ICANN Transcription

IGO Work Track

Monday, 29 March 2021 at 15:00 UTC

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JULIE BISLAND: Good morning, good afternoon, and good evening, everyone. Welcome to the IGO Work Track call, taking place on the 29th of March, 2021, at 15:00 UTC.

In the interest of time, there will be no roll call. Attendance will be taken by the Zoom room. If you're only on the telephone, could you please let yourself be known now?

Okay. Today we have apologies from John McElwaine.

All members and alternates will be promoted to panelists for today's call. Members and alternates replacing members, when using chat, please select all panelists and attendees in order for everyone to see your chat. Attendees will not have chat access, only View Chat access. Alternates not replacing a member are required to rename their line by adding three Z's to the beginning

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of their name and add, in parentheses, “alternate” at the end, which means that you’re automatically pushed to the end of the queue. To rename in Zoom, hover over your name and click Rename. Alternates are not allowed to engage in the chat, apart from private chats, or use any of the other Zoom room functionalities, such as raising hands or agreeing and disagreeing. As a reminder, the alternate assignment must be formalized by way of a Google assignment form. The link is available in all meeting invites towards the bottom.

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

Okay. If you need assistance updating your statements of interest, please e-mail the GNSO Secretariat.

All documentation and information can be found on the IGO Work Track wiki space. Recordings will be posted on the public wiki space shortly after the end of the call.

Please remember to state your name before speaking and, as a reminder, those who take part in ICANN multi-stakeholder process are to comply with the expected standards of behavior.

Thank you, and over to our Chair, Chris Disspain. You can begin.

CHRIS DISSPAIN: Thank you, Julie. Hello, everybody. Welcome to the 5th call of this IGO Work Track. I’m sure everyone is excited to be here after a whole joyful week of ICANN meetings last week, but no doubt

we're all buzzing with excitement to be spending the next 90 minutes discussing where we're at.

I thought I'd start just by taking some stock of a couple of things because, in the GAC communique from ICANN70 last week, there is mention of this work. It says the GAC welcomes the new GNSO Work Track on Curative Rights, and the GAC recalls prior GAC advice, for example, from Johannesburg and Panama. I thought I'd go back and have a look at what that advice was, in essence, and I've got it up on the screen here so everybody can see it. It says the GAC reiterates it's advice that IGO access to curative dispute resolution mechanisms should be modeled on, but separate from, the existing uniform dispute resolution policy and provides standing based on IGO status based on public intergovernmental institutions and respect their jurisdictional status while facilitating appeals exclusively through arbitration.

So just to remind everybody that the current GAC advice, which is again reiterated coming out of virtual ICANN70, is that. It's pretty clear that that hasn't shifted and that advice is still there and still advice to the Board, and the Board hasn't responded to that advice in the negative or the affirmative. But it is at significant odds with what it is that we are discussing.

I also want to just give everybody a clear understanding to refer you to something you may not have seen—if I could have the next slide up, please—which is that what the IGOs agreed to in principle they would be prepared to have as the things that needed to happen in order for them to have relief if they were to have a parallel process.

I brought this up because it struck me that it's significantly narrower than that which we're going to end up with if we manage to finesse the current process.

So what the IGOs had in the past—I stress this is in the past and things may have changed—is that they agreed that, to obtain relief, they would need to demonstrate the domain names identical or confusingly similar to an acronym and registered and used in situations where the registrant is pretending to be the IGO but that are otherwise likely to result in fraud or deception and there's an obvious risk of imminent harm from the claimed abuse of such domain name, and the relief under this mechanism would be the same as that provided under the URS.

Now, Brian your hand is up, presumably because you're going to say because this is only the stuff with respect to the rapid relief. Is that correct?

Brian? Brian, you've disappeared.

BRIAN BECKHAM: Sorry. I tried to type in the chat.

CHRIS DISSPAIN: There you go.

BRIAN BECKHAM: Yeah, exactly. Sorry to jump in.

CHRIS DISSPAIN: N, not a problem at all. There's a second piece—is there not?—that deals with what they need in order to get straight relief rather than URS. Is that right?

That is correct. Okay, good. Berry, if could see if we could find that—or Mary—second piece, that'd be helpful. We'll come back to it.

I'm seeking to make any point, other than the fact that we are heading down a path right now where A) we're going to end up being at odds with the GAC advice (but I think we do that already) and B) we're going to end up in a situation where it's highly likely that, if we finesse this, the IGOs are going to end up with more rights than they had asked for.

Is that—there it is. Thank you very much. As you can see: "separate dispute resolution mechanisms to resolve claims of abuse [of] domain names registered and being used in situations where the registrant is pretending to the be the IGO or that are otherwise likely to result in fraud." So, to be clear, that is a lot narrower than simply saying IGOs can leverage 6ter as it if were a trademark.

Now, I'm only saying this because we're about to now move to the discussion on Recommendation 5. No one has made any comments to the document that has been up in the Google Docs room, but I suspect that that's because everyone has to been too busy at the ICANN meeting. But I am going to ask us to think about what I've just talked about for later on when we think about discussing the beginnings of getting the IGOs into the track and what we would do if we were able to come to an agreement on

Recommendation 5 because, as we agreed to last time, if we can reach an understanding of a way of dealing with Recommendation 5, we're still going to need to go back and figure out whether or not we can finesse the previous recommendations to consider how IGOs would get into the track in the first place.

So, if we could perhaps have a look at the … I think it's Section B on the question of jurisdictional immunity, which is … I'm not sure what page it's on, but it's further down on this document. There we go. Keep going. Right. So we can ignore reversing Recommendation 5 because we agreed at the last meeting that that wouldn't work. I think everybody understood that.

The next… Can we go back up, please? We've gone too far down. Okay. Super. So the next one is an arbitration—no. Keep going. Sorry. There we go. It's an arbitration either in lieu of court proceedings or only via registrant consent. The one after that is the concept of a supreme or super panel of panelists to hear challenges.

