
BRENDA BREWER: Good day, everyone. Welcome to IRP-IOT Plenary call #103 on 4 April 2023 at 19:00 UTC.

This meeting is recorded. Please state your name before speaking and have your phones and microphones on mute when not speaking. Attendance is taken from Zoom participation. We do have apologies from Malcolm Huddy and Flip Petillion. I'll turn the meeting over to Susan Payne. Thank you.

SUSAN PAYNE: Okay. Thanks very much, Brenda. Hi, everyone. Thanks very much for joining and being so prompt as well. So this is our 4th of April call. As always, we'll quickly review the agenda and then get on to the substantive matters.

Our first agenda item is just to revisit the action items, which we'll do in a minute. Then agenda item three is a discussion and identification of any final outstanding items that require to be addressed on the draft rules. And then I've indicated on the agenda the proposed date and time of the next call which would be in two weeks time. That's just to be confirmed. I think assuming that it doesn't cause a clash for Brenda and Bernard. We'll get a calendar invite out for that time shortly.

Okay. Coming back up to agenda item one, updates to Statements of Interest in case anyone has one. Oh, I see a hand from Kavouss.

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KAVOUSS ARASTEH:

Hello, Susan. Good evening or good afternoon. I have no problem with the agenda. I have no problem. Nothing to declare on the review of agenda on the SOI. But I wonder whether we are in quorum. We are only five. Apart from the secretariat, we are five personally. Thank you.

SUSAN PAYNE:

Thanks, Kavouss. We normally do proceed if we've got five. I think on this particular call, in any event, we won't be making any sort of decisions of substance. We may discuss and hopefully agree some decisions about how we progress some of these final outstanding items. But I think we would normally proceed with five. So I think particularly given the nature of the agenda, I'm comfortable to keep going. But thanks for bringing that up. I do also hope that that Flip will be able to join us a little later in any event as well, which would give us an additional person. So if that's okay, I think we're good to proceed. Again, noting that we're not going to be making any decisions of sort of substance today. Okay. Just pausing again to see if anyone has a Statement of Interest update that they need to make. I'm not seeing anything.

So I think then we can come on to the second agenda item which relates to an item that was for me to circulate the clean version of the draft agreement that we have been working on in relation to initiation. That was circulated by e-mail on the 6th of March. That was a cleaned-up version of something that had already been circulated with a redline on the 24th of February. And as you all know, we've been working on this for quite some time. So there have been a few sort of recent iterations with relatively small changes being made. But that cleaned-up

document was circulated on the 6th of March. I had asked if there were any final feedback to receive that by the 17th of March. And just to confirm, there was no further feedback. So I think we can now view that version of the draft agreement on initiation as our sort of final text on which we have a consensus agreement. I hesitate to say we have full consensus because I think that's probably not the case, given objections that have been raised by Malcolm on some of the aspects and indeed on some of the recent discussion that we had regarding the level of the fee. But I do think it's something we have a consensus on.

Just as a reminder again that the document reflects the principles that we've agreed with respect to initiation. It's not the actual text of the rule itself, the updating of the text of the rule is a task that sits with ICANN Legal or that they potentially delegate to Jones Day. But any such text that then is drafted comes back to this group for the final review to assure ourselves that it reflects what we intend and for approval. So that's just really just finishing that item off, really, in terms of the work that we've been doing over the recent weeks on initiation.

I'm seeing a couple of comments in the chat that people can't make the 18th of April meeting. Perhaps I'll pick this up with Bernard after the call. Perhaps we'll do a short Doodle to see if we'll have enough people. And if not, maybe we'll be pushing it back by a week or something like that. Obviously, we don't want to schedule a call if we won't manage to get quorum. Thanks for flagging that. I'll sort of pick this up offline. Kavouss, yes, please.

KAVOUSS ARASTEH:

Yes. Thank you, Susan. I think with the announcement or advance announcement of two distinguished colleagues who will not participate, maybe we remain only three, or if Flip will come, we'll be four. And I don't think that at the next meeting, number one, you could make or take a decision. Number two, whether we need that meeting or wait for another week to have some sort of, I will say, not committed but some sort of announcement that they participate, they have sufficient number of the participants. So just a question, I know that after 103 meeting, you have to finish the job. It's more than two and a half years. So I just want to express not the concerns, but some sort of indication that we may not be in a position with three people at the next meeting to do anything. Thank you.

SUSAN PAYNE:

Thanks, Kavouss. Noted. Obviously, there's always the hope that some of the people who aren't on today could join us, but we'll do a Doodle or something to double-check that. I certainly don't want to waste people's time if we don't have enough people for that date to have a quorum. So leave that with me and Bernard, and we'll work out whether we can go ahead on the 18th or whether we need to shift the meeting.

All right, so moving on then to agenda item three. It's really just an attempt to indicate the items that I think we still have outstanding, specifically relating to the Supplementary Procedures, so the rules that we have here. I know we have other tasks that have been delegated to this group under the Bylaws and so on. So it's not a question of our work being done, but in order to finish off this task of revising the rules,

I wanted us to look at what we still have left to do specifically on the rules so that we can wrap this up, get the public comment that we know we need to have underway and generally get to a point where we have an agreed version of the final Supplementary Procedure rules.

So, Brenda, would it be possible for you to pull up the PowerPoint? And just to explain, we have previously had a call towards the latter half of last year where we went through items still outstanding. So I have worked off that list and hold together here what I think are the four main items that warrant some further consideration. If we can go to the next page, Brenda.

