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STEPHEN DEERHAKE:

Thanks, everyone, for attending. Good morning, good afternoon, and good evening. For the record, I am Stephen Deerhake, the chair of this working group. And I want to thank everyone for joining today's teleconference. For the record, this is the 17 June, 2020 edition of the ccNSO PDP Working Group, which was tasked with developing ICANN policy with respect to establishing a review mechanism for ccTLDs, as mentioned in RFC 1591, section 3.4.

We have convened this meeting today at 01:00 UTC as we continue to adhere to our recently adopted meeting rotation time schedule. I want to thank those of you who either stayed up really late or have gotten up really early for participation on today's call. And I see we have a robust turnout, which I really am appreciative for.

I also want to say that for those of you who may be recovering from COVID-19, I wish you a continuous recovery without all the crazy ancillary symptoms that present to some of us. And I, of course, wish all of you the best for you and your families. And please stay safe and careful in this crazy time.

I also wish to especially thank Kimberly, who's working her usual Zoom magic at a very late hour for her, as well as Joke, who's up very early for her usual time, documenting what we discuss. And lastly, I also wish to thank Bart, who's up very early, and Bernard, who, like me, is up late. So, thank you all. You're a dedicated group and I appreciate what you guys are doing.

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*Note: The following is the output resulting from transcribing an audio file into a word/text document. Although the transcription is largely accurate, in some cases may be incomplete or inaccurate due to inaudible passages and grammatical corrections. It is posted as an aid to the original audio file, but should not be treated as an authoritative record.*

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So, staff will presumably be taking attendance in the usual manner. So, if there is anyone on audio only, please identify yourself so that you're properly recorded as being present. And I don't expect to be taking up the entire hour but we'll see.

With regards to administrative matters, I don't have any. And unless the vice chair has any, I think we're good to go there, unless ... Kimberly, Bernard, Bart, or Joke, have I forgotten something? I don't think I have but I don't know. I leave it up to you guys to wiggle your hands or shout out if I have. But I think we're good. Eberhard's got his ... He's got a click mark. Okay. That's not a hand. That's an affirmative.

Okay. So then, on this call, we'll continue our examination of the various review mechanisms that are built into the ICANN eco-structure. And today, we're honored to be hearing from Amy Stathos from ICANN Org Legal, who will walk us through a presentation of the Independent Review Process, which is otherwise known as the IRP. Welcome, Amy. And thank you for also being available out of band to walk us through it.

I don't know. There was a rumor ... Yes, indeed! We also have with us tonight ICANN Board member Becky Burr with us to provide, hopefully, some additional background and color to this. And since Becky's here, for those of you who are not familiar with Becky's history with ICANN, let me just say she's been amongst us from the beginning of ICANN and is younger than ever for her efforts.

You may not know it or appreciate it but we are all deeply indebted to her for her work within the US Department of Commerce in the runup to the formation of ICANN, as well as the eventually disassociation of

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ICANN from the Department of Commerce oversight. And we are blessed to have her now serving on the ICANN Board. And that last sentence really is uttered in all seriousness. She's treasure to the community.

So, without further delay, thank you, Becky for being here. Thank you, Amy for being here. Let's move on to the substantive portion of today's teleconference. We have Amy's presentation up and ready to run. So, Amy, I thank you again for being here and I turn the floor over to you. It's yours. Thank you.

AMY STATHOS:

Thank you so much. And we'll go to the first slide. I do also want to note that Becky is here and Nigel Roberts is also here. And both of them are on the Board Accountability Mechanisms Committee. So, they may be able to answer some questions about process as well, after we conclude the presentation. So, it's good that they're actually both here. So, I'm grateful for that as well. So, Kimberly, can we go to the first slide, please?

STEPHEN DEERHAKE:

Thank you, Amy.

AMY STATHOS:

Thank you so much. So, as it states here, the Independent Review Process is one of the accountability mechanisms that's provided for in the ICANN Bylaws. I know at the last meeting you heard about the

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reconsideration request process. This is another one of the accountability mechanisms, as is the ombudsman.

