

**ICANN**

**Moderator: Brenda Brewer  
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6:00 am CT**

Becky Burr: Okay, we're a little light on attendance right now but why don't we get started? The purpose of this morning's - this call is being recorded and you can turn on the recording. The purpose of this call is talk about the IRP. Kavouss, who is not in Adobe Connect yet, has something he'd like to say at the beginning so I will turn to Kavouss please.

Kavouss Arasteh: Yes, thank you (unintelligible). We have started (unintelligible). It is not the time that...

((Crosstalk))

Becky Burr: Kavouss?

Kavouss Arasteh: It is not the time that we will have new notions, just we have to rectify any inconsistencies or any difficulties that will remove that. I understood (unintelligible) to have new ideas and it is not productive. It is not (unintelligible) before the public comment. So we have to return (unintelligible) one point.

And the other point is the IRP and with respect to the GAC advice, you know that if the GAC makes advice this advice goes to the board and if the board does not agree with that they have to discuss. Once they discuss it and they have to find a solution.

But if the community or ICANN (unintelligible) IRP and it is a binding the right of the GAC will be removed to have a negotiations with the board. This negotiations with the board is fundamental for the GAC for their advice because of the public policy issue.

We should be very careful when dealing with IRP and binding approach or binding aspects of that because it affects the GAC advice. This is an important point. I'm sure that you will receive formal comments from all GAC. But I want to raise this issue at this stage to be very, very clear. This is one point.

And the second is what you mentioned yesterday saying that all advisory committees shall be (unintelligible) yes every (unintelligible) but with respect to the GAC it is a special right of the GAC (unintelligible) advice and that was not totally addressed. You told me that I misunderstood. I hope I misunderstood you. But I stand to be corrected when I see the final text that this very right of GAC is maintained. Thank you.

Becky Burr: Thank you, Kavouss. I think your point about new ideas and making sure we get our work done is very well taken. I think that you will, when you see the final text, that the right of GAC with respect to engagement with the board on public policy advice is preserved.

And I think that we do have to address the GAC's concerns about binding although I just say it's a sort of difficult issue because if the IRP only addresses places where ICANN has acted or failed to act in violation of the

bylaws and if ICANN has no ability, as I think we understand it, has no ability to follow advice that would require it to violate the bylaws there's a little bit of a bind there.

But why don't we move into the - into the discussion about the independent review? And let me preface it by saying that this is a, you know, getting this right, the rules, etcetera, is going to be - it's going to be complicated. We need to make sure those rules are correct.

We need to put forward for Work Stream 1 the shape of the independent review, what its authority, the basic issues, and then talk about how - what process gets used to create the rules of the road and the detailed rules for the court.

I've been thinking that it would be a subset of CCWG aided by experts in constitutional law and international law because - although there are plenty of lawyers on the CCWG, I don't think that we have expertise in the sort of - the judicial function in quite the way that we would need.

So I am thinking that we, you know, have a resolution creating that committee or maybe it's just a subgroup of the CCWG but we have a, you know, some kind of guarantee from ICANN about the constitutional and international law support and address the details in that way.

Does anybody have any thoughts or ideas on that? David?

David McAuley: Sorry, had to get off mute there. Becky, excuse me, I would just like to say I largely agree with the way that you just put that, that is that for the Work Stream 1 we'll come up with basically the outline of the court, the things that you have on the document right here in front of us and that a committee of

sorts would be created to go to the details. I like that idea. And I certainly like the idea that rules of procedure, for instance, would be decided by that group rather than by an independent panel itself.

I just want to say with respect to the idea of the skills we're looking for, international law sounds to me to be right on. The constitutional expertise I would say maybe would be better expressed as corporate governance expertise. I'm not - and I think that's probably what that word, "constitutional," means in this context. But that's what I would say in that respect. Thank you.

Becky Burr: Thank you, David. Greg.

Greg Shatan: Thanks. Greg Shatan for the record. I'm also kind of thrown by the term "constitutional" in this context and also looking at the document in front of us referring to a constitutional court. Apologies for maybe being a little behind the curve on this particular aspect of our work but I don't see where that terminology came from and why it's appropriate in this case at all. So I'm not sure quite what it is we're looking for but I don't think we're - the word "constitutional" just strikes me as being incorrect in some fashion.

