
BRENDA BREWER:

Hello, everyone. I'm so sorry that was unmuted. I apologize. And let me just welcome you all to the IRP-IOT meeting on the 9th of May 2023. This meeting is recorded and just kindly state your name for the record when you do speak. And with that, I'll turn the meeting over to Susan. Thank you, Susan.

SUSAN PAYNE:

Thanks very much, Brenda. This is our IOT call for the 9th of May. So, thanks very much for those who are able to join. We have had a couple of apologies. And actually, we've also had an apology from Bernard who's not able to join today, unfortunately. But he hopefully will be back with us next time. So as usual, I think first up we'll just do our quick sort of review of the agenda and so on. And also, the updates to statements of interest if there are any. I will pause and see if anyone has any updates.

I will just mention I'll be making an update to my GNSO statement of interest. I'm not actually sure that it's something I will need to make to the specific statement of interest for this group, but I'll just mention it just for completeness, which is I've volunteered to be on the subsequent procedures IRT. And there's a request for all of us to have up to date statements of interest, so I will be making mine, remember to reflect that. But I don't think it's anything that really affects this work at all. Okay.

Then in terms of going back to our agenda, we'll review the action items. Our main agenda item is then to continue the discussion on Rule

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3, the straw person regarding composition of the IRP panel, and then just noted in the agenda on next call is in two weeks' time. So, coming back to agenda item two, then the action items. The first one was for Bernard to circulate this straw person on Rule 3 in the form of a Google doc, which he has done, and I included that again in the link to that in the agenda, but you will have all heard that from Bernard a couple of weeks ago. And then the other action item was for all of us to review that and provide input. So, sort of comments or edits in suggestion mode or via indeed via our email list.

And certainly, when I last looked at the document a couple of hours ago, I don't think there were any updates. So, I'm hoping that that means that aside from the issue we were talking about at some length last time, regarding how we handle the situation where the standing panel doesn't have the requisite diversity of skill and experience. I'm hoping that means that aside from that issue that generally speaking people are fairly comfortable with the straw person. Hopefully, we'll have the opportunity to just test that as we as we go through the document.

So, I think with that, then we can move on to the main agenda item, which is to continue the review of Rule 3. And I will just mention that I circulated at the same time as I sent around the agenda, I also circulated some thoughts on what a possible solution might be with respect to this issue that we really spent pretty much all of our call last time talking about. And it's what's reflected in paragraph three of the straw person, which is the procedure for what we do if the standing panel doesn't have the requisite diversity of skill and experience for a particular IRP proceeding.

And the reason we need to address this is because it is envisaged in the bylaws in 4.3(k)2. Although I think we all have the hope that this would be quite an unusual situation. I'll just touch on the points I made in my email because it was circulated fairly late on. But I think in terms of our discussion last time, my key takeaways from that, I think that there was a feeling that expressed by certainly one of our practitioners who uses the IRP that any rules that we do such should be relatively touched and we need to allow the panel to have some procedural freedom, because that's what has worked well to date.

And so, I think the point being made was that we should obviously address what we need to, but we don't need to be completely constraining all sort of all options or all opportunities for the panel to exercise its own skill and discretion.

Next up was the standing panel as a concept is an important one under the bylaws, and so there is an expectation that the IRP panels will be formed. Once the standing panel is in place, the IRP panels will be formed from that standing panel. And so again, anything that we craft in terms of the rules, we should be bearing in mind that any exception to the use of the standing panel is expected to be exceptional and sort of narrow. Nevertheless, as we discussed, there was a feeling that we do need to clarify that what the mechanism is to address a situation where there's an allegation that the standing panel lacks the requisite diversity of skill and experience.

And I think there were differences of opinion there on where this is best, where such a decision is best made. Certainly, many felt that this was an issue for the standing panel or potentially if not the full standing

panel, then for its chair, but there was also support as well for the idea that we do need to have some kind of a balance because it could be the parties who are raising this as a concern. And so, we need to envisage that could be the case. And then we also were asked to think very carefully about not inviting actions or decisions from the full standing panel where that might have the impact of effectively excluding them all from currently acting on a case.

And I think that is quite an important thing for us to bear in mind. We don't want to delegate a particular type of decision to the full standing panel if the upshot of that might be that they are then conflict in forming an IRP panel themselves. We did also remind ourselves that in terms of thinking about having the requisite expertise, that there is scope in the bylaws for the IRP panel to seek expert input, so we have to bear that in mind. I think that goes back to the fact that any exception here to using the standing panel is expected to be an exceptional circumstance.

And so finally, I think based on kind of the discussion last time, it seems to me that there were probably four possible options that people had suggested for how this type of decision on whether the standing panel does lack the requisite diversity of skill and expertise. Four possible options for making who should make that determination. And the first of those would be the full standing panel, but obviously noting that risk that potentially then we might have all of those standing panel members conflicted from serving on the subsequent IRP panel for the actual dispute.

Next option would be the chair of the standing panel. Again, I think there's a little bit of risk there that that might mean that the chair then finds himself being excluded from serving on IRP panels in any case where this becomes an issue. We could utilize the concept of the emergency panelist. There is already a provision for an emergency panelist. At the moment in our rules, it really is only envisaged to be a role for where there's a requirement to seek interim relief before the panel, the IRP panel is empowered. But I think that's certainly an option that we could consider, which may be just would require us to slightly sort of review and revise that emergency panelist role a little, r a suggestion towards the end of our call that we allow the standing panel to set their own process for this, and that did get some support.

So, in my email as I will move on to, I came up with a suggestion of a way forward, but I have just noticed I've got a hand already in the room. So, I will pause and see, Kavouss, if this is something would you help me to get to the end of my proposed way forward or is this something you want to raise now? Okay. I am not hearing from you, so I will continue, and then I will come back to you, Kavouss, as soon as I-- in a moment or two just when I get to the end.

