
BRENDA BREWER:

Good day, everyone. Welcome to the IRP-IOT plenary #104 on the 25th of April 2023 at 17:00 UTC.

Today's call 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. I'm turning the meeting over to Susan Payne. Thank you.

SUSAN PAYNE:

Thanks very much, Brenda. Thanks, everyone, for joining. As always, we will start with the review of the agenda and updates to Statements of Interest. In fact, let's do updates if there are any updates to Statements of Interest. I would perhaps pause and see if anyone has any right now. Okay. I'm not hearing any so I will keep going.

In terms of the agenda, we had one action item which was for me to propose a straw person on the kind of composition of the IRP panel. Hopefully, you've had at least some opportunity to at least briefly cast your eye over that circulated yesterday. But our main agenda item for today is to look at that and start that discussion on the composition of the panel and what the rules should say on that.

Then in terms of next call, on the agenda that is circulated, it was still to be confirmed. But I think two weeks time would take us to I think it is the 9th of May, if I remember correctly, looking at our later time slot for that call, the 19:00 UTC. Flip?

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FLIP PETILLION: Hi, Susan. Thank you. Just one question. Do you still plan to organize an in-person meeting while we are at the next ICANN meeting, Washington?

SUSAN PAYNE: Yes, I think we do. We had some discussion this on our last call. I think we went back and forth a little bit on whether it should be open or closed. I think we came down on the side of it being open in the sense of feeling a little uncomfortable having a closed meeting that is not transparent for the wider community. But it will be organized as a working session of this group. So we'll be looking to be making sort of progress and to having input from members of the IOT and not seeking to open this group up or to open the proceedings up other than to observers. I think that was the plan. I don't know that we have a time slot yet for that. But hopefully we will be allocated a slot.

FLIP PETILLION: Excuse me. Yeah. So you don't have a date for the moment? Sorry, Kavouss. Just continuing on my question.

SUSAN PAYNE: I don't think so unless Brenda has heard back yet.

BRENDA BREWER: No. No, there is no confirmation of a date yet. But we are proceeding with booking a session.

FLIP PETILLION: All right. Just for your information, in as far as you find it relevant/important, I have a hearing on the 14th of June. So I will be able to travel to D.C. only as of the 15th. I know that may frustrate the agenda and of course you shouldn't take that into consideration to reschedule or to schedule yours or the agenda of the group, but in as much as you want me to be there, please take a note on the 14th I have a hearing and I will only be able to fly on the 15th. Thank you, Susan.

SUSAN PAYNE: Thanks, Flip. Obviously, I don't have a great deal of scope. I don't think Brenda does either, but we'll certainly bear that in mind. Kavouss?

KAVOUSS ARASTEH: Do you hear me, please?

SUSAN PAYNE: I do hear, yes. I do hear.

KAVOUSS ARASTEH: Okay. Thank you. I'm sorry. I don't understand the term composition of the IRP panel. I look into the term or terminology of composition. What do you mean by composition of the panel? The panel is proposed by another entity to ICANN. And among those, they will take action as per Bylaw. So what is our mandate of composition of the panel unless I misunderstood your objectives or the language used in your agenda a

little bit vague. So what do you mean by composition of the panel as far as this group is concerned? Thank you.

SUSAN PAYNE:

Thanks, Kavouss. I use the terminology that is in the current rules, the ones that are called the interim Supplementary Procedures. Rule 3 of the heading for that rule is called composition of the IRP panel. I don't think it means anything more really than the section of the rules that's dealing with panelist selection, so how to identify the individuals who will go to make up the IRP panel. I think that's all it is a reflection of. So hopefully that makes sense.

KAVOUSS ARASTEH:

I don't believe so. At least, how to select the panelist, it is our duty? We don't have any duty to select the panelists.

SUSAN PAYNE:

No, no, no. No, not for us to select them but for us to help give guidance in the rules on what is the process for the parties to select the panelists. So not for us as a group to be choosing the panelists but just for us to explain what the process is.

KAVOUSS ARASTEH:

The process has already announced to everybody. So I don't think that they need to talk about the process. We are working since six months how to do the job. There was a consultant who was selected or proposed and selected by the group, by seven people, representative of

the SO and AC. And these people with the consultant did something among the candidates. They proposed names to ICANN, and that's all. Now it's in the hand of ICANN. We have no mandate to do anything at all.

So I'm very sorry. I think it is a mixture of responsibility. We have no responsibility at all with respect to the selection, with respect to the compositions, whether that is seven-member panel, whether that is three-member panel, whether in some very exceptional cases, one single member panel, this is not our duty. I'm very sorry. So I'm a member of that group, either the last six months I was wasting my time or I am not quite clear. I'm sorry. I don't want to object to you, as usual. I don't object to the chair, but please clarify what is our duty. We have no duty at all with respect to the panel. We're waiting for the ICANN to announce what they have done and selecting the seven among the number which has been proposed, and that's all. Thank you.

SUSAN PAYNE:

Thanks, Kavouss. Sorry, there is a misunderstanding. This is not about the selection of the Standing Panel, which the Standing Panel as you know very well because you are on that community selection group. The Standing Panel is the body of panelists that will stand ready to hear any cases. And I agree. We are not involved here in this rule with the identification of the Standing Panel. We are here only involved with the process for when there is a particular IRP case, the claimant in that case and how ICANN together work to identify the three panelists who will be their IRP panel for their case. But this is not the selection of the Standing Panel. I completely agree, that is not our role.

KAVOUSS ARASTEH: Thank you very much. Thank you for that explanation. Now it's clear for me. We are not dealing with a Standing Panel. We are dealing with a particular case coming by a claimant to the IRP, why they need the process about that. Am I right?

SUSAN PAYNE: Yes, yes. Okay. Thank you. All right, Flip?

FLIP PETILLION: Thank you. I saw Sam had her hand up. Probably that was related to this topic. Except if she would like to step in first, I would like to come back to my earlier question.

SAM EISNER: Thanks. I took my hand down. I raised it to support Susan in the clarification, but it sounds like the clarification has been made. So thank you.

