
ICANN Transcription
Transfer Policy Review PDP WG
Tuesday, 23 May 2023 at 16:00 UTC

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JULIE BISLAND: Good morning, good afternoon, good evening, everyone, welcome to the Transfer Policy Review PDP Working Group call taking place on Tuesday, the 23rd of May 2023.

For today's call we have apologies Raoul Plommer (NCSG), Owen Smigelski (RrSG), Osvaldo Novoa (Council Liaison). They have formally assigned Juan Manuel Rojas (NCSG), Essie Musailov (RrSG), as their alternates for this call and for remaining days of absence. As a reminder, an alternate assignment must be formalized by way of a Google assignment form. The link is available in all meeting invite emails.

All members and alternates will be promoted to panelists, observers will remain as an attendee and will have access to view chat only.

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Statements of interest must be kept up to date. Does anyone have any updates to share? If so, please raise your hand or speak up now.

And seeing no hands, please remember to state your name before speaking for the transcription. Recordings will be posted to the public wiki space shortly after the end of the call.

As a reminder, those who take part in the ICANN multi-stakeholder process are to comply with the expected standards of behavior. Thank you, and over to our chair, Roger Carney. Please begin, Roger.

ROGER CARNEY:

Great. Thanks, Julie. Welcome, everyone. Just a few things before we let Emily show us the work plan and walk us through that next few weeks before ICANN 77 and beyond. I want to first start off with our August poll for participation for August meetings. It turned out rather well, so I think we're going to go ahead and schedule meetings for August. If we get to that time and we have problems with participation, then we'll look at it, but we got a good response and availability for people in August, so we'll go ahead and plan to be as productive as we can August by scheduling meetings.

Talking about participation, we have noticed when we looked at the levels of participation across all the groups, we've seen a dip in participation by some groups, and we want to just bring that up just to recognize that we're still a ways out from our end goal here. We want full participation from all groups as much as we can get,

so it came up along those lines. In longer PDPs, sometimes they do a membership refresh or consultation with each of the groups, possibly one-on-one, just to see where we're going and if we're going in the right direction. Put that in the back of your head, and maybe we can talk about that in the next few weeks in an ICANN 77 if we need to do a refresh or if everyone's comfortable with their members now. Again, you can always swap a member if need be if someone's not available as this goes along more time here, but we wanted to open that up and give people thinking, is this something that we're looking to do? We still have quite a bit of work finishing out the dispute mechanisms, looking at the transfers and the change of registrant and getting our final report. There's still quite a bit of work to do, so just put that in the back of your minds and think about if you're still in it for completing this project or if you need to maybe have someone step in to do that for you. Again, maybe we just need to talk about it. Staff and I are open to any groups that want to talk about that or any individuals that want to talk about that.

I think that may be about it that I need to cover, and maybe I'll just throw out there that we only have a few more weeks until ICANN 77. Again, our goal is to get through these dispute mechanisms by then and start to wrap up everything we have at ICANN 77. With that said, I think I will turn this over to Emily so she can stand on our work plan. Emily?

EMILY BARABAS:

Thanks, Roger. Hi, everyone. This is, I'm sure, very familiar to all at this point, but again, just highlighting here that we just have a few sessions left—today, next week, and the following week—

before ICANN 77. The focus of those sessions is going to be on wrapping up our work on TDRP to the extent possible so that we have some preliminary outcomes to share at ICANN 77. And as a reminder, our next topic is ICANN approved transfers. So as we get a clear sense of where we are and when we can transition to that, this will continue to evolve and adjust. And as Roger said, we'll soon be adding August calls to this work plan as well. No open action items at this time. Thanks.

ROGER CARNEY:

Great. Thanks, Emily. Okay, I'll just, as we standardly do, I guess I'll open up the floor to anybody, any of the stakeholder groups that want to bring any comments or questions forward, anything they've been talking about that they feel is necessary for the group to review or respond to. So I'll open up the floor to anyone that wants to talk. Okay, I think we can go ahead and jump into our agenda then. And maybe I'll turn this back over to Emily so she can go through our recap for us.

EMILY BARABAS:

Thanks, Roger. So I'm just going to recap a couple of items from last week's call to ensure that everyone's on the same page about where we landed. So we talked a bit about charter question F1, which asks about whether additional data is needed to support evaluation of the effectiveness of the TEAC mechanism, and if so, what data is needed.

There was quite a bit of discussion on this during the last call, and I think where we landed is that there's not going to be any new

recommendations here in terms of required data collection or analysis of metrics, but that in response to the charter question, we'll be summarizing the data reviewed by the working group, summarizing also the kinds of information that groups identified as potentially useful to inform this discussion, but also noting some of the barriers to obtaining and analyzing all of the information that would potentially be useful, and ultimately concluding that the working group drew on the available information to bring about its conclusions for these charter questions and the corresponding recommendations. So just in case anyone's memory of that discussion was different, I'll pause for just a moment.

And then the second item was F6 and F7, which was about registry pain points. And there were sort of two elements of this. The first one was about registry operators' concerns regarding limited accessibility of updates to the TEAC. We're still working on fact-finding around this and understanding the history of the issue and the status from an operational perspective, and we'll provide updates as soon as we have them. And then for items 2, 3, and 4, that was about questions and concerns regarding sort of due diligence that registry operators conduct around requests to undo a transfer where a TEAC is not responsive within the four-hour time frame.

And I think where we landed on this one was that no change is being recommended here to the existing policy requirements, and that the response to the charter question will summarize some of the issues raised, but we'll note that ultimately the registry input that was received was that the existing requirements are sufficient for the purposes of the work that they need to do, and that a more

restrictive set of policy requirements might not actually be useful in that regard. So we'll be circulating text on that one as well. Any further comments? Rick, please.

RICK WILHELM:

Thank you. I'm just one real quick about romanette 1. There's just the way that that's wording, the worded after the comma there, where it says making validation of an undue request nearly impossible, kind of might make the reader think that right now the registry operators don't attempt to validate the undo request. And so if it matters, or if that's going to be taken the wrong way, maybe a friendly edit would be to like making validation of undo requests like quite difficult or something like that, because I wouldn't want any reader to imply that the registry operators are not doing what they're supposed to do and kind of proverbially throwing up their collective hands or something like that. Thank you.