Becky Burr: Okay. Let me just explain that. First of all I don't have any investment in that word. It was just - there was a comment (unintelligible) comment who warned against - if anybody is not talking could you put your phone on mute please?

That it be charged with really determining whether ICANN has acted or failed to act in violation of its bylaws. And then hearing claims involving statutory rights of the sole member. So I'm fine just removing that term if that makes people happy so long as people are comfortable with the role that - the tasks that the court is charged with carrying out. Greg.

Greg Shatan: Yeah, I think that's fine. I think - I'd like to remove that term and then figure out what it is we're really trying to refer to and distinguish this from the current IRP because it sounds like this is - is this just intended to be the current IRP plus more things, you know, plus the binding nature of things? Or is it intended to be an entirely different recourse?

Becky Burr: Well I think of it as an enhancement to the existing IRP plus a community right to act, to use the IRP plus claims involving statutory rights or other rights of the member. So it is a little bit plus but that involves largely the community mechanism and the dispute between ICANN and its member.

Greg Shatan: Okay, that's what I thought as well which is why it seems a little odd to kind of throw in kind of some, you know, new terminology that what's basically just an enhancement of an existing recourse that we have. And in that regard, you know, I'm sorry for being thick but not entirely sure what the problem is for the GAC since assumingly the GAC could take advantage of the current IRP why are we now having a big problem that requires international law experts?

Becky Burr: Well I don't know. I think we need some expertise in the international dispute resolution, not necessarily arbitration. So let's get to the GAC issue on the bindingness just in a second.

David.

Avri Doria: This is Avri. Can I get in the queue? I'm not online. Thanks.

Becky Burr: Oh okay I'm going to recognize David and then Avri.

David McAuley: Thank you. And just since you mentioned it, Becky, in Paragraph Number 1, you know, that this new - the enhanced IRP will be hearing claims involving statutory rights, I simply wanted to make a statement with respect to that phrase that we make sure that the standard that the IRP is going to be working to is the uniformly stated, in other words, in one section we say that it's looking at claims that ICANN has violated its bylaws, which I think is the right standard.

And then adding the idea of claims involving statutory rights of the sole member. I think it would be a good idea that we ask the lawyers to ensure that the statutory rights of the sole member meshes, you know, uniformly with the violation of the bylaws standard that we're adopting so that we don't sort of confuse ourselves and that's my statement, thank you.

Becky Burr: That's a very good point. I think that what we will refer to is rights of the sole member in the - under the bylaws, which will include whatever mandatory statutory rights there are. And I'll make that consistent throughout. Avri.

Avri Doria: Yeah, thanks. This is Avri speaking. Sorry, I'd just gotten online, I was on phone walking from one place to another. In terms of international, being that we're seeing these as basically functions, and I thought I'd heard someone reference, these are functions and capabilities, and not new (panels), I think that that international one is critical in that so many of the issues that we're going to be dealing with going forward are - and in relationships and interpretations of obligations under bylaws and such with an - from an international perspective that as an international organization we absolutely have to have that.

And I disagree that it has anything to do with the GAC. It has as much to do with ccTLDs as anything, in fact perhaps even more. And as we have more

diversity and more IDNs and more - we will have far more international issues that need to be properly understood and resolved. Thanks.

Becky Burr: Thank you. And that's a very good point because obviously one of the - of ICANN's obligations under its bylaws is to comply with international law. So that's another reason that we need that.

Okay, David, is that a new hand or an old hand? I'm going to assume it's an old hand. Welcome, Kavouss, I see you're in the room now. Okay moving on to the standing, we have a, you know, any person or entity materially harmed by action or inaction in violation of the bylaws the community, acting through the sole member and the thresholds for that are to be determined.

The process will provide for interlocutory relief, so if you demonstrate a likelihood of material harm the court would be able to step in and, you know, preserve the space going forward.

