
ICANN Transcription

IGO Work Track

Monday, 08 March 2021 at 16:00 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 8th of March 2021 at 16:00 UTC.

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

Hearing no one, we do have listed apologies from Paul McGrady and Vanda Scartezini. And joining a little bit later today will be Jeff Neuman. We have no alternates formally assigned for this meeting.

All members and alternates will be promoted to panelists for today's meeting. Members and alternates replacing members, when using chat, please select All Panelists and Attendees in order for everyone to see the chat. Attendees will have view to chat access only.

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Alternates not replacing a member are required to rename their lines by adding three Z's to the beginning of your name, and at the end in parenthesis "Alternate" which means you are automatically pushed to the end of the queue. To rename in Zoom, hover over your name and click Rename.

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

As a reminder, the Alternate Assignment Form must be formalized by the way of the Google link. The link will be placed in all meeting invites towards the bottom.

Statements of Interest must be kept up to date. If anyone has any updates to share, please raise your hand or speak up now. Seeing or hearing no one, if you do need assistance updating your Statement of Interest, please e-mail the GNSO secretariat. All documentation and information can be found on the IGO Work Track Wiki space.

Please remember to state your name before speaking. Recordings will be posted on the public Wiki space shortly after the end of the call. As a reminder, those Who take part in ICANN multistakeholder process are to comply with the accepted Standards of Behavior.

With this, I'll turn it back over to our chair, Chris Disspain. Please begin.

CHRIS DISSPAIN: Thank you, Terri. And welcome, everybody, to our meeting today. We've got a reasonable number of people here, so that's really good. And thank you all for making the effort to attend. It's very much appreciated.

We've got a simple agenda today, apart from me saying hello and all of that stuff. It's level-setting and options for discussion, and then an open discussion. So, I'm going to get straight into it, if I may, simply by telling you where I think we got to last week, or my interpretation of where we got

to last week. This is not set in stone at all, of course. It's just what I think. But hopefully, if we can settle on level-set on where we're at, we'll then be able to move forwards.

In essence, where I think we got to was sort of an understanding along the following lines. We talked about the fact that Recommendation 5, which is the key or the core of what it is that we're supposed to be looking at, is very much an end-of-the-road recommendation. In other words, it's relevant only once a whole heap of things have happened.

There's been a UDRP. There's been a finding. There's been a claim by the losing registrant to go to national jurisdiction. There's been an argument in that national jurisdiction, and the IGO has maintained that it's not liable to the laws of that jurisdiction. And the court has agreed with them.

And we could spend a heap of time discussing ways of fixing that so that it would be a recommendation that is acceptable to the GNSO and, as a stand-alone recommendation, one that's acceptable to the IGOs.

Where we got stuck-in last week—not stuck, but stuck-in last week—was the discussion about the fact that making recommended changes to that recommendation is only relevant to the bigger picture if we're in a situation where we can see ways of getting the IGO claimant into the funnel of the UDRP in the first place.

And we discussed the difficulties around the scope, and we discussed the challenges of the boundaries. And we talked about an understanding that there may be a way that we could tweak the previous recommendations rather than make wholesale changes to them. And if there were ways that we could tweak those recommendations, then we should consider those.

And we also discuss the fact that we may be very quickly at a point where we actually need to go back to the GNSO Council and say to the Council, “Is it okay if we discuss these various different aspects that may move beyond tweaking?”

So, the way that I see it is this. If we're in a situation where the IGOs were prepared to step into the funnel of a UDRP and we were talking about tweaking Recommendation—I think it's

Recommendation 2, but Mary will correct me if I'm wrong—to say that instead of the registration in 6ter being a possible right to bring a UDRP, subject to the panelists agreeing, but that that became a standing right, we probably felt we could in all fairness call that a tweak rather than a wholesale change. And if that were the case, it may be that we could move on from there.

And a couple of challenges arose in that discussion. And those challenges included whether or not we actually thought that was in fact a tweak, and perhaps more importantly whether the IGOs would agree to enter into the funnel on that basis or if we were actually talking about more wholesale changes being required to get them into the funnel. And, in fact, there was also the question of whether that change to 6ter was [a lot better] to be acceptable to some governments as well.

That, I think, is where we have got to. And I would now ask anyone who wants to make any comments about that or doesn't agree or whatever to raise their hand and we'll see if we're all at least on the same page that that's the state that we've reached. Anybody want to make any comments?

I can see ... Carlos your hand is up. Greetings, Carlos. How are you? Carlos, we can't hear you. You must be on mute.

KAVOUSS ARESTEH: Excuse me. Do you hear me?

CHRIS DISSPAIN: Kavouss, I can hear you but your hand is not up. I'm waiting for Carlos to speak.

KAVOUSS ARESTEH: Okay.

CARLOS RAÚL GUTIÉRREZ: Can you hear me now?

CHRIS DISSPAIN: Yes. I can hear you, Carlos. Go ahead.

CARLOS RAÚL GUTIÉRREZ: I apologize for missing the initial meetings, Chris. I'm sorry about that. I will try to stay on track now. I'm just reading these notes on Recommendation 2, and I have a very stupid question. Under which jurisdiction should the IGO go for this Recommendation 2? Thank you very much.

CHRIS DISSPAIN: My understanding is that it's the registrant's jurisdiction, but I may be wrong about that. Mary, can you enlighten us on the correct answer that question before we move on to the next person who wants to speak?

MARY WONG: I'm sorry, Chris and Carlos. Was the question about the jurisdiction that—

CHRIS DISSPAIN: Yeah. I think the question was who decides what the jurisdiction would be if a losing registration wanted to bring a claim in a jurisdiction.

Mary Wong: I see. As opposed to when the complaint is brought under the UDRP in the first place, yes. Then it would be the registrant who would bring the claim presumably in a court of competent jurisdiction. But [it's] not prescribed by the UDRP, obviously.

CHRIS DISSPAIN: No. Okay. We can come back to more detail on that in a second. Brian, I can see your comment in the chat and I'll get back to that in a minute. Kavouss, your hand is up. Please go ahead.

KAVOUSS ARESTEH: Sorry. I did not quite understand. Sorry, but good morning, good afternoon, good evening. I didn't quite understand what you proposed. You take Recommendation 2 and then from that, what did you propose? Thank you.

