ICANN Transcription
IGO Work Track
Monday, 26 April 2021 at 15:00 UTC

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JULIE BISLAND: Thank you. Good morning, good afternoon, good evening. Welcome to the IGO Work Track call taking place on the 26th 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 let yourself be known now?

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 thee Zs to the beginning 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 functionality such as raising hands or disagreeing.

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

Statements of interest must be kept up to date. If anyone has updates to share, please raise your hand or speak now. 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's multi-stakeholder process are to comply with the expected standards of behavior. Thank you, and over to you, Chris Disspain. You may begin.

CHRIS DISSPAIN: Thank you, Julie. Good morning, good evening, good afternoon, everybody. Thank you for making the effort to be here for the IGO Work Track meeting number nine. We can see the agenda in front of us along with Berry's colorful summary timeline chart. The first agenda item is the update on the GNSO Council meeting from last week. John, you are the GNSO rep. Would you like to give us a brief overview of what actually happened? Thanks.

JOHN MCELWAINE: Sure. I essentially presented the timeline in front of us that we see here. I mentioned specifically to the Council that this group was engaged in constructive dialog but struggling a little bit with the narrow scope of the Work Track. So I wanted to have the Council be informed that there's a possibility we could come back to them with some request to expand the scope of the Work Track. But I didn't want to go into a lot of detail there.

And then I let them know that we would have a more substantive update particularly with an approved workplan by this Work Track by either the May or June Council meeting. So that's it. Fairly quickly, didn't get a whole lot of questions that I can recall at all, so it may have just been the report and that was it. So, back over to you, Chris.

CHRIS DISSPAIN: Thank you very much, John. Much appreciated. Berry, over to you.

BERRY COBB: Thank you, Chris. Just to build on what John said, yes, it was a very brief update. The Council was running short on time given some of the other topics on the agenda. But it also was mentioned that we would be coming back in for a May update, which as you can see on the timeline is kind of a decision that this group will need to make whether indeed the scope of the charter is too tight or what those next steps might be.

I just wanted to note here that the project package or the summary timeline that you see shared on the screen, obviously, this is fairly out of date. I will send out a revised project package this Friday and we'll review it briefly on Monday. These are produced on a monthly basis, so that's why it looks a little bit out of date here. Thank you.

CHRIS DISSPAIN: Thank you very much indeed, Berry. That's immensely helpful. Okay, so that's the first part of the agenda, the logistics, etc. The main purpose of the call today is to discuss one of the four areas that we've focused on or that we are going to focus on, rather. And it's the issue of—we called it standing. I know a number of you—Paul especially—are concerned about what we mean and whether it's conferring any rights, etc.

Perfectly understandably concerned, I should say. But for the purposes of this discussion, I want just to say that this is not conferring a right. What it is doing is saying in the same way—it's effectively saying that the relevant IGO can enter into the process because ... And that because is currently we have two possibilities that we've talked about. One is because they're listed on 6ter, and the second is because they are listed on the GAC list. And to be clear, we all know what that GAC list is, I assume. It is a list of IGOs whose full names are permanently reserved and whose acronyms—I believe two per IGO—are currently temporarily reserved. The list itself was provided to ICANN by the GAC and it was approved by the Board. So it's an existing list upon which policy currently hangs, i.e. the policy to reserve the full names of the IGOs on that list.

There may well be work to do on how that list is curated, how it's amended, how IGOs are added or taken away, but it doesn't change the fact that the list itself exists in the ICANN arena and is being used as a list for policy.

So we have those two possibilities. Just to remind everybody, the 6ter possibility arose because in the PDP recommendations, it was suggested that it would be open to an IGO to use the registration under 6ter to get in and to say that they have common law trademark rights arising from that and it would be up to a panelist to decide whether that was acceptable or not.

And what we're talking about is the possibility of lifting out of that the opportunity for the IGO to use their listing on 6ter to get into the room, to use the process. They still would have to show that they have rights in the acronym.

So if we can, what would be great today is for us to debate and discuss whether there is—yes, Paul, thank you, I note what you say in the chat. That is the crux. 6ter does not equal common law rights. Agreed.

Where was I? Oh yes. So what would be good to do today is to discuss whether either of those two are acceptable or if there's a third or a fourth possibility of qualifying an IGO to be in the process, to be in the parallel as we're currently discussing the concept of the parallel IGO UDRP.

So I'd like to do that. I also want to just say that Alexandra very recently sent a note to the list with a Word document attached with some suggested thoughts on the redline that Jeff had produced. Alexandra, thank you. [inaudible] we will. And I know there's at least one major point that you've raised in respect to that, and we'll try and get to that if we can a little bit later on and address it. But for now, I am very interested in hearing what people think about whether we should use the GAC list or 6ter or why we shouldn't, or if there are any alternatives. Kavouss, please go ahead.

KAVOUSS ARASTEH: Yes, Chris. Good morning, good afternoon, good evening. Just a small piece of information. I have raised the issue with GAC chair and leadership with respect to the GAC list, because it was mentioned that the list is old, 2013. According to information that I sent to you, it seems that it is not that old, [last one was] 2019. And also to discuss having particular or necessary rules how to update. I told them, don't take it now, provide what information that you provide, because in IGO Work Track, we have very tight schedule and we should not wait for your rules or rule to update and so on. So I wonder whether part of those that I've mentioned that [I sent to] yourself, you may wish to further elaborate on that or inform the others. I don't know whether that was sent to the others or not, because I sent the message only to yourself.