The rules set forth in the Bylaws are what guides the Independent Review Process. But those are also supplemented by two different sets of rules and procedures. One are the Interim Supplementary Rules or procedures that have been established by the IRP-IOT, which is the Implementation Oversight Team. And then, also supplemented by that are the International Arbitration Rules of the ICDR, or International Center for Dispute Resolution. So, there's a couple different sets of rules and procedures that go into play. But the focus and the establishment of the IRP was through the Bylaws.

The process is built so that there can be independent third-party review of disputes that a claimant—and we'll go to that in a second—has identified as something that they believe is contrary to their interests and that they can have a third-party independent evaluation of that dispute and a challenge of a decision made by ICANN, either staff or the Board.

And it is defined in the process, “a dispute is any action or failure to act by or within ICANN,” which is either the ICANN Org staff members or the ICANN Board, as well as individual members of those groups, “that allegedly violates the Articles of incorporation or Bylaws of ICANN.” And then, in order to bring a claim or a dispute under the IRP process, a claimant is “any legal or natural person, group, or entity that has been materially affected by a dispute.” And in order to be materially affected, you must have suffered some type of injury or harm as a result of the action or inaction that's being challenged. Next slide, please.

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Presently, an IRP panel is a three-member IRP panel that is selected by the parties to preside over the IRP. There is a provision, which I'll get to in another slide, in a later bit in the presentation, that talks about the standing panel from which these three-member panels would be established. But at the moment, the standing panel is still in process. So, the International Arbitration Rules still apply in terms of how these three-member panels are put together by the parties in the IRP, which is the claimant and ICANN.

The standard of review is that the panel is asked to evaluate whether ICANN's action or inaction—and that's by the staff or the board—was consistent with ICANN's Articles, Bylaws, or internal policies and procedures. And the panel is tasked with determining whether ICANN has exceeded the scope of its mission or otherwise failed to comply with those Articles, Bylaws, or procedures. Next slide, please.

The IRP proceeding itself starts with the commencement of a claimant filing a written statement of dispute with the IRP provider. Currently, as I mentioned at the beginning, the IRP provider that has been identified and approved by the Board is the International Center for Dispute Resolution. And they are the party that administers. They do that adjudicate. They are not involved in deciding who is the prevailing party. They simply administer the procedural and logistical aspects of the IRP proceeding.

There are some deadlines in terms of when things need to be filed, as it is currently set forth in the Interim Supplementary Procedures that have been established by the IRP-IOT and that were adopted by the Board. There are two sets. First, it's 120 days following the day on which the

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claimant becomes aware of the material effect of the action or inaction. But in any case, even if they were not aware or have stated that they are not aware at present, that there is a 12-month deadline from the date of the action or inaction. So, at some point, there is a deadline so that items don't remain open indefinitely.

And once commenced, the IRP proceeds much like an arbitration. And in this case, it would be much like an international arbitration because, as I said, the International Arbitration Rules modify the rules that are in the Bylaws and the supplementary procedures. And that includes written briefs, some type of discovery, and in this case, under the Bylaws and the procedures, it's limited to document production.

There is no depositions, etc. And there are witness statements that be submitted with either party's brief, expert reports, occasionally, depending on the topic and subject matter of the IRP. There could be interim hearings. For example, there is an opportunity for claimants to seek interim relief to maintain the status quo during the pendency of an Independent Review Process proceeding. So, that's typically considered an emergency proceeding. But the limit there is to ensure that the status quo does not change until there's a complete determination.

And then, there's definitely a final hearing on the merit, typically before the IRP panel. Usually, this is in-person. At present, there is likely consideration of some of these hearings, depending on the timing. That may be through a Zoom process or some other remote, virtual mechanism, given the nature of the COVID-19 situation we have and the travel restrictions that are in place. Next slide, please.

As it relates to the IRP panel decision and then Board consideration, the decision is made by the three-member panel. But it could be made by the majority of that panel. So, there could be a situation where two of the three panelists agree and one of the three panel members don't agree. And so, that third panel member could either just simply say that they don't agree with the decision or, in fact, could write what's called a dissenting opinion. But the majority of opinion—so, if two of the three agree—that is the determination of the IRP panel. And it is considered a final and binding process so that the decision is binding.

In this case, just to clarify, the decision, in fact, is whether or not ICANN, either the staff, or Board, or individual members of those groups violated either the Articles of Incorporation or Bylaws. So, that's the limit of the scope of an IRP panel, as it's stated in the Bylaws, as well as in the procedures and Supplementary Rules.