The one thing that I wanted to raise here is a question of whether we should specifically say that ICANN will not, by contract, deprive any party of its rights to bring an independent review. I mean, we use the contract - we saw the contract for, you know, for the - or the, you know, rules for the new applicants. You know, they required applicants to give up their rights to go to court. I'm just a little concerned that we may need something clear here.

And it also - for contracted parties there is an arbitration provision in the contract but it doesn't exactly go to the violation of the bylaws. Kavouss.

Kavouss Arasteh: Yes, I now have Adobe connection and I wish to comment on some of the comments made. Some colleagues mentioned that GAC should not take advantage of IRP. How he came to that conclusion that GAC is an entity

looking to taking advantage of something? I don't think that any of the community would intend to take advantage of anything. This is something - a motion that I don't agree with that.

I don't agree with such a motion that people being suspicious with GAC and we should withdraw this sort of thinking and be neutral, impartial and fair to everybody. So I cannot agree with that statement. Thank you.

Becky Burr: Thank you, Kavouss. With all due respect, I actually think you misunderstood and I'm not quite sure, it was either Greg or David, I think what they were saying was that the GAC was entitled to use the IRP process and the term "take advantage of" in colloquial American English is not necessarily the negative derogatory reference that I think that you heard. So I think the clarification is that the GAC is entitled as all parts of the community are, to take advantage of - to use - to avail themselves of the independent review process.

So I hope that clears things up. David.

David McAuley: Becky, thank you. I would just like to respond to your idea of making it clear - excuse me - that ICANN cannot, by contract, deprive a party of the ability to go to IRP. I like that idea. I also think somewhere it would be good to provide whether this group does or the subgroup that's going to come up with the process that - to provide for the fact that when people go to an IRP both ICANN and the complainant, or whoever it is, they both sign an agreement that they will abide by the terms of the - by the judgment of the IRP.

And the claimant, I don't think, should be willing - should be able to go to court if they lose. In other words, I don't think they should be able to go to



court through an appeal. So I like your idea and I - so I wanted to get on record to say that. Thank you.

Becky Burr: Thank you, David. Ed.

Edward Morris: Yeah, Becky, as well I want to support your idea of having somewhere in what we're doing the idea that ICANN cannot use contract to bypass the IRP. As you know, some of us in the GNSO believe they're starting to do that with the dotTravel example using contract to bypass the PDP. So it'd be good to stop that practice regarding the IRP before it starts. Thanks.

Becky Burr: Okay, thank you very much. Any other comments on this thread? Kavouss, can I ask if you - if we have clarified your concern regarding the phrase "take advantage of"? Okay. I see a very, very long post from Rafael, would you like to - or your mic is not functioning. Okay so let me just read this.

So you were talking about the prospective relief where damage cannot be proved as something that has happened but it's likely to happen. The standing provides that there is an interlocutory, that there's an injunctive remedy so somebody who can demonstrate that there is a likelihood that they would be harmed - materially harmed - will be able to invoke the IRP process. That is clearly intended and there's some language in the report that speaks about in greater detail. This is just a bullet point.

So I believe, Rafael, that we have absolutely addressed this concern. But if not hopefully you will let us know when you get audio. And I hope somebody is working on the audio issue for you.

Okay in terms of the selection process, we've heard a lot from the community about the board involvement and various independence issues. We also heard

a lot from the community about the need to distinguish this from sort of standard international commercial arbitration and therefore the notion was that asking international arbitration bodies to nominate folks would be - the potential panelists would be counterproductive.

So what we discussed in Paris was that there would be a tender process for an organization that would provide administrative support, help us issue a call for expressions of interest soliciting applications from well qualified candidates with the goal of securing diversity and doing an initial review and vetting of applications against established criteria.

So in some ways this is like a specialized head hunter firm that is really looking at sort of judicial expertise around the globe. And it would be working with the community to get - solicit applications and, you know, issue a call for applications, get those applications, do a basic review.