CHRIS DISSPAIN: Thank you, Kavouss. I think it was actually sent to the list and I think people—

KAVOUSS ARASTEH: Okay. I'm sorry for that. I missed it.

CHRIS DISSPAIN: Not a problem at all. But just to repeat what you said and to confirm, yes, the list is more up to date than perhaps some people had imagined, 2019 according to Manal, the GAC chair, and yes, it is correct that a process is currently being worked on under which that list could be updated on a regular basis. So, thank you for that. Alexandra, go ahead, please.

ALEXANDRA EXCOFFIER: Yes. Hi, everyone. Just to say that, okay, everybody is worried about creating rights or things like that. Neither 6ter, as the GNSO said, does not create common law trademark rights. I agree with that. But you can't say that IGOs don't have rights in their names and acronyms. We do. These are our identifiers. So we do have rights in them. But that's an aside.

In terms of your question as to which list, frankly, it doesn't matter. For us, whichever way you want to go, the IGO list was, in a sense, when this was created, kind of based on the 6ter list. But the difference was that when it was created, there was a compromise that was made to only put two languages for names and acronyms. And as we know—you could take the UN but also other organizations that have several, more than two, official languages and that is an issue with the IGO list which I know, because at the time, some IGOs raised that point and did not see why, if they have three or more official languages, why they should limit it to two.

So if that list is used, which is fine, then that has to be taken into account. It should apply to all of the official languages of IGOs.

CHRIS DISSPAIN: Thank you, Alexandra. If I may respond briefly to that to say that the challenge there, I think, is that we would be stepping into another policy arena. That list has been set under a policy and those acronyms, as were the original names, set under that policy. But nonetheless, your point is well made and taken. And it may be that it actually mitigates against using that list and pushes the use of 6ter. Although my understanding—and I stand to be corrected with respect to this—was that part of the challenge with 6ter was that there were quite a number of IGOs who had not availed themselves of the opportunity to register under 6ter. And that was a concern to a number of IGOs. But as said, that's only my understanding, and I may be wrong. Feel free to respond.

ALEXANDRA EXCOFFIER: Not sure, but they could. If they had not done the process, well, that's too bad for them. They can.

CHRIS DISSPAIN: That's a perfectly fair point.

ALEXANDRA EXCOFFIER: And I'm not sure—I would not want to compare the IGO list, the GAC list with the 6ter but maybe there's missing organizations also on the GAC list.

CHRIS DISSPAIN: Super. Thank you very much. I appreciate your intervention. Paul, go ahead.

PAUL MCGRADY: Thanks. So I'm wondering if we can go back from this list back to the paragraphs that we had started out with. I just wanted to highlight two quick things, if we can. So the first thing is—and again, this is—I don't know that it's a nit, but I just want to say it one last time. Under nature of the problem, we said the Work Track has agreed that IGOs face two challenges. One is the requirement to have a trademark or service mark. And that is true. But I think we're conflating that with the issue of standing. And I know everybody is tired of my e-mail posts, but there is no standing requirement in the UDRP. It says very clearly, anybody can file. The only question about whether or not you have a valid trademark is whether or not you win.

So if we want to bake in a special requirement for IGOs to be on 6ter or to be on a GAC list or be on whatever it is that we come up to, that's fine, but that is a heavier burden than anybody else has. Everybody else just has to show up with a trademark in order to win. They don't have to have a trademark in order to file.

And again, if everybody wants to have the IGOs have a higher burden to even access the UDRP—I don't bat for the IGOs here, so that's up to the IGOs, I guess, to be worried about or not.

And then substantively, the second thing here is under the requirement for a trademark or similar right, we still are saying this thing which is causing me great heartburn. Second paragraph, in this regard, the Work Track discussed two possible options that may assist IGOs who do not have trademark rights.

Well, again, everybody keeps telling me, "No, don't worry, from 6ter and from the GAC list, this newly created standing requirement for IGOs, that will not equal trademark rights." But if the IGOs who do not have trademark rights according to this paragraph can access the UDRP and somehow win because of 6ter and the GAC list, then I think we are creating trademark rights. So I wonder if we meant here IGOs who do

not have trademark registrations instead of rights. If we change that to registrations instead of rights, maybe that gets us a little bit closer. But the way that it's written now, it really looks like we're using 6ter or the GAC list to create what I've been calling trademark-ish rights through the ICANN process when simply being on 6ter or the GAC list doesn't mean you have a trademark right. Now, it may be a really solid indication that you might have a common law right somewhere that you can then prove up, and nobody has any problem with common law rights being asserted and proven up in the UDRP, but as long as we say the Work Track discussed two possible options that may assist IGOs who do not have trademark rights, then I keep reserving my concerns over 6ter and GAC lists and everything else.

And that's without addressing which is better, 6ter or GAC list. So anyways, for what it's worth, that issue of 6ter or GAC list instead of trademark rights continues to persist in this document. Thanks.

CHRIS DISSPAIN: Thank you, Paul. I know there's a queue, but I know also that Jeff specifically wanted to respond to this point. So Jeff, do you want to just leap in quickly? And then I'll go to Yrjö, Kavouss and Susan and Alexandra.

JEFFREY NEUMAN: Thanks, Chris. So Paul, understand the wording and the use of the word "standing." I think it's just a shorthand of saying that it's what makes the disputes applicable. Right? So there's a section in the UDRP policy that says applicable disputes. And right now, the only applicable disputes are the first part of it is that you have to have a—I'll pull it up to see the exact words here. That your domain name is identical and confusingly similar to a trademark or service mark in which the complainant has rights. So maybe we shouldn't be short handing it by saying standing, but we can

say that it's the first element that satisfies the applicable disputes, or the way we say it as panelists are that it is the first element of the prima facie case that a complainant must show.