The Board is then asked to consider ... Once an IRP panel makes a decision or what we call "issues a determination," the Board is then required to consider that response to the IRP panel decision at the Board's next meeting, if it's possible. Sometimes, the timing will require it to be at a following meeting, depending on when the issue is decided and the next Board meeting is scheduled. Then, the Board is to affirm or reject compliance with the decision, with its expressed rationale.

I will say that there are many occasions where the panel members will make recommendations but they are just that. And it is up to the Board to decide whether or not those recommendations should be addressed. And I will say that the Board is very, very conscious of the import of an IRP and very, very conscious of the decisions that these independent

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panelists have made and have heeded these recommendations very, very carefully in each and every instance. Next slide, please.

Then, as I mentioned earlier, the ICANN Bylaws also provide for an omnibus standing panel. And this panel is expected to contain at least seven members but it could be more as time goes on. And those panel members must each have significant, relevant legal expertise in either international law, corporate governance, the judicial system, alternative resolution, and/or arbitration. In a sense, they need to have the skill set of a judge or somebody who is capable of adjudicating disputes, not necessarily what the topic area is because judges, who typically adjudicate disputes, have broad range of area. But the skill set of being able to adjudicate the resolutions are the key factor.

As set forth in the Bylaws, ICANN Org and the Board are in the process of working with the supporting organizations and advisory committees to establish the standing panel. The call for expressions of interest have gone out. We have received some applications and continue to do so. And we are looking forward to the establishment of the standing panel as soon as possible.

Once that happens, as typical from an IRP, there are parties or adjudicators that will be pulled from the standing panel, rather than from another group of panelists that the ICDR or another provider might have in place, including the emergency panelist that I talked about earlier, where people are asking to keep the status quo in place until the IRP can be fully resolved. That panelist would be someone from the already existing standing panel.



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Also, the three-member panel of the IRP will be selected from the standing panel. Typically, this would be one from each party, the claimant and ICANN. And then, those two would typically seek the chair of the panel for each IRP, also from the group of standing panel members.

And then, finally, what's relevant here is that when the standing panel will be in place, there will be a mechanism for an appeal to the entire group of standing panel members. So, it would be seven or more, depending on the status and timing of an appeal and how many panelists we actually have that are signed up to the standing panel.

Next slide. I think the next slide just shows the issue about the cooperative engagement process. And as you may know, this is a precursor, if you will, to the IRP. It is something that is also set forth in the Bylaws. The parties are strongly encouraged to participate in the CEP, which is similar to a settlement discussion or a mediation, to the extent some of you are familiar with those processes. And the purpose of the CEP or cooperative engagement process is to resolve and/or narrow the issues that are contemplated to be brought in an IRP.

So, the CEP is established with the parties relevant to the case. It's not meant to be a discussion between the lawyers, although the lawyers typically participate. But it is with the lawyers who represent the different parties, meaning the outside counsel. But it's intended to be a discussion among the parties—so, somebody from ICANN and somebody from the party that's filing the IRP.

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I will say that it is voluntary. But under the Bylaws, if the claimant does not participate in CEP, then the IRP panel has the ability to award ICANN reasonable fees and costs incurred during the IRP, including legal fees. So, the goal is for people to try to settle the matters before a full-on IRP gets started and everybody starts spending a lot of money. And so, that's why the community, when they were working up the new IRP and CEP rules, thought this would be a good idea to make sure that people are encouraged to participate in cooperative engagement process before an IRP.

And the last thing about CEP is that all the discussions contained in the cooperative engagement process are meant to be confidential, just like mediations or settlements, so that people can feel free to actually talk and discuss the issues and to see if they can arrive at a resolution that works for everybody, depending on the situation and circumstances.

The next slide, Kimberly, I think, are just some resources with URLs that are available for your information. And with that, Stephen, I'll leave it back to you for any questions that there may be.

STEPHEN DEERHAKE:

Thank you so much, Amy, for that. Taking the prerogative of the chair, if I understand you, before I throw the floor to other working group members, the idea is that the CEP is the first way forward. Hopefully something can get sorted there in a confidential, open, broad-based, honest manner between the complainant and ICANN. And then, if that does not resolve, then it's up to the IRP. Do I have that correct?

