
BRENDA BREWER: Good day, everyone. Welcome to the IRP-IOT plenary on 13 May 2024 at 18:00 UTC.

Today's call is recorded. Please state your name before speaking and have your phones and microphones on mute when not speaking. Attendance is taken from Zoom participation. And with that, I'll turn the floor over to Susan Payne. Thank you.

SUSAN PAYNE: Thanks very much, Brenda, and, everyone, thanks for joining. Thanks also for accommodating the change of day for this week, which I'm afraid I had a bunch of clashes and this was the best we could manage. So I really appreciate you being flexible on that. We'll do our usual. We'll quickly review the agenda and then we'll circle back and do SOI updates and take it from there.

In terms of our agenda, we had a number of action items. I think we'll go through each of them in turn. So I won't sort of run through them all now as I'm going through the agenda. But that's our first agenda item. We'll look at where we've got to on these various action items. Agenda item three is just a note for the upcoming ICANN80 meeting. And then agenda item four, we will start a discussion on appeals. We'll also try to start our discussion on the cooperative engagement process. As we talked about on a call—I don't recall now if it was the last one or the one before, but one of our recent calls, we discussed which of those two items we should take first. And we concluded that both were important and warranted early consideration. So we're going to see if

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we can manage to run the discussion, both of them in parallel, and we'll see how it goes. If we find that it's proving to be ineffective or unworkable, then we'll reconsider. Agenda item six, if anyone has any items of the business that they want to flag, please do so. And then a note there that our next meeting will be in two weeks' time back on our regular Tuesday slot.

Okay. Before we kick off the discussion items, just pausing to see if anyone has any Statement of Interest updates that they would like to flag for the group. All right, I'm not seeing any. So I will keep going.

Okay. Agenda item two then was with the various action items. I just want to run through them, really, because I think it was the result of the previous discussions, and then the opportunity to comment over the mailing list. A number of these are now essentially closed off, so just sort of noting that really for formality. First up, we had the redlines against the current interim Supplementary Procedures. This is the composite version, the latest version of the rules with rationales included. Bernard circulated that for us some time ago. We've had that on our agenda for one call. And then, as noted there, there was an action item for anyone to flag any comments, questions, or concerns, or edits by the 6th of May. So not having received anything further on that, I think that now is viewed as closed off. That's really the last piece that was needed in order for the documentation to go into the queue for our public comment, which hopefully will open in the coming weeks. So thanks, everyone, for that. As I say, just noting that that one is closed off.

Next up, we have the Standing Panel training materials. That's also been on our radar now for quite a while. I circulated a revised draft of a formal response that we might send back to Org via Sam and Liz as a result of our discussion our last call. And that of my e-mail of the 3rd of May, not having seen any comments on that over e-mail, I'm hoping that everyone is happy with where that draft has come out.

I'll pause here and just see if anyone has anything, any comments or concerns they wanted to raise. But otherwise, that e-mail was just noting a couple of items where, following our discussions, we felt it was helpful to flag a couple of additional potential training materials and to indicate—we'd find it helpful for Org to prioritize producing them if they don't exist already. So I will just pause. Okay. I'm not seeing any hands then. Again, I think, as I indicated with the last draft, my plan is to send that out then now after this call. That's another sort of items on our slate that we can close off.

Then we had a number of other items that again were on our list of potential matters for consideration relating to the IRP Supplementary Procedures, so related to the IRP rules, that were other items that were there on our list but we haven't yet closed off as part of this public comment exercise. So the first of these is item C which is around interim measures. It's Article 10 of the rules at present. On our last call, I don't believe that we felt there was anything further that needed to be covered, that Article 10 was adequate when taken in conjunction with the ICDR rules. But we did have an action for Bernard. He was going to flag a couple of items to put on our list of items where we want to just put a report back into the Board regarding some areas where we feel that there may be some inconsistency or potential inconsistency

between a couple of the Bylaws provisions. While it's certainly not our place to be recommending the revision of the Bylaws, it's something that we wanted to flag.

There was an action for Sam and Liz, who were going to review ICDR Article 7, which also relates to interim measures and just sort of ensure that they don't feel that there's a conflict there with the Bylaws. Not to put either of you on the spot. In fact, I'm not even sure that Sam is with us. Liz, not to put you on the spot per se, but is that something you have any update on yet? Or shall we keep this on our list of action items for now?

LIZ LE:

Thanks, Susan. It's Liz Le with ICANN Org for the record. That's still under review by us. We should be able to provide an update by the next meeting.

SUSAN PAYNE:

Cool. Thank you so much. All right, then we will keep that on the list. Next item D is another of the outstanding items on the IRP rules was the procedure where ICANN elects not to respond. Again, on our previous call and the discussion that we've had, there was a general feeling that the current provisions are adequate, but an opportunity for anyone again to share by e-mail if they feel that's not the case or indeed there's an opportunity here now if anyone has real concerns about the about this issue. Just as a reminder, this is one where I think generally there was a feeling that this is very much a sort of edge case situation and consequently probably it was not the best use of our time to spend.

