
ANDREA GLANDON:

Good morning, good afternoon, and good evening. Welcome to the IRP-IOT plenary on Tuesday, the 30th of April 2024, at 18:00 UTC. Today's call is being recorded and is governed by the ICANN Expected Standards of Behavior.

Kindly state your name before speaking and have your phones and microphones on mute when not speaking. Attendance is taken from the Zoom participation. Apologies were received from Mike Rodenbaugh and Brenda Brewer. And I will now turn it over to Susan Payne. You may begin.

SUSAN PAYNE:

Thanks very much, Andrea. Hi, everyone. Thanks for joining. We have a really good turnout tonight, which is great. I'm noting Liz has also joined us as well. Hi, Liz. So that's excellent. Yeah, we're more than quorum today. So hopefully, we can make some good progress.

This is our 30th of April call. We are hopefully in a position at the end of this call, or shortly thereafter, to really have pretty much all the documents in place that we need for our public comment to go out. So with luck, that should hopefully go out for public comment fairly shortly. Quite a long agenda. A lot of these items are not necessarily hugely time-consuming. It really depends. So I added items that in case we have the time and we got to them, but some of it is a little time-permitting, but in any event.

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As usual, first up, we're going to review the agenda and I'll circle back to the SOI updates once we've just quickly gone through the agenda. So we had as agenda item two, we've got various action items just mentioned there. I'll come back to all of them as the call progresses, in fact. So I'll just quickly mention them all now. We had one for us to review our SOIs and ensure they're up to date, and just remind the group of any interests we have in an IRP. This came up as a result of the discussion we were having about what we prioritized for some of our next tasks. And it was felt that it might be helpful for us to take the opportunity to just make sure our SOIs were up to date, and also to just remind each other of any interests that we might have.

We had an action for Bernard to circulate redlines of the legal text against the current interim Supplementary Procedures, and that was included. The version without the rationales, in a way, was included with the agenda. So we have an item on our agenda for that. Standing Panel training materials, again, we will have an agenda item on that just to look over the potential response we could send back to Org. We also looked on our last call at the provisions that relates to interim measures. So we had an action item for the group to review that and come along sort of prepared to discuss. So those are the action items. As I said, I think all of them have then got an agenda item themselves.

So agenda item three, we'll just quickly touch on those redlines that I mentioned that was circulated with the agenda.

Agenda item four relates to Standing Panel training materials and discuss if there is any input in the proposed response that we could send to Org.

Agenda item five is one of our outstanding tasks on the IRP rules, and that's relating to the interim measures, so Article 10, and whether we think that there's any particular updates that is needed to that Article 10.

Then we've got agenda item six is another of our outstanding tasks on the IRP rules. This is relating to the procedure when ICANN elects not to respond to an IRP, which is something that the Bylaws reference, and so we need to consider whether there's anything more that is needed in that regard. Albeit, obviously, I think we all think this would be an extremely unlikely situation but it is one of the items flagged by the Bylaws.

Then item seven, I think this one is time-permitting. We may start a discussion on the next of the outstanding tasks from our list on the IRP rules, which is about non-binding IRPs and precedent.

Then the usual sort of placeholder for if there's any other business. I will pause and see if anyone has anything they want to note for the agenda now while we're doing this. Okay. I'm not hearing anything. Then I do want to have a quick discussion about when our next meeting should be. So we will leave five or seven minutes at the end to do that.

Okay. Returning back to the top in the SOI updates. I hope you've all seen I actually did circulate an SOI update to myself. Having taken the opportunity to review my SOI, it occurred to me that out of an abundance of caution, I probably should mention something that is occurring in my capacity as one of the leadership team of the Intellectual Property Constituency. As a GNSO councilor for the IPC, I'm

a nonvoting member of the leadership team. So I don't have a decision-making role. And that's why I say it's for a sort of abundance of caution, but just to note that the IPC has recently entered into a cooperative engagement process as a result of the previous Request for Reconsideration that was filed relating to—I guess the best way to describe this is the manner in which Org was proposing to deal with Auction Proceeds Recommendation 7 and this application of accountability mechanisms. So that's quite long-winded. As I say, I don't have a decision-making role in the IPC as such. Certainly, if anything comes to a kind of vote, I don't have a vote there. I just felt I should flag it.

I think if people don't mind, it might be just helpful if anyone else has any sort of current or potential interest in an IRP that they think it's worth reminding the group about, even if it's something that you've raised previously. It's a long time since we've had this kind of discussion. David? Thanks.

DAVID MCAULEY:

Thank you, Susan. Hello, everybody. Verisign has an interest in the ongoing .web IRP or other—well, there's a couple, I think, IRPs with respect to .web, and VeriSign has an interest, and I'm an employee of Verisign. Thank you.

SUSAN PAYNE:

Thanks, David. Flip?

FLIP PETILLION: Thank you, Susan. Well, now that we are busy, I just wanted to mention that I tried to update my SOI as well. I think that will be carried out shortly. Because I was working on the old version and it was not technically possible to update the new version. I just wanted to mention that I'm counsel to the IPC with regard to the latest Requests for Reconsideration. There is a CP going on that is led by the chair of the IPC, and I am still the counsel of Namecheap in I would call it the aftermath of the arbitration decision in the Namecheap-ICANN IRP.

SUSAN PAYNE: Lovely. Thanks very much, Flip. Anyone else or anything else? If anyone has any sort of past interest in IRPs that they think are kind of relevant and wants to flag, feel free, but I think it's really more to flag if there's a sort of current or an anticipated participation that the group might need to be aware of just as we're continuing with our discussions. All right. I'm not seeing anyone else, I think. Perfect. Thank you very much, everyone. Okay. Oh, sorry, Malcolm?

MALCOLM HUTTY: So you said "anticipated". Do you mean actively in preparation or do you mean merely foreseeable?

SUSAN PAYNE: I think our SOI form does ask for us to disclose something that is anticipated. That's a difficult one to answer because there may be all sorts of things that are conceivable as an IRP but are very unlikely to come to pass.

MALCOLM HUTTY: Out of abundance of caution, why don't I just say anyway? That way, no one can accuse me of not having said it later.