Either way, I'm fine. We can work on the wording. And in fact, in the wording in the policy redline, it's not worded as standing or anything like that, it's just—you'll see how I worded it, which was that your domain name is identical or confusingly similar to the name or acronym of an intergovernmental organization. I know Alexandra changed some of these words, so we'll talk about that. And I had "administered or operated by a complainant," because I wanted to avoid the whole issue of talking about rights because specifically of this whole debate.

So Paul, I guess the point is we're short handing it by using the word "standing." What we're really saying is it's the first element of—or it is a tweak to make being on this list—whatever it is—an applicable dispute under the policy. Thanks.

CHRIS DISSPAIN: Thank you, Jeff. Yrjö, you're up.

YRJÖ LANSIPURO: Thank you. Since the GAC list is in use already within ICANN, I would think it's logical to use that list—updated, of course—and updated by GAC at a regular interval. So it would be logical to use that list also in this question of standing. Thank you.

CHRIS DISSPAIN: Thank you very much, Yrjö. Appreciate it. Kavouss.

KAVOUSS ARASTEH: Hello. I suggest that we do not talk about the language at this time. This is a very critical issue, sensitive issue, I understand. It has been worded for years as two languages. Let's, for the time being—I say for, the time being—not mix up this issue of language. However, [she] mentioned that there has been something that should have been in the list. Alexandra kindly mentioned that who were those that applied and are not in the list. If possible, we will take care of that and see what we can do. So let us do this step by step. But I strongly suggest not to get into the difficulty of language today or at least for the work track and so on and so forth. Let's leave that up to the end. But if there's anything missing from the list someone has asked but is not, I'm ready to take it with the GAC people and try to see to what extent we can complete it without waiting for the general rules of the updating and so on and so forth which may take time. We have to approve the rules while we are in session. The GAC is not like others, so we have to have something to consider. But please, kindly put the language issue aside for the time being. Thank you.

CHRIS DISSPAIN: Thank you, Kavouss. Appreciate it. Susan.

SUSAN ANTHONY: I agree—hello. I hardly agree with Kavouss that we park the language issue to one side. I also would be fervently hopeful that we could park the 6ter versus GAC list to the side for at least some of the time so we could step to 3B, which I think is going to be equally challenging, if not more so. But I did want to take the floor to discuss once again 6ter. As Paul McGrady said, people may be tired of him on 6ter, on the chat list. People are equally tired of Susan Anthony on 6ter in the audio/video. But I feel very strongly about this issue, and the government feels very strongly about this issue.

So I don't really care what you call it or whether you call it anything. Maybe not speak about standing. I don't have any issue. But I was a bit concerned over what Paul said regarding—let's just go on into the process and the IGOs will have an opportunity to present a trademark-ish kind of challenge. He had noted—and rightly so—you have to have a trademark in order to win on the UDRP. I don't know that 6ter gets you there. I would argue until the cows come home, but nobody wants to hear me. So just please accept that 6ter doesn't get you there.

At any rate, that's what I wanted to say. And if I've understood you, Mr. McGrady, I am terribly sorry. But I did want to clear up that 6ter isn't going to give you trademark-ish rights. It doesn't.

CHRIS DISSPAIN: Thank you, Susan. I understand what you say and I don't dispute it. You and I have had this conversation—I've lost count of the number of years that we've been discussing this. So I get it completely. And I for one am not suggesting that using 6ter as an entry point, if you will, to the UDRP or to a DRP is intended in any way to confer rights. I agree with what you've said.

Alexandra, then Paul. Just before I go to you, Alexandra—my apologies—yes, Susan, I do want us to try to get to—apart from anything else—discussing one point like this for an hour and a half will drive everybody insane. So I'm keen also to do that. Alexandra, go ahead, please.

ALEXANDRA EXCOFFIER: I'm not here to say that 6ter gives us trademark or trademark-ish rights, but that's just the point, and I'd just like to agree with what Jeff said, that basically, it's replacing having—allowing IGOs to use the UDRP, because we have not trademark rights but we have obviously rights and

interests in our names and acronyms. I don't think anybody is debating that. To replace this obligation to have a trademark.

So I think that's what Jeff was saying. The prima facie proof or something. So this list would replace that. It would not say that we have a trademark or a common law trademark or trademark-ish rights or anything like that. But if this is not accepted, then what's the point of this whole Work Track? We would be back to point zero where those IGOs that don't have a trademark—which is most of us—will not be able to use the process.

So I don't know. I think that's what Jeff was saying.

CHRIS DISSPAIN: You'd be stuck.

ALEXANDRA EXCOFFIER: We would be stuck at point zero, so no point discussing anything else.

CHRIS DISSPAIN: Well, point zero point five, because if you look at the current recommendation in the PDP, it does say IGOs should be entitled to use their registration on 6ter to put that forward to a panelist as evidence of a common law trademark or right. So that is in the policy. But I acknowledge what you said. All I'm saying is there is a slight gap, but only a very small gap to get the IGOs through the door. And that, Alexandra, as you quite rightly say, is why we started discussing the issue.

And as Susan has said in the chat and has said all along, irrespective of what the PDP says, her view—and I understand that she's talking effectively for her government—is that 6ter does not even confer a

common law trademark right, so therefore it is an inappropriate mechanism to be using in these circumstances if you're trying to say that it confers any rights. Did you want to respond to that, Alexandra, for now, or are you okay if I move on?