CHRIS DISSPAIN: Thank you, Kavouss. I didn't propose anything specifically. I was making a statement of where I think the discussion got to last week. And I was saying that the question we were butting up against last week, the question that we were trying to deal, with was whether or not we are needing to go back to the GNSO and effectively ask for consent to open up a much wider discussion because the current Recommendations 1 and 2, even given a small tweak—that small tweak being lifting the right to bring a claim because of 6ter from an individual panelist's decision to a standing right—was enough to bring the IGOs into the funnel.

But that's just where I think we got to and, Susan—thank you—your hand is up. Please go ahead.

SUSAN ANTHONY: No, you will not thank me for having my hand up.

CHRIS DISSPAIN: I will always thank you for putting your hand up, Susan [inaudible].

SUSAN ANTHONY: I do believe that what you have just shown us, which has now left my ... Thank you. I do [inaudible] it is a correct—

CHRIS DISSPAIN: Can we put that back up again, please? There we go.

SUSAN ANTHONY: Thank you. It is the correct summary of where we are. I still find Recommendation 2(b) to be absolutely ... It is the correct statement, I believe, of where the GNSO Council ended up and where we are ending up, but I don't believe that the panelists can make such a decision because the UDRP has not been reviewed or revised in that fashion.

But I raised my hand to take perhaps a somewhat different path this morning, this afternoon if possible because I fear ... As I thought about where we were last week, I fear we're going round and round the maypole and I don't know that we're going to get anywhere by continuing to do so.

I also fear that if we were to go back to the GNSO Council, they'll say, "I said what I said," and that will be that. We've also been down that road before. So, perhaps, and this is radical. I don't know whether others would agree. Perhaps we could just get to the business at hand to figure out what we would like to see, setting aside for the moment the strictures in which this working group finds itself—the GAC advice, etc.

Why don't we just put things to one side, put our blinders on for the moment to figure out how would we solve the problem if, indeed, we could? That is my suggestion.

CHRIS DISSPAIN: And Susan, if I may just to clarify. When you say “solve the problem” you mean solve the bigger problem not just solve the problem of redrafting Recommendation 5. Is that what you mean?

SUSAN ANTHONY: Yes, how do we ... Well, the GNSO Council has asked us to look at Recommendation 5. I think several of us have said that we have problems with the other recommendations. We also have problems with [inaudible] that we must look exclusively at 5 and cannot look at 1-4 and revisit 1-4 when [at least] myself thought we could revisit 1-4.

My suggestion is, we have an issue. We have a problem: the IGOs and what protection, if any, they should receive and how they should receive it for acronyms. How would we solve that if we could solve that? Setting [aside] other constraints which we can talk about until the cows come home, but I fear we [inaudible] get anywhere.

CHRIS DISSPAIN: Okay. So, thank you. And for my position, from my point of view, I have no ... If this work track wants to pick up that suggestion and have a, let's call it a just a full-blown discussion on fixing a proposal for curative rights for IGOs which would in turn also, obviously, have the effect of fixing Recommendation 5. I'm very comfortable and happy to leap to chair that process if that's what everybody wants, or if there is consensus that that is what we should do.

But what struck me from the discussions that we had last week was that there were some members of the working group saying, “Well, no. Hold on a second. All we're being asked to do is to look at Recommendation 5. You can possibly tweak a couple of things at the top end if you need to, but going back and reopening 1-4 is out of scope.”

And that's where I'm trying to get us to reach some sort of agreement because we talked about the fact that if we decided that we felt it was out of scope—and I know I'm paraphrasing here, that might not be the correct term—that it was open to us if we wished to do so, to go back to the

GNSO and say, "Look. Fiddling around with Recommendation 5 is a meaningless exercise if we haven't got an opening at the beginning that allows the IGOs to get into the UDRP in the first place, or a separate UDRP which we also talked about." And Jeff, you had mentioned that in passing.

So, I agree with you. I take exactly what you're saying. We can do that if there is agreement in this group to do so. And I'm game to chair it if that's what everybody wants, the best way that people want to move forwards.

Jay, you're next.

JAY CHAPMAN: Thank you, Chris. I hope you can hear me okay. I'm in transit, unfortunately.

CHRIS DISSPAIN: Yes. I can hear you really well.

JAY CHAPMAN: Excellent. Hello, everyone. I appreciate the time and the discussion. I tend to fall exactly, I guess ... I thought Susan was going in the direction that I was thinking, but it sounds like we kind of ended up in a situation or with an idea that we start trying to come up with ideas for which we're not really ...

At this point, we have no mandate to try and resolve. And so, to start out trying to solve a problem that we ... At this point we know we have, really, no direction to do. To go down that path, spend all the time associated with it only to come up with, at some point at the end and use all that time and then be told "no" which, like Susan, said seems to be a distinct likelihood, I just ...

I've been in too many working groups in the last four to six years and really have ... Personally, I don't have a large desire to jump into another multi-year situation. It seems like our directives are

very narrowly prescribed, and at this point ... I'm willing to listen and hear what others' ideas are, but at this point I fall into the line of, I'm somewhere between staying on the path that we were given.

To some extent, I kind of understood a little bit about what Jeff has said. With regard to the standing issue, I do think Recommendation 2 from the prior working group resolves a lot of those issues just with the agent nominee concept.

But at any rate, regardless, at this point I firmly believe we should stick to the path that we were given. And if we're going to focus on solving a problem, let's focus on solving the one that we were asked to solve. And then if there ends up being consensus or enough interest in trying to go back to the GNSO and ask for further clarification or get, as somebody said, just kind of finding out if we can make this ... There's a lot more to talk about here. Well then, at that point, maybe we could do that. But that's just kind of where I stand right now. Thanks.

CHRIS DISSPAIN: Thanks, Jay. Can I just test you on a couple of points, if I may? I understand exactly what you said. How would you feel about, leaving aside Susan's point that it's possible that we'll get a straight "no." You have said it's possible we will do a bunch of work and then be told, "But you've got no standing to do this work," and so we'll get a "no" there. Perfectly valid point.

How would you feel about the possibility of going back to the GNSO? Would you be prepared to agree to going back to the GNSO at this stage and saying, "We think we need to open up what we're looking at in order for us to be effective"? Or are you saying you wouldn't accept that position?