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AMY STATHOS: That's right. It's then up to the party who filed or initiated the cooperative engagement process to decide whether they are going to go ahead forward with the IRP. But it will be their choice to decide whether they do or not.

STEPHEN DEERHAKE: Okay. To date, how many IRPs has ICANN been dealing with, if I may ask?

AMY STATHOS: I can tell you that currently, and since the October 2016 Bylaws have been put in place, there are three active IRPs pending.

STEPHEN DEERHAKE: Okay. Thank you for that. With that, I see that Becky Burr has got her hand up. And I'm thrilled to have you here on our call, Becky. Thank you for staying up late. And the floor is yours.

BECKY BURR: It's a pleasure. I just actually want to ask Amy to clarify one thing. The IRP, from the beginning of time, has been, in fact, that the panel issues a declaration which has not historically been binding on ICANN. But IRPs filed after the transition and under the post-transition Bylaws are binding, I believe.

I just wanted to—because I think we elided over that change. And it's an important change, in the sense that when you combine that with a

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standing panel of arbitrators who understand what it is ICANN does, and what ICANN's job is, and what ICANN's Bylaws are, then hopefully you get decisions that have precedential value and they, then, are a guide to ICANN's behavior going forward. So, the goal would be to provide guidance going forward.

AMY STATHOS: Yes, Becky. In response to your question, that is right. That is a change in the Bylaws. That said, in, I believe, the vast majority if not all of the—

BECKY BURR: I just lost everybody. It's become very quiet.

STEPHEN DEERHAKE: No. You're there.

AMY STATHOS: Can you hear me, Becky? Can anybody hear me?

BART BOSWINKEL: Yes. We hear you.

AMY STATHOS: Okay. So, to answer Becky's question ... Hopefully Becky can hear me. That is right. The Bylaws, since October 2016, have indicated the binding nature of the determination as to whether or not ICANN did or did not violate the Bylaws and/or Articles of Incorporation or some other

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proceeding or procedure. But just to point out that in, I believe, all of the prior ones before, the Board did accept that determination, if it was determined that the Board had violated the Bylaws.

One other change that I want to point out is that prior to October 2016, only the Board's conduct, either action or inaction, was challengeable under an IRP. And since the October 2016 Bylaws took effect, staff action is also challengeable in an Independent Review Process proceeding.

STEPHEN DEERHAKE: I'd like to point out that's a significant change. Thank you, Amy.

AMY STATHOS: Yes. Yes, it is.

STEPHEN DEERHAKE: Becky, I assume you're okay. And if that's the case, let me go through—

BECKY BURR: Yes. I'm back.

STEPHEN DEERHAKE: Great. Okay. Thank you. Any further comment from you or can I go to Nigel, who also has his hand up next?

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BECKY BARR: Please go to Nigel.

STEPHEN DEERHAKE: All right. Nigel, the floor is yours, sir.

EBERHARD LISSE: I think you are on mute.

STEPHEN DEERHAKE: Nigel, we don't hear you.

NIGEL ROBERTS: All right. You should be able to hear me now.

STEPHEN DEERHAKE: Now we hear you.

NIGEL ROBERTS: Okay. I don't know if you can hear all the sound effects.

STEPHEN DEERHAKE: You've got birds in the background.

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NIGEL ROBERTS: Yeah. I was to say I don't know if you hear the sound effects. But it's just after 5:00 AM here and this is the dawn chorus here, out on the island. Good morning everybody.

STEPHEN DEERHAKE: I feel for you.

NIGEL ROBERTS: No. It's great. It's a nice time of day. And it's always very quiet here anyway because there's literally no boats in the harbor whatsoever. And it's also foggy. I can hardly see the harbor.

But anyway, a couple of things. I wanted to just mention there's also the possibility of a reconsideration request before you get to the deep IRP. Secondly—and this is kind of interesting—is that the accountability mechanisms do apply to the ccNSO with the exception, as everybody on this call will know, of the subject matter of this PDP.

So, in other words, there's a carve-out for ccTLD change of managers and decisions relating to the delegation of ccTLDs, where accountability mechanisms don't apply. But they do apply to everything else that the Board or staff may do in respect of the ccNSO. I'm sure both Amy and Becky can add some to that, if I've got anything wrong or omitted anything there. Thanks.