So finally, again, in terms of just specifically this determination of whether the standing panel has the lax, the requisite skill and experience for a particular case. My suggestion would be that this might be something that clearly the standing panel itself might of its own volition, and I think probably acting through the chair of the standing panel, might reach the conclusion itself that it lacks the necessary diversity for a particular case.

And I think if that were the case, my suggestion would be that they would then need to identify what the proposed path forward would be in that particular case. And that might be, for example, that both of the parties need to select an IRP panelist from the standing panel, but then when the third panelist is being sought, that that third panelist maybe would be selected from outside of the standing panel, or it might be in a particular scenario that maybe all three of the IRP panelists need to be selected from outside of the standing panel. And I think it probably is reasonable to leave it to the standing panel themselves to make that sort of assessment of what is appropriate for the particular case.

And then the other scenario that could arise is that one of the parties might raise the concern that they think that there's the lack of requisite diversity of skill and experience in the standing panel for their case, and where this really would be likely to happen or should happen would be when at the time when they're doing the IRP Panel selection. So, it's before the three-person IRP panel is appointed and each party is identifying their panelist. That would be the point at which if one of the parties think that there's this lack of diversity amongst the standing panel for the circumstances of the case, that would be where they would be expected to raise it.

My suggestion would be that where this is the case where it's raised by a party, that this would be something that gets referred to an emergency panelist and they would be appointed from the standing panel, and it would be their job to make the determination. And the reason for that suggestion is really to overcome this situation where it's always the chair who has to make these determinations and to allow for the standing panel members to take it in turn. And I think there'd be a

kind of expectation that the standing panel would take it in turns to be the emergency panelists anytime one's required in a case. Really, that's probably something that is for the standing panel themselves to set their own procedure. But then, as I mentioned before, that will require some fairly sort of narrow expansion of the provision that we have relating to emergency panelists just to ensure that emergency panelists could also be appointed to make determinations on this kind of procedural matter.

And that would be the case, but then I also suggested that perhaps the best way to handle this is that there would be an initial presumption that this would be the sort of issue that gets dealt with by an emergency panelist. As when the standing panel, if they choose to do so, make some kind of procedure or develop some kind of procedure of their own for how to handle this kind of situation, then obviously, then that procedure would take precedence. But unless and until we have the standing panel setting their own process for handling this, the default would be that we'd use an emergency panelist process.

And again, as I mentioned, I haven't updated the straw person in the Google doc. I didn't want to start sort of muddying the waters before we've had the discussion on this and hopefully reach some kind of agreement. But if there is some support for this kind of suggestion, then, obviously, I'll make some necessary amendments proposed in the Google doc. So, I am going to finally having gone through that sort of some slight length, I will now turn back to Kavouss. Kavouss has been waiting very patiently. So, Kavouss, over to you.

KAVOUSS ARASTEH:

Thank you very much for your kind background review, briefing, and introduction. I will take it from the following point. What we should do whenever there is a need to select or designate a panelist outside the standing panel? This is the question. And bylaw foresee that or foresaw that. In my view, that would happen whenever there is no expertise on the subject under consideration in the standing panel. I hope you will kindly take note of what I'm saying.

Thirdly, that decision that there is no expertise on the standing panel must be announced or pronounced by the standing panel itself, saying that on this specific subject, we don't have necessary expertise. It should not be outside that. It should not be ICANN board or anyone else. The standing panel, whenever they have no expertise on particular subject that it may happen, they should clearly announce that sorry, on this specific issue, we don't have expertise. Then we go to the outside sources. How to do that? That is different.

I don't want that someone else instead of the standing panel decide on the expertise or otherwise. I don't agree with what was said the previous meeting that someone apart from the standing panel decide that there is no expertise. A standing panel, whatever the number would be, would be selected or elected or designated by the ICANN board, and they have full authority to act in accordance with the bylaw on their mandate. However, there might be cases, very particular case, I don't know, that they said that sorry, in this case, we don't have expertise. Then we should go to the outside of the standing panel.

If you agree with this, and put it in the proper form that the decision on the expertise or otherwise on a particular subject is a matter to be

decided by a standing panel itself, but not by outsider. Neither ICANN board nor anyone else. If you cover that point, I have no difficulty, but I don't want to put the cart before the horse, making a judgment that, yes, there would be a case that there is no expertise and that lack of expertise must be announced or pronounced or indicated by the standing panel itself. If you put that one in your text, then I have no difficulty to follow the remaining. If you don't put that one, I have difficulty. That from the very beginning, there is this distrust of the standing matter upfront. And I don't want to take that and I'm not in favor of that approach.

So, I hope that you kindly take my point. In summary, expertise or otherwise that means lack of expertise on a particular subject before the standing panel need to be announced, pronounced, or declared by the standing panel itself. And we do not make any upfront procedure or decision. Thank you.

SUSAN PAYNE:

Okay. Thanks, Kavouss, for that input. I'm understanding when you say by standing panel itself, I'm understanding you to mean the full standing panel as opposed to a single panelist from that standing panel as an emergency panelist. That's my assumption in what you are saying. If I am incorrect, I'm sure you will put me right. David.

DAVID MCAULEY:

Thank you, Susan, and thanks, Kavouss. And thank you, Susan, for all the work you did to setting the backdrop here again. Pardon me. So, I just raised my hand to respond to you and to comment what my

recommendations would be, and I think I agree in part with Kavouss, but not totally. And where I agree with him, I think that this process should set by the standing panel for dealing with this question. And so, I think I'm supporting the fourth point in what you had in your email, that the standing panel create a process for this. And so, they could have themselves decided, or they could have the three-member panel that's been selected, decided, whatever they choose. To me, it's a process that they need to set.

And where I would, I guess, a little bit differ with Kavouss is I don't see this as being a subject-by-subject analysis. I think the requisite experience is actually laid out in the bylaws, and it's limited to, I think bylaw 4.3(j)(i), which says that the panel should have significant relevant legal expertise in one of the following areas: international law, corporate governance, judicial systems, alternative dispute resolution and or arbitration. To me, that's it on requisite expertise. That's the end of the analysis.

