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Financial Services Inc.**

October 23, 2021

## **ICANN Generic Names Supporting Organization (GNSO)**

**Subject: Call for Public Comments on Initial Report from the EPDP on Specific Curative Rights Protections for IGOs**

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Dear ICANN GNSO,

This submission is in response to the call for public comments on "Initial Report from the EPDP on Specific Curative Rights Protections for IGOs" as per the notice at:

**<https://www.icann.org/en/public-comment/proceeding/initial-report-epdp-specific-curative-rights-protections-igos-14-09-2021>**

I also attach our August 20, 2019 submission to the Board as a separate PDF, for completeness (a few sections reference it when discussing procedural history of the prior working group). It was originally submitted at:

**<https://mm.icann.org/pipermail/comments-igo-ingo-crp-recommendations-11jul19/2019q3/000025.html>**

(in the event it somehow gets lost in the new ICANN comment system)

Sincerely,

George Kirikos

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## 1. INTRODUCTION

**Leap of Faith Financial Services Inc.** is a privately held company based in Toronto, Canada. It is the owner of approximately 500 domain names, including school.com, math.com, leap.com, seeds.com, and options.com. This portfolio is worth many millions of dollars. As such, we have a direct interest in any changes to the UDRP/URS policies, to the extent that those changes deprive us of our legal right to challenge adverse UDRP/URS rulings in our national courts (in Ontario, Canada).

We have long been defenders of domain name registrants' fundamental rights in ICANN policymaking, and make our comments in that same spirit in this response to the initial report of the latest working group looking at IGO curative rights mechanisms.

**While we have severe disagreements with the proposals in this initial report, we also make our comments in good faith, and propose a "win-win" alternative** (a "Notice of Objection" system, documented later in this submission). By addressing the **root cause** of the "quirk of process" that we found in the prior working group's research, we can modify the UDRP/URS in a way that would be beneficial for both IGOs and domain name registrants, simultaneously improving the procedure for both complainants and respondents. We are confident that if this proposal was seriously considered, it would be welcomed as a great improvement in policy that solves multiple existing problems while balancing the rights of both sides of a dispute.

It's important to note that we are not cybersquatters. We **despise** cybersquatting, and applaud efforts to hold those bad actors fully accountable, especially in the courts (as Verizon did with iREIT<sup>1</sup>, for example). We have advocated for **balanced policies** which target actual cybersquatters while ensuring that those falsely accused of cybersquatting are fully protected.

This is not some theoretical debate. We personally faced a UDRP over a valuable short dictionary word dot-com (Pupa.com), despite registering it in good faith. Instead of waiting for the outcome of the UDRP (which eventually decided to defer to the courts), we exercised our right to go to court in Ontario, Canada, and our position was fully vindicated, with costs awarded against the defendant (an Italian cosmetics company).<sup>2</sup>

1 [Verizon hits tiny iREIT with cybersquatting suit](https://www.bizjournals.com/houston/stories/2007/04/23/story4.html), April 22, 2007, <https://www.bizjournals.com/houston/stories/2007/04/23/story4.html>

2 [Ontario Court Rules In Favor Of George Kirikos On Pupa.com & Awards \\$4,500 In Fees](#), April 8, 2013,

We are sympathetic to trademark holders or other rightsholders, including IGOs who are targeting actual cybersquatters. However, we must ensure that the rights of innocent domain name registrants who are falsely accused of cybersquatting are fully protected, including their due process rights. Those due process rights include the right to have the merits of their dispute fully argued and decided in their national courts.

Article 8 of the ***Universal Declaration of Human Rights***<sup>3</sup> states that:

Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.

Section 2 of Article 17 of the ***Universal Declaration of Human Rights*** states that:

No one shall be arbitrarily deprived of his property.

It is these fundamental rights that we are defending, to ensure that any mandatory policy imposed upon domain name registrants by ICANN fully reflects the existing legal rights of domain name registrants.

Furthermore, we fully acknowledge that IGOs have certain legal rights as well (discussed in more depth later on in this document). It is important, though, that they are not given any **new rights** at the **expense** of domain name registrants' rights. Instead of a "win-lose" approach, we must instead adopt "win-win" solutions.

We believe that a sound policy should not prejudice either party's legal rights. The goal of the UDRP/URS should be to get the **exact same results** as would have been obtained had the parties gone to court instead, but in a **more streamlined, faster and cheaper manner where possible**.

In the next section, we look at the historical development of the UDRP, to understand how we got to where we are today, and the principles that motivated its creation.

<https://www.thedomains.com/2013/04/08/ontario-court-rules-in-favor-of-george-kirikos-on-pupa-com-awards-4500-in-fees/> ; [Canadian court orders company pay costs over wrongful domain claim](https://domainnamewire.com/2013/04/08/canadian-court-orders-company-pay-costs-over-wrongful-domain-claim/), April 8, 2013, <https://domainnamewire.com/2013/04/08/canadian-court-orders-company-pay-costs-over-wrongful-domain-claim/>

3 <https://www.un.org/en/about-us/universal-declaration-of-human-rights>

## 2. UDRP ORIGINS, INCLUDING THE ORIGIN OF THE MUTUAL JURISDICTION CLAUSE

It's crucial to study the origins of the UDRP, in order to understand the principles behind all curative rights mechanisms (including the URS) adopted by ICANN. Unfortunately, the current working group (whose transcripts and emails were carefully reviewed before making this submission) did not fully review those materials, putting its members at a disadvantage when trying to come up with solutions that respected the founding principles of the policies.

The history of the UDRP, is documented on ICANN's website at:

<https://www.icann.org/resources/pages/schedule-2012-02-25-en>

<https://www.icann.org/resources/unthemed-pages/white-paper-2012-02-25-en>

"The proposals were designed to provide trademark holders with the **same rights** they have in the physical world, to ensure transparency, and to guarantee a dispute resolution mechanism **with resort to a court system**. [emphasis added]

Notice the "same rights" and "with resort to a court system" language. It can't get much clearer than that.

The White Paper goes on to say:

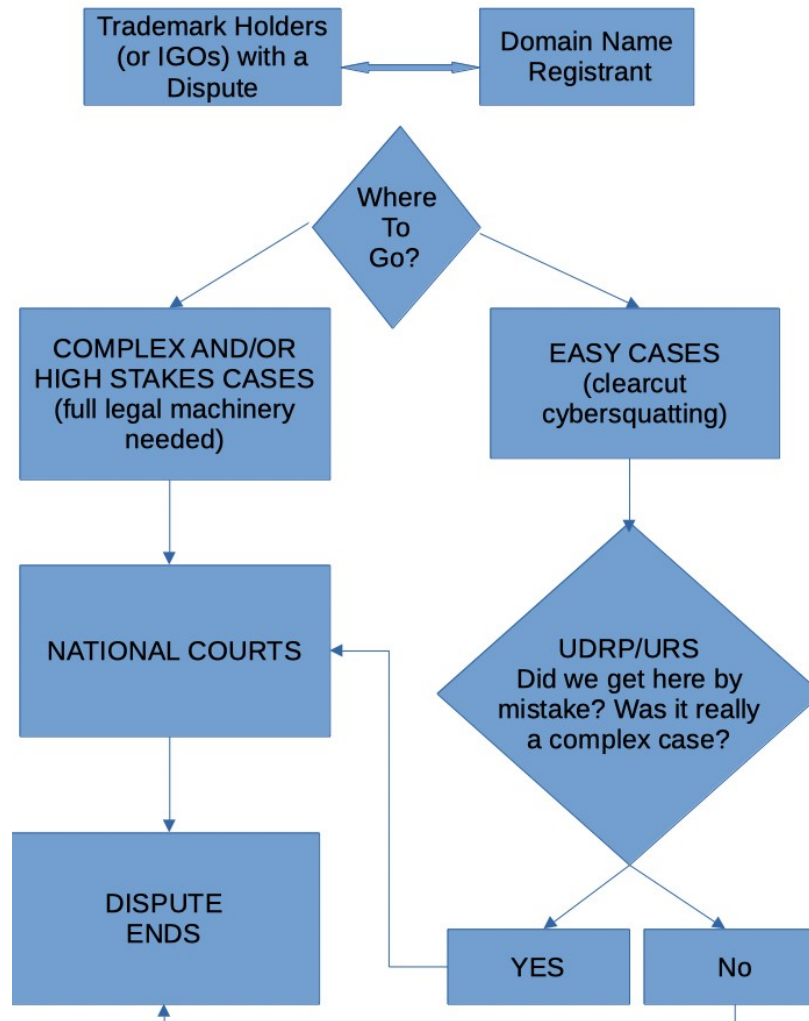
Further, it should be clear that whatever dispute resolution mechanism is put in place by the new corporation, that mechanism should be directed toward disputes about cybersquatting and cyberspiracy and not to settling the disputes between two parties with legitimate competing interests in a particular mark. **Where legitimate competing rights are concerned, disputes are rightly settled in an appropriate court**. [emphasis added]

In simple language, no one is getting "extra rights" or "fewer rights". The procedure was designed for simple clear cut cases, and "not to settling the disputes between two parties with legitimate competing interests in a particular mark." In other words, complex hard fought disputes are best settled by the appropriate courts. **By design, it was not for all possible disputes**.

This is critical. Far too many folks have tried to expand the number of disputes that should be handled by the UDRP/URS, rather than realizing that

it was never designed for all disputes. A diagram might be helpful.

**Figure A: UDRP intended for clearcut cases, whereas court is the forum for complex and/or high stakes disputes**



Why is this so? It's because the UDRP and the URS do not have all the safeguards and due process protections present in the rules of national courts. They are like an "online small claims court".

Who in 1999, when the original policies were being developed, would have thought that domain names could be worth USD \$30 million, for example, as per the Voice.com domain name transaction?<sup>4</sup> In a dispute over valuable

4 [MicroStrategy Sells Voice.com Domain Name for \\$30 Million](https://www.businesswire.com/news/home/20190618005248/en/MicroStrategy-Sells-Voice.com-Domain-Name-for-30-Million), Businesswire.com press release, June 18, 2019, <https://www.businesswire.com/news/home/20190618005248/en/MicroStrategy-Sells-Voice.com-Domain-Name-for-30-Million>

domain names, it is essential that they can be fully litigated in the national courts. In the language of the White Paper noted above, that's where those complex disputes are "rightly settled", not by an "online small claims court." One would not expect that the same rules/procedures would apply to disputes involving a \$100 domain name compared with a domain name worth \$100,000 or \$10 million.

While some folks believe that **arbitration** is "just as good" as the national courts, **we strongly disagree**, and will discuss why in greater detail in a later section of this submission. But, just from a process/design perspective, one need only look at any addition of arbitration as being fundamentally different than what was intended by the UDRP – it's no longer a simple, clearcut dispute, but is instead a complex case that belongs in the courts. An attempt to add arbitration only adds further complexity, rather than ensuring simplicity for simple and clearcut disputes.

The "mutual jurisdiction" clause of the UDRP (section 4(k) of the Policy<sup>5</sup>) was specifically added to **attempt** to ensure access to the courts was maintained for all sides, that neither party's rights would be prejudiced by the use of the policy, and that both sides could have disputes decided on the merits in the courts if need be. [Unfortunately there were some **unintended consequences**, both on IGOs and others, which we'll discuss later.] The URS has a similar clause, of course.

Indeed, if one goes to the Staff report at the time of the UDRP's development:

<http://archive.icann.org/en/meetings/santiago/udrp-staff-report.htm>

"DNSO Recommendation 4(b): The need to address the situation wherein a domain name registrant who has been unsuccessful in the ADR process is effectively prevented from "appealing" the result in a court due to the absence of a cause of action in contract, tort, regulation, statute or constitutional right. It was noted that there is an imbalance in the WIPO process in that an unsuccessful complainant will always be able to judicially challenge an ADR result by virtue of the jurisdiction of the registry being imposed over the dispute by the WIPO Report;

Staff Suggestion on DNSO Recommendation 4(b): The staff agrees that **both registrants and challengers should have equal opportunities to "appeal" an outcome of the administrative dispute-resolution procedure**. Some commentators have suggested that the DNSO-recommended **proposal would afford challengers significantly superior "appeal" rights**. The staff notes that **this result would be a**

5 Uniform Domain Name Dispute Resolution Policy, <https://www.icann.org/resources/pages/policy-2012-02-25-en>

**clearly unintended consequence of the DNSO proposal. The staff believes that this concern can and should be fully addressed in the implementation of the dispute-resolution policy, which should explicitly negate this possibility.**

[emphasis added]

They were clearly focused on ensuring that any implementation had equal opportunities on both sides for an adverse outcome to be decided through the courts. They did not want to tip the balance in anyone's favour and attempted to find a solution via insertion of the mutual jurisdiction clause.

