BRENDA BREWER: Good day everyone. Welcome to the IRP-IOT plenary call on 30 May 2023 at 16:00 UTC.

Today's meeting is recorded. Please state your name before speaking and have your phones and microphones on mute when not speaking. Attendance is taken from Zoom participation. I do have apologies from Flip Petillion and Mike Rodenbaugh. I believe there's a couple more. I apologize for not having those. And with that, I'll turn the meeting over to Susan Payne. Thank you.

SUSAN PAYNE: Thanks very much, Brenda, and thanks, all of you, for joining. My apologies again for the scheduling problem that I had last week, which was due to my incompetence, really. But what can I say? But anyway, I'm glad we've managed to reschedule to this week. Hopefully, with the Prep Week sessions, it's not going to cause too much problem for people. Anyway, let's crack on.

So we obviously have the usual first agenda item to review our agenda and do updates to Statements of Interest. I'll start with the SOI just in case anyone has anything to note. Okay. I'm not seeing any at the moment. But obviously, put your hand up and put something in the chat if you do want to note anything.

In terms of our agenda, second item is the review of the action items. That will be a pretty quick one. Then we'll be moving on to doing our best to conclude the discussions on Rule 3.

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Agenda item four is for noting, really, the details are there in our agenda of our session at ICANN77. So we'll have a face-to-face meeting there. I added a slot for AOB just in case we have anything that anyone wants to flag before we wrap up the call.

So moving back up to agenda item two, our action item was really for all of us. It was just you to review that Google Doc with the straw person on Rule 3 on initiation and IRP panel selection and, ideally, to flag concerns but more specifically to be looking at coming up with solutions amongst our group in order that we can wrap this up with really an assumption rather being that where people went making comments in the document or on e-mail that that the text is relatively settled. So I think now we can move on to agenda item three.

I'm noting that Greg has also now just joined us, which is super. Hi, Greg. You haven't missed anything substantive. If you need to make an update to an SOI, please feel free to put it in the chat or put your hand up when you have a moment.

The meat of our discussion is for us to try to come to some kind of conclusions on the way forward on this Rule 3. As I was noting, we all had an action item to be looking at the straw person and coming up with kind of concrete suggestions. In the absence of that, the text is largely what we have. Now, we have had a huge amount of discussion on paragraph three about how we handle the lack of capacity, whether that be lack of available panelists or potentially this concept of the lack of the requisite diversity of skill and experience. So I'm certainly not suggesting that that the text as it currently stands in the Google Doc on that is fixed. As I say, there was a lot of discussion about that. We will

come back to that but I did want to try to go through some of the other parts of this Rule 3 to ensure that we did actually cast our eye over them. As I say, I'm rather treating the text as being in close to final form in the absence of any objections from anyone. But I do feel we should look at paragraphs four and paragraph five where I don't think we ever really got to the point of even doing a quick read through when we were on a call. So if you will bear with me, we will come back to the discussion on Rule 3, but I don't want us to run out of time without having just gone through four and five for completeness.

Brenda, could you pull up the Google Doc, if you could? And then when you have it, scroll down to paragraph four. Thank you. In fact, that's just about right, that all fits on. So four and five fits on, which is great.

So four, the text here, is actually from the current interim rules. It's if anyone would cause what the current rule looks like, it's all a single lump of text in a single paragraph. But within that is this provision here. That is really just intended to cover what happens if an IRP panelist has to stand down for some reason. The basic idea is that were that to happen, then they get replaced using the same principles by which they were previously appointed. So what the text says is, as I say, this is unchanged. It's in the event that a panelist resigns or is incapable of performing the duties of a panelist or is removed or the position becomes vacant. A substitute arbitrator shall be appointed pursuant to the provisions of this section. It's in square brackets three, but basically, this rule that we've been talking about in these supplementary procedures, I've removed the word interim because by that point, it's very much that these aren't interim. Actually, I think as part of a cleanup of this document and to help make the distinction between a Standing

Panelist and an IRP panelist a bit clearer, I will go through and include the words standing or IRP where appropriate because certainly when we started having discussions on these rules, we did get confused. So with that in mind, this would actually then say in the event that an IRP panelist resigns, etc., etc. But that's obviously not a substantive change. So hopefully, there's no issue or concern with this particular provision. As I say, it's already in the current rules, but I'm just flagging it for completeness. Assuming not, then we can move on to number five, which is regarding conflict of interest.

This is new text. Well, it's not new text to us now. We obviously have had it on the table for a little while, but it's new text over the existing interim rules. It's intended to provide some assurance that IRP panelists will not have a conflict of interest. So to reflect what it says in Bylaws 4.3(q). Just in summary, what's envisaged here, that as is required in 4.3(q), Standing Panel members are meant to be independent of ICANN, its Supporting Organizations And Advisory Committees, and they have to adhere to certain criteria set out in the Bylaws, including that they have a sort of affirmative obligation to disclose relationships. That includes with ICANN with Supporting Organizations with Advisory Committees or any participant in an IRP proceeding. So once you're getting appointed from the Standing Panel to be an IRP panelist, obviously the participation or the relationship with the participant in an IRP proceeding kind of comes to the fore.