STEPHEN DEERHAKE: Thank you, Nigel. I assume that's an old hand. Eberhard, you've got your hand up so the floor is yours, sir.

EBERHARD LISSE: Thank you. Good morning. For our purposes of this thing, I would have some issues with a time limit for 12 months on an action or inaction that is not known to the affected party. I just wanted to record this. I have made a note of it in my notes so that I can mention it further. For how we are going to use this, we'll discuss later. This is not the right time. But I felt it's important to say that this is an issue that is not helpful for our discussions.

STEPHEN DEERHAKE: All right. Thank you. Nigel, is that a new hand or an old hand? That's a Nigel on the rock hand. I'll assume it's an old hand. Anybody else have any questions or comments for either Becky, Nigel, since he's also on the Board, or Amy, or Sam, since we have Sam Eisner, also, from ICANN Legal on the call. Thank you, Sam, for being here. You're out of band as well. I see Nigel's hand is gone but Allan's hand is up, all the way from Canada. Allan, go ahead, sir. The floor is yours. Thank you.

ALLAN MACGILLIVRAY: Thank you, Stephen. Actually, my question is a follow-on to Nigel's comment, which I think is very well-taken, that anything that's not carved out by the current carve-out, which I think is where the claims are rising from ccTLD delegations and redelegations ... I believe the explanation was that this deals with so-called actions or failures on the part of staff or the Board.



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And to this point ... And I appreciate we haven't gone very far in our work but our focus has been around looking at decisions. And I'm just wondering, since we have the legal staff with us, if our focus on decisions as opposed to actions or failures could ... Are those equivalent? Because, for example, if a decision is, in fact, more narrow than actions or failures, then anything not captured under a decision would then default back into the general provisions. And I'm just wondering if Sam or Amy have a comment on our use of the word "decisions" to this point. Thank you.

AMY STATHOS:

Sure, Alan. Thank you. And when you say "failures," what we're looking at is action or inaction. So, I would consider "failure to act" is the proper terminology there. And what is called for under the Bylaws, as it relates to the ICANN IRP that applies to the ICANN Board and staff are, essentially, actions or decisions that the Board and/or staff take which clearly are actions, that are affirmative actions that they make in their process of doing their jobs. But inactions are when, potentially, they've been asked to act and choose not to.

So, that could also be deemed a decision, I think. It just depend on how, if you're writing up some type of a dispute mechanism policy, how you would define "decision," in terms of if you choose to suggest that inaction is also something that you want to be able to be covered by a dispute resolution mechanism, then you would define "decision" as a decision not to act. So, it's something that you would be asked to do but choose not to because of the basis. And typically, there will be a reason

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for not acting. So, I think it's really just dependent on the definition of the word "decision" that you use in your process.

STEPHEN DEERHAKE: Thank you, Allan, for the question. Thank you, Amy, for the response. Peter's got his hand up. So, Peter, the floor is yours, sir. Thank you.

PETER KOCH: Thank you, Stephen, and good morning everyone. I would just like to ask a clarifying question. When it comes to the claimant being eligible to invoke the IRP, in our situation, it might be that the party affected, or affected in the future, cannot be identified within the 12 months. Maybe it doesn't even exist but it could exist. So, do I understand correctly that there is no opportunity for anyone to step in on behalf of that yet-unknown entity? Thank you.

STEPHEN DEERHAKE: Thank you, Peter. Amy.

AMY STATHOS: Sure. Thank you. Under the ICANN Bylaws, as it applies to ICANN Board and staff, that is correct under the current Interim Supplementary Procedures and the current Bylaws. The party who is the claimant must have experienced material harm or injury to it. One cannot step in on behalf of.

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Now, there is a mechanism in the Bylaws where there can be a community process for an IRP and there is a great deal of detail in there. But many of the different groups of the community must come together to challenge a particular decision or process that's been established so that they would need to show that that entire community has been harmed or could be harmed by this established process. But it's an extraordinary mechanism and we certainly haven't seen one to date.

But that would be the only circumstance where there may be some situation where not an individual person or entity has been harmed or injured by the decision or inaction but the community deems itself to have been harmed in the decision that either the staff or Board has taken.

PETER KOCH: Thank you.

STEPHEN DEERHAKE: Thank you, Amy, for that. Becky, I see your hand is up so you're up next. The floor is yours.