ALEXANDRA EXCOFFIER: You can move on, but I thought that was the whole discussion from the beginning on this point of standing or not standing or whatever you want to call it. But I think what Paul is saying is not completely off of what I'm trying to say, is that it doesn't mean we will prevail, but it means that we—either there is an IGO DRP or the modified UDRP which allows the IGOs to argue that the other party has been unlawful or etc. without having to demonstrate that we have a trademark, whether common law or registered.

CHRIS DISSPAIN: [Correct. That's exactly right.]

ALEXANDRA EXCOFFIER: And I can go up to what 6ter does not give us rights, it does give us protections of our names and acronyms and it does put obligations on states to protect them. So it's not like it's nothing either. Anyway, I don't want to go into 6ter, that was not my point.

CHRIS DISSPAIN: Thank you. And I agree. Paul, before I pass the microphone to you, I just want to say, what you said in the chat is exactly correct. But from day one, we have said that the reason why we moved across to the possibility of suggesting a parallel process was because we didn't want to mess up, to mess with the current UDRP because we acknowledged that what we were doing—if we were going to do it—was to say that the

IGOs could bring a claim for their acronym based on the fact that it is in 6ter or that it is on the GAC list. Completely correct to say—as you have in the chat—that what Alexandra is saying is they don't have to have trademark rights. That is correct. That is what we have said all along as a prerequisite for having this discussion. Because if they do have to have trademark rights, it simply doesn't work.

And that's fine. If it doesn't work and there's no appetite to create a process or to recommend a process that does work for IGOs, so be it. That's what we'll tell the GNSO Council. But we've been talking about this since day one and saying we are not saying that being on the GAC list or being on 6ter creates a trademark right. What we're saying is there is a separate process for IGOs to protect their acronyms which doesn't require that. It requires them to be on that list, on 6ter, or on the GAC list. At least that's what I think this group has been talking about for the last seven of the nine meetings. But if I've got that wrong, I'm sure somebody will correct me. So Paul, over to you.

PAUL MCGRADY: Thanks, Chris. I think this is a good conversation. not because I like the way that it's going, but at least it's out in the open, because I would say things like, well, 6ter doesn't create common law rights or 6ter doesn't convey trademark rights, and everybody would say, "Oh, yeah, that's right, except for the way the UDRP is written, you have to have [them] prevail." But now I think the two sides have really come out and are saying what they mean, which is one side of this discussion wants 6ter to essentially substitute for a trademark right. You don't have to prove anything but being on 6ter.

And the other side says, gee whiz, 6ter, GAC list, whatever, we don't really think there's a standing requirement to begin with, but fine as a ticket in if you feel like you need one, but you still need to prove trademark rights. So those are fairly stark positions.

Now, in the middle between those positions, of course, is a ticket in, and then a chance to prove common law rights, which any panelist worth their salt would be able to look at, the 5-25,000 news stories making reference to an IGO and would be able to say, “Oh, yeah, there's enough here to show that the average Joe knows who OPEC is or whatever and so that’s enough for me and bad guy has to give back the domain name.”

So, as we work towards a middle position, we need to figure out how to give some give. And maybe what we need to do is make the language more precise so that we don’t say things like 6ter is a ticket in if you don’t have a trademark. Well, you’ve got to show trademarks to win in the UDRP, so that’s not going to work. Maybe we mean something like 6ter is a ticket in or the GAC list is a ticket in—I don’t like either, but there it is—if you don’t have a trademark registration, but you still have to prove some sort of unregistered trademark right. And that’s the middle ground.

CHRIS DISSPAIN: Why does it have to be a trademark right, Paul? Why does it have to be an unregistered trademark right? Why can't it just be a right? Why does it have to be built around trademark?

PAUL MCGRADY: Well, but that’s what the UDRP is, Chris. So if we want to do a major rewriting of the UDRP, fine, but I think we’re still trying to squish all this into the UDRP.

CHRIS DISSPAIN: No, I'm with you. I was asking the question for clarification. So again, if we’re trying to tweak an existing mechanism, we can't use an existing mechanism to create a whole raft of new rights, is what you're saying, I think.

PAUL MCGRADY: That's right, because if we're saying under the UDRP you need a trademark right of some sort to prevail, and we say, "Okay, 6ter is enough." Well, then we've just equated 6ter with trademark rights and 6ter is not trademark.

CHRIS DISSPAIN: I'm not saying you're wrong, but to be clear, the current policy recommendation in effect does that.

PAUL MCGRADY: The current policy recommendation says it's up to the panelist, right?

CHRIS DISSPAIN: Right, but that effectively allows that to happen. Does it not?

PAUL MCGRADY: On a panel by panel basis, right?

CHRIS DISSPAIN: Yes, but it contemplates the possibility of a finding that 6ter is equivalent to—for want of a better way of putting it—a common law trademark.

PAUL MCGRADY: Well, let's actually pull up the language and look at it, because I think it still uses the word "standing" as opposed to an actual trademark right. So, which recommendation was that, number four?

CHRIS DISSPAIN: No, I think it's one or two, can't remember which. While you're doing that, let me go to Kavouss and we'll come back to you, if that's all right with you. Kavouss, go ahead.

KAVOUSS ARASTEH: During this discussion, there is a lot of emphasis on trademark. Why? For some IGO, what does trademark mean? What is the trademark of WHO? What is trademark of IMO? They don't do any trade. What is the trademark of the ITU? ITU does not make any trade. So we have to see the implication of that and to see where appropriate, where applicable and so on and so forth. But not as a strict rule. And there is something also mentioned that trade service. That may be another thing, but trademark is created by the commercial people. Thank you.