What we have is probably adequate given that that's the case. But again, I will just pause and see if there are any hands or anyone has any concerns. Okay. I'm not seeing any.

Then we can finally move on to 2E. The final one of the list on the outstanding tasks on the IRP rules was then about non-binding IRPs and precedent. This was one where, as noted there, it was an action for Bernard, again, to add this to the list of Bylaws items that the IOT may suggest to the Board is something where we've noted a potential sort of lack of clarity or something that there may be some uncertainty over. Oh, I lost the Zoom window there for a minute. I think that there was generally a view on our last call that this wasn't a task for us to be preparing anything further in the IRP rules relating to this. But as I said, something that Bernard has added to the list of items to flag to the Board. Really, just again pausing briefly to see if anyone has any further comment or concern on that before we put that one to bed as well. I am not seeing anyone. So that is super.

All right, then I think we can move on to agenda item three. This is really just flagging, again, I think it's been mentioned before, but I wanted to make sure that everyone is aware that hopefully our public comment will go out before ICANN meeting in Kigali, although that ICANN80 meeting is fast approaching. But in any event, even if it were not the case that the materials had gone out to public comment yet, it would be eminent. So our proposal is to have a public session at ICANN80 where we can present the work that we've been doing and sort of tee up our desire for input from the community on the work that we've done.

Brenda may correct me if there's more information, but when last we discussed, it was actually quite hard to find a 90-minute slot that was one that didn't conflict with something like a plenary type session or some of the other items, for example, where I would be needed to be on GNSO Council or whatever. Yes, thank you, Brenda. Brenda has just put it in the chat. The slot that we've asked for is 10:45 to 12:15 on Monday, the 10th of June. That's obviously local time. Kigali is, I think, two hours ahead of UTC. So, for those of you who aren't there in person and who are in the U.S., it's quite an early time slot. But as I say, there were very few 90-minute slots at all in the schedule at all. And really, that was kind of one of the few that was at all workable. So really, just flagging that. We'll have to have a bit of a think about that session in the coming couple of two, three weeks, because, as I said, the meeting is actually fast approaching.

So with that, unless there's any questions or comments, I think we can move on to agenda item four, which is to commence our discussion on appeals. At some point for one of our previous meetings, David had very kindly put together a sort of slide deck of some considerations relating to appeals. It's not something that at the time that we actually got on to you because we're continuing with our work on the rules. And so, David has very kindly volunteered to kick off the discussion with that slide deck as a sort of guide for the start of the conversation on what we should consider on appeals in terms of rules that govern appeals for the IRP. So, if that's all right with you, David, I'll pass it over to you.

DAVID MCAULEY: Sure. Thank you, Susan. Hello, everybody. Brenda, if you could pull up that slide deck. And while Brenda is doing that, Susan, I just was curious if I could go back to item three for just a moment and see what people think on the public session at ICANN80 with respect to the timing of the release of the rules for public comment. I think it's sort of hard to choose. I was wondering, is it better that we have the session before the Public Comment Proceeding opens? The downside that is then the Public Comment Proceeding would be mostly over the summer or to have the Public Comment Proceeding open prior to the public session where people could ask us questions. But a good chunk of the 42 days is eaten up by travel to an ICANN meeting and the lag that happens before and afterwards. I don't know what's better myself. We're almost on top of the meeting, as you said. So I was just curious if others had any views on that. But anyway, while I say that, let me go on to the appeals. Brenda, my slide deck is different than this. This is the CEP one. I guess Susan will be speaking to that.

BRENDA BREWER: I have that too. I am sorry.

DAVID MCAULEY: Not a problem. I will just preface the comments on the slide deck by saying why I did this back at ICANN78. I felt very happy that the ICANN Org was arranging for us the IOT to have a couple of sessions at ICANN78 actual in-person sessions. I had been asking for that for a little bit of time. And I thought, "Boy, that's really good." I just thought I would look at appeals for two reasons. One is I'm sort of interested in

the topic. And two, I thought it would be nice to have a slide deck just with considerations. I'm not trying to argue how this should be handled, although I do have some personal feelings on a couple of these, not many of them. But I just thought it would be nice to have a slide deck in case the time that ICANN have arranged for us to meet. We ran out of discussion points. I thought we should have something ready to bring up so that we maximize the time that we're given. I thought it was generous to give us time. I still think that way. And I think it's better to have stuff to talk about and not need it than the reverse. So that's why I did this. And as I said, I don't have an axe to grind on any of these issues, but I thought I'd try and flag what are the appeals issues.

Thank you, Brenda. This is the slide deck. So this first slide is basically teeing up the issue. Should there be limitations on appeals? I cited two Bylaw provisions in 4.3 that talk about appeals. There's not much else. But these two provisions, basically, in the Bylaw provision that deals with the creation of rules it says that our team should come up with the standards and rules governing appeals from panel decisions, including which handled decisions may be appealed. So we have some broad discretion here. I would read since the word standards and rules are both used, I will take it the legal construction that they must mean different things. So we have some pretty broad brushes to use here. And then later in the Bylaws, down at subsection W, it says, "Subject to any limitations established through the rules of procedure a decision can be appealed." So our job is we can also create limitations on appeals. Next slide, please, Brenda.