SUSAN PAYNE: Okay. Thank you.

MALCOLM HUTTY: That's just simply to say that while there has been no decision taken on this and certainly no authorization to go ahead, in the event that the Board end up passing the Rule 4 as currently wrote, it is a distinct possibility that I will challenge that in the IRP.

SUSAN PAYNE: Thank you, Malcolm. Absolutely. Your concerns about Rule 4 are well noted by the group, but thank you for flagging that. Lovely. All right, then I think we can move on. And just the usual reminder, everyone. Just to keep this in your mind, do update your SOI if necessary.

Okay. I think with that, I quickly ran through the action items as I was going through the agenda. And since they all have at least some passing a subsequent agenda item in their own right, I think we'll just skip straight on to item three which relates to the redlines. So just as a reminder, the redline of the new version, so the proposed amended text, as it's been through the legal review that we've just been doing, as against the current interim Supplementary Procedures, this is something that will be put out as part of the Public Comment package

for the assistance of the members of the community. As I said, attached with the agenda was a version of that redline that Bernard very kindly has pulled together. It doesn't include the rationales. I think probably the version we put out, we'll probably have a version with rationales included with the redline to help explain to the community what they're seeing. But the text of the redline itself will not change and the rationale text will not change.

First, just really, this is to flag that that's now being circulated. There's an opportunity here now, if anyone had any immediate comments or issues to flag that they wanted to flag having seen that since it was circulated, which was only yesterday. And absent that, I think what I will probably suggest is that if anyone has any sort of comments or concerns or spots anything that they think is incorrect, if we could perhaps look to circulate that by e-mail by next week, so the 6th of May, end of day, wherever you are. I hope that would be sufficient time just to allow this package of materials for the public comment to get sort of finalized and put out.

So I'll just pause briefly and see if there's anything anyone wants to bring up now. And if not, then yes, please do take the opportunity, if you can, to look at that. I will say Bernard produced it and I have also cast my eye over it. We think it's correct. But obviously, happy to have anything flagged if we've missed anything. David?

DAVID MCAULEY:

Thanks, Susan. Hi, again, everyone. I just wanted to mention that I do plan to make two tiny suggestions by May the 6th. I just had a note to

myself and I don't recall it entirely so I won't do it right now. But I do plan to do that.

SUSAN PAYNE: Lovely. Thanks, David. That's super. Hopefully that timing is okay for you.

DAVID MCAULEY: Yeah, that's fine. Thank you.

SUSAN PAYNE: Okay, brilliant. Thank you. All right. Of course, anyone else? And indeed, once David has sent that rounds, again, there'll be an opportunity just for any responses or feedback on that as well.

Okay. All right, then in which case, I think we can move on to item four. This relates to the Standing Panel training materials or whatever terminology is subsequently adopted. We have had these in our inboxes now for quite a while, the list of materials. Having discussed them briefly on a couple of our last calls, there was a deadline of a week or so ago for anyone to raise anything else, particularly to raise if there was anything that people felt shouldn't be on the list and shouldn't be referred to the Standing Panel as part of their package of training materials. But also, if there's anything that you will think would be of assistance to the Standing Panel members as well. Noting in relation to additional materials, as Sam has mentioned previously, it is envisaged this to be a sort of living list. So this isn't an opportunity that's close to us forever if we don't say something now.

But nonetheless, what we did discuss, on a couple of calls we identified a few items that we did feel might be of assistance. During that discussion, Sam did indicate that in a couple of cases, items were things that the ICANN Learn team had been thinking about working on materials that would address that particular issue. And it was suggested that if our group were to make a recommendation that the Standing Panel training materials to include that kind of content, then that would be helpful for prioritization purposes. So, with that in mind, I drafted a really short e-mail of the sort of thing that I think we might send to Org as a sort of formal notice of those items. Andrea, this is the e-mail that I forwarded. If you wouldn't mind just pulling it up.

ANDREA GLANDON:

Absolutely. Just one moment.

SUSAN PAYNE:

Perfect. Yes, exactly. It's very short. Just noting—and perhaps I'll just quickly go through it. Just noting that “Dear Sam and Liz, thanks for sharing with the IOT for our input the list of proposed briefing materials for the Standing Panel members as envisaged by ICANN Bylaws 4.3(j)(i). The IOT has reviewed and discussed these materials and supports the new Standing Panel members being directed to these to assist in their onboarding. In addition, the IOT believes materials on the following topics should also be included.”

So first bullet, the Empowered Community (ECM), materials to explain the concept of the EC, its role and powers, including that the EC has power to bring a community IRP. Bullet two, the IANA transition, the

background and history of the IANA transition, and the resultant changes to the ICANN's Bylaws and to the IRP. And then bullet three, the IRP and past decisions, directing the Standing Panel members to the IRP section of the website and the past cases for a sense of the types of issues dealt with under the IRP, pleadings, timings, etc., identify and encourage Standing Panel members to read the IRP cases that have been dealt with under the new Bylaws and distinguish these from the cases that were conducted under the pre-transition Bylaw regime. Then finally, to the extent that materials concerning the above are not already in existence, the IOT would like to encourage their prompt development to assist in the thorough onboarding of the Standing Panel members.

So that's it. Those are the items that we talked about. I think, generally, there was a feeling that those would be of assistance to Standing Panel members. I'll pause and see if there's any immediate reaction. Then we'll also try, I think, probably to finish this off over e-mail. We don't necessarily want to draft on the call, but I definitely am keen to get any thoughts. David?

DAVID MCAULEY:

Thanks, Susan. On the IANA transition bullet, I do recall I was talking about that. I think it's worthwhile that they know about it. I guess where I missed it is that we would get into the background of it. The only reason I raised that comment is because, as all of us know, and especially those of us who worked in Work Stream 1 and/or Work Stream 2, but especially Work Stream 1 where the IRP was developed, the background is just absolutely colossal and nuanced. And so

developing a course along those lines could itself become controversial. I don't know. So my question to ICANN, is there such a course about the IANA transition that includes some background information? And would it be better to just refer people to the Final Report of Work Streams 1 and 2? Anyway, it's just a question on the fly. I'm trying to digest it and get my thinking around it. And so that's why I brought it up. Thank you.