EMILY BARABAS:

Thanks, Rick. I don't think we can change the charter question itself, but in the response to the charter question, we can certainly note that nuance and make clear that it's impossible, but that it's more difficult, given the current circumstances, and try to detail that. And of course, you can suggest changes to that language if it's not accurately capturing what it needs to capture once we have the draft text available. Sorry, Roger, I see your mic open. Is there something else you wanted to add? That's great.

ROGER CARNEY: No, I was just going to say we wouldn't want to change this, but we can respond to it and say, say something about being overly burdensome or something. Again, I think Rick can probably fine tune our wording there. So. Great.

EMILY BARABAS: Okay. So moving on, we're going to start talking today about the TDRP charter questions again, focusing first on G1 and then G2 and G3 as time permits. So Roger, would you like me to kick off the discussion on G1 and provide a little bit of background here?

ROGER CARNEY: That would be great. Thank you.

EMILY BARABAS: Okay. So G1 is about whether there's enough information available to determine if TDRP is an effective mechanism for resolving disputes between registrars in cases of alleged violations of the IRTP, and if not, what additional information is needed.

So as homework, hopefully folks have reviewed now the case decisions on the TDRP provider websites, which are also summarized in the TDRP working document with the necessary links. So I'll just share that again so that people have that handy, the working document, as well as the inputs from the transfer policy status report included with the agenda. So that's the survey inputs, again, summarized in the working document.

The numbers of transfer dispute cases from 2010 to 2017, that includes at the registry level, gathered from registry reporting. But as you'll recall, after 2016, that registry level no longer existed, and it's only the TDRP providers themselves who handle those cases.

So the other items are the transfer complaints that were handled by contractual compliance. Transfer-related inquiries received by ICANN's global support center as well as GSE inquiries. I believe those are two different ways of looking at global support inquiries. And then finally, in the transfer policy status report, there are also some examples of the dispute cases that are also linked in the Google Doc.

And then you'll also recall that contractual compliance gave us some updated data on complaints related to the TDRP, and they found that between the 1st of September 2020 and the 31st of December 2022, there were no valid cases related to the TDRP that came through compliance.

So, looking at the written early input at a high level, I think what a couple of groups have said is that it's a little bit difficult to make conclusions based on the available information about the broader question of whether TDRP is effective, because you really have to look at the TDRP in the context of the broader landscape of disputes that are arising, how they're being handled through different channels, informal, through the courts, through the TDRP, through TEAC, and so forth, as well as how that fits into the overall volume of problem transfers, and it's difficult to quantify that with the currently available data.

It was also noted that the small number of TDRP cases make it difficult to draw conclusions about how effectively the TDRP is handling and resolving the disputes it does receive and handle through that channel, through that process, and further that the small number of cases could be interpreted differently, could be a positive, could be a negative, and so forth, so that also causes challenges in terms of interpretation.

We did receive one additional data point. Staff reached out to the providers to determine, just to confirm that the information that we have is the most current in terms of the number of cases, because we only saw, we can see that there's four cases listed on each of their sites. We did receive a response from Forum that it has received a total of 11 TDRP filings in total, with nine decisions and two withdrawals, so five of the nine decisions were filed prior to the point at which reporting was required, publication of decisions on the website, and the other four are the ones that you see on their website.

You can see on the ADNDRC website that four cases are listed, and they're actually all before 2016, so that seems to indicate that four is all they've seen in total, but again, we're trying to confirm that that's the case, just to be complete.

So, in terms of discussion, this charter question, as a reminder, really just focuses on whether there's enough information to evaluate the TDRP. It doesn't get into proposed recommendations to improve dispute resolution, so we're not going to get there yet in this charter question. But I think the question for discussion is whether it's sufficient to answer this charter question by summarizing the information and data that the working group

looked at, and to support its deliberations, while also noting the limitations to the available information and some of that broader context.

Or the alternative, of course, is that this working group could make an additional recommendation about data collection and so forth, or seek additional data, but we'd need your input on that to take it further. Thanks.

ROGER CARNEY:

Great. Thanks, Emily. Yeah, and I think that that kind of leads to the point of, is it sufficient to do this? I mean, I don't know that we've identified any other data, and maybe [inaudible] still has something that they haven't mentioned, but any additional data to do or to go after to make these decisions. And I don't think that we've congealed around anything around forward-looking metrics to help ongoing or future endeavors to review. So, the idea of is it sufficient to say, yes, here we looked and these are limitations, I don't know a better way to do it, but I'm definitely open for others' comments on this to see if there's something else we can do to this. But to me, this does answer our charter question, and it does to align with all of our discussions we've had so far. But definitely open it up to comments and questions.

Steinar, your chat, do we know why the number is low, and you specifically call out the fee? I think fee is maybe something that someone looks at, but I think realistically, the comments I've heard anyway are the policy, is generally followed or can be followed, and still, issues occur. So, the dispute mechanism is to see if the policy was followed or not, not if there's a dispute necessarily, just

if the policy was followed. And I think that what we've come to is that the dispute mechanism is efficiently looking at if the policy was broken or not, or if someone broke the policy, I should say.

And to your point, I don't know if fee is or not. I'm sure that that gets looked at. But I think for the most part, the fact is a hijacking typically doesn't break the policy in itself. You know, they get credentials or whatever, and do things according to policy correctly, once they have that access. And then that's where it comes in. So, I think that the fee may be part of it, but I think the bigger issue is that—the issues that I think people see are outside of the policy. So, but anyone else, please, if you have any comments or questions, let us know. Steinar, please go ahead.

STEINAR GRØTTERØD: I hope that the registrar could actually give some input on this because they are the one that deals with it and either ends up or send a case into the TDRP, if they don't manage to solve it internally. Whether they have some sort of gut feeling that it is the panel fees that is the total showstopper, or is the other elements that brings it to a very, very low number. Because I feel the numbers here kind of signals that, well, based on purely the numbers, maybe there is no need for a dispute resolution for the transfer stuff here, because nobody's using it. So, but we will come to that later on. At-Large has submitted a comment into the early questions about the—and kind of an option for the registrant to have a case solved by something similar to transfer dispute resolution panel. But then again, I think it will be also discussed, the fees of the panel in that area. But anyway, I hope that the registrars do have some input there. Thank you.

