ICANN Transcription
IGO Work Track
Monday, 19 April 2021 at 15:00 UTC

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TERRI AGNEW: Good morning, good afternoon, and good evening. Welcome to the IGO Work Track call taking place on the 19th of April 2021 at 15:00 UTC.

In the interest of time, there'll be no roll call. Attendance will be taken by the Zoom room. If you're only on the telephone, could you please alert us now? Hearing no one, we do have listed apologies from Alexandra Excoffier. They have formally assigned David Satola to represent the IGO as their alternate for this call in the remaining days of absence.

All members and alternates will be promoted to panelist for today's meeting. 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 to the chat. Alternates not replacing a member are required to rename their lines by adding three Zs at the beginning of your name, and at the end in parentheses the word "alternate," which means you are automatically pushed to the end of the queue. To rename in Zoom, hover over your name and click

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

As a reminder, the alternate assignment form must be formalized by the way of the Google link. The link is available in all meeting invites towards the bottom.

Statements of interest must be kept up to date. If you have any updates to share, please raise your hand or speak up now. Seeing or hearing no one, if you do need assistance with your Statement 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.

As a reminder, those who take part in ICANN multistakeholder process are to comply with the Expected Standards of Behavior. With this, I'll turn it back over to our chair, Chris Disspain. Please begin.

CHRIS DISSPAIN: Thank you very much, Terri. Good morning, good afternoon, and good evening, everybody. Welcome to the eighth call of the IGO Work Track. Good to see some of you here. That's great. Maybe there'll be a few more joining us as we go along but it's important that we get started.

The agenda for today is up on the Zoom room, the welcome and updates. I'm going to check in with Berry in a minute to make sure what else, if there's anything he wants to talk to us about. And then the four components of deliberation, though, hopefully, most of you and all of you have seen that I sent an e-mail to the list about an hour ago to see if we could have a discussion around the way forward, given the challenges of whether we are in scope or not. But we'll get to that in a minute. Before we do that, let's just check in with Berry and see if there's anything on the work plan and status update that Berry wants to take us through. Berry?

BERRY COBB: Thank you, Chris. Just as an FYI on Thursday the 22nd, the Council will be meeting this group or this topic is on the agenda. And I believe, at the very least, John, as our liaison, will provide an update to the Council and will be, as part of that update, is basically a blessing from them about the work plan that we're submitting. And then if you've reviewed through the materials, you'll see that there's also kind of an update in May as well based on our near-term work and possible outcomes that we develop here. So it's really all I have. If you have any questions about the overall plan, please let me know. Thank you.

CHRIS DISSPAIN: Thank you very much, Berry. Does anybody have any comments about that before we move on? Okay. Well, no hands are up so that's fine. Let's move on. As I said, I did send a note to the list a little while ago. I'm going to summarize it, and then I'm going to open the floor up for comments. But basically, what I've said in my

note, at least my assessment, was that on the call last week we seem to be leaning towards pursuing the work of limited amendments to the UDR template, to create what, in essence, would be a specific UDRP for IGOs. And then if we could reach some sort of consensus on that heading out to the Council the appropriate time, whenever that might be—to paraphrase, to ask for forgiveness rather than permission—to say this is what we've done and this is how we think we can fix things. The limited areas for amendment are in my e-mail and are in fact 3A and B on today's agenda, but in essence, they're the standing discussion, 6ter and the GAC list. The requirement for local jurisdiction, submission, the beginning of the process, the concept of whether you can bring local jurisdiction proceedings if you lose, and the discussion on the final hearing, and whether there would be a super panel or an arbitration. I'm not wishing to single Paul out, but Paul raised the point in his e-mail suggesting that perhaps this was actually creeping too far, and that we should be asking for consent. So I'm going to come back to that in a minute.

In essence, if we go now and ask for consent, we will have asked and we will either get a yes or a no, or maybe a maybe. If we believe that we can say that what we are limiting our discussions to at the moment, assuming we agree to limit it to that, if we feel that as a group that is justifiably tweaking that we can say that that is in the general spirit of the recommendations and the scope, then we can continue. If we start to step outside of that, it would be open to anybody, of course, to say I think we're outside and we should go and ask the GNSO.

So it just struck me that, really, we do need to be, at least in the majority, on the same page on this, as to whether or not we are comfortable having this discussion and seeking forgiveness later, or whether we actually feel or enough of us feel that we should go and ask the GNSO Council the guidance or consent.

Secondly, it also struck me that the discussion itself is pointless if the IGO contingent and possibly government contingent on these calls doesn't view the basis of the discussion, i.e., redlining the existing template and making very limited amendments in the areas that we've discussed as to be sufficient to—again if I could paraphrase—bring them into the tent, get them into the system. Because if that simply don't, then again we're going stray outside of scope.

Finally, I noted that David—David Satola who I see has joined the call—had sent a note saying that he would later have an intervention, and I just wanted to say that's absolutely fine. David, you should feel free to obviously make that whenever it suits you.

Having set it up on the basis of the e-mail that I sent out, we should talk about I think whether we are comfortable as a group that this is justifiably within scope, within tweaking, within the general spirit of the previous recommendations, and if we're not, we should say so. So I'm going to throw it open for discussion.

Paul, I don't know if you want to say something, but given that you sent the e-mail, you might want to make at least an opening point. Perhaps if you actually had a chance to talk to your colleagues, you might also be able to update us on that. But don't feel that you have to.

PAUL MCGRADY: I appreciate it.

CHRIS DISSPAIN: Thanks, Paul.

PAUL MCGRADY: A couple of thoughts. One, yes, we did have a chance to discuss this a bit in within the IPC Membership. It's out to our list now. I will say that the reaction was conservative, meaning that there was some concern over the 6ter issue. There was certainly some concern over building out a brand new IGO DRP, which is not what's contemplated in your e-mail, and the desire to look at the other options, which are in your e-mail and are meant to be more tweak-like than revolutionary. So again, I'm chasing people for input and like I said in my e-mail, I promise not to be on this fence forever but I don't want to paint a picture. I sort of ran this past the IPC and everybody thought, "Wow, this is great. Let's do all these things." So just by way of disclosure, I'm where they are.