JAY CHAPMAN: Yes. I appreciate that question. It's a valid question, Chris. At this point, I don't know what the question would be. We've kind of danced around a few different things, but I

think until we have a firm grasp on what it might be or is and how that's delineated ... I mean, I think there's a lot of questions here. I don't want to ...

I guess where I'm coming from is at this point, I have no desire to open up ... I just don't want to open up a whole new universe of questions and issues and things that are, at this point, still quite unclear as to what it is some in this work track would want to see. At this point, I would say no, if that the simple answer to your question.

CHRIS DISSPAIN: That's fine. I know you're always open to be persuaded. I just wanted to get a position of where you are right now. Thank you. I appreciate that enormously.

I have Jeff, then Kavouss, and then Carlos. Jeff, go ahead.

JEFF NEUMAN: Yeah, thanks. Sorry for earlier. I joined a little late. I had a dentist appointment that went over.

I think that there are ... What we need to come to agreement first is what the actual "problems" are. And the only problems that I was able to discern from the last call that were related to the curative rights specifically for IGOs was the standing issue and the IGOs subjecting themselves to jurisdiction and unintentionally waving sovereign immunity. Those were the two issues.

The other things, and I know Brian brought up a whole list of them, but those were issues, generally with the UDRP, that should be referred to the Rights Protection Mechanism Phase 2 which is specifically reviewing the UDRP.

So, I'm not sure. I'll ask Susan, maybe, the question. What are the other problems that you think we need to address other than the standing issue and the not subjecting itself to waving sovereign immunity?

CHRIS DISSPAIN: Thank you, Jeff. And perhaps we can circle back and look at that question. Well, of course, anyone's entitled to talk to it. But Kavouss is next and then Carlos. And then I'll come back to that question and see other people want to comment on it if Kavouss and Carlos haven't already Kavouss, go ahead, please.

KAVOUSS ARESTEH: Yes, Chris. I didn't understand the person or yourself saying that going back to the GNSO and asking, what, after two or three meetings. What is the issue that you want so immediately before going further to find whether there are some alternatives to address those difficulties which were identified by GNSO and others in Recommendation 5? You go back to GNSO and ask what? I didn't quite understand what we are going to ask from GNSO.

CHRIS DISSPAIN: Thank you, Kavouss. Let me try and make it clear. And I apologize if I wasn't clear before. The basic premise is that trying to fix Recommendation 5 is a meaningless exercise if the Recommendations 1-4 mean that the IGOs cannot and will not utilize the UDRP. Because Recommendation 5 is a recommendation that deals with what happens at the very end of a process.

And if the IGOs won't/can't use the beginning of the process or even get into the process in the first place, fixing Recommendation 5 isn't a meaningful exercise. So, what we discussed last week was the possibility of effectively saying that—not necessarily in those terms—but saying that to the GNSO and saying, "In order to be able to meaningfully fix Recommendation 5, we actually need to look at tweaking or amending or changing Recommendations 1 or 2 or 3 or 4." Or we specifically talked about 1 and 2.

That is what we discussed in outline last week and what I was attempting to summarize today to see whether people agree that that is where we had got to. Not that that's what we should necessarily do, but that's where we had got to.

Carlos, you're next.

CARLOS RAÚL GUTIÉRREZ: Thank you very much, Chris. To Susan's point, I need to understand how far back do you want to go? In my time in the GNSO, there were proposals to solve these issues. And the problem on Recommendation 5 was that there was no agreement on those recommendations under international law.

So, I think your suggestion is very interesting, but I need to understand how far back are we going. To the final decision of the five recommendations? Or are we going in earlier times? That's, for me, a very important issue.

Thank you very much, Chris, number two, for the explanation of the tweaking. I see clearer now. I still see a difference between tweaking and boxing us back into the UDRP. Boxing us back into the UDRP without a possible new solution ... It's a waste of time to go to the GNSO. I spent enough time there to ... Unless they have changed everybody's brains, it would be a waste of time.

But I think that these tweaks as a way to present a way out sounds interesting. I need to digest more. Thank you.

CHRIS DISSPAIN: I understand, Carlos. And thank you very much. Kavouss, you've raised your hand again. Please go ahead.

KAVOUSS ARESTEH: Yes. I understand now that it is suggested that in order to address the problems/difficulties in Recommendation 5, we suggest that if everybody agrees, if there is consensus, we go back to the GNSO and say that the problems/difficulties raised or addressed or identified in Recommendation 5 could be addressed in Recommendations 1 and 2. In that case, we don't need Recommendation 5. Am I right? Or I'm wrong?

CHRIS DISSPAIN: It's not that we wouldn't need Recommendation 5, Kavouss. It's a discussion on the possible way of fixing Recommendation 5 which is currently a circular recommendation. In other words, it means if something happens, you go back to the beginning. If it happens again, you go back to the beginning. In other words, there is no actual solution or "get out" from Recommendation 5, which is why the GNSO said that they weren't prepared to accept it.

It's not that we wouldn't have to do that work, it is that we would be tweaking Recommendation 1 or 2, we would be having a meaningful discussion because the IGOs would actually have to be prepared to come into the UDRP mechanism in the first place. Whereas at the moment, they say they can't because the way the recommendations are currently drafted makes it impossible for them to use the process.

Now I'm paraphrasing here. And if I misunderstood, then perhaps somebody like Brian or Susan could step in and explain that I have, in fact, misunderstood. But if I've got it right, the current situation is that Recommendations 1-4 make the UDRP process unworkable for the IGOs.

There is a small possibility that they might be prepared to accept 6ter as a reason for standing. We haven't got that far yet, but we have talked out it in outline. Susan has some concerns about the use of 6ter on that basis, but expressed a view last week that she may be prepared to continue having the discussion on that along those lines. And Brian, I don't believe, has said one way or the other whether the use of 6ter would be acceptable as standing to get into the process. But those are the things that we talked about as being tweaks.

We also looked at the possibility of completely opening up Recommendations 1 and 2 and saying, “What we’re actually talking about is effectively a parallel process.” And I think we all agreed—well, I think most of us agreed anyway— that to do that would definitely be beyond a tweak and would certainly need a return to the GNSO to ask them if they were comfortable for us to do that. I hope that makes sense.

Yrjö, your hand is up. Go ahead, please.

YRJÖ LÄNSIPURO: Thank you, Chris. Yeah. What I understand is that solving the problem of Recommendation 5 actually is a theoretical exercise if, in the first place, it’s impossible or very difficult for an IGO to get into the process. That is to say the UDRP. So, in that sense, I would support Susan’s approach.