CHRIS DISSPAIN: Thank you, Kavouss. Paul, do you want to come back on the point that we were discussing?

PAUL MCGRADY: Sure. The Rec 2—I'm reading it. Yeah. An IGO may consider this to be an option where it does not have a registered trademark or service mark in its name and/or acronym but believes it has certain unregistered trademark or service mark rights for which it may induce factual evidence to show that it nevertheless has substantive legal rights in a name or acronym in question. In other words, it does not do, Chris, what you thought it did. All it does is allow the IGO an opportunity to prove up its unregistered trademark or service mark rights. It doesn't—

CHRIS DISSPAIN: But that's what I said.

PAUL MCGRADY: Yeah.

CHRIS DISSPAIN: That's what I said, it allows for the possibility that they can use 6ter to show that they have the equivalent of an unregistered trademark.

PAUL MCGRADY: Yeah, [inaudible].

CHRIS DISSPAIN: Is that not what it says?

PAUL MCGRADY: It is what it says. I misunderstood what you were saying. I was afraid you were saying—

CHRIS DISSPAIN: So what I was saying was that creates the possibility that 6ter could be—so if the panelists found that your registration in 6ter means that you could show that you had the equivalent of a trademark, so a common law trademark or some sort of common law right [in PMG] then that's a precedent that's been set that that is in fact indicative of a right, is it not?

PAUL MCGRADY: That's not what it says.

CHRIS DISSPAIN: Okay. So, make the distinction for me.

PAUL MCGRADY: Sure. So I guess it is what it says. We've got the standing issue in the first sentence, and then the second sentence, so you ... Well, okay. So the first sentence, the working group notes that an IGO may seek to demonstrate that it has requisite standing to file a complaint under UDRP and URS by showing that it's complied with requisite communication and notification procedures in accordance with 6ter, blah-blah.

So what we've said is, okay, standing doesn't mean you win, it's just a ticket in. Okay?

CHRIS DISSPAIN: Correct.

PAUL MCGRADY: So then an IGO may consider this to be an option when it does not have a registered trademark or service mark in its name or acronym—okay, again, standard—but believes it has certain unregistered trademark or service mark rights for which it must produce factual evidence to show that it nevertheless has substantive legal rights to the name or acronym in question. So in other words, you still have to prove that you have a trademark or service mark right in order to prevail.

CHRIS DISSPAIN: Well, that's not what it says. It says you have to produce factual evidence to show that it has substantive legal rights in the name or acronym in question. Let's not you and I monopolize this discussion on arcane legal discussion, but if you parse the sentence in a slightly different way, you could argue, I think, that it creates a different substantive right than a trademark.

PAUL MCGRADY: Maybe, but the must produce factual evidence to show is—

CHRIS DISSPAIN: Oh, I'm not suggesting for one nanosecond that you don't need evidence.

PAUL MCGRADY: Right. But it refers backwards to trademark or service mark rights. I guess if we want to say substantive legal rights—

CHRIS DISSPAIN: But to be clear, at the end of the day, it's a moot point because we all know that if we're going to say that the only basis upon which an IGO can claim under a version of the UDRP in respect to its acronym is that it has a trademark or that it has a common law trademark, then we're wasting our time, because that simply isn't going to be feasible. And if that's the case, that's fine—well, it's not, not for some, but what I mean is it's fine for the work of this group.

PAUL MCGRADY: So again, Chris—

CHRIS DISSPAIN: Kavouss's point is a very valid point, which is, how does an IGO have a trademark? Or even a common law trademark for that matter.

PAUL MCGRADY: So I'm happy to address that second question if you'd like, but I would like to go back and just reiterate why this recommendation 2 was brought up, which is you asked me to concede that this recommendation 2 already wipes out the obligation to prove that you have a common law trademark or service mark right. But I don't think it does, because it still says must produce factual evidence. So I will gently not concede that point.

But that leads us right back to the chasm, which we can build a bridge across, with Alexandra saying essentially 6ter is all you need and me and I think Susan saying you actually have to show trademark rights. But we can find the bridge, probably through showing common law rights, which then leads to Kavouss's question and how do you show common law rights. And he mentioned ITU. I put into Google "ITU." They have a wonderful mark with a globe and a lightning bolt and a big writeup about them. I'm on page four or five before there's any mention of anybody else. I don't think that there's going to be a whole lot of problem of ITU showing that they have used their mark in commerce.

I know Kavouss thinks that the ITU is not commercial, but of course, it rents hotels, it does all kinds of commercial things. So it's not as if there's no use in commerce here. So before we pitch common law rights out the window as a bridge to the two positions, and either put our hands up and say, "Well, we couldn't solve this," or worse, we march forward and create trademark-ish rights, let's give common law rights a chance.

CHRIS DISSPAIN: Thank you. Appreciated. Yrjö.

YRJÖ LANSIPURO: Yeah. I have a simple and maybe a stupid question. If you said that one needs factual evidence to show that an IGO nevertheless has legal rights

in the name, would, for instance, the charter of United Nations suffice for that evidence as far as UN is concerned? Thank you.

CHRIS DISSPAIN: Could you make that point again, Yrjö? It may have just been me, but I lost you towards the very end.

YRJÖ LANSIPURO: Yeah. Simply, since it says here that the "must produce factual evidence to show that it nevertheless has substantive legal rights in the name or acronym in question," and my question is, for instance for the United Nations and the abbreviation UN, would the charter of United Nations be sufficient as evidence of that right?