Then in specific response to your e-mail, which I didn't have a chance to read before but I'm reading now, setting aside the 6ter issue, which still gives me heartburn, and until I see in writing somewhere that standing doesn't mean rights, I'll still keep having heartburn. So mark me down for that.

CHRIS DISSPAIN: That is not your fault.

PAUL MCGRADY: Removing the requirement to agree to a local jurisdiction was my idea so that doesn't bother me. Let's jump to D. A final hearing by arbitration or super panel, again that's one of those things that the IPC is still kicking around and I'm on the fence about. C, however, jumped out at me, which is whether the registrant could bring proceedings in their local jurisdiction if they lose the UDRP. That's an interesting thing because obviously, for example, I can't speak for all jurisdictions, but in the U.S, the ACPA is a legislative, it's law. And it is not considered to be claimed preclusion if you lose in the UDRP or win in the UDRP, and then you want to use the ACPA anyway. So as I look at C, whether the registrant could bring proceedings in their local jurisdictions if they lose in the UDRP, I guess how that would be accomplished is that everybody who registers a domain name would have to agree in advance to waive their rights to use their national legislation for relief in the event an IGO didn't like it and file the UDRP against them. I'll leave it to the folks who represent domain name investors who may be on this call, but even as a non-domain name investor attorney, that one makes me super nervous. So maybe we meant something else besides what it—because sounds like a huge wave or something. So those are my thoughts, Chris. Thanks.

CHRIS DISSPAIN: Thank you, Paul. Just to respond to that, yes—just to remind everybody—what we talked about was at the moment, ignore IGOs, just look at the current situation. The current situation is you have the UDRP and if you're a registrant and you lose that, you can bring a claim through your local jurisdiction. What we have

told about in several calls now are two things. One is we've said that it is obviously open to an IGO to argue that it's not subject to their jurisdiction. And the point about removing the requirement at the beginning of the process is precisely that, Paul, and that is of course why you suggested it. We also acknowledged that if an IGO wants to be able to argue that it was not subject to that local jurisdiction and to win that argument, that is what Recommendation 5 seeks to deal with. And the way that Recommendation 5 seeks to deal with it is to effectively put it all in a big circle and go back to the beginning again, which is why we're here, because that doesn't work. So what we said was if the IGO was to win the argument in a local court, then maybe that is not subject to the jurisdiction, that maybe we could have then a super panel or an arbitrary list. Let's not get into the discussion which one of those is best at the moment. Let's just say either one of them.

What point C is meant to be is a point of discussion as to whether putting in an arbitration or a super panel would, in essence, be enough for registrants to say, "If we've got, in essence, and appeal or rehearing," whatever you want to call it, "we are prepared to not have the local jurisdiction as a step along the way." That was the reason for it, Paul, and I completely understand why you might not agree with that and others might agree with it, but that was the basis of putting it in as a discussion point, not that it's settled in any way. Does that make sense, Paul?

PAUL MCGRADY: Thanks, Chris. It does make sense and I understand what we're trying to accomplish there. I put into chat that I do worry about the

optics of ICANN appearing to want to strip away—right. So we should think about that. But we should also think about—I know the U.S. isn't the only country in the world and everybody gets tired of hearing about it—but at least in the U.S., it doesn't fully solve it. Because if I were representing a domain name registrant and an IGO defeated me in a UDRP complaint, and I thought it was baseless and the panelists got it wrong, and I filed under the ACPA seeking a reverse domain name hijacking decision from a court, and the IGO showed up and said that the court doesn't have jurisdiction over them, that wouldn't bother me at all. So the court would rule no jurisdiction over the IGO, and then I would amend my complaint and proceed and review and rem provision of the ACPA, which is precisely for domain name disputes where there is no jurisdiction over the registrant. Then I would still come out victorious. At least in the U.S., I don't think that curtailing this right solves it, if that makes sense. I'm not trying to throw a monkey wrench in it and be that guy—

CHRIS DISSPAIN: No, no.

PAUL MCGRADY: But anyway, optics and rem. Thanks.

CHRIS DISSPAIN: Not a problem. I'm going to come to David in a second, and then to Kavouss. But I just want to test one thing with you, Paul, if I may. My apologies to others. Presumably your point about in rem applies even if the court found it was outside of its jurisdiction, and

there was then an opportunity to go to arbitration, you'd still be able to use that in rem, wouldn't you?

PAUL MCGRADY: Yes, unless we change the UDRP's language. Because right now the UDRP says—first of all, yes, you could use the in rem anytime. That's the short answer. The long answer is that the UDRP currently specifically says that registrants or complainants can use the courts at any point during the UDRP process. And so, if we're attempting to take away registrant's ability to access the courts in their home jurisdiction or the jurisdiction of the registrar or wherever they think they may get relief, then it's not just the consented jurisdiction, it is the language related to access to the court that's found in the UDRP itself. I don't have the paragraph number in front of me. I apologize for that.

CHRIS DISSPAIN: Yes. So if we're creating a parallel process for you, just for IGOs—we were trying to fix it—we would have to make changes to that as well. Understood. Thank you.

PAUL MCGRADY: Thanks.

CHRIS DISSPAIN: David, over to you.

DAVID SATOLA: Thank you, Chris. Can you hear me?

CHRIS DISSPAIN: Yes. I can hear you fine. Thank you.

DAVID SATOLA: Great. I'm looking at your e-mail as well for the first time. I was on another call this morning when it came in so I haven't studied it. We had a discussion amongst us IGOs towards the end of last week about how this might work. So I'm trying to look at your note in respond to—

CHRIS DISSPAIN: Well, don't worry about my note. Why don't you tell us what you wanted to say?