SUSAN PAYNE:

Thanks, David. This came out of some comments Sam was making, but I'd much rather have Sam's response. So, Sam?

SAM EISNER:

Sorry, I'm late. But I guess I arrived just at the right time. As an organization, we're recognizing that we really need some good materials on the history of the IANA transition as we're getting to be so many years from it and there are so many valuable things that can be encapsulated about the history of why it happened, what happened within it, and not just focusing on the accountability aspect but also the actual stewardship transition that happened at the same time. So, to close on that point, we're really looking at how we can build out internally from the ICANN side and not just from a legal aspect. I mean, this is really an ICANN history issue. Of course, we have some ICANN history stuff but we haven't focused yet on the transition as a historical last vignette. So that's being worked on. It's not there yet.

In terms of the resultant changes to the ICANN Bylaws and the IRP, one of the things that we took from the conversation that we had last time was, as training packages being built about the accountability

mechanisms, we thought that was a really great point that was brought out. So we went back to the team building that content and said, “Look, we need to reflect in here that there was a big change that happened in 2016 and give some context to it.” Of course, we also have the ability to refer panelists to that Work Stream 1 Report. There’s a particular annex that really talks about the changes that came in around the IRP itself, if it’s helpful to bring that in. That, of course, is not the story of the transition. Of course, the transition is a much bigger thing. But we’ve already actioned that particular point about how the accountability mechanisms themselves change and why they’ve changed as a result of that 2016 work.

SUSAN PAYNE:

Thanks. Okay. So I wonder then, because I’m sort of hearing what you’re saying and this was the reason I put it on the list, because I knew you said that it was something that was being actively considered and something that ICANN is planning to do. But as David rightly says, that’s quite a big topic. As you point out, that goes further than the accountability mechanisms. So I wonder then, I guess maybe a question for you. Is it helpful for you if we flag this as something that we think the Standing Panel members should see because it helps prioritize it? Or should we actually remove that reference to the background and history and just keeping the part that’s more applicable to accountability and the IRP. Acknowledging that, as you say, that’s something you’ve already taken away to action anyway. Looking for some guidance, I guess.

SAM EISNER:

Thanks, Susan. My initial reaction is so long as the IANA transition history itself isn't identified as a required topic that might be preclusive to a panel member serving, that it can only help to have that listed. I think that could help with some prioritization and identification of resources, if we're doing any level of prioritizing which ICANN Learn courses might need to be developed or where we're going to adjust some resources internally. So, we welcome this input from the IOT.

SUSAN PAYNE:

Okay, lovely. Thank you. Perhaps we'll divide this into two bullets then, and then that maybe gives a bit more flexibility. Again, I'm happy to get the feedback from the wider group and anyone else who has thoughts on this now. Otherwise, let's take some time over the next week or so and see if we can just finalize this. And absent objections, I'll send around a slightly revised version. But absent objections, then I'll look to send it out in about a week or so time, just so that we can close this item off, if that sounds okay to everyone. All right, lovely. Malcolm?

MALCOLM HUTTY:

My only comment would be that I think it's impossible to contextualize the modern accountability processes written in the Bylaws without understanding both the desire for transition to occur and the concerns and oppositions that were stated at the time from various courses, and to recognize that the accountability process was set up to address those so as to gain a broad level of support for it when that support wasn't immediately forthcoming.

SUSAN PAYNE: Thanks, Malcolm. Am I hearing you say then that you think that background in history is perhaps something that should be required as opposed to suggested reading? Or, actually, is David's suggestion of referring to the specific final report perhaps give that kind of level of understanding or at least—

MALCOLM HUTTY: I would think the final report should be required reading. And additional material, as Sam says, is probably limitless, and is also going to be contentious. Different people will have different perspectives on it. So I would tend to agree with Sam that making that as sort of open-ended and non-required element makes sense. But I really think that certainly the Work Stream 1 report, I don't I would be horrified to think that a panelist would think about sitting without having read that.

SUSAN PAYNE: Super. That sounds good. All right. Thanks, everyone. I'll tweak the draft and send a background, and then we can hopefully reach some agreement over e-mail. Noting David's just saying he's agreeing with Malcolm that it could be contentious to develop a background to the transition. And I think yes. I mean, there were obviously a lot of views and perspectives, and it was a tricky issue. But having some understanding of what went on and how that fed into some of the changes under things like the Bylaws, I think it's something that ideally we'd like the panelists to have some appreciation of. Okay. Then I think if we could go back to our agenda just briefly, Andrea.

ANDREA GLANDON: Just give me one moment. Of course, I lost it. Hold on.

SUSAN PAYNE: Me, too. In fact, I can see what our next agenda item is. Agenda item five is the outstanding item. The interim measures, so Article 10. So, in fact, we could just, if you don't mind, go straight to that attachment which we circulated with the agenda. Hopefully the title is sufficient to help. Let me see which one.

ANDREA GLANDON: Is this it?

SUSAN PAYNE: It's the other one.

ANDREA GLANDON: The other one. Okay. Of course.

SUSAN PAYNE: Of course, it is. Yeah. That one will be afterwards.

ANDREA GLANDON: This one? No, that's the one I just opened. Wait, hold on. Sorry.

SUSAN PAYNE: No worries.

ANDREA GLANDON: Is it this one?

SUSAN PAYNE: No. Let me see what it's called. It is called outstanding issues interim measures Rule 10. That's it. Yes.

ANDREA GLANDON: That was it? Okay. Here we go. We're good now. Yes?

SUSAN PAYNE: Yes.

ANDREA GLANDON: All right.

SUSAN PAYNE: Perfect. Yes. Okay. We touched on this topic, which is one of the items on that list of outstanding matters for the IOT to consider that was recirculated on the 8th of April for our 8th of April call. So this is one of these. It relates to Rule 10, which is interim measures of protection. And the specific questions that had been flagged when we were back some time ago, putting together a list of items for the group to consider with these questions here that are highlighted at the top. So first of all, highlighted in yellow, to consider codifying the typical arbitral practice in clarifying the emergency panelists and/or IRP panel has the authority

to modify interim relief measures. And then I highlighted in green, for procedural equity, consider defining a page limit and right of reply for request for interim measures. As we quickly touched on our last call, there was some relevant text in the current version of Rule 10 In the interim Supplementary Procedures, I think.