So the proposal here is that we make it clear that in order for a Standing Panel member to be appointed as an IRP panelist, that when they are appointed as a Standing Panelist, there will have been some kind of notice of appointment that they would make a declaration or confirm

their compliance with that those conflict of interest provisions in the Bylaws. The idea being proposed here is that they would also be expected to do that same exercise of signing a notice of panel appointment when they're being appointed to a specific IRP panel. And the idea of this would then be just to serve as a reminder every time a standing panelist is appointed to an IRP panel that they've got to consider again whether they have any conflict of interest and to confirm that they don't have one. So that's paragraph A. I haven't read it out. But that's my explanation of what I was trying to achieve here. Then I will just pause briefly to give you a moment to just review it.

Okay. Oh, David?

DAVID MCAULEY: Thanks, Susan. I think it looks good. The only question I have about it, however, is whether we think seven days is sufficient to do a conflicts check amongst the participants in an IRP. It may be. I was just wondering.

SUSAN PAYNE: In terms of getting them to sign or are you thinking about—

DAVID MCAULEY: Confirming the compliance.

SUSAN PAYNE: Confirming they don't have a conflict situation with one of the parties?

DAVID MCAULEY: Yes. Confirming there's no conflict. It couldn't be. I'm not a practitioner. I don't know how this works on the ground. So I was wondering, should we say within seven days? It was just a question. And I was hoping that Flip or Mike would be here but—

SUSAN PAYNE: I think it was a question I had too, which is I think why it's highlighted. Kristina has got a hand up. It's possible Kristina will come to my assistance. Otherwise, this might be another of those timings we need to square bracket and little bit. Kristina?

KRISTINA ROSETTE: I think whether seven days is long enough really depends on, quite honestly, if the proposed panelist is currently part of a large law firm or something like that. As a general matter, anyone who's either a solo practitioner or is kind of a professional arbitrator so they don't necessarily have colleagues who have clients, etc., anyone in that former category, seven days should be ample. David is right, though. I can tell you that depending upon if the Standing Panel members coming from a multi law firm that's got offices either across the country or across multiple countries, then that process—I'm speaking from very painful experience—can take a long time because you've got to get notice out to everyone in the firm, and then you have to follow up with anybody who says, "Oh yeah, I might have this issue, and so on and so forth." So without knowing where the Standing Panel members are coming from in terms of organizationally, it's hard to say whether or not

we would need to worry about that. Maybe what we do is we put in in this and drop a footnote saying that we have recommended seven days in the interest of the proceeding moving forward expeditiously. But that it may be necessary that we would welcome comment on it.

I'm reluctant to go much past seven, and maybe what we could do is kind of give ourselves a little wiggle room and say seven business days. But then you get into the real issue where's the business day. But I don't know if that helps or not. I could see situations in which seven days wouldn't be long enough. But speaking from my days in large law firm world, if you get to the point where seven days isn't going to be enough as a practical matter, there's likely to be a sufficient and enough conflict or client relations issue that you're not going to be able to go forward anyway.

SUSAN PAYNE: Thanks, Kristina. I like your idea of the footnote and we seek some input on that as well. But we're flagging what our reasoning is. I agree. The reason for the seven days was bearing in mind that there's a certain timing expectation for these proceedings, you don't want things to drag on too long. It did also occur to me as you were speaking that I think it would be quite an unusual IRP, not impossible, but quite an unusual one where there were enormous flags that this was coming down the pike for months in advance. Given that these disputes are usually quite well known, there usually would be a cooperative engagement process. And it's a matter of public record, I believe, I'm pretty sure it is. Or maybe it's not, I'm not sure. But I think it's generally well known that these disputes are in the pipeline. Even if they haven't actually proceeded to

the IRP having been commenced. And presumably even after commencement, we're not getting to the point of panelist appointment absolutely immediately. So that would give IRP panelists an opportunity the moment and IRP has commenced to start doing their own inquiries even before there's any prospect of them being an IRP panelist in order to rule themselves in or out. I would have thought it would be a matter of good practice to try to do that if they possibly could. Okay. Anyway, let's not labor this one, but I think we're all aware of the potential concern about seven days, but we can include that kind of a footnote.

Okay. So, in the light in the case of paragraph B then, since we also have the possibility of there being panelist appointed from outside of the Standing Panel, not least in the current situation where we don't have the Standing Panel in place that there is that possibility. So the idea in B, the intent behind B is to have panelists who are being appointed as IRP panelists from outside the Standing Panel to make that similar comparable declaration the 4.3(q) in the Bylaws is specifically about Standing Panel members being independent of ICANN and its SOs and ACs and making those disclosures about those groups and about the parties. Strict speaking, that 4.3(q) because it's about the expectations of Standing Panel members, it doesn't apply strictly speaking to non-Standing Panel members, but obviously those same principles are incredibly important. So that's the intent behind paragraph B, to have them sign a similar notice of appointment, making those same kind of confirmations that they don't have a conflict of interest.

I will pause again and I will also say thanks, Kristina. I did think that the party is inactive CEP were published, and I had a moment of doubt as I was saying it. So thanks so much for confirming, which I think again goes

to my point that these things, generally speaking, don't come as a massive surprise. There's a history of activity before you get to the point of an IRP. Okay. Then I'm going to move on and not spend too long on this one.