What I'd like to do is for us to have a discussion and see whether or not we think either of those two things are going to be acceptable and, if so, on what basis. To be clear, there really only are two ways of looking at this. One way of looking at it is to say—I see your hand, Paul. I'll be with you in a second. One way of looking at is to say we retain the legal jurisdictional appeal or, rather, reconsideration, in a local jurisdiction, and we say that an IGO can claim but it isn't subject to that jurisdiction. And if it wins, then the matter is referred to an arbitration or a supreme panel. Or we can say, because we put in place an arbitration or a supreme panel, the local jurisdictional challenge is not necessary. But in

either case, we would have to be prepared to accept that there is a final decision made by either an arbitration or a super panel or supreme panel.

So, Paul, your hand has gone down. Does that mean you've changed your mind, or do you want to say something?

PAUL MCGRADY: Changed my mind. Thanks, Chris.

CHRIS DISSPAIN: Thank you for telling me that you've changed your mind. Thank you for turning your microphone on.

So, absent that, does anybody have any comments that they want to make about the concept of using either arbitration or the principle of using either arbitration or creating a super panel or supreme panel to handle—what did we decide to call them?—reconsiderations or whatever or a reassessment or a claim? Does anybody have anything to say? Because, if not, then I shall make a proposal and then we can whether anybody has anything to say.

Paul, you've come back again.

PAUL MCGRADY: I've come back again. Thanks, Chris. I guess my question is, who pays? Who pays for this arbitration? Who pays for the super panel? If the losing registrant basically has no skin in the game, why wouldn't they appeal every single time, and why wouldn't

think just become super expensive for IGOs if they have to pay for arbitrators and super panels?

So I know that, for years, we've been talking about "loser pays" within the context of the UDRP, and I expect that to be a hot topic in Phase 2 of the RPMs, but this is a whole new thing here, where … So that's Question #1.

Question #2 is, if the loser pays and the registrant loses, how do we collect that? Thanks.

CHRIS DISSPAIN: Let's see what Brian has to say first and then I'll comment. Brian?

BRIAN BECKHAM: Thanks, Chris. My question is much more mundane. Just to make sure—apologies if you mentioned this—when we talk about supreme panels—just because that's a new term of me—that's meant to be some sort of appeals-type panel.

I suppose one question … If that's right, then I think what we had discussed earlier was that this would be possibly drawn from a more limited roster of experts with possibilities of … I don't want to get into the weeds, but just to make sure I broadly understand the concept.

CHRIS DISSPAIN: Thank you for the question and request for clarification. Yes, without getting into the weeds, we were talking about using existing panelist with high levels of experience, but we hadn't got

any further than that. Does that kind of answer your question, Brian?

BRIAN BECKHAM: Yeah, perfectly well. So I guess we're just avoiding the specific term "appeals" because this would be—

CHRIS DISSPAIN: I think we said, if we were going to make an effort to at least try to replace the jurisdictional piece, then it should be on roughly similar terms, which is effectively what we're hearing, isn't it? Or have I misunderstood?

It is. Okay, excellent. Thank you.

So, Paul, you raised a very good question, which of course is: who pays? Who pays in the case of taking it to a local jurisdiction?

PAUL MCGRADY: Let's play that out. So, in the US, there's a $245 whatever filing fee—small change—go to a court, and then everybody starts paying their own lawyers with the hopes that, at the end of the day, the court will make the losing side pay for not only the court fess but also the other guy's lawyer fees. So maybe that kind of system, which one hopes discourages frivolous filings would make sense at this level.

I also think we need to do some thinking about what it means to file an appeal. If you file an appeal at the supreme level, does the loser who is appealing wave their right to file anything in their own

local courts forever on the matter? Because if they don't do that, I guess I don't know what this is solving because you could lose at the supreme level and then just go ahead and file in your—

CHRIS DISSPAIN: Absolutely. So either this is instead of a local court hearing in a jurisdiction, or it is after on the basis that an IGO has one … the fact that not subject to that jurisdiction. Don't worry about that for the minute. Which way around it is … It's obvious to me that the cheapest way is to replace, but let's not fuss about that for now.

So does that help you, Paul? It's either … It is a final, so it's either instead of or after an IGO win. So if you look at Recommendation 5 currently, Recommendation 5 says, if the IGO wins and wins the fact that they're not subject to that jurisdiction, you go back to square one. What we're saying is, no, you don't go back to square one. If we insist on having that local jurisdiction step in there and the IGO wins, then it goes to an arbitration or a supreme panel, and that's final. Does that make sense?

PAUL MCGRADY: Yeah, that does, as long as that's respected. Right? So it seems like it would be a bit more respected if the IGO has already won the immunity question in the jurisdiction of the registrant. If this is instead of going to the court first on the immunity question, then, at the end of that process, if the losing registrant loses at the supreme level, I guess we still have the issue then of what happens next. Does the losing registrant who lost at the supreme level then go to court and then the IGO has that—

CHRIS DISSPAIN: No, that would not … Sorry. In simple terms, if we were to decide to not have the jurisdictional step, the jurisdictional step would not be there. Now, there is an argument saying you can't take that away.

PAUL MCGRADY: Right. Well, that's the same argument for not taking it away later because—

CHRIS DISSPAIN: Yeah, I'm saying that. I'm talking about later.

PAUL MCGRADY: Right. Because if I lose at the supreme level—I'll speak bluntly. If I had a client and I was defending a case and I lost before the first panel and we went to a supreme panel and I lost at the supreme panel, there's nothing keeping me from going to my courts. ICANN can't legislate away a national right that someone has to do.

So my question is, if we build in this extra structure, what can we build in—

CHRIS DISSPAIN: So you can abandon that right. Admittedly, a court could reinstate it. This is in danger of becoming a very legalistic discussion between you and me Paul, but leaving that aside for a second.

PAUL MCGRADY: Right, yeah.

CHRIS DISSPAIN: A court could reinstate it but you could say—you the registrant could say—"I agree to be bound by the terms of this and I will not …" You could.

PAUL MCGRADY: You could, and then if you violated, then the IGO would have to go to a court and consent to the jurisdiction to enforce its contract claim.

CHRIS DISSPAIN: Yes, but it then becomes a question of who's got the domain name in the meantime, doesn't it?

PAUL MCGRADY: Right.

CHRIS DISSPAIN: To a degree.

PAUL MCGRADY: So I don't think we need to solve it today. I just wanted to highlight the issue that this is not a panacea.

CHRIS DISSPAIN: Yeah, I understand. No, it's not. And there may well be those who say that there must be that step. In other words, Recommendation 5 stands as it is, expect that, instead of going back to the beginning again, you actually go a final deciding panel. That would mean that the jurisdictional step stays in place at that stage.