By the way, this is just my effort. As you all read through Bylaw 4.3 from time to time, you may see other issues that I've missed that are relevant

for appeals. The next slide talks about this thing that we've been talking about last couple meetings, non-binding IRPs. It says in subsection X that a claimant can actually arrange for a non-binding IRP if ICANN agrees to that. Why on earth this would happen is beyond my ability to understand. But typically, if it's not binding, it sounds to me as if it's something less. And in the U.S., we have sort of standing requirements and we tend to frown upon courts issuing advisory opinions. Usually we want both parties to litigation to have skin in the game so that the issue was presented to the decision-maker becomes crisp and fully argued. So this sounds to me like it may be less than that. Can we go to the next slide, please, Brenda?

So my questions were should non-binding IRPs be appealable or should we create a limit here? We have the right to create limitations, should this be one of them? Should we say that non-binding IRPs are not appealable? Well, if we say that possibly they should not be appealable because they may not have been intensively pursued and the issues not fully formed. On the other hand, if a non-binding IRP creates precedent, then for heaven's sakes, maybe it should be appealable, where there can be a more fulsome discussion of the thing on appeal. I think the Bylaw is silent on whether a non-binding IRP creates precedent except the Bylaw says that IRP Panel decisions create precedent. So that's unfortunate. But in any event, next slide, please.

Another issue I flagged is in the CEP, which is Bylaw 4.3(e), in the CEP there's a mediation kind of mechanism that's at least referred to. The IRP mediator would be appointed from the Standing Panel. And this is if the parties at CEP go that far to the mediation kind of thing. But that IRP mediator shall not thereafter be eligible to serve as a panelist presiding

over an IRP on the matter. What about appeals? A panel has three members and appeal is to the en banc Standing Panel which presumably is going to be around 12. Maybe some will be conflict off, you never know, but it'll be a larger group than three. So, assuming that the facts as established at a panel are final and that the mediator did not sit in on that event where the facts were determined, should a mediator sit in on an appeal? I think this is something that we should consider when we get to the appeals. Next slide, please.

Then I just asked, "Should these kinds of rulings be appealable?" There's an unstated question that comes with this, and that is if we say yes, then when should they be appealable in the course of the litigation or when the whole thing is over? Thanks, Flip. So, one would be summary dismissal. The case can be dismissed if it's frivolous or something like that. Let's say somebody brings a claim at IRP that a ccTLD was improperly delegated. Well, that's beyond the scope of IRP. That case would probably be dismissed automatically. Consolidation intervention questions and cost expense shifting. Are these things appealable? Next slide, please.

And again, this I said, I'm just trying to point out some things that we need to consider when we take up the subject of appeals. Interim relief, Susan was just talking about this on our agenda. There's possibly confusing Bylaw provisions that we might get some clarification on it, we might make some assumptions on it, but we might want to work this out. Does the emergency panelist make a decision that is binding on ICANN? How does this work? I think we just need to think this through, this interim relief. And then the related question is, is our interim relief issues appealable presumably where someone's seeking—look at the

three factors in Bylaw 4.3(p) for things like injunctions. The factors are a harm for which there's no adequate remedy, likelihood of success, a balance of hardship tests, all that kind of thing. Well, those issues probably should be appealable in the interim while the litigation is pending. But we'll see what this group thinks. Next slide.

Another thing I thought we should look at when we do appeals is we've done consolidation intervention and joinder for the panel. What about on appeal? Are there amici briefs? Can the panel put a limit on them? I know in appellate courts, if they get 100 amici briefs, they may say, "We're going to consider 10 or 20 of these." We should probably clarify what is the amicus status at appeal, things like that. This may be quite important in those cases we talked about earlier, the non-binding case. If it's appealable, I think you would want to have somebody come in on an appeal that is going to sharpen the argument or have the potential to sharpen the argument that may have been less intensively pursued down below. Next slide, please.

Governing appeals submission. Should appeals be handled just by written documents? Can the panel order a hearing? Can the parties ask for a hearing? Maybe sometimes I think appellate courts want a hearing because they feel it may help them understand the party's arguments. So maybe we would decide that the panel can ask for a hearing, but the parties cannot request one of right. I don't know. We'll have to talk about it, page limits, all that kind of stuff. But I don't know if I mentioned this elsewhere. But it also brings up the notion of does the appeal have to accept the body of facts as developed down below, or is it de novo somehow? Can a case be reopened on appeal? I think we should probably be explicit in how we handle this. Next slide, please.

Are cost shifting decisions appealable? And is there cost shifting at the appeals level? It's something I think we should be explicit about. As I said before, these are things I think we should discuss and make explicit rather than have them bounced around without a rule. Next slide.

BRENDA BREWER: That's all.