In paragraph C, this is again seeking to address other circumstances that might influence an IRP panelist and their ability to be neutral or the perception or appearance that they might have an inability to be neutral. We spoke specifically about issues of geography and nationality when we had our first call discussing this Rule 3. That came about as a result of a bit of a conversation we had about whether there was any concern about having a panelist or panelists have be from the same country or geographic area as the parties. I think it's fair to say that our conclusion was that that wouldn't automatically give rise to any concern about conflict or perceived inability to be neutral and impartial. We also talked in fact about the concept that if you've got a Standing Panel of a finite number of individuals, it would be incredibly difficult to try to operate with that in that kind of model and also requiring that no Standing Panel member ever is of the same nationality as either of the parties involved in the dispute. We didn't feel that that was something that we needed to be concerned about. But there were comments that there could be some circumstances where the actual facts of the case are just such that issues of geography and nationality are absolutely fundamental to the case. That might be the kind of circumstance where a potential panelist should be considering if it was appropriate for them to act in the case or not. So paragraph C is seeking to cover that off and just highlight it that even if there's not, strictly speaking, a relationship with either of the parties, the panelists should be giving some thought

to whether there's some other specific circumstances of the case that just make it perhaps inadvisable for them to be acting. So again, I'll just quickly pause and just see if there are any questions or comments on that. Okay. I'm not seeing any.

So go on to the final one and this is D. This is just an ongoing obligation, basically. So it's just confirming that if a panelist has or develops a conflict of interest, then at any point, they should recuse themselves. Well, actually, they must recuse themselves. It's what I've written. This is one I think that it's perhaps us worth just looking at the Bylaws Section 4.3(q). If you wouldn't mind, Brenda. This is this is my reading of it or my interpretation of what the intent is of 4.3(q). But I did want to sense check that with the group. Again, I'm just going to pause until Brenda has a moment to pull that Bylaws provision up, if that's all right, Brenda.

BRENDA BREWER: I'm sorry, Susan. Is it—

SUSAN PAYNE: Would you be able to pull up the ICANN Bylaws 4.3(q)?

BRENDA BREWER: Yes. Hold on. One moment.

SUSAN PAYNE: Thank you.

BRENDA BREWER: You're welcome.

SUSAN PAYNE: While Brenda's finding that, I'll just introduce or explain what I'm thinking. So what we have in 4.3(q) is this provision about conflict of interest. It talks about Standing Panel members must be independent of ICANN Supporting Organizations and Advisory Committees, and so must adhere to the following criteria which we'll come on to and we'll be able to see in a minute. It talks about panelists having—I'll pause while Brenda finds it because that would make sense to have it up. So it's Q, which is shortly probably. There we go. There we go. Thank you.

So you'll see an A. So these are the criteria. It says first of all, upon consideration for the Standing Panel and on an ongoing basis, panelists shall have an affirmative obligation to disclose any material relationship with ICANN any SO and AC or any participant in an IRP proceeding. And then it says additional independence requirements to be developed by our group. But as I say, the Bylaws only talk about this affirmative obligation to identify the material relationships or disclose the material relationships. It doesn't actually say that the panelist should recuse himself where it's the case of acting in an IRP proceeding. My feeling is that that is the intent. I think that I'm reading that intent, not least because in paragraph I at the beginning, it does talk about the necessity for independence from my comment, it's SOs and ACS. I think it's certainly a general principle, it's certainly something that's captured in the ICDR rules that obviously panelists have to not have a conflict of

interest with the parties to a case. I believe that's correct. I think if there is a conflict of interest, they should recuse themselves and not act but I wanted to just specifically check that with everyone, given the slight vague language in the Bylaws.

Thank you, David. I'm seeing your support of that interpretation, and Kristina's agreeing. Okay. So I think then, in terms of paragraph five then, subject to any last comments, I think we can probably leave that provision there and move back up to the beginning of the rule. Sorry, Brenda. If we go back to the straw person thing. Yes. Thank you. Then if we could start again from the beginning. This is a slightly strange way of doing things but I didn't want us to get bogged down with Rule 3 before our time. I know we have looked at paragraph one. We did introduce that and the fact that the language in paragraph one is really just intended to capture the points that the IRP panel isn't in place until all three panelists have been appointed. My understanding is that there has been some lack of certainty about that in the past, or lack of clarity. And that can lead to difficulties in knowing, for example, whether you need an emergency panelist or not, if you have a situation where maybe one or two of the IRP panelists have been appointed but we don't have all three yet. So those edits to paragraph one we're seeking to clarify that point. '

On paragraph two, this is seeking to address the appointment of the three IRP panelists when you've got a Standing Panel in place, and then there are no issues of capacity or skill and experience. So this is just the regular situation where you've got a Standing Panel and the panelists need to be appointed from there. Some of the text is existing text. Essentially, the idea that the claimant and ICANN each select one

panelist from the Standing Panel, and then the two selected panelists then choose the third panelist from the Standing Panel. I hate that there's no real controversy about that.

The new language in paragraph A or subparagraphs A and B is to try to build in some process for if one or both of the parties are being slow and not. So in paragraph A, what if one or indeed both of the parties were failing to select their IRP panelist from the Standing Panel? I think in order to have scope for things to move along, it's building in a suggestion that the other party can go and request that an appointment gets made. In this current draft of the straw person, the suggestion is that they would go to the IRP provider's administrator and ask them to do that. But when we discussed this briefly before, there was some pushback. I think it was largely from Mike Rodenbaugh about whether this is really the right role for the IRP provider's administrator, I think particularly in the circumstances where we've got a Standing Panel in place.