FLIP PETILLION: Thank you very much, Sam. Susan, back to my earlier question. Actually, I just saw the information about the possibility to have a meeting of 90 minutes. In D.C., I thought that the idea was to take advantage of our presence to have a much longer session so that we could cover much more topics. I don't even think that it does make sense to come over to Washington for a 90-minute session. So if we could extend that so that

we could cover, I would say, three or four sessions in a row, even spread over a couple of days, then I would say that makes sense. Otherwise, I don't think it makes sense to spend the time and spend the money. What are your views?

SUSAN PAYNE:

Well, I don't know that that's going to be achievable. The Policy meeting is only a four-day meeting. We're kind of up against a lot of other calls for time in the agenda. So I'm not sure that that's achievable. I can certainly take the views of others on the group as well. But I don't know whether in practice, that is something that we can do, Flip. If there is strong support for us to try to do something longer than that, I will certainly investigate. You still have your hand up but I think it's probably ... yes. Okay. David?

DAVID MCAULEY:

Thank you, Susan. Hi, everybody. I just want to jump on board and support what Flip is requesting and give strong personal support for this idea that we need good time, not just at ICANN77, but in my opinion, continuing at each and every ICANN meeting. We have so much to do, our work is really important. But it never has the urgency of an EPDP or an E this or an E that. But I just don't understand why sometimes. I also feel that if we do have these meetings, we will pull back together many of our members become broader in our scope, more focused. I just think there's so many benefits to come from it that I want to throw my voice in support of Flip and say that's my hope going forward. So thank you very much.

SUSAN PAYNE: Thanks, David. Kavouss?

KAVOUSS ARASTEH: Perhaps I don't clearly understand. I understood from you that you first planned to have a 90 minutes meeting. And I understand that, if I'm not mistaken, some people want to extend that. I am not in favor of that. We have a very tight meeting in Washington, D.C., very, very tight meeting. I don't think that we need to have more time for that. At least one and a half hour with the maximum that we have. It is two and a half years, three years we are working. Another few months doesn't make any change and there is no urgency on anything. And even I wonder whether we need to have anything in Washington, D.C., why we need to have a meeting. Let's just have our normal meeting as we have every two weeks and that's all, because there are so many important things in that period that we don't want to take away the people from their normal works. At least I am a member of the GAC and we are very, very busy and tight meeting in the GAC. We do not have any time and I don't want to be absent. Thank you.

SUSAN PAYNE: Thanks, Kavouss. Yeah. That's certainly another perspective. I appreciate that. I think that is why we were not necessarily looking at more than one meeting. I can see the feedback. Sorry. I'll come back to you, David.

DAVID MCAULEY: Oh, thank you, Susan. Are you calling on me now?

SUSAN PAYNE: Yeah, if that's okay.

DAVID MCAULEY: Yes, I think Kavouss raises a fair point about the GAC's heavy schedules. And Brenda says 90 minutes is the best we can achieve now. So if that's the case, then I think we should take the 90 minutes and I think it should be open to observers. I think it would be good to let the outside world see what we're doing within this respect, not that they would be speaking. Then I think we should organize it for meetings going forward. Even if given the GAC schedule and everybody else's schedule, it requires a separate face-to-face day contiguous to an ICANN meeting, which would save on travel expenses, I think.

It just seems to me to be quite urgent. A good long day or two together would help us draw people back, would help our focus, would help us achieve momentum through the course of the day, make progress, make closure. We have a lot on the plate, not just these rules. So I just wanted to say I understand Kavouss's point about the GAC's schedule. So okay, for 77, I guess all we can do is 90 minutes. And certainly we ought to be able at that meeting to accept remote participation. I really strongly urge us to do something more comprehensive going forward. Thank you.

SUSAN PAYNE: Okay. Thanks, David. I'm noting Becky's comments as well in the chat about it does feel that there's a great deal of urgency to getting this work done. I think we all agree that there is much to be done. So we'll certainly stick with the plan, I think, for at least that one meeting in D.C. We certainly wouldn't plan not to have that. There was strong support for it. Yes, we will see what, if anything, can be done for future meetings as well. But I think now that we're back to in-person meetings, then yes, I think it would be the expectation that we would be meeting. We obviously didn't tend to have meetings scheduled during an ICANN meeting, but when they were virtual meetings, it didn't make sense. But I think our expectation would be that we will try to meet and make good progress during face-to-face opportunities as we can.

Okay. David, is that a new hand?

DAVID MCAULEY: New hand for a brief point. Thank you, Susan.

SUSAN PAYNE: Okay. Thanks.

DAVID MCAULEY: I think we need to get very serious about planning this in the future. When we do it, it's not fair for us to turn to you and say you have to carry the leadership of an all-day meeting. So I think we need to plan ahead and seek volunteers to lead elements of the discussion. And I think we'll do that. I think people will be happy to do it. But we need to sort of spread that leadership. Spread that around the facilitation,

whatever you want to call it, and plan it well so that we have good meetings. Thank you.

SUSAN PAYNE:

Thanks, David. Yes. Very good point. And you won't get any objection from me. All right. Thank you. Let's move on. I think we have effectively done agenda item two in the sense of, as I mentioned, when I ran through the agenda, I'm hoping that you all have at least had some opportunity to look at the straw person. So I think let's move on to item three on the agenda which is actually to review that proposal and hopefully discuss and see if we can make some progress on agreeing some of this.

I pulled this together. It's a markup of the existing Rule 3 from the interim Supplementary Procedures. On our last call, we did have on the slide that Rule 3, as it currently exists, displayed. You'll probably recall that that's quite brief and sort of forms a single paragraph. So there's quite a lot of markup here because I was trying to flesh this out. So it's more a sense of adding text in rather than deleting what currently is there, but also breaking it out into paragraphs, making it hopefully a bit easier to be a bit more user-friendly. But just giving a bit more detail, and also trying to sort of align a bit better with what we have in the kind of fallback provisions, which are the ICDR rules, and just generally give a bit more clarity for the parties on things like timing, because we heard from some practitioners that the timing of the appointment of the panelists can be quite lengthy and has at time proved a little challenging.

