ICANN Transcription
IGO Work Track
Monday, 07 June 2021 at 15:00 UTC

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TERRI AGNEW: Good morning, good afternoon, and good evening and welcome to the IGO Work Track call, taking place on the 7th of June, 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 identify yourselves now. Hearing no one, we have no listed apologies for today's meeting.

All members and alternates will be promoted to panelists for today's call. Members and alternates replacing members when using chat, please select 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 Z's, 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, private chat, or use any Zoom Room functionality such as raising hands agreeing or disagreeing. As a reminder, the alternate assignment form must be formalized by

the way of the Google doc. The doc is available on all leading invites towards the bottom.

Statements of interest must be kept up to date. If anyone has any updates to share, please raise your hand or speak up now. Seeing or hearing no one, if you need assistance with your statement of interest, please email the GNSO Secretariat. All documentation and information can be found on the IGO Work Track Wikispace. Recordings will be posted on the public Wikispace shortly after the end of the call. Please remember to state your name before speaking. As a reminder, those who take part in ICANN multi-stakeholder 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, Terri. Good morning, good afternoon, good evening everybody. Welcome to the IGO Work Track call. I've got a few people still in the attendee room who are heading on over into here so we'll get going. Actually, maybe if we start … Although it's not technically on the agenda, Berry, is there anything you want to cover with us before we get going?

BERRY COBB: Nothing specific, other than on the list, you'll see the May version of the project package. No substantial changes since the last version but other than that, good to go.

CHRIS DISSPAIN: Excellent. Thank you. And thank you everybody for joining. The first item on the agenda is an update from the small group and homework. Hopefully you will all have seen a very brief but incredibly important few paragraphs that were sent out by Berry a few hours ago, which are the output from Susan, and Brian, and Paul in respect to the top of the game, getting the IGOs into the UDRP in the first place. Let me guess. Brian, would you be prepared to just briefly explain to us what you guys have done and what, if anything we need to do? Okay. Brian is trying to preserve his hoarse voice a bit. Okey-dokey. We don't have Paul on the phone at the moment, anyway. So Susan, are you game to briefly take us through?

SUSAN ANTHONY: Yes. I am.

CHRIS DISSPAIN: Thank you. Please go ahead.

SUSAN ANTHONY: So we actually did work very hard, Brian, Paul and I, to come up with a proposal that would accomplish several purposes. One, that we all could agree to it; two, that we thought that the larger working group could agree to it; and of course, three—and I really thank Brian for this because he was the go-between—the IGOs would be satisfied with it. And a supplementary purpose was to make it simple and avoid modifying the UDRP. We think we accomplished this so let me share it with you in case you've not had a chance to review it or review it carefully.

So, you'll see it's very simple. It only has two points. We want to clarify, not the UDRP or URS itself but the rules, the rules of the Uniform Domain Name Dispute Resolution Policy and the Uniform Rapid Suspension System. So, in modifying the rules, we would add the description of the IGO complainant, a defined term, to section one and section one is definitions.

So, the IGO complainant has three prongs, A, B and C. A is international organization established by a treaty and which possesses—thank you. I can see it a little bit better—which possesses international legal personality or an inter-governmental organization having received a standing invitation to participate as an observer in the sessions and the work of the United Nations General Assembly, or a distinct entity organ or program of the United Nations. You may recall as to 1c, this was very important for the larger group or at least a number of members in the larger group—namely Brian, the IGOs and a number of other people—that said it really does have to include the programs.

And so, then the other modification we proposed to the rules, is to add certain explanatory text to certain rule sections in the UDRP and the URS. And it says, now that the letters are large enough for me to read, “Where the complainant is an IGO, it may show rights to a mark by demonstrating that the identifier which forms the basis for the complaint is used by the IGO to conduct public activities in accordance with its stated mission as maybe reflected in its treaty, charter, or governing document.”

So, that's it. That's the proposal in a nutshell. And we really did try very hard to take everybody's everything on board and to

anticipate and avoid any objections or expressions of outrage that we might receive. So, that's it, Chris.

CHRIS DISSPAIN: Susan, thank you. I've got a couple of questions if I may, hopefully not too challenging or complicated. First of all, going to number one, I just want to make sure that I understand correctly. So, we have effectively moved away from the current list of reserved acronyms. I'm not saying that there won't be crossover but we moved away from a GAC list. We've moved away from 6ter. And what we're saying is, this is a definition of what an IGO is and therefore they will be some presumably that are already covered and temporarily reserved on the list but there may be some that are not, which is fine to me.

Was it intended that there would be—is there a definitive list of what that is? There probably isn't, is there? Which is why you need to have the definitions. And secondly, could you perhaps just give us an example of each of the three so that we've got something that we can hang our hats on?

SUSAN ANTHONY: You would ask me for that. Well, I think that—

CHRIS DISSPAIN: Well, maybe Brian can if you can't.

SUSAN ANTHONY: And here comes Paul. So I feel—

CHRIS DISSPAIN: Yes. Paul has arrived as well.

SUSAN ANTHONY: - if I say anything wrong. The cab drove him around the city. I guess he had to drive around the city to get to the computer. I don't know. I can't explain. We really wanted to avoid any … We just wanted to get out of 6ter as well as the GAC list quagmires. Goodbye. Park them to the side. Just not pertinent to this conversation.