So one possibility or one suggestion for us is to think about whether we have this request for an appointment to be made just made to the Standing Panel. Do we leave it to the Standing Panel to decide what their process is, whether they give this job to the chair, whether they take it in turns to be the Standing Panelists dealing with these kinds of requests or something along those lines? I think probably that may be the way forward, and so that would be my suggestion rather than having it go to the IRP provider's administrator. But I'll move on to paragraph B while you're thinking about that, and see if there's any strong reaction to that.

Paragraph B, it's looking at the other possible scenario where we now have two IRP panelists that have been selected by the parties. And for some reason, they can't agree on who the third panelist should be. That again, either party could make a request to have that third panelist selection be taken out of their hands and moved on. Again, in this original straw person proposal, I'd been proposing that that's a request to the IRP provider's administrator. But again, bearing in mind the comments briefly that Mike made that he felt the administrator wasn't the right person or the right place to be making such a request. Again, we potentially could be referring this just back to the Standing Panel and it be for the chair or the rotating chair or however they structure themselves to be making a decision on who the third panelist should be. Kristina?

KRISTINA ROSETTE: I certainly think that I understand Mike's concern with regard to referring it the issue to the IRP provider's administrator, where the party itself has not selected a panelist. However, I think there's different considerations at play where both parties have already selected panelists from the Standing Panel and those Standing Panel members cannot themselves agree. I think in that case, it's cleaner, and quite honestly, faster to refer it to the IRP provider administrator, rather than having the Standing Panel whose members already can't agree who the third panelist should be by then forcing that decision. I don't know that I articulated that as clearly as it is in my head. I hope I did. Thanks.

SUSAN PAYNE: Thanks, Kristina. You did. You articulated it very well. I think we're starting to speak. I found myself agreeing with you that yes, actually, you're absolutely right. If we've got two Standing Panel members who are already struggling, then perhaps the Standing Panelist is going to struggle equally with that decision making and maybe it does need to be someone a bit independent. So okay. You certainly persuaded me to not be making that suggested change to be that I had been just floating just now. But still, I'm minded to suggest is the Standing Panel who deals with selecting the panelists where one of the parties is just delaying and not appointing. Greg? I'm not hearing you, Greg.

GREG SHATAN: Thank you. Sorry. The mute button doesn't always appear immediately on my phone. It scares me probably. I'm wondering whether we should not have a two-step process here where it goes first to the Standing Panel as kind of the initial kind of arbiter or at least the initial administrator, if you will, of kind of substantive tasks and give them either a period of time or if they believe that they can't come to a decision that should then go to the administrator. I feel like the role that we've created for this Standing Panel, once the IRP-IOT gets out of the way is kind of the rule maker. And the administrator should be, I think, a backstop. If indeed the two panels are having a problem, first to see whether—essentially, the panel per curiam can resolve the matter amongst themselves. And if not, then it should go to the administrator. Thank you.

SUSAN PAYNE: Thanks, Greg. Again, really great. I think that's a really helpful suggestion. Can I just clarify? Are you thinking of that to both A and B? Or are you thinking of that more in the context of A? I think you might be muted again, Greg.

GREG SHATAN: I was thinking of it both in the case of A and B. Particularly B, actually, because that's the more thorny one. But it makes sense for both.

SUSAN PAYNE: Okay. I think what we don't want to do is drag things out. But I think your suggestion—

GREG SHATAN: My suggestion is that the panel should be immediately be able to say, "Not only can our appointed panels not make a decision, but we can." They can say that in five minutes if they wanted. We don't have to deal with them. We shouldn't leave it with them for no more than X days, but they should have the ability to basically pass it along to the administrator immediately should they choose. I just liked the idea of kind of viewing the Standing Panel is kind of a self governing body first except where the administrator needs to take care of kind of purely administrative type things. It's good to have the administrators a backstop for something like this. But I feel like we'll develop kind of the panel and the jurisprudence of panel-ism, if you will, better by having the kind of a very standard and self-sufficient role for the Standing Panel

as its administrative body or its regulatory body, if you will, for self-regulating. Thanks.

SUSAN PAYNE: Okay. Thanks, Greg. Kristina?

KRISTINA ROSETTE: I understand the perspective that Greg is articulating, like the philosophical basis it seems that he's coming from. But it also then seems to me that at least with regard to B the possibility that the issue will have to go to the IRP provider's administrator should, in and of itself, serve as kind of impetus to the two panelists to agree and move forward. I'm hesitant particularly with regard to B where you already have a situation where two members of the Standing Panel who otherwise hopefully are working together very well are unable to agree on the third panelist, and then it goes to the Standing Panel which presumably would be the chair or the other panelists to decide. And then if they can't agree, then you have a situation where it then goes to the provider's administrator. I'm just really concerned about the possible delays you're looking at if you have that additional layer. Thanks.

SUSAN PAYNE: I appreciate that comment as well. Absent other comments now on this call, maybe this is something we take back to the list. I wonder if the compromises that we do give only kind of 48 hours or something like

that in that scenario, so that there really is a quick opportunity for the Standing Panel to mess out. Otherwise, it goes off elsewhere. Greg?

GREG SHATAN: Thanks. I was going to suggest something along that line or that the panel needs to act expeditiously or perhaps both should be expeditiously, but in any case, in no more than 48 hours or 72 hours. It will then go on to the panel. It should also be clear in the body or in the footnote that the panel can pass it immediately on to the administrator if it believes that no solution will be forthcoming from within the panel. Thanks.