And I think that applies to many IGOs in that the legal basis for using the name is the treaty or whatever document is the founding document of that. And I think this is something that we are going around this, and somehow, we should accept as it has been said that they don't have trademarks, b you they have another kind of basis for the legal rights to the name. Thank you.

CHRIS DISSPAIN: Thank you, Yrjö. Appreciated. Alexandra, you're up next.

ALEXANDRA EXCOFFIER: Just to respond to Paul, I did not say that 6ter should give trademark rights or trademark-ish rights. Just to be clear. I don't want to speak for Susan, but I don't think that's what she was saying either. I think she was saying the opposite.

The thing about recommendation 2 is that if we were required to prove other legal rights, that would be fine, but we're required to prove that we have unregistered trademark or service mark rights. And going back to whether registered or unregistered, this is not something that we have. And acting in commerce means, for trademark purposes, actually using the name or the acronym as a trademark in commerce. The fact of renting space is not the same, I don't think, as acting in commerce, and does not mean that you have unregistered trademark or service mark rights.

But if the evidence is to show that we have legal rights in the name and acronym, then that could be very simple, obviously, as Paul and others have said. Maybe that's the way to go without necessarily using lists. But those IGOs that don't have trademarks can show that they have other legal rights. That might be the way—I think that's something you said, Chris, just agreeing with that.

CHRIS DISSPAIN: Okay. Thank you very much. Appreciated. Jeff.

JEFFREY NEUMAN: Paul can speak for himself, but I think what is being said, if I'm interpreting Paul right, is that you as an IGO would still have to show that your mark, your name, still functions as a trademark, whether it's registered or not, which means that you've got to show that it's got secondary meaning, which means you have to also show that it's distinctive and not just suggestive of the services. And then usually, that is a whole big analysis of things like market penetration, sales, all sorts of what you would normally think as commercial activities. It really is an in-depth analysis. So I don't think Paul is just saying any other legal rights.

If we're not going to give IGOs access by virtue of being on whatever list, then it is a fairly lengthy, difficult determination as to whether an IGO has unregistered common law rights. It is not as simple, as Paul said, you're on Google. It is fairly complex. Courts often disagree with each other on it. UDRP panels often disagree. Panelists disagree with each other. It is actually a very legalistic and difficult analysis to undertake, which is why you have trademark registration, because it kind of shortcuts it all and it's just a rebuttable presumption that if you get a registration, you have trademark rights.

So I don't think—the reason I disagree with Paul or with the whole notion of treating it like common law rights is that now you're making panelists have to—well, one, you're making IGOs have to produce this evidence as if it's using it in a trademark sense. And two—well, I'll just leave it there, and I see Paul's hand is up. Thanks.

CHRIS DISSPAIN: Thank you, Jeff. Kavouss.

KAVOUSS ARASTEH: Thank you very much. The more I listen to this, the trademark, the more suspicious about this situation. I don't think that the organization like ITU with 156 years of existence needs to show that [inaudible] under the trademarks. They have a constitution and the constitution is a valid point and there's a law of treaty internationally governing all of these things. And I don't think that you should oblige that they should show that they have a trademark or equivalent to trademark. They work according to their constitution, according to their terms of reference, according to what they have, the purpose of that.

And in the purpose of the [ITU, for instance, I read it] 100 times, there is nothing about trademark or other things. So I don't think that you need to

push too much on the trademark and then countries coming 21-year, establishing a rule for another institution which working 156 years. This is not ... You'd have some trademark or equivalent trademark or service mark trademark as appropriate, where appropriate, if [applicable.] So you have to soften this situation and not put a finger on the trademark.

By the way, every ITU meeting, Chris, we discuss the IGO. Every Council meeting. This is important. And then we have no answers [inaudible] and so on and so forth. So we have to find something. And please try, kindly, to conduct or direct us in a way to find something acceptable to everybody. But not dominated by some particular group of people. It is nothing to do with the DNS saying that private sector [inaudible] and then forget about the government. Thank you.

CHRIS DISSPAIN: Thank you, Kavouss. Paul.

PAUL MCGRADY: Thanks. And so yeah, I just wanted to respond briefly to what Jeff was saying. And yeah, I understand, again, if you're going to go to a court, you may have to hire a survey expert, blah-blah to prove common law rights. Within the UDRP context, I think the burden that Jeff was projecting frankly is significantly lower. You still have to show that you've used it, and if you have sales, great, if you have marketing dollars, great. If you've got whatever, great. Also showing in media that you're recognized is another kind of evidence to show.

And so again, I think part of the problem here is we're doing two things. One, we're conflating trademarks with trademark registration, and that's not the same thing, and we should be more careful with that because I think that would bring a lot of clarity. And two, I also think that we probably need to talk a bit about how you prove up a common law right.

So without trying hard, I just put one into the chat where—its closed now, but there's a United Nations civil society conference. They run conferences, and that's a trademark that's a kind of service that's recognized under international class 41 of the Nice agreement.

So it's not that IGOs don't do common law trademark things. And so I remain concerned that if we just dismiss common law rights as a bridge out of hand, we're going to end up in two siloes and I don't think that that's where we want to be. So I would really love it if we could talk a bit more. And if Jeff is worried that the common law right standard is too high for IGOs to meet, maybe we should be messing around with the standard to show common law rights for IGOs rather than creating trademark rights by simply relying on 6ter and nothing else. So maybe it's the burden of proof [inaudible].

