this working group, but really want to let us not lose sight of the fact that this isn't really just ... You know, sometimes it almost feels in the conversations like a bit of a coin toss. Shall we choose Court A or Court B? And it's really much more fundamental from the IGO's perspective than, "Is this in my backyard or your backyard?"

So I think with a small adjustment, we can certainly get there. But this is why I mentioned that the specific term "Mutual Jurisdiction" was a bit of a red flag. And if, picking up on David's suggestion, we can make an adjustment to the definition, then that could get us across the line here.

CHRIS DISSPAIN: Understood, Brian. Can you hear me?

BRIAN BECKHAM: Yes, I can. That was that was it for me. And I can hear you, Chris.

CHRIS DISSPAIN: Okay, so let's go to David whose hand it up.

DAVID SATOLA: Thanks, Chris. I can appreciate that the registrars/registrants won't like it. I don't know whether it will fly or not, and I don't know whether

we should presuppose that. At the same time, I know ICANN is an international organization in its own right. It's also a California not-for-profit. And I don't know how a rulemaking process being undertaken by a California not-for-profit could do so in the face, and flagrantly ignore, U.S. federal law. I just don't ...

I have a basic problem with that. I don't know how we get around that, but it's just not workable for some pretty major IGOs. And I don't know that we could agree to that either. So I think we'll need to think hard about how we approach that issue.

CHRIS DISSPAIN:

Well, I want to make sure I understand the core issue here. If I understand it correctly, the core issue ... I take your point about there is a law that says the place to hear these things is wherever it is. Right? But that doesn't detract from the right of anyone, if they choose to do so, to try to go somewhere else. And logically what would happen is you would turn up and argue that they're wrong and it should be here. It seems to me that, if I could pick out the key concern, it's more—and I think you said it and Brian said it—that it might be that accepting the jurisdiction, you're saying this is a jurisdiction in which it's okay for the registrant to go to— notwithstanding that we will argue—might be deemed to be a waiver and that that was of concern to you.

So my question would be, unless you can definitively say that it would be, then should we not avail ourselves of an answer to that question and see whether or not it would be, in fact, a waiver? Because I frankly can't see it, but don't hold myself out as being an expert on it, especially given that I agree to turn up and argue what

I'm going to argue. But it seems to me that you are saying you're very concerned about it and it might be considered to be a waiver. If it's not a waiver, if you were clear that it wasn't a waiver, then my question would be how would you feel about it then, I suppose?

Brian and then Paul.

BRIAN BECKHAM:

Yeah. Hi, everyone. I think the fundamental issue with that is that—and I think this is really what David was saying—we would be knowingly teeing up a situation where it wouldn't work out. The registrant wouldn't be able to—I think Wisconsin was mentioned earlier—file a case against the World Bank if there's federal statute that says that should be heard by the federal circuit court in D.C. So it's, I think, a question of, we know the answer so let's not propose a solution that flies in the face of the answer.

And I think, just to take us back to one of the core principles here which was that we want to, on the one hand, allow the IGOs to be able to use this system. We want to address that question of privileges and immunities. We also want to preserve the rights of registrants to appeal the case, and we've gone down the different forks in the roads of court and arbitration. And so nothing in the proposal—if I can call it that, from David, from the IGOs, to define with more precision that works according to case law on the point—nothing in that would foreclose the opportunity of registrant to actually have its day in court to air its case. It's just saying that based on experience, based on the law that's known, that this should be done in front of a particular court. But nothing is eclipsing

the opportunity of a registrant to actually seek to have its claim heard in court. Thanks.

CHRIS DISSPAIN: Yeah, okay. I understand. Paul.

PAUL MCGRADY: So I guess my question is this, which is if it's not meant to work as a waiver or a hint of a waiver, then what does it do? Because without the language, the losing respondent is in the same spot that they would be with the language. In fact, they have more freedom because they can file anywhere instead of one of two places. And so I guess I just don't understand the function of the language unless it's meant to be some kind of waiver, [re-waiver]. Like we're creating an entire new classification of legal notion here.