So if we could scroll down a little, Andrea, you'll see there's some highlighted text there. Yes. So in relation to that first item, we've got that highlighted text in yellow that refers to the emergency panelist. Modify or terminate the interim relief if the emergency panelist deems it appropriate to do so in the light of further arguments. That goes, I think, at least in some way to the question, the first part of that question that was referred to us. And then just above that in green, somewhat touching on the second of the questions was that any party whose arguments were not considered prior to granting such interim relief may submit any opposition to such interim relief, and the emergency panelists must consider such arguments as soon as reasonably possible, which is, I think, touching on that sort of right of reply element that we were asked to consider. Then we also have the ICDR rules themselves that obviously the interim Supplementary Procedures are supplementary to the ICDR rules. So Article 7 of the ICDR rules deals with emergency measures of protection.

And if we again scroll down, we again have a bit of text that's covering or at least going in some way towards the two open questions. Again, I'll deal with that first question, the text in yellow first. So we have there in that paragraph four that the emergency arbitrator may modify or vacate the interim award or order. And then in five, we have that once the tribunal has been constituted, and that would be the IRP panel in our

context. The tribunal may affirm, reconsider, modify, or vacate the interim award or order of emergency relief issued by the emergency arbitrator.

Then going against that second question about rights of reply and so on, that paragraph three just above, we have the text in green, talking about some of the procedural matters in the ICDR rules, so the emergency arbitrator shall as soon as possible and in any event within two business days of appointment establishes scheduled for consideration of the application for emergency relief. Such schedule shall provide for a reasonable opportunity to all parties to be heard and may provide for proceedings by telephone, video, written submissions, or other suitable means as alternatives to in-person hearings.

So we think in terms of the items specifically identified to us in the original questions, possibly the only item that's not covered at all is about page limits for these sorts of requests. So, again, just really a question for the group, whether there's a feeling that what we have here is adequate to address the point of ensuring where there is an emergency, an interim measure, the points about the IRP panelist and the IRP panel having authority to modify is adequately covered, and whether the right of reply for request for interim measures is also adequately covered.

To my mind, I think it is, but I obviously would be very keen to hear from others particularly if they disagree. And as I say, the item that isn't covered specifically is about defining a page limit. It certainly seems to me that that's the sort of thing that we could leave to the panel's discretion or the emergency panelist's discretion if we felt that it wasn't

necessary to make a specific rule. But again, really just throwing this to the group to see whether there are strong feelings that we need to update the interim Supplementary Procedures Rule 10 as it currently exists, or whether we think that that together with what's in the ICDR rules is adequate. David? Thank you.

DAVID MCAULEY:

Thank you, Susan. So pardon me, I had a hard time getting off mute. I think the page limit topic—this is my opinion—could be left to the panel. I actually have some knowledge of who the panelists may be because of the work of looking to nominate a Standing Panel, and they will be conversant with normal arbitration rules and I think could easily deal with something like that. I also think these rules are reasonably sufficient in conjunction with the ICDR rules. But I also have a general overall question—and it's what I flagged in the PowerPoint thing I sent around about appeals—and that is at some point, I think we need to do something with respect to what I read—and maybe I'm not reading it correctly—but what I read as some confusion between what the emergency panelists can do under Bylaw 4.3(p) I think it is, and what ICANN can do to stay in action or grant interim relief under 4.3(o). I read 4.3 reasonably often, and I came away from reading those two provisions, subsection (o) and (p) somewhat confused. I don't have in front of me right now, one of them, as I recall, says a panel can recommend that ICANN do these things. And the next one says an emergency panelist can do these things, and I think the verb is adjudicate, which to me, I take that as being make a decision and, as these rules say, order it done. If others share my sense of confusion, maybe we need to just flag this as an issue. We've mentioned from time

to time, when we're done, we ought to send a note to ICANN Org and the Board saying, "You know, in our work we noticed these areas of potential lack of clarity. We suggest that when you're in the mood to amend Bylaws, you might want to add clarity to these areas." This might be one where we want to do that. Thank you.

SUSAN PAYNE: Okay. Sorry, I'm mute. Thanks, David. I wonder if it's worth us having those two sections of the Bylaws pulled up into the Zoom window so that we could look at them. I don't know if you'll be able to do that, Andrea. It would be 4.3(p) and (o), I think, were the ones that David was mentioning.

ANDREA GLANDON: And I'm looking for what Bylaws?

SUSAN PAYNE: The ICANN Bylaws.

SAM EISNER: Okay. I dropped the link with that. Jump to Article 4 in there, Andrea, and if you scroll down to 4.3. Susan will give a direct site.

ANDREA GLANDON: Much easier. One moment.

SUSAN PAYNE: I think 4.3(o) was the first one.

DAVID MCAULEY: That's correct, Susan. I'd be interested if others come away with similar thoughts. Maybe I'm just missing something as I read it.

ANDREA GLANDON: Sorry, give me one moment. My computer's not cooperating with me very well right now.

SAM EISNER: David, just to be clear, you're looking at 4.3(o)(v) or five, consolidate dispute—sorry, four.

SUSAN PAYNE: That would be correct, four.

DAVID MCAULEY: Just got to that section. So it would be 4.3(o). 4.3(o) says, "Subject to the requirements of this Section 4.3, each IRP panel shall have the authority to," and then it lists things. And Subsection (iv) says, "Recommend that ICANN stay in action or decision or take necessary interim action until such time as the opinion of the IRP panel is considered." Then (p) talks about an emergency panelist adjudicating these kinds of things. I'm sorry if I got aside, but it is topical to what we're talking about.

SUSAN PAYNE: No, I think it is topical. Andrea, it's a bit further down because I think that's 4.2.

ANDREA GLANDON: Here we go. Sorry.