SUSAN PAYNE: Sorry, I'm on mute now. I think that seems like the sort of makings of a kind of a compromise on this, but I'm noting Kristina's comment that maybe this is another one for a explanation of footnotes and a kind of request for thoughts on this from wider feedback. But it seems hopefully we're close to a path forward on this.

Okay. All right, with hesitation, let's move on to Rule 3, which is obviously where we've spent a huge amount of our time when we've been discussing—or not Rule 3, paragraph three, rather. When we've been discussing this Rule 3 to date, we have spent an awful lot of our time. A little bit bogged down in what happens if the Standing Panel does not have the requisite diversity of skill and experience to field panelists for a particular proceeding. This is obviously a concept that came or comes from the Bylaws. But I think I would say there's been that overwhelming reaction during calls. To the extent that there were

comments between the last call and this one over our e-mail, I think overwhelmingly there's really support for leaving it to the Standing Panel to be the one to determine if it lacks capacity and whether that's lack of capacity in terms of panelist availability or about having the requisite diversity of skill and experience.

Oh, yes. Thanks, David. Yeah, Brenda, if you wouldn't mind scrolling down so we can see most of para three to the extent we can, that would be great.

So I think based on that, I think we fall back therefore to the position which is quite similar to what the current interim rules have, which is where there's no Standing Panel or if the Standing Panel doesn't have capacity then the party select from outside the Standing Panel, each selecting a panelist from outside of Standing Panel, then the two selected panelists then agree on a third.

One of the points, Greg, I think it was raised last time around was that this is very all or nothing. There's rather a kind of presumption that the lack of capacity in whatever form that might take that the Standing Panel automatically doesn't have three panelists, whereas there's quite a possibility that they could fill two but they can't fill three, or they've got one suitable panelist but they can't think of three. And that perhaps it's all a bit all or nothing at the moment. But I think that could probably be addressed if we build in some kind of provision where there's a lack of capacity, it's for the Standing Panel probably acting through the chair to propose an alternative process for how the selection of the panelists will be handled in that circumstance but with the kind of fall back being. That in the absence of the setting up process or in the case where

there's no availability at all for any of the panelists then we fall back to this selecting all three of the panelists being selected from outside the Standing Panel.

Yes, my suggestion then—and again, based on I think the kind of feeling on our previous calls and the feedback on e-mail such to the extent that that there's been any is kind of let's not build in too much complexity here, let's kind of trust the Standing Panel again to be able to sort out their own processes and not bind things too much. So this this paragraph three does need to be a bit rejigged to reflect that. But then if we take that as the kind of proposed path forward, we then have paragraphs B, C, and D which are covering this same issue we've just been talking about, about where firstly in B if one of the parties is being slow and they haven't picked their panelist then the other party can go to the IRP administrator to make that selection. I think in this case, it does have to be the IRP administrator because we are in this circumstance here at least. We're going outside of the Standing Panel. And then similarly, if the two selected panelists can't agree on the third, there's provision here for, "Okay, how do we get the third one appointed?" This makes a specific reference in paragraph D then to what the current ICDR process is, which is this kind of list method as they refer to it, and the ICDR rules which is about the administrator sending list to both the parties and giving some timing and picking of panelists in that way. Okay. I'll pause there. Kristina?

KRISTINA ROSETTE: Maybe I misheard. I just continue to have grave concerns about not having any mechanism through which a party that believes that the

Standing Panel doesn't have the requisite diversity of skill and experience for the particular IRP proceeding, that there's no mechanism for a party to notify the Standing Panel of that belief, particularly where is here. I would expect that the next round of gTLD applications is similarly going to have a covenant not to sue, where IRP outcomes are now binding on the parties. To be clear, it could be ICANN. That seems unlikely. But it's not intended to be just for claimants to raise the concern. I think not having any kind of escape valve or mechanism for a party to raise this concern just really creates an impossible situation where a party will have to go forward with a panel that it has concerns about the diversity of skill and experience. I just think it creates a no-win situation either substantively, procedurally, or optically. And if it's the view of the group that we can't create a mechanism for the parties to raise this issue then I would very much like to have something in the report or the request for public comment that notes that the group considered the possibility of allowing parties to raise this issue and rejected it and why. Thanks.

SUSAN PAYNE: Thanks, Kristina. David?

DAVID MCAULEY: Thank you, Susan. I'll begin by saying I think I somewhat disagree with Kristina with respect. But I think, Susan, you are correct when you said we will probably have to redo this a bit. And I want to state my concern. It's similar to Kristina's from the other side. I want to state my concern that I think we should have a default built into the system into using the

Standing Panel. I think that the Bylaws are very coherent in such a respect. When decisions are binding, when decisions create precedent, it makes sense to me that you will have a body of judges that you draw from that have developed some understanding of ICANN, etc., and they're not just arbitrators that you get off the street. So I think it's actually quite important.