DAVID MCAULEY: Uh-oh. Thank you, Brenda. As I was pondering this this morning, I was also thinking maybe I missed something in the case where—this is something we saw elsewhere on the agenda—if ICANN does not respond, and we know this is a very, very edge case, the IRP Panel can proceed forward. In fact, the rules say it. They can go ahead and consider the case in accordance with the procedures in the Bylaw. When that happens, is there an appeal? Can ICANN appeal a panel decision where it didn't participate? Or can the claimant appeal? I mean, that's another thing.

As Brenda just told me, that's the last slide. I had lost sight of that. So those are issues I think are worth discussing. And either coming up with a rule or saying, "We've looked at this and we don't think a rule was necessary." But as I said before, I wanted to have something ready at ICANN78 just so we had something to chew on if we had some empty time, and this is what I've come up with. So when we come to appeals, these are my thoughts on things we can discuss and there may be others that I've missed. And that's about it, Susan. Thank you.

SUSAN PAYNE:

Thanks, David. You've certainly had some agreement in the chat from Flip about a number of these observations that you've made. I think if people are willing, we're at the time where we could start to have some of these discussions. We did determine that we would try and kind of advance the work on appeals. I think probably most of the group agrees that it would benefit from there being some rules regarding appeals. I think the current IRP Supplementary Procedures, it does have a very short paragraph that deals with appeals but it is extremely brief and, as you're noting, it doesn't cover most of these issues. So I think this is probably as good a time as any for us to begin some of this discussion. I guess with that in mind, I think depending on how we get on, maybe we could go to sort of the top of the hour, and then we'll shift over to CEP and have a bit of a discussion about that. Malcolm?

MALCOLM HUTTY:

Thank you. Can I give my thanks to David for a very helpful introduction to the appeal subject? I think that some of those questions we might wish to get into or we might just say breeze on largely past—you know, appeal was everything, right? But the one thing that I think that it's critical that we cover, I didn't see whether—maybe I missed it. Maybe David covered this and I didn't notice. If so, apologies. But one thing that I think is critical is the standard of appeal. Is it simply—and I know you mentioned it and then sort of raised it when he went through the question of de novo. But is the standard to be that the appeals panel thinks that the initial panel got it wrong? Or is there some higher standard such as it was unreasonable or something like that? I wouldn't

think that we would want to do that standard. But I think it's very important to be explicit about that one. Thank you.

SUSAN PAYNE:

Thanks, Malcolm. David?

DAVID MCAULEY:

Thank you. And thanks, Malcolm. That's a good question. I did mention standard but, as you mentioned, only with respect to de novo versus taking the body of facts as it was developed below and working with those facts to make an application of the "law," so to speak. So you're right. We could come up with a standard that says the Standing Panel on appeal should exercise some sort of standard that's beyond just—I forget. I'm having a brain freeze—preponderance of the evidence or something like that. But I just don't know. We'd have to discuss it.

But the other thing that I wanted to get across and you did get from my comments, Malcolm, is these are things I think we ought to be explicit on. So I very much would encourage us to do that. I don't have too much to add except to say the standard that I spoke about was let's be explicit. I would recommend that we say an appellate Standing Panel in appeals form should accept the facts as developed below.

But the other thing I raised my hand for, Susan, is if we are going to talk about this substantively now, I think on this odd duck of a non-binding IRP, we should do two things because I think it does create precedent. I mean, the way I read the Bylaws, I think any panel decision adds to the body of precedence. So with a non-binding IRP, I would take the

position where to do two things. One is make them appealable clearly. And two is allow broad intervention rights at the appellate level. Not so much to have a whole big gaggle of folks glom on. I think the panel should have discretion to limit the number of things they get, but they should be able to get things like amici, some forms of intervention, just so that they can get a sharpened argument where people do have an interest and have a skin in the game, fully fleshed out so that they're going to litigate the case. I'm just worried that this non-binding IRP is someone's throwing something up to see what the panel may say. Anyway, I would see those as appealable. Let's get somebody in there that's going to take a good look at it. So if we're addressing it substantively, that would be my comment right now. Thank you.

SUSAN PAYNE:

Thanks, David. I'll note Flip's comment in the chat in a minute, but Liz has her hand up so I'll go to Liz first.

LIZ LE:

Thanks, Susan. Thanks, David. Just to follow up on this conversation that we're having on non-binding IRPs, I just put in the chat the quote from the Bylaws section 4.3(x)(A)(iv) which speaks to non-binding IRP, and in that, calling your attention to the last sentence there where it states that "With respect to a non-binding IRP provided that such non-binding IRP decisions is not intended to be and shall not be enforceable." I think when we go to the section that speaks is to appeals, that session is referring to appeals of the IRP which is Section X that the IRP is intended

to be as a final binding arbitration process and that those decisions are final unless they are subject to their appeal.

I guess what we're looking at is Org doesn't necessarily share the interpretation that non-binding IRPs—not sure when they would ever happen, but that they would create some kind of precedent. And in the same vein, the language under 4.3(X) is clear that the appeals process is intended to apply to binding IRP decisions that have binding final effect and those are the ones that are subject to appeal.