So, if there's a question that goes into the deep characteristics of the DNS, or there's a question that goes into the deep characteristics of algorithms or whatever the issue might be, that's not what we're talking about here, and that doesn't fall under requisite expertise and skill, at least in my view and my recommendation. For instance, that very same bylaw provision goes on to say that the panelists should over time, get knowledge of the DNS. Not expertise, knowledge. And so, I think every esoteric subject in the world, bar the ones I just mentioned, the panel should have some knowledge, or they should hire an expert. So, they create their process.

I think we should be very wary of allowing this issue to become a point of contention in litigation. And so when we come to consider putting limitations on appeals, which we, as the IOT, have the right to do, we have the right to create limitations to appeals. When we get there, I'm going to strongly recommend that we not allow this question to be appealable. It's something the panel should decide, that should be it, done and dusted. Diversity is a goal. It's never going to be perfectly achieved. And anyway, those are my comments. Thanks, Susan.

SUSAN PYNE:

Thanks, David. Okay. Yeah, definitely hearing support for, I guess, for this being a decision of the panel, the standing panel. Kavouss and David are addressing that in slightly different ways, but I think David's suggestion that the process is set by the standing panel is somewhat encompassed in I think what Kavouss is trying to achieve. All right. I'm seeing Kristina's hand as well, so I'll go to you Kristina. I think you're still on mute.

KRISTINA ROSETTE:

Yes. Thank you very much. Kristina Rosette for the recording, the transcript. I certainly understand the perspective that Kavouss and David are proposing. And I certainly also agree that we do not want this particular circumstance, namely contentions where a proceeding in which it's contended that the standing panel lacks the requisite diversity of skill and experience, we certainly don't want that, that exception, that extraordinary circumstance to become the rule. However, I do think we need to allow in the processes that we are identifying the

possibility that for whatever reason, the standing panel itself might be reluctant to frankly acknowledge that they are lacking in that diversity of skill or expertise.

And I think the part of the concern and to that end, just to be very clear about it, I do think that there needs to be an opportunity for either the claimant or ICANN for that matter to raise that contention. I would have no objection to frankly making it a fairly high bar or hurdle for the party making that contention to succeed. And, frankly, I think that would make sense for it to be a fairly high bar. But I am concerned that if we don't at least create an opportunity for the claimant or ICANN to make that complaint, contention, allegation, whatever, I think we are not honoring the spirit and the intent of the bylaws.

And while I certainly understand the point that David has made about, at least if I understood it correctly, that the universe of expertise or experience that would be at issue as very narrowly circumscribed, in my view, that view almost becomes circular. In other words, the standing panelists were picked because they have the experience in this area so it will never-- You almost make it true by definition that there will then never be an allegation or a circumstance in which the standing panel doesn't have that experience. So, I think from the perspective of someone who has been through this process as a representative of a claimant, I do think you need to have, at a minimum, the opportunity to raise the issue.

I don't have any objections to making the burden on the party raising it fairly high. And if we wanted to go even farther with then what is set

forth in your proposed way forward, I wouldn't have any kind of general objection to that. Thanks.

SUSAN PAYNE:

Thanks, Kristina. And hear what you're saying, certainly support from you in terms of that we should allow the possibility that it's one of the parties, either the claimant or ICANN to raise this. I'm not sure. I hadn't understood to be honest, what either David or Kavouss had said is excluding that possibility outright? But that may have been their intent, and I hadn't understood it to be that. But I can see both have their hands now up. So, Kavouss.

KAVOUSS ARASTEH:

Sorry, Susan. Maybe we forgot what we discussed at the very beginning of the accountability, separation of power and responsibilities. ICANN has executive power but not legislative power. The legislative power is implementation of the bylaws. I understood from David McAuley saying that in the bylaw, the expertise of the panelists of a standing panel are limited to the area that is mentioned. And he said there are other areas which is not mentioned, that is a shortcoming of a bylaw. He interpreted bylaw in the way that he did. I don't see that. I don't see the example that he's given is outside that expertise. This is an interpretation of the bylaw.

I would put it in a more general way. Whenever there are areas without explaining that areas that the standing panel declares that does not have expertise on that area, we can go to external sources. And how we do that, that is a different issue. But I don't want to say that the

expertise of the standing panel mentioned in the bylaw is only those that David mentioned. If that is the case, shame to us that we did not foresee the case that David mentioned. And in fact, he was one of the active members of this group in the first and second accountability. I have never heard that he says that these areas that we say the expertise of the standing panel are not the entire works. Nothing is heard. So, if you raise that point, there are shortcomings.

Nevertheless, this group is entitled to propose a shortcoming but not going to a specific area interpreting the bylaw, saying in a general way whenever there are areas that the standing panel clearly and specifically announced or pronounced that they don't have sufficient expertise, therefore, the selection of the panelists from outside the standing panel will proceed. If you put it in that thing, I have no problem. But I don't want to interpret the bylaw as David mentioned. I have some difficulty with that. Thank you.

SUSAN PAYNEL:

Okay. Thanks, Kavouss. So, David,

DAVID MCAULEY:

Okay. Thanks, Susan, and thanks, Kavouss. And I appreciate your point, Kavouss, but I stand by what I said. I think that the relevant significant expertise is what we're talking about when we use the phrase requisite expertise and skills. And I think the bylaw sets those ones that I called out as a backdrop, what the arbitrator should have as a backdrop for sitting on a standing panel. That bylaw provisioning then goes on to say, "and they should have knowledge in addition to that expertise they

have on these other areas, they should have knowledge of things like the DNS developed over time.”

It's almost like being a judge. A judge gets appointed to a bench, and a judge can hear cases that have to do with negligence, crimes, all kinds of stuff that they don't have particular expertise in themselves, but they ask the parties to brief the case, if needed, they hire an expert, and they move on and make judgments about how the case should be handled. I think that's what we're talking about here.