SUSAN PAYNE: Yeah. That's huge sections.

ANDREA GLANDON: I don't read the Bylaws too often. Maybe I should.

SAM EISNER: Stick with me, Andrea. We'll get there.

SUSAN PAYNE: Slightly.

DAVID MCAULEY: Yeah, launching into them.

ANDREA GLANDON: I don't know if I'm ready for that.

SUSAN PAYNE: There we go. So 4.3(o), as David just mentioned, yes, talks about “Subject to the requirements of this Section 4.3, the panel shall have the authority to,” and we’re thinking here about subparagraph four there, “Recommend that ICANN stay in action or decision or take necessary interim action until such time as the opinion of the IRP is considered.” Okay. Which certainly, to my mind, makes sense. If an act is being challenged in an IRP, it would be an act of the Board or Org. And so, this would be looking at effectively injuncting ICANN from proceeding until the final decision is issued.

DAVID MCAULEY: The issue that I’m trying to flag is I think there is potential confusion between the verb “recommend” and the verb “adjudicate”.

SUSAN PAYNE: Okay. Adjudicate is in (p). Is that correct?

DAVID MCAULEY: That’s my recollection. I’m trying to read it right now on the screen. Yeah, it’s about the fifth or sixth line down.

SUSAN PAYNE: Yes. “A single member of the Standing Panel shall be selected to adjudicate requests for interim relief.” I don’t necessarily see a conflict between the two. But I do think the use of the term “recommend” in terms of staying is somewhat less definite than you would want as a claimant. But I think perhaps that’s because all of the rulings from the

IRP are effectively recommendations. Yes, David, I can see your hand. I don't know if you wanted to add something.

DAVID MCAULEY:

I do. So you're helping answer a question I had. Do others in this community find this as confusing as I do? You, I think, are finding it more consistent. But I actually think Sam may have nailed this when she said that the language in (o) is a carryover from the pre-transition Bylaws. My recommendation to us as a group is we ought to roll forward with the interim relief rules we just talked about and assume that (p) is the intent of the Bylaw. But I think we're going to sort of aggregate some comments back to the Board and Org saying these areas need to be clarified. This is one I would say to them. This should be clarified. We are assuming and we believe that (p) is operative here. But the language is unfortunate, at least the way I read it. Thank you.

SUSAN PAYNE:

Thanks, David. Yeah, that certainly makes some sense to me. Malcolm?

MALCOLM HUTTY:

Firstly, I'm not sure. Are we recommending ICANN review and amend the Bylaws? Because I didn't think that was really our role. As for this particular issue, I actually think that it's reasonably straightforward. (o) says recommend because the only—basically, I agree with Susan's interpretation in any such things of recommendations, because the true relief that is available is declaratory, that action of the Board is contrary to the Bylaws. And then any recommendation would be ancillary to

that, but are not directions to the Board. The Board ultimately is charged with responsibility for deciding how to proceed, given that a particular thing has been found to be contrary to the Bylaws. And the recommendations are essentially guidance to the Board as to further interpretation, so it doesn't keep on sending back things which continue to be that, contrary to the Bylaws.

(p) is different. (p) is not talking about directions to ICANN. It's adjudicating the interim statement that must be made, which is different. In any case, I think we should stand by the rule that we're not amending the Bylaws here and we're not questioning them, we are applying them as they stand. So, in that extent, I agree with David that we simply follow what it says in (p) as being this is what applies to the emergency panelists. Thank you.

SUSAN PAYNE:

Thank you, Malcolm. David, and then Sam.

DAVID MCAULEY:

Thank you, Susan and Malcolm. I've listened, Susan, to you and to Malcolm, but I'm just not convinced. I still struggle with the confusion. But I really raised my hand to speak to Malcolm's point about did we ever agree to recommend amendments to the Bylaws? I thought we had said at one point, or maybe even more than one point, that we would sort of gather together observations we have about Bylaw 4.3 where we find it either confusing or perhaps even unwise and make a recommendation. When we're done with our work, I think, would be the appropriate time to do this. Make a recommendation to Org and

Board to take this to the community and suggest that the Bylaws be amended in certain respects. I don't think anyone knows as much about 4.3 as this group that's on this call. One good example of that would be something I've struggled with is this idea of non-binding IRPs. I think that's very unwise. And I thought at the end of this process, I would certainly sign on to those who said, "We might want to suggest that this is unwise." I think non-binding IRPs screw up the concept of precedence. But that's just one example. And so I thought we were going to. So I see that a little bit differently than Malcolm. Thank you.

SUSAN PAYNE:

Thanks, David. Sam? Sorry, Sam. I think you're on mute still.

SAM EISNER:

Indeed. I took down my hand, pressing mute. Sorry. I think from the ICANN side, recognizing the depth which this group is looking at 4.3 and to David's point, if there are areas where this group believes that the Bylaws could be clarified or where further attention might be needed, those are definitely things that we would hope that the group flags for further conversation, recognizing that that conversation wouldn't happen with an IOT, right? It's not necessarily about whether the IOT then gets to develop that work. But I think that's a really logical outcome of the attention and the diligence of the work. So, to the extent that there are areas where there could be potential inconsistencies or challenges in reading. Those are the outputs we would really welcome and recommend, I think. As an organization, we always kind of take a look and see if there are things that we can fix, we

can do better. Things aren't always at the right time to do it. But we could imagine a future accountability and transparency review, for example, that's doing work on the IRP that we would then have that kind of record of potential changes that we would bring that into, for example. So we keep that record and not just act on it individually either.

In terms of the actual language at (p), I understand that the potential and consistency that David is flagging, but I also agree (o) says these are the things that the panel can do, and I think the (p) here gives us the specifics of how it's done. So I'm not worried, really, about the way that it can get put into practice for now if the potential language isn't addressed, but I also appreciate having that reference for that future language to be addressed.