ROGER CARNEY: Great. Thanks. Yes, and we will cover the idea that some people have recommended, maybe a path of a [registrant pass.] Any other comments or questions? Okay. I think unless someone comes up with something, we'll answer our charter question as such, in that we did review the data. And we'll obviously discuss the limitations on that being older data and things like that, and the numbers. But we'll say that we did have adequate data to make the decision, and we're not recommending anything moving forward. So, Emily, if you want to take us on to the next one.

EMILY BARABAS: So this is a charter question G2. So as part of the IRTP Part D working group work, the ADNDRC noted that in cases that it processed appellees and appellants failed to provide sufficient information to support arbitration. And this question asks whether this is something that needs to be looked at further in the context of policy. What I can provide to you as context for that input is what we have in the IRTP Part D report regarding those cases that they did handle. So that's in the chat now. And as far as we know, there have not been any cases filed through the ADNDRC since then. We're still waiting for confirmation, as I mentioned. But it appears, based on their website, that this is the full set of cases that they handled.

So what the homework was for this group, for this charter question, was to look at the requirements existing in the policy around the information that's expected to be provided, and to also look at those cases and the decisions on the providers' websites,

and also to take a look at the existing information that ICANN provides on its webpages regarding transfer disputes and transfer-related issues. There are quite a few webpages there. On the staff side, we took a look at those as well. It appears that none of them provide any specific information about the standard of evidence. And also, in looking at the providers' webpages, it doesn't look like there's extensive information provided there either about the requirements around evidence, nor does that exist in the supplemental rules.

So I think the main thing to look at right now is what exists in the policy and whether that's sufficiently clear. And then, looking at the early written input, it doesn't seem to point to any gaps in the policy itself. But some responses indicated that it might be useful as part of the implementation process for ICANN Org to review existing informational materials to determine if updates or clarifications might be appropriate, potentially including with respect to what information is necessary to support arbitration.

So before I go into... Actually, why don't we do this? We're going to talk a little bit about the Rec 27 work that's already been done around this and the outstanding questions. Caitlin's going to speak to that in a moment because there's a bit of an interplay here. But maybe it makes sense for me first to bring up the policy. And, Roger, if you'd like, I can walk through the Section 3.1 and 3.21. I'm not sure how many people have that fresh in their mind.

ROGER CARNEY: I think that would be great if you could, Emily.

EMILY BARABAS:

Okay. So... Screen share here. Okay. So here's 3.1. Let me bring up... For those who want to follow along on their own screens, please do. So when the registrar files a request for enforcement with a dispute resolution provider, the gaining registrar or losing registrar may submit a complaint. So it can be either of those. And it must be done in accordance with the supplemental rules.

And then that complaint shall request that the complainant be submitted for decision in accordance with the TDRP and the applicable supplemental rules. Provide the name, postal, and email address and telephone and fax numbers of the complainant and those representatives authorized by the complainant to act on behalf of the complainant in the administrative proceeding. Provide the name of the respondent and all information known to the complainant regarding how to contact the respondent or any representative of the respondent, including contact information based on pre-complaint dealings. Specify the domain names that are subject to the complaint. Specify the incidents that gave rise to the dispute. Describe in accordance with the transfer policy the grounds on which the complaint is based. State the specific remedy being sought. Identify any other legal proceedings that have been commenced or terminated in connection with or relating to any of the domain names that are subject to the complaint. Certify that a copy of the complaint, yada yada yada, has been sent or transmitted to the respondent. And conclude with a statement.

So those are the requirements for the complainant. I'll just perhaps run through as well 3.2.1, which is what the respondent needs to

provide. So that response shall respond specifically to the statements and allegations contained in the complaint. Provide the name, postal, and email addresses and the telephone and fax numbers of the respondent. Identify any other legal proceedings that have been commenced or terminated in connection with or relating to the domain names that are subject to the complaint. State that a copy of the response has been sent or transmitted to the complainant and include with the statement that follows. And then they are expected to annex any documentary or other evidence upon which the respondent relies together with the schedule indexing such documents.

So those are the requirements as stated in the policy. And maybe before we pause, Caitlin can just walk us through the discussions that have already been had around the Rec 26 item that touches on this. Thanks.

CAITLIN TUBERGEN:

Thanks, Emily. So a couple of weeks ago we talked about the specific items that were identified in the EPDP Phase 1 Rec 27 terminology updates. So, for example, what the group had tentatively agreed to was that in the transfer policy Phase 1A, there were terminology updates applied or at least recommended to be applied to the transfer policy, which you can see at the top of the document. So, for example, the term who is data shall have the same meaning as registration data since we're sunseting the term WHOIS and so on and so forth.

What we're getting at today in terms of the transfer dispute resolution policy or one of the things that the group will need to

think about as it looks at the documentary evidence provided is that in the Rec 27 Wave 1 report, there were a couple of options when it came to printings of WHOIS output, mainly because when TDRP and complaints were filed in the past, you could go to get a WHOIS output printout to see who the registered name holder was at the time a transfer was initiated and presently. And now with a large amount of data redacted, a WHOIS printout would not be informative for determining who the current registrant was. That would be in the possession of the gaining registrar, most likely. And the losing registrar may not be able to file that kind of WHOIS output.

So what the Rec 27 group had provided as two options is, one, that the TDRP could be rewritten more at a high level in terms of rather than having specific elements that the complainant or respondent would append to its complaint or response, it would just note at a more high level that the complainant or respondent would file documentary evidence that it deemed helpful to make its case or show a clear violation of the transfer policy.

The other option that the Wave 1 Rec 27 report had noted is that the TDRP could operate similar to the UDRP or the Uniform Domain Name Dispute Resolution policy, whereby when a complaint is filed, the provider, so in this case, the ADNDRC or Forum would reach out to the current registrar of record and ask for a verification request seeking the current registrant when the domain name was transferred or the registration date of the name and a current printout that's in only the possession of that registrar.