I want to express my thanks to Kristina again. Kristina very kindly cast her eye over my sort of initial draft and made some really helpful suggestions and input. So I really appreciate that.

Brenda, if we could pull up the markup of Rule 3.

BRENDA BREWER: Yes, Susan. I have the one you sent and I have the one Flip sent. Do you want the first one you sent?

SUSAN PAYNE: I have been on another call and so I haven't seen the one Flip sent. I don't see an objection to using that one. I think that seems fine. I'm assuming, Flip, that you will not have been deleting anything. There we go. Okay. This is going to be a bit challenging.

FLIP PETILLION: I seem to have done, Susan, but not dramatically. I'm sorry to have been sending this so late in the process.

BRENDA BREWER: This is Susan's version. Should I change it?

SUSAN PAYNE: Yeah. Sorry about this. Would you mind going back to the original one? And perhaps, Flip, if I could trouble you to making your comments as we

go through it, perhaps that would be better. Apologies for this, but I'm afraid I came straight from another call.

BRENDA BREWER:

This is the original, Susan. Your initial is right here.

SUSAN PAYNE:

Okay. All right. Well, let's go with this one. Flip, as we go through them, if you wouldn't mind speaking to what you've changed, that would be really helpful, because I maybe won't appreciate what you've done or won't pick up on it. So that would be I think helpful.

So first up, the IRP panel will comprise three panelists, and that is not a new point. Some of the input that we had had on this, it would be helpful if we considered making it clear when the IRP panel—so that is the three-person panel for a particular case—is considered to have been convened because that impacts on things like whether you need to go to an emergency panelist and so on. I think the point was that there have been situations where perhaps two panelists have been identified and they haven't yet agreed on a third. And so the point that I therefore was trying to capture is that we're not considered to have an IRP panel in place until we have the three panelists. As I said, that then allows the parties to understand that if they haven't got three panelists in place yet, then if there are matters that need to be adjudicated urgently, they would need to use the emergency panelist process, I think.

Flip, I think your amendment here is fairly minor. But would you mind just flagging it?

FLIP PETILLION:

Sure, Susan. It's really language. There is no change on the essence here. Just to help, I don't think there is any other important—I don't think there is any other change afterwards. What I would like to propose is that in view of more than 10 years of IRPs that we have already initiated, conducted, and having issued declarations, I think it's important that we keep in mind that typical for arbitration is the freedom of the parties. And that freedom of the parties to appoint people, to sit as an arbitrator, has worked over the past IRPs. I don't think ICANN—I've never heard it. I've never heard of any other party complaining about the quality of the panelists that had ultimately been nominated and formally appointed and been in place to issue a final declaration in an IRP. So the system works. And I mean by that "the" generally, globally accepted approach to nominations and appointments and installments of panels has worked and has also worked and the IRPs where ICANN was a party and the claimant was a party. So my suggestion is to add as few provisions as possible, not to add any complexity that actually nobody needs and nobody asks for. I know that will sound quite in the abstract, but I think it's useful to take into account when we are drafting any text related to three. Thank you.

SUSAN PAYNE:

Thanks, Flip. Yeah. Certainly this is more fleshed out than the previous version. I certainly was not trying to over engineer. But I think this is very much a straw person. This is for all of us to discuss and agree. Obviously, your insight and the insight of others who act as practitioners is very helpful on that. So this is a starting point to get the discussion

going. We can keep text or some of these provisions we'll remove them as we think is most appropriate. But it is attempting to address issues or concerns that had come to light in previous cases that were flagged as things for us to consider as a group.

Looking back to certainly when I first joined this group, we had a few things that were flagged as being things for consideration, one being when is the panel considered to be convened? We also, I think, had something to consider about timing. Mike Rodenbaugh talked to this last week on our last call as well about challenges that he's experienced with if the two panelists can't agree on the third. So it's attempting to address issues that I think are light issues, but I say again, this is a sort of starting point for us to try to collect around. David?

DAVID MCAULEY:

Thank you, Susan. Hi again, everybody. So, to respond to you looking for strawman-like comments, I don't have it in front of me right now, but in paragraph three, I did have a comment. There was a sentence in there that said something along the lines of if a party believes that the panel doesn't have the requisite diversity and skills, etc., it will notify the others. I thought it left me unclear. When I left reading the document, I was unclear.

I want to make this point, I think it's a strong point I want to make, and that is it seems to me that under the Bylaws 4.3(k), if there is an absence of the requisite diversity and skills, that presents an issue. But that is something, in my opinion, the panel decides not a party. And so if a party believes that there is an absence of diversity and skills, it should

raise the matter or the panel should itself raise that as an issue if they see it coming down the line. But oftentimes, they're not going to know the complexity that's coming their way. But I think at the end of the day, the decision whether there is requisite diversity and skills is a panel decision, and I'm not sure it would fit within 14 days.

So that's my comment to the strawman. It may be related to what Flip was just saying in that I think Flip makes a good point. When you get to paragraph three, less is probably better than more language. But I think some things need to be made clear, and that's one in my mind that I think we need to be clear about. So I've stated my opinion. So thanks, Susan. Bye.

SUSAN PAYNE:

Thanks, David. I'll get to Kristina as well since she already had her hand up. So Kristina?

KRISTINA ROSETTE:

Thanks very much. I actually put my hand up to flag the very point that David had raised, namely, that when I was looking at the straw person draft that Susan sent me, that I thought was really excellent. The one thing I think we need to have is a mechanism that needs to address the situation in which the panel does not have the requisite experience. I am not necessarily opposed to putting that incumbent on the Standing Panel. However, I also think that if it's the responsibility or the obligation of the Standing Panel to make that point, I question how often, or if ever, they would actually do that. On the opposite end of the spectrum, if it's completely up to the other party or one of the parties, I

think that makes the potential frequency with which that point is made seems to be higher.