To understand the specific development of UDRP's Section 4(k) (mutual jurisdiction), see:

<http://www.dnso.org/dnso/notes/19990729.NCwga-report.html>

The **need to address the situation wherein a domain name registrant who has been unsuccessful in the ADR process is effectively prevented from appealing** the result in a court due to the **absence of a cause of action** in contract, tort, regulation, statute or constitutional right. It was noted that there is **an imbalance in the WIPO process** in that an unsuccessful complainant will always be able to judicially challenge an ADR result by virtue of the jurisdiction of the registry being imposed over the dispute by the WIPO Report.

One suggested **solution to this problem** which WG-A agrees merits further consideration, is the requirement that a **complainant enter into a contract** with the registrant (or the arbitral institution in a jurisdiction that recognizes third party beneficiary agreements) as a **condition of initiating ADR, that provides for consent to be sued in the jurisdiction where the registrant is ordinarily resident, and in the jurisdiction where the subject registrar is located** (assuming both parties do not agree to voluntarily contract out of the right to subsequent litigation).

**That was the genesis and motivation for the mutual jurisdiction clause** – it was a specific solution to an identifiable problem. **They were focused on a lack of cause of action, and thought that adding the mutual jurisdiction clause would solve the problem.**

As we'll discuss later, though, it's **not the only possible solution.** [Remarkably, it is possible to adopt a "Notice of Objection" system that allows us to **safely remove the mutual jurisdiction clause in its entirety, while still ensuring that complex disputes are decided by the courts.** We'll discuss that in depth later, though.]

In the next section, we'll discuss the unintended consequences of the UDRP and mutual jurisdiction clause, which affects IGOs and also registrants located in certain countries (or using registrars in certain countries).



### 3. UNINTENDED CONSEQUENCES OF THE UDRP AND MUTUAL JURISDICTION CLAUSE

In order to truly understand the issues in play at a deep level, one needs to understand that there is a fundamental but subtle design flaw in the UDRP (and also the URS; when we refer to "UDRP" below, the argument applies equally to the URS).

If the UDRP didn't exist, and an aggrieved party or rightsholder (e.g. IGO, trademark owner, etc.) initiates a dispute in the courts, that party would be the Plaintiff/Complainant in the domain dispute. The domain owner, on the other hand, would be the Defendant/Respondent. **Thus, the natural role of the initiator of the dispute (rightsholder, TM holder, IGO, etc.) is as Plaintiff/Complainant, and the natural role of the domain owner is the Defendant/Respondent had the UDRP/URS never existed.**

Thus, this "Baseline Scenario" looks like the following (note that this is simplified):

BASELINE SCENARIO	
Trademark Holders (or IGOs) with a Dispute	Domain Name Registrant
Plaintiff in Court	Defendant in Court
<ul style="list-style-type: none"><li>• asserts that the domain name owner is a cybersquatter, and seeks damages and/or transfer of the domain and/or other remedies</li><li>• as plaintiff, naturally submits to the jurisdiction of the court</li><li>• if an IGO, the IGO naturally must give up its immunity, as the initiator of the dispute in court</li><li>• plaintiff has chosen the specific court (country, state, etc.), but must pick one that has jurisdiction over the domain name and/or defendant</li></ul>	<ul style="list-style-type: none"><li>• denies that they are cybersquatting, and has all the defences in law available to it to counter any statement of claim</li><li>• possesses the domain name at the start of the case</li><li>• can potentially counterclaim, if there is a larger dispute than just the domain name</li></ul>

This is simplified, but the key is that in the absence of the UDRP/URS, it's the TM holder or IGO that is generally going to be the plaintiff, the one on the offence attempting to get a court to order transfer of a domain name, or other remedies like damages (money). As plaintiff, they can conceivably pick from any court in the world, but generally need to pick one that will have some nexus with the domain name and/or registrant. So, often it would be

the location of the registrar (given that domain name registration agreements specifically mention that as a valid jurisdiction), or the location of the registrant themselves (since a registrant could not credibly argue that such a court would not have jurisdiction over themselves). But, there is nothing stopping a plaintiff attempting to use some other court, and a defendant might dispute the jurisdiction as one of its defences.

In some situations, a domain name registrant might have a counterclaim available, if there is a larger dispute than just the domain name. This might be a real concern for an IGO (or other rightsholder), as the counterclaim might more than offset the value of the domain name (in which case the IGO would never have given up its immunity in the first place to file such a case, lest it risk the counterclaim).

But, let's now add the UDRP/URS into the mix. Recall the "Figure A" chart -- the IGO or TM holder is picking the UDRP/URS path because they claim it's a "simple clearcut case" of cybersquatting. So, rather than going to court, the IGO or rightsholder becomes the Complainant in the UDRP/URS, and the domain owner becomes the Respondent. Furthermore, the IGO or rightsholder **must agree to the mutual jurisdiction clause** (for the historical reasons explained in the prior section, to allow an "appeal"). Now, there are 2 general situations, either the domain name registrant wins the UDRP/URS, or they lose the UDRP/URS.

**Situation #1** -- domain name registrant wins the UDRP/URS

If the rightsholder or IGO wants to challenge this outcome, they have **full recourse to the courts** as above Baseline Scenario without any prejudice or hindrance to their legal rights (because they will still be the plaintiffs in the court, as would have been the case had they not tried the UDRP/URS first). If the rightsholder or IGO doesn't want to challenge the outcome any further, once again there's no impact on their legal rights. So, to the extent any policy changes are necessary to the UDRP/URS, this situation is uninteresting.

**Situation #2** -- domain name registrant loses the UDRP/URS

This is where things get more interesting. If the domain name registrant accepts the outcome, then nothing interesting is required from a policy perspective. However, what happens if the domain name registrant doesn't accept the outcome? Under the current policies of the UDRP/URS, **the losing domain name registrant is expected to take court action**, to "appeal" the outcome. In tabular form, here's what it looks like:

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## UDRP/URS "APPEAL" SCENARIO AT COURT

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Domain Name Registrant	Trademark Holders (or IGOs) after a successful UDRP/URS
Plaintiff in Court	Defendant in Court
<ul style="list-style-type: none"><li>• possesses the domain name at the start of the case, but has lost a UDRP/URS</li><li>• seeks a declaration that they are the rightful owner of the domain name, to stop the outcome of the UDRP/URS</li><li>• as plaintiff, naturally submits to the jurisdiction of the court</li><li>• plaintiff has chosen the specific court (country, state, etc.), but must pick one that has jurisdiction over the domain name and/or defendant</li><li>• since the other side has agreed to a mutual jurisdiction, this will generally (but not always) be the one that the other side has submitted to</li><li>• conceivably can bring in other non-domain name matters as part of the action</li></ul>	<ul style="list-style-type: none"><li>• has agreed to mutual jurisdiction</li><li>• argues they instead are the rightful owner of the court</li><li>• IGO is disadvantaged if attempting to assert immunity (to the extent it had any), as it had agreed to the "mutual jurisdiction clause" as the price of using the UDRP/URS</li><li>• can potentially counterclaim, if there is a larger dispute than just the domain name</li></ul>

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Note that there is a big difference between the "Baseline Scenario" and this scenario, because now the domain name registrant is the plaintiff in court (whereas in the baseline, they were the defendant).

This is what we refer to as a **Role Reversal**. The natural role of plaintiff and defendant has been flipped around. This role reversal might not seem like a big deal, but in a few specific ways it can make an enormous difference.

### **Unintended Consequence #1 -- lack of cause of action**

As the domain name registrant is now the plaintiff seeking a declaration that they're the rightful owner of the domain name, it's a prerequisite that they have a valid cause of action in the court where the case is being heard. If it's in the USA, that's not a problem (due to the ACPA). But, it turns out that this is a problem in the UK (and perhaps Australia) as discussed by David Maher in an article at CircleID.com<sup>6</sup>. Had the TM holder or IGO filed a dispute directly in the UK court, for a claim of cybersquatting, the case

6 The UDRP and Judicial Review, David Maher, January 3, 2018, [https://circleid.com/posts/20180103\\_the\\_udrp\\_and\\_judicial\\_review/](https://circleid.com/posts/20180103_the_udrp_and_judicial_review/)

would have proceeded as normal, and the domain name registrant would have had the ability to have the case decided on the merits, with full argument. But, the courts in that country have said that the domain name registrant lacks a cause of action to bring the case as a complaint, for a declaration that they're the rightful owner of the domain name. As discussed in the historical development of the UDRP section of this document and in the article by David Maher, this is **grossly unfair** to the domain name registrant, as they're deprived of their right to have the case decided on the merits by the court. [while some TM holders look upon this current result with glee, and seek to perpetuate it, it is truly an unfair outcome, as the UDRP was always intended to allow for court action; UDRP was never intended as the "final word" when deciding complex disputes that were heavily contested by both sides]

The root cause of this "lack of cause of action" problem is the **role reversal** and the manner by which the mutual jurisdiction clause was inserted into the UDRP historically. The designers of the UDRP simply did not anticipate this situation, and obviously ICANN lacks the ability to simply create a "cause of action" on its own (that's up to each nation in their laws).

### **Unintended Consequence #2 -- quirk of process where court recognizes IGO immunity despite submitting to mutual jurisdiction**

The second unintended consequence is the one we looked at in depth in the prior IGO working group, a theoretical possibility that has never happened (because a losing domain name registrant has never challenged the outcome in court with an IGO complainant). We explored the theoretical possibility that after an adverse UDRP/URS result, a losing domain name registrant might take an IGO to court as an "appeal" mechanism, to have the case decided on the merits at court. It is theoretically possible that, despite the mutual jurisdiction clause, a court might still refuse to hear the case if an IGO successfully asserted immunity.

This was seen as a "quirk of process", because it was always intended (via the historical development of the UDRP above) that the case could be heard in full at court, and so the domain owner would be denied its rights to a full hearing on the merits simply because the IGO launched the UDRP first (rather than having sued in court first). In essence, under this theoretical scenario, the IGO gained a tactical advantage which later prejudiced the domain name registrant at court.

Once again, the root cause of this "quirk of process" is the **role reversal**. It's because the IGO is the defendant at court (after having gone through the UDRP/URS) instead of a plaintiff, the IGO is now able to attempt to assert immunity (as plaintiff, an IGO can't assert immunity).

This odd theoretical scenario is what led to the year-long study and debate of "what to do, should it ever happen?", which eventually led to Recommendation #5 of the prior working group, which essentially said "**Put them back in the same situation they would be had the UDRP/URS not taken place.**"

While some folks argued for other solutions, this is was seen as an appropriate solution, due to its simplicity, and also the fact that by vitiating (disregarding) the UDRP/URS outcome, it would be aligned with the historical design goal of the UDRP. It's NOT a circular solution, because if you look at things in tabular form, they would now look like this:

<b>SCENARIO AT COURT AFTER UDRP/URS RESULT VITIATED</b>	
<b>IGO after a successful UDRP/URS vitiating</b>	<b>Domain Name Registrant</b>
Plaintiff in Court	Defendant in Court
<ul style="list-style-type: none"> <li>• has been the aggressor, and has won the UDRP/URS but the result has been set aside</li> <li>• had already agreed to mutual jurisdiction clause</li> <li>• asserts that the domain name owner is a cybersquatter, and seeks damages and/or transfer of the domain and/or other remedies</li> <li>• as plaintiff, naturally submits to the jurisdiction of the court</li> <li>• as plaintiff (and initiator of the overall dispute), the IGO naturally must give up its immunity, and must become the initiator of the dispute in court if things are to continue</li> <li>• plaintiff has chosen the specific court (country, state, etc.), but must pick one that has jurisdiction over the domain name and/or defendant</li> </ul>	<ul style="list-style-type: none"> <li>• possesses the domain name at the start of the case, but has lost a UDRP/URS, but that loss has now been disregarded/vitiated</li> <li>• denies that they are cybersquatting, and has all the defences in law available to it to counter any statement of claim</li> <li>• can potentially counterclaim, if there is a larger dispute than just the domain name</li> </ul>

This chart is basically the same as the "Baseline Scenario", which was the scenario where the rights of both sides have not been affected (negatively or positively) by the UDRP. From a legal point of view (ignoring how they got there), both sides have their full legal rights/defences.