Then the community would select the proposed members and an overflow pool. And it says on the paper, "process to be designed through the CCWG," that can be part of WP 2 although it needs to be an early part of WP 2. And then once the panel and the overflow or alternative pool was determined by the community it would go to the board for confirmation and the board would have the right to object to a member - a proposed member of the panel based on, you know, conflict of interest or something like that. But stated reasons not just because.

How do people feel about that? David?

David McAuley: Thanks, Becky. You - in your discussion you mentioned - I like the process but in your discussion you mentioned that it would almost be in the nature of looking for a judicial head hunter. And so that brings up a point under

Number 3 and Number 4 that I would like to talk to and that is the fact that we're looking for significant legal expertise.

And I would like to float the idea that maybe what we're looking for is some legal experience but I - I have served as an arbitrator in a number of three-member panels in my career and one of the things I found is it doesn't take a lawyer to be a really good arbitrator. There are many engineers and other disciplines that come at this with the discipline needed and the understanding and the expertise, etcetera, to be a good arbitrator or decider.

And so I worry a little bit, this is what I'm actually sort of expressing a worry a little bit, that the panel will be a bunch of lawyers, which is fine, but I just think we're narrowing the ability to pick up good people. And I would urge us to think maybe it need not be all lawyers. Maybe we should think of a way to look for people that have expertise in this area but go beyond the legal field. Thank you.

Becky Burr: Thanks, David. Let's talk about that for a little bit because I think that what we put out in the first report, and have been talking about throughout this, is panelists who have legal expertise and who are supported and aided by technical or, you know, governmental diplomatic, whatever kind of expertise is needed.

I mean, I guess I - I now am speaking not as the rapporteur but my personal opinion. I think that there are, you know, people who have helped countries put together, you know, a court, judicial systems, who have just in terms of the head hunter part of it, who have a particular kind of expertise that in judicial systems that I think we are going to need to set this up correctly and to not make mistakes.

And I don't disagree, I mean, we could have panelists, you know, who have - who are not lawyers, although to me it does seem like a particular, you know, legal analysis of whether ICANN violated its bylaws. So other views on that? I see that Matthew - that should be - that the skill set should be broadened. And having individuals with arbitration skills would be useful. I think that is a - that's a given, Matthew.

I think the question here is whether we're going to change the standard that we have had for panelists since the first report, which is significant legal expertise for panelists and then expertise also in the working the management of the DNS and then access just still technical, business, diplomatic, regulatory or other experts upon request. And, Greg, I see your point about arbitration and I agree we should put that in.

Okay, not quite sure how we want to resolve - okay, David, we'll move on. Okay I take it from the lack of hands that people are comfortable with the selection process as it is and the expertise.

In terms of the diversity there a question that we need to address. The standard in the initial report is reasonable efforts to ensure cultural, linguistic, gender and legal traditional diversity. Some of the comments we received said that we should place a sort of some kind of hard requirement and something like no more than two panelists from any individual ICANN region. That is a discussion point that I'm interested in hearing views on.

Should we - in other words, should we make it that - there are two ways to handle it, one, we can make that an absolute or, two, we can say as - that reasonable efforts, for example, striving to ensure that no more than three panelists are from any one ICANN region? David.

David McAuley: Thanks, Becky. It seems to me that since the group we're trying to fill is seven, sufficiently small, that it should be easy to fill this from all five regions and the idea of a cap at two seems good. I recognize Jonathan's point that he put in the chat that some regions are pretty big and I assume there's some very well qualified folks that we may want to get. But this should, I think, at least be a goal so I think it makes sense. Thank you.

Becky Burr: Okay. Others? Okay there seems to be - Greg.

Greg Shatan: Hi, it's Greg Shatan for the record. Just I think it's a, you know, reasonable efforts is good but a hard cap or minimum concerns me because we don't know how many applicants we're going to get or how many people are going to reach out and find for this. And I think that diversity has to be secondary to skill set. So if it can be satisfied - if diversity can be satisfied while having first rate people with - in terms of the skill set, I'm sure everybody is a first rate person will apply in some fashion.

But I would not want us to have a situation where we have to kind of make due because the system that we're using didn't yield a highly qualified individual from a given region. And I'm not thinking of any given region but I think the choices have to be made with an eye toward diversity but also an eye - two eyes toward merit. Thank you.