I'm totally open to finding a balance. But I do think we need to have something because I just questioned whether or not if it's up to the Standing Panel if they would ever be willing to, frankly, acknowledge the deficiency. And depending upon what the issue is, it could be outcome determinative. Thanks.

SUSAN PAYNE:

Thanks, Kristina. Lots of hands. Flip?

FLIP PETILLION:

Thank you, Susan. Excellent point made by David and definitely by Kristina. That's the risk you have to assess as early as possible. You cannot change the rules of the game when you started the game. You choose the right people from the outset and you hope they have the know-how and experience of the procedure aspects, the typical ICANN aspects, the pragmatic approach that everybody expects, the exact personality you want. It's a cocktail. And it's at the beginning that you have to make the assessment. There is, in my view, no point in time after the nomination and definitely appointment of the members of the panel to review that, and it's definitely not to the members of the panel to do that. At most, what they can do and what they can be allowed to do is ask for input by experts, which of course, will be subject to due process and the right by both parties to contradict what an expert would have as a view, and even the possibility to bring along their own experts. But there is no way that a panelist can be replaced or

completed with other people once the panel is installed. When is it installed? It is installed from the moment that the last panelist has been appointed. Then there is no way back. That's the point of no return.

SUSAN PAYNE:

Okay. Thanks for that. Again, I see another couple of hands. So David?

DAVID MCAULEY:

Thank you, Susan. I agree with what Flip just said. I think that's important not to change panelist in midstream, etc. But I really raised my hand to reply to Kristina. I think she made a good point. Some balance is needed. I came on strong that it's a panel decision. I still believe that. But in installing some balance into it so that it's not just completely without discretion, I would urge us to remember that the concept of a Standing Panel gaining insight over time into ICANN, issuing precedential decisions, the concept of getting the panelists from the Standing Panel is quite important under the Bylaws in my opinion. I was very active in this section back during Work Stream 1. When we designed this, if my recollection serves me correctly, this notion of using the Standing Panel, having a default position of going to the Standing Panel was quite important. So I would underscore that and say if there is a balance or a check, it should be narrow.

To Flip's point, the Bylaws even provide that the panel can ask for experts. So I think that this is in reasonably good shape, but we need to make clear that this is a panel decision barring some extraordinary circumstance. Thank you.

SUSAN PAYNE: Thanks, David. Sam?

SAM EISNER: Thanks. I agree with much of what has been said here. I think it's important that we don't just place into the Supplementary Procedures the line from the Bylaws or the requisite diversity of skill and experience needed for the particular IRP proceeding, that we don't just drop that in here. If we're if we're intending to create some sort of procedure around it with all of the warnings that we've heard today, I think we need to be clear about how that would be done and how we would expect that to be done. We are well on path to having a Standing Panel named where people can see the list of the panelists, the parties can select their panelists, and the panelists will select the third panelist. And there's some opportunity for the parties to identify if there's any sort of particular skill that might be helpful, that the two panelists could then consider as part of their selection, that could be something to be used and taken advantage of in the future. I do have some specific items to discuss later that might impact some of this, but I think it's important for us to close on or at least move forward on this part of the discussion before we turn to the other provisions.

SUSAN PAYNE: Thanks, Sam. I'm hearing, I think, a lot of agreement here that we need to have more clarity on this, if I'm understanding correctly. And also that it's possible that the 14 days may not be sufficient for this kind of process. I think we can we can look at the timing at some point.

In terms of the language from the Bylaws, I pulled this in from the Bylaws because the current rule didn't make a reference to it. So the current rule did make a reference to the circumstance where the Standing Panel isn't in place. Or it doesn't have capacity, which obviously, it's also something that comes from the Bylaws. But this other example of where you might go outside the Standing Panel, which is where they don't have the requisite skill, wasn't being captured in the rules. So it seemed to me that it was important for us to capture it in the rules. But I agree that we want to try to make a process that's workable. I think we're all in agreement that the idea of having a Standing Panel is that, in most cases, the IRP panel will be appointed from the Standing Panel.

David is commenting that he thinks capacity is clearly for the panel to assess. When you say the panel, David, I'm understanding you to mean the Standing Panel in that, and I think I'd agree with that. I think that's what is intended to be reflected here. Actually, we should probably scroll down, if you don't mind, Brenda, because I realized we were talking about this paragraph three but we don't have it on the screen. Yes. David is confirming that. Clearly, the Standing Panel knows whether they have too many other cases on and don't have capacity. But it's more this question of if there is relevant skill and experience.

Yeah, I think what we need to try to work towards or at least to brainstorm is how we can strike that balance that we've been talking about here and what our process should be for raising this, whether this is entirely a decision for the Standing Panel or whether we should be building a process whereby a party can say, "Hang on a minute, I'm supposed to choose my panelists here, but I don't feel that the Standing

Panel has the right skill and expertise.” Again, I’m seeing some hands so I will go to Flip.

FLIP PETILLION:

Thank you, Susan. Just to be very precise, it’s not the panel to assess, it’s the people on the panel who are invited to become part of a particular panel in a particular case who have to assess. I should actually draw your attention to the important declaration that people are invited to handle arbitrations or globally invited to declare now. They are asked to declare not only that they are impartial, that they are neutral, that they accept the task, but also very important, that they are available. That is really becoming very important. We come from an area where people who started to accept more and more arbitrations actually were the victim of their own success because they accepted too many cases and they couldn’t handle them. So that’s very important.

What I would like to add to discussion is that—and I’ve said that before in one of our previous calls probably two years ago—let’s not focus too much on particular 30 days or 21 days because we have had situations where a party, and in concrete, it was actually ICANN who needed more time to find a panel member. Sometimes you need some time because you need to find the right panelist. Sometimes you have as counsel cases that keep your attention away from the IRP that is at stake. So I would try to avoid to focus too much on particular periods like 30 days or 21 days, if possible.

SUSAN PAYNE:

Thanks, Flip. Sam?