Now, with respect to Kristina's point about this becoming circular, I understand her argument. And I think both Kristina and you, Susan, were correct in what I was trying to say, I didn't do it all that well. But what I'm saying is I think expertise, as I just said a moment ago, is limited to the ones that are called out in 4.3(j)(i). But, Kristina, I think it's not quite circular. It may almost be circular, but maybe a three-member panel will have three people who are all steeped in international law, and none of them in corporate governance, and a party might say, “Hey, look, this is all about corporate governance. This isn't quite right. Can't we re-juggle the panel?”

So, I think those kinds of claims can be made. I think there is one. I don't think it's totally circular. I do want it, as I said before, to be not something that becomes a point of contention. I think this is something for the panel to manage if somebody raises their hand, and I honestly think we should make this non-appealable, just a panel deal with it, done and dusted. If someone feels that they've been fundamentally unfairly treated they can always go to court. These bylaws in this provision 4.3 are explicitly based on notions of fundamental fairness.

And even if a country has a law that says we honor arbitration awards and we don't allow challenges, would probably allow a challenge that says, great, but this particular panel was improperly constituted much to unfair treatment of me. So, that's where I stand. I understand Kavouss' point and appreciate it, but I leave my comments as I mentioned them. Thank you.

SUSAN PAYNE:

Thanks, David. So, I'm not seeing any other hands at the moment. So, if you don't mind, I'll just raise an issue that is concerning me with what you said, which is just that it seems to me that this scenario could arise, this belief that there is a lack of the requisite diversity of skill and experience for a particular case. That situation could arise and it seems to me is more likely to arise at the point where the parties, that's the claimant and ICANN, are picking their panelists. It could arise at some other point, but it seems to me that if one of the parties thinks that's the case, that's the point for them to raise it. And so, at that point, there isn't a panel, there isn't an IRP panel. There is a standing panel, but we don't have an IRP panel in place because it's arising at the point where the IRP panel is still being selected.

And so, that's my reservation with-- And I think maybe as we're speaking about this, it's probably helpful for us all to be really clear on when we're talking about the IRP panel and when we're talking about the standing panel, the slate of standing panelists, so that we know if we're in agreement or disagreement. Because it seems to me that it would be unfortunate if we reached a point where three panelists have been appointed to the standing panel, and it's only at that point that

one of the parties says, "Oh, I'm sorry, this panel, which I participated in the selection of, doesn't have the requisite skill and experience now, and I want to change one of my panelists." I think that would be an unsatisfactory scenario, and certainly, wasn't one that I had envisaged. So, I can see there's lots of hands now gone up, so I'll go back to my queue. So, Kavouss.

KAVOUSS ARASTEH:

Okay. I'll provide you some examples. That Amazon, if it was not settled before and should have become later to the attention of the panel, what would be expertise that is required? If the panel says, sorry, we are not able to settle this issue because of its nature, then going to outside. How the outside will settle that? Outside would be one person or two person or three persons. All of them are human beings, and they might have some position.

I'll give you another example. That Persian Gulf, this is a totally political issue. Totally. How it should be settled if you go to the outside? Suppose that the standing panel declares that we are not capable to decide on this very delicate political issue that what is the name of that water? That for ages and ages of Persian Gulf, and recently after 1956, it is called by some country another name. Who would be capable to do that?

So, we face difficulties if you go to the outside even. I don't see that everything is settled, but I think when it come to my position that they are expertise or non-expertise on the matter should be announced by the standing panel. That's all. They could say that we are not expert on

that Amazon, and we are not expert on that Africa, and we are not expert on that Persian Gulf, and we are not expert on that halal and so on so forth. But the second issue once they announce, we have settled part of the matter. The second is to go outside. Who would be that outside? An individual? I don't agree with that. So, they are running in sort of difficulties. I'm very sorry. Please take this question seriously.

SUSAN PAYNE: Thanks, Kavouss. David.

DAVID MCAULEY: Thank you, Susan. I just raised my hand to respond to your point. You're right., I think the question could come early in the proceedings. And in my view, the process that would be established by the standing panel would address questions as appropriate for when they're raised, and they would have a process to deal with that. Thank you.

SUSAN PAYNE: Thanks, David. Scott.

SCOTT AUSTIN: Hi, Susan. Thank you. I realize I have nothing involved. I think someone else is talking.

SUSAN PAYNE: Hi. Kavouss, I think that might be you. Can you mute? Okay, Scott. I think we're good.

SCOTT AUSTIN: Yeah. Thanks. I know I have not been able to participate for a while, and so I'm getting back to this. But again, I tend to be more of a constructionist, I guess, in terms of looking at the words on the page, and I'm still looking for the word expertise. I'm assuming we're talking about requisite diversity of skill and experience, at least in the rule that I'm seeing, or the portion of the text that I'm seeing?

SUSAN PAYNE: Yeah, that's correct, Scott. I think I probably, at one point, said expertise and set people down the wrong path. So, yes, it's experience.

SCOTT AUSTIN: Great. And then what I guess brings me to my real question, which is that something that is shown for each of the standing panel members and/or the selected IRP panel members? In other words, is there something online or brochure or something that the parties in engaging in a particular case know what the diversity of skill and experience is by the panelists? Is that in writing some place or is it divine from a press release when they were appointed? How do you figure that out? That's my first question.

SUSAN PAYNE: I'm sure I'll be put right on this by Sam at some point, and I will go to the queue. My feeling is, and we don't quite yet have the standing panel members appointed, we understand that they're shortly to be appointed, but my belief is that there will be something that sets out

their kind of CDs so that parties are aware of that. That would be my assumption.

SCOTT AUSTIN:

Sure. Okay. So, using that as a basis one of the things that David said, which I very much agree with, and I very much agree with Kavouss in the sense of how serious this could be because it could create endless bickering over whether someone is qualified, or whether they can even find someone qualified so that the proceeding can go forward. Judges typically are not really put up to subject matter abilities so much as they are their fairness, their decisiveness, their ability efficiency, so to speak, their intolerance for delay, etc.