So when the group talked about this a few weeks ago, there was a camp within the working group that thought it would be better to have the TDRP provider verify that information and provide that information directly to the panel. And then there was another camp of working group members that thought, rather than go through all of that, it's better to just rewrite the policy or make a recommendation that the policy follows a more high level approach and that really it's the complainant that needs to make a clear case that there's been a violation and file whatever evidence that it can. And similarly, the responding registrar would also provide whatever evidence that it could that the transfer policy was followed.

So Emily, I don't know if you have the document that shows how we redrafted. Right. So here we have two options that we went over when we went over the Rec 27. But you'll see that in the bracketed text, we have what it could look like if the working group goes down Path 1, which would be adding in a requirement that the provider will submit a verification request. And that also the request would include a request to lock the domain name so that it's not further transferred during the pendency of the TDRP proceeding. And similarly, the registrar of record would be required to provide the requested information back to the provider, as well as confirm that a lock had been applied and that any information that the registrar supplied to the provider would then be submitted to the panel as part of its evaluation.

If you scroll down a little bit more, Emily, you can see the other option, which is, instead of having any reference to an authoritative WHOIS database, we have in 3.2.4 that the dispute

resolution panel would review all applicable documentation and following its review, they would make a determination whether a violation of the transfer policy indeed occurred. And you may remember that we have a footnote here about the contact data, noting that in some cases there might be privacy proxy data and/or redacted data so that the current printout of any RDDS may not be authoritative in terms of making a decision. And I think a couple of working group members noted that they like something like that added just for clarity. And then you'll see that in little i, 3.2.4i, rather than again note the authoritative WHOIS database, the dispute resolution panel would be making its decision based on the evidence provided.

And there, in the TDRP, Emily thoroughly went over what it currently asked to be provided, but that when the working group reviews these data or these components of a complaint, the authoritative WHOIS database really can't be used going forward in the current landscape. So the group will have to think about which approach it prefers, a more high level of leave it to the parties to provide what they think shows a violation or lack thereof, or involve the provider going to the registrar of record to confirm who the current registrant is. I hope that makes sense. I'm happy to answer any specific questions. But I hope that it's helping to jog people's memory about what we discussed in the past.

ROGER CARNEY:

This is great. Thanks, Caitlin and Emily. Just a follow up question. The second one is more UDRP-like. Is that correct, Caitlin?

CAITLIN TUBERGEN: Thanks, Roger. So I think when I was describing it, if you scroll up in the policy, the first thing that appears is what would be the UDRP-like option. And then when you scroll down, which is where we just were, that's more the high-level approach.

ROGER CARNEY: Okay, perfect. Thank you. Zak, please go ahead.

ZAK MUSCOVITCH: Thanks, Roger. Is now the right time to share a couple of thoughts about which option might be preferable or should we wait for that?

ROGER CARNEY: Absolutely.

ZAK MUSCOVITCH: Okay. First of all, thank you for jogging my memory. I appreciate that, Caitlin. And I haven't thought long or hard about this, but from what I can see, and this is based largely on my experience with the UDRP procedure, is that if a respondent to the TDRP, in other words, the responding registrar, need not respond to the proceeding. There's no requirement, as far as I know, that the responding registrar respond. And also, there's no requirement that the responding registrar answer the panelist's order. So if the panelist said I need to see responding registrar's WHOIS data, the responding registrar could not comply with that order or may not even be participating in the proceeding at all.

And so that wouldn't be a compliance issue either, I don't think. A registrar can say no contest to this, not participating. And so I think that it would be more effective generally for the first approach, because providers are very used to seeking that registrar verification from the UDRP. So something they're used to and wouldn't see it as an extra special or heavy lift. And registrars are used to complying with it. And more importantly, I think it probably would be a compliance breach if a registrar didn't provide that requested information to the provider, because of the contravention of the temp spec.

So I think if the group believes that it could be crucial to get that WHOIS information to the extent that exists from the responding registrar, the best way of doing it would be through the UDRP style registrar verification process. Thank you.

ROGER CARNEY:

Great. Thanks, Zak. Any other comments or questions? Yeah. And again, thanks, Caitlin, for pulling us all back to the discussions we had on this. Okay. Yeah. And going along and maybe adding on to what Zak said, I think leaning this way toward a UDRP provides a more consistent feel, at least to me anyway. So I think that outside anyone coming up with some support on the other option, it seems like this is a simple, let's follow what's happening now. Keep it consistent. It works for UDRP and it should work here. Likewise, we're not deviating only on what's being disputed.

So I think it seems to make sense to go with this. But again, if anyone thinks about it and thinks that they see a problem with it or

would propose something else, please bring that up. Okay. Emily, please go ahead.

EMILY BARABAS: Thanks, Roger. So it seems like no one's really speaking up. And perhaps that means that we have a direction, at least for the moment, to go the route of the verification request that's highlighted on the screen here and use that sort of as our working assumption at this stage. Does that sound right?

ROGER CARNEY: That sounds great.

EMILY BARABAS: Okay. So I think that that kind of brings us back to the broader question. So this charter question, again, intersects with the Rec-27 item, but isn't exclusively about that. The question itself, and maybe it helps to go back to the slides, is more broadly about whether the policy itself provides enough information about what is expected in terms of the evidence to support arbitration as a general matter. So I think the feedback we're looking for here is whether anyone sees any identified gaps or whether it's simply that it's on the parties to provide evidence that they think supports their case and ultimately that that's for them to determine exactly how that needs to play out and the burden falls there. And again, if there's something else that's needed beyond the policy, we also welcome input from the group about what that is that is needed. Thanks.

ROGER CARNEY: Great. Thanks, Emily. And as Emily pointed out, some of the early input thought that it was fairly clear and didn't provide any detail of additional stuff. And I think when we discussed this a while back, there were some comments saying it seemed clear to them at the time. Obviously, they weren't filling it out or issuing one, but reading it seemed to be clear. So I think that from our standpoint, we think it's clear. The group thinks that it's clear and doesn't need to change, but yes, definitely modify this to be a little lighter mode of in using the UDRP model.

So unless anyone else has anything, I think that we'll go with that prior discussions and input. Okay, great. Anything else we need on this, Emily?