In other words, going back to "Figure A" above which delineated complex and simple cases, Recommendation #5 recognized that this "quirk of process" was a situation that was never "simple". Both sides were vigorously disputing who was the rightful owner of the domain name. If the dispute was to be taken any further, it would need to be handled by the courts.

In particular, Recommendation #5 reinforced that a "loss due to immunity" in the courts was really a **procedural loss**, rather than a loss on the merits. It would unfairly elevate the importance of the prior UDRP decision if it was to be left to stand, as it was expressly being challenged on the merits. The only good way to add weight to the UDRP outcome was to reinforce it via a **win on the merits** in the courts, rather than avoiding any decision on the merits in the courts. Perhaps with this additional context, those who have misunderstood Recommendation #5 will reexamine their position.

Notice that both unintended consequences (the "lack of cause of action" in the UK/Australia; and the "quirk of process" involving IGOs) **have at their root cause the role reversal.**

Is it possible to design a system so that the role reversal is eliminated, while still preserving the full legal rights of both sides? It turns out the answer is "**Yes**"! See the next section for an exciting solution that solves the problem for both parties, **eliminates those unintended consequences**, making it a "win-win" solution that should be able to be adopted on a consensus basis because it improves both sides. And as an important **side-benefit**, it **eliminates the need for a mutual jurisdiction clause** (thereby benefiting IGOs directly!).

#### 4. NOTICE OF OBJECTION SYSTEM AS A NEW SOLUTION

At a very late stage of the prior IGO PDP, in June 2018, too late for the working group to really consider it, I discovered that an elegant solution exists which completely eliminates the role reversal flaw discussed above. This was posted to the mailing list on June 7, 2018:

<https://mm.icann.org/pipermail/gnso-igo-ingo-crp/2018-June/001226.html>

which documented a procedure within the rules of the "Civil Resolution Tribunal" an online tribunal that handles small claims and strata (condominium) disputes in the British Columbia, Canada.

In particular, they have a "Notice of Objection" system as their appeal mechanism:

<https://civilresolutionbc.ca/how-the-crt-works/how-the-process-ends/#what-if-i-dont-agree-with-a-final-decision>

If you disagree with the CRT's final decision on a small claims matter, including a default decision, you can pay a fee and file a Notice of Objection with the CRT. The Notice of Objection must be filed within 28 days after a party receives a CRT decision. The CRT cannot issue an order in a small claims dispute until the deadline for filing a Notice of Objection expires. **If a Notice of Objection is filed, the CRT decision is not enforceable. If any party wants to continue any of the claims that were included in the dispute, that party must file a Notice of CRT Claim in the BC Provincial Court.** [emphasis added]

Essentially, if one pays the appropriate fees and files a "Notice of Objection", the decision is not enforceable, and further court action (in an established offline court) would be required.

Note that **I did not invent this procedure**, but immediately recognized that it eliminated the "role reversal" in its entirety! It's a real process designed by a real jurisdiction in the world.

In a UDRP/URS context, this means that there'd be no reversal of the roles of plaintiff/defendant in the court, compared with the complainant/respondent in the UDRP/URS procedure. Thus, the "quirk of process" involving IGOs discussed in prior section, where an IGO can become a defendant in the courts due to the role reversal and attempt to assert immunity, simply doesn't exist under the Notice of Objection system. Instead, the IGO would continue to have their "natural role" as Complainant in the courts, as is the case had the UDRP/URS never existed.

The UK lack of "cause of action" issue mentioned in the prior section, caused by the role reversal, also doesn't arise, as the trademark holder would be the complainant in the court case (if the UDRP/URS decision became not enforceable).

To see this in tabular form, it would look like this:

<b>SCENARIO AT COURT AFTER "NOTICE OF OBJECTION"</b>	
<b>Trademark Holders (or IGOs) with a Dispute</b>	<b>Domain Name Registrant</b>
Plaintiff in Court	Defendant in Court
<ul style="list-style-type: none"> <li>• has lost the UDRP/URS but has exercised a "Notice of Objection", and decided to "appeal" the result, <b>OR</b> has won the UDRP/URS, but the domain name registrant raised a "Notice of Objection", setting the decision aside as not enforceable [regardless, the TM holder or IGO is always going to be the Plaintiff in court]</li> <li>• asserts that the domain name owner is a cybersquatter, and seeks damages and/or transfer of the domain and/or other remedies</li> <li>• as plaintiff, naturally submits to the jurisdiction of the court</li> <li>• if an IGO, the IGO naturally must give up its immunity, as the initiator of the dispute in court</li> <li>• plaintiff has chosen the specific court (country, state, etc.), but must pick one that has jurisdiction over the domain name and/or defendant</li> </ul>	<ul style="list-style-type: none"> <li>• has won the UDRP/URS but the other side has exercised a "Notice of Objection" <b>OR</b> has lost the UDRP/URS, but has itself raised a "Notice of Objection" setting the decision aside as not enforceable [is generally going to be the defendant]</li> <li>• denies that they are cybersquatting, and has all the defences in law available to it to counter any statement of claim</li> <li>• possesses the domain name at the start of the case</li> <li>• can potentially counterclaim, if there is a larger dispute than just the domain name</li> </ul>

It's essentially the same as the "Baseline Scenario"!! What's truly **magical**, though, is that you **don't require any mutual jurisdiction clause when invoking the UDRP/URS**!! That clause can be taken out in its entirety, because it'll be the Trademark Holder (or IGO) filing the dispute in court (it would make no sense for the domain name owner to file in court as plaintiff, as they can simply set the adverse decision aside by invoking the Notice of Objection, making the loss not enforceable).



Furthermore, to prevent "gaming" of the notice of objections, various court costs can be assessed in the courts later on, if the party who filed the notice of objection did no better in the courts:

If the **person who filed the Notice of Objection does not have a better outcome** in the BC Provincial Court than in the CRT's decision, the BC Provincial Court may **order that party to pay a penalty to the other party** [emphasis added]

What happens when you eliminate the mutual jurisdiction clause, and instead replace it with a "Notice of Objection" system"? Besides solving the quirk of process and cause of action issues, **it means that an IGO can invoke the UDRP/URS process without first having to give up its immunity!**

This is huge, because for the **99% of domain disputes** where the UDRP/URS results are accepted by both sides, and there's no further court action or "appeal" desired, the IGO has **protected and preserved its immunity**. But, the domain name owner is protected too, because in the rare cases that court action is needed, the results can be set aside via the Notice of Objection, and further court action can proceed (with the IGO or TM holder as plaintiff, and the domain name owner as defendant). Indeed, what's great for IGOs is that they can **decide at that later date**, after the "Notice of Objection" has been exercised, whether or not to go any further. They might choose to waive their immunity and go to the courts. Or they might decide that it's not important enough to them (after weighing their options having seen the domain owner's defence of the domain), and cease the dispute at that point.

As someone who went through all the transcripts of the calls carefully, this is actually something expressly desired by the IGOs! On pages 19-20 of the very first meeting (February 22, 2021), Alexandra Excoffier of the OECD said:

[https://gnso.icann.org/sites/default/files/policy/2021/transcript/transcript-igo-work-track-22Feb.en\\_.pdf](https://gnso.icann.org/sites/default/files/policy/2021/transcript/transcript-igo-work-track-22Feb.en_.pdf)

Maybe two little points on small ways. It says that we cannot create a specific new dispute resolution procedure, but from my understanding we can tweak, a little bit, the UDRP. And one of the things ... In terms of immunities, there's one thing to say that after the process is over and if there's an appeal to national courts, the IGO will

have to essentially decide whether or not to waive immunities, or a court decides if we insist in our immunities.

But there's something preemptive, as well. **And the way that UDRP is phrased currently, it's [that] we have to decide this not at the time of the appeal, but at the time of actually deciding whether or not to launch a process because we have to actually decide to waive immunities in order to do the process.** And I think this is a small tweak that can be done which would allow the losing party to appeal; at the same time not require the IGO to waive its immunities at that outstart.

...

That's all I wanted to say. A suggestion I hope that we can discuss around not having to waive immunities from the start[**sic; start**]. That will be already a good start for us. Thank you so much. [emphasis added]

Ms. Excoffier is describing the **exact feature** that the "Notice of Objection" has, namely that they can file the UDRP/URS without giving up their immunity at the start (because there's no mutual jurisdiction clause needed at all in a Notice of Objection based system, given that it's the TM holder or IGO that is always going to be the plaintiff in court when rulings of the UDRP/URS are not enforceable through invocation of the Notice of Objection). With a Notice of Objection system, the IGO can defer the decision as to waiver of immunity to such a time that the Notice of Objection has been exercised. And for 99% of cases, pragmatically it means they'll have gone through the UDRP/URS and not have had to waive immunity at all. In the 1% of cases where Notice of Objection is raised, the IGO can make a choice at that point whether or not to waive immunity (if the domain name is important enough, and the benefits outweigh the legal risks, they might decide to waive it -- it's their choice).

I personally put out an olive branch directly by email to Mr. Passaro of the OECD at the time of the first working group was active in 2018 to raise this as a possible solution, and we did have fruitful discussions. I strongly believe that this could form the basis for a global solution, and I didn't invent it --- it's modeled on a procedure created by others in an established legal system. While IGOs are obviously trying to convince ICANN to tilt the scales in their favour by creating an uneven playing field that advantages them via arbitration, this "Notice of Objection" system keeps things entirely neutral for all sides, and recognizes that ICANN isn't the place to create "new law", but instead it is the national courts that have supremacy. For IGOs, there's a particular advantage in that there would not need to be a "mutual jurisdiction" clause at the time of the filing of a UDRP/URS, because it's no longer necessary. i.e. the Notice of Objection means the decision is unenforceable, so then it's entirely up to the IGO to decide whether they wish to pursue the dispute in court (as the initiator of the court action). IGOs wouldn't have to risk others dragging them into a court via the

inherent waiver of immunity from the current mutual jurisdiction clause, in other words.

**Mr. Passaro's main concern appeared to be the potential "gaming" by a malevolent domain owner (i.e. a true fraudster), if the cost of the "Notice of Objection" was too small. But, I believe a suitable figure could be determined that would fully address his concerns (on the order of several thousand dollars at risk -- it cannot be free, to ensure that potential legal costs are also covered if the objector simply doesn't show up to defend in court).**

I think to be fair, the minimum level of the Notice of Objection fee should be the level of court costs to file a case in the domain owner's country (or an average globally, to simplify). So, that would be on the order of a few hundred dollars. At a maximum level, it should reflect the greater of the costs of the UDRP/URS procedure and the legal costs of filing a case (i.e. paying for lawyers to draft a statement of claim), so perhaps a few thousand dollars. Advocates on both sides of the debate (on one side, who want to ensure court access for the poorest domain name registrants who still have a legitimate case, but on the other side want to make sure that notice of objections are not used too often to force court action) can find a number that everyone can live with. Since the domain owner would be punished through costs orders if they don't have a better outcome in the courts, it would not be a decision taken lightly to invoke the Notice of Objection, having seen the decision in the UDRP/URS.

Indeed, one would expect mainly the most egregious decisions (like the ADO.com case) or the highest value domain names to be fought over in courts via a Notice of Objection. And if you go back to the chart in Figure A above, **those are exactly the kinds of cases that belong in the courts!**

On a pragmatic level, if IGOs limit their UDRP/URS disputes to the "criminals" they claim to be after (i.e. phishers, true cybersquatters, etc.), they have little fear that those domain name owners would ever invoke a notice of objection, as it would mean that authorities would be "on to them". (i.e. they'd have to show up in real court to defend the case, and the police could nab them; if they didn't show up, they'd lose by default, including losing any fees/security deposit they put up when invoking the notice of objection).

To see that this system is robust, suppose that, despite exercising the "Notice of Objection", the domain owner still tries to sue the IGO in court?

(Or they even try to sue in court before the UDRP/URS is decided) What would happen? Since the IGO hasn't agreed to mutual jurisdiction, the IGO can fully attempt to assert any immunities it might have in court, if the IGO was ever a defendant. The Notice of Objection system has not prejudiced the IGO's legal rights and in particular any claimed immunity.

All in all, this is an elegant solution that is a win-win for both IGOs and domain name registrants, and I hope that it will be seriously considered by the working group. Potentially, it is best suited for phase 2 of the RPM PDP (and can be adopted for the URS too simultaneously), but it can be accepted within this working group and be forwarded to the new working group as an acceptable outcome.