SAM EISNER:

Thanks. I think this might follow well from what Flip was saying too. Some of the conversation that we have here—and I think it’s also embodied within some of the language that’s lower—is the concept of the Standing Panel as a body that we expect to take sua sponte or unilateral action, decide when it wants to act as a Standing Panel, as opposed to act as the list of panelists from which the parties are anticipated that they’re going to select for each individual IRP panel. Clearly, we have places where we have kind of an administrative role for the chair to help coordinate panel activities and those sorts of things. But I think we do want to be careful that we’re not inviting action from a group of panelists that are not officially seated onto a case that could impair their actual availability to be involved in a case.

So for example, we wouldn’t want to necessarily ask the Standing Panel as a body to look and say, “Okay, if you’re looking over these arguments, what skillset do you think is needed to hear this substantive discussion that’s a place between the parties?” because what that does is it could render a lot of the panelists on that same panel unavailable if there’s ever a need for emergency panel declarations or anything. We don’t want to take action that actually is inviting substantive review of claimants by the entirety of the panel before they even get onto the panel. So that’s why we have in other places that concept of emergency panelists, which we anticipate will be taken care of through people who are also on the Standing Panel, but they’re means that appropriately don’t invite action by the entirety of the panel over a case. So I think we have to keep that in mind. And keep in mind Flip’s caution that when

we're talking about the panel picks, that it's really about those who are selected to serve on a panel within an individual dispute.

One of the things that might be helpful—and we can see if we can help coordinate this if the IOT is interested—is we could ask the person who helps lead a lot of the coordination on the ICDR matters for IRPs. We could ask him or one of his colleagues from the ICDR to come and just discuss in general how they envision the panel selection process working just to give the understanding of what they've envisioned to make sure that we're all kind of on the same page and coming at this with the same assumptions about the panel as a body versus the panel, as a listing of people that are really reserved for specific actions, plus the chair that might help coordinate some of those activities.

SUSAN PAYNE:

Sorry, I was having trouble getting off mute there. Thanks, Sam. That's a really interesting suggestion, and I would like to circle back to that. But I can see Kavouss's hand up. So I will go to Kavouss first and then perhaps we could circle back.

KAVOUSS ARASTEH:

I think we should be allowed to talk but not secretariat always intervening. They should intervene when they asked them question. We should not be biased by their ideas. I'm very sorry. Let us think it over. If you have a question, we raise, and then they answer. But they do not give us any guidance what to do. So we have to be quite disciplined.

SUSAN PAYNE: Kavouss, apologies. I'm not sure I understand your comment here.

KAVOUSS ARASTEH: My comment is that some come in and said that we should do this, we should do that. We don't need to do unless we have a question raised, and they be invited to come on. But not they give us a guidance what to do. It seems that giving sort of instruction.

SUSAN PAYNE: Would you permit me to respond to that, Kavouss? If you don't mind, Sam is a member of this IOT group as well. So she is a member just like the rest of us.

KAVOUSS ARASTEH: I'm sorry. They are not a member. They're attending the meeting and they are not members.

SUSAN PAYNE: No. I'm sorry. Sam is a member.

KAVOUSS ARASTEH: No, I'm very sorry. They are not members. They attend. We appreciate very much. We appreciate the good advice, if you ask them and so on, so forth. Now, I come to my question. It was said that if the members of the panel are not sufficiently expert, who decide that they are not expert? This is my question. Who decides that? Can you please clarify because we're discussing for some 10 to 15 minutes. If one member is

not the expert, then we should look for the substitute from X and Y, and so on, so forth. Who will decide that a member is not expert? Thank you.

SUSAN PAYNE:

Thanks, Kavouss. Well, that is exactly what we're talking about is how we develop a process to allow for that. That is what we're discussing. And it is open to all of us to work out the solution. So that's our job here, to come up with the solution. But I'm going to go to Becky now. I think she will want to comment on the point you made regarding Sam's participation. Thanks. Becky?

BECKY BURR:

Yes, thanks. I definitely want to be clear about this. This IRP-IOT is not a standard community policy development process, where the staff is here for support. This is a committee group that is sort of created under the Bylaws at the direction of the Board. And Sam is indeed a member in full standing with every other member of the community on that point. So I know, Kavouss, that that's not the ordinary way things happen in ICANN, but this is not the standard cross-community policy development or GNSO policy development effort. It has a very particular role in which the Board thinks that or needs to be affirmatively at the table.

SUSAN PAYNE:

Thanks, Becky.

KAVOUSS ARASTEH: I'm waiting for my question to be answered. Who decides that the expert is not expert or panelist is not expert? Thank you.

SUSAN PAYNE: Thanks, Kavouss. I believe I answered your question when I said that this is what we are trying to develop, the rule to cover. This is why we are having this discussion. There is something in the Bylaws that says that if the panel doesn't have the requisite expertise, then it may be possible for the parties to go outside of the Standing Panel. So this is what we've been discussing is what process should we build into that, and that is our job here in this group to work out what that process should be. So if you have suggestions, then they would be most appreciated.

We've had some other suggestions from the group talking about this being the role for the Standing Panel as a whole to make that decision. And then we had the caution that Sam expressed, which is that we may find that we have an unintended consequence of giving that task to the full panel because we may then find out that we have inadvertently excluded all of them from actually being eligible to be panelists for a case because they have been involved in this kind of procedural question. So I think this is a good point at which we circle back to Sam's suggestion about perhaps it would be helpful for us to hear from the ICDR on this. I'd be interested to hear whether other things would be helpful. With that in mind, I'd also be interested to hear how people envisaged this.

KAVOUSS ARASTEH: I'm sorry. It's off the situation. You said that the member of a Standing Panel is not expert. Are we talking of member of a Standing Panel not expert or member of the panel is not expert? Which panel we are talking?