But we wanted to make sure that we chose a definition that was sufficiently broad to include … For example, one of the organizations, if you will, that we wanted to make sure would be encompassed is Interpol. And so, in some ways, I think we kind of … Well, I won't say we back ended into the definition but we thought about various IGOs or programs of IGOs in very general terms that we wanted to make sure that the definition was sufficiently broad to cover any of them. Paul, you're the man with all the examples. Can you give Chris some examples, please?

CHRIS DISSPAIN: Hello, Paul. Welcome to the call, Paul.

PAUL MCGRADY: [I've been] in the chat. The idea is to add a definition that is broad enough to include and not come with the inherent list of our problems with [inaudible], like how do you [inaudible] of them, if, in

fact, they are that kind of thing. And yeah. Interpol was one example. [Inaudible] we talked about that. UNICEF was another example.

SUSAN ANTHONY: Yes.

PAUL MCGRADY: It's part of the UN infrastructure so we wanted to make sure that we include those guys. And so, we tried to [inaudible]—

CHRIS DISSPAIN: Paul. It's extremely hard. I don't know if others are … Yes, they are. It's very hard to hear you. You're breaking up. Are you on a—

PAUL MCGRADY: I can dial in here in a second. Can you hear me any better now? I'm kind of leaning at the computer.

SUSAN ANTHONY: Yeah.

CHRIS DISSPAIN: Yes. A bit better. Thank you.

PAUL MCGRADY: I'll dial in after this intervention. But the bottom line is, we were looking for something that would be sufficiently inclusive that was

not dependent on getting on or maintaining a list but would also be sufficiently definitive where you can look at the definition and know, “Yeah, I'm in or I'm out,” and that’s what we hope to [inaudible].

CHRIS DISSPAIN: And a couple of … I may have missed them but could you give an example of, say, for example, a program in the UN that would fit into that?

PAUL MCGRADY: Yes. So, the program was UNICEF.

CHRIS DISSPAIN: Okay. Understood. Okay. That's very helpful, Paul, and thank you. Your connection is still a little dodgy so if you're able to fix that for later on, that would be brilliant. And then my second question Susan or Brian or Paul is, simply put, how would I demonstrate the rights in a mark? How would I demonstrate that I use it to conduct my public activities? Is that a specific definition or is that …? Is public activity something that is defined or are we just saying “public activities” in our wording?

SUSAN ANTHONY: We are just using “public activities” in our wording. We believe that just about any IGO should be able to meet the requirements—that second prong of our proposal. But we also realize and acknowledge—and I would imagine that Brian has indicated this

too and among our IGO participants in the working group—that while we hope all GOs will be able to participate, it is possible that we have not captured everyone but certainly done our best. Here comes United Nations. Good heavens. We have everything you ever wanted to know and then some, Chris.

CHRIS DISSPAIN: Yes. Marvelous. Although, of course, a lot of IGOs don't sit under that UN [inaudible].

SUSAN ANTHONY: Yes, of course. Of course.

CHRIS DISSPAIN: That covers the panoply that is the UN but [inaudible].

SUSAN ANTHONY: But there are many that will not be within the UN system. Yeah.

CHRIS DISSPAIN: Okay. All righty. Well, look, that's marvelous. Jay's asking a question in the chat, “Does this definition also include INGOs?” I think the answer to that is no, isn't it? It doesn't include INGOs, Susan does it?

SUSAN ANTHONY: INGOs?

CHRIS DISSPAIN: International non-governmental organizations.

SUSAN ANTHONY: Non-governmental, no.

CHRIS DISSPAIN: Yeah. No. It doesn't. Didn't think so. All right. Good. Thank you, Susan. That's incredibly helpful. So, let's take stock of that. Let's throw this open for comment and discussion. If anybody has anything to say, anybody wants to ask a question, or add or whatever, that would be great. Jay, go ahead.

JAY CHAPMAN: Thanks, Chris. Again, I appreciate the work done by Susan, Paul and Brian. I'm curious about … We spoke specifically about programs. If an IGO creates some new program and gives it some new name, is that also included? Because the expansion of what this could become might be a bit of a concern. Thanks.

CHRIS DISSPAIN: The answer to that, my immediate response to that would be yes. But I would argue that's the case now, in the sense that if we were to use the IGO list of the GAC or you were to use 6ter, neither of those two things are frozen. But, of course, the point is that this is only the step to get you into the funnel in the first place. All the other rules still apply. So, it's the same as everything else, isn't it? It's the same as the trademark, which presumably doesn't have to

exist today in order for you to possibly have a claim in the future. Is that fair, Jay, or have I misunderstood?

JAY CHAPMAN: I just got some answer answers in the chat there, Chris, from Alexandra. And I think Mary maybe provided some assistance in there as well so I'm satisfied. Thanks.

CHRIS DISSPAIN: Okay. Good. Excellent. Anybody else? Sorry. Susan, if you're talking, you're on mute.

SUSAN ANTHONY: I was just noting, for anybody that doesn't have a chat function, as I didn't the last time, I discovered that's because I wasn't elevated to a panelist the last time I was on the line. I think that was the problem.

CHRIS DISSPAIN: No.

SUSAN ANTHONY: Yes. There's a running diatribe going down the right-hand side of the screen so in case I fall short on my answers, I can just look over there and go, "Oops. Nope." But the IGO complainant refers to in C, a program of the United Nations. So, I believe the answer to Jay's question is, if they add new programs in the United

Nations, yes. If an IGO is not in the United Nations, the answer possibly would be no.