EMILY BARABAS: No, I mean, I think if the response to the charter question is simply that the working group believes that the policy is sufficiently clear and that the burden falls on the parties to provide the evidence they think is necessary, and that the only adjustment is to the single item that was just discussed in response to the Rec 27 item, I think our instructions are clear here. But I see Zak's hand.

ROGER CARNEY: Yep, Zak, please go ahead.

ZAK MUSCOVITCH: Yeah, that sounds fine to me. Just one thought and I'll leave it to you whether it's even worth mentioning, but generally speaking, once the case law evolves with a bunch of cases, the evidentiary requirements become clearer and clearer. And this procedure really hasn't had that opportunity because there have been so few cases. So that's part of it, too. Right. Thanks.

ROGER CARNEY: Great. Thanks, Zak.

EMILY BARABAS: So perhaps we can also just add a note in the response to the charter question to Zak's point that over time and with the reporting requirements around decisions, to the extent that the volume of cases grows over time, that there may be a clearer record to draw from in terms of what makes a successful case.

ROGER CARNEY: Sounds great.

EMILY BARABAS: Our next item is a big one. This is G3. And I think that this is ultimately where a lot of the discussion around the gap analysis is going to sit. So G3 states that if the TDRP is considered to be insufficient, are additional mechanisms needed to supplement the TDRP and should the approach to the TDRP itself be reconsidered?

So as a reminder, there's been a lot of discussion about informal resolution in the context of the gap analysis. And some working group members have identified costs and time necessary to complete a TDRP as a limitation to the process. And also as part of the gap analysis discussion, the working group talked quite a lot about proposals to create new requirements around informal resolution between two registrars, some of which seek to provide a less expensive and faster path to resolving disputes compared to the TDRP. But to date, none of those proposals have been taken forward by the working group.

So to help us stay a little bit focused, we're going to not focus for the moment on the specifics of those proposals around informal resolution, because there's another piece of this that we haven't yet been able to discuss or had an opportunity to discuss in a lot of depth. And this is about dispute resolution mechanisms.

So as a reminder, some working group members have previously expressed that there are limitations to the current options available to registrants when there's a problem with a transfer. So for informal resolution, the gaining registrar might refuse to transfer the domain back to a losing registrar unless they receive indemnification. But the losing registrar might not be willing to provide that. So the transfer back doesn't happen.

With the TDRP, in addition to noting the costs of filing and the time, it was noted that the registrar might have different incentives than the registrant in making a decision about whether to initiate a TDRP and that the registrant might not be able to convince a registrar to initiate a dispute, even though they think it might be appropriate to do so.

And with the courts, it was noted that registrants may not have access to courts of mutual jurisdiction and may experience barriers in terms of cost, for example. So some working group members had suggested at one point looking at expanding the TDRP to allow registrants direct access, but it seemed like that was not something the group wanted to pursue further because the TDRP is really designed around the assumption that the two parties are registrars in terms of the standard, the evidence standards and so forth, and that it relies heavily on internal registrar documentation. But at the same time, some working group members have advocated for a recommendation that future work take place within the GNSO to determine if a new mechanism for registrants should be created.

So I think that's where we left off in the discussion. And then we have some discussion questions here to try to perhaps scope out the problem space a little. I think that, if you'll recall, the IRTP Part D working group looked at the question of whether dispute options should be developed to registrants. They ultimately decided not to, although their focus was on expanding the TDRP itself. And they said the question of a new dispute resolution process should be looked at in the future looking at available data.

But if the working group decides that this is something that they want to pursue in light of all of the priorities that the GNSO council has on its plate and needs to consider, it's going to be important for the working group to provide a clear rationale for why further work is needed on this issue. And so I think that's where we need to focus the discussion.

So I think one of the big questions here is, is there any evidence to support that there is a problem that needs to be solved here? So we have some examples of types of evidence that might point to the need for a dispute resolution process for registrants. So for example, frequent instances of registrants asking registrars to file TDRP cases, but then the registrars declined to do so because of time and cost, even if there's strong evidence supporting the case or frequent instances of attempts at informal resolution where there's strong evidence of an improper transfer, but the gaining registrar won't undo the transfer absent indemnification. So the outcome is ultimately unsatisfactory for the registrant. Frequent instances of registrants reporting to registrars that they can't access a court of mutual jurisdiction, or other examples of significant issues that would point to needing a registrant option.

And then I think the second part that is helpful to discuss is if there is evidence of these problems, is it in fact a new dispute resolution process that is the best solution for the problem? So if there's, as an example, a significant problem with hijacking that the group is pointing to, that's not being addressed sufficiently in the current ecosystem, is the need a new dispute resolution process or is the need focusing on protections to prevent those improper transfers from happening in the first place?

So a lot of moving pieces here, but we're hoping that we can structure the discussion to really provide a logical case for whatever the working group decides. Thanks.

ROGER CARNEY:

Great. Thanks, Emily. Zak, please go ahead.

ZAK MUSCOVITCH: Thank you, Roger. Thank you, Emily. So I'm sure Emily's recollection is a lot better than mine, but for what it's worth, my recollection was that the reason that the working group didn't want to tackle a registrant initiated dispute resolution process here is because it really wasn't within the mandate of this working group. And so it didn't really have to do with such a procedure would require evidence that's normally in the hands of the registrars, although that is an issue, but I don't think that was the main reason why. I think it had to do with the scope of the working group.

And then in terms of the evidence to support if there's a problem, I mean, the lack of evidence has never stopped us or deterred us so far. So I think that just looking at a few facts, and this is really outlined very well in the slide, like the evidence is really the fact that the TDRP is very limited in its scope. It doesn't deal with hijackings beyond violations of the policy and that it does rely on registrars and it does exclude registrants. And there are court cases that would otherwise go to court if there were such a policy.

I think those factors that are easily apparent without collection of data or other evidence make a good argument that although this is something that we cannot and should not address in this working group, there's been a significant support. I would hope—I've heard at least from, from a few people in this working group, but it's something that the GNSO should seriously consider. Now, listen, in terms of GNSO's priorities, that's a whole problem that we can't deal with, I'm afraid, but we can say that there is enough basis for seriously considering this. Thanks.