My question is, to do that, do we have to go now back to the GNSO Council and ask for permission? Or can we actually work on a solution that would include [Recommendations] 2 and 5, and then go back and say, “Hey, this is the solution we propose and it goes beyond the [remit, etc.]”?

CHRIS DISSPAIN: Yes.

YRJÖ LÄNSIPURO: Thank you.

CHRIS DISSPAIN: Yrjö, thank you. And I think that’s precisely the point. The answer is I think we can pretty much we can do that if we choose to do so. We can say, “We’re going to have that

discussion”—that’s our context.
“We’re going to have the discussion in that context, and we’re going to seek forgiveness later.”

But Jay’s point ... And other people started to make this point last week as well. Jay’s point is, at the end of the day you do all that work, what is the standing of what we have done if our scope of work—our charter, if you will—if what we’re doing is outside of that? And, as we know, one of the boundaries that’s been put in place for this work track is not to make changes to the other recommendations.

So, I’m game, as I said. Absolutely, we can do that if this group wants to do it. We can do it and I’m happy to do it. But we would need to agree amongst ourselves or certainly get consensus that this was an acceptable way forwards. And we may well find that at the end—we may find at the end of the process—that what we have done doesn’t go anywhere because the GNSO says, “But hang on a second. That is out of scope.” I’m not saying they will say that. I’m just saying they might. I hope that’s clear.

Kavouss, I’ve got your hand again. Then Susan.

KAVOUSS ARESTEH: Yes. Sorry if my hand is again. I believe [inaudible]—

CHRIS DISSPAIN: [inaudible]. You speak as often as you like.

KAVOUSS ARESTEH: Excuse me. Do you hear me now?

CHRIS DISSPAIN: Yes. I can hear you very well. Carry on.

KAVOUSS ARESTEH: Yes. I was going to say is it too early to go to the GNSO? It may be said that you have not tried all paths and all avenue alternatives, and you immediately come back to that. So, perhaps we should try to use the option that was indicated to go to GNSO more or less as the last resort if you don't find any other alternative to address the case. Thank you.

CHRIS DISSPAIN: Thank you very much, Kavouss. Susan, you're next.

SUSAN ANTHONY: I agree with Kavouss. And I raised my hand only to clarify what I think I said, or at any rate to say what I meant to say. I was simply trying to free up our thinking because, at least for myself, I could spend all the time poking holes in Recommendations 1-4, at least in 2(b). And I could spend all my time wringing my hands like Lady Macbeth that there's simply nothing to be done. But I don't think that this is fruitful for this group, and I also am not convinced that going back to the GNSO Council, at least at this time, would [inaudible] anything. They would simply say, "We said what we said."

I am not proposing that we go back to the beginning of time. I am not proposing that we start all over. I thought starting over would take us back to 2012. There are others who say it would take us back to 2001. Definitely not.

I'd like to focus on Recommendation 5. But I would also like to point out something that Jeff Newman had said, I thought, last week to make sure that I was clear on what he did say. As I look at Recommendation 2(b)—thank you—the difficulty for an IGO is that we agreed ... I think Jeff called it entering the funnel or entering the portal.

The way that the GNSO Recommendation 2(b) is currently written, an IGO wouldn't know whether or not it could be in the funnel because a [UDRP] panelist or URS panelist could decide that 6ter

is not a basis for standing. And so then, the IGO is not in the funnel, so we can't even get to Recommendation 5.

You all know my problems with 6ter, but let's set them to one side. What I thought Jeff Newman had said last week—and Jeff [tell me] if I'm wrong—that perhaps one way of looking at this is just taking the list of the IGOs that we currently have and saying these IGOs, this list is permitted to enter the funnel. Some of you would be quick to say, "Wait a minute. That's tinkering, and that would require GNSO Council buy-in."

And I appreciate that, but let's just try to get past this for the minute to figure out what we could do with Recommendation 5 because Recommendation 5 [has] been a recommendation that has been debated for years. And if this group were to come up with something that made sense, I think others might say, ["Hallelujah!"] And we might be able to make tweaks where we needed to make tweaks to the extent that tweaks are needed.

CHRIS DISSPAIN: So, Susan. Thank you. That's incredibly helpful. I know Jeff's got his hand up. I just want to address that point before I go to Jeff.

I agree with ... I mean that's immensely helpful. Where I'm struggling is to be clear that doing that would be enough. So, I'm comfortable to say we are ... By tweaking to 2(b) to lift 6ster to standing, or to say let's not worry about 6ter. Let's just tweak the GAC's list of IGOs as the GAC's list of IGOs. And those are the ones who are entitled to use this process.

I'm comfortable to proceed on the basis that we could then, if we agreed that as a sort of caveat or prerequisite of our way forwards to deal with Recommendation 5, to proceed on that basis knowing that would still have to go back to the GNSO at the end and they would need to accept that.

But my question for the IGOs is, is that enough to get you into the funnel, to get things started? So that we can have a meaningful discussion about Recommendation 5 because when we started

the conversation last week, I think it might have been Brian but there were a number of people who came up with a raft of different issues that, I got the impression, was being said needed to be dealt with.

So, perhaps if Brian and others might be able to—I can see Brian's hand has just gone up, so that's great—address that point, then we'll be able to move forward from there.

Jeff, you're next.

JEFF NEUMAN: Yeah. Although I might just defer to Brian, I agree with Susan that the problem with Recommendation 2 and getting it to the funnel was that it puts a UDRP panelist in an awkward position of having to determine the legitimacy of an IGO where, if we can come up with some objective criteria, that would be much better, I think, in the long run.

And then I also agree with Susan on looking at that 6ter list or trying to work on that and then going to [Recommendation] 5. Those, I think, we're the only agreed upon problems, but let me stop and defer to Brian because I think he's got his hand raised. Okay. Thanks.

CHRIS DISSPAIN: Sure. I'll go to Kavouss first because he was next, and then to Brian. Kavouss, go ahead.

KAVOUSS ARESTEH: Yes. May I suggest we take both suggestions into account in a stepwise manner, a stepwise approach. Step one would be we try to attempt or make every effort to address the difficulty or deficiency of Recommendation 5. Should we not succeed to do that, then we go to what was proposed by someone to leave it, [Recommendation] 5, and go to possibly

address the problems in Recommendations 1 and 2. But not take one and put the other totally aside. But do it in two steps. Thank you.