CHRIS DISSPAIN: Yes. But a new IGO would be, if a new IGO was set up tomorrow, but then that would be the case anyway so that … Yeah. Okay. Good.

SUSAN ANTHONY: Yes.

CHRIS DISSPAIN: Okay. Excellent. Thank you, Susan. Does anybody else want to comment? Because if not, then I'm going to park this and say that we've—not that I'm making a consensus call or anything but just it's there and we've kind of discussed it and nobody seems to have any major issues at this point. Okay. So, in that case, let us do that and let us also say—I say on behalf of everybody on this Work Track—an enormous thank you to Brian and to Paul and to Susan for spending the time and effort to actually make this a workable solution. So, all of the discussions that we are now going to have are, for the moment, based on the premise that this is in place and that is how the IGO gets in to the UDRP.

Okay. Let's move, then, to the next part which is the jurisdiction area. In the memo that Mary and Steve and Berry sent out, there are some extracts from the legal opinion that was given to the previous policy development process in respect to mutual jurisdiction on immunity. And the team have highlighted those

statements they think are the most relevant. And I think it's worth actually going through those and letting them surface for discussion.

So, the first one … We're in B, if we could go to B, on the excerpts from the Swaine memo. Lovely. And we're on the first page, number one. That's it. So, the first part is that there is what Swaine said. And if I remember correctly—Mary, you can confirm this for me—I think he was effectively employed, seconded as an expert in this area to the PDP. Is that right?

MARY WONG: That's correct, Chris. He was asked very specific questions about IGO jurisdictional immunity.

CHRIS DISSPAIN: Okay. So, he raises at the beginning an abstract question, which is, if there wasn't a mutual jurisdiction provision, whether an IGO would in principle enjoy immunity from judicial process. And he says in reference specifically to U.S. law, that whilst you can't—and I'm paraphrasing here —but whilst you can't say definitively, yes, they are, you can say that there's quite a high likelihood that they will be. In other words, they would be able to go to the court and say, “We're not subject to your jurisdiction,” and that there is a high likelihood that they would be successful in that submission. Unless I've misunderstood, I think that comment is only made in reference to U.S. law but I imagine it wouldn't be that dissimilar in other jurisdictions.

And then the second point, in bold—the second and more relevant question—is if an IGO does assent to mutual jurisdiction, does its immunity remain? And the answer to that is, effectively, no it doesn't. And what that explains is why our IGO friends and colleagues have made it very clear that it is simply not feasible for them to use this process under their own rules, if they are required to subject themselves to the jurisdiction or the local court. And it's for that reason that we've been discussing moving away from that mutual jurisdiction consent.

So, where we've got to—and I'm acknowledging this is not even close to being agreed—but where we've got to is a discussion that says, "If we take out the mutual jurisdiction, that does not prevent a registrant from going to their local court but it does allow an IGO to argue that they are not subject to that jurisdiction." And if that were the case, then everyone seems to accept that some alternative, additional dispute resolution mechanism should be put in place. And we appear to have coalesced around the idea of arbitration, although there are still some people who suggest that some form of expert panel might be appropriate. And, in fact, it's interesting that the Nominet model appears to involve a panel. Paul, please go ahead.

PAUL MCGRADY: I didn't want to interrupt your … Are you guys hearing the feedback?

CHRIS DISSPAIN: Yeah. You're appearing on both the telephone and online so maybe you've got both microphones turned on.

PAUL MCGRADY: Come back to me, Chris. I'll figure this out.

CHRIS DISSPAIN: Okay. Although keen to hear from you. I've no doubt it's relevant to what I was saying. I was done, actually. I was going to say so before we move on to discussing the sorts of things we would like to see in an arbitration process, which is covered to some extent by both the Nominet process and also by the WIPO memo, which makes some suggestions, and of course me asking everybody a couple of weeks ago to do some thinking about that, let's see if there are any comments or questions on the jurisdictional issue. So Paul, do you want to try again? If you are speaking, we cannot hear.

PAUL MCGRADY: Yeah. I'm sorry, Chris. I'm having trouble figuring out how to turn my microphone off on my computer. I'm having a day. I'll come back as soon as I can. Sorry.

CHRIS DISSPAIN: You are. Okay. Fair enough. All right. So, while we're waiting for Paul, does anybody else want to make any points or comments about the mutual jurisdiction issue which is … Okay. So Terri's

muted your computer for you, Paul. You want to try on your phone now?

PAUL MCGRADY: Terrific. Can you hear me now? Is it better?

CHRIS DISSPAIN: Oh, look at that. That's magic. It's absolute magic. [Inaudible].

PAUL MCGRADY: Okay. Thank you, Terri. This is one of the disadvantages of being generation X instead of millennial. We invented a lot of it but we don't know how to use it. So, yeah, Chris, I've been giving this a lot of thought and I've spoken with others in the group informally. The principal issue, I think, still remains with how do we get to consent to this mutual arbitration. And it's leading me to think that the answer here is—and this is typically Chicago. This is yes, and—that we make available to a losing respondent the ability to consent to a binding arbitration. And if they do that, then that solves the problem of consent because they've agreed to do that.