CHRIS DISSPAIN: I'm sorry, Paul, you have lost me. We are not talking about creating trademark rights. You keep saying that we're talking about creating trademark rights. We're not. You've lost me because I don't understand why you think we are.

PAUL MCGRADY: Okay. I'll keep trying. Sorry.

CHRIS DISSPAIN: No, but I mean, to be clear, we are not saying that—it's not being said that because you're on the GAC list, that gives you a trademark right. You have said, because you're on the GAC list, you can come in the door, and you have said that it should be open to the IGO to show that they have common law rights. So you said both of those things. So why do you think that this is therefore creating trademark rights? I'm at a loss to understand.

PAUL MCGRADY: Right. What I first said was that, which is, again, I think the standing issue is a red herring, but if people want to call it standing, that's fine. And if you are on 6ter and you can actually show unregistered trademark or service mark rights and produce the factual evidence to show them, that's great. That's no different from the UDRP now. Anybody with a common law right, IGO or not—

CHRIS DISSPAIN: Yes, I understand that.

PAUL MCGRADY: Yeah. And so the concern that Jeff had raised that I was responding to is that he thinks the common law right standard, the evidentiary standard may be too high for IGOs. So my comment was, well, if that's the issue, then maybe we tweak the standard for providing common law rights for IGOs. I don't think IGOs have a problem showing that, but maybe we tweak the standard. Instead of just saying—which I think Alexandra has been saying—that 6ter is sufficient and you don't have to prove anything else, that's one side of the chasm.

CHRIS DISSPAIN: Yeah. So just to be clear—I get it—just to be clear, you are saying—and I want to be absolutely crystal clear on this—and Jeff has put it in the chat—you are saying UDRP, whether it's tweaking the existing process or setting up a parallel process under the auspices of tweaking has to be trademark and trademark only. You are not interested in discussing any other basis upon which an IGO may claim the right. So it either has to be a registered trademark or it has to show an unregistered trademark. Is that what you're saying?

PAUL MCGRADY: I think that's right.

CHRIS DISSPAIN: That's fine. If that's what you're saying, that's clear.

PAUL MCGRADY: Yeah, otherwise it's major surgery. So I'm trying to find a way forward for the IGOs without making major changes to the UDRP.

CHRIS DISSPAIN: Okay. Fine. So we have 27 minutes left. Kavouss, your hand is up. Go ahead.

KAVOUSS ARASTEH: Yes. I believe that Paul say something, and it is his views. It's not shared by others.

CHRIS DISSPAIN: Yes, I appreciate that.

KAVOUSS ARASTEH: He insist and he took—I respect him very much, he is a knowledgeable person, but we have one and a half hours, and everybody should have the opportunity. We should not [put our finger,] yes, it is his views, his opinion. Fully respect it as his views and opinion. Thank you.

CHRIS DISSPAIN: Thank you, Kavouss. And in fact, I was going to ask, I appreciate Jay has already put in the chat that he agrees with Paul, but if we have—if that's the position of a significant number of people on this group, then we need to adjust the basis upon which we've been talking, because Jeff's redline—unless I misunderstood your redline, Jeff—contemplates a slightly different—I wouldn't argue it's a vast change, but it is a significant change to the stance that Paul has taken.

I'm not really sure at the moment whether the best thing to do is—it probably doesn't work to crack open a new topic right now, although I'm conscious that we haven't progressed very far on this meeting because we keep butting up against the same thing, which is the requirement to—absent advice or—permission is the wrong word but it will do for now, absent permission to expand the scope, we keep butting up against the same issue, which is we're trying to tweak it, and it feels a bit to me as if we are—as we go into further detail, we are actually heading towards the inescapable conclusion that we can't get very far unless we go back to the GNSO and say, "Subject to the current guidelines or scope, we just can't get very far." Because unless you can say it's a tweak—I think we all agree, unless we can say it's tweaking the current policy—I can't remember what the exact words are for the recommendation, but we all know what the recommendation basically says, no separate processes, all of that stuff. Unless we can come to an agreement of what we're talking about is tweaking, then we can't achieve a resolution, I don't think. Does anyone disagree with me? No one disagrees with me. Okay.

Do we think that we should craft a note to the GNSO Council setting out where this group has got to and the general positions that have been taken and explained to the GNSO why that means we would struggle to come to a conclusion unless we had a wider scope? Do people think that that is a sensible next step to take?

All right, let me turn it on its head. It's easy to ask the negative. Does anybody think that is not a sensible next step to take? Please raise your hand if you're uncomfortable with that. Susan, go ahead. Or are you just telling me you're uncomfortable, or did you want to say something?

SUSAN ANTHONY: I'm not uncomfortable, actually, but I have a question for you, because the GNSO Council has suggested a—not suggested, they've made plain, to me at least, that these recommendations one through four are intractable. I am sorry that Brian Beckham is not online, or at least I haven't heard his voice or seen his name.

CHRIS DISSPAIN: No, he's not on this call.

SUSAN ANTHONY: But going back—oh, gosh, I've lost all track of time, but going back to Morocco in the summer a couple of years, I can still remember a conversation that Brian and I had with Keith Drazek saying that if the GNSO are going to work on recommendations, that they would have to be flexible so that we could revisit them as we struggle to find a meaningful resolution for IGOs.

CHRIS DISSPAIN: Yes.