SUSAN PAYNE:

Okay. Lovely. Thank you. Thanks for that discussion. It's helpful to hear you say that, Sam. I think, certainly, it's something we've talked about before and somewhere we have a slight sort of parking lot of these kinds of issues, which will obviously come back to before we were to make that kind of communication. As David rightly pointed out, we have other priorities before we do that, and again, recognizing that this group would only be, at best, suggesting that the language might be something that warrants a further review or a further consideration. We would not be recommending specific changes. We would not be recommending specific language. We would not be the group that is tasked with that effort. But we would simply be saying, "In the course of

our review, we've identified some things where the language seems less than optimal to us," I think is probably how one would look at it.

All right. Thank you. I think if we then look again at that Article or Rule 10 language—I've heard from David, on the specific questions on this Article 10, David is certainly fairly comfortable with leaving it to the panelist to make any determination on limitations on things like page limits. And that otherwise, the two sets of rules, when read in combination, do address the items that were flagged as ones for us to consider whether additional language was needed. Anyone else have a different view? Or can we assume that we're all relatively comfortable with Article 10 as it is? All right, I am not seeing any hands. So I think with that in mind, we will take that position. I'll circulate it again on the e-mail just as a confirmation, but I think we can take this one as one that we don't feel we need to amend. Sam?

SAM EISNER:

Sorry, Susan, for coming in so late. Liz and I were just discussing something behind the scenes. We do want to just take a look. We're not concerned with the language of Rule 10 from the ICDR as it stands, but we do want to make sure that we're covered within the Supplementary Procedures that the references from 7.2 of the rules here that says that the IRP administrator appoints the emergency panelist that there's no way of that being seen as overriding the Bylaws requirement if the Standing Panel in existence comes from the Standing Panel. So we're going to just take one further look at that and see if we have any recommendation to include in the Supplementary Procedures just to

make sure that there's clear understanding of the primacy of the Bylaws obligation of where that panelist would come from.

SUSAN PAYNE: Okay. Thanks, Sam. I'll have that as an action item for you and Liz, if that's okay with you.

SAM EISNER: Sounds good.

SUSAN PAYNE: All right. Okay. Then I think for now then, we can park Article 10. I think we can move on to the next item on our agenda, and that is—oh, I can't find the agenda. The next potential outstanding task is the procedure where ICANN elects not to respond. That is the other document that you were pulling up previously, Andrea. I think we all think this is an extremely unlikely situation. But nevertheless, when we get the Bylaws language we'll see why it's on our list.

ANDREA GLANDON: One moment. This one?

SUSAN PAYNE: Yeah, absolutely. Yes. That's perfect. We can start right where that is. Reproduced on here is what it says in the Bylaws 4.3 and (iv) or four and then capital F. That is a mouthful. So 4.3(iv) says the Rules of Procedure—I think I missed (n). But "The Rules of Procedure are

intended to ensure fundamental fairness and due process and shall at a minimum address the following elements.” And then (F) of those elements is the procedures if ICANN elects not to respond to an IRP. This is obviously something specifically in the Bylaws. It was one of the items that the Rules of Procedure should cover. So the question identified, effectively, I think, is that when we’ve been working on the appointment of the panelists in our Rule 3 that we’ve just spent quite some time on, we’ve dealt at quite some length with the failure to appoint a panelist by either party. If either party it delays or were not to appoint a panelist, there’s a whole set of processes built in for how the three-person panel nevertheless gets constituted in order to hear the case. So the question for us, I think, is: are there other elements that would need to be addressed in order to meet that subparagraph F on the procedures if ICANN fails to respond?

We’ve got a bit of additional assistance again here in the ICDR rules in Article 29, which is actually referred to as default. And if you wouldn’t mind just scrolling up a little bit for me, Andrea, or perhaps down? Yes, exactly. That way. I think that’s probably it. Yes, that’s good. So, Article 29 of the ICDR rules says, firstly, paragraph one, if a party fails to submit an answer, which would be, I think, the equivalent of a counter statement. In accordance with Article 3, the arbitral panel may proceed with the arbitration. That asterisk just flags what Article 3 actually is regarding, and it’s about the answer and counterclaim. There’s no equivalent provision in our IRP Supplementary Procedures specifically dealing with the ICANN answer or counterclaim to an IRP. So, my understanding is that that Article 3 applies, obviously, as appropriate to an IRP proceeding.

Then subparagraph two says, “If a party duly notified under these rules fails to appear at a hearing without showing sufficient cause for such failure, the tribunal may proceed with the hearing.” And then paragraph number three, it says, “If a party duly invited or ordered to produce evidence or take any other step in the proceedings fails to do so within time established by the tribunal without showing sufficient cause for such failure, the tribunal may make the award on the evidence before it.”

So we have under the ICDR rules those three provisions dealing with sort of failure to participate. And then that added to which, as previously mentioned, we have in our rules relating to your panelist appointment, we’ve dealt with what happens if either party but that would include ICANN doesn’t select their panelists. So I think, again, the question for the group is for us to consider is whether we think these provisions in combination adequately address the point we referred to in the Bylaws about what rules apply if ICANN decides not to participate in the IRP proceeding. Noting, again, for the avoidance of doubt. It’s fairly inconceivable to me, really, that it would happen that ICANN would not to participate. But, again, I’ll pause there and see if there are any immediate comments on this. I know this is a new point. We didn’t talk about this on our previous call. So I just wanted to flag it. David?

DAVID MCAULEY:

Thanks, Susan. I’ll take a shot at it. It strikes me that, like you, I can’t envision a situation where ICANN wouldn’t answer, including a claim that’s out of scope. For instance, if their claim came in that concerned a delegation of a ccTLD, that’s clearly out of scope of IRP. ICANN should

feel satisfied that this case would be dismissed without an answer from it. But I can't imagine that they wouldn't answer and say, "Hey, this is out of scope." So I, too, am struggling with the idea that they won't answer. So maybe a procedure to add would be a confirmation of no reply. "We have no response on the record, ICANN. Is that correct?" or something like that. But you have to be careful when you do that. You don't elongate the timelines unfairly.