DAVID SATOLA: I think if you remain to this point C and also the red line, I'm not an expert in the ACPA so I don't know how that works, necessarily. But we just didn't think that the inclusion of the right of the registrant to go to court would actually make much sense because of the way that our communities work. I only speak from the point of view of the immunities of the World Bank and I won't speak to other IGOs because there may be little nuance differences amongst them. But generally, the way they work is that any IGO and treaty-based member organizations like the bank or WIPO or even OECD, our members decide what our immunities are and it's based in treaty. So we only have to appear to court if we decide

to. And it might seem unfair but we get to decide whether we waive our immunities.

Now, the immunities are not absolute or complete, they are functional. And even though our immunities are drafted in the 1940s before there was a lot of work being done on functional immunities, based on what's happened with COVID in the last 12 to 14 months, I don't think anyone could deny that with the way that everything in life has moved online that the operation and maintenance of our domain is somehow outside of our function as financing institution. I don't think that argument would fly. So if one accepts that the uninterrupted operation of our domain is within our functional immunity, we don't have to waive our immunity to defend that if we were taken to court in a country. And because we have 189 members, only three or four countries in the world who are not members of the World Bank, it's unlikely that our members who have agreed to our immunities when they joined would allow the courts of that jurisdiction of their jurisdiction to subvert what those immunities mean.

So that means in practice—I'm making a totally random example—a registrant from, say, Mali in Africa and he goes to the court in Timbuktu and says, "I've lost this case. It wasn't fair," or whatever, for whatever reason, it may very well go up to the Supreme Court of Mali. But for the registrant to then exercise the judgment, the registrant would have to go to the Federal District Court of the District of Columbia, which under the Foreign Sovereign Immunities Act is the only court that has jurisdiction over the World Bank. And then we do get out there.

So there's no real cost savings in terms of litigation by having this local court resolution because, for the most part, they're going to go to the HQ court of whatever the IGO is to execute it. Only then will the IGO to say, "Well, it's in my benefit to waive my immunities to fight this case or to fight the execution of the award, so I'll do it." Otherwise, the way the waivers work, we don't have to. So we thought that given those realities that it just made sense to keep it in an arbitral forum. Now, whether that means that—and I'll defer to my colleague, Brian Beckham on this—but if we rewrite UDRP and bolt out an exception to that or whether we take UDRP as a framework and come up with something new for IGOs that leave the ultimate resolution, including the execution of the original arbitral judgment to some sort of arbitral forum, that's probably going to be better for everybody in the end. So the short message is I don't think that keeping this thing about courts in you the fifth item of the GNSO proposition is a savings to anyone. I think it's a bit of a fiction.

CHRIS DISSPAIN: Can I ask you a couple of questions, if you don't mind? Kavouss, I can see your hand is up and I'll get to you in a minute, I promise. David, I understand what you said, but isn't your point of going to out of Mali to whichever the court was that you mentioned—I can't remember what it was now but whichever court it was—is that only relevant if you've got the name and someone's trying to force a judgment against you? But if the point is that if the name doesn't pass, which under the current rules of UDRP it wouldn't, doesn't pass on the finding of the UDRP until the registrant has had an opportunity to bring a case in their local jurisdiction. That makes it

slightly different, doesn't it, because it's actually you trying to enforce it, not the other way around?

DAVID SATOLA: Yeah. Partly, Chris, I think that's right. The example that I was setting up was where a registrant had attempted to register. There was a UDRP process. We prevailed, and then the registrant was trying to seek an appeal. Now, if the opposite or if the contra example is true that the registrant wins and we want to seek to appeal it, then we have to decide if we want to waive our immunities to do that. We think it's that important to do. And that's sort of where we don't want to necessarily be. And I don't think we'd have to waive our immunities because, again, I just think that the operation of the unfettered uninterrupted operation of an IGO's domain would be seen to be an essential part of its function and therefore protected by its functional immunity.

CHRIS DISSPAIN: But that's precisely my point. I completely agree with you, but that is if it is a domain that you already have. That's not actually what we're talking about, really. What we're talking about is where somebody registers a domain that is passing itself off as you. You've already got your domain, you may have several, but if somebody registers … Oh, I don't know. WHO is the easiest example simply because it's a word. So if somebody registers who.shop or who.magazine and it's the WHO magazine, it's clearly not infringing on World Health Organization's rights. But if they register who.shop and they claim on their website to be

raising money for charity or selling medical equipment or whatever it might be, then there is a case to say that they might be.

So I take your point completely but I'm wondering if—and we don't have to get into it now, I'm just responding to what you've said. I completely understand that you wouldn't be required to give up, waive your immunities in the event that you're talking about your own domain name. But you're actually, in this case, I think, talking about somebody using a domain name that looks like yours or might be perceived to be yours.

DAVID SATOLA: Chris, I'm going to defer to Brian on that because I don't know. I'm not an expert in the operation of UDRP.

CHRIS DISSPAIN: No, no. I completely understand. Thank you very much.

DAVID SATOLA: Thank you.

CHRIS DISSPAIN: As I said, come back any time you like. Kavouss, you're next up.

KAVOUSS ARASTEH: Thank you, Chris. Good afternoon, good morning, good evening. Yes. I think paragraph three of what you have on the left-hand side of the page, it seems this is not what we have discussed. We

have discussed standing: 6ter versus GAC list. We have discussed arbitration. We have discussed super panel and likelihood to amend the UDRP. But now the list is expanded. We go to the local jurisdiction, we go to the court procedure. So we're expanding. Rather than narrowing down the options, we're expanding that. So I think that perhaps by this prolongation, we want to get tired everybody and not to have anything at the end. This is my worry.

CHRIS DISSPAIN: Actually, that was on the list.