BECKY BURR: Thanks. I just wanted to follow up on this timing issue because it actually is a subject that is still under discussion within the IRP-IOT right now. And we're trying to balance complicated issues, one which is you actually have to ... Because of the requirement that somebody be actually harmed, you don't want to cut off access to this dispute

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resolution mechanism prematurely. On the other hand, you do want some finality with respect to decisions.

But the questions about whether the 12-month absolute limit is enough usually comes up in the corner cases because ICANN could ... For example, the way this would come up in the GNSO context is the GNSO would develop some policy through the PDP. The ICANN Board would adopt it. And then, 15 months later, ICANN Org would interpret the policy and take some action, with respect to an individual, whether it's a Contracted Party or some other thing. And at that point, that's when the harm to the individual occurs. So, the fact that the harm to the individual has occurred 15 months later as a result of a decision of ICANN Org still means that that individual gets to bring their case.

So, I think that it's important to understand that the question of this statute of limitations is an issue that is being actively discussed right now and also that it doesn't mean 12 months and you're done. It means 12 months from the time that you could have been harmed. So, if ICANN doesn't interpret a policy and then suddenly interprets it in a weird way, you would not be precluded from challenging that action.

STEPHEN DEERHAKE:

Okay. Thank you, Becky. Anybody else have any questions or comments on this? Everybody's gone very silent. I think I might have to be Socratic here. Perhaps I will call upon Nick, who might have some thoughts on this. Nick, you didn't hear me.

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NICK WENBAN-SMITH: Yeah. I heard you, Stephen. Sorry. It's early and I don't want to wake up the whole house.

STEPHEN DEERHAKE: I know. Sorry. I apologize for that.

NICK WENBAN-SMITH: Barking dogs and ... Anyway.

STEPHEN DEERHAKE: Well, we need a barking dog. I'm going for three out of three calls with a barking dog in the background. Unfortunately, Becky didn't provide us a barking dog.

NICK WENBAN-SMITH: The dog's been fed so that's fine now. Yeah. Just it's interesting looking at ... Obviously, it's a proper arbitration-style process with a pre-arbitration mediation. And obviously, it wasn't chosen for the sorts of things that this policy group is tasked with. I was wondering why that was. And if there's a good reason for it then it means that we should avoid a similar process for the sorts of review mechanisms that we're looking into. I wondered if there's anybody who's got good insight or background onto that because I wasn't there at the time, obviously.

STEPHEN DEERHAKE: No. Personally, the idea—the pre-mediation, try to sort it out—is something I think we ought to consider. But that's my personal opinion.

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It's not a mandate from the chair. So, thank you, Nick, for your comments on that and sorry to put you on the spot early in the morning. So, anybody else have anything to say on this? I'm not seeing any other comments. Going once, going twice. Nigel has his hand up. So, Mr. Roberts, the floor is yours, sir.

NIGEL ROBERTS:

Yeah. Good morning again. I guess the seagulls are going to sound a little bit like—become as traditional as the dogs. I just wanted to make a quick comment on that. It seems to me that the procedure is going to run something a little bit like a major litigation, in the fact that you're going to start out with an informal complaint, then maybe some kind of reconsideration request, then CEP-type stuff, which corresponds, as I see it, to the mediation phase of litigation, at last over in England, where you try and sort things out [inaudible].

And then, of course, if the IRP fails, which it shouldn't do, then there's always the option of serious litigation. But at that point, everything will have been narrowed down so much, there probably wouldn't be anything left to go to court over. Hope that helps.

STEPHEN DEERHAKE:

Thank you, Nigel. I see Eberhard also has his hand up. I assume, Nigel, that hand will be lowered shortly if the seagulls don't prevent it. Eberhard, the floor is yours.

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EBERHARD LISSE:

Thank you. For our purposes, I am looking at something like internal remedy mechanisms, which should and must be exhausted prior to going external. Then, maybe some form of mediation, which is voluntary or not but voluntary is probably better. And there is a difference between mediation and arbitration.

And then, there is arbitration. And we must take into consideration that during the .africa arbitration or lawsuit, the courts in the US have held that you cannot, in court, use arguments that are contrary to arguments you used in arbitration because arbitration is, for that purpose, considered a quasi-judicial proceeding.