The reason why they would agree to do that is because if they file a complaint to stay the UDRP decision in their home court, they won't know with certainty whether or not the court will kick out the case because of IGO immunity or whether the court will say "Hey. No problem, IGO. You don't have to show up and I'm going to help this complainant out under a different theory," whatever. There's a lot of uncertainty in going to the court. And so, if the losing respondent wants to hold on to the domain name longer, they'll

consent to the arbitration, hire good lawyers and try to try to keep it, right? It's basically a way to get an automatic stay on the UDRP decision. So, that makes sense to me.

And then, in addition to that, if the losing respondent didn't want to consent to the binding arbitration because he or she thinks that, if they could have just gotten more due process than the UDRP currently allows—witnesses, arguments, that kind of stuff, Zoom hearings—then maybe they would select the super panel, which we could build. And then we would have basically three ways out of a situation—one where the losing respondent goes to court takes his chances, one where the losing respondent goes to super panel. It would be speedy. And if he loses again, then we're back down to where we were which was losing respondent could go to court, take his chances or could agree to binding arbitration.

And so, I think instead of making it binary, if we had the three branches—which is more work for us. I agree. But if we had the three branches, then there would be more options here and a lower likelihood that somebody will feel like they've either lost their domain name without being heard or that they were forced to go to a court and explain why, as an IGO, they don't have to be there. So, for what that's worth. Thanks.

CHRIS DISSPAIN: Well. Thank you and don't go away. So, I had no idea that the start of that was a Chicago suggestion but that's exactly where I was headed, which is to say the consent issue, I believe we can deal with on the basis that, if you lose and you want to take extra steps, then it's at that point. And then you said it at the beginning

of your intervention, it's at that point that you could then say, "Well, we have an option now, if you choose to do so to consent to go to arbitration." And let's just couch it in terms of the registrant losing for the moment because that's just easier to deal with. It's just easier not have to keep bouncing the ball around from one side to the other.

So, the registrant loses, at that point, there is a right—there is an opportunity rather—as you've said, to consent to going to arbitration and acknowledging that that arbitral process would need to be chunky enough to satisfy a registrant that they are getting their "court day." And that they would have the right to say no to that and proceed to their own court if they wished to do so.

Where I went off—not got lost but I wasn't sure—that I possibly started disagree with you was whether it's necessary to have that additional piece of a super panel. Because isn't that effectively just going to mean that that is always what will happen? Because why wouldn't you? Because you get to hang on to the domain name so why wouldn't you? If at the end of the day, you're not bound by that decision, then why wouldn't you take that step? Because you're simply going to get the domain name for longer. Yeah?

PAUL MCGRADY: Yeah. So, here's a couple of thoughts on that. One, the advantage of the super panel is that it does not add automatically force both parties into very expensive options, right? So, an arbitration is not cheap. It's mini litigation. Most arbitration providers do depositions. There's judges. There's all the things that you do in court but just faster and supposedly less expensive. So, that's not cheap. The

other thing that's not cheap—and for the IGOs especially—is to go in and brief why you should not have been hauled into court. And it's not cheap for a losing respondent who files that lawsuit in their home court to brief why the IGO should be in there, right? So, neither of those two options are inexpensive.

The super panel would be less expensive but not free, right? If we build this where both parties have to pay their fair share to get that super panel, then it won't be abused if the price tag is high enough, or at least it will be abused less than it otherwise would be. And that super panel could be something in between the UDRP and the full-on arbitration, where a losing respondent could maybe feel like, “Gee whiz, I really got a hearing here and I really shouldn't have this domain name,” or, “I really got a hearing here and the super panel agreed with me. I was able to get facts in front of that super panel that I was not able to get in front of the original panelist.” So, it's a pressure valve. It's a pressure valve between—

CHRIS DISSPAIN: I understand. What I’d like to do … I don't want us to get lost in this discussion because irrespective of that possible step, we'd still need to build the arbitration at the end. What I'd like us to do is to park that idea as an interim step for a while and come back to it, in the sense that we still need to build the arbitration anyway. So, if it's all right with you, we could concentrate on that side of it and then come back and see if there's an appetite for an additional step. And if there is, then what you've said makes sense to me.

PAUL MCGRADY: Yeah. Thanks, Chris. And the thing to keep in mind about—

CHRIS DISSPAIN: Good. Thank you. Sorry, go ahead.

PAUL MCGRADY: Chris, one more little point.

CHRIS DISSPAIN: Yeah. Go ahead. Yes, of course.

PAUL MCGRADY: The thing to keep in mind about doing it this way is that it takes a lot of the pressure off of us in terms of building out an arbitration. We just have to locate a provider. Thanks.

CHRIS DISSPAIN: I see what you're saying. Okay. All right. Well, okay. I've got, Alexandra's hand is up. Let's run the discussion through but we still need to talk about what sort of arbitration it is. Otherwise, we won't know what sort of provider we need but I take your point. Thank you. Alexandra, go ahead, please.

ALEXANDRA EXCOFFIER: Yes. Thank you. I have a question on Paul's suggestion. I fully agree with Paul that we don't have a consent problem if we provide arbitration as an option and if the registrant agrees to it,

they would have consented. They would have consented so we don't have a consent issue.