KAVOUSS ARASTEH: Please—

CHRIS DISSPAIN: Carry on.

KAVOUSS ARASTEH: Please, respectfully, let me finish. I don't like [any] ping pong. We are not talking to each other, we are talking to the group. So allow me to finish. If I'm wrong, tell me, "You are wrong." Before starting, I sent you an e-mail. In sending that, I suggest that we take it and narrow the options and so on. It seems that there is no willingness to resolve the matter. I may be wrong. Please correct me if I'm wrong. But you're expanding the list and so on, so forth, you go to the specific examples, which is not the general case and so on, so forth. Please limit the discussions and so on, so forth. Come back

to the list that are the standing, 6ter, GAC list, then go to the arbitration or super panel, and likelihood of UDRP. That's all. Thank you.

CHRIS DISSPAIN: Thank you, Kavouss. With respect, the list in that, on item three of the agenda is the same as it was last week, the items A and B on that list. The GAC, 6ter agreeing to local jurisdiction, court proceedings and arbitration were the items on the previous agenda and we discussed all of those. And the week before, in fact, there was discussion about whether or not registrants would be prepared to walk away from the local jurisdiction point if they had an option of an appeal, for want of a better way of putting it, to arbitration or a super panel. So we have been discussing that point and it has been part of the discussion for the last few weeks. So we haven't expanded it.

What's expanded, what's changed or altered is the addition of a red line of the very, very preliminary as an attempt to encourage discussion on the red line of the UDRP because we discussed last week the possibility of a parallel process. I've taken account of what Paul has—did you want to say something, Kavouss?

KAVOUSS ARASTEH: No.

CHRIS DISSPAIN: Thank you. Brian, go ahead, please. Brian, you're up. We can't hear you, Brian.

TERRI AGNEW: Brian, it's Terri. I do see you're unmuted on the Zoom side. If you might want to check your mute on your side, or let me know if a dial out on the telephone would be helpful. Perfect. Thank you, Brian. I see you'll dial in.

CHRIS DISSPAIN: Brian is going to dial in. I wonder if I could encourage people to tell us what they think about the point regarding whether we are in scope or whether Paul's point made in his e-mail has some traction that maybe we should in fact be going to the Council. To be clear, I'm game to chair this group through the process of considering these amendments. I'm happy to, at this at this stage in any rate, to again paraphrasing ask for forgiveness rather than permission, but I want us, at least the majority of us, to be on that page. Brian, I'll get you in a second. Jeff, your hand is up, then we'll go to Brian.

JEFF NEUMAN: Thanks. I guess my question for Paul then is—I don't understand what we'd be going to the Council to say. It doesn't sound like we have agreement on anything, right? Some people don't want a separate policy even if it's copying the UDRP word for word, essentially, and just changing a couple words. Other people don't want to just amend the existing UDRP because they think that it'll risk the jurisprudence of over 20 years, the points that Brian made. So until we figure out what we as a group think the ideal solution is, talking to going to Council is kind of, in my mind, it

doesn't make sense. We need to figure out as a group what it is that we would like to see happen and come to some sort of agreement that we think exploring a certain option is the best way to go, then we can go to the Council and say it. But right now, I think going to the Council, what would we say? So that's my question.

CHRIS DISSPAIN: Jeff, let me just test out for a second. We could go to the Council, couldn't we, and say, "We are heading into an area of drafting a parallel process and making what we consider to be what we think are probably tweaks. Are you okay with that?" But I'm not suggesting that's what we should do. I'm saying—you asked what we could ask them—that is what we could ask them. There are other things we could ask them as well.

JEFF NEUMAN: Well, that's what I'm not sure of because I thought Paul—

CHRIS DISSPAIN: Yeah. I understand.

JEFF NEUMAN: Yes. So we need to come to an agreement on what it is we're seeking. Thanks.

CHRIS DISSPAIN: Well, let's go to Paul to respond. And then, Brian, I'm assuming that you're able to talk in a second. We'll go to you after we've been to Paul. Paul, go ahead.

PAUL MCGRADY: Thanks. Yeah. I guess it's how you look at it, right? I guess maybe I'm too much of a rule follower. We have a charter, it says don't do certain things. Some of the things we're kicking around would, in my opinion, exceed the scope of that charter. Yes, we can spend the next three months, three years, however long this takes, and ignore that charter, and then take something back that's outside of the scope of the charter and hope the Council is giddy that we spent three years on it and don't mind that we ignored the charter, or we may run into a Council that says, "That isn't what the charter said. We don't know what this work product is." And now we've lost three more years or three more months, however long it takes.

So I think an early informal check-in with at least Council leadership, if not raising there's a discussion item on the next Council agenda, just to say, "Hey guys, we get it. You want to be experimental, you want to try new things. The charter is guardrails, it's not law, knock yourselves out." That I think would give a lot of us a sense that, okay, we can be more flexible. But at the end of the day, if we are going to have these discussions, they have to fit within the four corners with the charter, or else, we're kind of wasting our time. So, Jeff, you have a different view and I respect that, and I respect you, Kavouss, as you know. But I just think that and early check in with Council leadership at least makes some sense. Thanks.

CHRIS DISSPAIN: Thank you, Paul. I'd appreciate it if you wouldn't mind stop setting expectations at three years. That would be super.

PAUL MCGRADY: Yes. Sorry. Nobody wants that.

CHRIS DISSPAIN: If you could stop that now, that would be fantastic. Thank you. Jeff, I know your hand is up but Brian has been waiting so I'm assuming Brian would like to speak. Brian, please go ahead.

BRIAN BECKHAM: Yeah. Just to check that you can hear me?

CHRIS DISSPAIN: Yes, I can hear you fine. Thank you.

BRIAN BECKHAM: Great. Thanks. First, I wanted to fully agree with David's earlier intervention on the complexities involved in some of the court discussions and I wholeheartedly agree that I think that at least the more I've understood this—thanks to my IGO colleagues—it strikes me as more fair and efficient for everybody involved if we can hone in on the arbitral appeal side versus the court side.