Alexandra, go ahead. Sorry to keep you waiting.

ALEXANDRA EXCOFFIER: No, that's okay. It's an interesting discussion. I don't know. Maybe I see things a bit simpler. I was following what Paul was saying, and I was like, "Yes, that's right. Yes, that's right. Yes, that's right," and then it seemed to steer off in an interesting way.

Can't we see the UDRP process or basically even … But at the time, when you register a domain name, you agree to submit to the UDRP process. So it's like a contract between the registrant and ICANN. I don't know.

The contract has terms in it, and one of the terms can be that, in case you lose the case against an IGO, you go to either arbitration or a supreme panel for a final decision, period. It's a contract. You agree. You wave your rights to pursue in the court. We do these contracts all the time. Obviously, we do not want to submit to jurisdictions. We, with our partners, our contractors—whoever we have an arbitration clause with and it's final arbitration-- … And that's it.

If we're worried about costs, well, with having to go to court, the court costs may not be that important, that heavy, but the lawyers' costs certainly are. And if you are in the US, the US lawyers' costs

are extremely high. The issue is unlikely to be resolved in the lower courts. There's several levels of appeal. So if you're worried about costs—and we are, always, and I'm sure the registrants are worried about cost—arbitration or the supreme—what do you call it?—panel is probably more cost-effective. There's one level and it is final and binding and everybody has clarity on what the decision is.

Currently, UDRP basically provides that IGOs have to submit to national courts and waive their immunities. It's a contractual privilege. Of course, that's the problem. So it could also provide, as a contractual provision, that this is how disputes will be resolved between an IGO and losing registrant.

I don't see the legal problem, but maybe I'm missing something. I don't really see it.

CHRIS DISSPAIN: Well, partly it's about level of change, as Paul has said in the chat, Alexandra. The current UDRP says anyone can go to the courts at any time. So we would be changing stuff. It's not that it can't be done. It absolutely can be done. There's no question. It's just a question of whether there's an appetite and a willingness to do it and then the current discussion they're having is—

ALEXANDRA EXCOFFIER: Is a different question.

CHRIS DISSPAIN: Exactly, correct. You are correct. And in the current discussion we're having, there is a question as to whether we can create or structure what we're talking about under the auspices of tweaking other recommendations and can go to the GNSO with a genuine belief that we are merely suggesting some tweaks and some significant fundamental changes which are changes to policy.

ALEXANDRA EXCOFFIER: I think we're in a situation where, if we don't tweak and we don't propose something which is agreeable to us, we're going to be … Maybe it won't work with the GNSO. It would certainly not work with the GAC.

CHRIS DISSPAIN: Yeah.

ALEXANDRA EXCOFFIER: So instead of maybe questioning, we should try to go through this exercise and see where we end up and then see if we can please both the masters.

CHRIS DISSPAIN: Absolutely, which is exactly what we're trying to do. Thank you. I appreciate the input and the clarity.

It feels to me as if, leaving aside the steps for a second, no one is violently objecting to a—Jay, go ahead. I knew somehow, if I used the words "object," somebody would put their hand up. Jay, go ahead.

JAY CHAPMAN: Thanks, Chris. Can you hear me?

CHRIS DISSPAIN: Yes, we can.

JAY CHAPMAN: All right. Perfect. So maybe I'm jumping ahead or maybe it's a situation where we need to go back. To me, this whole thing resolves around what you started the conversation with, which is this idea of impersonating the IGO. So, in the case where we've defined exactly what that means, well, then I think some of this becomes a lot easier if we really are able to pin down what impersonation means as opposed to a situation where we're basically just changing the situation where an IGO can utilize an RDP to go get at acronym domain from a registrant.

So if it's clearly just about that we're trying to prevent these situations of fraud and phishing—whatever; impersonating the IGO—then I think this gets a lot simpler. If we're simply talking about that we're just going to do a new IGO-based UDRP-type procedure, then, from my perspective, it's where I like the "and" position, which is allowing the registrant not only to go to court to see if they can get jurisdiction issue settled so they can move forward and then, if not and they fail in that respect, go to this arbitration-type panel, which is right along, I think, in line with what Phil Corwin had been trying to present at the end of the last working group.

So, again, for me, where I would fall on this really kind of depends on how narrowly we're going to define what it is we're trying to prevent and capture here. Does that make sense?

CHRIS DISSPAIN: It does make sense and is precisely the challenge because, at the moment, what I presented to you earlier on is what the IGOs had said in the past they were looking for in respect to a parallel process. If we sought to impose those restrictions on the use of the current process, we would be rewriting UDRP, and I don't see how we can do that.

So I said it at the end of the last call—the irony here is that, by insisting on no new process, that insisting that we must use the current process, we're trying ourselves into a large of knots and we're going to end up in a situation where, if what we recommend is acceptable, the IGOs actually have a large claim than they would otherwise have and, in fact, want. I apologize if I'm speaking to IGOs, and I appreciate that I am talking from the past. But if I've understood correctly, not much has moved in that respect.

So, Jay, the point I'm making is, yes, I agree with you. It would be much simpler, but I don't see how we can do that in this process because what we would be doing is creating a different set of criteria for IGO claims in the UDRP to be judged against. That is effectively a new UDPR for IGOs, which I personally am fine with. But I understand it's A) against the current recommendations, B) against the GNSO's scope for this working group, and C) not something that Phil could bring even his group even close to

consensus on, which is why Recommendation, I think, 1 or 2, says no new processes, no parallel processes.

Before I go to Brian, Jay, did what I say make sense to you?

JAY CHAPMAN: I understand. I would say that, if that's the case, then, at this point, I still remain … To undo 20 years of UDRP situations to take away the court of mutual jurisdiction option for a registrant just seems like a pretty high bar then.

CHRIS DISSPAIN: Sure. I will get to you in a second, Brian. But, Jay, if you look at Recommendation 5—just bear with me for a second—Recommendation 5, as it's currently drafted, contemplates an IGO being able to claim in the local court, although is it not subject to the jurisdiction, and contemplates an IGO winning that argument and then that's then when it goes off the rails because it says you go back and start all over again, which of course is non-sensical because you end up having to do the whole all over again and you go around and around in circles. If you broke it by saying, "And if that happens, then there's a final place you go to, which is a supreme panel or arbitration that makes that final decision," how would you feel about that?