CHRIS DISSPAIN: Okay. Thank you, Kavouss. Brian. I can't hear you, mate. I've got you now.

BRIAN BECKHAM: You can hear me now?

CHRIS DISSPAIN: Yes, I can.

BRIAN BECKHAM: Okay, good. Thanks everyone. I think this is going in a positive direction, and I wanted to both kind of zoom out and then also focus in on a specific question that Jeff has [inaudible].

SUSAN ANTHONY: We can't hear you.

CHRIS DISSPAIN: We've lost you again, Brian. Sorry. You're not on mute, but we can't hear you. Still can't hear you.

TERRI AGNEW: Chris, I see where he said he's going to try to dial in, so it may just be a moment.

CHRIS DISSPAIN: Oh, okay. I'm sorry.

TERRI AGNEW: That's okay. And, Brian, I see where you reconnected. So, we'll go ahead and see if that audio connection worked for you.

BRIAN BECKHAM: Thanks. Can you hear me now?

TERRI AGNEW: We sure can.

CHRIS DISSPAIN: Now we can hear you.

BRIAN BECKHAM: Okay. I'm very sorry about that.

CHRIS DISSPAIN: That's all right.

BRIAN BECKHAM: I wanted to try to kind of first zoom out and just sort of see where we were. I think it's been very productive. So thanks, Susan, for kicking us off on this conversation. And then I'll also try to zoom into a specific question that Jeff has raised, and then just sort of mention some of the things that I mentioned last week.

So, I think we're all aware that we're here because there's been an issue identified where IGOs can't access the UDRP for various reasons. And along the way, over the years, there was GAC advice issued on this topic. There was a GNSO PDP initiated, and the output of that PDP and the GAC advice didn't match. So, we were in this recast to see if we can unlock that.

So, that's kind of, as I see it, the big picture here. In terms of the specifics, I don't think we're talking about a lot. We've got on the table the standing, the appeals jurisdiction issue. And then one other one I mentioned last week was the ... Under the UDRP, you're required both to prove registration and use in bad faith. And that has caused some consternation and UDRP cases over the years. And rest assured, for those of you who follow the rights protection topic more generally, this is going to be a very big topic, if not the central topic in the UDRP Review that's set to kick off, it looks like this year.

So, in terms of the standing, one of the one of the potential issues that comes up with just relying on the 6ter list ... And I think Jeff is right to say that it puts a panelist in an awkward position, potentially, to have to assess whether an IGO would actually have standing to get into the funnel as it has been said here. There are some bodies or programs within IGOs which are out there doing work in the public and yet are, for different reasons, either not in the 6ter list or haven't gotten into the 6ter list or are unable to get into the 6ter list.

It really gets us into the nitty gritty, but I can share, for those of you who are interested, some links to some FAQs on the WIPO website as to what qualifies and what doesn't qualify to actually get an IGO name or identifier onto the 6ter list. The bottom line is [that] it's not just a simple process of someone comes and says, "This is my name," and you're on the list and there you go. There's a little bit more nuance in that.

So, one of the concerns that was raised was that there may be programs or activities of IGOs that out there doing work or providing services to the public that, for different reasons, wouldn't be on that 6ter list. So, I don't have a solution to that. I just wanted to raise that as one of the potential issues with just relying on a 6ter list. Then, of course, we all know well about the jurisdictional question. Then there's the and/or question.

And the items that I listed last week. So, I mentioned a few things like possibility of mediations or the different composition of panel rosters, the composition of panel appeal rosters—things of this nature—changing the burden of proof to actually raise the burden of proof from what's currently in place for the UDRP, changing the substantive criteria from what's in the UDRP to make it much more narrow to where the conduct that we're actually looking to address goes to really where someone's attempting to masquerade—I'm using just kind of a generic term—but masquerade as an IGO to defraud the public.

But those things that I mentioned ... To Jeff's question or the group's question, I want to be clear that those weren't things that were seen as necessary items to get to a solution here. Those were actually things that, when this was discussed over the course of the past working group with different members of the community, those were actually seen as things that would bring balance to a curative mechanism here that would actually—I don't know how to quite put it—but bring balance that would actually get to that question.

One of the questions before us is that we don't want to foreclose registrants' rights during this process. Right? And so, all of those things that I mentioned—the early mediation, just to give you a simple example—would be ...

Sometimes we see in UDRP cases that are filed particular content that a trademark owner takes issue with. And the registrant might write in and say, "Oh, gosh. Had I known that you didn't like that link or something, I'd be happy to take that down." So, it's something short of divesting someone of a domain name, but changing what's being presented to the public so that there's no infringement or risk of impersonation, something to that effect.

So, those were things that I was mentioning not in terms of being necessary from an IGO perspective to get to a solution here, but actually ideas that it was thought would bring balance to the process. And, importantly, if we look at this question and ... So, this is really the gist of the answer to your specific question, Jeff, what else is missing? It's really that and/or situation. So, the UDRP requirement today is that the domain name both be registered and used in bad faith.

And the dilemma there is that if you have a domain name registered in, let's say, 1995—and I'm using a UDRP example. But let's say a brand like Facebook comes along many years later, and then the registrant uses that domain name to openly infringe or defraud users on the heels of the reputation and goodwill in that trademark. Well then, the trademark owner under the UDRP is in a bind because they are not able to prove that the domain name was registered in bad faith. So that would be, I think, pretty much the third leg of this tripod, to put it that way—the standing, the appeals, and the criteria of bad faith.

The things like the higher burden of proof, the more narrow standards, the different appeals, the panel composition, for example. There was an idea floated of people would have the ability to challenge certain panelists that they didn't think they would be fair. Or the roster of potential panelists would be much narrower. Or you could have, as I mentioned, that mediation component.

Those were things that were really seen to balance the process because, to be frank, this question of the “and” and the “or” is a new one. It's one that UDRP panelists have wrestled with over the past 20 years. And, as I say, it's certainly going to be a hot topic in the UDRP Review. So, I guess the point is if we notice it's an issue in the UDRP, we can without too much imagination look into the crystal ball and see that it could be an issue here.