On the second step, well, as you know, I'm against multiplying steps in general because there will be costs. So, my question is, will the registrant then bear all the cost? Obviously, we will still need lawyers and we will still have to pay for that ourselves. But if there if there are any costs … And as it is an intermediary step, I suppose it will not be binding in any way. So, the time element would still be a factor for us, as within the courts, of course, because if we're having …. What we're trying to cover here are basically criminal activities, fraudulent activities. And as the shorter that they continue to exist, the better, from our perspective.

So if we have to go through the UDRP process, then a super panel, then an arbitration, I think that the cost will be tripled and the time, as well that it will take. I understand where Paul is coming from but we seem to be giving all of these possibilities to these registrants which have lost the UDRP. Basically, they've lost the UDRP and they can get … If they don't feel happy about that, then we're providing them with options. They can try the courts or they have an alternative dispute resolution. And I think we will not avoid building that arbitration, in any case, and building that system, and indicating what it would be like. So, I guess as I'm talking, I'm not in favor of this middle appeal, a pre-appeal, then a final appeal. It just seems—

CHRIS DISSPAIN: Thank you, Alexandra. It was precisely why I don't want to try and get too deep in the weeds on it because we'll spend a lot of time discussing that. And I think I'd like to come back to that and really concentrate on the arbitration side. So, a useful starting point is the—well, more than useful, very useful starting point—is the … Sorry. We were just trying to get Jeff Neuman into the panelist room. I'm sure, we'll sort it out in a minute.

Part C of the memo from staff, if we could scroll to that, please, on page five, is the extracts from the WIPO secretariat paper and arbitration option which was put forward in respect to country names. But of course, it stands as a system, irrespective of whether you say you're using it for country names or whatever. So, I think there's a lot to be gained from having this discussion—rather, having a look at what that memo said and seeing whether or not there is stuff that we want to add to it or stuff that we're not happy about having at all. Welcome, Jeff, to the room. I hope you pick up where we've got to.

So, I was going to ask Brian but I know Brian's got a voice issue so I'll do it instead, to have a look at what this basically says. So, the starting assumption is that it's a de novo arbitration mechanism. So, full hearing on the facts. And I think everybody accepts that that needs to be the case. So, I don't think there's an issue. As far as I'm aware, I don't think there is an issue there. And then I'm going to go through the bullet points, which start at the bottom of page five and then move on to page six.

The parties should be able to restate their case completely anew. They should not be confined to claiming that the UDRP panel did not consider certain relevant facts. Yes. That would obviously be

part of—or wrongly apply the UDRP. Then they can also submit new evidence and new factual or legal arguments. So, it would be a true de novo mechanism. It shouldn't be more burdensome than conducting litigation in a court of mutual jurisdiction. Absolutely not quite certain, although I'm challenged to know how that could be more burdensome. I suppose it depends on the mutual jurisdiction.

The tribunal should consist of one or more neutral and independent decision makers who should not be identical or related to the panelist who surrendered the UDRP decision. Brian, I know you're trying to save your voice but I'm interested to know whether you had anticipated that this tribunal would be made up of all people who were actually panelists or had experience of UDRP or whether you had anticipated that it would be something completely separate. Are you able to type in …? Sorry. Go ahead, Brian.

BRIAN BECKHAM: Chris, can you hear me?

CHRIS DISSPAIN: I can, mate. I can. Sorry, you're not feeling well.

BRIAN BECKHAM: No, it's okay, I feel okay. It's my voice. I'll do my best. So, to the question, I think that the bullet here was meant to say basically it should be a different panel or panelists that would render the de novo review versus the first instance. So, what I think was

normally anticipated was you could … And this is, again, what the Nominet system does is, they'll have a roster of, let's say, 30 or 40 panelists, and then they'll have maybe 10 or so which are on an appeals panel roster for a rotation of a few years. So those two rosters are independent of each other. And just to recall that we had discussed agreement on who would make it onto that roster of appeals panelists so that was something that could be mutually agreed to give all the different stakeholders assurances that these are qualified people.

CHRIS DISSPAIN: Thank you. To be clear, that wouldn't then be an arbitration process run by an independent arbitration organization. That would be in the context that you are talking about because Nominet actually runs at itself, does it not? Yeah. Okay. So, thank you. Yes. You've said, “Right,” in the chat. So, again, I think, I want to test in a minute whether we do think actually it should be an arbitration, [inaudible] arbitration, or whatever process, or whether we are comfortable that we can copy something along the lines of the Nominet process. But that's a question for a little while down the track.

So, I understand that the arbitrators need to be different. Either party should be able to present its case in a complete manner. The tribunal should, for example, have the authority to allow for or request additional written submissions and it should be possible to hold in-person hearings.

Okay. So, those are four main bullet points. Does anybody think that there's a problem with any of those? Not should there be

more bullet points but is there a problem with any of those? Jeff would like to see cross-examination. That's only because you want to cross-examine people, Jeff. That's the truth. Jeff, is that not covered by in-person hearings or do you think that that needs to be a specific point?

JEFFREY NEUMAN: I think that needs to be said because in-person hearings can just be making arguments as opposed allowing each side to question the other side. There's a lot of different meanings of in-person. I just think that evidence should be able to be cross-examined, and witnesses, and things like that.

CHRIS DISSPAIN: Yeah. Okay. Thank you for that. And Alexandra, I think the answer to your question is, yes, it does because the whole point about this is to build something that satisfies registrants, that they would take this option rather than take their chances of going into court, quid pro quo being, either registrants agree that I'm prepared to accept that you haven't consented at the beginning to mutual jurisdiction. And the quid pro quo for that is down the other end I get if I want to. I get a proper day in court where I can have witnesses and so on.