I do acknowledge that we've gotten a little bit wrapped around the axle around the phrase, "What requisite diversity of skill and experience for particular IRP proceeding." That language appears in 4.3(k). But in 4.3(j), it talks about the expertise that the people who appointed to the panel should have, and those areas of expertise are things like corporate governance, international law, arbitration, alternate dispute resolution mechanisms, that kind of thing. So I think I said last time—and I want to restate it—I think that the requisite diversity of skill is talking about that expertise that's listed in 4.3(j). And so I went in the interim, to the Merriam Webster Dictionary, which is not the only dictionary obviously, but it's a good one, and the word expertise is just defined as the skill of an expert. I think that's what 4.3(k) is talking about. I do think that there will be instances where you have to go outside of the Standing Panel, they will be rare. But there was a comment, I think it may have been Flip that made, but I just got the sense that there was an understanding that there would be a relatively easy way to get to a panelist outside of the Standing Panel. I think we should, when we create the clause, say that preference has to be given to the Standing Panel in all cases. So when you go to a court, if you have a dispute that involves engineering, you don't get a judge with an engineering degree. If it involves a question of geography, you don't get a geographer as your judge. Now, people do

that in arbitration. When they contract for arbitration, they can sign a contract to arbitrate a dispute and say that the arbitrator has to be an engineer, but we're building a panel that's a Standing Panel, and that's not what we're doing. So I just wanted to restate my strong feeling that there must be a built-in default or bias to using people from the Standing Panel. The skills that they have to have are the ones that are listed in 4.3(j). Thank you.

SUSAN PAYNE: Thanks, David. So first off, I don't think most, if not all of us, disagree with the idea that there is an intention for the Standing Panel to be used. Oh, sorry. I'll go to Becky because I think you also have to drop off, Becky. Becky?

BECKY BURR: Yeah, sorry. I just wanted to stay on when we started talking about this. I really strongly I agree with David. The notion that we always had in mind was that the Standing Panel would be the Standing Panel. Of course, there could be some weird situation where you had to go outside of it to pick a panelist. But the point about the experience was to enable them to call on technical experts, those kinds of things that a normal commercial arbitrator might not have. If we have a situation where people can go outside of the Standing Panel for arbitrators, except under extraordinary circumstances, then we lose the value of the Standing Panel, which is having people who really know ICANN and understand what's going on in this space. With that, I'm going to have to drop off. But I just wanted to say that.

SUSAN PAYNE: Thanks, Becky. Really appreciate your time and thanks for joining us. Greg?

GREG SHATAN: Thanks. I find myself also sympathetic to what David and Becky have said. The phrase "requisite diversity of skill and experience," the first two panelists, it seems to me—first off, there's nothing set up here to say who will be the arbiter of whether the claim that the party is making holds water and what beyond all of the panelists is the type of skill and experience that we would expect. It's completely silent on that we don't know what they would say, who they would say it. To my mind, it should be a very high bar to prove this. The idea of having a Standing Panel and picking one that's at the larger end of the spectrum we were thinking of is the idea that they should be able to handle virtually everything that comes along. If there is an edge case where some very specific type of skill and experience is needed for the arbitrator or for the panel and not for an outside expert who's going to be brought in to assist them as a designated expert of some sort. That seems to me to be very much the exception, not the rule. I would hate to see this used as a substitute for claiming—rather than claiming that there's a conflict of interest, we need to clearly have the ability for parties to raise a concern about conflict of interest, but that's separate from this diversity of skill and experience claim, which is there's someone out there who's going to be an expert arbitrator and mediator who did not apply for or was not picked for this panel, but yet possesses unique skills and abilities, and that there are three of them perhaps that need to be

found from somewhere to do this rather than our Standing Panel. It seems almost far-fetched except that we don't know what the requisite diversity of skill and experience even means. We've got a need to be more clear and more detailed here and also not to create some sort of situation where the Standing Panel is bypassed on a regular basis because somebody makes a claim that they don't have the requisite diversity of skill and experience because they're all cisgendered. I don't know what it might be. Whatever it might be. Just we need to do a little better. Thanks.

SUSAN PAYNE: Thanks, Greg. Kristina, I've got a great deal of sympathy with the point that you've made. I do think we've discussed this to death now. When it went out on the mailing list it, it's now been sitting with people for really a number of weeks and the strong feeling from the feedback was that the IRT members are concern at the very issues that Greg and, before him, David was bringing up. Just reservations about building in a process—hang on. I'm sorry. I'm going to just pause and read what you're typing.

Kristina said she was looking at 4.3(k)(3) assignment from the Standing Panel. That's why our key panels shall take into consideration the Standing Panel member's individual experience and expertise in issues related to highly technical civil society, business, diplomatic, and regulatory skills as needed by each specific proceeding and such request from parties for a particular expertise. Which, she's commenting is more relevant than 4.3(j). So it refers to requests for the parties for any particular expertise, which we haven't really addressed.

Well, David's got his hand up. My only reaction to that would be that the parties are selecting from the Standing Panel, both the claimant and ICANN are selecting from the Standing Panel, and that I think is part of that process, is in order to address exactly that. But maybe that is—well, I'll go to David. David?

DAVID MCAULEY: Thanks, Susan. Kristina makes a fair point. I actually had considered that when I made my comment. What 4.3(k)(3) requires is nothing more in my opinion that these backgrounds be taken into consideration. What 4.3(j) does is require that when the Standing Panel is constituted, it should be from the skills of international or corporate governance, and whatever else it says. I think an alternative dispute resolution experience, something like that. To me, when you find a phrase in 4.3(k) that uses the word "requisite skill," I think it's referring to 4.3(j), that's what's required. That's the basis upon which you build your standing panel.