And so, I guess the question is in the arbitration level that we're talking about here, and my assumption is that some of the people that will be appointed will be retired judges and of quite substantial a background and expertise, if you pardon the expression, in terms of running proceedings and running cases and getting things done. But as far as subject matter, I guess the question then becomes, are we looking for people that have tremendous experience and background and knowledge on the way the Internet works, the way that the policies and bylaws are formulated, or even the technical aspect of things in terms of whether the fabric of the Internet has been unwound by someone's abuses? Or is it a knowledge of the policies that may be interested in the bylaws, for example, as we've had to sift through over these many months? Do we have any idea of the subject matter that really would be at issue?

SUSAN PAYNE:

Thanks for that. I'm not going to presume to answer that, but that is certainly something where David expressed his views earlier on on what the bylaws say about expertise. And I think that's certainly at least a factor in this. Kristina.

KRISTINA ROSETTE:

Kristina Rosette. So, two points. One, just to support the observation that you made earlier, that we would anticipate that this issue would arise fairly early on. That was intended to be it at least when I had made some suggestions on the draft from the last call, putting the 14-day time limit on it, I think, it was intended to really accomplish that purpose to ensure that the proceeding didn't get too far down the road before the claimant or ICANN made this issue.

And it makes me realize that if we haven't already done so, I think we need to just make a note to ourselves, that once we come up with a complete set of processes and procedures that as a group, we have consensus on, I think we need to sit down and run through all the timing that we've put forward and compare it to the bylaws and make sure that there's no conflict or that we somehow have ICANN introduce some lack of clarity.

I do appreciate David's clarification of how he interprets the universe of experience. I still do not agree with the viewpoint that that is the entire universe. It's my interpretation of the bylaws that it wasn't intended to be that narrowly circumscribed. So, I think at this point, David and I will just have to agree to disagree on that. Thanks.

SUSAN PAYNE: Thanks, Kristina. Sam.

SAM EISNER: Thanks, Susan. This is Sam Eisner. One of the things that I heard that I think we need to work to keep separated, and I think Scott was starting to address this as well, is that the difference between general types of expertise to be a good neutral and to hear the claims. If there are specific types of expertise that we think are important for the general bench of IRP standing panelists, for example, learning about ICANN specific worlds and how policies are developed, etc. But then we heard one other example from Kavouss, which was whether or not when you're going into an IRP, if the panel requires one of the neutral sitting on that panel to be an expert on the specific subject matter.

So, we heard Kavouss use the example of the dotHalal issue, which I believe has gone up to an IRP. And there, I think that's where we need to make sure that we're not tying the hands of either the parties or the panel. You would actually think that if someone has such specific knowledge of the specific subject matter at issue, that they might actually be potentially conflicted from serving as neutral. But then the question is, do the parties have the ability through the remainder of the IRP to bring that sort of expertise and that sort of knowledge before the IRP standing panel?

I believe that we have other procedural abilities for the parties to do that and we should make sure of that through our IRP process, or through the IOT process that remains. But we should be careful as to

which types of expertise we're talking about, the expertise that's needed for the neutrals or the expertise on specific subject matters which the parties can then bring into the IRP process.

And I take Kristina's point. I think there could be specific times where there's an issue that's a subject of an IRP that is of such a unique character. For example, it could be really about some deep technical issue that's happening, that having a panelist who understands technology at a deeper level than the general benches, maybe that's an example of the type of concern of expertise we're talking about. Because I take Kristina's point as well. There could be times where you want the neutral to have specific expertise but it's not necessarily about the subject matter of the dispute, but having the ability to understand and help the other panelists understand what is being discussed within the dispute that's really the focus.

SUSAN PAYNE:

okay. Thanks, Sam. And thanks, yes, for reminding us again that in terms of the subject matter of the dispute where the specific expertise is required, that it's envisaged in the bylaws. And it's been the case in IRPs to date, that the parties can call on expertise or indeed, the panel can call on an expert. There is the capacity to do that, and that's what would be anticipated. Okay. Greg.

GREG SHATAN:

Thanks. This is Greg Shatan for the record. I think we'd go to a dangerous place where we interchangeably use the terms expertise and experience, which has been happening a lot here even after we noted that we were confusing the two. The bylaws don't use the term expertise. It only uses the term experience. And I think experience has a lot more to do with how long you've been doing something or how long you've been doing kind of a particular thing in general as opposed to having gained a very specific type of expertise. I won't go into the fact of how attorney advertising distinguishes very much between whether you can make claims of expert experience and claims of expertise.

And so, I think that we're not looking for expertise. I'm not even sure. I feel even a little bit uncomfortable with the fact that the bylaws call for the requisite skill and experience. I almost feel like this is the vestige of when the panels were kind of picked ad hoc or for each time and there was no standing panel. So, where we've got a three-member panel, I think, maybe it was Scott who was saying this, we're looking more for experience, theoretical experience or experience as a neutral, and not for people to be subject matter experts. They need to clearly be able to comprehend, but I also, yeah, I think that where expertise is needed, where an expert is needed, the panel should be able to call on an expert and not have one person out of the three kind of act as the expert and the other two acts as like the pupil. That can be dangerous in the panel here.

So lastly, looking at how this comes up in the bylaws as they stand now, it's when the panel does not have capacity due to other IRP commitments or the requisite, the lack of the requisite diversity of skill

and experience, neither for a particular IRP experience proceeding. I guess the question is whether we envision-- this seems to envision that different panels, that panels will be chosen substantively differently for one dispute over another. I'm not really even sure that especially given kind of what I know of the potential panel, that that really is the way things will go down. But the questions whether or not the panel has capacity, and by turning that around and turning it into whether the one of the parties thinks the panel has capacity as opposed to whether the panel says either we can take on this case with our current lineup or not, even that creates a problem in my mind. Turning this into something that can be challenged.

I know that certainly a complainant would like to have the ability to challenge that if they think they can't get a favorable panel, but in terms of getting a panel that has requisite knowledge, then certainly all three panelists aren't going to have all the same exact knowledge. Which again goes back to the idea that the solution to this in reality has a lot more to do with the panelists seeking out an expert rather than trying to make sure that one of the panelists is an expert in some particular factual aspect or some specific aspect of law.