You'll be pleased to hear that subject to any comments that anyone on this call or subsequently over e-mail raises about other items that they also think need to be addressed, as far as I can see, I think we just have, as I said, four items that need to be finished off. So the first of these relates to the Article 7, the article regarding consolidation, intervention, and participation as an amicus. We did do quite a lot of work on this in a small team. We didn't I think get to the point where we had quite finished off our proposed redraft, although we had gone quite some way. So, with apologies because this one has languished for a little while.

My proposal here is that probably the best way to handle this one is for the small team to be sort of briefly reconvened. And hopefully, over the course of e-mail and perhaps one or two meetings, that small team can reach a point at which they have something that they can report back to this full group for discussion and agreement. Obviously, when that small team meets, they may come to the conclusion that it will need more

than a couple of meetings. But I think it may be that it probably or at least I hope it won't need more than a couple. Then obviously, we know that anything that comes from that small team has to come back to the full plenary for discussion and agreement because it's the plenary that will be making decisions on this. And so if we do have any items in that consolidation small team that are still outstanding, it may be that at this point it makes sense for them to be kind of referred back to the to the full plenary for taking forward.

So that's my suggestion. I'm noting and with appreciation that both David and Kristina have indicated in the chat that there are consolidations for team members and that they are sort of standing ready to get going again on this. So that's really appreciated. We had, I think, a couple of other members as well. So that was a fairly meaty part of the rules, fairly complex. But obviously, that small team did a lot of work. So hopefully, we will have something fairly shortly that the plenary group can consider and hopefully adopt. So that's the first item. I wasn't sure if I heard someone speaking then, so I'm just pausing. No, I'm not. Okay.

Second item is relating to ICANN non-response. We did talk about this on that previous call that I mentioned. I think all of us felt that it seems fairly inconceivable to us that there is likely to ever be a circumstance where ICANN doesn't respond, doesn't participate in the IRP. Indeed, we even talked about an example of the kind of case where maybe ICANN wouldn't respond because it would be an inappropriate matter for an IRP to be brought. So something that relates to a ccTLD matter. We did discuss this and felt that even in that case, even when it was a case where ICANN perhaps would feel that they shouldn't participate in

an IRP because it's not appropriate. Even then, we felt that there would be some form of response from ICANN to that effect, seeking to have the IRP dismissed. But in any event, looking back to the Bylaws again, just to remind myself, Bylaws 4.3(n)(iv) is the Bylaws' provision that talks about the work of this group in developing the rules for the IRP and it gives a non-exhaustive list of items that that should be included in the consideration when setting these rules. One of those items in subparagraph F is this scenario where ICANN is non-responsive in the IRP. Therefore, given that it's in the Bylaws that this should be addressed in the rules, I do think that it does need to be looked at. We do need to make sure that if there is any particular part of the IRP Supplementary Procedures—or I'll call it the IRP rules—where we need to reflect how things would be handled if IRP is non-participatory, then we should do that. So my proposal for the way forward on this one and I think probably this is one that we will need to do towards the end, really, because once we have a really close to final version of the rules, I'm hoping that perhaps one or two volunteers would put their hand up to do a quick read-through of all the rules and to flag if they think there are any areas where we specifically need to make a provision for what happens if ICANN is not participating.

An example of this that sprang to mind, because we'll be coming on to talking about arbitrators in a minute, is, for example, it might be that we need something in relation to the selection of arbitrators that addresses this, although I think in fact it may be that when we do get on to dealing with arbitrators in a minute, this gets covered off by having a general provision about what happens if one or both of the parties don't appoint an arbitrator for some reason. So that actually, in that particular

case, might be either of the parties, but then that would obviously cover the scenario where ICANN was non-participatory in the IRP for some reason. But there might be a handful of other places in the rules where we just need to cover this off. So that's my suggestion for how we deal with that particular item.

I will just pause briefly and see if there are any hands. I'm seeing David is agreeing. He does agree that it needs to be addressed, given that there's some explicit requirement here and is supporting leaving it towards the near end. Kavouss, I see your hand. Over to you.

KAVOUSS ARASTEH:

Thank you for all explanation. I just maybe have missed some point, the time that I was absent. What is the issue of participating of ICANN in the IRP? IRP is dealing with the action or inaction of the ICANN Board or ICANN staff. What does it mean that they participate in or not? What do you mean by participation? Response to the points raised by the panel? What do you mean by that? Please kindly identify the situation that we know what. Then I would like also to know about arbitrator. I'll be talking different things from the panelists arbitrator. So what we need to discuss? Just a point of clarification, not objections. Thank you.

SUSAN PAYNE:

Absolutely, Kavouss. I'll respond, but since I see David's hand up, I'll go to David first, and then I will respond on that if David hasn't addressed. David?

DAVID MCAULEY:

Okay. Thank you, Susan. I thought it was a fair question by Kavouss. But I thought your example and it's one I thought of myself before we started the meeting, it was a good one. And that is let's assume for a moment that somebody directly challenges in an IRP claim request, a redelegation of a ccTLD. That is a conceivable situation where ICANN would not respond because it's clearly not subject to IRP. So, I could envision that as an example where there would not be a response, although I agree with you too that it's almost inconceivable that ICANN wouldn't say something. Now, maybe the small group would say, "Okay, there has to be a provision where ICANN can say things like that under a "reservation of rights," sort of like you see in jurisdictional cases where people don't want to by participating in an answer subject themselves to jurisdiction. I don't think it's that important in IRP. I don't think we have those hard and fast kind of borderlines. But maybe that's what would be needed is to say, "Yes, you can come in and respond under a reservation of rights," and those kinds of things. But that was a good example that you gave. So I think it is conceivable. Maybe there was some ICANN action that took place surrounding a redelegation of a ccTLD. So it's conceivable to me that there are cases where ICANN wouldn't have to respond. It's not a proper IRP. Anyway, those are my thoughts. Thank you.