SUSAN PAYNE: Kavouss, we are talking about the provision in the Bylaws, which is—let me quote it. Bylaws 4.3, I believe it is k.2, which talks about the Standing Panel and the use of the Standing Panel for the selecting panelists for a particular IRP. And it says specifically, “In the event that a Standing Panel is not in place when an IRP panel must be convened for a given proceeding, or is in place but does not have capacity due to other IRP commitments, or the requisite diversity of skill and experience needed for a particular IRP proceeding, then the claimant and ICANN shall select their panelists from outside of the Standing Panel.”

So that is what we are talking about here. It is that for a particular case, we have a Standing Panel of a number of people. But for a particular case, they do not have the right skill and expertise to hear the case. I think this probably will be a fairly unusual circumstance—I'd like to think it would be a fairly unusual circumstance—but it is expressed in the Bylaws that this could happen. So we are trying to work out a process for dealing with it. Does that make sense?

KAVOUSS ARASTEH: There are two questions here. Please correct me if I'm wrong. First, Standing Panel, they are not expert in that particular case. Then who decides that they are not expert? They themselves decide they are not

expert or someone else decides that they are not the expert? Who decides that? Thank you.

SUSAN PAYNE: All right, Sam?

SAM EISNER: Thanks, Susan. Thanks, Kavouss. I think when we go back to the purpose for which we see the panel, we're not always looking for experts. But I believe it was Flip or it might have been David who alluded to the potential for bringing expertise on. There is a different provision of the Bylaws that says that the IRP panel could seek expert inputs and that would be done by the collection of the panelists who are selected and seated on the case to identify that they need more inputs, as well as each of the parties has the ability to identify if they think that expert inputs, which has been done before, it's a regular part of IRP proceedings where a panels identify their experts on topics and brief those items for the panelists, and the panelists are able to further seek information from those experts, if needed. So the IRP process itself already allows for expertise to be identified and accessed, so that's not necessarily what we're discussing here when we're discussing the selection of the three panelists to seat over any of the individual disputes.

SUSAN PAYNE: Thanks, Sam. So, going back to how this is envisaged to work, I would welcome the thoughts on this group in terms of once we have a

Standing Panel in place, is it envisaged that then these kinds of decisions would be made by whoever is a chair of the Standing Panel? Or is it envisaged that this type of decision would remain the role of the provider, the ICDR administrator who, certainly if you are proceeding with your dispute under the ICDR rules, there are a number of these kinds of decisions that get made by the ICDR administrator. So is that a suitable way forward that we give the parties the opportunity to raise the possibility that in their view there is not the necessary expertise and diversity of skill and experience? Let's use the right term. And they can make that representation or indeed that the Standing Panel themselves could make a similar representation to the administrator, and then it is for the administrator who is appointed by the ICDR to make that decision. Is that a way forward? Or does that not make sense once we have a Standing Panel in place? That is one of the questions that I have been somewhat grappling with and indeed grappled with it when we come on to the provisions about what happens if the parties won't agree. It seemed to me that there may be a difficulty in tasking some of these decisions to even a chair of the Standing Panel because the chair could be the person in question who doesn't have the expertise, or the chair may be one of the panelists already appointed and is the person who was unable to reach agreement with his co-panelists. So, it seemed to me that there could be a role still for that independence coming from the ICDR administrator. But again, very keen to get thoughts on this and views on whether that works and particularly if it works based on your experience in practice. Flip?

FLIP PETILLION: Thank you, Susan. Based on that experience, I think in the following order, we should give priority to the parties and their representatives, the panel members that are already in place, the Standing Panel, and in last place, the organization that is administering the proceedings. Thinking of the last one, it's my experience that ICDR is a typical organization that is managing the process but is not and will definitely not get involved into substance or discussions that could even remotely be related to substantive discussions.

SUSAN PAYNE: Okay. Thanks, Flip. David?

DAVID MCAULEY: Thank you, Susan. To respond to your question, in my view, even though the Bylaws don't talk about a chair, there must be a chair, the Standing Panel is going to have to organize itself administratively. There will be a chair. And it seems to me that this is a matter for the chair. It's like assignment of a judge. Most jurisdictions have more than one judge to hear cases and the assignment of a judge is not an appealable issue, an appealable matter. It's just an assignment. If there's a lack of diversity or skill, that can be solved by use of experts or going outside the panel. I think the parties can ask the question but I don't think they should have a say in the in the outcome. Thank you.

SUSAN PAYNE: Okay. Thanks, David. Kavouss?

KAVOUSS ARASTEH: First of all, I thank you, Becky, for the explanation given. Whether I agree or not agree, I don't want to discuss that. I understood that he is right. Okay. No problem. But I don't know. But my question is that the seven members of a Standing Panel, they're supposed to be expert in the areas that they are expecting to work. We should not get into that issue if they believe that among the seven. It is not possible to establish a three-member panel or assign one member, so on, so forth. That is up to them to clearly mention, "Sorry, the issue is outside our expertise." But we do not leave it to the others to decide that they are not expert. I don't think that it is correct. So I think we need to see whether we are doing the correct course of action or not. I don't put in question the Bylaw but the course of action we are taking may not be the same as we are doing. We have seven members, they're supposed to be expert in many areas, and we are working now on abstract. I don't know whether that case that you're talking will or will not happen. But nevertheless, if it happened, the seven members of the panel or whatever number ICANN select at the end, they could bravely and encouragingly say they're sorry, "The issue is outside our expertise." Thank you.

SUSAN PAYNE: Thanks, Kavouss. Greg.

GREG SHATAN: Thanks, Susan. Interesting discussion so far. I think, first, as a general matter, we need to make it clear in whatever implementing documentation that we expect the panelists to come from the Standing Panel in virtually all circumstances. I think you said very well what the

intent of having a Standing Panel is. So I think we need to be clear about that.

My concern is and in particular with the hierarchy that Flip proposed is that we're going to end up with a form of shopping by the parties, where even if there are panelists available, they're going to object in some way to their expertise or their diversity or something like that. I think we need to avoid that. I think the idea that someone would come from outside the panel should only be our last resort and not some sort of a regular process. Specifically, I think that it is the essence that whoever is the chair of the panel at the time to manage this process and it's really more a matter of availability and not just sort of fine tuning. What if we have a panel that's three women or three people from Latin America? Is that somehow offending diversity? I realized we have to cope with what's in the Bylaws. But the idea that we're somehow trying to establish some sort of panel that each panel has to represent diversity is problematic. Obviously, the overall Standing Panel—we've worked hard to have it represent diversity as much as possible from the pool that we have.