So, I think we need to look at the whole what we're setting up here and how we're proposing to change the bylaws to create this very kind of party-centric view of capacity due to skill and experience as opposed to the panel as a whole making a judgment that they in fact do have the capacity to do this. So, I think we need to consider whether we really want to turn this into some idea that panels are going to be like specialists and that you can say, well, nobody on this panel knows

anything about Halakha law, which is the law of observant Jewish Daily Life.

Is that really something we're going to need from a panelist? And if given all of the other things that we need from a panelist, it seems to me that especially when we start confusing experience and expertise, I think we should allow no challenges based on expertise because it doesn't say it. It only says experience. So, let us not. We maybe even need to point out it specifically that this is an issue that does not relate to expertise as such. Thanks.

SUSAN PAYNE:

Thanks, Greg. So, to be clear, despite what may have been said when people are being loose with their language on this call, we're not in the draft, there's not a reference to expertise. It is a reference to the bylaws' language of skill and experience. And certainly, I don't think any of us are seeking to change the provision from what's in the bylaw. Scott.

SCOTT AUSTIN:

Thank you. Scott Austin for the record. And I really appreciate Greg's analysis there because it really opened up a lot of the things that I was concerned with. And by opening up, I mean, answering some questions. And I totally agree that this really is looking at their ability as impartial neutrals. And when it says experience, to me, because I do serve as a panelist for [inaudible - 00:58:59] and for the forum, I think that may be thinking in terms of someone who served on a panel before, an IRP panel perhaps, or who's a member of the standing panel who has had

many years at the bench or as an arbitrator with JAMS or AAA or one of the other ones that are so well known and respected.

And perhaps, that person is going to serve as the presiding panelist if there is such a thing, if that's important here, but it may be that the parties want to have someone who's been this is not their first rodeo as they say, and that will be able to manage certain things or maybe objections or the qualification of an expert, if it is a subject matter expert. And whether or not they'll be looking to see which of the proposed panelist has a double league degree so that you would think they have a good understanding or appreciation for technical matters, because they have an engineering background or whether they are political scientists because they've had some more exposure to political matters, who knows.

But I don't think that really should be our concern at this stage. I think the words say, diversity, skill and experience. And I think that's what we should be looking at. I think of that in terms of years or in terms of practical exposure to the particular event or a work that's being assessed, which, to me, would mean, the kind of judicial or arbitrator experience that we're looking for. And so I think the way that it's structured, if we proceed on those lines, I don't see any real problem with other than as Kristina was discussing the two options for timing, assuming that's what the brackets are standing for, is there's been we're trying to decide over 14 or 21 days in several elements. Thanks.

SUSAN PAYNE:

Okay, thanks. And Greg, I can see your hand, but I think that is an old one that's not come down. So I think maybe we perhaps need to leave this here for the moment. I would say if I've understood what you all have been saying correctly, there seems to be more support as far as I can tell for this being purely a decision of the of the standing panel collectively to make this determination, as opposed to this being something that either ICANN or a claimant might raise as an objection, and then have a determination by the standing panel or whoever. It does seem that if I've understood correctly from the group, and I think I probably need to put this to the list to be clear on that. But there's certainly whilst I appreciate Kristina's position on this, that the parties may be raising this themselves and should be entitled to bring this up and have this considered. I don't think I've been hearing a great deal of support for that, but I may be misinterpreting.

I think probably we spend a lot of time talking about this. So I think it's worth putting it to the to the list for those who haven't been on the call and to get any additional input, but that does seem to be where we come out. What I'd like to do now, I will come to you in just one minute Kavouss, is just quickly look at the rest of this proposed rule 3. Obviously, it's been on the mailing list now for some time. So as I said, I'm hoping that there's a lot of support for the rest of this, but there are some areas where people may have some thoughts and it would be good to at least get through this on this call if we possibly can in the remaining kind of 25 minutes. But before we do that, I'll just come back to you, Kavouss. And I'm not hearing you at the moment.

KAVOUSS ARASTEH: Do you hear me now?

SUSAN PAYNE: Yes. Thank you.

KAVOUSS ARASTEH: Okay, thank you. I think Greg mentioned that bylaw talk about experience. That may be right. Nevertheless, it is incomplete expression. Not what Greg said, but what is in bylaw. Experience should be complemented by expertise or expertise complemented by experience. Someone who have the expert, fresh from the top university on a subject, but has no experience is not capable to do the job. Some other people, they have experience, but that have no basic knowledge of the situation is not working. So experience and expertise are complementary to each other. Even bylaw talking of one of them, in our work, we should mention both, expertise together with associated experience. Otherwise, one single doesn't work.

But this is now departure from what I said. I want to once again saying that the decision on expertise and experience on a particular subject must be announced and pronounced and indicated by the standing panel itself. This trust, the standing panel, we should not put in, I would say, doubt that they are capable to do something, but let them to decide that, sorry, we are not expert on this issue. I don't want to give examples. Example of halal is a particular case after. In halal, not everybody is expertise nor experienced. Because some group of people in the world they are that. And even in that group of people, they are divided to different denominations. One interpreted halal in one way,

the other one interpreted halal in the other way. And sometimes between halal and not halal, there is a something between the two. In Arabic, it's called Makruh. Is not recommended but is not prohibited. So I think it is very difficult to find those things.

So we have to be quite careful and leave the matter in hand of the IRP standing panel to decide that they are not expertise, nor having experience, nor both, and then leave it to go to the outside. And the main problem come that from outside what we can do. Who is those capable people from the outside that could fill the gap that was announced by the seven people in the IRP panel? Who will be that? That is the main difficulty and problems that we have. Thank you.