I'm not saying this is ... This is relatively technical and I don't want to go into too much detail. And I'm most certainly not saying you must raise everything in arbitration which you later rely on. But I think it is helpful to notice that you cannot, for example, arbitrate in one way and then go to court and do something totally different. I'm not in favor of even writing any lawsuit remedies process but the point is, we cannot exclude it. If I go internal remedies, one, mediation, two, arbitration, three, lawsuit, I would look at position 99 or something further.

STEPHEN DEERHAKE:

Thank you, Eberhard. I see Nick's got his hand up as well.

NICK WENBAN-SMITH:

Yeah. I was just going to say ... To be blunt, then, here's a perfectly sensible process, with all the phases that you would expect in terms of private arbitration procedure. So, Stephen, we could make you hit your

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PDP timelines. Why don't we just adopt this lock, stock, and barrel and be done with it. And why is there any reason to discuss it further? That's what I'm trying to tease out why it is that this was never thought an appropriate mechanism for these sort of processes that the PDP's set up for.

STEPHEN DEERHAKE:

It was not considered at the time. In fact, it was rejected at the time by the Transition Working Group. But you can certainly put that forth to the working group at our next call. Maybe that's what we should do, just go home. I'm not saying one way or another. I'm just the chair herding the cats. It's up to you guys to decide, really. I can't weigh in one way or the other on that, Nick. But you certainly have elicited some comments coming up. So, sit down and enjoy your coffee and let's see what they all have to say, Nick. Thank you for that. And with that, next one up is Eberhard. So, go for it, sir.

EBERHARD LISSE:

Nick, that would be a ditch with is very deep, and full of water, and I am about to jump deeply into it and I won't swim. The probably I have with the current IRP is multifold. And one of them is that we need to carefully review the panel. In the end, we might say, "Okay. We can use that." But we cannot do this just lock, stock, and barrel—say, "Okay. We'll just use that mechanism." We might use the same panel. We might use the same structures. But we may have different rules for the purposes. So, I think we should not be too quick and too abrupt in our



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decision. But I think you're just throwing it among the pigeons, or among the seagulls rather, as food for thought.

I personally would much like to have a structured approach where internal remedies must be exhausted before we go to any further steps so that we avoid costly things that can be remedied for oversight, or for errors or mistakes or something, that we don't need to engage into costly processes.

But if we do reach the stage where we come into arbitration, then it must be procedurally and substantively fair. And that means we must carefully look at that the panel selection—not who is on there but how this is done. And if that is done to everybody's satisfaction, we can very well go and say, "Okay. We'll use these panels. We'll use the basic modified rules, add some supplemental rules," as it has been done before so we don't have to reinvent the wheel totally.

STEPHEN DEERHAKE: Thank you, Eberhard, for that. I've got a couple Canadians in the queue. So, we'll start with Allan. Allan, the floor is yours, sir.

ALLAN MACGILLIVRAY: Thank you, Stephen. I just wanted to follow up to Nick's question or comment. And I suspect I'm going to make the same comment that Bernie has his hand up for. At the time of the IANA transition and the idea of some kind of review mechanism being developed, there was a bit of concern in the ccTLD community about some kind of one-size-fits-all mechanism.

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And as a consequence, there actually was a separate—the so-called [DTE]. So, there was a separate working group established and I happened to chair that. And at that time, I did a survey ... The working group did a survey about attitudes in the CC community towards joining what was then the idea of a review mechanism.

And the outcome of that ... I'm happy to review it but it's all part of the transition proposal. Overwhelmingly, those CCs that responded to the survey wanted a review mechanism. But they were leery about joining into the one-size-fits all. So, that's the reason we have the carve-out.

But it's worth making it a point to Nick that the IRP, as we saw it outlined today, was not developed at that time. So, it can't be said that the CCs rejected this. What they were uncomfortable with was the idea of joining into a mechanism that ... This is my own read of it. They were concerned that they wouldn't be able to control it enough, if it applied to the whole of the ICANN community. So, that's why they opted out. So, certainly, this was not rejected.

And, certainly, I for one would like us to look at seeing what we can do to clone or tweak the IRP because I think that has the highest probability of completion for our work. It's worth pointing out the IANA transition was 2016. And as we just heard from Amy, we still do not have a full IRP panel almost four years later. So, if we were to develop some completely new mechanism, my fear would be that it would be literally years before it could become operational. So, let me leave it at that. Thank you.