CHRIS DISSPAIN: I think that makes sense. Sure.

CHRIS DISSPAIN: Okay. So you're not adverse to the principle of a non-court-based final decision in principle, based on what I've just said. And this is not going to be cast in stone.

JAY CHAPMAN: Of course. Let me clarify maybe where I was coming from then. My understanding what we were talking about a situation where we would just … I think Paul kind of identified that maybe it might be impossible to just completely write off [inaudible] the idea that a registr[y] …

CHRIS DISSPAIN: I can't hear you, Jay. Is it just me?

MARY WONG: No, I think Jay is breaking up.

CHRIS DISSPAIN: Jay is breaking up. Okay.

JAY CHAPMAN: [inaudible]

JULIE BISLAND: Jay, we're unable to hear you.

JAY CHAPMAN: [inaudible]

CHRIS DISSPAIN: Let's maybe mute Jay for a second and get back to him when his line is a bit clearer because we can't hear him at all.

JAY CHAPMAN: [inaudible]

CHRIS DISSPAIN: We can't hear you, Jay.

JULIE BISLAND: I'm trying to private message him. I'm able to mute him. One moment.

JAY CHAPMAN: [inaudible]

CHRIS DISSPAIN: Okay.

JAY CHAPMAN: [inaudible].

CHRIS DISSPAIN: I think the sound system is catching up with his previous comments. Brian, why don't you give it a go?

BRIAN BECKHAM: Hi, everyone. I hope Jay can hear us even though he can't hear him. But I wanted to say, no, I completely agree with Jay that this is a little bit of a chicken-and-egg scenario in terms of that, in some instances, agreeing to the arbitral appeals side of things hinges on knowing the criteria. So I just want to affirm that the IGO position has been and remains that this is for a narrower set of abuse, and we've used, I think, the term "masquerading" or "misrepresentation" in earlier iterations of the work. So I agree, Jay, wholeheartedly that that is kind of a foundational principle to the extent that we can agree on that. And I appreciate that these are moving parts and sometimes, when you adjust one, that means you need to look with some fresh eyes at other parts.

But I completely agree that the better we can agree on the conduct that we're looking to address here, then that situations the discussion around the appeals.

I did just want to mention one thing in terms of the … Chris, you mentioned, a little bit, the procedural bind we could potentially find ourselves in. Of course, earlier, there was, on screen, a GAC advice where … I don't have the language in front of me, but it talked about creating a separate process modeled on but separate from the UDPR. So I think that precisely goes to this question … I think, just to clarify, when that language was used, the idea was that using the UDRP as a broad framework—so you have a known mechanism with known criteria and defenses and a process; so in other words, using the UDRP as a big-picture model but actually, when it comes to the specifics, there are some

very important differences, and this is precisely what we're talking about with the conduct that would be subject to this mechanism.

So, again, that's a long-winded way to say I agree with Jay on what we're looking to address that then helps, again, inform the discussions on the later parts of the process. Thanks.

CHRIS DISSPAIN: Understood, Brian. Thank you for that clarity. It's a shame—I think Jay is not on the call at the moment to hear you and he violently agreeing with each other.

But let me ask the group then. Brian has just said—I set it up at the very beginning at this call—that the IGOs are prepared to accept a situation where the basis of how much they can make a claim is narrower and is open to available trademark owners under the current UDRP and is limited to situations where—let's not worry about what the definition is for the moment—a registrant is pretending to be an IGO or that otherwise would likely result in fraud or deception. Who believes that we could build something workable as a series of recommendations back to the GNSO Council, including something like that, and that we could do that without falling foul of the other recommendations? In other words, who think we could get that in as a tweak? I'm hoping for positive responses because, if we can, then actually we move a significantly long way down the road. But the question is whether we can; whether we could say to the GNSO, "It is not a parallel process. It is the same process, but it is a different criteria for judging the rights." Does anyone want to comment on that?

Paul?

PAUL MCGRADY: Thanks, Chris. This might make me really unpopular, but I'm still trying to figure out how we based a UDRP on 6ter, which is not a trademark right. It's a list somewhere. Now we're down the road about building a special mechanism based on 6ter that's different from the UDRP. Maybe I'm just not creative enough, but I feel like we're far away from where council intended us to be.

So, anyway, for it's worth, thanks.

CHRIS DISSPAIN: I don't disagree with you that we would be effectively saying … We can get stuck down into the weeds about 6ter or not. Just for the moment, what we effectively would be saying is, by some mechanism—be it an approved list, be it a registration in 6ter—whatever—there is right for an IGO to bring a claim in the UDRP; the claim being that an acronym that is on that list or registered under 6ter is registered by registrants, being used in bad faith, and the registrant is pretending to be the IGO or is otherwise likely to result in fraud or deception. That's what we would be saying. Whether we use 6ter or we use something doesn't, for the sake of this discussion, matter very much in the sense that we would be adding a right, adding an opportunity, to the IGOs to step into the UDPR and to bring a claim for a very specific purpose and only that purpose—so not a wide claim—in the same way.

So that's what we're talking about if we go down the road that … As Jay has said, if it's narrow, then it's more likely to be

acceptable. I'm saying I get that, but can it be narrow, given that we are not supposed to be making changes to UDRP?

Yrjo and then Susan. Yrjo?

YRJO LANSIPURO: Thank you. I'm very much in favor of what you proposed. I think that this narrowing of the scope could be really the solution to this dilemma. And just to say that, as a representative for At-Large, our stake here is to avoid situations where people would be confused. So this case of impersonation/masquerading/whatever is precisely what we want to avoid.

So, yes, I'm, for one, in favor. Thank you.

CHRIS DISSPAIN: Thank you very much. Susan?

SUSAN ANTHONY: I'm cautiously optimistic with this language, but I take the floor to simply note that, rather that referring to 6ter as a registration, it is important to recall that it is not a registration. It is a recordation. I welcome keeping 6ter off the table and somewhere away, away, away.

CHRIS DISSPAIN: Susan, do you have any thoughts about, absent 6ter, how you might define your list, how you might define who is entitled?

SUSAN ANTHONY: I think we had a list once upon a time.