SUSAN PAYNE:

Okay, lovely. Thanks, Kavouss. Okay. Let's just start at the top. As I said, I'll take this particular aspect of the rule to the mailing list to be sure that we get the insights from others, particularly those who would normally be on this call, and we have a couple of sort of active practitioners, and it would be helpful to get their thoughts on this too. But just running through the rule three as a whole, I won't read it in full, but I will just sort of paraphrase. And I will look for any sort of thoughts or concerns or suggestions for improvements, if that's okay.

So in paragraph one, this amendment is really just intended to sort of confirm when we consider we have an IRP panel in place. And that is when all three panelists have been appointed. And that's relevant for things like if you're needing interim relief you would use an emergency panelist when you don't have an IRP panel of three panelists in place.

And so that's why it's relevant that we know when we have the full panel in position.

Paragraph two is dealing with the selection of the panelists from the standing panel. And the basic process is each of the parties, the claimant and ICANN selector, a panelist. That's not new, that's in the existing rules, and just seeking to build in some timings really. So if either the claimant or ICANN hasn't selected a panelist and the suggestion was within 30 days of commencement of the IRP, then there could be a process whereby the administrator might make an appointment instead. So there is a question here about whether this should pull to the administrator, the IRP providers administrator, or whether we want to give this job to the chair of the standing panel.

And as flagged, one of the challenges if this task is given to chair of the standing panel is to a point when one of the parties hasn't done so. It's just that there's always a possibility that they already are one of the panelists. And so there could be a scenario where they're already a part of the IRP panel themselves. But perhaps we can build something that envisages the concept of a deputy chair to the IRP panel or something like that. But at the moment as drafted it, this is a task being given to the IRP providers administrator to do. Again subject to input from others. And then I'm moving on. I can see your hand Kavouss, but I think it is an old one.

KAVOUSS ARASTEH:

It is a new hand on paragraph three if you are there.

SUSAN PAYNE:

I'm just coming on to paragraph three. Yes. So leaving aside of course that we have been spending some time on paragraph three talking about this specific issue about the diversity of skill and experience. But other than that, paragraph three is seeking to address this situation where you have to go outside the standing panel. For example, because the before the standing panel is in place, which is the situation we're in at the moment. So I'll turn to you, Kavouss.

KAVOUSS ARASTEH:

Okay. Where this paragraph three comes from? If the standing panel does not have the capacity due to the so and so forth, and then, okay. But if a party believes that the standing panel does not have the requisite diversity and the skill, is this on the bylaw? If it is from the bylaw, I have difficulty with that. What is the criteria that a party unilaterally decide that a standing panel of seven or more persons does not have requisites, diversity, and skill? What are the criteria? Just a statement? I am a party. I said that a standing model does not have expertise. What is the criteria for that? What is justification for that? What is rationale for that? Does it like in the standing panel? The standing panel has been selected by the CRG and then approved or not approved or added by the ICANN. Is somebody simply disagreeing with that? If a party believes that. on what ground the party believes that? We should say with necessary justification and rationale. We should add that one, but not leave it open to the party. Thank you.

SUSAN PAYNE:

Okay. Thanks, Kavouss. Just to just to clarify, this is what we talked about the whole of the last call and what we've just talked about for the whole of this call up until now. That text is only a proposal. It isn't set in stone. I am taking that particular element about whether we even leave this to a party to make this claim. I will ask the mailing list to provide further input on this. But in the meantime, we haven't agreed on that provision. We've been talking about it now for two calls. So rest assured that language is not fixed. Greg. On meet, Greg?

GREG SHATAN:

Thanks. Greg Satan for the record. Yeah, I'm glad to hear that this is not fixed, especially because I think it's broken. I agree with Kavouss. This is just not right. Again it's a question of capacity. And I'm also concerned with the way that this is being laid out with the idea that if somehow there is no one panelist that possesses this magic skill and experience, that we throw out the entire panel. And that we're going to pick three completely outside panelists who have not been vetted, have not been interviewed, are just going to be picked and that somehow all three of these panelists are going to be a better panel than a panel that is composed of one person with this magic skill and experience and the other two people who will have all these skill and experience that qualify them to be on the panel, but don't have the skill and experience for this particular set.

I think that the idea that we're going to, you know-- it's one thing if there's no capacity. But even then the capacity might be the capacity to have two, but not three in terms of IRP commitment. The idea that we're just going to completely throw the panel out and have the parties

kind of freelance out in the world of potential neutrals seems to me to be wrongheaded. It really undermines everything that we're trying to accomplish here with a standing panel. Terrible idea.

SUSAN PAYNE:

Thanks, Greg. So that's why this was a straw person. And just as a reminder, everyone was supposed to be going into the Google Doc, over the last two weeks and making suggestions for improvement. But again, just to reiterate, this isn't fixed. It was a suggestion to get the ball rolling and the discussion going. And issues like that are exactly the sort of thing which as a group, we're all supposed to be picking up and improving. So thanks for that. But in terms of this the rest of this paragraph three, that it does also reflect we have to still have a rule in here for what happens while there's no standing panel.

Because although I know that your group is making great progress, we still have no standing panel at the moment, and there could be an IRP that gets commenced while we still have no standing panels. So we have to still have something. And so this does also envisage, and it captures the previous language of the previous rules, which is that there could be a situation where there's no standing panel, and so you have to go and get all three panelists from outside. And so that's what paragraph 3A is covering, where the parties select one panelist and each, and then a third panelist has to be selected.

And then moving on to B is seeking to envisage, just again to set some timings. So what happens if we're dealing with something where the parties are having to go outside of the standing panel and pick their

panelists from elsewhere. What happens if one of them hasn't selected a panelist within a certain period of time? Suggestion, again, here is it's 30 days that then if after 30 days they haven't picked their panelist, that the other party could go to the IRP providers administrator and ask them to exercise that power to pick someone instead.

And then again once we've got two panelists in place, what happens if we can't agree a third panelist, and that procedure set out in paragraph 3D is essentially what the process is under the ICDR rules, and rather than just referring to using that process under the ICDR rules, is actually kind of picks up that process and includes it in these rules here so that it's easier for people to find, and they don't have to cross reference back and forward between multiple sets of rules. So I've got a couple of hands. I'll pause. Scott.