SUSAN PAYNE:

Thanks, David. Kavouss?

KAVOUSS ARASTEH:

Maybe the problem is the use of the term participation. Answering or responding to the request is not called participation. Participation has different connotation, different meaning, and different scope. But response is different thing. So, I would like to have clarification. We are not dealing with participation as such on any decision or decision-making because the IRP is, I will say—sorry to use this term—against action or inaction. So, the one who is subject to this issue of action or inaction should not participate and comment, does not have carving of the situation. So, lack of response or response is different from participation. Thank you.

SUSAN PAYNE:

Thanks, Kavouss. Just so that there's some clarity, I've put in the chat—and I hope you can see it—what the Bylaws 4.3(n)(iv) say. It says, "The Rules of Procedure are intended to ensure fundamental fairness and due process and shall at a minimum address the following elements." And then there's a list of elements. In numbered paragraph F says procedures if ICANN elects not to respond to an IRP. So that is what we are talking about here.

Again, we all think that it would be an extremely unusual situation where ICANN didn't make any response whatsoever. But because the Bylaws specifically say that we should cover this in the Rules of Procedure, I think we need to at least consider it and see whether there is anywhere in the rules that we draft, that we need to reflect this or make some change or make some accommodation to cover this very unlikely scenario where ICANN, for some reason, elects not to respond and so not to defend the IRP. We do know, for example, that in that

extremely unlikely scenario, there isn't a judgment in default, for example, that there should still be a panel, and they should still make a decision on the merits. But they obviously would only in that, again, very unusual scenario, they would only have the papers from the claimant. And only the claimant would be appointing, picking an arbitrator, and that kind of thing.

Yeah. David is commenting on there could be some discussion about the meaning of address. I think that's a good point too, David. I provided that we have considered and we feel that our rules sort of stand up and not inconsistent with this scenario should it happen. I think that would probably also counters address. It doesn't necessarily mean we need a whole set of rules about what happens, but I think we need to make sure that we have looked at it and if there are places where it would be beneficial to make some accommodation for this unlikely scenario, then we should do it.

So that's my suggestion for what we can do to handle this. As I said before, I think it's probably best to happen towards when we've got a sort of close to final version. So I hope that makes sense. I'm not seeing any hands. So I will keep going.

Kavouss, sorry, we will come on to the arbitrator point four in a moment. I haven't forgotten your question, but I will come back to that. Oh, sorry. Kavouss, your hand.

KAVOUSS ARASTEH:

I just want some sort of clarification. If ICANN is arraigned or called for response, what is the reason that they elect not to respond? That

means ignoring the process? What does that mean? Even if the Bylaw— I don't know how. In what way we have risen the Bylaw, but it doesn't seem that is the case in anything. I'm sorry to refer to that. Sorry. I apologize to ICANN Board or staff that if somebody is, I will say, called for not taking action or taking inaction, it must reply. I don't understand that elect not to reply. What does it mean? Thank you.

SUSAN PAYNE:

Kavouss, I think we all have the same view as you in the sense of I don't think it's very conceivable that ICANN wouldn't reply in some form, even if what they did was put in some kind of response that said, "This is not a case that falls within the Bylaws to be considered through an IRP because it relates to the redelegation of a ccTLD," or whatever the example is. When we have talked about this before, we're struggling to think of an example of when this situation could arise. But as I say, we must at least consider it because we are asked to do so in the Bylaws. But I agree with you, I think it is extremely unlikely.

Kristina is asking you if Liz can shed any light. I'm very happy to divert a little bit. She may be wishing not to be deferred to. Liz?

LIZ LE:

Thanks, Susan. This is Liz Le with ICANN Org for the record. I'm sitting here. I cannot think of any instance in which ICANN Org would not respond to an IRP filing request even if it's in an instance where the filing relates to some a subject matter that's outside the scope of the IRP, such as an instance that David brought up with a ccTLD delegation or redelegation. I think ICANN would respond to such as filing to note

that it's beyond subject of an IRP or are any other instance where it's beyond the scope of an IRP. Again, I don't see any instances where ICANN would not respond to an IRP filing. Thanks.

SUSAN PAYNE:

Lovely. Thanks, Liz. With that in mind, I think when we come and do this, we can be fairly light touch, but I think we're asked by the Bylaws to consider and address this. So I think we have to do it.

All right. Our third item on the list is appeals, and that's Article 14. I've included this for completeness, really, and just to ensure that it doesn't later get forgotten. But when we have previously discussed this, we've all agreed that having rules governing appeals under this IRP process are very important. At the moment, Article 14 is extremely brief. It does refer to the process of appealing. Off the top of my head, I think it talks about appealing to the full panel. But it is quite brief, and I think it certainly would be beneficial. We've discussed this on that previous call, we discussed that we did feel it was beneficial for us to consider whether we need to expand have a fuller set of rules dealing with the process for bringing an appeal. But we also discussed and I think there was general agreement that we probably should finish what we are doing in relation to these draft Supplementary Procedures first dealing with the standard IRP process, and then we can circle back when we have finished on the Supplementary Procedures and consider whether we want to develop a sort of short set of rules specifically covering appeals, rather than starting now to try to work on something substantive on appeals now and thereby holding up the Supplementary Procedures even further.