CHRIS DISSPAIN: They still exist. It's still there.

SUSAN ANTHONY: It still exists [inaudible]

CHRIS DISSPAIN: Yeah.

SUSAN ANTHONY: I think it was developed in or around 2012, and it was developed to try to address this particular challenge. I understand—I hope Brian is on the line and can correct me if I'm wrong—that the concern with that list is that it may not be sufficiently comprehensive. I suppose the answer to that is that then it gets updated from time to time, perhaps.

I can tell you the way in which requests for recordation of IGO names and acronyms under 6ter is an issue that is taken very seriously in the United States at the US Patents and Trademarks Office, and we looked carefully at every request. On any number of occasions, we have had to say, "I'm sorry, but the request is for an IGO, and there is no IGO here." And there is a great variation—a patchwork quilt, if you will—around the world of what gets in and what doesn't under 6ter. So, as I say, park it away.

I myself thought that the list had some real appeal to it, and I thought that several weeks ago. I guess I [don't] understand everyone's concerns that, "Well, it's great to say. Then let's go to that and let's narrow. It's about fraud or masquerading." I think we could all agree that's the kind of abhorrent behavior that we would like to get rid of. But lurking around all of this is the issue that maybe, just maybe, we wouldn't be allowed to do these things because it requires an upset of other recommendations that the GNSO Council [inaudible].

Jeff Neuman, I see, has just posted a question on the chat. I can't always focus on the chat because I'm listening carefully to what people are saying and reading the screen, so somebody I have to go back and look at the chat, but he says, "How was that list better?" That part I do not know. I'm not sure if Brian or another IGO representative on the line might be able to tell us.

CHRIS DISSPAIN: I can tell you it was a GAC list and it was actually contained in GAC advice originally, or the reference to it was.

SUSAN ANTHONY: It's cleared by the US.

CHRIS DISSPAIN: Yeah, I think that's probably right.

SUSAN ANTHONY: I'm not questioning that. Jeff Neuman has said, "How was that list vetted? How was it initially determined?"

CHRIS DISSPAIN: Yeah. My understanding it was that, as Mary has put in the chat, the list was submitted to ICANN in 2013 and based on 1) IGOs that are created by treaty and 2) IGOs having international legal personality—i.e., not 6ter. And Berry has said there was some reference to .int although I recall that the references to .int are incredibly complicated and weren't particular useful because there were arguments about what is meant and whether registrations [inaudible] was relevant or not.

But I do know that that list was past by the GAC and I also know that the GAC was going to come up with a process by which that list was updated but they haven't. Clearly, if we were going to be using it as an authoritative—or not us, but if it was going to be used as an authoritative list for the purposes of this exercise, there would need to be clear understandings of how you'd get on the list and so on and so forth. Merely just saying some people in the GAC got together and said, "Here's a list," isn't going to work. But it's a starting point, and at least it has been through some discussion in respect to international treaties.

Paul, then Alexandra. Paul, go ahead.

PAUL MCGRADY: I'm getting senile. It's an old hand. I'm sorry.

CHRIS DISSPAIN: It looked like a young hand to me, Paul. Alexandra, go ahead.

ALEXANDRA EXCOFFIER: Hi. Me again.

CHRIS DISSPAIN: Hi, you again.

ALEXANDRA EXCOFFIER: Just to remind on the list, I was there. It doesn't make me any younger. But we did start off looking at int, but in .int, there are some organizations that are not IGOs. I don't know how historically they got in there. But we did look at the criteria for .int as Mary indicated, created by [treaty] and having international legal personality. That list was compiled by some members of the GAC, including some IGOs, including OECD, and [Data] by the United States was very active in that. But also Canada was the Chair at the time, I think.

And we did discuss a mechanism to update the list. The question that we got stuck on was whether it would be a rolling mechanism—like any IGO can ask to be on the list if it's a new IGO or an IGO that didn't get on the list because we didn't think of them—or whether we could update the list any six months or every year.

So there were discussions on that, but as you say, Chris, I don't think we settled on that. But it certainly would need to be updated.

CHRIS DISSPAIN: Yeah.

ALEXANDRA EXCOFFIER: The issue that I would see with the list is that we negotiated to only put two languages, and several IGOs objected to that because they have more than two official languages, whereas, under 6ter, they could notify all of their official languages. So—

CHRIS DISSPAIN: Yeah. And, again, you can see that, the more steps you take, the more complicated it becomes from the point of view of policy because, at the moment, those aren't even reserved. I mean, there is a temporarily reserved list of names, and what—

ALEXANDRA EXCOFFIER: Well, if they were reserved, we would have no problems.

CHRIS DISSPAIN: Of course. Exactly. Correct.

ALEXANDRA EXCOFFIER: We wouldn't have to have curative rights.

CHRIS DISSPAIN: I'm aware of that, as you quite rightly [pointed out], although, of course, you can't reserve backwards. You can only reserve forwards. But nonetheless, I take you point. But I think, at the end of the day, where we're at is an understanding that, were it to be

acceptable to move, there are ways that you could make a list and there are ways that you can make a list that would clearly be limited very specifically to IGOs, to treaty-based organizations.

I guess that brings me back to my question. So Jay says—and I completely understand Jay's point—that the narrowness helps him. Yrjo says, "Yes, I think that helps." Susan says, "Yes, that helps," etc. But the question is—I'm more than happy to take us down that path of crafting something—what do we think in respect to going back to the GNSO with our thoughts on this? Because it will take work to do this. There is some work to be done about honing the definition. As Paul McGrady has said in the chat—and he's quite right: ""Otherwise likely to result in fraud or deception" is a very convenient shorthand, but as a legal expression, simply doesn't work because it is far too wide and we would need to some serious work to make it acceptable."

Jeff, your hand is up.

JEFF NEUMAN: Thanks. I was just going to agree with that serious work because, if you do read a number of UDRP decisions, there's all this kind of creative language about diverting traffic that was meant to go to the complainant, and that's considered bad faith. And it's not much of a stretch to say that diverting traffic from the complainant in this case would be akin to impersonating. So UDRP complaints and decisions have gotten very creative in defining these terms.

So I'm not sure, Chris. You started out the call and said a couple times that this is actually pretty narrow, but I actually see that it's

just another way of … It could be narrow, if we define it that way, but if we just left the wording the way it was, I'm not sure it's any narrower than the standard under the UDRP because … yeah.