I am trying to keep up with the chat and I know there's some substantive stuff being said in there so I'll try and keep up to speed with that. Anybody else got anything that they consider to be a major problem with those four bullet points before I move on to the subsequent bullet points? No. Okay, cool. Paul, I know your

hand is up and I'm assuming you'd left it up from your previous intervention because it's up on your computer. Thank you.

Okay then. So the next set of bullet points, then. We have the status quo of the domain name should be preserved. The UDRP decision ordering cancellation of transfer should not be implemented, provided that the de novo arbitration is initiated. That seems to me to be a fair circumstance, given that we are effectively talking about an appeal. The lock on the domain name should continue for the duration of the arbitration. Again, that seems to me to be fair.

The agreement to arbitrate could be concluded in a similar way as the choice in which jurisdiction. The complainant is required submit, in the standardized clause … Yeah, I think we can have that. Unless I've misunderstood that bullet point, I think actually that's handled simply by the point that Paul and I have made about you can consent at the time that you lose. I think trying to get people to consent upfront is going to be massively challenging. But if others have a different view, please speak up.

Now, the next one is submission to the arbitration should not restrict either party's recourse to a national court. And I think that's true. In other words, you can choose not to consent to the arbitration and then you can go off to your court. But to be clear, in your courts, the IGO would be able to argue they're not subject to the jurisdiction.

Arbitration is to be conducted completely independently of any prior administrative proceedings. I think we've covered that above. Now, this is interesting. Need to specify choice of law is distinct

from venue where the arbitration is to be conducted. If I understand it correctly, the choice of law is the registrant or the registrar currently, is that correct? And does anybody have a problem if that's still the case for this? Jeff, is that … Have I got that right?

JEFFREY NEUMAN: Well, the mutual jurisdiction is—today would be where the registrant is located or the registrar. And I guess I'm not sure—

CHRIS DISSPAIN: That would make sense to use that law for an arbitration, then, would it not?

JEFFREY NEUMAN: Yes. Yeah. But his goes back to the whole thing we were talking about earlier, which is that the UDRP is a different standard than the law in certain jurisdictions. So, I don't know if we want … And Brian, help me if I'm misstating this but this was something that Brian and I were kind of saying which is that we want to make sure that this "appeal" is something that's similar to the standards in the UDRP. Brian's got his hand raised so maybe he can rescue me here.

CHRIS DISSPAIN: Yeah. Go ahead, Brian.

BRIAN BECKHAM: Yeah. Thanks. I think exactly, Jeff. So, this is really … We're borrowing from, let's say, a traditional arbitration context. So, let's say, Chris, you and I have a contract and we want that to be decided under UK contract interpretation principles or Swiss contract interpretation principles.

So, it kind of treats it like a la carte and so I think that the point here really is, we're drawing just an analogy to, say "We believe that … " and I think we would largely be borrowing from the substantive criteria of the UDRP to say, "Those would be the legal principles that would apply." Of course, there's kind of a carve out in the UDRP that allows the panel to incorporate other considerations of law they would deem appropriate but it's really that choice of law means that the substance and that looks back to the UDRP criteria and the name.

CHRIS DISSPAIN: So, in practical terms, Brian and Mary, I'll come to you in a second, in practical terms, Brian, is what you're saying exactly that it would be the choice of the registrant's jurisdiction, or the registrar's jurisdiction, or could I choose any jurisdiction I want?

BRIAN BECKHAM: Right. Maybe I'm getting a little confused. I thought the question was less about jurisdiction and more about substantive law.

CHRIS DISSPAIN: I'm sorry. I apologize. That's my fault. You are confused because of me. I meant, yes, the choice of choice of law, not jurisdiction,

choice of law—the applicable law. Which applicable law? Are you saying I could choose any applicable law?

BRIAN BECKHAM: Well, yeah. That's really a discussion for the working group to have. We could say that we want Czech trademark law to apply to these cases but I think that what we really mean is that we would apply the UDRP case principles.

CHRIS DISSPAIN: Okay. I must admit that hadn't occurred to me as a possibility. Let me come back to that in a second, Mary, go ahead.

MARY WONG: Thanks, Chris. So, I did put earlier in the chat that some of these points … This is just a summary and the bullet points that you're looking at here from the staff. It might be worth those who are interested in looking at the paper itself because it does go into a little more detail on some of these items. In respect of the choice of law, yes, that is applicable substantive law.

The paper does recognize that obviously the current mutual jurisdiction options are narrower than what might otherwise be the case in an arbitration. In an arbitration, the choice of applicable substantive law is either made by the parties or by the arbitral tribunal in terms of whichever principles of substantive law are deemed applicable. So, the paper recognizes that one is narrower than the other. It recognizes also that in building out this process, you could go either way. I hope that's helpful.

CHRIS DISSPAIN: Yes. Thank you. That is helpful. So, bearing in mind that we all acknowledge that there is more work to do and there is detail required, do any of those subsequent bullet points underneath "the paper also noted the following heading," are any of those causing a red flag to anybody? Anything in there that you're recoiling from?