ROGER CARNEY: Great. Thanks, Zak. Yeah. And to your point, some of the early input received also indicated support for this idea. So, yeah, I think the evidence part is as you said, sometimes not always available directly data-wise. So, but yeah, it's been commented multiple times that through, through multiple sources and not just the same stakeholder group, but multiple stakeholder groups that this idea does bubble up. So Berry, please go ahead.

BERRY COBB: Thank you, Zak. And I, I hear what you're saying. I'm just trying to piece together in my mind about what it would look like if this group were to recommend further work to be done. And let's pretend that the GNSO has no other policy development on its plate. And in essence, the council, the next step would be a specific issue report around this particular topic, going through the motions of reviewing that initial or that issue report and assuming that it were to be scoped into a PDP—so trying to kind of flash forward, assuming all of that occurred.

I think at the end of the day, and this is definitely way outside of my lane, so I'm probably mostly motivated about asking what I'm asking, just purely from a bandwidth and resource perspective, but even setting that aside, at the end of the day, I believe if this issue were to be deliberated further, it boils down to whether there's essentially an arbitration type option, right? Because courts are already available in most instances, although there are jurisdictional issues. You know, there already is this informal procedure, as good or bad as it may be to try to rectify the issue

before it gets escalated. This arbitration type thing, whether it's kind of like the UDRP or not, it's a form of arbitration.

I think where I'm struggling with personally is if a policy were to be recommended to create an additional arbitration mechanism for registrants to resolve disputes about the transfer, air quotes, AKA ownership of the domain name, I don't see the mechanism where the policy would—that it could be something that's enforced. And again, I go back to the kind of the original aspect here is ICANN Org from a policy and enforcement perspective only has contractual relationships with contracted parties. And so even if there was support to stand up some independent arbitration type mechanism, how do you compel registrants to use it? Or is it just an optional offering?

So those are some of the kinds of the questions that come to my mind. And the main reason I'm bringing this up is because it is true that the IRTP D did discuss this a while ago. Certainly things have changed over time, but this topic is relatively fresh in the GNSO minds because the topic of arbitration was also discussed in the context of an additional mechanism for UDRPs related to international governmental organizations.

And the final thing I'll say here is those kind of start to center around trademark rights and disputes in that regard versus here, it's not trademark rights, and it kind of seems to venture into an area that when you're talking about—I guess the other way is I'm not sure how we can draw a bright line of creating an additional arbitration mechanism to resolve the dispute related to the transfer of the domain name without treading into territory about the actual ownership of it.

Anyway, so just some of my initial thoughts and I encourage the working group to, to kind of think in those lines more broadly, because it'll help staff develop text around some rationale should there be enough support for this additional work. Thanks.

ROGER CARNEY: That's great, Berry. And thanks for that perspective and additional thought for everyone to take into. Zak, please go ahead.

ZAK MUSCOVITCH: Thanks Roger, thank you, Berry. So look, if the working group were to make a recommendation that the, the GNSO explore the merits of a registrant initiabile dispute resolution procedure. What that means is this working group doesn't have to decide whether there's issues about it or whether it's necessarily a good or bad idea in the end ultimately.

That's precisely the punt that's been given to the GNSO with an issue report to make that determination. So I think the threshold is a lot lower at this point than determining that this is necessarily a workable, practical, implementable, good idea. It's that this is an issue that's been identified and there's an absence of registrants' ability to do this.

And listen, I mean, when it comes to alternative dispute resolution procedures, we have one for registrars to recover a domain name. We have one for trademark owners to recover a domain name. We have one for intergovernmental organizations to recover domain name. The only one we don't have is for a registrant to recover a domain name. Those guys have to go to court,

\$100,000. That's the problem. There is widespread support amongst registrants that I'm aware for such a thing. Not asking the working group to work on it or necessarily even propose it. But I do think that this is worthy of a strong suggestion to the GNSO to look at.

And in terms of the practicalities of doing this, as I said, it's done for all these other different kinds of complaints. Ownership is something that can be decided through dispute resolution and alternative dispute resolution procedure and to avoid going to court. Thank you.

ROGER CARNEY:

Great. Thanks, Zak. Yeah. And I'll agree with you on that, Zak, that this work is in the hands of council, not—all the councilors can vote whichever way we want to discuss it. But we do need to not just throw out anything as recommended to look forward. As you actually just laid out, to me anyway, we have to have a reason for that recommendation and do our own due diligence saying we see the potential for something better here. So just my thoughts on it. So Emily, please go ahead.

EMILY BARABAS:

Thanks, Roger. So just to help the conversation a little bit, I wanted to try to draw a line between two related things that are not exactly the same. So we've heard people advocate for a dispute resolution mechanism that is directly accessible by registrants for violations of the transfer policy. So this would essentially be another version of something like the TDRP that's

about violations of the transfer policy itself. And this could potentially be a case where a registrant thinks they have a strong case for a TDRP and the registrar disagrees and doesn't, doesn't decide to initiate one.

The other situation is what I, what I think people are alluding to, which is an owner's ownership dispute that does not have to do with the violation of the transfer policy. And I think it might be helpful to distinguish which of these folks are interested in pursuing or potentially both.

On the ownership side one, one question that I think that comes to my mind is this question of who might be in the best position to determine legitimate ownership. And it sort of seems like in terms of gathering the necessary evidence to determine that, that that evidence seems to be more possible to obtain at the registrar level than by a third party arbitration provider looking at the case from scratch. But again I'm not an expert on that, but it would I think be helpful to understand people's thinking around that as well. Because I think that that could also potentially be a consideration in terms of making sure that cases could actually be successful. Thanks.

ROGER CARNEY:

Thanks. And that's a great delineation that you're making there. And from what I've heard and maybe even what I'm maybe inferring a bit here is to me, it's not, a registrant transfer dispute mechanism. It's bigger than that. And it's—a registrant, I mean, sorry, a registrant. To me, it's what you were describing as the both option. It's more of the registrant wanting [for any] reason, not

necessarily for a deficient or a broken or someone breaks the policy, the transfer policy, but it's something bigger than that. But that's just, again, maybe I'm inferring that and maybe others don't agree, but that sounds like what I'm hearing. So it's more of the both factor from a registrant standpoint than it is—as you clearly lined up as the policy itself versus other things. But anyway, Volker, please go ahead.