Then the issue of expertise, I think I wouldn't make too much of it. We're talking about adjudicators here who have been picked for a number of areas of expertise that are relevant to our process. So we're not looking for experts in and of themselves, but just those who are expert enough to be able to make heads or tails of what they're being asked to decide about. So I think this is very much something for the panel itself to run with backup from ICDR and from whatever, secretariat or staff support it has. If a party wants to invoke the Bylaws and object to the panel, we need to deal with that. That's kind of a

hypothetical on top of a hypothetical. They don't even know that we want to necessarily have a process for that. But it may be unavoidable, given that it's in the Bylaw. But I think this is something that we should try to make as unusual as possible. Thanks.

SUSAN PAYNE:

Thanks. Flip, if you will bear with me a minute. Greg, could I just ask you to clarify? When you say something for the panel, do you mean something for the Standing Panel to decide or do you mean the IRP panel in the particular case? I'm not sure which you're referring to. Given that we're talking about IRP panel selection at the moment, it seems to me that there isn't an IRP panel until we've selected them. So this is happening at the point where we haven't yet selected the panelists, where there's a consideration about whether there's qualification or not.

GREG SHATAN:

Thanks, Susan. Sorry not to be more clear. I was talking about the Standing Panel and particularly the chair of the Standing Panel in organizing the answer. Once a particular IRP panel has been seated, maybe then the procedure shifts, for instance, to the panel itself. But it seems like this question mark more likely arises before the panel is seated. Objecting to a panel is not having the necessary ... I think the way that the Bylaw is constructed, it really happens only before an IRP panel is seated. So let's not try to expand the ability to object under that. But yes, it's a Standing Panel obligation to manage and resolve this issue should it arise.

SUSAN PAYNE:

Okay. Thanks. I just wanted to be clear. So I think I'm hearing quite a lot of support for that position that this is a role, really, for the chair of the Standing Panel to take on—or a responsibility rather, not really a role. I'm noting your comment about the expectation being that once there's a Standing Panel that that is where the panelists are coming from. This is not a regular occurrence. This is an unusual and perhaps kind of extreme situation. Again, I have a few hands. Flip, I will come to you.

FLIP PETILLION:

Thank you, although I'm not so sure anymore what I'm actually asked to clarify or comment upon. But let me maybe remind you of the fact that the whole IRP process is an exception to the general principle that a party can simply go to court. So when a party initiates an IRP, it is accepting an alternative dispute resolution mechanism that is there, that is put in place, and that actually has been thought of by the ICANN community. It has an impact on that party's say in the composition of the panel. I can live with the idea that a chair should, in a first instance, be sought within the very small group of the members of the Standing Panel. I read Mike's comment here. Is that seven? That's what I recall, but I think it could be 9 or 11—if somebody could clarify that, that would be very helpful—which is still a very limited number of people. So I could live with the idea that parties—ICANN on the one side and the claimant—should seek for the experts or the chair with the expertise within the Standing Panel. But that should not hinder both parties freedom to discuss finding an alternative person. In the past, in IRPs, both ICANN counsel and counsel for the claimant have been taking a lot

of effort to find the right people. And sometimes it took quite some time. But I think it's important to not forget that this is a process based on the willingness of a claimant to call upon an alternative dispute resolution mechanism which is the IRP. If we are going to impose too strict rules, that's not going to make this process attractive. I've already pointed to the fact that in the discussions, there is one particular party that is permanently involved, that is even participating in drafting rules, and that's ICANN. But there are claimants that are not even aware of the fact that they are a potential claimant in the future who we would be compelling to follow some rules that we are discussing today but who have never been around the table to discuss them in the first place. That's very problematic in ADR and in arbitration in particular, which is an IRP.

SUSAN PAYNE:

Thanks. Thanks, Flip. Yeah, your comments are noted. We have this process. We have what it says in the Bylaws. I don't think we can start reopening some of these considerations. We're all very sensitive to this. I think it would be an unusual circumstance, if both the parties felt that there was no suitable panelist and went to the Standing Panel on that basis. It would be a very, I think, unusual circumstance for the Standing Panel to disagree with them, surely. But we do have this expectation that once there's a Standing Panel, the parties will be picking their panelists from the Standing Panel. I don't think there's any dispute. I don't think there's any ambiguity in the Bylaws over that. Kavouss?

KAVOUSS ARASTEH:

Thank you very much. I think we should avoid premature solution for hypothetical cases that may not happen at all, number one. So those people who propose the immediate solution going outside, they are jumping into conclusion, and I don't agree with that, with all due respect, to go to outside the ICDR or whatever. Because you have not yet discussed, it's a hypothetical thing that the case comes and there is no expert, we don't know.

Second, within the seven, the Standing Panel or panelists, if ICANN select or opt for seven or maybe more, I don't know, I don't think that we should distrust them from now, at the very beginning, saying that they maybe are. Let us wait to see whether such a case comes before the panel, whether I'm sure they are sufficiently fair to mention for that very hypothetical case that may not be at all to say that, yes, we need expert. But I think it's seven people in very general way. Normally, there are experts, one of them or few of them. So I don't think that we should discuss and come to a conclusion. My problem was that someone jumped into the conclusion immediately in saying that they are not experts and we go to outside for that one. That I don't agree. Thank you.

SUSAN PAYNE:

Thanks, Kavouss. Sam?

SAM EISNER:

Thanks. Hearing that there's a bit of convergence that if this issue arises, that this would be something to decide amongst the Standing Panel, I think I'd recommend that we not fully assign this role to the chair of the

Standing Panel and maybe assign it to a process among the Standing Panel, just so we're not automatically keeping the chair from also serving in a substantive manner on cases, because this could be something that we might utilize something like the emergency process or something else. I have discomfort in assigning a role to a specific person right now, though I think that there is convergence that this is a role that is appropriate from amongst the Standing Panel in some way, shape, or form.