Okay. So, what I'm going to suggest we do, I want to come back in a moment and talk about whether we want to go to an existing arbitration body or whether we want to consider the possibility of effectively using UDRP panelists and so on. I may be making a false distinction there. I'm not sure so I'm very keen to get feedback.

But before I do that, I just want to flag that what I'm intending to do is to have … Given that we do not meet next week because we are all joyfully—well, most of us, anyway, are joyfully engaged in the ICANN policy forum—I'm going to ask staff if they will take the small group paper that we discussed at the beginning—if they will take the yet-to-be-agreed but, we understand, important principle of moving away from neutral jurisdiction point, and take the points in the arbitration that we are discussing at the moment and we'll continue to discuss for the rest of this meeting, and put together …

I get into trouble with this. It used to happen on the board. Somebody would say, "strawman." Somebody else would say "straw person." Somebody else would say "straw dog." And then we ended up settling on "straw being." So, perhaps a straw being

of what we would be looking at, if we were going to be putting out a document that said, “This is what we think we can recommend.” Mary, Steve, are you comfortable that you will be able to? It is just for discussion but I'm keen to actually put it together into one piece and see if we can have a meaningful discussion about it. Mary, Steve, do you think you're going to be able to do that, say, within a week to give us a week to think about it before we meet again on the 20th of whatever day it is in June?

MARY WONG: Steve and Berry might berate me behind the scenes for this. Yes. I think we can. Given that it's ICANN71 next week, it’s is probably going to be not as beautiful as we might want it to be but we will give you something to look at.

CHRIS DISSPAIN: Perfection is dangerous. It prevents progress. So let's not worry about how beautiful it looks. Let's worry about that we get the substantive points made. And I do appreciate that you guys will be incredibly busy next week so if you wanted it to roll it forwards to early the following week, I'd be absolutely fine with that.

So, that said, I have a question. Am I off-piste when I'm thinking that we would need to make a decision about using an arbitration body, and going to them and saying, “This is the sort of arbitration that we want. You are the supplier?” And if we did that, would we be able to say, "And these are the pool of people that you use as panelists," or would they insist on using their own? Is somebody who has experience of these matters able to talk to that? Thank

you, Jay. I always like to ask good questions, especially if I don't know the answer, although anyone who's a lawyer will tell you should never ask a question unless you already know the answer. Brian, thank you. I know it's an effort. I appreciate the answer.

BRIAN BECKHAM: It's a little hypothetical. I know in some arbitration cases that I've worked on, normally what happens is, we as a provider—and this is separate from the UDRP work that we did but we had, for instance, an arbitration involving some contracts for IT. And we had a roster of panelists where we would say to the parties, "We have this list of 10 subject matter experts. If you'd like to choose from one of those, you're free to agree between yourselves on the panelists." They actually came back to us and said, "We'd like to use this retired judge in that case." So, in my experience, there's normally … An arbitration provider would have a roster of subject matter experts but then the parties could be free to agree on an alternate arbitrator to decide their case.

CHRIS DISSPAIN: Okay. But irrespective of that, it's correct, isn't it, that there will need to be a manager? There'll need to be a provider of arbitration services who manages the process.

BRIAN BECKHAM: Correct.

CHRIS DISSPAIN: And we would need to designate that? From a policy point of view, is that the sort of thing that we should be considering? Mary, Steve? Brian, go ahead.

BRIAN BECKHAM: Yes. So, there's all manner of ways that arbitration cases work their way to a provider. Sometimes the parties would say, "If there's a dispute between us, the trademark licensee and licensor, we want to submit to arbitration under the WIPO rules. If there's a HR contract interpretation clause, we want to go to the ICC under their rules." Other times, it's not actually covered off in advance and it's done by the parties only once a dispute arises. So, there's a number of different ways that this happens. I would suggest that probably it makes more sense for the work we're doing to identify a provider in a roster of experts in advance, probably.

CHRIS DISSPAIN: Yeah. Well, I certainly think … I'd be interested in what Jay thinks as a sort of registrar representative but I would have thought that knowing, at least, that you are going to be dealing with people who understand domain names and understand the language and all of the acronyms and abbreviations, etc., would be beneficial to both sides. And it would be dangerous to be going to retired judges, as previously mentioned, not that I have anything against retired judges. Thank you. Yes, Brian and Jay agree. Excellent.

So, again, I imagine that that ICC, etc., can be … I don't think we need to say … In our recommendations, we don't just say, "And it shall be done by X." I think what we need to say is, "The process

needs to meet the following criteria. And if it does meet the following criteria and it's independent, then it's a …" Yes, exactly, Alexandra. it's an implementation matter as to who we go to. Okay. So, at the risk of going too far, let me sum up where I think we've got to.

And I acknowledge that a lot of this stuff is new. It was put up today, came today, etc. So, I know everybody needs to do some thinking about it and so on. I completely understand that. We have got a feasible solution to getting the IGOs into the process. We have discussed mutual jurisdiction and Paul has put forward an understanding that if you abandon that mutual jurisdiction, the quid pro quo for that is that you have your full day in court arbitration but you have a choice that consent doesn't have to be given at the beginning. If you lose and you choose to appeal, then you have the option to consent.