I wanted to respond, Chris, to the initial question, going back to your e-mail just before call, to say that and sort of by way of small

apology or clarification, I suppose, is that when we were speaking about I guess what would be phrased as more sweeping modifications that was when we were looking at things more holistically, so we were looking at things like changing the UDRP criteria from the three criteria and the defenses that are built in there to some of the work that came out of the small group, where there was really a focus on misrepresentation and fraud, things of that nature, changing the entity. But just to be to be crystal clear, certainly there was a feeling that that would have perhaps been kind of a cleaner start and may have been a more straightforward policy, ultimately, that if working off of the markup that Jeff has done, for example, is the way to get there, then certainly from the IGO's perspective then that's perfectly fine. It was just that the kind of earlier, let's say, small group version was initially seen as a little bit more straightforward. When you look, for example, at the UDRP criteria, it talks a little bit about likelihood of confusion versus the defrauding type concepts, but I think those are non-exhaustive criteria and, ultimately, if this is the way forward, then fantastic. Basically, just to affirm that.

Then I think that kind of takes me to the other question that we've just been talking about concerning going to the Council or not. I tend to agree, I think, more with how Jeff has sort of seen this, where it strikes me as maybe a little premature to do that. I understand there's a check-in coming. And I understand from our last call that there was, let's say, a working agreement within the people on this call to work off of the markup that Jeff shared with us, that that would be largely seen as under this generally consistent with the umbrella that we've been tasked with then, then at least my view is that we have sufficient way to keep going.

So if there's a check-in coming up with the Council, rather than, let's say, asking, "Is this okay?" I would suggest it may be better to say, "This is how we've been exploring this. We feel comfortable that this is coloring reasonably within the lines and we have a degree of optimism that we can we can deliver something here."

CHRIS DISSPAIN: Brian, thank you. That's amazingly helpful. I'm going to take it for now, at least, that the answer to my question about whether working off the red line or rather limiting our discussion to amendments to those that we've already corralled into the four points is acceptable, and you've said yes. So let's just take that as red for now, so that's good.

Secondly, I appreciate your input regarding going to the GNSO Council. Paul, I'm not pushing back. I think we kind of got to a point last week where we'd said, given that the meeting with the GNSO Council is coming up this week that barring—I was going to say red lines but what we'd do with the red line text here—but some red flags, let's put it that way. Some red flags arising at this meeting, we would proceed to have John do a simple report saying, "This is our timeline, etc.," knowing that we have got the ability in a few weeks' time to go back to them. If we either run out of steam and can't go any further or we feel that we are pushing ourselves off-piste to such an extent that we do need to go and ask them for their input. So I'm inclined to that view still unless others would like to comment in respect to what you've said.

Brian, I've got a question for you on this jurisdictional point. Ignoring the logistics for a second, how do you answer Paul's

point 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. If you've got the right to argue that you're not subject to their jurisdiction, leaving aside the timing of it, which I do acknowledge, is that not sufficient? And it's not that you can't argue that you're not within their jurisdiction, it's just that you have to go through that process.

BRIAN BECKHAM: Yeah. Certainly, I would. I would invite David to clarify anything that I see that it is wrong here. First, the question, if you look at the existing UDRP language—even I haven't had a chance to look in great detail the markup, I just put a few colored flags where I had some questions—notwithstanding the language, whether that would be a straightforward matter of a court saying you've waived your immunity from jurisdiction and the process would commence in court or whether it would be more along the lines David has described, where a court would have to actually look at this and there would be a potential inter—

CHRIS DISSPAIN: Am I the only one who can't hear Brian? Has he dropped off?

BRIAN BECKHAM: Can you hear me?

CHRIS DISSPAIN: Yeah. You're back again now.

BRIAN BECKHAM: Okay. So I think there may still be somewhat open question whether it's as straightforward as the language here would be tantamount to a complete waiver, or whether there would be still a need for a court to engage on that topic, potentially multiple courts in the same jurisdiction and even another court in the home jurisdiction of the IGO. So I guess maybe this is a slightly sideways way of answering your question. Again, the more I've understood this, the more it seemed that—maybe I can put it this way. The current requirements to not foreclose registrar rights that are there under the existing UDRP, when the question of IGOs and immunities from jurisdiction enters in, it's not terribly straightforward and ultimately it's a more efficient fair time and cost-effective process for everyone involved if rather than going through these different court processes, we focus in on the arbitral appeal side of things. So I suppose it's an argument more for efficiency.

CHRIS DISSPAIN: I'd be surprised if anyone argued that there aren't time savings, but I suspect that that's not the only argument. But your point is taken. I'm going to go to Jeff, and then to David. Jeff, go ahead.

JEFF NEUMAN: Hearing from Brian that he'd like to work off the red lines is good. But the point is that if we went to Council, it would be great to say, yeah, everybody in this group seems to think that working off of

red lines that involve, technically, a parallel process that's only for IGOs but use is almost identical or is as identical as possible to the normal regular UDRP, that's something to go to Council with. But if we don't all buy off on that's the approach we want to take, again I don't understand going to Council, I don't know what we'd say. So if these people on this call say, "Yeah, let's do that, let's all agree to go down this path of looking at the red lines," then we have something. If not—

CHRIS DISSPAIN: Thank you, Jeff. I think we're at a point where I can say that there certainly is a significant leaning on this call to that way forward to at least not yet going to the Council but to continue our discussion. David, you're next, and then Jay. David, go ahead.