## **5. IMMUNITY IS A DEFENSE TO A DISPUTE, AND NOT INVOLVED WHEN IGOs INITIATE A DISPUTE**

Before we go further and analyze the working group's recommendations in the report (in later sections of this submission), it's important to clear up misconceptions of "immunity".

There are a lot of misconceptions regarding the nature of IGO immunity. They often assert that it's always absolute, but the precise nature of immunity will often depend on the specific IGO, the national jurisdiction (which may not even recognize a given IGO), specific terms of a treaty, and other factors.

However, at a more basic level, immunity is a **defense** to a dispute initiated by others against the IGO. It's intended to protect the IGO when the IGO is the target of a dispute. **Whenever an IGO is the initiator of a dispute, though (when it's the Plaintiff/Complainant), then it has waived any immunity. Immunity is simply not in play anymore.** This is such a basic thing, but has not been understood by some who've only read imperfect summaries of the debate.

The mutual jurisdiction clause of the existing UDRP, and similar clauses of the URS, which IGOs complain bitterly about, attempts to reflect the reality that they are the initiators (not the target) of the underlying dispute. There is simply no expectation of immunity when IGOs are the initiator of the dispute (rather than the target of the dispute).

This is evident in the "Baseline Scenario" above.

IGOs instead try to assert that there are **two** separate "disputes", the dispute at the UDRP/URS provider, and then a second dispute if the decision goes to a national court (i.e. if the domain registrant loses at the UDRP/URS level, and seeks to challenge that outcome in the courts). This is simply nonsensical. It is clear that there is **one** overall dispute, which is split between potentially many steps/stages (UDRP/URS, and then courts if need be). IGOs want immunity in the second step of the dispute, in the courts, if they win at the initial UDRP/URS step of the process. That is simply untenable, and not consistent with the nature of immunity when the IGO is the initiator of the overall dispute concerning the domain name. It's also inconsistent with the history of the development of the UDRP (discussed above), where it was never intended for the UDRP to be the "final say" on a dispute. Access to the national courts for a decision on the merits with full due process was never a right to be lost by any party to a dispute.

Thus, the argument has been made by some that **arbitration is required** because of the IGOs' alleged immunities. This is simply not correct.

While IGOs are free to enter into direct contracts with parties they do business with (e.g. employees, contractors) which include arbitration clauses, IGOs have no contractual relationship whatsoever with most domain name registrants. [indeed, if they had such direct contractual relationships, they wouldn't need a UDRP/URS at all]

With those parties they have no contractual relationship with, they have no means of compelling arbitration, **nor should they have such a power.** That would be the creation of brand new law, and ICANN is not the forum for that. [ICANN needs to reflect actual law, and step aside and let all sides use their own national laws]

For instance, if someone had a bakery and put up a sign saying "UNESCO Cookies", there is absolutely no mechanism for the UN agency to compel binding arbitration. The UN agency could waive their immunity and go to court. They can contact the police and have the police do something. They can ignore the situation. But, they can't compel arbitration.

While this might seem unfair to some, it's the same thing as if someone at UNESCO broke a copyright law, or did something else "bad". The third party would have no recourse in the courts at all due to immunity of the UN agency, and a non-contracted party, couldn't impose arbitration either. So, in a way it's symmetric.

In a general sense, going back to "Figure A", these cases fit into the Complex and/or High Stakes category, and are ill suited to ICANN policymaking. To go beyond the UDRP/URS to create brand new complex systems is simply the wrong approach, as it would attempt to reinvent the courts, rather than recognizing that the courts already exist.

## 6. ANY ARBITRATION SYSTEM COULD NOT BE LIMITED TO JUST DOMAIN NAME DISPUTES

Before we go deeply into the current working group's report, it's important that we address an **implicit assumption** by members of the current working group (of which I'm not a member, but I've read all the transcripts of calls and emails of their mailing list) that alleged cybersquatting is the **entirety of the dispute** between the complainant (in this case an IGO, but conceivably anybody initiating a domain dispute if some future arbitration system is added to the UDRP for non-IGO complainants) and the domain name owner. However, in many situations, that assumption will not be correct.

A domain name owner who seeks to challenge an adverse UDRP/URS decision in court is not limited to making their court dispute only about domain names. They are entitled to bring up **all potential claims** against the other side. For example, if the domain name owner who is seeking relief in the courts from an adverse UDRP/URS decision was an alleged victim of some IGO misbehaviour, **all of that would appear in their statement of claim at the court**. If the **IGO successfully asserts immunity** at that court, not only does it **prevent the domain name aspect of the case to be decided on the merits by the courts**, it also **prevents the court from hearing the rest of the case on the non-domain name portions**.

If the UDRP/URS had not existed, the IGO might not ever have taken the domain name owner to court, because they might have feared a counter-claim against them which would either partially or potentially more than offset the value of the domain name. (see the "Baseline Scenario" in section 3 above) [Indeed, it might not just be the domain name owner who would counter-claim in court...once the IGO submits to the jurisdiction of a court, other victims might appear and join the case.]

For example, suppose a rape victim of the World Health Organization [WHO] (there was a major scandal recently<sup>7</sup>) was prevented from getting civil damages, due to the WHO's immunity. She registers a domain name such as WorldHealthOrganizationRapedMe.tld to tell her story. In the absence of the UDRP/URS, if the WHO wanted to challenge the ownership of that domain name in court, they'd have to give up their immunity and she could counter-sue them for damages related to the rape. Given the potential financial risk, the IGO would be very reluctant and unlikely to give up their immunity by

7 [World Health Organization Says Its Staff Perpetrated 'Harrowing' Sexual Abuse In Congo](https://www.npr.org/sections/goatsandsoda/2021/09/29/1020814023/world-health-organization-says-its-staff-perpetrated-harrowing-sexual-abuse-in-c), September 29, 2021, <https://www.npr.org/sections/goatsandsoda/2021/09/29/1020814023/world-health-organization-says-its-staff-perpetrated-harrowing-sexual-abuse-in-c>

taking cases to court, if the other side had a valid claim that would result in large damages against them.

But, suppose they still wanted to take the site down, for whatever reason, perhaps reputation management (this is a hypothetical related to rape, but the domain owner could be an unpaid supplier, or a victim of environmental damage, or some other victim with a valid grievance unable to get relief due to the IGO's immunity normally). The IGO files a UDRP/URS, and amazingly wins (such strange outcomes plague the UDRP, as has been noted that some panels do not see free speech issues the ways those of us in Canada and the USA do). Regardless, if the domain name owner takes the case to court to challenge the adverse domain name outcome, **she can certainly also include the claim for damages related to her alleged sexual abuse.** [indeed, she might even file a class action lawsuit, and make things even more interesting with multiple complainants]

If the judge in the court case denied a full hearing, due to the IGO's immunity, tossing it out on a "technicality" and not allowing for a decision on the merits, what happens next? That's what the current working group is debating. They appear to be pushing for arbitration as a "solution".

However, what would be the subject matter of the arbitration? **Fairness dictates that the rape victim should be able to state the full claim at such an arbitration panel, and not just be limited to domain name issues!**

It would be fundamentally unfair if the arbitration was limited just to domain names, because an IGO cannot **selectively carve out aspects of their immunity**, when they submit to the jurisdiction of a court. It's all or nothing, as noted above (i.e. **which is why they never took her to court in the first place regarding the domain name, for fear of a counterclaim involving sexual misconduct civil damages**).

Indeed, in the prior working group, of which I was a member, we even offered IGOs the opportunity to have an express "limited waiver of immunity" provision as a modification of the current "mutual jurisdiction" clauses in the UDRP/URS. IGOs felt that wouldn't protect them, **so by their own analysis and stated positions at ICANN**, it appears to be "all or nothing." They don't get to pick and choose. [if, on the other hand, they are able to pick and choose which aspects of their immunity they are able to give up, and limit things only to the domain name, then that would have been a complete solution to the IGOs' alleged 'problem', and the working group would have completed its work years ago]



This is a huge unforeseen negative for those advocating arbitration, because it means that ICANN would have to create, for fairness, an arbitration system that would handle non-domain name disputes, **as long as domain names are a portion of the overall dispute between the parties**. This would mean building an arbitration panel that could also handle employment disputes, whistleblower cases, environmental cases, defamation actions, copyright cases, trademark cancellation cases, sexual misconduct cases, and any other potential court actions, as long as domain names were somehow involved as an element of a broader action. I think this goes far beyond ICANN's capabilities, and shows that the new working group hasn't fully considered the ramifications of their proposals.

Indeed, the current report proposes removal of the mutual jurisdiction clause in its entirety (without an adequate replacement), which is far beyond what the prior working group ever did, and is beyond the scope of the working group. This would allow "forum shopping" and tactical use of the UDRP/URS by IGOs, who would attempt to retain immunity from the non-domain name aspects of their overall dispute with the domain name owner. It invites abuse and misuse.

If ICANN ever contemplates binding arbitration for non-IGO disputes, similar situations might take place, where **counter-claims** by the domain name owner that would offset claims against them for alleged cybersquatting **would all need to be heard in arbitration, out of fairness** (to avoid tactical advantage for one side or the other, relative to the courts). So, trademark cancellation claims, for instance, might be natural counter-claims by domain owners, which would have to be heard by panelists. Employment disputes, anti-whistleblower claims, environmental claims, and so on. Should ICANN design arbitration systems to handle such complexity? Of course not.

Taken to the "extreme", it could allow governments (since IGOs are the creation of government) to challenge domain names, and even perhaps registered trademarks or other disputes outside the court system, in an ICANN-designed arbitration system. For example, if the South American countries who were vehemently opposed to the dot-Amazon TLD created a treaty with an IGO which had rights to the term "Amazon", what's to stop them from challenging the ownership of the Amazon.com domain name? Would Jeff Bezos' company be forced to an arbitration, where the laws and legal protections might be those of South America, and give up their rights to access the courts in the USA? Could Jeff Bezos' company even be forced by an unaccountable panel to relinquish ownership of their prized domain name without any recourse to the courts to challenge what most would perceive to be a "perverse" outcome? (although, those in South America might see that as the "correct" outcome) Sometimes panels just make the

wrong decision – would Amazon agree to put such power over its assets into the hands of a small number of panelists, who could be potentially bribed, or have some other bias against them, and whose incorrect decisions could not be challenged in the courts of the United States?

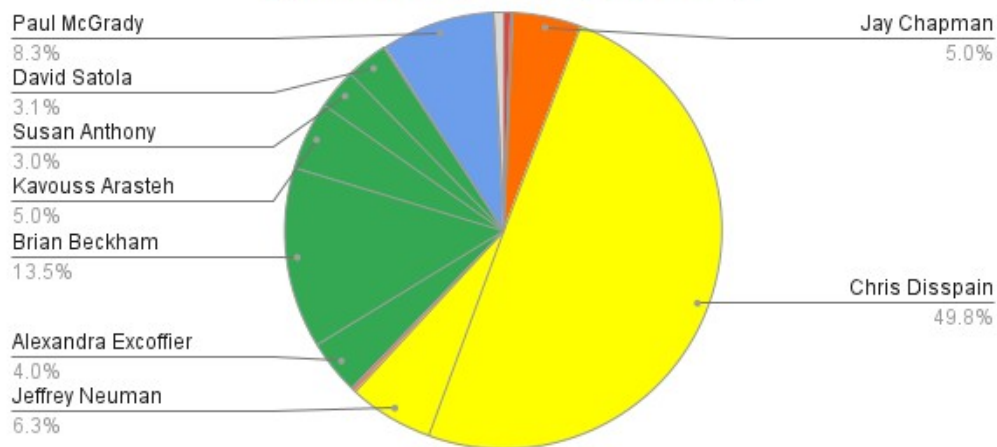
IGOs are the creation of governments, in some ways an unaccountable alter ego and amalgam of groups of them. It's the national courts that protect citizens from abuses by their governments. Any form of involuntary arbitration risks being misused, given that they can lead to different outcomes than national courts.

## 7. UNBALANCED PARTICIPATION LEADS TO CAPTURE

To understand what led to the current report, I decided to look at the actual participation of working group members, as per the [mailing list activities](#) and on the weekly calls (transcripts are available on the [GNSO Calendar page](#)). The shocking results<sup>8</sup> [visible on the web via a [published Google Spreadsheet](#), with graphs) clearly demonstrate why such one-sided proposals were arrived at by the working group. In particular, the IGOs (through the GAC) had **far greater participation**, via Brian Beckham of WIPO and others, with only Jay Chapman of Digimedia (participating on behalf of the Business Constituency) as a voice for domain name owners. **It is clear that the output of the working group reflects capture.**

### IGO Working Group Weekly Calls Participation (words spoken)

(up to 2021/10/16; excluding ICANN staff)



### Methodology

Kevin Ohashi of ReviewSignal.com was commissioned to assist with part of the work, in particular the parsing of the PDF transcripts. Mr. Ohashi authored a [widely cited study looking at regulatory capture in the renewal of the .org contract](#)<sup>9</sup>.