I know I'm not discussing the third leg of this, which is the possibility of a super panel, just at the moment. I'll get back to that in a sec. And we've talked about the sorts of things that we think an arbitration will need, the type of arbitration it will need to be, and the sorts of things that we'll need to do, including, as Jeff has said, cross-examination, in-person hearings and so on. And we've got staff lined up to do a straw being document that deals with all of those things. “Experts,” says Jeff. Yes, indeed, Jeff. They should definitely be experts.

So, I want to just briefly touch on Paul's suggestion before we wrap. And that is that there is an additional step. And if I get this wrong, Paul, I've no doubt you'll tell me. Alexandra. I want to say

up front, I appreciate that you've said that you don't agree and we'll come back to that to other thoughts in a second.

But what Paul suggested was an additional step. And that additional step is … Let's talk about the registrant. The registrant loses. The registrant can refer the matter to a UDRP super panel. It would be swift. It would be inexpensive. And I'm guessing, Paul, it would be not de novo but maybe it would be de novo. You need to clarify that. And if the registrant lost that and the registrant could then either go to court or consent to going to arbitration. Paul, do you want to just address my questions to whether you had intended that the super panels thingy would be de novo?

PAUL MCGRADY: Yeah. I think that my feedback's back. You guys hearing—

CHRIS DISSPAIN: Sorry, say that again, Paul. Yes, we can hear you.

PAUL MCGRADY: Are you getting that feedback or is it just me?

CHRIS DISSPAIN: No. We're not getting any feedback. We're not hearing feedback if you are now. Now we can't hear you at all.

PAUL MCGRADY: Okay. Can you hear me now?

CHRIS DISSPAIN: Yes. Brilliant.

PAUL MCGRADY: All right. Yeah. It's a comedy show today. Sorry, Chris.

CHRIS DISSPAIN: It's okay. No worries at all.

PAUL MCGRADY: Yeah. I don't think it would be de novo in the sense that the super panel would get nothing from the prior decision. I think there should be an opportunity to supplement things that perhaps the winner or loser thinks that the panel should have spent more time with. And the idea behind it is … Like I said, it's a pressure valve because it's not going to be free for the losing respondent or the IGO to do an arbitration. It's going to be months—not years but months. And then a court battle over whether or not a particular IGO is recognized in a particular jurisdiction, again, is not going to be free or fast for anybody.

And so, if there is a situation where there's a good faith dispute, neither party really wants to spend gobs of money on it. The IGO, maybe for strategic reasons, doesn't want to force the issue to have a particular court where that respondent sits, test, their immunity—because that could go south and could affect all kinds of things. So, there could be a pressure valve here.

If the IGOs are telling us that they don't want it, great. I see lots of benefits for them to have that pressure valve and there's certainly reasons why a respondent would want to hear it. Maybe we can hear from Jay. But if Jay says, you know, the respondents don't want it either, then dead issue. We'll drop it and move on. But if the pressure valve has some benefits, I think it'd be a relatively easy thing to build out. Thanks.

CHRIS DISSPAIN: Thank you. What I think you're saying is put in place an opportunity for a widened group of panelists to consider the same facts, with maybe the right to launch into some additional documentation. What you're saying is, the incentive is, "Look. If you fail on that, then at least you've had an opportunity to have it reconsidered and you haven't had to spend a fortune by going to court or going to arbitration," and I get that. I think the other side of the coin is that it's an additional process and who's to say that people won't just simply say, "Well, of course I'll do that and then I'll do the next thing as well." However, I take your point.

What I'm going to ask you to do, Paul, because I don't want this … Staff don't have any of the information about this. So, what I'm going to ask you to do is separately from their document, could you just do a simple overview of how you think it would work and get that out to the list within sort of a week or so, if you've got the ability to do that? Because I think we can then slot it in and we can discuss it in the context of the staff document. But you can provide the detail because you've got the pen on that. Is that okay?

PAUL MCGRADY: That's fine enough. I'm putting it here in the chat. Happy to do it but also would welcome others who want to contribute on this. It'll just be a better strawman.

CHRIS DISSPAIN: Sure. Okay. I'll let you work that out but we'll run that as a separate track for the moment so that we don't confuse the issue and we don't get tied up in knots over something that may or may not be able to be slotted in. Okay. All right. So, I think we have got a way forward for managing the time between now and when we meet again and managing it in a positive way that makes, I'm hoping, real progress. It is dependent on staff being able to put the document together, the straw being together. And I appreciate the pressures that existvaround that but we'll be flexible on that.

I don't think there's much to be gained by continuing this discussion much further, unless there are matters that any of our Work Track members would like to raise. Okay. Seeing none, then I'm going to check in with Berry if there's anything you need to raise, Berry?

BERRY COBB: All good. Thank you.

CHRIS DISSPAIN: Excellent. Mary, Steve, anything you need to raise?

MARY WONG: Not from me, Chris. Thanks.

CHRIS DISSPAIN: No problem. And I'll take Steve's silence as being he doesn't have anything either. Once again, a really huge thank you to the small team that did all the work on the final exercise. Thank you to everyone for being willing to be constructive. And let's get the document out to everybody in the next 10 days so that we can have a meaningful discussion on the list and then when we meet again on the 21st of June. And with that, I will call the meeting to a close and thank you all for coming.

MARY WONG: Thank you, Chris. Thank you, everybody.

TERRI AGNEW: Thank you everyone. Once again, the meeting has been adjourned. I will stop the recording and disconnect all remaining lines. Stay well.

[END OF TRANSCRIPT]