And so, I suppose the takeaway is, here, kind of picking up on the path that Susan put us down. Why work on—if I can put it this way—kind of a half solution if we're leaving an important element out? If we're going to address the problem statement that's before us, let's look at the three pillars that have been identified and see where we can get ...

I hope that's helpful. Thanks.

CHRIS DISSPAIN: So, Brian, thank you. I was with you until you started talking about the and/or because, as you quite rightly just said, that's a matter for the UDRP Review and is not an

issue that is IGO-specific or specific to the IGOs being able to utilize the UDRP or, for that matter, a parallel process.

So, could you briefly address why you would not say that that's a step too far? Just to use a sort of simple term, I would go into battle to say that the use of 6ter as a right in standing, or possibly even the use of the GAC list as a right of standing were things that we could build our work on Recommendation 5 around because we could say, "Our caveat for a solution on Recommendation 5 is that the IGOs have to be able to get into the game in the first place. And frankly, unless you fix this, they're not going to be able to get into the game."

But I don't see how that applies to the and/or which is a problem for everybody, not just a problem for the IGOs.

BRIAN BECKHAM: Yeah, I know. Thanks, Chris. It is a problem for everybody. And like I say, it's going to be probably the number one topic discussed in the UDRP Review. And so, the point here is that if we know that's going to be an issue in the UDRP Review and if, all things being equal, our starting point is, let's say, taking a cut and paste of the UDRP to look at a possible solution here—and there are one or two things that have been identified already and another one which is causing problems in the UDRP and we know will be the focus of serious attention in that working group—then it seems appropriate to also include that in the conversation here.

CHRIS DISSPAIN: Okay. Thank you. Susan, you're next and then Kavouss. Susan. Susan, you're on mute. We can't hear you. There you go.

SUSAN ANTHONY: I have a problem. Big fingers and small buttons. I just wanted to clarify, when I said, "import a list," what list I meant to import. We have a GAC list, the list that we've been

working with for some years now whether we're talking full names or acronyms. That's the list I was talking about.

I was not talking [about] importing a list of 6ter IGOs, of IGOs that have received confirmation of an IGO recordation in a particular country. Because I can tell you that how countries review requests for IGO recordation varies widely and wildly. And I don't think that is anything with which people should be comfortable. So, I just wanted to make sure that nobody misunderstood what I meant when I said "list."

CHRIS DISSPAIN: Thank you. Appreciate it. Kavouss.

KAVOUSS ARESTEH: Yes. I enjoyed very much of the, I would say, interesting information provided by Brian. But I think, rather [than] go through such very useful but detailed explanations, perhaps we should look to put some, I think, more concrete proposal in the two steps that I have suggested. I don't know whether you agreed or not. [inaudible] take both of them in step one to address the difficulty of Recommendation 5. And step two, if not succeeded in step one, go to see whether we could address the issue in Recommendations 1 and 2, whatever is possible. And then take forward.

So, I suggest that colleagues perhaps propose a more concrete suggestion of either of these two ways rather than describing the problem. So, at least even less knowledgeable persons like me that are familiar with the problem, so we don't need to remember again or remind again the problem. So, we should have a concrete suggestion, if in any of these two steps, what are the possible ways to address deficiency/difficulty/shortcoming of Recommendation 5 to resolve the issue? And what are those for the Recommendations 1 and 2, one after the other. Thank you.

CHRIS DISSPAIN: Thank you, Kavouss. I appreciate the constructive suggestion that you've just made. I'm going to make a slight tweak to it, maybe, and see if we can move forwards.

What I would suggest is that we do the following. That we agree that our discussions on Recommendation 5 are going to be caveated or sit underneath an umbrella of us saying to the GNSO that, in order for our conclusion in respect to Recommendation 5 to be meaningful, either there needs to be a tweak to Recommendation 2 to give 6ter a standing; or a change to Recommendation 2(b) to say that standing comes from being on the GAC list. And, Susan, I'm clear on what we mean by the GAC list. So, let's take that as [read] for now.

And that we don't spend our time discussing, at the moment at least, which one of those two it could or should be, but that we agree amongst ourselves that, for now, one of those—or both of those, even—could go to the GNSO as caveats, as our saying, “Here's our suggestion of solving Recommendation 5. But we're also saying in order for this to be of any use to anybody, you also need to do that to do one of the following two things.”

On that basis, are we prepared to move forwards and start a discussion about how we would deal with Recommendation 5? [That] is my question. Perhaps better put, does anybody object to us moving forwards to discuss ways of resolving Recommendation 5 on the basis that I have just suggested? Does anybody object to that?

I can't see any hands up which gives the impression that nobody objects, which is fantastic. Okay. So, I'm going to take it that this group has agreed in principle—in principle, nothing set in stone yet—that we are going to go back to the GNSO with our recommendations in respect to [Recommendation] 5 along with a caveat, which is that in order for this to work, they're going to need to do something about Recommendation 2; and that that something could be either, as we've said, the use of the GAC list or lifting 6ter out of a panelist's decision to become a standing.

We will have a discussion about that. We will see if we can reach consensus about which one of those is acceptable. But for now, we will proceed or we will work on dealing with Recommendation 5. Okay.

I'll give it one more chance for some hands to go up just in case. Okay. No hands. Good.

Now then. Recommendation 5 is what we need to talk about. When I looked at Recommendation 5 ... And to be fair, I'm speaking as a lawyer, so I know that there's a particularly specific way of thinking of things as a lawyer.

When I looked at Recommendation 5, I have to be honest and say it made absolutely no sense to me at all because what it seemed to be saying was [that] the registrant goes to court in their jurisdiction. The registrant has lost. The IGO has won the UDRP. The registrant goes to court. The IGO turns up at court and says to the court, "We are not bound by this jurisdiction." The court agrees. And the IGO, therefore, wins that point. And the result of that is that everything gets untied and you start the UDRP process again.

Now, if my reading of that recommendation is correct, then that means that makes no sense to me at all. So, let me make a suggestion. In the normal course of events—again, speaking as a lawyer in an effort to encourage us to have a discussion. In the normal course of events, the way that these things would work is that the IGO would win the argument and the original standing of the panel would stand. The original decision of the panel, I'm sorry, would stand.

In other words, the court would say, "We agree with you, IGO, that you are not subject to our jurisdiction. Therefore, we're not going to sit in this matter." And, therefore, that would mean that the decision of the UDRP panel would stand.