CHRIS DISSPAIN: So I agree that the tail-end of the sentence in respect to "otherwise likely to result," etc., could be interpreted in a wide way. And I agree that we would need to … The one I was talking about—narrow—was talking about pretending to be. And a few other bits and pieces. It certainly was intended, and I think Brian will agree with me—hopefully, Brian will agree with me—that it was intended to be a narrow definition than that which is currently in the trademark version of—well, in the only version—of UDRP, which is the trademark version. But I take your point, Jeff.

I guess where I'm at with this is asking this group to say whether or not you want to proceed on the basis of narrowing the criteria to craft, in essence—don't worry what it is at the moment—IGO-specific criteria. Jeff, you said you'd rather not play with the scope or the criteria. That's fine if that's what everyone feels, but there is a price to pay for that. The price to pay for that is that you then end up with an unwillingness to … Because the criteria are not narrow, you then can't make any other changes further down the funnel.

If you could, Jeff—I appreciate you saying you don't want to play with the scope or the criteria—is that at a principle level? You just don't think it's a sensible thing to do? Or are you saying we can't do it because of the current scope?

JEFF NEUMAN: I'm saying that, well, both, I think. Here I'll take the other side of Jay; that there's 20-something years of jurisprudence on the criteria. I'd rather stick with that jurisprudence but also then give … I'm a fan of the getting rid of the mutual waiver and taking the option that you said at the beginning, which is, if they get to taken to court and they can show that they're immune from liability or immune from even a court hearing the case, then I'm good with a supreme or super panel deciding that case.

So I don't think we need to play with the standard. I think that's just really taking 20 years' worth … That's going to be A) a lot more work and B) create a whole parallel line of jurisprudence. I think that's a much bigger impact than just saying that, if an IGO wins, the registrant tries to take them to the local jurisdiction and, [if] that fails, then you hear it again.

CHRIS DISSPAIN: So I take your point, but now let me take you back a step. We've already said that, for Recommendation 5 … Let's assume for the sake of discussion that we say Recommendation 5 stands as it currently is, except that, at the end, instead of going back to the beginning, it goes to a super panel or supreme panel. That's fine. Just assume we say that and we solve that problem that way and everyone says, "Yeah, I'll buy into that." We're still left with the problem of, how do you get the IGOs in the game in the first place. Let's not argue about whether it's standing or not standing. I understand Paul McGrady's point, and he's right. But how do you get them in?

If you say you get them in … Let's just say you get them in via 6ter, which apparently there's no consensus on, or they're on the list. You're saying they come in on the list and they have the wide entitlement, the same rules as everybody else. I just want to be clear. That's what you're saying. You're saying you put on them on a list. We agree that the list is acceptable. They come in the door that way. They're treated in the same way. They have to [meet] the same bad-faith criteria as everybody else and they come at the end and go down through that process. Is that what you're saying?

JEFF NEUMAN: Yeah, exactly. They're on the list. You take out the waiver. Then, if the IGO wins and the registrant cannot challenge in court, it goes to this other super panel and it—

CHRIS DISSPAIN: Or arbitration. Whichever.

JEFF NEUMAN: Yeah. I think that's really simple. That seems like the least amount of changes to me.

CHRIS DISSPAIN: Oh, unquestionably it'll be the least amount of changes, but that is completely correct. Well, actually it's not correct. If you stuck with 6ter, it would probably be one less change. But leaving that aside,

that would be the only difference. Thank you for typing what you're saying into the chat.

So, if everyone listens to that, how does that sound? List gets you in the door. Ditch the waiver. Come down. And—Brian, go ahead.

BRIAN BECKHAM: Hi. Thanks, everyone. I feel like we were all rowing in one direction and then this question of scrapping the progress on … I think Jay may be back now, so I'll just say, for the benefit of repeating the message for him being on the line, I was wholeheartedly agreeing earlier on the bad act that would be addressed by this, helping to inform the discussion about the likelihood of agreement on the appeals side of things.

Let me put it in another way to react to Jeff's intervention. I think, first of all, it goes against what's been asked by the GAC and IGOs, specifically in terms of creating a mechanism that's meant to go after bad actors who are misrepresenting to the public that they are or acting on behalf of an IGO with an intent to defraud the public. It's a much narrower set of behavior that's covered today under the UDRP.

Just to give a practical example of why I think it's not terrible productive to just take, let's say, the path of least resistance that Jeff suggested of saying A) you have the list and B) you have the waiver removed and then C) you have the appeals discussion, if you go WIPO.com right now, we use WIPO.int as our homepage. WIPO.com is a bunch of what looks to me to be more or less random pay-per-click links. There are a number of cases under

the UDRP where the site is being used for pay-per-click links. But, frankly, that's not really the problem that we're seeking to address here. We're seeking to address a very narrow set of potential issues, where someone is actually trying to confuse and defraud members of the public, not just put up pay-per-click websites.

So I think, really, put another way—sorry to ramble a bit—while there's a simplicity to it, it doesn't really address the problem statement that we've been tasked with tackling. Thanks.

JEFF NEUMAN: Can I respond to that?

CHRIS DISSPAIN: Jeff, yes. Of course. Please. Of course you can. Please go ahead.

JEFF NEUMAN: Thank you. So, Brian, the issue I have, though—and I think the issue the issue the GNSO will have—is you then don't have to show registration and use in bad faith. You just have to show, in theory, use in the manner you described and use in the standard you mentioned. There's a lot of clever lawyers out there that could put a lot of behaviors in there.

So now you're changing the standard from that you have to register it in bad faith and you have to use it in bad faith to just the standard of that it's used to misrepresent the public, which is so much different. It would need a ton of work to actually all agree on what that would be.

Then, if I were a trademark owner, I'd be like, hey, that's a cool standard because you don't have to show registration in bad faith. Why can't we have that as well? Now you're really delving into a much … I know Chris says … And I know, Brian, you're representing it as narrow. I actually think that it opens up a hole that you can drive a truck through.

So I think, from the GNSO perspective, I want to give the IGOs the right to a curative right that they can't have now, which is because they can't waive their immunity. I want to fix that problem. That's the problem I think we need to fix. And everything else seems to me substantive. That should go in an RPM review as opposed to our problem, which is ensuring that IGOs have a curative mechanism without waiving their immunity. Thanks.