And so from that aspect, I guess that's why I just ... I'm not real smart and I'm not about to parse it out. That having been said, David and Bryan keep saying that they think that there's some tweak here that can be made that will get people across the finish line. And I don't have any particular skin in this game. I just want whatever we do to make sense at the end. So if there's a way to compromise, great. But the way it's drafted direct from the BC, I guess I just don't understand what it does other than hint at a waiver. Thanks.

CHRIS DISSPAIN: Thank you, Paul. Jay, I'm going to ask you ... [Let's listen to] David, I'm going to ask you if you have any comments to make about what

Paul has just said in respect to what it's intended to achieve. David, go ahead.

DAVID SATOLA:

Thank you, Chris. I just wanted to respond, Chris, to the comment that you made about the terms of reference for the work track and that the GNSO Council didn't want to do certain things and they didn't authorize us to do certain things. I understand and appreciate that, but I wonder if they made those statements with the knowledge of some of the very complex issues that we're talking about now. And if they were apprised of these issues, whether the Council would amend the terms of reference to be able to address those things.

I mean, I feel like we're a little bit artificially hamstrung. We've gone through the process. We've identified some pretty dicey issues that aren't really that simple to deal with. And if they were apprised of the work that that we'd done and where we got to and the arguments that we've unearthed, whether that would change their minds about that. And I think I would agree with what Paul said. Thanks, over.

CHRIS DISSPAIN:

Thank you, David. Jay, before I come to you, Mary, did you want to say something?

MARY WONG:

I suppose I can. And I apologize. I had thought that David was asking about the Council's knowledge and intent at the time it set

up the work track. But I realized, subsequently, that he was talking about the latest updates to the Council.

So if I just could briefly say that when the Council set up this work track, it clearly was aware that we're dealing with two very important fundamental principles, and those two principles are at tension with each other. So the hope is that this group can, through the discussions that you are now having, come up with whether it's a middle ground or an alternative solution, recognizing that it's still very difficult task.

CHRIS DISSPAIN: Thanks, Mary. Jay, go ahead.

JAY CHAPMAN: Thanks, Chris. Look, these suggested changes came because they kept being asked for. This is the second time now that the BC has come back with a suggestion to try and make things work. The original claim was, "Look, because ICANN says we submit to Mutual Jurisdiction, then obviously we submit to Mutual Jurisdiction."

So coming back and saying, "Well, we'll take out the word 'submit.' Mutual Jurisdiction is a defined term," does that work?

And now it's, "Well, no. It only works if it's in XYZ specific courts," which wouldn't be specific for everyone. And I also want to point out that in going to a court, I mean there are there are all kinds of reasons why a court might want to listen to this case or keep the case or take jurisdiction over it. Again, just the bigger picture of this

is, it's not the typical situation where someone's going and filing a case against an IGO. This is a situation where, in effect, although ... It's a de novo situation, but it's still sort of ... I mean, if there hadn't been an adverse decision at the UDRP level, then we wouldn't even be here.

So it's sort of, again—quote, unquote—it's an “appeal.” Don't call it an “appeal.” And I think courts everywhere can recognize those situations and they can make the decision for themselves. And they might make it while there might even be laws that say, “Well, we've got to do it this way or we've got to do it this way.” I think there are opportunities there for either equity, public policy, other reasons for courts to potentially keep those cases. And as other people has have said, maybe these things are decided once and then that's it as well.

But I think there are reasons why ICANN shouldn't be getting into specifically delineating, and doesn't want to get into specifically delineating which case goes where and when and under what circumstance. It sticks with its long-time held policies which is what we have with where the court cases are being held—either in the place of the registrant or the registrant's registrar.

So I just want to throw all that out there. And again, I continue to remind everyone here. We're talking about the rarest of cases. Howard [inaudible] just came out with reports last week—and I'm happy to send links to everybody to let everybody know—just talking about how rare it is. Like 88% of the cases in 2021 were default cases at WIPO. 91% were default cases at the Forum. So you're talking about a very small contingent of cases that are even

going to be contested. So in the rarest of situations, I don't see the point in ...