I think probably what we could do, obviously we can think about what else we have on our plate, and this is definitely an important element. But it might be something, for example, that we start work on once we've got those draft Supplementary Procedures out for the Public Comment period, if we think it's a suitable time to get to start work on this or subsequently once we feel that we finished this task off. Again, that's my suggestion. I looked back earlier today to the transcript, but that is where the sense of where we came to on our last call where we were talking about our outstanding items. David?

DAVID MCAULEY:

Thank you, Susan. Hi, again, everybody. I agree with you with respect to the rules that would apply on hearing appeals. But I think there's one thing that we should do regarding appeals in the supplementary rules that does not deal with the rules of appeal. I think I mentioned this before but it may have been some time ago. So under the rules, under 4.3(w) I think it is—let me go over to that screen. But under the rules, it says that appeals are available—I'm quoting now—subject to any limitations established through the Rules of Procedure. Those are the rules we're talking about now. IRP panel decision may be appealed to the full Standing Panel sitting in bank within 60 days, etc. So we have the ability in the rules that we're now dealing with, not the appeals rules, but in the rules that we're dealing with, we have the ability to create limitations on appeals. I actually think we should. I've mentioned this once before. Under Bylaw 4.3x, a claimant can actually bring a non-binding claim. I can read that part of x. It says any claimant that does not consent to an IRP being a final binding arbitration may initiate a

non-binding IRP if ICANN agrees, provided that such a non-binding IRP decision is not intended to be and shall not be enforceable.

So the limitation I would create in the Supplementary Rules of Procedure would be, if there is in fact a non-binding IRP, that should not be appealable. But I think also that's the question. I think it's a complicated question because while it's not enforceable, we would then have to address the question or at least think about it. Is a non-binding IRP three-member panel decision, does it establish precedent? And if we think it does, then we may want to make it appealable. Or we may want to refer it back to the Board and say, "When you consider Bylaws amendments, you might want to look at this. It doesn't make sense." So that's the one thing I think that we should deal with in the Supplementary Procedures is the so called non-binding IRPs should they happen. Thank you.

SUSAN PAYNE:

Thanks, David. Yes, I recall that you have raised this before. I don't think I had properly appreciated the point you've just made. I'm sure you made it. I think I had rather missed it. That, as you say, if it mentions in the Bylaws that we have the scope to impose some limitations on appeals in our rules, then I guess yes, I think you are right, that is an element that we should consider now. I think I also agree with you off the top of my head regarding the concept of the non-binding IRP and perhaps it should be non-appealable. But this is obviously one we will need to discuss as a group.

As I can see, Mike is putting in the chat, "I'm struggling to know why anyone would ever be seeking a non-binding IRP." Really, particularly given that permission is required in the first place in order to seek one. I'm finding it difficult to understand what the point would ever be for someone to go through the whole process of an IRP only to have it non-binding, but perhaps others have some thoughts on that. Kavouss, and then David has his hand back up. So, Kavouss, over to you.

KAVOUSS ARASTEH:

I think that non-binding normally would not involve any appeal which is non-binding is not binding, more or less as some voluntary things, that if I have some non-binding decision, I don't appeal to that because there is no need to appeal for something which is not binding, which is not enforceable. So nothing should be enforced on that to any particular claim and so on and so forth. Therefore, what is the need to appeal? Appeal to what? Something which is not binding? It is not appealable. Thank you.

SUSAN PAYNE:

Thanks, Kavouss. David?

DAVID MCAULEY:

Thank you, Susan. I think Mike raises a point that I think is the point that is, to me, the risk here is that somebody's going to bring an IRP that's not really going after it vigorously. This is not something that comes through the crucible of relitigation that's even possibly a friendly IRP in order to get a rule made or to get a decision on the books. Who knows

what motivates people, but to me, that's the risk. As I was mentioning, alluding to, I personally think that if there is such a thing, it exists in the Bylaws, that these things should not have any precedential value, whatever. I don't know that we can sort that question out. I don't know that we have that power in what we're doing. But if ever the Bylaws are amended, if I were on the Board, I would certainly look at that pretty close. I'd say that doesn't make any sense. But I think that's the risk here is that someone goes after an IRP, that's not really fighting the battle. Anyway, thank you.

SUSAN PAYNE:

Thanks, David. Although, if that were the case, surely there's a danger if one makes it not appealable, isn't there? I'm not sure if that's the point you're making or the reverse. Yes, thanks, David.

DAVID MCAULEY:

I agree. If a three-member panel decision is if we look at this and we decide amongst ourselves that we think it is precedential, then we may not want to put a limitation on appealing it because we would prefer that the full panel get a chance to have their say on it. So I agree with that. I think it's not an easy question. It's sort of a small, compact question, but I'm not so sure how easy it'll be. But I do think we should address it. Thank you.

SUSAN PAYNE:

Sorry. I'm agreeing that with you and talking away with my microphone turned off. I think you're right. So I think this is one then. As you say,

there's this particular point in relation to appeals that probably we do need to think about. Mike?