The other thing I'll mention is—I sound like a Bylaw nerd—but Bylaw 4.3(g) says at the end—I'll quote it. It's just one sentence. It says, "If no response is timely filed by ICANN, the IRP panel may accept the claim is unopposed and proceed to evaluate and decide the claim pursuant to the procedures set forth in these Bylaws." So the procedures are set there, the procedures in Bylaw 4.3. 4.3 says to us create other rules so those are within the scope of the things. So we have the Bylaw itself, we have rules. It seems to me we have enough. But one question that maybe needs to be answered is what if ICANN doesn't answer and the panel proceeds to evaluate the claim. And then in midstream, ICANN senses that things are not going well and says, "We'd like to come in now," is that possible? I don't know. But those are my thoughts. Thank you.

SUSAN PAYNE:

Thanks, David. Thoughts from anyone else? Sam?

SAM EISNER:

Thanks. This is admittedly a very challenging hypothetical for me to work through, because I don't actually see when this would come in. I'm

having trouble recalling David and Malcolm, you are the two that might have the most recollection of why we even put this in the Bylaws in the first place. But I think to the extent a party tries to enter a proceeding late, then panels already know how to deal with that. It becomes a discretion issue with the panel. So the impact of a default is the impact of a default. I mean, it's very interesting here, the way that the ICDR has listed out the default proceedings because they go down the chain. First, you have the opportunity to answer, you can proceed to the arbitration. So if they notice a hearing and you are noticed about the hearing, then the tribunal can proceed with the hearing even if you don't come. And then if you've been ordered to produce evidence or take any other steps in that proceeding and you don't do it, then the tribunal may make the award on the evidence before it. So, it seems that the ICDR rules contemplate continued notice throughout the proceeding to the parties, and there's always the opportunity for a party to come in or not. But if an answer hasn't been timely provided, then it really doesn't matter if it's ICANN or someone else who's not replying to something. The panel becomes empowered to act on the evidence in front of it or to make a determination as to whether or not it makes sense within the panel's discretion, more information to be provided at some point. But the default rules kind of give the general statement of, if you don't do it when you're supposed to do it, you give up your right to do it. It makes sense from our side, I think, to continue along that path. I don't know if the IOT wishes to see anything more specific. I wouldn't encourage IOT to spend a lot of time to build edge cases on this one. I think we have a lot of other things that we could do that we know are likely to happen as opposed to ICANN just totally avoiding the fact that an IRP has been filed.

SUSAN PAYNE: Thanks, Sam. Malcolm?

MALCOLM HUTTY: Thank you. Yes, I agree with Sam. I don't think there needs to be too much time spent on this. And you said, it seems very unlikely that this would ever happen. But since Sam referenced me as to why this stood in the first place, I think—and I wasn't personally one of the people that was agitating for this particular clauses inclusion in the WS 1 report. But yeah, I think those that argued for it, did so on the basis that ICANN should not be allowed to turn around and say, "Well, we simply cease to recognize the IRP for that reason," and thereby frustrate the process. It should be made clear to the IRP panel that in the event that that were ever to happen, it proceeds anyway. But I don't think we're in that world. I hope we're not in that world. I don't believe we're in that world. So I think that we just sort of move on with this. As Sam says, there were no difficult edge cases to look at here that we need to tie ourselves up in. It was just put in there just to ensure that what was being said in the WS 1 was never frustrated. Thank you.

SUSAN PAYNE: Thanks, Malcolm. That's really helpful background. Sam?

SAM EISNER: Thanks, Malcolm, so much. Just a follow-up. I think that's right. As I'm listening to you, that conversations come back. ICANN, of course, again today commits that we would never just not answer as a purpose to

avoid the impact of an IRP, and that if an IRP is filed against ICANN, it can go to whatever logical conclusion it needs to go to in accordance with the Bylaws, Supplementary Procedures in the ICDR rules, and then all the other obligations fall in ICANN about the consideration of that outcome, even if ICANN affirmatively chose not to participate. So we stand with the community on that outcome.

SUSAN PAYNE:

Super. Thank you. Okay. Well, I think we've had a decent discussion on this. I know, David, you did make some suggestions. I think perhaps we'll take this one to the mailing list as well. David, when you've reflected on the discussion we've had, if there's a specific suggestion you feel that we really ought to be making and you want to propose that, then please do. Yes. I think we're all conscious. We have other tasks on our plate, and that this is very much an edge case. So, we'll take it to the list, but I think absent strong feelings that more is needed here, I think maybe we'll quickly be able to view this one as kind of asked and answered as well.

All right, I'm conscious of the time, but I think we probably do have time to at least sort of tee up the next item on our list, at least to start thinking about it again. It's one actually David's just mentioned and it's on that same document. Sorry, Andrea. I'm making you jump around.

ANDREA GLANDON:

It's okay.

SUSAN PAYNE: This is about non-binding IRPs and precedent its appointment. It was put on our list for consideration. Again, just because it's on our list, it doesn't mean we need to do something. Oh, sorry. No. It's the one we just had up.

ANDREA GLANDON: Oh, sorry. I thought you said it was a different—

SUSAN PAYNE: Sorry.

ANDREA GLANDON: No, no. It's okay.

SUSAN PAYNE: Exactly. Can we keep scrolling down where it says non-binding IRPs? I'm not sure if we'll quite get everything on the screen. It's non-binding IRP is referred to in 4.3(x). But I felt it was helpful to also give us 4.3(a), which is the Bylaws language that basically talks about the purposes of the IRP. And subparagraph five of that or subparagraph (v) of that is to reduce disputes by creating precedent to guide and inform the Board officers as defined in Section 15.1, staff members, Supporting Organizations, Advisory Committees, and the global Internet community in connection with policy development and implementation. So I think that this is where this concept of precedent in particular comes in.

Then 4.3(x) refers to the IRP panel is intended as a final binding arbitration process. And then subparagraph four of that says, “By submitting a claim to the IRP panel, a claimant thereby agrees that the IRP decision is intended to be a final binding arbitration decision with respect to such claimant. Any claimant that does not consent to the IRP being a final binding arbitration may initiate a non-binding IRP if ICANN agrees, provided that such a non-binding IRP decision is not intended to be and shall not be enforceable.”