Well, I've said this all before. I think there are unique situations where we have legitimate disputes, or at least legitimate defenses, certainly, where they're going to be contested. And when that happens, we should stick to the existing ICANN rules. And to go any deeper than that, I think ...

If we're talking about changing what Mutual Jurisdiction means, to me that goes far beyond what our group should be doing and something that, I don't know, maybe if there's ever the part two of the Right Protection Mechanisms group, then maybe that's where that gets decided. Anyway thanks.

CHRIS DISSPAIN: Thanks, Jay. I appreciate it. Brian, before ... No, I'll go to now. Go ahead, Brian.

BRIAN BECKHAM: Yeah. Thanks, Chris. Apologies, but I was not really following Jay, the point there. It was mentioned that we're looking to choose a jurisdiction. Well, yes, because that's what we've been told works to meet that central question of the court-recognized concept of privileges and immunities for IGOs. And that's, by the way, what the UDRP has been doing in every case since its implementation in 1999. So I guess I'm just a little fuzzy on the upshot, and I wonder if ...

Just to go back to what I mentioned earlier, what I'm not really following is if the concern is, on the one hand, for IGOs, there are issues with certain courts and privileges and immunities which I think we all recognize. There's concern on the registrant side that there's a desire or a need to have an opportunity to have a case that's considered to be wrongly decided heard in court. And by the way, let's not forget that this court option is followed by an arbitration option.

But at the end of the day, there's still an opportunity to have one's case heard in court and, again, followed by an opportunity to have that case heard under arbitration. So, I'm sorry if I'm overlooking something obvious, but I'm just not following what the sticking point from the registrant perspective is. If we make a small change to ... We're still preserving the right to go to court. We're still preserving the right to go to arbitration. We're just shifting from one of the two jurisdictions that a UDRP complainant normally selects today to reflect the nature of IGOs recognized under international law.

Sorry, again, if I'm overlooking the obvious, but I was getting a little lost.

CHRIS DISSPAIN:

I've got a couple of comments to make about what Jay has said and about what you've said, Brian. I'll get to in a minute, Jay. I just want [to say this first]. Well, actually, no. Jay, you go ahead and respond, and then I'll summarize.

JAY CHAPMAN:

Well, I think the answer is that we can stick with the existing UDRP format, and then we let the courts make those decisions. If there are certain ... And I think Chris has even said so. Right? If the court of Mutual Jurisdiction—again, defined term—makes its determination that, yeah, this has got to be decided somewhere else, well then so be it. That's what happens. That seems be the way that's, again, within the mandate of the GNSO here as well as the 20 plus years of existing UDRP jurisprudence, and what I think the community as a whole would be willing to consider. Thanks.

CHRIS DISSPAIN:

Thanks, Jay. So, look, having reached a point where I believe we have a [inaudible] compromise, but a structure, nonetheless, that sees us through from the beginning of the process to the end of the process. We are now arguing about one very specific—and I know it's incredibly important—one very specific point. In spirit of cooperation, the Business Constituency who made some comments in the public comment period came up with ...

And we went out to them and said, “Can you can refine what you mean? Explain/clarify.” They've done. They've given us a suggested way forward. I accept, Brian and David, that you're not comfortable with it. So I think, really, the next step is for you guys to go away and can come back with some words built around that that you are comfortable with.

Let me say, Brian, I take your point. Leaving aside the principle of whether it would be acceptable to make that small change, I'd like to see it because it strikes me as quite complicated to come up with a process by which you would determine what such a jurisdiction is,

other than simply to say, “Well, we’ll leave it up to the IGO” which I don’t really see how it would be [inaudible] would be acceptable. Maybe I’m wrong, but to simply say, “An IGO may choose a jurisdiction” seems to me to be way outside of the scope of what we could agree.