Cleaning up the data was a huge task, and credit goes to Mr. Ohashi's persistence in getting to a clean data set that could be analyzed. For example, there was an obvious transcription error where some text was attributed to "Brian King" (a [famous name in ICANN circles](#)), who wasn't

8 See: [https://docs.google.com/spreadsheets/d/e/2PACX-1vRyhPivBSZxfZ1Cu8tHtZHNNwqF-3VDGosbwO0vx94cN\\_ttIVJERCIT81-44\\_4zVrxI\\_oruIm2gNj98/pubhtml#](https://docs.google.com/spreadsheets/d/e/2PACX-1vRyhPivBSZxfZ1Cu8tHtZHNNwqF-3VDGosbwO0vx94cN_ttIVJERCIT81-44_4zVrxI_oruIm2gNj98/pubhtml#)

9 [The Case for Regulatory Capture at ICANN](#), June 24, 2019, <https://reviewsignal.com/blog/2019/06/24/the-case-for-regulatory-capture-at-icann/>

even a participant in the working group. Consulting with the Zoom original recordings confirmed that that text should have been attributed to Brian Beckham. Similarly, some people had variations on their name (e.g. Jeff vs Jeffrey) on different transcripts. Had the transcripts been provided in a tagged format such as XML, analysis would have been much easier. All the chat transcripts of the Zoom calls were also reviewed, but we did not separately tabulate them, given very little activity took place via chat.

## **Results**

The above pie chart speaks for itself. While Jay Chapman spoke for 5% of the total words (excluding ICANN staff), he was drowned out by members of the GAC (mainly IGOs, in particular Brian Beckham of WIPO, who by himself had nearly triple the participation of Jay). Paul McGrady of the IPC also had a large amount of participation, and given his pro-complainant policy positions, he can't be counted upon to protect the interests of domain name registrants.

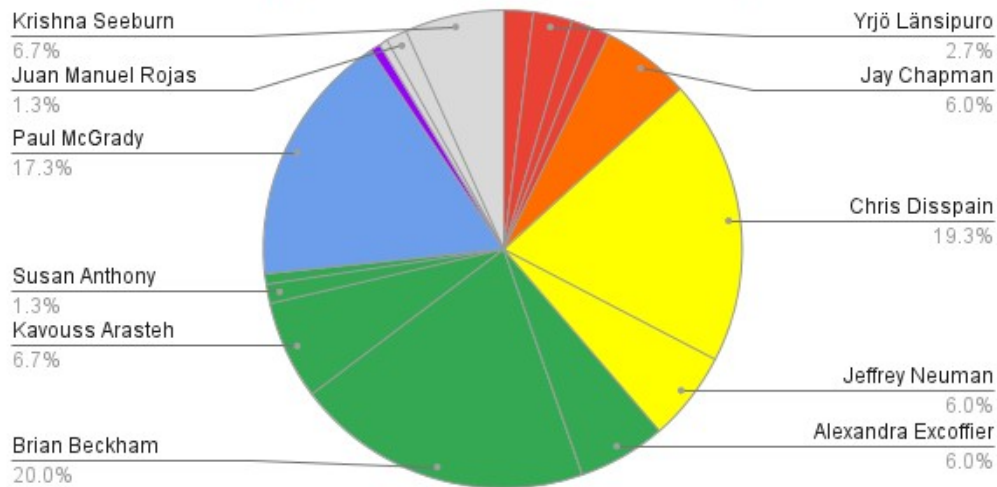
You can see the "raw" results in tabular form on the [published Google Spreadsheet](#) (and the charts are bigger on that). [NB: To make it easier to see groups affiliations, they were colour coded accordingly. e.g. green for GAC]

What's also clear is that some members of the working group had little, if any participation. [Full attendance records of each participant can be found on pages 29-30 of the [ICANN report](#).] ALAC members barely even made their presence known by speaking. Two of the three NCSG members didn't speak at all, despite attending over 70% of the meetings! [we thought there was a database error or something, but we double-checked manually] The third NCSG member left the group after 2 meetings. The ISPCP member just spoke one time on the first call, despite attending nearly 80% of the calls. No members of the Registry or Registrar constituencies even participated in the working group.

Similar domination by GAC and IPC members took place on the mailing list, as per the pie chart that follows (raw data is available in the [published Google Spreadsheet](#)).

## IGO Working Group Mailing List Participation

(up to 2021/10/16; excluding ICANN staff)



The role of the chair in ensuring balanced participation and representation is crucial, yet unfortunately Chris Disspain should have done better to ensure that the voices of affected stakeholders were heard, especially on the calls (not very much work was done via the mailing list on this working group, as compared to other working groups that I've seen). Excluding staff, he accounted for a whopping 49.8% of the spoken words on calls just by himself. Given that the chair of a call takes on an extra administrative burden, one would expect the chair to have above-average participation. But, to me that is very high indeed, truly excessive by any reasonable metric. There should have been far greater outreach to affected stakeholders (i.e. domain name registrants), to ensure a balanced policy outcome. Unfortunately, that didn't happen.

### **Conclusions in relation to capture**

In conclusion, we are where we are because ICANN policymaking has been captured by an unrepresentative group. This is a failure of the bottom-up multistakeholder model. ICANN and the GNSO should:

1. Do greater outreach even after the comment period has concluded, so that affected stakeholders become aware that proposals exist that will negatively affect their fundamental legal rights.
2. Consider a second period that is more widely publicized and longer, to ensure greater opportunity for outreach and study.
3. Expand membership of the working group, to ensure that the voice of domain name registrants is heard. Otherwise, the GNSO should

respect the results of the prior working group's effort (despite criticisms, it had much better balance).

4. Rethink the entire restricted membership working group model, which has led to these kinds of results. In particular, **the second phase of the RPM PDP, which will do the very first review of the UDRP, is subject to similar capture if it is not an open membership working group model where affected stakeholders particularly domain name owners like myself, can actively participate.**

## 8. WORKING GROUP WENT BEYOND THE SCOPE SET BY THE GNSO

This new working group was given a limited mission, namely to review the prior IGO PDP working group's Recommendation #5. It was not appropriate to relitigate Recommendations #1, #2, #3, and #4. Any proposed alternative to Recommendation #5 was to be "generally consistent" with the first four **already approved** recommendations.

Instead, due to capture (discussed in section 7 above), this new working group strayed far beyond its limited scope. We agree with the analysis provided by the Internet Commerce Association in their own submission on this point (page 2 of their submission, "Background" section).

The new working group decided to ignore its charter almost immediately upon formation. For example, on page 28 of the transcript of **the very first call** (February 22, 2021):

[https://gns0.icann.org/sites/default/files/policy/2021/transcript/transcript-igo-work-track-22Feb.en\\_.pdf](https://gns0.icann.org/sites/default/files/policy/2021/transcript/transcript-igo-work-track-22Feb.en_.pdf)

Brian Beckham of WIPO was saying:

"Also, I note that the concept of boundaries and beating back the boundaries and the potential questions about relaying some questions or work that we have back to the GNSO and/or the GAC ... So, I say let's beat back these boundaries and not tie our own hands."

Chris Disspain, the chair, also did not feel constrained by the charter, in the very first meeting again, on page 32:

Let's take the spirit of the discussion around tweaking and being able to come up with creative solutions using words and tweaking the other four recommendations and the boundaries, and let's see if those of you who have the time and the ability to do this work can perhaps come to the next meeting with some thoughts and suggestions about possible solutions that fit within the tweaking of the scope and the boundaries.

So, I'm not seeking a strict reading. I'm suggesting that, as [is quite right,] these boundaries and this scope are open to interpretation, and there's no suggestion that they're not. So, I would encourage those of you who have an interest in doing this, to please come to our next meeting with some suggestions that you think would fit within the sort of tweaking of the scope and so on.

It is not surprising that the new working group lost its way, when the members had such an utter disregard for any constraints imposed by the charter. Instead, an unrepresentative group captured the new working group, coming in with a predetermined "wish list" that would overturn the charter and past recommendations. That is not acceptable.

Now, some might claim that the prior working group's Recommendation #5 was out of scope with its charter, and it would be a double standard to hold the new working group constrained by its own charter. However, that is **not correct**.

As per my comments submitted in August 2019 to the Board (included in full as a separate PDF for this comment period, to accompany my new submission), see:

<https://mm.icann.org/pipermail/comments-igo-ingo-crp-recommendations-11jul19/2019q3/000025.html>

I explicitly raised (as part of a Section 3.7 appeal) the concern of whether Recommendation #5 was within that old working group's charter, or whether the "quirk of process" should just be noted and referred instead to the RPM PDP for further policy work. See a summary of what happened on pages 5 and 6 of that 2019 PDF.

In particular, Heather Forrest, the chair of the GNSO, explicitly told us it was "**sufficiently related to a charter**" and we could "**deal with this**" and not "**fling it to another PDP**".

That's all on the record. In particular, that was **several years into a PDP**, after randomly encountering that "quirk of process" through our research as a working group. We discovered it, and made a recommendation about it, after long study.

That's in sharp contrast with the new working group, which **came in with preconceived ideas** to test the limits and boundaries of its charter, and hadn't even started doing any work yet.

Indeed, in the second meeting, Brian Beckham of WIPO was openly advocating changing the "AND" in the UDRP/URS rules to "OR" (conjunctive vs. disjunctive debate). That March 1, 2021 transcript can be read at:

<https://gns0.icann.org/sites/default/files/policy/2021/transcript/transcript-gns0-igo-worktrack-01mar21-en.pdf>



For instance, on page 8, Brian Beckham said:

"Obviously, the former presents the possibility of significant gaming. That's a problem that we see in the UDRP context. So, the UDRP requires both that the registration be shown to be registered at the time of registration and then subsequently used in bad faith.

A number of ccTLDs have actually combined that to just say [that] there has to be a showing of bad faith. So, something targeting the brand owner. And that ccTLD-type formulation, if you will, has tended in practice to be a little simpler and cause a few less headaches."

When Chris Disspain wanted to be clear (page 9) about what Brian Beckham was saying, he asked:

"Thanks, Brian. I'm going to Jeff in a second, but forgive me. I just want to make sure I'm clear. Are you suggesting that these are topics we should be discussing?"

Brian Beckham responded (still on page 9):

"I think that whatever output we ... If we sort of look into the crystal ball, if we ended up creating, let's say, some adjustments to the UDRP that address this Recommendation 5 issue, these are the topic that, in previous discussions, were some of the forks in the road that we would want to look at."

Even Jeff Neuman questioned this straying from, indeed subversion of, the charter, on page 10:

"I thought the only issue—nothing else, nothing about changing the “or” to an “and” or any other criteria of the UDRP. That's not before this committee. I thought the only thing that's before this committee is what do we do about the mutual jurisdiction clause because IGOs are either unable—let's just say unable—to sign that because there are issues with sovereign immunity.

I think everything else you brought up is just completely ... That's for the UDRP Review to look at, not for us to look at."

But Brian Beckham of WIPO (one of the most active members of the working group, second only to the chair in terms of overall words spoken, as per the analysis earlier in this submission) continued to persist, as per page 11:

"Yeah. Thanks, Chris. I'm happy to. And I think that's ... I don't know that I would share that limitation. First of all, when we look back at the briefing note on this, we look at some of the issues that have been raised in terms of the scope of the work and the potential issues faced by IGOs and the problem statement."

And on page 12, Brian Beckham continued:

"To me, that limitation sort of, sorry to put it this way, but that kind of puts our collective heads in the sand as to the problem statement that we're tasked to address. And failing to actually think more creatively about a holistic solution, I think, misses the mark. And if we're only here to look at what happens in the case of an appeal. In case an IGO wins and a registrant wants to take that to court, then obviously that simplifies our work. But I think it misses the mark in terms of the issue that's been put in front of us.

I would say, broadly speaking, the problem statement is, "As drafted, the UDRP is not framed in a way that IGOs can use it." And that goes not only to this jurisdiction issue, but some of the more substantive issues about trademark rights and bad faith criteria."

This should be shocking to anyone. Indeed, it floored me when I was reviewing the transcripts in such detail, to figure out how the working group arrived where it did.