SCOTT AUSTIN:

Well, I'm not sure I want to see it on fire. That's a pretty graphic representation, but I will say that obviously, there's some things that people want to change. The question I have is regarding the 3A. There's the comment or there's the provision. And I'm assuming all the red text is what's been added as the strawman. Then it says the claimant and ICANN shall each select a qualified panelist. What we're talking about stepping outside the standing panel, which has been vetted and has gone through for these various months submitting of very qualified CVs, etc. Where are those qualifications found? Because that might also give us some sense of the kind of experience and diversity of skill. And skill, by the way, diversity of skill, I mean, this isn't

some kind of a sporting event, I guess. So diversity of skill to me might point toward some area of expertise.

But, anyway, I'll leave that for the moment. I'm just asking what qualifications. If we're going to find a qualified panelist from outside the standing panel, where are those qualifications or have they been? And there's also a reference in C, to a list method described in D. And D is not there. So obviously, I think that's in D. But I just don't know if that has something to do with qualifications. And that's it. That's my question.

SUSAN PAYNE:

Thanks, Scott. So D is there. It's just on the next page. And as I was just mentioning, that's the process that the ICDR has in their rules. They call it the list method. And so, indeed, it's just picked up out of the ICDR rules and transposed in so that there's only one place to look, I think, for the process. But yeah, agree. I mean, in terms of selecting a qualified panel from outside the standing panel, again, that's how the language that's currently being used, but this is also covering the situation where there's no standing panel because we don't have one. And so were it to take six more months for the standing panel to be appointed, and I really hope that's not the case. But in the meantime, anyone who's bringing an IRP is working on this process where the claimant and ICANN reach, each picking a panelist from outside the standing tunnel because there isn't one. But yeah, I think there's some reference in the bylaws to the type of expertise required, but that's all that we really have to go on. Okay, Greg.

GREG SHATAN:

Thanks. Greg Shatan for the record. Your point is well taken of the current situation where there is no standing panel needs to be dealt with. But I think it's a very different situation than the lack of capacity situation. So I think we need two different sets of rules, one that deals with the fact that there's a complete void, and the other one that deals with the fact that there is arguably some lack of capacity but that lack of capacity might be less than complete. In other words, there could be the ability to generate two but not three panelists due to other IRP commitments or the like. And so it should be a much more retail situation.

And there should also be a presumption that if the panel itself says that it has the capacity based both on availability and on the skill or experience that it believes, it's necessary to be an arbitral body for a case, then that should be given a presumption of being correct. And it goes back to then the question of how we're going to deal with the fact. Are we going to have? We should not have that the parties making the initial judgment. But I guess that's part of the strawman we'll need to work out. But the main point is that we can't have the same rules for no standing panel versus lack of capacity.

And who decides whether there is a lack of capacity? Are we going to start getting into kind of peremptory challenges of a panel? I don't want to encourage the idea that people are going to eliminate panelists so that they can choose somebody that they've got in their pocket in the outside world. You know, the presumption is that if we're selecting a panel, and maybe as many as 13 people, that we should be able to

generate enough panelists for virtually everything, and that the lack of skill and experience of this odd cast group should be rare if not nonexistent. Thanks.

SUSAN PAYNE:

Thanks, Greg. Right. We have three minutes left. So Kavouss you get the final word and then we'll have to wrap up.

KAVOUSS ARASTEH:

Yes, two things I think up to now we discuss. Experience and expertise. Now a new term getting capacity, I don't know what we mean by that. Expertise, I mentioned, experienced, but capacity, I don't know. However, I request you, Susan. I appreciate very much the hard work that you have before you, and appreciate the hard work you're doing before the meeting, and the amount of energy you have spent to explain to us what situation. But I hope and in fact, request you to take into account what we discussed at this meeting and your next meeting, at your next meeting, we do not start from the scratch. We put elements of these discussions into the text that you suggest.

I suggest that we do not talk about capacity. Experience and expertise, but capacity get into the main problem that the selection of the standing panel was totally wrong because people did not have capacity. I think expertise and experience is two factors, but if you add capacity, which is not wrong, but more complicate the situation. Thank you.

SUSAN PAYNE: Thanks, Kavouss. And just to be clear, both capacity and lack of the requisite diversity of skill and experience, those are two provisions referred to in the bylaws in 4.3K2. I would love not to have to talk about them, but they're in there so we have to address them. Sam.

SAM EISNER: Thanks. I think that the capacity issue is actually something that's not a subjective test. I think capacity really goes to whether or not those who have been selected to the standing panel have availability to take on additional disputes, and so that is something that we need to make sure that we've built into this.

SUSAN PAYNE: Yes. Thanks, Sam. And that indeed was why in the straw-person, notwithstanding it, it has its faults. That was why there is a distinction between capacity which is a determination entirely for this standing panel in this suggestion. Because only they know whether they have the capacity to take on another case as opposed to the skill and experience situation, which may or may not be a question purely for the standing panel as we've been discussing at some length. All right. It's 30 minutes after the hour. Kavouss, I see your hands. So I will come to you and then we must stop.

KAVOUSS ARASTEH: I'm sorry. I don't agree that we interpret capacity as unavailability. Capacity is lack of knowledge. You raise a question with someone, he does not have capacity to reply to that because of the lack of knowledge

background. So I don't think that capacity means unavailability. I don't understand that. Thank you.

SUSAN PAYNE:

Okay. Thanks, Kavouss. I think you get the last word on that, although I'm not sure that that's necessarily how everyone is understanding capacity, but perhaps we can all take an opportunity to reread the bylaws and we can exchange our further thoughts on that by email.

All right, thanks everyone very much for your engagement and helpful discussion. And hopefully we will be able to agree on some path forward for this. If we can make some suggestions in the Google Docs and or exchange views on the email list, it would be very beneficial in wrapping this work up a bit more quickly. Thanks, everyone. I'll speak to you again in two weeks.

[END OF TRANSCRIPTION]