SUSAN PAYNE:

Thanks, Liz. I think from my perspective, personally, I'm quite persuaded by what Liz has just said. I certainly don't want to shut the conversation down around this. I definitely don't want to shut the conversation down. But I do feel like if we're looking at appeals, the question of non-binding IRP seems like sort of one of the least high priority elements of it. Just in the sense of I think we're all of the view that no one can understand why this is even in the Bylaws. No one can understand why anyone would ever want a non-binding IRP or cast to agree to it anyway. I think we're all of the view, I think we've all discussed it before that we're mystified as to why this is even in there or when it would ever come into play. So, from that perspective, I think there are a number of really important elements relating to appeals that definitely need thinking about and not to shut us off from thinking about this as well. But I think it is somewhat lower priority than some of the other elements. David?

DAVID MCAULEY:

Thanks, Susan. I did appreciate that these are not binding decisions, it's non-binding IRPs. But I think what you stated, Susan, is absolutely correct. And that is a middle ground between what I was saying and what Liz was saying, and that is this shouldn't be a priority for us. I guess I should have caught on to that but I didn't. But I agree with you, because it's probably never going to happen. But I would just point out that to me, the fact that the decision is not binding does not mean it's not precedential. But I think we can drop it for now because it's unlikely to ever happen and it could be the last thing we take up if we take it up. Thanks.

SUSAN PAYNE:

Thanks, David. Okay. Flip had put in the chat that certainly a very sensible suggestion, which is from an organizational point of view, why not have a group of people who are interested in this, take this out of the full group and prepare some position or positions, and then bring it back to the group to discuss? I am very happy to do that. Indeed, I'd be delighted if we think that there's sufficient interest to form a small group of people who will work on this. The challenge we've had to date with when we've set up small groups to take items sort of out of the full working group is we've sort of struggled with volunteers and with people having the capacity. So that was my reservation behind suggesting this to start with, but I'm noting that Flip is very happy to participate in such an effort, as is David. So, we certainly could put out a call for additional volunteers to join you two. Indeed, we may be able to do this, to organize some of this work. We perhaps would take a break of a week or so from the full meeting in order to allow a subgroup to cover, to have some time to discuss. Yeah, Flip is also mentioning that it

might even be possible to meet if people will be at the INTA meeting in Atlanta. I suspect that not everyone on this group would be, whether all of our volunteers on appeals would be, that may be a different matter. If there's sort of comfort with doing that, I'm happy for us to try the small, targeted group approach and see how we get on. If that group feels that they're not getting sufficient participation or it's not working, they certainly can bring it back to the full group and suggest that we take this up in the full group. Okay. I'm certainly very happy to do this.

If you would bear with me, there was one point that I thought might have a bit of a discussion on, which is the question of the en banc appeal. But I see David first, so David?

DAVID MCAULEY:

Thanks, Susan. Just to encourage people to volunteer, I suspect that this discussion will not be like our rules discussion over these many years won't be as detailed. We'll be talking about principles, and then knowing that whatever we decide there'll be somebody to draft it up like the legal team that we're using to draft up the rules, I suppose. So it might not be that detailed. But I do like your idea. We should go out to the list. Because I know Mike Rodenbaugh may be interested. I have a feeling Kristina might be interested in stuff like this. So I think we should give others a chance to raise their hand, too. Thanks.

SUSAN PAYNE:

Super. Yeah, definitely. We don't have everyone on the call. And as you say, some of our regular attendees aren't with us and may well have quite an interest in this.

If you wouldn't mind bearing with me, it'd be quite good I think with the group that we have here to just talk about the question of the en banc panel. It came up in the context of David's slides in terms of if there's a mediator in the cooperative engagement process, should they then sit on the en banc panel to hear an appeal? But I think this is probably on maybe the first of David's slides, Brenda. If you wouldn't mind going back.

BRENDA BREWER: Not yet?

DAVID MCAULEY: No, you just passed it.

SUSAN PAYNE: Actually, I was looking for the Bylaws language, which I think was quite early on. Yes, if we pause here, David pulled out Bylaws 4.3(w) which says, "Subject to any limitations established through the rules of procedure, an IRP Panel decision may be appealed to the full Standing Panel sitting en banc within 60 days of issuance of such decision."

It may be that that text that's highlighted in blue is the important part. But my understanding of what is meant by the term en banc is that it's intended that the whole of the Standing Panel hear the appeal, irrespective of whether they were already involved in being the panelist for the initial IRP or irrespective of whether they've had any other role in the process, irrespective of whether they've been an emergency panelist, irrespective of whether they've been a mediator in a

cooperative engagement process. But I think it would be helpful to know, particularly from practitioners like Flip, whether that reading is actually correct on my side. And also just out of interest, how often, if at all, is there actually a cooperative engagement that goes to a mediation? Is it common or actually not that common at all? I see Flip. Flip?

FLIP PETILLION: Hey, Susan. Hi, everybody. I don't know if you see me, but what is much more important is do you hear me?

SUSAN PAYNE: We do both.