VOLKER GREIMANN: Yes, and I think this ties into something I talked about a couple of weeks ago that basically with ownership conflicts, the registrar's basically thrust in a position that he's in many cases not very well equipped to deal with, basically deciding civil matters between two parties that we only have half the information.

And therefore, I think such a process as Zak suggests is helpful and need not only be applicable to transfer situations, but also situations that may arise over the course of normal domain name registrations. We have cases on a monthly basis where somebody comes to us and says, look, my domain manager registered domain for us in his name, and we now have to decide whose domain name it is. Or our web designer absconded with a domain name, made an update that he didn't have to do. And we have to decide whether this was legal or not.

These are all situations that are not necessarily transfer, but owner change processes that are also now part of the transfer policy, but not necessarily transfer related that could be resolved by such a process. And I think making such a suggestion that this be looked at for a future policy working group, I think is a

worthwhile effort that should be pursued. So I support that. Thank you.

ROGER CARNEY: Great, thanks Volker. Zak, please go ahead.

ZAK MUSCOVITCH: Thank you, Roger. Thank you, Volker. So as you mentioned previously, Roger, Emily's delineation between the two kinds of potential registrant initiative procedures was a good one. I'm envisioning it as either or, that it could be both. If you're going to set it up, it might as well be both.

There's no doubt that a procedure may have difficulty resolving all ownership disputes, all transfer disputes. And that's also the case of the UDRP. Sometimes the panel will say, you know what? This has to go to court because we can't decide without live evidence and without cross-examination. He said, she said. This one is too complex. We have to punt it. But in many other cases, in fact, in like 96% of UDRP cases, the respondent doesn't even respond. There could be a similar dynamic here where the responding party who's a thief doesn't respond.

But Volker's point, I like in particular because it kind of makes me think that registrars should be lining up behind this recommendation because you all know that when someone writes to your customer service rep and says, I have a trademark, this domain name belongs to me, you should transfer it. What do you say? Sorry, but we can't do that. But there's this procedure called the UDRP you could use. And likewise, when someone says my

web designer, can't find them, it's been 17 years, but this name belongs to me, rather than resolving that or sending them to expensive court, that's something that the registrars can easily punt to this new procedure.

So it really takes a lot of judgment calls off the desk of registrars. It really empowers registrants. And so there's a lot of benefits to it. There are complexities and problems to it. It's not completely clear sailing, but it's something that is definitely worth looking into. And we can't look into it in this working group. Thank you.

ROGER CARNEY:

Great, thanks, Zak. Any other comments? Okay, I think trying to take this down this line, we'll have to document those certain cases that we see the potential here. And I think Emily, the prior or the IRTP actually had documented several, and maybe we can start with those use cases and build on those to just show, if we do end up with a recommendation, the thought process of this.

And again, I think everybody's clear here that this isn't a recommendation on a PDP, it's just a recommendation to evaluate if there's a need there. But I think that, again, we had to do our due diligence, not just make a plain recommendation, but show that we see that there are issues out there that can lead into a better result. So, Emily, please go ahead. Thank you.

EMILY BARABAS:

Thanks, Roger. I do wonder if we'd want to revisit, as you mentioned, the use case situation and kind of look at some of the use cases that the IRTP Part D group thought was perhaps a gap

in terms of the existing mechanisms and whether there are additional use cases that this group thinks would be additional gaps. And so I do think that that's a concrete step.

I do wonder if maybe we want to come back to this question about hijacking and if that is the primary issue that people see as a concern that needs to be addressed, if that is the sort of primary use case that people are looking at. And again, here, I just want to note a little bit that a lot of the discussions in the group 1A charter questions focused on the fact that domain name hijacking appears to be less of an issue than it used to be. And it feels a little bit here, like if it is in fact the main use case that here we're saying that dispute resolution is needed for those hijacking cases.

So just looking at the life of all of the phases of our work, I think it's important that we make sure that there's consistency there. Thanks.

ROGER CARNEY:

Great, thanks, Emily. And maybe that's what our good next step is, just to pull those forward and everyone take a look at those and then try to add to those. So maybe we just create—I don't even know what it is, Emily, but I know that staff does a good job at that document where we can record what IRTP-D identified and then this working group can add to that. So, Zak, please go ahead.

ZAK MUSCOVITCH:

Thanks. So I can appreciate that from staff's perspective, it may not be their first choice to punt one more issue coming out of the working group because there's an expectation that things get

resolved in the working group and then nobody's gonna like to say the working group resolved to create three more working groups. I understand, I appreciate that.

But on the other hand, I think that this issue is not a new issue, it's a longstanding issue. And so there's widespread support for at least outside of the working group, probably in At-Large, amongst registrants. And so if the test is whether there's evidence of hijacking in order to be able to examine or refine or revise a policy, then we failed that threshold from the outset. We've never had evidence of hijacking. We all understand that anecdotally, it's likely to have gone down for at least a couple of reasons, but it continues to exist. Court cases continue to be filed. And a decision about whether there's enough of an issue there to actually stand up a UDRP-like process is something for minds greater than ours to decide with more evidence down the road. Thank you.

ROGER CARNEY:

Great, thanks, Zak. Yeah, and just to throw onto that, and again, I think I mentioned this a few weeks back or I can't remember exactly when. I do believe, we've heard from registrars that hijacking is not as a big an issue as it used to be. But again, I think that the imbalance is hijacking as a whole is better, but still, when a dispute comes up, hijacking is a big part of disputes. So again, it's that balance of, yes, hijacking is better, but when a dispute comes up, hijacking is still a big part of that. So just my thoughts on it. Berry, please go ahead.