So, I put that out there as a possible way forward, just merely as a suggestion for comment and discussion. And I look forward to spending some time actually discussing that for the rest of this call.

Brian, your hand is up. Go ahead.

BRIAN BECKHAM: Yeah. Thanks, Chris, for moving us into this conversation. I think and I hope this shows a real desire to bring balance and see all of the different viewpoints here. If I wanted to be totally opportunistic, then I think I could say, look, that's fine. If you want to adjust it and say if a registrant goes to court and an IGO is successful in having a court accept its view of immunity from jurisdiction, then the UDRP decision stands, that could be a very simple way to tackle this problem.

At the same time ... And I hope by my IGO colleagues will understand that I'm saying this in a good spirit of compromise. And I appreciate that we've had discussions about the merit of Recommendations 1-4. And there's the prior history of the working group. But I do think that really rubs up against number 3 and the ability of the registrant to have an outlet for an appeal to a decision it felt wasn't right. And so that's, of course, [inaudible] idea of some sort of ...

Whether it's a formal arbitration in the sense of the New York Convention or an arbitration-like process—like the UDRP is—is, I think, a very open question. To recap in simple terms, that could be a solution. But then, I think we would be creating a mechanism that didn't take all of the views into account.

CHRIS DISSPAIN: And I agree with you which is why the simple solution is often not workable. So, agreed. So now, there are a couple of questions that arise.

Jeff, I acknowledge your point exactly the same in the chat about a registrant needs a meaningful right to appeal. The question becomes, then, do we go through the jurisdictional question and have a court rule that it cannot hear the case because the IGO is not subject to the jurisdiction? And then go to a secondary mechanism, i.e., arbitration?

Or do we abandoned the jurisdictional issue completely of going to a court of competent jurisdiction, and instead go straight to an arbitration. Those seem to me to be two discussion points to be focusing on, picking up on what Brian and has just said in Jeff has said in the chat.

Jeff, I can see your second note. I'll come back to that in a second. Alexandra, your hand is up. Please go ahead.

ALEXANDRA EXCOFFIER: Alexandra Excoffier from OECD. I just wanted to say that I agree with what Brian has said in terms—and I think Jeff wrote as well—that this is not how IGOs function. We always make sure that our partners, contractors, whoever have a right to have their matter ... I'm not going to say have adjudicated because that that sounds like in a court. So, I don't think that your solution, sorry Chris, would work.

Also, for another reason, is that the way that the UDRP is written currently, in order for someone to use the UDRP, we have to pretty much waive immunity in the first place. At least that could be interpreted as such. So then, we can go to court and say we have immunities, but the court may say, "But you have accepted the UDRP process which requires you basically to waive immunities."

So, the two things there. But I agree that your simple solution sounds great, but ...

CHRIS DISSPAIN: It won't work.

ALEXANDRA EXCOFFIER: But it won't work for others, and it won't really work for us either because ... I mean, it would work for us, like Brian said. It would work if you just go back and you hold up the decision [protecting transferring] the domain name. So, in theory, yes.

I also would hate to see several processes in place so that we go to the court and then we go to another legal process. So, perhaps it would be at least my preference—and I'm speaking under

the control of the IGOs present—would be instead of going to a court to find some kind of non-judicial mechanism right away so that we avoid ...

Because it's also costs. Even going to a court, it may be ... Some people say it might be less expensive than arbitration, but these days arbitration is not necessarily a physical process. It could be done on the Internet and, I'm sure, WIPO can tell us about that. So, those are my three points. Thank you.

CHRIS DISSPAIN: Alexandra, thank you. That's very helpful. Let me try another suggestion. So, I completely accept that my simple solution, my strawman, flew in the face of Recommendation 3. That's quite right. Now, I can see that having to go through the jurisdictional question and go to court in the jurisdiction and say you're not subject to their jurisdiction and then ending up going to a different appeal mechanism seems like an extra number of processes for no good reason.

So, if we had a situation where we could agree that there was an alternative appeal, whether that's an arbitration or possibly even a number of additional panelists or something. I mean, let's not get stuck on what it is for a moment. If we could agree that there was a method by which a registrant could appeal, would this group agree/except that we could make a recommendation that said that the jurisdictional point is excised and abandoned?

And that, therefore, the IGO and the registrant would travel down the process of the UDRP and at the end of a panelist's finding either side—either the registrants or the IGO if they lost—would be able to utilize an appeals mechanism. And that appeals mechanism would not be jurisdictionally based, but rather international as in the possibility of arbitration.

Jay, your hand is up. Go ahead, please. Jay, I can't hear you. If you're speaking, you're on mute.

JAY CHAPMAN: Thank you, Chris.

CHRIS DISSPAIN: There you go, Jay.

JAY CHAPMAN: [inaudible] the suggestions and I tried to understand best [inaudible].

CHRIS DISSPAIN: Jay, we are we are struggling, or at least I am struggling to hear you. You're breaking up really badly.

JAY CHAPMAN: Can you hear me?

CHRIS DISSPAIN: No. I mean, we can hear noise, but we can't hear you.

JAY CHAPMAN: Sorry. I think I may have switched out. You know the perspectives [inaudible] much simpler and ...

Can you hear me now?

CHRIS DISSPAIN: Try again one more time.

JAY CHAPMAN: Chris, can you hear me now?

CHRIS DISSPAIN: Yes. Don't move. Stand still.

JAY CHAPMAN: Yeah. I think I will. I think I will stay put for a minute.

So, I appreciate what was just suggested and I understand the concerns of the extreme cases of people trying to impersonate IGOs and then the potential problems that could be envisioned in having to go to courts—costs and things like that. I totally understand.

I think, though, that I don't want it to get lost, though, that we're in a situation where this is an attempt to deprive someone, a registrant, of their domain name.

CHRIS DISSPAIN: Yes. Jay, you are breaking up again, I'm afraid.

JAY CHAPMAN: And so, we definitely need to find the registrants ... Sorry. Can you hear me now?

CHRIS DISSPAIN: Yes. Please go ahead.

JAY CHAPMAN: So, registrants rely on that right to be able to go to a court of competent jurisdiction so that they don't feel like they just go from one "arbitration-type" process; they just

don't bounce around from one to the other which could be completely ... It's very unfamiliar to them.