MIKE RODENBAUGH:

Hey. I would love to hear what Kristina is thinking about in the chat. So hopefully she'll share that with us. But what I'm thinking on this particular issue is why don't we recommend that in the next Bylaws revision or whatever, that this notion of a non-binding IRP just be eliminated? Again, I can't imagine why anyone would spend money to do it, what it would mean, why we would need to develop special rules about something that's very unlikely to ever happen. It just seems superfluous given the reality as to a so-called binding IRP anyway.

SUSAN PAYNE:

Yes. We're getting some support there in the chat. I suspect we won't get much guidance on this. But I wonder, Bernard, if I could maybe ask, if you wouldn't mind looking back at the Accountability work and just see whether there's any explanation in there as to what that group was thinking when they proposed or when they came up with this particular Bylaws provision regarding non-binding IRP. That might help us as well to get a better understanding of what's in mind. Thank you. Kristina, thanks. Over to you.

KRISTINA ROSETTE:

Thanks. You, actually, in your request to Bernard just raised the point that I was going to. I agree with Mike's point that IRP should not be advisory. I am having a hard time imagining the specifics. But it seems to

me that you could have a situation in which ICANN for the non-binding IRP, where ICANN and the potential claimant are not actually really adverse on the particular issue, that there's no disagreement as to what the outcome of a particular scenario should be, but that's not what the outcome is. So the purpose would be to get a decision rendered that could be utilized for future foundational work. I'm still not writing out the scenarios in my head about when that one would work. But I think you could theoretically have that situation. I don't think that makes it any less helpful. Frankly, I agree with David that any such non-binding should also be non-precedential and non-appealable. But I also agree that I don't think we're currently in a position, the six of us or however many there are now, to move forward on that point. I do think it's something that we would need some broader discussion and consensus among the group. Thanks.

SUSAN PAYNE:

Thanks, Kristina. Yes. Okay. I think we've probably got as far on this one as we can for the moment. So I'll make a note. Indeed, I think I'll probably just update this particular document so that we can reflect that we do have this item on appeals that we do need to actually think about. Bernard is going to do that, digging around back in the work of the CCWG on Accountability to see if that gives us any insight into what that group had in mind when they came up with this scenario. So we will keep this specific item relating to appeals on our radar for handling by this group insofar as we're able to do so. Like others, I'm not sure that we have the power to opine on whether a non-binding IRP is precedential or not, although I think certainly we can again look back on the Bylaws and see precisely what is said. But we can certainly think

about whether we want to be making that kind of suggestion that Mike proposed about if a Bylaws change is coming, then perhaps consideration might be given to making a Bylaws change on this as well, if it seems like it is appropriate. Lovely. Kristina, I'm assuming that's an old hand. So I'm carrying on, but please—yes. Thank you.

All right. So our final item is what I've termed here selection of arbitrators, Article 3. Kavouss questions the terminology here. You are absolutely right, Kavouss. Actually, a better term would be panelist or selection of panelists. That's what this is in reference to. So maybe that's another change that I can make, just so that there isn't that misunderstanding.

When we had discussed this previously, I had been thinking that this might be something that we could move off into a small team or a sort of sub-team to do some groundwork and come back on. But given where we are now and the fact that actually we have had some challenges in terms of the small teams in really having enough people participating in them, that they feel able to be making sort of substantive decisions, I think that my suggestion is that we deal with this topic of the rule, Article 3, and reviewing whether we need to make any changes to the current Article 3. We do that in plenary in the next few weeks.

My suggestion would also be that we keep anything that we do fairly light touch. Bearing in mind some of the comments when we discussed our further work previously, I think we should be looking to make just the kind of changes that we feel really need to be made for the efficient operation of the IRP process. So if we review this and we decide that

actually we think the current version of Article 3 is adequate, then maybe we don't need to make any changes. But I think there's a task for us to do in this group to just do that exercise and see whether any more work is needed. Then if we can go on to the next page on the document, Brenda, please.

BRENDA BREWER: Susan, I'm sorry. You want the—

SUSAN PAYNE: Just slide three.

BRENDA BREWER: Oh, got it.

SUSAN PAYNE: Thank you. Yes. This is just for convenience. This is what Article 3 currently says. This is the text that talks about the composition of the Independent Review Panel. I'm not going to read it all out. You will have seen this before. You can see here what we have. It's not terribly user-friendly at a minimum, I would say. It's quite sort of dense text. It's a little bit difficult to read. So at a minimum, I think it might be nice to just put in a few paragraphs here. But I think it obviously deals with the situation where there's the assumption initially that there's a Standing Panel and how appointment is made from the Standing Panel, and I think that's all well and good. We know that we're relatively close now to having a Standing Panel in place. I think on our next call, I'm hoping

David will be able to give us a quick update on the work of that Standing Panel Selection Group. But even when we have the Standing Panel, the Bylaws still envisage that there can be circumstances where, for whatever reason, the Standing Panel can't take on an IRP, either because they don't have the right expertise for the particular case or because there are so many IRPs that the Standing Panel are basically too busy and they can't take on another one, and the Bylaws specifically envisage that. So even though we are obviously hopeful that we only ever need to have the process for when there's a Standing Panel in place for panel selection, we do actually need to build in just a process for what happens where, for whatever reason, the Standing Panel either isn't yet in place or can't act for some particular reason.