DAVID SATOLA: Thank you, Chris. I was just going to respond quickly to the question that you had raised, Chris, to Brian which struck me as being kind of a very fundamental basic question about political economy and denial of natural justice and stuff like that. That's very fundamental questions about how the immunities of these organizations work or even diplomatic immunity, which is greater. We had a case in Washington shortly after I moved here to join the bank where a diplomat from a country ran over a guy on Connecticut Avenue, and ordinarily, his diplomatic immunity would have covered him and sent home but he was tried here. So these immunities are quite fluid.

When countries join international organizations like the World Bank, they do sign up to a treaty—a treaty is a very powerful legal instrument—and they agree to the functional immunities in place. At some point, I guess one would have to dig deep into the annals of history to determine what was in the mind of the country when they signed up to the functional immunity of the organization. But, clearly, one would expect that as adults, they would have known what that meant and, at that point, there were some understanding that individuals who wanted to sue international organizations may not have those same "rights". I think that's a question that's far, far beyond the remit of this work track.

CHRIS DISSPAIN: I agree. But where I get confused, David—and I think it's just worth pushing on this a little bit—I completely understand what you're saying but we're talking about not somebody suing you, but you actually bringing proceedings against someone else and saying, "We believe that the domain name that you've got is breaching the rules"—I'm very much paraphrasing here—"but it is pretending to be us." And the point is that as IGOs, you guys must enter into Terms and Conditions contracts all the time even just to buy your coffee. So you can agree to do it, if you choose to do so. I'm not going to asking you to, I'm just saying you can.

DAVID SATOLA: That's an excellent point. Excellent point, Chris. I would take the opportunity to say that every one of our commercial contracts, whether it's with Microsoft or the software that we use on our computers or with Dell for our computers or for paper clips or for

coffee or for Sodexo who does our catering, every last one of those contracts is arbitration. We don't agree to the jurisdiction of a court for dispute resolution. In our lending agreements, again, there are treaties. There is no recourse to courts. This is not an exception to that. This is a continuation of what is a long history of commercial engagement. We're willing to recognize up to a point that there's a commercial essence to it. But the operation of our domain, like providing food to our employees and working computers and stuff like that is part of our function as an organization. So we're not going to waive our functional immunities to do that. Over.

CHRIS DISSPAIN: Nope. Understood. Thank you very much and I appreciate it. Jay, you're next.

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

CHRIS DISSPAIN: Yes. I can hear you fine, Jay.

JAY CHAPMAN: All right. Thank you. I appreciate David's input. It's been lot of interesting discussion so far today. I'm just kind of going back to your original e-mail. I'm from the BC so I think at this point continues to be firmly in favor of just doing the limited job that we've been mandated to do with the minor exception of standing. I

don't see any interest at this point in the new policy. I think just staying within the scope is where we should be. I think it goes without saying, like Paul said that registrants are not going to be interested in waiving anything any more than David says IGOs would be interested in waving theirs.

As to Part C in that one paragraph of your e-mail, I just don't see how taking away the opportunity for a registrant to go to court. I don't see how we can move forward with a position like that.

CHRIS DISSPAIN: Let me ask you this question, Jay. I want you to be as clear as possible. You're saying it's not enough to replace the hearing in a court with a different type of hearing, an arbitration hearing, even if that hearing has the same legal evidentiary requirements and all of the bells and whistles that go with legal hearings. So it's not done on the papers, it's not done in the same way that a UDRP is actually done, but it's done as a hearing. You're suggesting that submitting to that arbitrational hearing, instead of a court hearing is not acceptable.

JAY CHAPMAN: Well, I think if I had my druthers and was able to kind of have the best situation, I would say it should be both. It should be both, not just an either/or.

CHRIS DISSPAIN: I accept that situation. I accept that's what you say. But what I was trying to get to is whether there is in fact—I mean, you can see I

assume—I suppose it depends on who pays the costs. But you can see that there is a significant impact in cost, presumably on both parties of doubling up the situation. Now, in a circumstance where an IGO turns up, I'm assuming that in a circumstance where an IGO turns up at your local court and argues to the local court, that they are not subject to your jurisdiction and they win that argument. I'm assuming you would not be happy with that being an end to the matter and that they then win. Because you would want there to be a second way of there being a hearing. And if you couldn't use the hearing in the local court, you'd want there to be another way of there being a hearing. But you want the chance of using the local court as well, is what you're saying. Is that right?

JAY CHAPMAN: I think to kind of add on to Paul's point, it would be having the jurisdictional question, I guess, settled at the local court level, then going to the in rem option. I'm glad to hear Paul saying that that's what he would do. I don't know whether or not or how that would play out. I'm not sure of any previous situations where it's played out like that. Perhaps it has and I'd be happy to hear. But yes, of course, in the event that there wasn't resolution and the court didn't hear, well then yes. The arbitration super panel, whatever we want to call it, I mean, that's what makes sense.

Listen, I do appreciate the efficiency argument. I get it. It makes a lot of sense. I guess where I'm coming from, though, is just the standpoint of from the registrant's perspective, we want to make sure that there is a complete and a right decision. And it could happen through both, one or the other. I'm sorry. If you have to go

through the court, don't get resolution there, then you go through the Subsequent Procedures. I appreciate the efficiency arguments, but ultimately, I'm more interested in trying to make sure things are done right and that justice is served.

CHRIS DISSPAIN: I get it. I mean, one of the reasons why I think the concept of a parallel process rather than fiddling around with the existing one works to a degree is that it is much easier to maintain categorically that this is specifically and only for IGOs so that you don't get any sort of creeping across of remedies or efficiencies that are put in place for this one in respect to anything else. But I take your point. Paul, your hand was up but it's gone down. Sorry, Jay, go ahead.

JAY CHAPMAN: Do you mind?

CHRIS DISSPAIN: No, you carry on, please.