But I’m very comfortable for you, Brian and David and the other IGO folks to go away and build something around the BC’s suggested amendment that is workable for you for us to consider on our next call next Monday. I fear that if we can’t reach some sort of acceptance about a jurisdiction was chosen for the registrant to go to court, then having reached all of the other compromises and all of the other agreements that we have effectively done, that we are simply going to fail. Because if we can’t come to an agreement on that, then we don’t have anything other than the structure in place but no way of triggering it.

It seems to me that we really do need to concentrate now on this one particular point. And if I can, Brian and others, ask you to perhaps put your heads around your suggestion about what would be acceptable. And the Business Constituency having already done the work of telling us what [maybe] would be acceptable to them.

Brian, is that a sort of thing that you guys could put your minds to over the next few days, do you think?

BRIAN BECKHAM:

Yeah. Thanks, Chris. I just was typing in the chat and realized you’re on the phone. I was only saying, of course we’d be happy to.

We'll work offline, the IGOs, and come back to the list and see where we can get.

CHRIS DISSPAIN:

Yeah. I think that would be that would be immensely helpful. It seems to me that this really now ... I mean leaving aside what I consider to be a minor point about how we decide on our definition which we can come back to later, and on the assumption we can coalesce around Option 2, then it seems to me that this is the key point now.

And what we're basically talking about is a situation where, given that the registrant has the right to go to court, picking up the current situation which is that the complainant—in this case, the IGO—has the right to choose one of the two, as mutual jurisdictions is defined—the change is that, whereas in the current situation in the subclause—I can't remember the name of the clause, but it's been up on the screen a little while ago—it says that they will submit to that jurisdiction. In this particular instance, we would be saying, "We do not submit to a jurisdiction. We reserve our rights to ..." I mean, you could even say, "We are immune. We say we're immune. We reserve our rights to claim it, etc."

And it seems to me that if were able to do that ... Every one of us has talked about trying to save money, trying to save time, etc. And at the end of the day, one or two—and we've talked about the fact that, as Jay quite rightly keeps saying, it's a very small number of cases—one or two precedents being set of registrants deciding to go off to court in wherever and IGOs turning up and arguing their

immunities and winning. acknowledging their communities and winning. We'll see this not happen.

But at the end of the day, we seem to have a lot of people telling us what might happen. "This might be a risk ... this might occur, etc." And I would very much like us to actually be dealing, in as much as we can, with facts. Which is by way of me saying also to you, Brian and the others, if there is any way that you can check in with those that you have faith in to ascertain the position regarding the possibility of saying, "We will agree to go to this particular jurisdiction to argue that we have immunities."

Or, to be clear, to argue that we should be arguing in a different jurisdiction which, of course, is another argument that you could be putting, as David quite rightly says—"This court has no basis for hearing this. It should be heard in the federal court in D.C."—is a perfectly fine argument to bring.

I remain unconvinced that merely agreeing for the registrant [to go to] its own jurisdiction in any way closes off any of your rights to argue any of that. So I'd appreciate it, given that you've said that you consider that it might, if you could look into whether, in fact, that is the case.

Does that make sense to you, Brian and the rest?

BRIAN BECKHAM:

Yes, thank you

CHRIS DISSPAIN: Okay, good. So given that it is 22 minutes past the hour and given that I don't think we're going to take this much further, if any further, today, let me go to Berry and see what he has to say before closing us out. Berry, go ahead.

BERRY COBB: Nothing much. The Recommendation 1 team to try to work on a compromise for the (i)(b) definition of an IGO Complainant, as we just concluded. The IGO coalition to maybe come back with an option or a suggestion working off of the BC's intent from their suggested change, which is basically Recommendation 3. Recommendation 4 seems to be stable for now, so staff will take the action to start updating that PCRT.

It sounds like the next call will continue the discussion across these three recommendations. And time permitting, we do still have to review the other comments that, as Chris noted, if we can get general agreements across these three definitions, maybe the substance of those comments becomes a little bit less important. But nonetheless, we still need to acknowledge and review them.

Next call is the 31st of January, same time.

CHRIS DISSPAIN: Thank you, Berry, barring any last-minute interventions. Thanks for putting up with my dodgy Internet today. See you all next week.

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

[END OF TRANSCRIPTION]