Then I get back to the point that I made and Greg made, and I think make sense is if it's an engineering question, you should take into consideration engineering skills you have on the panel, but that doesn't mandate who you pick. And a Standing Panel will, also under 4.3(k), have access to experts. I guess what I'm saying is I did think of what the provision that Kristina cites, I don't think it's decisive against the case that I made. Thank you.

SUSAN PAYNE: I mean, it's something certainly that's in the Bylaws. Do we think that it's helpful in this clause if it's not somewhere else in the rules, and I would have to check, to actually make a reference to being able to call on expertise? Do you think that would assist? David?

DAVID MCAULEY: I don't think it's required because it's in the Bylaws. I think that a panel in some cases will want to hire an expert. They'll say, "Goodness, is there any reason why we can't?" And they'll quickly be disabused of that notion. I just don't know that we need to put that in the rules. I actually would like it if we could get to rules that are simpler than they are complex. And when we restate the Bylaws, we're tending towards more complexity and the potential for, maybe even in a minor way, misstating what the Bylaw says and only an actual quote would work, I think, from the Bylaws. I just don't it's that important. I think we should. Thanks.

SUSAN PAYNE: Okay. Kristina?

KRISTINA ROSETTE: Sorry. I'm having issues unmuting myself. I have to disagree with David here. As someone who has gone through the entire IRP process, I can promise you that folks are going to go through these rules with a microscope. I have concerns about if we don't specifically address it in the rules, regardless of whether it's in Bylaws, then that ability will be determined not to exist to call an external expertise. And I think that

there's a broader way to do it. While I hate to say it, I think what this whole conversation makes me realize is that I think when we get to the point where we think we might be done and ready to go out to public comment, I do think we're going to have to go through the exercise of mapping our proposed rules against the relevant sections of the Bylaws to make sure we haven't missed anything.

The alternative is to then put some very broad catch-all language in the rules that were not intended to negate specific language in the Bylaws, etc. But doing something like that then creates its own host of issues. I understand the point that we don't want to create a situation where everybody's going outside of the Standing Panel for panelists. I get that. Quite honestly, I think part of the concern here, for me, at least, is without having any idea who the caliber of folks that have been invited to be appointed to or whatever the actual process is to Standing Panel, that raises a lot of uncertainty. So the idea that there isn't even a mechanism for a party to say, "We have concerns that the Standing Panel does not, in fact, have the requisite skill and experience to..." There's no mechanism to even say that. Even if they then go on to say, "Nonetheless, since we have no choice, we're picking panelists so and so." I realized I'm in the minority here. But I just continue to have concerns and reservations about what happens if we don't do anything. Thanks.

SUSAN PAYNE: Thanks, Kristina. I think this is probably, reluctantly, we know we're putting these rules out for public comment. Perhaps this is another one we do need to call out. Greg, I think you might have the last word here.

GREG SHATAN: Thanks. A couple of things. I am sympathetic to Kristina's concern. It seems to me that the second sentence of three does at least create the predicate that Kristina is looking for, if not, a more detailed mechanism. And maybe I'm just not getting the concern right or the wording right. But it says "If a party believes that the Standing Panel does not have the requisite diversity of skill and experience for the particular IRP proceeding, they must notify the Standing Panel in the other party in writing within 14 days of the commencement of the IRP." Now, the problem is where does that leave you? Just with a notification that's sitting there like a fallen soufflé? I mean, we need to go somewhere from there.

Even if it's going to be rare and even if there's a high bar to it, there needs to be some sense of mechanism even if it's sketched out at a framework level. It can't just be left as, "We send a notification," and then it sits there and nothing can be done about it. If the notification has clearly been put in there for a purpose, same thing with the capacity. Or does it just go to the language below, the requisite diversity of skill and experience and you go outside the panel. But there's still some sort of a hinge that's missing. Either we go to the rest of this and they go a point from outside the panel because the party says so. Or there is some form of a mini proceeding to determine whether, in fact, it holds water.

Just briefly on the larger point, I think we do need to put it in at the beginning of these rules, that the Standing Panel operate under the Bylaws and these rules and the ICDR rules and whatever other rules,

there needs to be an understanding of what the book is, so to speak. What the Guidebook is for the panel. It needs to be very clear that the Bylaws, and particularly, the relevant Bylaw that we've been referring back to section is very much part of the active rules. I do think that for many of those rules, including the ones we're discussing, the rules need to expand on the Bylaws and essentially create the implementation, if you will, for the policy level stuff that's in the Bylaws. I don't necessarily think you need "really simpler rules," necessarily, they should be clear. But they should also take what's in the Bylaws, and wherever is necessary, create the appropriate structures by which those Bylaws become implemented in this new context we have of a Standing Panel. Thanks.

SUSAN PAYNE: Thanks, Greg. That language in the second sentence, that's really what is proposed to be being deleted as a result of the feeling from the group as a whole that that determination of whether there's the requisite diversity of skill and experience is really just a question for the Standing Panel themselves. So the proposal was for that to be deleted. Hence, Kristina's concern, because we wouldn't be there, it would just be it would go straight into the sentence that says in the event that the Standing Panel is not in place or is in place but doesn't have capacity or the requisite skill and experience. And that would be a decision the Standing Panel is making rather than something that's raised by a party.