At the moment, what I think would be useful for us is to hear from practitioners like Mike and when he's able to be with us, from Flip as well, on if there have been any particular challenges in terms of panel selection. Based on this current text, it's possible there haven't been. For example, currently, we have no Standing Panel. Where have you found panelists? Has it been the case, for example, that you would go to the ICDR and the expectation is that you use a panelist that they identify? Is it generally the case, as this rule seems to suggest that the party, so ICANN and the claimant just come up with their proposed panelists who they go off and find themselves from wherever? Then those two panelists get together and find a third panelist from somewhere. So it'd be interesting to know what is done in practice and whether this rule really reflects what is done in practice and if there have been any issues that that we need to fix.

Then the other point that struck me is that there's no timing here at all. The ICDR rules, which these rules supplement, do have some references to 45 days. But I have to say, it doesn't seem terribly clear to me when 45 days kicks in, given that we've got a process here, albeit not very clear one. So again, interested to know whether as a group, and particularly with the insights from people who are active in IRP, is whether we ought to be building some kind of timing in because we don't currently have any. With that very, very long introduction, Mike, thank you for putting your hand up. Over to you.

MIKE RODENBAUGH:

Sure. I can just speak from my personal experience that this clause definitely has been utilized in at least one case that I've handled. We've each selected a panelist, and then those panelists could not agree on a third panelist. That process took a well over six months, as I recall, until finally I think—I forget exactly how it resolved. I have to go back and look. It's been so long now. But I think it certainly went to the ICDR and they selected the share, I believe, because the two panelists, the two sides, could not agree on one. And yes, so given that experience, I think it would be good to have some guardrails in around timing and specifying exactly what happens in the event that the two panelists cannot agree. It says here, "The ICDR rule shall apply to the selection of a third panelist." So that's there. It just doesn't say how long the two panelists should argue, I guess, over selecting the third panelist because that process was very open-ended and took a long time.

SUSAN PAYNE:

Thanks, Mike. That's really helpful. If you were just following the ICDR rules, I think there are some provisions in there. Parties can call for the ICDR to sort of take over. But I think because the fact that we have this rule here, I think there's probably a kind of uncertainty or maybe a bit of an ambiguity over when you default back to the ICDR process. It struck me that that might be the case. It sounds from what you're saying as though that might have been the case in your scenario. So it does seem to me that I think this does warrant a little bit of looking at.

David has also suggested in the chat that you have a suggested addition up. Thanks, David. So over to you.

DAVID MCAULEY:

I do. Thank you, Susan. It's not with respect to the point Mike made. With respect to the point that Mike made, though, I would just observe, I think that we have to be careful with the guardrails because I assume that the two that we're trying in his case, we're trying and weren't sitting on their hands, it might be difficult. So maybe what our guardrail should be should be an exhortation to do it within 90 days or whatever it is, but I'm glad to hear from practitioners because that was something I wouldn't have thought about. So thank you for that, Mike.

Anyway, the point I wanted to make, Susan, was on independence. There's independence of the panelists. There's two sentences in this draft that I'll read, and I'm starting on the third line. The first sentence that I'll read says, "A Standing Panel member's appointment will not take effect unless and until the Standing Panel member signs a notice of Standing Panel appointment, affirming that the member is available to

serve in as independent and impartial pursuant to ICDR rules.” That seems fine. The next sentence says, “In addition to disclosing relationships with parties”—and I’ll underscore the word parties—“to the dispute, IRP panel members must also disclose the existence of any material relationships with ICANN and/or the ICANN Supporting Organization or Advisory Committee.” Now, that sentence is the one I want to comment on. What I want to say is that is not a perfect map to the provisions in the Bylaws, on independence, which is 4.3(q). And what 4.3(q) indicates is that it’s not the parties, necessarily. They have to disclose the material relationship with ICANN, a Supporting Organization and Advisory Committee or any other participant. So participant is going to include those people were talking about in consolidation, joinder, all that kind of stuff. So I think it might be preferable here to say that they will also confirm that they are in compliance with ICANN Bylaw 4.3(q). The reason I put it that way is that same Bylaw says that we, members of the IOT, can, if we want, develop additional independence requirements. So that’s my comment. Thank you.

SUSAN PAYNE:

Thanks for that, David. Yeah, that certainly sounds very sensible to me. So again, that’s something that we can think about adding in and reviewing as a group. I like your way of putting it. An alternative might be to sort of mirror the language from the Bylaws, but I think your way might be cleaner and allows, as you say, for perhaps a future Bylaws revision or for us as a group coming up with sort of additional criteria in accordance with that particular Bylaws provision. So thanks for that suggestion. I’ll make a quick note of it.

Sorry, I'm just quickly checking the chat. Brenda, could we go to the fourth slide? Yes. These are a couple of other things that had been previously flagged. So the first items, A, B, and C, on here were raised as potential issues for consideration by the IOT members very early on in the process when we were looking at sort of issues under the rules that we felt we needed to address. And that includes IOT members. Some of these were raised by ICANN Legal.

So A was to consider whether we better align the Article 3 language with the ICDR rules, particularly about the selection of the third panelist where there's a disagreement. So that's the point that Mike just made. B is about considering adding specificity on the nationality of arbitrators and whether you could have one or more arbitrator, be of the same nationality, and also whether there should be any nationality restrictions as between the arbitrator and ICANN or arbitrator and the claimant. As I say, that was one of the ones that was suggested as something we should consider. Certainly, I think we should consider it.