JAY CHAPMAN: Okay. Of course, I also just want to make note of not everyone—and we come to recognize this—in particular jurisdictions has access to—as courts have even gone so far to say, "We're not going to hear anything like this." So I do appreciate the fact that there needs to be some sort of procedure in this situation with the IGOs where we've got this arbitration. I agree that that needs to be a part. But that is not only consistent, that is directly the point,

one of the things we were supposed to consider, I think, with regard to this work track. And also make note of just at the beginning of this word track, 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. Brian, your hand is up and I'll be with you in one second. Paul, you did have your hand up, it's down now. Did you want to say something?

PAUL MCGRADY: 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.

CHRIS DISSPAIN: Understood. Thank you. Okay. We're going to go to Brian and then to Jeff. Brian?

BRIAN BECKHAM: Thanks. Just to build a little bit on what Paul said and to unpack what Jay said a little bit, I think in terms of the way different courts might deal with this around the world, in the UK, for example, because there's an internal appeals process in the .uk space, then courts have not entertained appeals brought to them precisely because there's an appeals process. And I think Paul raises a good point, which is it's kind of a variation on forum shopping or I guess it's sort of the absence of the ability to do that. Because depending on where a registrant may be located, they may or may not have the ability to bring an action in a National Court.

In fact, while our charter might speak specifically to the court point, I think, actually, if we build an appeals process within this tweaked UDRP variation, that actually preserves the registrant's rights potentially better than merely the option on paper to go to court if in practice that's not a practical option.

But I just wanted to ask a question. I understand when Jay says that he's also supportive of the efficiency argument tonight. And I think ultimately, I know, I've said it several times on this call but again, the more I've heard from my IGO colleagues and the more I've understood this, it strikes me as just a better process for everyone. And that kind of takes me full circle to—when we were talking a little bit earlier about the charter and the red line versus something newer, for example, in the UDRP, you have this concept of passive holding, and I know there's been some

disagreement with that doctrine over the years, so the idea of narrowing the focus of this mechanism to basically look at this misrepresentation or fraud and dispense with those doctrines that in some people's minds are a bit more controversial, that was really the genesis of the idea behind a more narrowly focused mechanism. The question I wanted to ask was—I suppose it's to Jay but everyone—what about the idea that if we allowed for this court option as kind of a safety valve, but what if we gave parties the option to waive that or override it? In other words, we would say, look, if a registrant feels strongly and they want to go to court, then there's a option for them to do that. And they do that with eyes wide open and that may take time and money. At the same time, if the registrant and the IGO say, "Well, gosh, that's just resources that we would rather not put into this." Let's both agree that we would rather go straight to this arbitral side of things. I wonder if that might be acceptable. In other words, if the parties agree to skip the court route and go straight to the arbitral appeal, that could be a way to kind of meet in the middle.

CHRIS DISSPAIN: Yes. I'm happy to go into that and to take responses to that if anybody wants to raise their hand. What I was going to suggest in the meantime was that I think we have reached a point where I'm comfortable that the majority of us are prepared, at least, for now to continue down the path of discussing—I'm just going to call it the red line for the sake of shorthand—the red line. I think that we've got an understanding from Brian on the IGO's limiting the amendments to those areas. I'm going to come back to your suggestion in a second, Brian. Limiting the members to those

areas is where we're at. And what we should do is actually have that red line worked on in the sense that, Brian, it would be ideal, for example, for you to make that suggestion on the Google Doc in respect to the part of the document that deals with the local jurisdictional point. And Jay, or anyone else for that matter, can respond. But while I've been talking, I noticed Paul's hand has gone up. So, Paul, please do carry on.

PAUL MCGRADY: Thanks, Chris. So here's where multistakeholderism kicks in, which is, okay, it sounds like the river is flowing one way for us to consider these things without going back and checking you with Council. The multistakeholder, it says, "Okay, let's do that but I'd like to put down a little coin here on the ground saying that I'm not at all sure of this stuff is in scope, but let's proceed and see what we can figure out."

CHRIS DISSPAIN: I think that's absolutely fine. Just don't trip over the coin. Don't forget it's there. It goes without saying, Paul, you're absolutely right and I completely appreciate it. And as I said in my note, it's obviously open to anyone to object. It's also open at any time for us, if momentum builds, to say we're going too far to go back into the Council at any stage. It doesn't even have to be set in stone. It can be the next week that it's available, the next time that it's meeting. Kavouss, please go ahead.

KAVOUSS ARASTEH: Chris, I think 10 minutes before end of this meeting, I request you kindly to summarize the progress that we have made, where we are now, and not going back. Brian made some missteps. Other people made something. But at least we have to know where we are and not opening more and more and widening the subject, try to see whether we could narrow down the things. You refer to at some part of your discussions that parallel process. I'm not sure what you mean by that parallel process. Could you also explain that? But 10 minutes before the end of the meeting, we have to have a summary of what we have discussed and whether we made the progress narrowing down or we expanded that opening more and more like the IGF workshop. Thank you.

CHRIS DISSPAIN: Thank you, Kavouss. Exactly right. Just to answer your question on the parallel process, that is shorthand for the reference that we agreed last week, which is that what we're talking about is taking the existing UDRP policy and making some changes to it, specifically and only for IGOs and calling it an IGO-UDRP. In other words, it's parallel to the existing URDP. That's what we mean by that.

As to where we've got to, absolutely, I'm in the process of drawing the threads together at the moment. Paul, I take your point, agreed. As I said, we can come back and we can call on the Council if we need to do so. But for now, I think we will proceed with our discussions.

What I would like to do is to encourage everybody to use that red line that Jeff very kindly started with a caveat. As I hope

everybody knows that it was a very preliminary start and there is nothing set in stone in that. There are three or four things that we need to consider. They are the 6ter and the GAC point. And included in that is dealing with Paul's very valid point that he perfectly legitimately remains to be convinced that we're not writing new rights here, that we are talking about standing in the context of that which we had discussed it, which is getting you into the game, entering the funnel, whatever you want to say. So there's that. I'd like to see discussion on that on the Google Document, so that when we come back on our call next week, we can actually start to talk about, "Well, it seems that most people feel this way," or "Here are some questions that have been raised." Asking questions, making points is really valuable input to this stage.