CHRIS DISSPAIN: I got it, Jeff. Thank you for that. Brian, you can respond, of course, but I want to ask you a question.

BRIAN BECKHAM: Go ahead.

CHRIS DISSPAIN: Leaving the standard the same doesn't make it any more difficult for you, so the question becomes what, by narrowing it, would you expect else to have happen because it's been narrowed. If you see what I mean.

BRIAN BECKHAM: Yeah. Thanks, Chris. I'm looking, at least from what I can see on the screen—Jay is not back on the call, so maybe we lost him—

CHRIS DISSPAIN: No, he's here.

BRIAN BECKHAM: Oh, he's here? Okay, good. I think there's two things. One is you're still stuck with the conjunctive "and/or," but I think it importantly overlooks that, if part of the concept of getting consensus in this group hinges on that appeals side of thing—the arbitral appeals side of things—and if one of the forks in the road has been expressed as narrowing the behavior, then it feels to me that we end up at a bit of an impasse. If we can't agree on narrowing the behavior, then—I don't want to speak for everyone else—I think we may have some members who have issue with that appeals side of the equation.

So maybe we can go around in circles, Jeff, on whether it's narrow or if you can have creative lawyers.

By the way, I want to remind folks of what Alex said earlier. IGOs are, as much as anyone these days, mindful of the cost implications of enforcement against bad actors. So I appreciate that we're gazing into the crystal ball, but the idea was really that this is for really bad acts that need to be addressed because there's a risk that donors would be defrauded—that sort of thing—versus that somebody doesn't like that somebody has a pay-per-click site or isn't willing to sell a domain name at their asking price.

So I think it's veering into slightly hypothetical territory to say that this isn't more narrow because you can have creative lawyers arguing that. I think the intent—and if you look at the language on the screen—maybe in hindsight we could have used some language like "misrepresentation," which is a more known concept as opposed to pretending. But I—

CHRIS DISSPAIN: Don't get too tied up.

BRIAN BECKHAM: Yeah. I guess, just to summarize, maybe we could see things differently in terms of whether the existing criteria or the UDRP versus what's on the screen is narrower or to what extent they're different. But if we've heard from some members that agreeing on a more narrow set of behavior on the front end has an impact on the possibility of consensus of the appeals, then I think that's a question that we have to unpack.

CHRIS DISSPAIN: Which is what I thought you were saying. In other words, being very simplistic about this, if I accept, leaving aside that Jeff doesn't think it is narrower, a narrower definition of what I need to show in order to win a claim, will you walk away from the local jurisdictional court and go straight to arbitration or a supreme panel? That's where I thought you were heading towards. I don't know whether that was something that Jay actually was saying. I do know that Jay said he was more comfortable if the criteria were narrowed.

Jeff, I'm conscious that your position as the GAC liaison puts you in quite an interesting position, but I'm just wondering if you were comfortable that the criteria was narrower. That's what I meant to say—what you just typed as the GNSO liaison to the GAC. You're so many things, and that is one of the things that you are. If it could be made narrower and put into words that you accepted were narrower, as a principle, would it be okay? Or are you saying, "No, as a principle, it's a step too far in my view because of the restrictions placed upon us"?

JEFF NEUMAN: I think it's the latter, that the GNSO has given us a task and, if we were going to work on narrowing it, we would absolutely need a change to the charter because this is a much bigger change.

CHRIS DISSPAIN: Understood. Are there other people who disagree with Jeff's interpretation?

Brian?

BRIAN BECKHAM: Thanks, Chris. Thanks, Jeff. Maybe saying "disagree" puts it a bit starkly, but this was why, at the beginning, I tried, at least for myself, to focus in on … I think the verbiage was "generally consistent with." I think, broadly speaking, the UDRP covers certain kinds of categories of conduct. What we're looking to do is narrow our focus on one particular kind of topic.

So, if you think of it in terms of a Venn diagram or a funnel, I guess I'm a little confused, to be totally honest, as to how looking at actually narrowing the focus of the behavior that would be prohibited would not fall under that "generally consistent with" rubric.

CHRIS DISSPAIN: Okay. Paul, go ahead.

PAUL MCGRADY: Thanks. I think this is an opportunity where we really have to be willing talk [in]decision on these two primary options because it's kind of true that we don't have the scope from the council to go build an entirely new process. On the other hand, that doesn't mean that the council won't say, "Hey, that's interesting. Here's more scope." But I would like, rather than trying to vanquish one today and selecting one to focus on, a week of indecision because I'd like to take this back to … I'm here as a representative of the IPC, so I'd like a week to take these two options back, put them on the list, and see who screams bloody murder or if everybody says both look great. That would help me in knowing what I'm supposed to be saying.

CHRIS DISSPAIN: That's exactly where I was headed, Paul. Thank you for that. I was going to suggest exactly that, and I was also going to ask if Brian would consider reaching out to whoever he thinks is appropriate, considering the words currently in that now-half-hidden slide, Brian, as to what sort of finessing you could do with those to make

them clearer and more likely to deemed to be narrower, not because I'm saying it's going to happen but because I'm saying I think it would be helpful in the discussion. So if you are prepared to try and tackle that as a piece of homework. If you don't come back with anything, so be it. But if you could, it would be great.

And, Paul, I agree. I think take those two thoughts. It brings me to a very important discussion, which is that, for some people—not everybody, but for some of the people on this call—next Monday is a holiday. It is Easter Monday. That is a holiday in many places in Europe. I don't think it's a holiday in the states, but it is elsewhere. So I wanted to see if there's any appetite for us to meet again next Monday or whether people would prefer—oh, yes; thank you, Jeff, for reminding us—perhaps having a two-week break. Paul, that would give you even more time to go back to your group.

Kavouss, welcome. The floor is yours.

KAVOUSS ARASTEH: I was here from the very beginning—

CHRIS DISSPAIN: I know you were. I heard you.

KAVOUSS ARASTEH: I don't think we should have a meeting next Monday. I think we need a break to reflect on what we are doing. We are discussing many things. Some of them are very interesting. We have to think

about it and then we have to talk about narrowing or not narrowing and the degree of narrowness and so on and so on. So I think we need to reflect a little bit, and also we have not forgotten what we did the last meeting here—so not to touch Recommendation 5 but go to other recommendations. So we need to think it over, and I suggest that we do not meet next Monday. Thank you.