FLIP PETILLION: Okay, because I can't check it. A CEP in, let's say, commercial international arbitration or international arbitration would be like a kind of a negotiation. It may be followed by a mediation, and that mediation may be followed by an arbitration. It's not unusual but it's exceptional. In an arbitration, there may be a moment where parties concert and wants to initiate a mediation, which then is, if it's not successful, followed by an arbitration. The key rule to comply with as a mediator/arbitrator is, in my opinion, to avoid that you are involved in one phase which jeopardizes your role in another phase. For example, if you're an arbitrator and you accept to suddenly become a mediator in the same case, you should only accept to do that if parties beforehand agree that that will not jeopardize or question your role in the

arbitration should that mediation be unsuccessful and the arbitration should need to proceed. That's basically it. It's not more complex than that. Everybody who would be eager to share views on a particular point in whatever phase of the process should be aware of the implications. So sometimes it's better for a mediator not to be further involved just to avoid that you're mixing up roles and you jeopardize not even your role, but also the whole dispute resolution process. That part is agreed upon at the outset.

SUSAN PAYNE:

Thanks for that, Flip. As I say, perhaps that is part of what that blue text that David highlighted. It allows us to address that this would be a limitation we might apply. David?

DAVID MCAULEY:

Thanks, Susan. I too think that Flip's comments just now were very sensible. It made a lot of sense. But there is other language in the Bylaws too that I think is consistent with what Flip was saying.

Brenda, if you could go into the slide deck, three more slides. That one. That language there that's in italics basically says the mediator, if there's a mediator that's used, will be from the panel. But that mediator shall not thereafter be eligible to serve as a panelist presiding over an IRP on the matter. If this is where we come down, I think we should make it explicit, that serving as a panelist presiding over an IRP includes appeals. I think that would be how to handle that one. Thank you.

SUSAN PAYNE: Thanks, David. Okay. All right. We'll then not to labor this unless anyone else has any other—Flip?

FLIP PETILLION: Yes, Susan. I find this very interesting. This is really going to the core of what we are interested in, the core of my practice. What I really would like is that we have that kind of discussion in a group of people who are interested in the topic and who can prepare a sensible position. They appoint for each topic somebody who makes a summary, a presentation, and we can, from a management point of view, take it on from there in this IRP-IOT group, rather than trying to discover this in this group. Do you see what I mean?

SUSAN PAYNE: Yes, absolutely. I'm very happy with that approach. I've noted that you and David have volunteered. After this call, there'll be a call to the rest of the mailing list for anyone else who would like to participate in that exercise. I think I agree with you. I think that would be a very productive way to take this work forward if there's a sufficient interested group who are willing to work on this. Okay. All right then. Then I think that we can park our discussion on appeals for the moment then and move on to the next agenda item, which is the cooperative engagement process.

Brenda, there was another slide deck, quite a bit shorter than the one on appeals, but hopefully we'll again just serve to sort of flag some issues as they occurred to me. Yes, thank you very much. Okay. All right. And if we go to the next one, the text is a little bit dense, but this Bylaws 4.3(e) is where the Bylaws talk about the cooperative engagement

process. It says specifically in (i) that except for claims brought by the Empowered Community, as sort of highlighted there, that prior to filing your claim or commencing your IRP, the parties are strongly encouraged to participate in a non-binding cooperative engagement process or CEP for the purposes of attempting to resolve and/or narrow the dispute. The CEP shall be conducted pursuant to the CEP rules, to be developed with community involvement adopted by the Board and amended from time to time.

As we've talked about previously, whilst it doesn't specifically say that this is a task for the IOT, I think our view was that probably this is the community group and the community involvement that is envisaged there. I haven't seen any concern expressed that this is outside of our remit. Obviously, this is something that as we work on this, we would, of course, be putting it out to the wider community as well for comment and input. So, yes.

So moving on to (ii), the CEP is voluntary, however, except for claims brought by the Empowered Community again. If a claimant does not participate in good faith in the CEP and ICANN is the prevailing party in the IRP, the IRP Panel shall award to ICANN all reasonable fees and costs incurred by ICANN in the IRP including legal fees. That's something I think that has been essentially a position for a while under the CEP. So it's just they're making the point that that cost shifting element that is anticipated for the IRP might get shifted in a situation where a claimant doesn't take the opportunity and act in good faith in pursuing a cooperative engagement process.

Then either party may terminate the CEP efforts if that party (A) concludes in good faith that further efforts are unlikely to produce agreement, or (B) request the inclusion of an independent dispute resolution facilitator, an IRP mediator after at least one CEP meeting. So that's the IRP mediator we've just been talking about.

Then (iv) deals with that. That unless all parties agree on the selection of a particular IRP mediator, any IRP mediator appointed shall be selected from the members of the Standing Panel by its chair, but that such IRP mediator shall not thereafter be eligible to serve as a panelist presiding over an IRP on the matter. And that's intending, therefore, to keep that separation between the role as a mediator where you may be given all sorts of confidential information and share all sorts of discussions with the parties in a manner that is not the kind of information that one would share with the person adjudicating the case, as we've just been talking about. So that's what the Bylaws say on CEP.