SUSAN PAYNE:

Thanks, Sam. I think I'm hearing your suggestion being that we—I'm not sure if the emergency panelist, I'd need to look at what that currently covers, but we utilize that sort of concept whereby perhaps a panelist in turn is effectively selected to be the emergency panelist to hear this, and this would be this kind of question so that this is a rotating kind of role rather than being held just by the chair, thereby potentially having the chair be excluded. I'd welcome other thoughts on that as well. Again, if this is a fairly unusual circumstance. Then hopefully, it wouldn't exclude the chair too many times. But I suppose we can't rule out that this might get raised regularly and thereby giving rise to the concerns that Sam has expressed. Greg? Sorry, Greg, I'm not hearing you. I think you might be on mute still.

GREG SHATAN:

Sorry about that. Trouble getting off mute. Maybe I picked this up from Sam or maybe I'm just making it up. I don't know that we want to make any one final decision about how this goes. I think that we might want

to allow some flexibility, and maybe just say that it will be established through a process of the panel to be facilitated by the chair of the panel. That way, he or she could decide whether they have a group of three people to decide it or have a rotating emergency panelist or just interlocutory panelist. It's even too early for interlocutory. Anything we decide now might turn out to be not a good fit once we get to implementation. I think we do have an idea that further rules for the panel will be established by the panel itself once it's standing. And I think the panel is a lot larger than seven. So I think we nominated as many as 13 or 14 for it. So I think that also goes to the equation of how many panels could be in place simultaneously before the idea of a lack of capacity could occur. Thanks.

SUSAN PAYNE:

Thanks, Greg. David has commented in the chat on the size. David, just as a reminder, is the chair of that selection group. He prefers not to comment on the exact number of panelists that have been selected for the Standing Panel at the moment because there's still some things to be clarified, but it should be information that's available soon. I think it's the Bylaws. I could be wrong, but I think the Bylaws say something like a minimum of seven or something along those lines. So it could definitely be more than seven.

Okay. This has been a really sort of good discussion. I'm not sure that we've necessarily come sort of firmly down to a single conclusion. But we do, I think, have some general principles that I think we're largely aligned on. The expectation is that once there is a Standing Panel, that's where the panelists will be selected from. And these other

circumstances are anticipated to be the exception rather than the rule. But in some form within that Standing Panel group, this decision about whether there's the requisite diversity of skill is something that I think most on this believe falls to be determined within that Standing Panel. Not quite clear as a group on how that should happen, but whilst there's a lot of support for it being a decision for the chair, there's also some concern that we don't want to exclude the chair from many cases by virtue of them always having to take on this kind of an arbitration within the concept of the Standing Panel role.

I can see a couple of hands, and I'll come to you all in a minute. But we just have five minutes to go. So I think we obviously have other provisions in this Rule 3. We'd very much welcome discussion and input on them. Ideally, if people have thoughts that they want to share before our next call, that would be very helpful. I didn't circulate this as a Google Doc, but perhaps that would make sense so that people can mark up in the same document, particularly giving thoughts to things like time limits and so on, and some of these other sort of newer kind of provisions such as the provisions talking about conflict of interest and so on.

So I'm sort of starting to wrap up in and saying that perhaps we can get some engagement between this call and the next one, but in that document with some thoughts on whether this works and thoughts on some of these other issues, in addition to what we've just spent in this call discussing. I will need just a moment or two at the very end just to remind you all of our next call, but I've got two hands. So Kavouss and then David.

KAVOUSS ARASTEH: Thank you very much. The discussion has been started, it's good discussion. We have not come to any even preliminary conclusions. We should avoid mistrusting or distrusting the panels, where there will be 7 or whether there will be 9 or 10. I don't know. It is very, very unlikely that that hypothetical situation happens. Still I am of the strong view that we leave the issue in the hands of the chair of the Standing Panel and the members of the Standing Panel to clearly mention that the hypothetical issue randomly, seldom it will arrive, may be outside the expertise and we should not get to any conclusion and we should not jump to anything and going to outside that panel. Thank you.

SUSAN PAYNE: Thanks, Kavouss. David?

DAVID MCAULEY: Thank you, Susan. Thank you to you and to colleagues for an interesting discussion that's not yet finished. I think that underscores the dead horse or the almost dead horse I want to be right now and say it illustrates, in my opinion, how well served we would be by a full-day face-to-face meeting, contiguous to an ICANN meeting. Bernie in chat earlier said that that's an exception and expensive. I understand that. I think this work merits something like that. So we I think we need to get to a place where we draw more people back. I'm glad we'll have 90 minutes at ICANN77 because I think people will be interested in this and find this interesting and come back to us. But we really need to get ourselves engaged for longer periods of time. 90 minutes, we just can't

seem to close issues, and then we have a couple of weeks and memories fade. So dead horse beat. Thanks, Susan.

SUSAN PAYNE:

Thanks, David. Okay. I'm sort of reluctant to say our next call is not for two weeks, David just having said that. But we should all be able to review and provide input in the meantime. I'll ask Bernard if he could transfer this onto a Google Doc for us and circulate that around because it will make it easier for people to be making suggestions in the interim. But please do, if you if you possibly can, take the time to review the whole of this Rule 3 so that we can know if there are areas where we are aligned or if there are particular other areas that we need to spend a bit of time talking about. But I think we're all of the view that probably this kind of decision is one that that, in the unusual circumstance, hopefully where it comes up, has to get decided within the Standing Panel, but with hopefully as little disruption being caused to who can then act as a panelist as a result of that process.

Okay. I will stop there. Our next call is in two weeks and it's at 19:00 UTC. Okay. Thanks very much, everyone. Thanks again for the really engaged and spirited discussion. See you over e-mail and then in a couple of weeks' time.

[END OF TRANSCRIPTION]