BERRY COBB:

Thank you, Roger, So this is a two-part question that is not requiring an answer right now. Part one, I guess, is kind of to Zak and part two would be the registrars. So based on kind of what I'm hearing, there could be general support for some kind of recommendation to go back to the council. That's totally up to the working group. And obviously whatever this working group comes up with is gonna go through a public comment down the road. So I'm not suggesting that we're anywhere near consensus or anything along those lines, but I think in terms of providing context or substance around the recommendation—and again, I'm kind of thinking ahead here, let's just pretend that the council did sign off on an issue report. I'm not even sure that staff has the expertise to create enough substance or has the expertise to create a quality issue report to try to frame this issue, because our staff's visibility into what goes on in disputes beyond just the transfer policy is near zero. Unless contractual compliance gets involved in one way or another, that's kind of the extent of our visibility.

So the first part of the question would be to Zak to explore with some of your colleagues in the legal arena or maybe even the ICA, in terms of trying to put together an issue report on such a thing, first, can you find suggestions of who or what organization might help in developing some kind of issue report or is there some kind of expert or expert organization that could be tapped?

Secondarily, I think it would be interesting, if you are aware of a lot of instances where registrants would potentially use this new option, it would be interesting to hear those views about why they would or would not potentially use a new dispute resolution procedure.

And then the second follow-on question, which is kind of more towards the registrars, assuming that there could be kind of this independent, I don't want to use the term investigator, but a researcher, that's the term, would the registrars be willing to have like one-on-one anonymized type interviews so that we can really get down to the—to get more intelligence through this due diligence phase to really understand where some of the issues lie? Because outside of that collaboration beyond ICANN, I'm not really sure where we would even find the expertise to write up a quality issue report. Thank you.

ROGER CARNEY:

Great, thanks, Berry. And again, great perspective there. I appreciate that thought process that you're going through. And just off the top of my head, as Emily may have suggested, I think looking at the IRTPD use cases and expanding on those, I wonder if that's maybe a vehicle to start that process. Again, I don't know if that solves that, but just trying to think, as you were describing that, but I'll turn it over to Zak. Please go ahead.

ZAK MUSCOVITCH:

Thanks. So Berry, you underestimate the expertise and capabilities of your colleagues. They can undoubtedly come up with an excellent experts report just with the information that they already have in the slides and other reports and stuff like that. No need to create a independent investigation third-party group. That's never been done for these kinds of things. I don't know why we should start to do that now when it comes to seeking what sounds like a reasonable remedy for registrants. We never were

that concerned with data before. It's just starting now. Let's not make this into a bigger deal than it is.

Here's the solution I suggest. If the working group were to put something in the report that goes out for public comment that kind of sought to gauge the interest levels from stakeholders and sought what the benefits and problems with such a thing would be, then that would give the GNSO a lot of helpful information that they could use to base their decision on. So a recommendation here is very interim, as Berry pointed out, it goes to public comment, GNSO, etc. So a recommendation isn't a decision on whether we should proceed with such a mechanism. It's really to get greater feedback and insight from stakeholders. Thank you.

ROGER CARNEY: Great, thanks, Zak. Steinar, please go ahead.

STEINAR GRØTTERØD: Just for clarification, because I need to report back to the CPWG, do I understand it correctly that this working group do not have the mandate to include in the transfer dispute resolution an opening for registrants to initiate a dispute, but it has to go in a different path approved by the GNSO? Is that correct? Thank you.

ROGER CARNEY: Thanks, Steinar. And I would say that's true. Plus I would say, I'm not sure this is the right group to do that, but just my thoughts on it real quick. But Emily, please go ahead.

EMILY BARABAS: Thanks, Roger. So I think another thing to consider in going back to the previous conversations, my understanding was that the group thought about framing potential future work and that at least for those who spoke on previous calls, it seemed like there was potentially not support for the existing transfer dispute resolution policy being expanded, but rather a wholly new transfer dispute resolution or with a different name, potentially, a totally new process to be created that was designed around registrants being the parties involved.

So that was my understanding of previous deliberations, that the group had set aside the idea of the existing mechanism being expanded and was focusing on creating something entirely new. But if I am recalling that incorrectly, please let me know. Thanks.

ROGER CARNEY: Thanks, Emily. Volker, please go ahead.

VOLKER GREIMANN: Yes. And to add to that topic, the reason why I support handling this in a different group is that this group came together with a specific purpose. And if we are taking on something that is tangential to that purpose, we might accidentally or intentionally exclude members of the community that would want to weigh in on the creation of such a new process, because obviously that is of interest to various parties. And we might have a different composition of members for such a discussion. And I would see it as problematic if we were to come up with an entirely new

process, policy, even though we provide public input and public comment at the end, it would probably be seen as exclusionary to those that might want to weigh in on this as well. So to ensure that as many people as possible can weigh in on such a discussion and have knowledge of such a discussion going on, I think a new process is the way to go. Thank you.

ROGER CARNEY: Great. Thanks, Volker. Okay, we have about four minutes left, I think, in our call today. Any other comments or questions on that? And maybe I'll let Emily finish this. Emily, please go ahead.

EMILY BARABAS: Thanks, Roger. So, I guess I want to ask the group if clarifying some of these use cases is potentially the next step here to have perhaps a more tightly scoped ask of the gaps that the group is identifying and to see if perhaps that previously assembled list could be a basis for building out something that we can use for documenting what the group is looking for here. Thanks.

ROGER CARNEY: Great. Thanks, Emily. Yeah, and again, looking at it from myself—because no one's going to speak here—I think that's a great way to start this. And as I think Berry mentioned, obviously, or someone mentioned, this is going to go out for public comment. And I think with use cases, with something, if we did come up with a recommendation that this be looked at, providing as many use cases as we can would provide that knowledge to the public to be able to provide any useful input back.

So to me, yes, Emily, I think that's a great place to start. And I would hope Zak and the other registrars would be able to fill in some of those use cases and add to them. Okay. Two minutes to go, Emily. Are we through this one? Do we need to ...?

EMILY BARABAS: I think we're at the end of the slides.

ROGER CARNEY: Okay, great. Again, we've got two more meetings scheduled before ICANN 77. We will see everyone next week and the week after and then in DC. But have a great week, everyone, and we'll talk to you next week. Thanks.

JULIE BISLAND: Thanks, Roger. Thanks everyone for joining. This meeting is adjourned.

[END OF TRANSCRIPTION]