If we go on to the next page, on this page, and then the subsequent one, I've included a link at the bottom to where you find this. I've just reproduced what the current cooperative engagement process says. And this dates back as it notes there from 11th of April 2013. It's quite a short process, just talking about the governing how the CEP operates. And the second page is—one slide on, Brenda. This has been shared a couple of times now, so hopefully you will have at least cast your eye over this. I suspect you're not all fully familiar with it, although those who've been involved in IRPs and CEP processes will be. As I say, one thing to note immediately—and I'll go on to a few points of note on the next page. But one thing to note immediately is the date, it's the 11th of April 2013. So this predates all of that work that was done on the IANA

transition and the development of the new accountability structure and the new Bylaws.

The other thing to note, just as a point of note, I included the link to where the CEP processes is found because it's actually astonishingly difficult to find. It's not something that you find very easily from the IRP page. You actually have to go into the table of current IRPs, and it's there in a footnote. So, for that reason alone, I included the link. And then before I go on to the next page, I see David's hand. David?

DAVID MCAULEY:

I'm sorry. It's a legacy hand, Susan. I'm sorry to interrupt you.

SUSAN PAYNE:

No worries. All right then. If we go on to the next page, a number of sorts of issues for consideration occurred to me as I was looking at this again. There may be others that I've missed, but just to sort of quickly run through them. I believe that the sort of length of procedural process for the CEP that currently exists, which is about one page of A4, that doesn't strike me as being inappropriate. I think the idea is this is a fairly light touch process not particularly bound by rules. That seems entirely appropriate to me. But nevertheless, there are some issues, I think, many of which probably stem from the fact that this CEP process hasn't been updated since the Bylaws changed. So, first up, in paragraph one of that process or numbered paragraph one, I should say, it only envisages that IRPs are a challenge to Board action. It doesn't refer to Board inaction or to staff action or inaction. So, in that numbered paragraph one, it's talking about the timing for bringing CEP and so on.

But it doesn't envisage all the types of action and inaction that the modern IRP might be addressing.

Then the second point is, as I say, the timing for when you should enter into CEP is by reference to the posting of the Board minutes and briefing materials. And that's fine if this is a Board action or at least that may be fine if it's a Board action. But what about if it's a Board inaction? And what about if it's a staff action or inaction? Having timing run by reference to Board minutes isn't appropriate for all of that.

As I sort of pointed out in B, in actual fact, a trigger for the IRP is about when the claimant becomes aware or reasonably should become aware of being materially affected by whatever the thing is that they're bringing the IRP over the action or the inaction. So, presumably one really needs to align the trigger for the timing on the CEP in the same way. Otherwise, you could theoretically have Board minutes published or whatever. At a time when the claimant in question isn't eligible to bring an IRP because they're not aware of it or they don't hit the trigger for bringing an IRP but they run out of time for their CEP, and that clearly isn't the intent.

Moving on to number three there, the timing of 15 days. It's 15 days in the current process from the posting of Board minutes. But that 15 days is in the context of the old IRP process where there was a deadline under the Bylaws of 30 days to commence an IRP. So, clearly, if you've only got 30 days to bring an IRP, you've got to get on with it if you're going to bring your CEP first. But something for at least consideration is whether now that we are proposing that the time for bringing an IRP is longer than that, it's more like 120 days is what we're proposing as

being the appropriate length of time. In that context, is 15 days actually rather too short time period? And is it appropriate to allow a potential claimant at least a little bit more time than 15 days in that context? Certainly, it's something for consideration.

Then item four is perhaps one of the slightly bigger ones, but given that we've spent so much time talking about it in relation to other processes in the IRP, hopefully it isn't too challenging. Just how do we ensure that the entering into the CEP doesn't put the claimant out of time to file their IRP? And the current process in the CEP does specifically refer to an extension of no more than 14 days. So when you get to the end of your CEP process, if your time for filing an IRP, if you're out of time, you would have at least 14 more days in order to get your IRP filed. And again, is that reasonable? Is that sufficient? When we talked about it this in the context of Request for Reconsideration, we talked about it at great length and came up with that concept of a fixed additional time for where someone's done a Request for Reconsideration and then still needs to proceed to an IRP. We ended up concluding that 30 days is that fixed additional time that we imposed in that process. In that sense, should we actually be looking at something more aligned with that 30 days rather than only allowing the claimant 14 more days once the CEP ends? From the way I'm presenting it, you'll probably assume that I think that's probably yes. Given the purpose of the CEP is to allow the parties to try to narrow the issues or resolve the dispute. We don't want a claimant basically having to do all of the work preparing the IRP because they know they've only got two weeks when the CEP finishes. But at the same time, we don't want to allow so much time that this process just drags on and on.

So the final one that I identified in five is do we need a process for termination of the CEP? This refers back to Bylaws 4.3(e) subparagraph three. Brenda, if you wouldn't mind going back to page two on this slide deck. That one, yes. Three just talks about, either party may terminate the CEP efforts if that party (A) concludes in good faith that further efforts are unlikely to produce agreement, or (B) request inclusion of the mediator. So it's just a question. Do we think our CEP process should make some specific reference to that? Do we need to cover that off? It's in the Bylaws, but would it warrant covering off more specifically?