SUSAN ANTHONY: That was the general understanding I had when I left that meeting in Morocco, and I felt like while I couldn't say "winning," I felt like there was hope. And I was very taken aback when I saw the recommendations and

the instructions that said you may only look at recommendation number five, but meanwhile, we're so fenced in by one through four, I thought, how can we meaningfully look at five? And I can't be angry with Keith because Keith was only saying what he thought he could do or what he thought might make sense, and it was only at that time. Obviously, there are many other people who believe differently, and that's what occurred. But it's [inaudible]. So I just raised my hand to say that I could support your proposal, I just wanted to know whether we could, in your mind, hope for any legitimate relaxing of or encouragement to be more flexible about these other recommendations. That was all.

CHRIS DISSPAIN: I don't know, Susan. I know some of the background and the history, detail of why it ended up being what it is. It's not necessarily [inaudible] to discuss it on this call, but I don't know. I think—if I can be blunt, I think anyone who imagines that even absent recommendation five and absent any form of t weaking to make a system that is acceptable or has a chance of being acceptable to IGOs, anyone who imagines that that simply means the GNSO full recommendations are going to go to the Board and be accepted and put into [inaudible] is deluding themselves. That's not going to happen.

There is conflicting GAC advice, GNSO recommendations, conflicting GAC advice and so on. That's never a win for anybody and it's highly unlikely that—in my personal view—the Board will come down on either side of the fence. It'll find a middle ground [fudge.] And if that gets left to the Board to do, then so be it. But I agree with you, and I don't know the answer to the question.

I suppose it is possible that the Council, if we are clear in our explanation as to why—if we're straightforward that we had put our best efforts in, nobody is being obstructive, no one is being difficult, people are just clear in their positions and have justifiable reasons for their positions,

that the only way forward is for us to change, effectively, the scope to allow us to be a bit more flexible, then that may be okay. But it may not, because it may be that the change in scope is still not enough to get us across the line.

But I'm game to give it a go if it is. Paul, go ahead.

PAUL MCGRADY: Thanks, Chris. Just to bring something forth in the comments, Alexandra and I have been chatting back and forth, and I will say even if the Council tells us we don't have more scope, I still think it's worth it to keep talking, because I don't really think we're as far apart form each other as it may appear. That's number one.

And then number two, Alexandra makes a really good suggestion in the chat saying—and I think in terms of keeping us moving, maybe while we're writing to Council on this issue, we take up again the issue around immunity so that we can keep working while we're waiting to hear back from Council, because that may take a while. Thanks.

CHRIS DISSPAIN: Sorry, explain to me what you mean by the issue around immunity.

PAUL MCGRADY: About whether or not you have to consent to a jurisdiction, what happens—

CHRIS DISSPAIN: Oh, I'm sorry. That side of things.

PAUL MCGRADY: Yes.

CHRIS DISSPAIN: All right. Got you. Oh, no, completely agree. I think that that absolutely is the case, certainly. I would be looking at us having a call next week to discuss specifically that question. I'm not suggesting we should stop and wait for the GNSO to do anything, I'm just saying I think we have a clear issue at the top end of the funnel, if you like, the top end of the funnel being getting in and what your rights are. That is a clear issue, and we're not on the same page in respect to that. So I think we need to take that out and go and see if we can get some clarity around that.

Although, Paul, I'm interested in your suggestion that—if I can roughly quote you—we are not as far apart as it might seem. If I could encourage you to use the list to set out why you think that might be and some sort of suggested way forward, and if I could ask those on the IGO side of the discussion, Alexandra and others, to perhaps try to respond on the list so that we can actually make some progress on where we are actually positioned intersessionally, that will, A, save time, and B, it's often easier for people to respond to points made in writing on a list because they can do so after thinking rather than having to respond in the moment.

Susan, I take your point about without going to GNSO Council this time—I'm happy to park today's discussion about 6ter, GAC list and standing or rights or whatever you want to call it to one side for a bit to reconvene next week to discuss what Paul has called immunity issue, which is a good shorthand to use for now. And how we will deal with that if indeed we will deal with it, and to see whether we can reach some sort of consensus and agreement around that point, because if we can do that, that may be an encouragement for us to return to the earlier point with a win under our belts and an ability to be flexible.

So if that's all right with everybody, that's what I propose that we would do, so not go to the council at the moment, park what is currently 3A on the agenda, discuss legal immunity and 3B next week. But when I say park it, I would like—and Paul has agreed to do this—to see some discussion on the list fleshing out Paul's premise that we may not be as far apart as we think we are and perhaps getting a response on the list.

I think that is probably the most sensible way forward. Does anybody have any objections to that? No one has any objections to that, which is excellent. Let me check in with staff. Berry, Steve, Mary, do you have anything that you want to bring up at this point? "All good." "Same." Excellent. All right. And Mary, I think, has dropped off the call because she had to go to another call. So that's good.

Okay, I'm going to swing by and summarize it one more time. Paul is going to come out onto the list with some thoughts about today's discussion and why we may not be as far apart as we think we are. Hopefully, IGO representatives and others will be able to respond to that and we can have a discussion on the list. Going to come back next week and talk about legal immunity, arbitration, super panel, and we'll take stock of next week's call and decide whether or not we've made enough progress to once again park the going back to the Council issue.

Our next meeting is on Monday the 3rd of May, that's next Monday at the same time, 15:00 UTC, and I want to say thank you to everybody. I know this is hard, I know this whole debate has been going on for more years than most of us care to think about, but I think we may actually be able to at least crack a part of the nut even if we can't crack the whole thing.

So I'm going to wind the meeting up at that stage, say thank you all very much for your time, and see you all next Monday, and see you all on the list with some vibrant discussion. Thank you, everybody.

JULIE BISLAND: Thank you, Chris. Thanks, everyone.

[END OF TRANSCRIPT]