CHRIS DISSPAIN: Kavouss, thank you very much. Paul has said in the chat that he agrees that we shouldn't meet next week. And I'm just going to call it and say we're not going to meet next week. It will give everybody an opportunity to consider what we've talked about, and I'm going to sum that up in a second. And we can roll our meeting through until the following week.

So where I think we're at is as follows. There is a general understanding that it would be feasible to put an arbitration or a super panel in as a final decisionmaker. There is discussion about whether the right to go to court in a local jurisdiction could go altogether or could be step prior to the super panel. I'm going to keep saying "super panel" rather than "arbitrational super panel" because I can't be bothered. So either one or the other. No decision has been made. So there's discussion about whether the legal jurisdiction stuff could go altogether or go in as a step. Some would say that they don't think we should lose the local jurisdiction. Others have said, if you're going to go to a super panel, that should be enough. That's at that end of the game.

Kavouss, your hand is up. Go ahead.

KAVOUSS ARASTEH: We need the local jurisdiction and super panel. In my view, whether you call it super panel or arbitration, I am much in favor of arbitration, [now] that there's super or not-super panel. I don't think we need to have both. I think super panel or arbitration. Let's just call them, if everybody agrees, arbitration. In my view, it's covering and more traditional than local jurisdiction, which some people have difficulty with. Thank you.

CHRIS DISSPAIN: So just to be clear Kavouss—sorry—you're saying that your argument would be, "I don't need the local jurisdiction. I'm happy just to go to arbitration." Is that what you're saying?

KAVOUSS ARASTEH: Yes. That is what I meant and that's what I suggest. Thank you.

CHRIS DISSPAIN: Thank you very much. So, as I said, there are those who think the way Kavouss does, and there are others who say we shouldn't lose the local jurisdiction. 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.

If that's at the bottom end of the process, if we then come back up to the top end of the process, what we've discussed is two things. We've discussed whether or not you could, instead relying on 6ter,

which I know some people are very uncomfortable relying on because they don't think it's fit for purpose, go with a list. We've said that the current list was put together by the GAC and that it would, obviously, if we were going to be using it, need to have some guardrails in place. It would need to be very clear how you get on the list. It would need to be very clear how new people, if any, got onto the list and so on. But leaving that aside, we've talked about the principle or the possibility of using a list.

I've just seen Paul's note in the chat. That's lovely. I'm very much happy with the SLAP. That's great.

And the second thing we talked about is whether or not it would be feasible to narrow the criteria that the IGO would be required to show in order for them to win in the UDRP and whether, as a quid pro quo for that, that would lead us to being more inclined to skip one of the steps further down—i.e., the local jurisdiction step—and perhaps move straight from [initial] finding to arbitration in the event that either side wanted to appeal.

Those, I think, are the issues that we've got to go away and think about. The one final piece is that I've asked if Brian, if he's able to, could do a little bit of work on the criteria that we discussed and whether the narrowing of those—the wording of that—could be changed.

Kavouss, is that an old hand?

KAVOUSS ARASTEH: No, it's a new hand. Just at the end of the meeting, I want to say that, during the GAC discussion on this IGO, there was a sort of, I

would say, qualified sharp criticism on the charter for this IGO work track. I discouraged them not to put that language in the GAC advice.

CHRIS DISSPAIN: I understand.

KAVOUSS ARASTEH: And I said that I am confident that we in the work track tried to find something, [and], then "Please don't jump into any conclusion that the charter is narrow or narrowly crafted and so on and so forth." Still I am of the opinion that we could be in a position to find some sort of solution and go back to the GNSO in one way or the other. So I am relying on that. And they agreed me not to put that language in the GAC advice. Thank you.

CHRIS DISSPAIN: Thank you, Kavouss. That is very much appreciated. Thank you very much. So I think everybody is clear. I think everybody knows where we stand. I think everybody has a lot to think about for the next two weeks.

I would encourage us all to consider asking questions on the e-mail list for clarification, for considering if you come up with a conclusion or you've got a question or you've had an idea. Let's see if we can get some discussion running on the list. That would be good if possible.

Berry, your hand is raised. Go ahead.

BERRY COBB: Thank you, Chris. Just a note for the entire working group. Since we're not meeting on the 5th, we'll be meeting on the 12th and then a meeting on the 19th. Just as a reminder, the GNSO Council meeting is on the 22nd, whereby we will need to provide an update to the council. Or more specifically, we need to have our entire workplan decided on. So probably the 12th is when we'll review what our go-forward workplan is going to look like. This was a requirement for the GNSO resolution. So I encourage the group to definitely work offline with homework leading up to the 12th so that we can have plenty of substance and a clear message to take back to the council. Thank you.

CHRIS DISSPAIN: Or a solution, Berry.

BERRY COBB: Yes, sir. A solution.

CHRIS DISSPAIN: I know that's incredibly optimistic, but you never can tell. Stranger things have happened.

As Julie has said in the chat, the next call is on the 12th. We can bring this call to a close. I'd like to thank everybody for being so collegial and helpful.

Kavouss, your hand is up again. Go ahead.

Kavouss, you're on mute.

KAVOUSS ARASTEH: Oh, okay. Can you hear me now?

CHRIS DISSPAIN: Yes. Go ahead.

KAVOUSS ARASTEH: Thank you very much. Just in half a minute, could you or the secretariat or staff put together a very brief summary of what we have at least discussed now in order to be able to think it over between now and the 12th?

Also, when you refer to "narrow" and "narrower," please kindly clarify "narrower" with respect to what. That means we should have a reference that is narrow and saying what is narrow now. We want to make it narrower. It should be also … You said that criteria [inaudible]. So be a little more clear for some people that have not fully followed the discussion. It is possible? Thank you.

CHRIS DISSPAIN: Yes, Kavouss. The document … There's a link in the chat (but I'll ask Mary to send it out to the e-mail list as well) to the document, which has been updated pursuant to our chat. And, yes, we'll get a note out that deals with where we've got to.

Thank you all very, very much indeed. Much appreciated. Good call. Let's all take the next two weeks to think carefully and chat on the list if need be. Take care, everybody.

[END OF TRANSCRIPT]