So, I just don't want to get that lost in that while I do recognize the problems or the complications that might arise, it's there for a reason., And so, I'm still very much in favor of the idea that a registrant could go to court mutual jurisdiction. If the court says no, then this is where we come to the Recommendation 5 situation and what to do at that point. That's the way I see it at this point. Thank you.

CHRIS DISSPAIN: Thank you very much. Brian, your hand was up but it's gone down again. Have you changed your mind?

BRIAN BECKHAM: Yeah.

CHRIS DISSPAIN: And there it goes again. [Okay,] go.

BRIAN BECKHAM: First, I wanted to remind of the point that Alexandra raised which is [that] there is this sort of threshold question of getting into the UDRP. And, of course, we could adjust that language so that that's not an issue. So that the fact of filing a case wouldn't be misconstrued as ta waiver. So, it's something we would tackle that ...

I just wanted to say I find it a little unconstructive that this is somehow cast as an attempt to divest a registrant from a domain name. We're talking about ...

I mean, if we go back to what's the problem statement that's in front of us, it's that someone has registered a domain name and they're attempting to impersonate the IGO to defraud the public. Now, with that narrow focus for this mechanism, it's not to say that there wouldn't be the theoretical possibility of an appeal. It's not to say that every panelist gets every case perfectly correct. But I do think it's worth bearing in mind that this is ...

And I know that a lot of people here on the call, including Jay, have a lot of experience with the industry and with the UDRP, but this is not the UDRP we're talking about. We're talking about a very narrow mechanism that's geared towards preventing the public from being defrauded. And this is why I mentioned earlier things like recasting the standard of proof, recasting the substantive criteria.

I firmly believe that the more holistically we look at this and make it clear that it's geared towards a specific type of bad conduct, then that makes the entire mechanism make more sense. And it really addresses some of these concerns, which are, if I can put it this way, being kind of brought over from 20 years of UDRP history. And I think the more narrowly we define things here, then the better we can address some of those concerns. Thanks.

CHRIS DISSPAIN: So, Brian, thank you. And I appreciate what you what you said. My only pushback would be that, of course, your claim is your claim. And it's alleged behavior, and if there's a [inaudible], as you said, you don't know what the panelist is going to say.

But I'm more interested in picking up another point that you've made because we're not talking at this stage, are we, of redefining what a claim is. We're not talking at this stage of writing a special set of criteria to which an IGO would be put—or rather the name would be tested against. We're talking about using the existing process.

Not that I'm saying suggesting that necessarily causes you a problem. I'm just saying were you intending that there would actually be a separate set of criteria? Because that, again, is an

additional item that would need to be added to the list of things that we'd need to change. Do you see what I'm saying?

BRIAN BECKHAM: Yeah, yeah, yeah. Thanks, Chris. I do. And personally, I think that we would get a lot further if we if we did that. One simple path is just to take what the UDRP has and cut and paste it into a new document and make a few adjustments to the mutual jurisdiction clause, to the standing clause.

But I think it's sort of overlooking a few elephants in the room. And if we can make some targeted changes, then we actually come out with the mechanism that makes a lot more sense for everybody. That's my personal view.

CHRIS DISSPAIN: Yeah. So, for what it's worth, I can see that writing a whole new process, were we able to do that—and assuming we could get agreement, of course—would certainly mean that you'd be able to tweak—well, more than tweak—that you'd be dealing with a different set of rules. But at the moment, I don't think we can do that.

So, we've got 10 minutes left. I actually think we've made some significant progress. We need to continue to discuss how we would fix Recommendation 5 given our caveat.

Kavouss, please go ahead.

KAVOUSS ARESTEH: Yes. Thank you very much, Chris. In fact, you took the word from my mouth. I was just waiting to tell you that I am very happy that we had a very constructive session. There were a lot of good proposals.

The only thing that the burden is on you, if possible, you can table them. We know what proposals are on the table and how we should tackle them in a way that's appropriate. So, that is just by my view. I heard a lot of good, constructive proposal at this session. Thank you.

CHRIS DISSPAIN: Thank you, Kavouss. I appreciate that, and I agree with you.

Mary and Steve and the team, can we produce a document that encapsulates the discussion that we've had so far, i.e., the caveat that we've talked about in respect to Recommendation 2 and the bits and pieces that we've picked up in respect to Recommendation 5?

In other words, taking the line through one possibility of going directly to arbitration and another possibility of going through court to get to arbitration; and actually craft that into just a sort of "here's where we've got to" statement that we can then get out to everybody. People can think about and bring their thoughts to our meeting next week. Mary?

MARY WONG: Yep. We certainly can, Chris. Probably not within the next 12-24 hours, but certainly.

CHRIS DISSPAIN: Oh, for crying out loud. Seriously? What? Not by 6:00? That's appalling.

MARY WONG: 6:00 which time zone?

CHRIS DISSPAIN: I'm absolutely fine ... If it was possible to get it out by Friday, that would be great, so that at least people have got Friday and the weekend to think about it. But I understand

that there is an awful lot going on right now including prep for an ICANN meeting, and so on. But if we could do that that, will be great. Okay.

And then what that would mean is that Brian, you could—and Susan and Alexandra. Well, not just the IGO folk, but everyone could have a look at it and actually come back with some specific, “This is a redline for me ... I can’t move past this ... This makes sense,” and so on and so forth. So, Jay, you might be able to address the point about the need to go to the jurisdictional route first, and so on.

And if there are any models that members of the work track could refer us to of alternative appeals mechanisms that we could use as a sort of model for arbitration or maybe even some sort of super panel. I don't even know if a super panel of panelists would be an acceptable way forward, but it is certainly a way.

Even if it's not acceptable, perhaps we could encourage you to maybe put typeface to e-mail and send that to the list for consideration. Are there any comments/last minute points before we close?

Our next meeting is on the 15th of March at 16:00 UTC. And yes, quite correct, there will be no meeting on the 22nd of March because we will be at ICANN70, and we agreed that we weren't going to have a meeting in that week. So, thank you very much indeed for that information.

Any last comments? Okay. Well, there being none, five minutes early but a convenient time to stop. Thank you all very much, and see you all next week. Thanks, everybody, for coming.

TERRI AGNEW: Thank you, everyone. The meeting has been adjourned. I'll stop all recordings and disconnect remaining lines. Stay well.

[END OF TRANSCRIPT]