Now, of course they did not end up recommending changing the "AND" to "OR", but the above gives you the foundation of their mindset, that they were going to do what they would do regardless of any limits of the charter. And that's reflected in the recommendations that they did make, which were out of scope.

Indeed, this calls into question the very suggestion by IGOs that the procedure would be used, as per the submission of the Registry Stakeholders Group, "on a very limited basis." When they are **actively looking to create loopholes in policy**, or interpretations of working group charters, that's when the broader community should be concerned.

We've seen this in the past in other ICANN policy debates, where a lobbyist or stakeholder would argue that "they would never use that power" or "they would never do such and such". This came up in the tiered pricing debate<sup>10</sup> long ago. Even Frank Schilling's companies suggested in their new gTLD applications that their future price increases would be limited to inflation, but then reversed themselves.<sup>11</sup> Or, as we alone warned, what would happen with private equity and dot-org, if pricing caps were removed.<sup>12</sup>

10 [ICANN Confirms: Tiered Pricing Not Forbidden in New .BIZ, .INFO and .ORG Contracts](https://circleid.com/posts/icann_tiered_pricing_tld_biz_info_org_domain), August 24, 2006, [https://circleid.com/posts/icann\\_tiered\\_pricing\\_tld\\_biz\\_info\\_org\\_domain](https://circleid.com/posts/icann_tiered_pricing_tld_biz_info_org_domain)

11 [Frank Schilling just killed the New gTLD domain name program \(Warning!\)](https://onlinedomain.com/2017/03/08/domain-name-news/frank-schilling-just-killed-new-gtld-domain-name-program-warning/), March 8, 2017, <https://onlinedomain.com/2017/03/08/domain-name-news/frank-schilling-just-killed-new-gtld-domain-name-program-warning/>

12 [Breaking: Private Equity company acquires .Org registry](https://domainnamewire.com/2019/11/13/breaking-private-equity-company-acquires-org-registry/), November 13, 2019, <https://domainnamewire.com/2019/11/13/breaking-private-equity-company-acquires-org-registry/>

IGOs are no different. They are, after all, run by human beings. They can say one thing now, but then do something entirely different later. That's why it's imperative that one looks at the **actual words of policies or contracts**. If something is allowed, or if there is a loophole, **it is almost certain to be exploited in the future**. That's what people do, they test boundaries, as happened in this new working group from the very start.

In this case, they went well past the boundaries, and as such their recommendations should be rejected (as we'll discuss in detail in the next sections).

## 9. OPPOSED TO RECOMMENDATION #1: DEFINITION OF "IGO COMPLAINANT"

We oppose this recommendation. While others in the community might not have paid much attention to it, given the more radical ideas in other recommendations, the new working group is essentially rewriting the prior working group's Recommendation #2.

The new captured working group ignored how the old working group arrived at Recommendation #2. Initially, the old working group recommended that presence in the Article 6ter database alone was sufficient to meet the first part of the 3-part UDRP/URS test

[Note: there was some confusion amongst some readers as to what was meant by 'standing'. Using the most strict definition of 'standing', anyone can file a UDRP/URS regardless of whether or not they have trademark rights. So, it's not that sense of the word 'standing' that is meaningful from a policy debate. Instead, the 'broader' way the word 'standing' was used by many is that a complainant who had met the first part of the 3-part UDRP/URS test was said to have "standing". One can see that this broader definition of 'standing' (i.e. meeting the first part of the 3-part test) is widely used, e.g. even in the WIPO 3.0 Overview<sup>13</sup>, for example,

1.2 Do registered trademarks automatically confer **standing** to file a UDRP case?

1.2.1 Where the complainant holds a nationally or regionally registered trademark or service mark, this prima facie satisfies the threshold requirement of having trademark rights for **purposes of standing** to file a UDRP case. [emphasis added]

However, the public comments<sup>14</sup> and response to that initial recommendation of the old working group was that it went too far.<sup>15</sup> The US government stated:

The U.S. disagrees with this recommendation because it incorrectly concludes that an IGO has standing, and therefore a right that is equivalent or similar to trademark rights, based on completion of the communication and notification under Article 6ter. This procedure does not have any legal effect under the terms of the treaty itself and therefore, there is no international right. Further, there is no harmonized approach among treaty members in implementation of Article 6ter.

13 WIPO Overview of WIPO Panel Views on Selected UDRP Questions, Third Edition, <https://www.wipo.int/amc/en/domains/search/overview3.0/>

14 <https://forum.icann.org/lists/comments-igo-ingo-crp-access-initial-20jan17/>

15 Report of Public Comments, May 5, 2017, <https://itp.cdn.icann.org/en/files/generic-names-supporting-organization-council-gnso-council/report-comments-igo-ingo-crp-access-initial-05may17-en.pdf>

Similar, the IPC said:

First, IPC does not support using 6ter notifications as an independent basis for standing under the UDRP or URS. The mere notification to WIPO that an entity is claiming 6ter rights does not provide a sufficient basis for standing to bring a claim. It might be possible to consider whether (a) a 6ter notification has been actively accepted by any national trademark office and (b) conversely, whether a 6ter notification has been rejected by any national trademark office, in considering whether to allow standing. However, this seems both complex and uncertain.

Thus, the old working group **changed** its recommendation, so that being in the Article 6ter database was no longer sufficient on its own to automatically meet the first part of the 3-part UDRP/URS test. It could form a piece of evidence, along with other evidence, to show unregistered "common law" rights, similar to how other complainants show demonstrate their rights when they lack a national trademark registration. As Paul McGrady said during the new working group meetings, it's a very low bar, and one simply needs to gather the evidence (do some web searches showing some publicity for a name, that it was being used, etc.). Any lawyer worth their salt could satisfy the first part of the 3-part UDRP/URS test in their sleep. All it requires is minimal education and/or experience.

[As an aside, some IGOs think that it's impossible for them to show "use in commerce" for common law trademarks, as they are non-profit. That's a myth, because many non-profits and charities do own trademark registrations. One need only scan the USPTO for phrases like "promoting awareness of" or similar broad/creative language, that meets the burden. See, for example US Registration Number 6352406 for "500 WOMEN SCIENTISTS"<sup>16</sup>]

So, that's why the prior working group's recommendation regarding Article 6ter was changed, to no longer make it an "automatic pass" of the first part of the test. Some minimal additional evidence was required, just like any other similarly situated complainant, to pass that hurdle.

Pragmatically, UDRP/URS cases are rarely decided by the first part of the test - the heart of of the domain dispute is usually the 2nd and 3rd parts (especially the third part regarding bad faith registration and bad faith usage). In a real sense, the old working group had worked hard to lower that initial hurdle just a tiny bit, but the pushback forced us to change it.

However, the new working group's recommendation **goes much further**

16 500 WOMEN SCIENTISTS trademark registration, US Registration #6352406, [https://tsdr.uspto.gov/#caseNumber=90086485&caseType=SERIAL\\_NO&searchType=statusSearch](https://tsdr.uspto.gov/#caseNumber=90086485&caseType=SERIAL_NO&searchType=statusSearch)

**beyond even what the old working group's initial recommendation had been.** It would dramatically expand the definition far beyond even Article 6ter registration, which would be unacceptable.

Why unacceptable? If one reads the proposed recommendation carefully, it says that all an IGO needs to do is demonstrate "that the identifier which forms the basis for the complaint is used by the IGO Complainant to conduct public activities in accordance with its stated mission."

If one parses that carefully, that goes well beyond even the name of the organization. It could literally be anything, for example the name of a newsletter, the name of an event, the name of a project, simply any term used by an IGO.

Why is that a problem? It's a problem because many terms can never be trademarked (e.g. because they are generic, descriptive, or other more esoteric reasons like primarily a surname, etc.).

For example, if an IGO called their newsletter simply "News" or their event "The Event", it would literally meet the test proposed by this new working group. That's unacceptable, as those terms are explicitly generic for those uses.

Another reason why the expanded definition, beyond the prior working group's recommendation, has problems is that there is little to no chance of the registrant having "**constructive notice**" of the identifier's usage (let alone, actual notice), if it's not in the Article 6ter database. With the old working group's Recommendation #2, a diligent domain name registrant could at least search the Article 6ter database for matching terms, to avoid registering domains that might conflict with terms used by IGOs [some of those records might also show up in national trademark databases, like the 8900-series ones in the USPTO; by the way, the old working group members were certainly aware that those were not trademarks in themselves, but merely records of potential blocking rights; some folks in the new working group didn't think we knew that, perhaps as the staff who wrote the report didn't make it clear].

In conclusion, this captured working group simply went beyond the scope of its mandate, and made it far too easy for an IGO to make complaints about **any identifier**, regardless of whether it is even generic or merely descriptive. If instead the very first recommendation (in the old working group's initial report) is desired, so that Article 6ter registration alone is sufficient to pass the first part of the three-part test, we can support that as a middle ground (despite the past objections of the US Government and

IPC). At least with a minimal effort, an IGO can register in the Article 6ter database and declare to the world that "this mark is important to us", letting domain name registrants and others be aware that those are terms to avoid in the event their intended usage would be confusing to the public. [and as we know, many acronyms have multiple uses, so Article 6ter registration would not permit any monopolization of terms] An IGO would still need to prove the 2nd and 3rd parts of the 3-part UDRP/URS test, so good faith domain name registrants would still be protected.

## 10. OPPOSED TO RECOMMENDATION #3: EXEMPTION FOR IGOs FROM MUTUAL JURISDICTION CLAUSE

We oppose this recommendation, and join with others like the Internet Commerce Association (ICA) who oppose it. Not only is it out of scope for this new working group, but it just reinforces how the new working group was captured. I support the ICA's analysis of this point, and won't repeat what they already submitted.

As argued above, if one wanted to actually eliminate the mutual jurisdiction clause, the right way to do it is via a Notice of Objection system. I strongly urge the new working group to examine that serious proposal, as it truly gives the IGOs an immense benefit, while also **fully maintaining** domain name registrants' rights to have complex disputes decided instead in the courts on the merits.

Instead, this new working group's recommendations are, in the words of its member Jay Chapman in the August 2, 2021 call, "intellectually dishonest." (see transcript,

<https://gnso.icann.org/sites/default/files/policy/2021/transcript/transcript-gnso-igo-wt-02aug21-en.pdf>

page 22:

So really what the problem is as I see it, the current proposal as written today, it doesn't provide for due process. It's a forced process. And at best, it seems to me to be somewhat intellectually dishonest. And I think everyone kind of knows it on the call.

With the mutual jurisdiction requirement also currently sought to be disposed of, it seems to be kind of a wink-wink on the registrant being able to find relief or at least a decision on the merits I suppose by going to court. It's kind of like the group wants to say, well, good luck with that, Mrs./Mr. Business Registrant. There won't be any jurisdiction in the court and thus no remedy for you.

No one is fooled by this proposal. It disrespects everyone in the community to think that registrants wouldn't notice. Page 17 of the working group's report even had the audacity to declare that they were "**preserving registrant rights**". That is clearly **false**, as was conceded three pages later on page 20, where "**the EPDP team acknowledged that removing this requirement for IGO Complainants could prejudice a registrant's right and ability to have an initial UDRP or URS determination reviewed judicially.**"



Indeed, if one reviews the transcripts carefully, as we did, the working group was aware that the community would not like what they're recommending. On page 10 of the August 2, 2021 transcript, Chris Disspain said:

<https://gns0.icann.org/sites/default/files/policy/2021/transcript/transcript-gns0-igo-wt-02aug21-en.pdf>

One of the things that I'm personally very concerned about is the response we're going to get from this when we go out for public comment.

And the more we do, that encroaches on the general rules and regulations for the current UDRP system and carves out a different status for the IGOs that is not specifically required. And you can argue that the point about mutual jurisdiction is specifically required. The more we do that, the more likely we are to end up with pushback of such a heavy nature that we will stand no chance of getting this across the line. And I really don't want to lose that opportunity.

Similarly, on page 6 of the June 28, 2021 transcript by Chris Disspain:

<https://gns0.icann.org/sites/default/files/policy/2021/transcript/transcript-gns0-igo-wt-28jun21-en.pdf>

Or whether we should actually be talking to the GNSO Council first and saying, "This our proposed solution, but you may get pushback from the community that says that this is outside of the scope."

Consider this submission yet another voice in the community, a very well informed voice, "pushing back".