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STEPHEN DEERHAKE: Thank you, Allan. Duly noted. And that's important stuff that you just said. So, I would argue we need to think about that. And with that, I turn the floor over to Bernard. Bernard, the floor is yours, sir.

BERNIE TURCOTTE: Thank you. Allan covered most of my points. But I think one additional point we have to remember in the history is not only was it a one-size-fits-all issue but we knew that there would be changes made to the IRP at that point. So, that was an additional area of concern for the CC community, which led to the carve-outs for the CCs. And as a matter of fact, the IOT, which is working on modifying the supplementary rules, is still ongoing. Thank you.

STEPHEN DEERHAKE: Thank you, Bernard. If there are no further questions—and I don't see any hands wagging—I really want to thank Amy for her presentation and Becky for pitching up on our call this evening, my time, morning your time. Kim, you read my mind. Thank you for putting the agenda back up.

And if I can, let me move on, then, to next meetings. As you can see, the upcoming July teleconference has been cancelled. This decision was made, based on the fact that this meeting would be held on the immediate week after virtual ICANN 68. I think it's 68.

This upcoming meeting is going to be difficult for a lot of us, given it's being held on Kuala Lumpur time. It's certainly difficult for me. It's 12 hours away so I have to become a vampire next week and that's going

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to be a pain. But I'll do it. But it's also going to be difficult for ICANN Org, especially our support staff. I think they'll need some downtime after that week of doing that they're going to do.

Thus, we've now said the next teleconference will be on 15 July at 20:00 UTC, keeping our rotations. And I also see Eberhard is wiggling his hand. So, I will give the floor over to him to see if he's got something outrageous. No. He's put his hand down. Thank you.

EBERHARD LISSE: No, no, no. I'm still on. I just anticipated the floor.

STEPHEN DEERHAKE: Okay. Is this regarding next meetings or AOB?

EBERHARD LISSE: Next meetings.

STEPHEN DEERHAKE: Okay. Go ahead, sir.

EBERHARD LISSE: I just wanted to amplify what you said. It is difficult for staff because, for example, Kim is in a really poor time zone and Kim has to work every single day of that meeting. And I have to go to tech day. I have to do tech day, which is in a very favorable time zone for me, and it's on a Monday, and I have cleared my schedule at the practice. But if you're in

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the US, it's an extremely difficult time zone if you have to do every day before—a few days before the meeting and every during the meeting. It's just not fair to make them do another meeting.

So, we decided to propose this to the group, that we cancel the meeting. And we wanted to keep the rotation intact for this particular term because some people have got this time already penciled in into their schedule. So, we didn't want to change the meeting on the 15th, for example, to now go at 12:00. I am trying to plan my things in my practice as good as possible so I don't like time changes on short notice. So, I think the reason why we do this and how we do this will be acceptable to the group.

STEPHEN DEERHAKE:

Okay. Thank you, Doctor. That being said, I assume this is an agreement. Anybody, any complaints or comments on it? Because I just feel, really, that we're all going to need a break from trying to do this teleconference ICANN meeting. And I certainly want our staff to have a break, some downtime, recovery time, given the time zone for everybody involved. Not seeing any hands wiggling. Is there any other business? Now you can wiggle your hands for AOB. And I'm not seeing anybody wiggling their hands for AOB.

So, as just discussed, then, our next teleconference will be held on the 15th of July at 20:00 UTC. And hopefully, at that point, we can start to deep dive into substantive policy development work on the review mechanism, now that we've done our review of what's out there. And I really thank Amy for presenting tonight, my time, at least. I know it's a

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while away—a month, basically. But please give all this serious thought between now and then. Feel free to express yourself on the mailing list, which is woefully lacking contributions. Hint, hint. And let's all come prepared at our next get-together for some serious discuss of what we think we need for a review mechanism.

And with that, I want to thank you. And good morning, good afternoon, good evening. Thank you, Joke. Thank you, Bart. Thank you, Bernard. Thank you, Kimberly. And with this, not seeing any other hands wiggling, Kimberly, you can stop the recording and we can all go to bed. Thank you.

**[END OF TRANSCRIPTION]**