I did make a note a bit further down on the page that certainly once we have the position where we've got a Standing Panel, and I think that's going to be a minimum of seven people, although I think we maybe end up with a Standing Panel that's perhaps 9 or 11, I'm not quite sure. But again, when we hear how the process is going, David may be able to update us on that. But with a Standing Panel of a pretty sort of finite number of people, I'm not sure with certainly—it's one for us to think about and discuss—not sure how realistically we'll be able to impose nationality restrictions. They always seem like a fine idea. But I'm just thinking of how things work in sort of stakeholder and constituency processes where you're supposed to have geographic diversity and you

then find yourself absolutely stymied by a requirement for that diversity that can't be met out of the membership. It would be unfortunate if we built in something that led to that outcome.

David, I will come to you. I'll just quickly do C before I do. The third item was considering specifying a date when the IRP panel is in place so as to give clarity as to when an emergency arbitrator might need to be empowered. I think that one seems to me, it probably does just need some clarity. I guess this goes back a little bit to the first point about what happens when you have a situation where the third panelist hasn't been agreed on and appointed. Do you have a panel in place or not? So that may be all kind of related.

Yes, I think that's pretty much all of what's captured on that slide. So, David, sorry for keeping you waiting.

DAVID MCAULEY:

No problem. Thank you, Susan. With respect to the nationality, I'm speaking as someone who thinks putting restrictions on nationality of the panelist is a bad idea. And it would limit a party, claimant or ICANN, from being able to choose the panelists they want, which I think is not a good idea. But it's interesting since we just spoke about 4.3(q) and creating additional independence requirements, maybe we could create an independence requirement that says to every panelist that they will not accept an appointment where considerations of nationality could play into their judgment, or if they find themselves feeling that when they've already taken one on, they would resign, something like that. Maybe that's the way to skin that cat. Thank you.

SUSAN PAYNE: Thanks, David. Good suggestion. I'm sure that the nationality point is really about whether there's some bias built in as a result of nationality in it, and I suppose it is conceivable depending on the nature of the dispute. There could be a scenario where sort of matters of nationality are really sort of fundamental. But probably in many IRPs, that is unlikely to be the case. Kavouss?

KAVOUSS ARASTEH: Sorry, David McAuley, I don't agree with you that nationality is a bad idea. I did want everyone to be the same nationality. And in that nationality, also there are issues that some people, they have two or three nationalities. I don't know what you mean by nationality, how we do with that. But on the other hand, I have difficulty with everyone with the same nationality. Usually, there are some countries, they override other people and they, I will say, have maximum participation internationally. So I don't think it is a bad idea. It's not bad idea. But it is how to implement that. Thank you.

SUSAN PAYNE: Thanks, Kavouss. I think we're all supportive of the concept of diversity and very alive to it, obviously, within this ICANN space. But as you say, how to achieve that, particularly given that once the Standing Panel is in place, we will have a very finite group of people from whom to call. And the panelist available to the parties in the IRP will be based on those who've been selected by that Standing Panel Selection Group.

Okay. Kristina has made a comment in the chat that, for example, if the IRP was related to a TLD and it was concerning a term that was a geographic name or an indication of origin or something of that nature, then definitely geographic diversity considerations could well be particularly coming to the fore.

I think as far as I had really got with this, I think we've already had quite a useful discussion here on this call around this. What my suggestion was in terms of the way forward was that we will pick this up within this panel group and have further discussion on subsequent calls. What I think was probably be helpful would be if there is a review of the text, then perhaps we have some suggested sort of redline language, suggested straw person for amended version of this Article 3, again, bearing in mind the desire to keep things as light touch as possible, but to address points that we do feel do need to be addressed.

I'm very happy to take on that exercise but I'm equally extremely happy if one or two of the IOT members on the call wanted to volunteer to work on that, either one person on their own or a couple of people working together to put together a straw person for the purposes of our next call. I'd be extremely happy to hand this task over to a couple of volunteers. But if I don't see a couple of volunteers then I will suggest that I'll give this a go and see how I get on and circulate something with the understanding that whatever I circulate to get the conversation moving and hopefully to spark further discussion and further improvements.

Kavouss, I see your hand is up and I'm not sure if it's a new one, so I'll just pause. Okay. I think maybe that's an old hand then from Kavouss.

KAVOUSS ARASTEH: It is a legacy hand. Sorry.

SUSAN PAYNE: Okay. No worries at all. No problem. All right. I'm not seeing any volunteers. I've had a couple of people that have to drop off the call. Indication is David's going to be away. I think with that in mind, I've been giving this some thought, I definitely won't feel confident that anything I suggest is the final version but I'll take this as an action for me and I'll circulate a suggestion as a straw person that we can start working from to get the discussion going on this.

Thanks, Kristina, for that offer. That's super helpful.

I think then we can move on. David said he has an AOB question. I think we probably can start now, David, if that's okay with you.

DAVID MCAULEY: Sure. Thanks, Susan. I was just curious. Are we working towards meeting together at ICANN77? I hope so. I hope we could get some dedicated time together and spread the word to the full team and urge people to come. But I'm just curious what's happening.

SUSAN PAYNE: Lovely. Thanks for raising that. Yes, I think certainly that's the intent. I'm going to look to Brenda to let me know what the deadline is. But I think that this has already been flagged for us to have a request put in for a

meeting slot. If that's not the case, Brenda, let me know and I'll do that now.

BRENDA BREWER: I can submit requests starting April 24th. So we haven't missed any deadlines yet. But what are you asking for in particular besides a meeting? Is it a two-hour meeting? They don't offer two-hour meetings. They offer 90-minute meetings.