At the April 19, 2021 meeting, in the main (oral) transcript, Jay Chapman and Chris Disspain had the following exchange at page 32:

<https://gns0.icann.org/sites/default/files/policy/2021/transcript/transcript-gns0-igo-wt-19apr21-en.pdf>

JAY CHAPMAN: ...I think the GNSO made clear that whatever happened here was **not supposed to interfere with the opportunity for a registrant to go to court**. I believe that's what they said. Thanks.

CHRIS DISSPAIN: **Yes. That is in the documentation**. [emphasis added]

It doesn't get much clearer than that - working group members, including the chair via his own statements, knew the limited scope of the charter, but decided to throw caution to the wind and overstep their authority. And it

wasn't a minor misstep - it's a huge leap to uncharted territory where registrants have lost fundamental rights.

Or similarly in that same April 19, 2021 meeting, but via chat transcripts by Paul McGrady:

[https://icann.zoom.us/rec/sdownload/Vyz6GUlqm\\_8Xvg3DxR9JefG-VqyGQPSYao4xOTISPGNDWio5TJ0i9SsGIJo3EIKS\\_Q8FuMf\\_FIkIWQIS.II7ZspCvOf2vsbI1](https://icann.zoom.us/rec/sdownload/Vyz6GUlqm_8Xvg3DxR9JefG-VqyGQPSYao4xOTISPGNDWio5TJ0i9SsGIJo3EIKS_Q8FuMf_FIkIWQIS.II7ZspCvOf2vsbI1)

00:39:14 Paul McGrady: I worry about **not only the legal ramifications to registrants**, but also the optics of **ICANN appearing to want to strip registrants of rights they otherwise have at law**. [emphasis added]

Paul McGrady made the same point orally on that call, on page 32 of the oral transcript:

Thanks, Chris. It was just the nerdy thing that I put into the chat that a waiver of the right to go to court, **those rights that are being given up could really never fully be captured in an arbitration mechanism** because the rights in Poland are different than the rights in South Africa, which are different than the rights in the U.S. or whatever. So what we would be doing is creating some sort of amalgam of protections for registrants in the arbitration process that we, I guess, think best blend all the various rights around the world. **Then we would be offering that to registrants in lieu of their local protections. And as I said before, I think in the chat, the optics of that, they're hard to get your arms around that. We don't want ICANN be accused of overreach, for what it's worth**. Thanks. [emphasis added]

Indeed, members of the working group argued they could "tweak" things, but this is no "tweak". Once again in that April 19, 2021 meeting, Chris Disspain personally said (on page 24):

"....regarding **the fact that there is a right to go to court**, come what may, and that therefore what we would presumably be doing is **saying that you were requiring registrants to abandon that right**, which is **fairly significant step** and is, I think, **sitting significantly outside of tweaking**." [emphasis added]

All in all, this recommendation must be rejected. [The proper way to eliminate the mutual jurisdiction clause would be via adoption of a Notice of Objection system, because it retains full access to the courts for decisions on the merits via elimination of the "role reversal".]

## 11. OPPOSED TO ALL RECOMMENDATIONS INVOLVING ARBITRATION (#4, #5 and any variations)

The Internet Commerce Association submitted a decent response. We mainly concur with their analysis, as an initial statement. As they correctly noted, IGOs have been trying to impose arbitration upon registrants for a very long time, as far back as 2003 when Professor Wendy Seltzer wrote about it.<sup>17</sup>

WIPO doesn't like the UDRP as it stands, because its claimants must subject themselves to the jurisdiction of national courts. International Government Organizations (IGOs) would prefer international arbitration, where not only can they keep their sovereign immunity, but the procedural and substantive rules differ. **But the possibility of appeal to national courts is no minor detail, but part of the balance keeping domain name disputes in check. If UDRP arbitrators, or the ICANN "consensus" veer too far from national laws, they can be corrected by courts.** [emphasis added]

In other words, this is an issue that IGOs have litigated and relitigated ad nauseum at ICANN. They seek a one-sided unbalanced solution that would obliterate access to the courts. The IGOs have no new facts, no new law, and no new arguments. They want to create a forum for disputes where the odds are tilted in their favour. Such blatantly self-serving proposals by the IGOs are rejected repeatedly. Their only hope is to keep repeating their false narratives, and prevent the other side of the narrative (i.e. the truth) from showing up to present the other side of the argument.

Indeed, I specifically warned in my August 2019 comments to the ICANN Board that "capture" might take place in the future, on page 11:

Indeed, **they and other opponents of the final report hope to control the composition of any future working group on this topic** (e.g. via mechanisms like PDP 3.0 reform, which will be used to stifle debate, create censorship), as they simply cannot compete in the marketplace of ideas on a level playing field. The threat of "capture" is forward looking, where **capture is actively being contemplated** by those who've failed in their agenda for the past 15+ years. [emphasis added]

This clearly took place, as documented above in section 7.

There are numerous reasons why arbitration is unacceptable, as a forced alternative to the courts. To enumerate some of them:

1. It would lead to deviation from national law (as noted by Wendy

<sup>17</sup> [Why WIPO Does Not Like the UDRP](https://circleid.com/posts/why_wipo_does_not_like_the_udrp/), Wendy Seltzer, December 5, 2003, [https://circleid.com/posts/why\\_wipo\\_does\\_not\\_like\\_the\\_udrp/](https://circleid.com/posts/why_wipo_does_not_like_the_udrp/)

Seltzer above). To the extent that arbitration can lead to different results than the courts, it would encourage forum shopping by complainants. Indeed, long rejected "theories" or "interpretations" such as the Octogen<sup>18</sup> line of cases could be revived under unchecked arbitration, and those decisions would be unable to be reversed if recourse to the courts was unavailable.

2. Arbitration is **more expensive than the courts** (not less), because taxpayers pay for judges, whereas parties to an arbitration must pay for the salaries/fees of the panelists. For example, the IRP costs in the .xxx saga with ICANN were nearly USD \$500,000<sup>19</sup>. It's a myth that arbitration costs are cheaper, perpetuated by those who wish to compel arbitration upon the uninformed. This was discussed at length in the prior working group, for example in the mailing list.<sup>20</sup>
3. Lack of multiple levels of appeal. In an arbitration, it's "one and done". In courts, in many jurisdictions one can appeal to one or more higher levels. For example, in Ontario, Canada, one can appeal from the provincial (first) court to the Court of Appeal, and then later appeal again to the Supreme Court of Canada. These multiple levels of appeal provide important protections in the event that the lower courts make incorrect decisions.
4. Lack of open court principle (and or "open justice"). In the courts, all documents are presumptively open for inspection by the public, and the entire case can be monitored by the public to ensure that justice took place. Many arbitrations are private, though, which can undermine justice and lead to mischief.
5. Discovery is often limited.<sup>21</sup>
6. There can be "repeat player bias" and other concerns about impartiality of panelists.<sup>22</sup>
7. Lack of amicus curiae. In a real court case, if important enough, others might intervene to lend assistance to the court on important issues, particularly if it gets to the higher courts.
8. In some jurisdictions (e.g. Ontario), mandatory arbitration is inconsistent with consumer protection law.<sup>23</sup> Thus, any attempt by ICANN to mandate such terms would be ineffective, and indeed might cause trouble for registrars.

18 The Rise and Fall of the UDRP Theory of 'Retroactive Bad Faith', May 8, 2017, Internet Commerce Association, [https://circleid.com/posts/20170507\\_rise\\_and\\_fall\\_of\\_udrp\\_theory\\_of\\_retroactive\\_bad\\_faith](https://circleid.com/posts/20170507_rise_and_fall_of_udrp_theory_of_retroactive_bad_faith)

19 XXX Saga Continues, Michele Neylon, February 20, 2010, <https://circleid.com/posts/4405/6276/>

20 Arbitration costs would be HIGHER than court cost, George Kirikos, November 22, 2017 (with links to many supporting articles), <https://mm.icann.org/pipermail/gnso-igo-ingo-crp/2017-November/000929.html>

21 Consumer Arbitration Agreements, Eighth Edition, chapter 1.4.6, <https://library.nclc.org/arb/010406>

22 Ibid, Chapter 1.4.4

23 Consumer Protection Act, 2002, Section 7(2), <https://www.ontario.ca/laws/statute/02c30#BK8>, "...any term or acknowledgment in a consumer agreement or a related agreement that requires or has the effect of requiring that disputes arising out of the consumer agreement be submitted to arbitration is invalid insofar as it prevents a consumer from exercising a right to commence an action in the Superior Court of Justice given under this Act."

9. As we've seen from infamous decisions like the ADO.com case<sup>24</sup> or the IMI.com dispute<sup>25</sup>, even the most experienced panelists (ADO.com was a 3-person panel at WIPO, and IMI.com was Neil Anthony Brown at NAF) can get it completely wrong. Without the ability to have the case determined by the courts, an unfair arbitration panel ruling would stand and lead to consequence free reverse domain name hijacking. Indeed, rogue panelists would be emboldened to make outrageous decisions if they knew that no one could go to court to challenge the outcomes, as who could say that it was a "wrong decision"?
10. Actual courts are more flexible, and have an array of remedies other than merely the transfer of the domain name. For example, they can consider monetary damages, or requiring that the domain name registrant put a disclaimer in a footer, instead of transfer of a valuable domain name.
11. The rules about cross-examinations, and ability to compel outside (third party) witnesses to attend are much more developed in the actual legal system, compared with arbitration.
12. Decisions rendered in arbitration have no precedential value in the legal system, and as such would not aid in the development of a body of law in a nation. There are relatively few domain name cases to begin with, so every case removed from the legal system damages the overall body of law in a nation. For example, the Tucows v. Renner case<sup>26</sup> established that domain names are property in Ontario, Canada. That happened at the Court of Appeal for Ontario. It would have deprived domain name registrants of an important development in their rights if that case had instead been forcibly diverted to arbitration, never establishing this important legal precedent.
13. It's 2021, not 1999. Back when the UDRP was being developed in the late 1990s, there was a fear that cybersquatting cases would overwhelm the legal system. Similar fears were raised at the launch of the new gTLDs program (which led to the URS). However, we now know that those fears were overblown. Cybersquatting has long been in decline as a fraction of all registered domain names. And the number of times that cases ever get escalated to the courts has not skyrocketed over those years. The internet is no longer "shiny and new", and courts are more than capable of handling domain name disputes. The internet has matured, and the courts have also improved in the past 20 years, and are familiar with domain names. Thus, the need for alternate dispute resolution mechanisms that are specialized

24 [Ado.com domain dispute settled](https://domainnamewire.com/2019/01/10/ado-com-domain-dispute-settled/), January 10, 2019, Andrew Allemann,

<https://domainnamewire.com/2019/01/10/ado-com-domain-dispute-settled/>

25 [Jury overturns horrible cybersquatting decision for IMI.com](https://domainnamewire.com/2019/06/25/jury-overturms-horrible-cybersquatting-decision-for-imi-com/), June 25, 2019, Andrew Allemann,

<https://domainnamewire.com/2019/06/25/jury-overturms-horrible-cybersquatting-decision-for-imi-com/>

26 [Tucows.Com Co. v. Lojas Renner S.A.](https://www.ontariocourts.ca/decisions/2011/2011ONCA0548.htm), 2011 ONCA 548,

<https://www.ontariocourts.ca/decisions/2011/2011ONCA0548.htm>

to a "new emerging technology" is just not there anymore (except perhaps in the view of those whose livelihood depends on diverting cases from the courts to ADR).