Then I think if we go to that final page again, Brenda. Thank you. Those were all of the ones that sort of struck me immediately when I was looking through the CEP process. But very keen to hear if others have identified other things that they feel could do with sort of discussion and potentially being addressed. Again, sort of putting Flip a bit on the spot because he's one of the few on the call this week. He's been involved in cooperative engagements. But from your participation in the in the CEP, Flip, is there anything that particularly strikes you as requiring adding to this list?

FLIP PETILLION:

Thank you, Susan. If it's not yet on the list, it's equality. So it's related to due process. It's equality of the parties in the discussion. Sorry for the noise. But I'm sitting outside and we have some neighbor farmers doing the work they need to do at this time of the year.

SUSAN PAYNE:

That's no problem. I could hear birds tweeting earlier, but I can't hear farmers. And it was very nice hearing the birds. I think I understand what you're meaning by that. One of the things that did strike me, although it seems to me it's kind of a Bylaws provision, is that there's something that says that the claimant has to act in good faith. And if they don't act in good faith, then the cost shifting shifts to them. But there's no equal obligation on ICANN to act in good faith, although that's certainly an expectation. But there's not that same cost shifting in that case where ICANN's to act in good faith. But I don't know to what extent one can address that, given that it's a Bylaws provision that says that. But I don't know if that was what you were meaning or if there's other issues.

FLIP PETILLION:

I think this was a great example. And frankly, even if the Bylaws wouldn't cover that, frankly, that would be irrelevant because there are higher principles that apply anyhow, and that ICANN and the claimant have to comply with, including principles of international law, principles that are anyhow applicable with regard to due process, equality forums. So we don't necessarily need to regulate everything. We simply need, in first instance, understand what are the principles that apply anyhow? But I'm happy to repeat the suggestion that I made for the appeals discussion. I think it's really challenging. It's interesting to have a small group prepared and discuss the issues that may be relevant for the CEP, and then come back to the group with the different positions that are defensible, and then discuss it in the group. As I wrote in the chat, I think this is a great summer project for those who are interested.

SUSAN PAYNE:

Thanks, Flip. Actually, after your hand, I was planning to come back to the comment you'd made in the chat. Again, it's the same comment from me, really. I totally agree with you that this does seem very be appropriate for something that could be handled in a smaller group, which is just a bit more informal discussion and an opportunity to chat through ideas and come up with a suggestion or straw person to bring back to the full group. My reservation is kind of the same as before, which is our small group efforts in the past haven't always been terribly effective. We've ended up with very small groups indeed, and a challenge getting a big enough group to really be workable. But again, I'm happy to attempt this and to see how it goes. Again, it may be that trying to do the CEP and appeals at the same time may make that challenging, but the CEP process is much nimbler than the appeals one. I think it is a smaller piece of work or at least I really hope it's a smaller piece of work. Again, I'm very happy to take on board that suggestion. I think it's a good one. We can go out to the list on both of these items and see what volunteers we get. We can take it from there. David?

DAVID MCAULEY:

Thank you, Susan. I like Flip's approach. In my past, I've been involved in court-based litigation, also arbitration, never done mediation. So I'm sort of out of my can in that area. As we consider doing this, I think we should encourage our practitioners like Flip and Mike and litigators to weigh in. Liz, I would encourage you to check with your ICANN colleagues who manage IRPs to see what they think, because I mentioned there's some useful comments that would come from them

as well. So I hope we can make this approach work. It sounds very sensible to me. Thank you.

SUSAN PAYNE: Lovely. Thanks, David. Lovely. Liz?

LIZ LE: Thanks, Susan. Yes, we will definitely consult. We have been consulting. We will continue to consult with the team that are the practitioners on IRP. Definitely, I think that they will have some suggestions in terms of ways that we can improve upon the current CEP rules going forward, especially to align it with the Bylaws. And we'll revert with those suggestions.

SUSAN PAYNE: Lovely. Thank you. Okay then. All right, I will just pause and see if there's anything else anyone wants to bring up now then on the CEP. Otherwise, we can put out a call for volunteers to work on this outside of the main group and bring some proposals back to us. And again, we will check in with that group. We'll have that group check in with the full group. If it's proving unable to handle this in small group, then we can reconsider that approach. But I'm very hopeful that a small and nimble group can make a progress on both of these items.

Okay. All right. In which case, I think in terms of our agenda, we're down to Any Other Business. So I will just pause here and see if anyone has anything else they would like to bring up at this point. All right, I'm not

seeing anyone. Then I am going to give you all 15 minutes of your day back and we will wrap up here.

Thanks, everyone, for your participation and discussion. Brenda, we can stop the recording. Thank you. And thank you, David, for your work on appeals. That's really appreciated.

DAVID MCAULEY: Thank you.

[END OF TRANSCRIPTION]