The second point is the local jurisdiction point. And the third point, I'm taking the right out at the beginning is dealt with just for the moment. So there is the court proceeding in the local jurisdiction. And the third point is the arbitration versus super panel. Assume for the moment there is going to be an alternative process, whether the local jurisdiction sits in place or it doesn't, doesn't matter. For now, there is going to be a second hearing. Is that going to be an arbitration or is that going to be a super panel? What are the pros and cons? How do people feel about that? That's an important discussion. Clearly, there are advantages to a super panel. Assuming it is made up of wise people from the process that already understand the process, there may be advantages to actually that from an educational point of view and a presidential point of view. But there are equally advantages to arbitration and then it's more formal process and so on. I'm not

making comment one way or the other, I'm just asking us to consider it and discuss it on the list and on the document.

The final point I'd like to make—and I hope I'm not going to throw a cat among any pigeons here—we have resisted stretching the tweaking beyond that which we have discussed. However, in listening to the conversation that happened today and some of the conversations that happened last week, there may be merit in considering the narrowing of the criteria to bring—I want to just say this up front here. I'm not interested in getting into horse trading. So I'm not interested in saying, "Well, if we take a step and we narrow the criteria up front, that we should also change clause 27B or 26C, whatever it might be." No, but there has been discussion of narrowing the criteria. Paul has talked about that, perhaps making things more comfortable. Brian has talked about maybe that's being beneficial. I'm just putting it out there to see whether over the next week or so in our discussions online and in the document, there is buy-in to that possibility of saying not only is this a process that's specific to IGOs and has a small number of tweaks in it. It's also far narrower than the current UDRP process. Just a thought that I'm putting out there.

We have 15 minutes to go on, maybe 14 minutes to go. So let me throw it open for comments and reiterate that I really would like to see us working on the document online over the next week. Who'd like to say something? Or do you all want to go home 15 minutes early?

No hands and complete silence. I'm going to assume then that I've stunned everybody into total silence and that we can wrap the call. Before I do, we're coming back next week again, and I think

our agenda is going to start with the beginning. We're going to start with the standing discussion. We're going to start with 6ter and the GAC list, and see where we get to. Maybe we can get through that and move on to the next thing for next week. So that's a clue for the agenda for next week.

John, are you clear about your meeting with the Council on Thursday about what to say? Is everything okay? Is there anything you need from us before we send you in to meet with them?

JOHN MCELWAINE: Not completely clear. It seems like we just want to go over the timeline. But that's something that we can probably take offline to have the right amount of detail.

CHRIS DISSPAIN: No problem. I think that really is just a case. I think Berry's documentation and where we've gotten to with the timeline, we believe that we can meet these deadlines and keep to these requirements is probably mainly what the discussion is about. We're certainly not ready at this stage to be talking to them about scope. I don't think so. That's fine. We can discuss that afterwards.

All right. Last call for any last comments. Okay. I hope everybody thinks it was worth doing what we did today and going through that and getting some clarity. I certainly feel that we're clearer. And we can open up the discussion on the substantive points with a bit more understanding that we all know where we're coming from. Brian, yes, please go ahead.

BRIAN BECKHAM: Hi, everyone. Just wanting to ask a question by way of kind of helping me think about the question, Chris, that you've asked would be our first agenda item for next week, which would be the 6ter versus the GAC list. I think that we're very well aware that there are strong hesitations to use 6ter. Here's my question is with that understanding—and maybe it's just a question that we can discuss on the list or through exchanges on the markup or even some of us can talk individually—but in the markup that Jeff had shared, it says your domain name is identical or confusingly similar to the name or acronym of an IGO. I had highlighted administered or operated by the complainant. But if we just focus in on the name or acronym of an IGO, my question is, in other words, does that open up a third option where we would neither rely on 6ter, which I understand may be off limits, or the GAC list, or we just look at this third option of the name or acronym of an IGO?

CHRIS DISSPAIN: I think that may be a step too far, Brian. The reason for putting the GAC list in the game, so to speak, is that there is a current list upon which the reservation of specific names is based. So there is existing policy using that list, leaving aside the temporary reservation of the acronyms for that matter, for this purpose because that is a temporary reservation. But that list is already used in policy for the reservation of names. So it seems to me to make sense that if we're going to consider an alternative to 6ter, that would be what you would consider. I think trying to step outside of that maybe us trying to—because we'd have to then get

into discussing about what it means and that's probably not sensible.

BRIAN BECKHAM: The reason I ask is when you look at the UDRP, the requirement is that the domain name is identical or confusingly similar to a trademark or service mark in which the complainant has rights. So it doesn't talk about the class of goods or services or the jurisdiction or registered versus unregistered, that sort of thing. I see Jeff's comment in the chat that that was just a placeholder to get something in there. I just wanted to ask that. So maybe we'll give it some thought over the course of the next week. But I hear you, Chris, and I see the comments from Paul. And I'm well aware of the hesitation to the 6ter. So just trying to figure—

CHRIS DISSPAIN: Brian, to be clear, I'm not closing the discussion down and I'm not saying no. I'm just saying, as putting the suggestions together in my head, I took the view that the GAC list has already been accepted in the sense that it is there and there is policy in place that says the full names on that list are reserved and that the acronyms on that list are temporarily reserved. So that kind of discussion is dealt with. I'm not saying don't try and come up with a different solution. If we can come up with one that gets buy-in from everybody, that's fine by me.

Okay. Excellent. Thank you. All right. Anyone else? Then thank you all very much for a good call and we will see you all next week. Thank you all.

TERRI AGNEW: Thank you, everyone. Once again, the meeting has been adjourned. I'll disconnect all remaining lines and recordings. Have a wonderful rest of your day.

[END OF TRANSCRIPT]