14. We should be informed by the CASE Act, which created a "small claims court" for US Copyright holders<sup>27</sup>. In particular, it had an explicit opt out, recognizing the fundamental right to have cases determined on the merits in the courts. Domain names are not "special" and IGOs are not "special" either, that those fundamental due process rights should be eliminated.
15. As noted in section 6 above, to ensure justice for those situations where the dispute over the domain name is just one aspect of a larger dispute, it would require allowing arbitration over all potential causes of action and subject matters (employment law, defamation law, copyright law, trademark cancellation law, environmental law, sexual abuse law, and so on). This is far beyond ICANN's limited technical role in the DNS, and would represent mission creep to create a forum for any kind of dispute (as long as it touched upon domains in some manner).
16. ICANN has a poor track record when it comes to creating balanced accountability mechanisms, and would be unable to create a "fair" arbitration system. We've seen how the Independent Review cases have gone -- they can't be considered "fast and cheap" alternatives to the courts. And even then, parties have still tried to disregard the outcome or have gone to court afterwards.
17. Disproportionate response to a non-existent problem. While the new working group has suggested (on page 17) that arbitration is "proportionate to the problem", that's just not correct. How many actual UDRP/URS losses have IGOs had? Zero! They've won all the time. Similarly, how many times have they been dragged to court after they've won a UDRP/URS? Zero! So, either there's no actual problem (as per the actual data), or the **IGOs expect that they will be dragged into court in the future**. But, we can infer that it would not be "criminals" who would appeal cases to court (since criminals would never show up at court, lest they be immediately arrested by authorities). Instead, we can infer that IGOs would be going after non-criminals, trying to seize domain names that are the rightful property of legitimate registrants. **That's when innocent domain name registrants need the protection of the courts the most**, when creatures of government (IGOs are created by governments after all) with delusions of grandeur seek to take what they can by force. It is simply not credible for IGOs to claim they would only use any "new rights" to "target the bad guys". That's as believable as those who trusted Frank Schilling not to raise prices above inflation (as noted

27 Copyright Small Claims and the Copyright Claims Board, <https://www.copyright.gov/about/small-claims/>

above). What matters is the actual words in the contract, not empty promises. **If IGOs are telling us that they "need" these new rights, we should be wary, as that implies that they would go overboard with the new rights and target legitimate domain name registrants with impunity.**

18. Expensive compliance costs for registrars and registry operators relative to alternatives. Both the existing Recommendation #5, and the newly proposed Notice of Objection system, are much simpler in terms of monitoring and other compliance for registrars and registry operators. Indeed, a registrant denied access to the courts, and denied justice, might feel compelled to sue the registrar and/or the registry (or even ICANN itself) as a tactical move as a form of escalation. This would add to everyone's expenses. One of the implicit goals of the UDRP/URS was to make it easier upon registrars, so that they didn't get dragged into the middle of a dispute. Attempting to bring in mandatory arbitration might have the opposite effect, undoing years of progress in that regard.
19. Real courts have serious penalties for witnesses who commit perjury (e.g. jail time or other forms of censure), or for lawyers who engage in misconduct (including getting lawyers disbarred), whereas arbitration has no meaningful penalties.
20. The prior working group not only rejected arbitration, but reached a "consensus against". That consensus should be respected.

One could see that this was a one-sided and biased report by all the little things in it that advantage IGOs at the expense of registrants. For example, on pages 12 and 14 (new Recommendations #4 & #5), the options hard-code a 10 business day period when a registrant must request arbitration after a court order declining to hear the merits of the case due to immunity. But, in real courts, parties can appeal to the next level (e.g. Court of Appeal, Supreme Court of Canada, Supreme Court of the US, etc.), and have explicit timelines to appeal (for example, it might be 30 days to appeal). Instead of waiting until all appeals have been exhausted, the proposal forecloses upon those appeal rights, requiring an arbitration decision to be made before any appeal to a higher court could be heard!

One might argue that the members of the working group simply hadn't contemplated the possibility of appeals to higher courts. But, **that's not the case.** In the diagram on page 13 of the report, it contains a flow chart that explicitly says that if an IGO loses at lower court, it would have the IGO appeal. And then if the IGO loses that appeal (at the higher court), it has another box saying "IGO goes to Supreme Court".

In other words, IGOs who have captured and dominated this current

working group have looked at every angle to preserve their own rights to appeal to higher courts. It was explicitly on their mind, as per the diagram. [also in the transcript of the August 23, 2021 call, at page 14]. Yet, do their diagrams reflect the same logical and rational choices that a registrant might make, to preserve their legal rights? Not at all.

Another way to look at things is to weigh the two big "risks", namely:  
(a) the risk of reverse domain name hijacking (that could not be undone through the courts), vs.  
(b) the risk that "criminals" would take IGOs to court

That's really what this is all about. Domain name registrants want to make sure that the correct decision is rendered (and arbitration can lead to incorrect decisions). IGOs want to avoid court entirely.

But, we know that reverse domain name hijacking attempts take place repeatedly. There's an entire website at RDNH.com documenting decisions of that nature (and there are of course other cases which the panelist didn't make a reverse domain name hijacking determination, even though others would say it was such a case). That's a statistical fact (and it's telling that WIPO itself tracks all kinds of domain name statistics, but stopped tracking reverse domain name hijacking, lest it interfere with its narrative).

What are the statistical facts about IGOs being dragged to court after a UDRP/URS case? It's never happened.

That should be the end of the story, if the working group is basing its decisions on empirical facts rather than self-serving story telling by IGOs.

In conclusion, we are **strongly against** any imposed arbitration system. ICANN should not be involved at all in the creation of such a system. Parties are free to go to voluntary arbitration on their own, via a negotiated agreement, but do not need ICANN policymaking to compel such a system.

[For completeness, given there's a recommendation #6, which we reject entirely, Option 1 is the "best" of a bad group of choices. Recommendation #6 shouldn't be in play at all, though, as arbitration should be rejected.]



## 12. TUNNEL VISION EXCLUDED SERIOUS CONSIDERATION OF OTHER OPTIONS BESIDES ARBITRATION

Reviewing the transcripts of the new working group's calls, it's easy to see that they did not seriously consider any other alternatives other than arbitration. They were laser focused on it from the very beginning (within the first 5 calls), with no serious consideration or time spent researching alternatives. By March 29, 2021 (meeting #5), Chris Disspain was openly saying, on page 43,

[https://gnso.icann.org/sites/default/files/policy/2021/transcript/transcript-igo-work-track-29Mar.en\\_.pdf](https://gnso.icann.org/sites/default/files/policy/2021/transcript/transcript-igo-work-track-29Mar.en_.pdf)

So that's a point which we need to consider, but I do think that we're heading towards, **if we haven't gotten there already**, an agreement that an **arbitration** as a **final solution**, a final ending to this, is acceptable. [emphasis added]

That's a clear product of the group dynamics involved, and lack of broad representation or participation as discussed above in the section documenting capture.

As the prior working group found, the agent, assignee or licensee approach has proven effective by IGOs in the past. There is successful precedent, as a way to bring a case via a "proxy" complainant instead of the IGO directly. Every attempt to bring that up in the new working group simply led to it being summarily rejected, without argument (simply with statements like "No, we don't believe that would work." or words to that effect, with no further legal explanation). Critics don't even attempt to distinguish between agent vs. assignee vs. licensee but instead lump them all in as "unacceptable" ending the discussions without explanation.

Similarly, the related idea of an Independent Objector (brought up in the May 3, 2021 meeting), modeled on a similar Independent Objector used in the new gTLDs program, was summarily dismissed. No research, no debate, no pros and cons, just a few words and it's off the table. That was typical of the "workflow" of this new working group, which was instead fixated on a single solution (arbitration), to the exclusion of all others.

In terms of implementation, the working group did not consider applying any policy changes only to newly created domain names (i.e. grandfathering already-registered domain names from any change), or restricting any changes to the new gTLD program (instead of legacy extensions like .com/net/org). This allows us to infer that IGOs seek to target valuable

legacy domains (e.g. short and valuable acronyms in dot-com, which can be worth millions of dollars, and where legal protections are of paramount importance).

The first working group explored potential subsidies of IGO complaints by ICANN (with equal corresponding financial aid for registrants in those cases). One novel idea might be to make any corresponding financial legal aid to a registrant contingent upon the registrant waiving the right to go to court. Some registrants (particularly of lower value domain names) might take that offer, and IGO risk would then be lower in those cases.

Another policy option would allow legitimate registrants to opt out of the UDRP/URS completely, by posting a security bond (or some other mechanism that is "expensive for the bad guys, but cheap for the good guys -- basic signaling theory from economics). In the event of cybersquatting, rightsholders would have access to the security bond. For a company like our own that does not engage in cybersquatting, posting such a bond in order to ensure that a valuable domain name's fate is only determined by the courts (rather than a dubious UDRP/URS system) would make a lot of sense.

Lastly, the new working group did not review past comments, or they would have already discovered the "Notice of Objection" system (discussed above), which would completely solve the IGO debate, given it can safely remove the mutual jurisdiction clause while still preserving full court access (because it eliminates the "role reversal").

## 13. METRICS

The policy change impact analysis section of the report (page 17) seems to be more of a box-checking exercise, rather than a serious analysis.

In particular, the key issue of whether or not any arbitration panel got the decision "wrong" would be **impossible to measure**. For example, had the ADO.com or IMI.com cases been unable to be decided on the merits by the courts, how would they ever have been determined to be "incorrect"?

The "howling of the domain industry press" isn't a metric that ICANN has ever taken seriously, so that's obviously not a suitable metric.

In other words, there's not a "fail safe" mechanism triggered by any metrics to protect registrants from unfair arbitration decisions, once an arbitration policy is involuntarily mandated by ICANN.

Here's a question for the working group to research - ask WIPO what specific changes they made after the ADO.com decision. Or ask NAF what they did after IMI.com. The answers to those question will inform you as to why domain name registrants should be skeptical of any institutional arbitration provider as the "final say" over the fate of a domain name, instead of allowing the courts to take over. In a real sense, arbitration providers are like airlines that have plane crashes, but don't make any changes to protect future passengers after those crashes have taken place. There should be zero tolerance for any crashes at all.

This new working group wishes to treat domain name registrants as guinea pigs, experimental test subjects who can be mistreated, without repercussions or any metrics to document their abuse.

Essentially, the new working group has deliberately avoided putting forward **any reasonable metric that would expose to the world that their proposed solution (once implemented) has harmed domain name registrants**. This alone speaks volumes, and is a **reason to reject this report in its entirety**.

## **14. FINAL THOUGHTS**

In conclusion, we reject the report in its entirety. It's the product of a demonstrably captured group.

As a way forward, we strongly urge consideration and adoption of a "Notice of Objection" system, as it can provide strong benefits to IGOs, while simultaneously preserving the full legal rights of domain name registrants. It's a true win-win solution, and we would be willing to assist the working group if it would advance the solution.

The working group itself should be expanded, to ensure that domain name registrants (who are affected stakeholders) are heard.

## **15. APPENDIX A: CONCERNS ABOUT THE NEW ICANN COMMENTS SYSTEM**

In order to clean up my submission, I've moved my concerns about the new ICANN Comments System into this appendix, so that they're on the record. Please forward these concerns to the appropriate department, so that they can fix the issues for future comment periods.

1. deadline time wasn't showing (they've since added text to the main page showing that 23:59 UTC is the deadline, but that could have been added much earlier)
2. number of days left is miscalculated
3. ordering of the sections doesn't make sense; it should be: 1) summary of submission, 2) attachment(s), 3) summary of attachment(s), 4) other comments
4. Bold, Italics, Underline and Link tools aren't available in the "Summary of Submission" section! (all the rest have it!)
5. There's no obvious way to delete a "draft" comment (I created a test "Draft" for the dot-name issue, to test out their platform). I can edit it, I can save it, I can publish it, I can download it, but I can't find a way to "discard" or "delete" a draft comment.
6. The entire system appears to only support **ENGLISH** (I tested it with a browser set to French, and there are no account profile preferences for other languages). That hurts non-English members of the community.
7. Furthermore, the ICANN Bylaws require a meaningful Reply Period for public comments. I reminded ICANN about this in my submission to the Complaints Department in April 2021, yet this new comment system doesn't have such a reply period. See my blog post:

<https://freespeech.com/2021/04/26/icann-staff-have-repeatedly-violated-public-comment-period-requirements-in-bylaws/> which cited Article 3.6(a)(ii) of the bylaws.

<https://www.icann.org/resources/pages/governance/bylaws-en/#article3>

"provide a reasonable opportunity for parties to comment on the adoption of the proposed policies, **to see the comments of others, and to reply to those comments** (such comment period to be aligned with ICANN's public comment practices), prior to any action by the Board"

While technically those might appear to apply "prior to any action by the Board", the same principles must apply to **any comment period** (and did exist in the past explicitly, to ensure robust debate, instead of simply slipping in comments at the final moment that couldn't be responded to by affected stakeholders). Plus, the lack of reply period definitely existed prior to comment periods explicitly referencing Board action (as I noted to the Complaints Office).

Or see how Donuts reminded ICANN of that very same Bylaw requirement, when they asked for a 21 day reply period:

<https://newgtlds.icann.org/en/applicants/cpe/guidelines-comment-extend-donuts-20sep13-en.pdf>

8. Lastly, the way to "edit" an already-published comment has an unnatural user experience. When you go to edit a past comment, none of the submission can actually be changed. You have to first "retract it" (which, as it turns out, **unpublishes it for everyone else (I saw this when I went back to the main page)**), which then enables editing. Then you have to republish it after you've made changed [I was naturally concerned that if I retracted it, I might lose all the material already written, so I had to copy/paste it to a different file just in case....]