GREG SHATAN: I think if we're not clear that the party can't raise it, they would raise it. If we just struck that second sentence and went right into, is in place but not have capacity due to the requisite diversity of skill and experience, then I would use that as a opportunity to object even if the second sentence wasn't there, personally. Of course, that doesn't leave us with any mechanism but I think unless we foreclose it, I'm not suggesting necessarily—I'm feeling a little bit uncertain about whether we should truly foreclose it as opposed to making it a high bar. Because there may well be times. I think they're rare but there may well be times when, at least, it should be raised where a party would want to raise it. And it should be at least considered whether the panel can meet the requirements of this particular IRP. It can't be easy, but maybe it shouldn't be completely foreclosed. Thanks.

SUSAN PAYNE: Actually, I'm hearing you now being more aligned with the view that Kristina has been expressing, Greg, which is that it should be possible to raise this albeit that we want to couch this in terms that make it very much the exception.

GREG SHATAN: That's fair. That's why I'm feeling we should be clear about what this means, it should be a high bar to be an exception. Our standing panels is going to be a narrow slice of the requisite skills that would be expected from an arbitral body and therefore, it should be pretty easy to say "I don't see the requisite diversity of skills and experience here." We don't

have an astrologer. Therefore, I need to pick an outside panelist who happens to be my brother-in-law but you can't know.

SUSAN PAYNE: No conflict of interest there. Okay. I think you're right in terms of if we delete that sentence, people will potentially raise it if they feel the circumstance exists. I don't think a party would not raise it. But the removal of the reference to it makes it less front and center of mind for a party. Well, this has been a useful discussion because I think there's been movement away from outright removal of this possibility to building in some extremely limited language or some language reflecting extremely limited circumstances. Liz?

LIZ LE: Thanks, Susan. This is Liz Le with ICANN Org for the record. I agree with what Greg has just said. I think it's clear from Bylaws that the selection of the panel to preside over IRP matter, the default is with respect to selecting from the Standing Panel itself. The instances where one would not select from the Standing Panel should be reserved really for those outlier cases for the reasons that we agree upon here. You cannot find a qualified panelist to serve from the Standing Panel but that should not be the norm and rather more of the exceptional circumstances. Thanks.

SUSAN PAYNE: Okay. Thanks, Liz. All right. I think I have a bit of work yet to do a little bit of drafting on language. But it looks as though we've come to a compromised position that it looks like we've got good agreement on.

Thanks, everyone. I think this has been a really useful discussion. All right.

Then returning back to our agenda. I think the agenda item four was just largely for noting to remind people of our face-to-face meeting in Washington, D.C. We're meeting on the last day. It's not quite the graveyard slot. But given it's only a four-day meeting, hopefully that most people will still be available. And Thursday was the day that was a bit lighter in terms of other sessions, and so we had fewer conflicts and we're readily able to find a slot.

In terms of what we'll be covering, that's something better than I do to have a catch up and give some thought to what we discussed, but I think we potentially will be looking to have the final language on this. Having said, it may be that that's something we can be finalizing over e-mail and maybe don't need to take up more air time on given where we've reached today. David, you put a comment in the chat. I don't know if there's anything particular you wanted to suggest or bring up. Thanks.

DAVID MCAULEY: Thanks, Susan. Well, I would do a couple of things. I would encourage you, Susan, as our esteemed chair, to write an e-mail to the list and encourage people to come remotely or in person, if they're in D.C. The timing, I think is good, because I know that Flip said he may not be able to come. So it's even a decent time for remote participation in Europe and encourage people to come.

I think it might be worthwhile to have a 10-minute segment on the agenda for us to discuss amongst ourselves. Especially with respect to people that don't attend to ask frequently to say, "What can we do to make this more cohesive and more participatory?" Everybody should speak up. "What would it take for you to be here more frequently?" Another possible idea is for us to just outline, this could also be a five or seven minutes session, work beyond the rules that we have in our future that we need to start thinking about at some point. Because I think when it comes to the rules, we're probably pretty close or we're closing in on the end. So those would be my idea, Susan. I would encourage you to let's hopefully get together and meet each other face to face and try and figure out a way forward. Thank you.

SUSAN PAYNE: Thanks, David. And thanks for those suggestions. Definitely one of the things on my mind was, as you say, the work beyond the rules. And we may want to have a bit of a brainstorm on what we prioritize for taking on next. Whether we think it's realistic, for example, for us to split some of that up into smaller groups. But certainly based on our core size at the moment, I think when we try and split into small groups, we struggle to get sufficient attendees to be really able to make good progress. Certainly, that's been the experience to date. Yes, I'll certainly do my best to flag to some of those who've fallen perhaps a little by the wayside from our group to specifically encourage them to come back as well so that if they're there and if they're available, they will join us, I hope. In answer to Kristina's question, I think that's right. We agreed that the meeting would be open in the sense that observers can attend,

but it's intended to be a working session and so it's for members to be actively participating.

Noting the time, it's actually just two minutes before the end of our scheduled time. I'll just pause and see if there's anything anyone else wants to raise now before we wrap. Okay, I'm not seeing any hands. Again, huge thank you to everyone for making the time, being available on this rescheduled call. And I think we've had a really productive discussion. Thanks, everyone. And look forward to seeing you all in a couple of weeks' time. We can we can wrap up, Brenda.

GREG SHATAN: Thank you.

SUSAN PAYNE: Thanks, everyone.

BRENDA BREWER: Thank you all very much.

[END OF TRANSCRIPTION]