So the question for our consideration was, at least an initial question from my mind, is it within our remit to consider whether non-binding IRPs should constitute precedents? I have an initial question that I think may even be one for Org and/or our participant from Jones Day on whether this has to sit within the list of items where we might make some kind of a suggestion to the Board rather than something where we actually, as part of our work on the rules, have it within our scope. I’m not sure that it is within our scope. I’m not sure that it’s within the scope of the IRP rules to determine whether or not such a non-binding IRP would be a precedent as considered under the Bylaws as put in that section from 4.3(a)(v). So this may be one that simply is flagging us, as something that warrants some further consideration. Sam?

SAM EISNER:

Thanks, Susan. I guess in terms of the question presented, in my mind, this could be a semantic issue, the binding nature of an IRP also goes to the precedential value. So I guess I never quite anticipated that we could ask this question this way. But on the other side of it, going to your other question about, “Is this the place where the IOT could

identify potential areas for consideration for the future?” I think that this would be one of those times to identify that. I know from the Org perspective, I have concerns about the use of ICANN resources that are still called for within an IRP. This doesn’t excuse a person who’s elected to use the IRP as a non-binding mechanism from the other operations of the IRP. That goes along with that is the use of ICANN resources to pay for panel administrative expenses, etc. So it still represents a cost to the broader ICANN community to proceed with it. But it results in a non-binding nature. I think this would be the exact kind of thing that we could raise as a question as to whether or not there’s remaining value for this to be within the Bylaws, looking at how we as a community, and in this instance, I’m including ICANN Org within the broader community, how we think about the use of ICANN resources and the value of using resources in some of these edge case ways like this is presenting.

SUSAN PAYNE:

Okay. Thanks, Sam. I must say, just going back to your initial comment, that certainly would be how I would have read it in terms of if it were non-binding. I would assume that it also wouldn’t constitute precedent. I guess I could also envisage a situation where an IRP panel may feel that they did want to refer to a case, but I think that they might have a discretion to do so. I’m not sure. This feels also very much like an edge case to most of us, since we can’t really imagine why you’d want to go to the cost and the expense and other resource expenditure on an IRP that was then not going to be binding. David?

DAVID MCAULEY:

Thanks, Susan. I agree with Sam that this would be an appropriate one to put in the bucket of things that we want to say, “Hey, this doesn’t make sense. Can the community clarify whatever?” however we term that. But I also thought I’d note I don’t come out where you and Sam come out on how it would be treated. I’m not so sure that a good argument couldn’t be made, that a non-binding RFP should not be considered precedent. I think that’s absurd, because to me, a non-binding IRP is just like an advisory opinion could be litigated half-heartedly. It’s just an absurd idea. I don’t know how it got into the Bylaws. I hope that ICANN would never agree to one. But maybe I’m just reading Bylaws in a contrary way today, but I just didn’t get it. I think the argument can be made that even non-binding decisions are precedent. Thank you.

SUSAN PAYNE:

Okay. Thanks, David. But in which case, I’m not convinced that it’s within our scope to make a determination otherwise. But I do think that, as we’ve been talking about, it may be, as we’ve discussed, worth us putting it on the list of items to flag. Malcolm?

MALCOLM HUTTY:

Thank you. For what it’s worth, I completely agree with David on this. I think the whole idea is nonsense. The IRP only gives declaratory judgments. It’s like it either believes that something is within the scope of the Bylaws, something that’s done was not within the scope of the Bylaws. That’s its opinion. And that’s all there is. And to say, “Oh well, yes, but we’ll ignore that,” or “Oh well, yes. But we won’t take that into

account next time we consider a similar issue,” seems to me absurd. That’s my opinion, for what it’s worth. But I don’t think my opinion is worth much here, because I don’t think that it’s really up to us to be like saying, “Actually, we don’t like these bits of the Bylaws, and we think they should be changed.” I think we should stick more narrowly to actually implementing what we’ve got in front of us, rather than rewriting it as we think it should be better, even though I agree completely with David, that I would strike through this whole bit. But it’s not for us to do that. Thank you.

SUSAN PAYNE:

Okay. Thanks, Malcolm. All right. I think, again, this is one we can sort of continue any discussion that we think we need to have on the list. But I’m conscious of the time. I did want to quickly move on to just the next meeting. And this is, I confess, largely because I have some commitments that will make the next regular meeting slots a bit challenging.

So first of all... Sorry. I was going to say in the ordinary course of things, our next call would be on the 14th, which would be the Tuesday, I have a client commitment for much of that week, and in particular on the Tuesday. So I think I will struggle to do a call on the 14th. Although it’s not unprecedented for us to miss a week and reconvene the following one, the following one is the INTA Annual Meeting, and I’m fairly confident that again I wouldn’t be able to do the call. So I don’t want us to have such a long gap.

So, a couple of proposals, really. One is that we sort of pick things up in a week's time on the 7th of May. So we just carry on next Tuesday in our regular time slot. Or that we convene on the Monday, so the 13th. So, instead of in two weeks time, instead of it being on the Tuesday, which is the 14th, we met on the Monday instead. Now, either of those works for me. I wanted to get an immediate sense. As they say, Monday, the 13th, would work for me. But if I hear lots of concern that that's not a day that you will have available for these calls and that you're used to a Tuesday slot, I want to be sensitive to that. So we're really just looking for concerns about if we were to schedule this for Monday, the 13th, does that cause concerns to those who are at least on this call at the minute? Okay. I'm not seeing any concerns. So I think that we will look to try to do that.

Kristina is saying she has a conflict, but the 7th is also a construction zone in her house, which sounds like fun. So it sounds as though both of those dates are not optimal for Kristina. I appreciate that, Kristina. All right. I think then as a sort of an unusual circumstance, but we'll look at the 13th and perhaps we'll think about timing just a little, as noting that Kristina might be able to do to join us late or perhaps we could start a little later. Okay. Keep an eye on your mailbox and we'll send around a calendar invite. Thanks very much, everyone.

Okay. With that, I think, unless anyone has anything, any other business that they wanted to quickly flag, I think we can wrap up. All right, brilliant. Thanks very much, everyone. I really appreciate your engagement today. Have a good rest of your day.

MALCOLM HUTTY: Thank you. Goodbye.

[END OF TRANSCRIPTION]