SUSAN PAYNE: I think 90 minutes would be good if we can get one. I know there are usually limited slots at 90 minutes. So if we could only get 60, I'd rather have 60 than nothing, but 90 would be good.

BRENDA BREWER: Do you want this to be on the schedule? Is it an open type of meeting?

SUSAN PAYNE: I think that's fine unless others disagree. If it's on the schedule, that means we get things like support and recording and so on, don't we?

BRENDA BREWER: Yes.

SUSAN PAYNE: The anticipation would be it would be a working meeting. But I think, generally speaking, working meetings tend to be open, don't they, even if most of the people who attend are the members of the group?

BRENDA BREWER: It doesn't have to be open. It can be closed and still on the schedule, but only the people you invite are able to walk into the room. So it's a closed session. There's two options, a closed session on the schedule or a closed session off the schedule or an open session for everyone to be welcome to join, whether it be remote or in person.

SUSAN PAYNE: Okay. Thank you. Kristina, I can see your hand but I think Bernard probably put his hand up to comment on this. So if you don't mind, I'm going to just turn to Bernard first. Bernard?

BERNARD TURCOTTE: Can you hear me?

SUSAN PAYNE: Yes.

BERNARD TURCOTTE: Okay. Just some experience here. On very technical things and the stuff we're doing here is very technical. I have found in the past that it's been more disruptive to have an open meeting than not because, A, some people are smart enough to figure out that they're not going to

understand all the history and everything else and have read up before showing up so they won't come. And then you get those people who actually do not have any idea and then will, even if we ask them not to, ask questions and it slows the whole thing down. Just a point of view. Not trying to hide anything. But the question is if we've only got 60 or 90 minutes, it takes 15 or 20 minutes for people to get settled and start working on stuff. Then if we've got all sorts of other people in the room, it can be disruptive. Also, what I have seen if it happens to be at that sweet spot in the schedule, all of a sudden a bunch of people will decide, "Let's go have a look at that." And then all of a sudden, you've got an overcrowded room. There's all sorts of reasons. I mean, I'll go with whatever the group decides but I'm just telling you my experience with these things. Thank you.

SUSAN PAYNE:

Okay. Thanks, Bernard. There's a bit of chat on this as well so I might want to review that. Kristina, sorry for leapfrogging over you.

KRISTINA ROSETTE:

That's all right. Just picking up on Bernard's point. I think the topic of IRPs and the work that this group is doing seems to be sufficiently potentially controversial, that I would be reluctant to delve into the waters of some of the negative inferences, generally adverse, that people will come to if we have the meeting closed. We have nothing to hide. I don't want people to think that we do.

My point was really related to the one David raised, namely, my recollection is that on the last call I was able to participate in, there was

some discussion about saying, “Can we pick what our target date for delivery of a work product is and then work backwards so that we can try and perhaps give ourselves more of a timetable?” I wasn’t sure if that effort actually happened. And if so, what the outcome was. Thanks.

SUSAN PAYNE: Thanks, Kristina. I’ll come back to you after Kavouss. Kavouss?

KAVOUSS ARASTEH: My question is that open or closed to whom? To members of IRP? Is it IOT? To whom? To the public? There is a middle ground on that. You could make the meeting open but no one asking outside the particular person that’s designated to ask a question, but they listen. So I just want to see what you mean not to be totally saying closed and closed, but putting something workable to comment with what Bernie mentioned. Thank you.

SUSAN PAYNE: Thanks, Kavouss. Actually, I’m seeing a bit of comments in the chat along similar lines. I’m very alive to Bernard’s comment that this is quite technical and it can be disruptive if it’s a very open meeting and people are coming in and asking questions. But I think I have some reservations as well about looking as though—there’s always a question about why on earth is someone holding a closed meeting and why are they not willing to be observed. I think on balance, I’d probably feel more comfortable if we had a meeting which was open to observers. But in

terms of participation and access to the microphone, it's a working session and that's the intent.

I think perhaps I'll take chair's prerogative and propose, Brenda, that we do that. We'd like to be in the schedule. It would be an open meeting but the session description will make it very clear that it's a working meeting of this group. Therefore, it's open for quiet observation rather than active participation by third parties. Kristina, that exercise hasn't been done. But I think now that we've got this agreed set of outstanding items, I think Bernard and I can get on and hopefully do that now and work our way back from the time we need to finish off and when we're targeting for doing that. You're absolutely right. If we have a deadline, we are more likely to meet it than if we don't. So yes. Watch this space. I have not forgotten that we could do with having a proposed timeline for wrapping this work up.

Okay. I can see Kavouss's hand but I think that is an old one. I do I think we probably can wrap this call up for this week. We will do a Doodle poll about our next call. It may be on the 18th. We may shift it back by a further week.

KAVOUSS ARASTEH:

Susan, this is all done anew. I agree with you to be an open meeting with observer but not today's any question at the meeting, as Bernie mentioned, after 103 or 104 meeting and newcomers may have some peculiar idea that may not be very constructive.

SUSAN PAYNE:

Yes, absolutely. Thanks for that, Kavouss. Okay. Thank you very much, everyone. Thanks for all of your engagement and I really appreciate you all joining this call and sticking with this effort. I feel we are on the closing slopes now. We can stop the recording, Brenda, for this call. Thanks again, everyone.

DAVID MCAULEY:

Thanks, Susan.

[END OF TRANSCRIPTION]