Becky Burr: Thank you, Greg. Ed.

Edward Morris: Yeah, I would echo what Greg is saying in terms of having sort of a stock requirement. Of the categories we're looking at for diversity, I'm more concerned about the legal tradition diversity. Having grown up in a common law country but having my legal education in a civil law country there's a

different way of thinking among lawyers in both traditions. And I really think we need to prioritize that even a bit more than the geographic diversity.

Becky Burr: Thank you. I think at some level the geographic diversity is going to help us in the legal tradition diversity but not - it's not sure fire so I understand that as well.

Okay so what I'm hearing support for is reasonable effort and a soft goal of no more than two panelists from any ICANN region. And unless there are objections to that we'll move on. Greg and Ed, you guys both have your hands up. Are they old hands or new hands? Okay, they're old hands.

Okay we've been saying since the beginning it would be a seven-member standing panel. I think that ICANN, the board, raised some questions about capacity constraints with a seven-member panel so in Paris I floated the idea of having a pre-vetted pool of overflow or alternatives - alternative panelists that can be brought in in any situation. They would be, you know, pre-vetted by the community, they wouldn't be on a standing payroll, they would be, you know, paid on a per case basis. And in all cases at least the chair would be a member of a standing committee.

Does that - and then, you know, we talked about individual panels of three decision makers in any case and then that would be appealable - their decision would be appealable to the full panel on an abuse of, you know, a standard that is, you know, sort of manifests - you got the facts wrong or, you know, you got the law just clearly wrong.

And first I want to ask if everybody's comfortable with the pre-vetted alternatives idea? I am not seeing - I'm not seeing any hands in objection. Okay. I think Kavouss is indicating in the chat that this is the place to discuss

the concern of the GAC with respect to whether a decision is binding or not and if somehow that would undermine the GAC's ability to exercise its right under Article 11 to engage in constructive engagement with the board.

I just want to remind people that the decisions of the independent review panel will not be directive in the sense that if ICANN has - if a panel determines that ICANN has violated its bylaws the declaration will be that ICANN has violated its bylaws. The panel will not specify the manner in which ICANN must fix that violation.

And so the decision of the panel would go back to ICANN and it would say you've violated your bylaws and then ICANN would have the obligation to come up with a solution. So one response I have is - one response I have is that because the panel's decisions are not, you know, do not tell ICANN how to fix something, just that it must, there's consultation opportunity there as there is in advance.

The other comment we had was that the decision - the United States government in their contribution to the GAC complication also said, you know, maybe there should be some test period when we see whether it's binding or not or maybe there should be some out for, you know, truly clearly, you know, off the wall decisions. Don't know exactly how we make that work.

Greg.

Greg Shatan: This is Greg Shatan for the record. This is on a relatively minor point of what you just kind of went through and not necessarily on the question you just asked. But the idea that the standing panel or that the panel - the panel is

making a decision can't indicate how ICANN should act in response to its decision that the bylaws were violated seems perhaps unduly narrow.

I think the dotAfrica decision there was some discussion of that. But I haven't been through that whole decision. But I think the idea that at the end of all of this the answer is either yes or no but they can't say anything more than that I'm not sure that that's how we want to constrain the panel after months of looking at the issues closely.

Becky Burr: Okay there's language that the attorneys have provided I think that is in the first report that I don't have in front of me. But I don't think it's just a - it's just a yes or no, it's a, you know, they would provide their rationale for why the decision was wrong and that would be part of the record.

Other comments? Kavouss has indicated in the chat that the GAC has established a working group to examine this issue. And that's great. Obviously, you know, we would be delighted to answer any questions that the working group might have. I think it's important to avoid any misconceptions or misconstructions or misunderstandings about this. So to the members of the GAC who are on the call I want to affirmatively reach out to you and say that, you know, this group and individual members of it are available to, you know, to provide any answers to questions that the GAC may have.

We still need to get to - I think we still need to talk a little bit about the - just the binding non-binding issue here. The community seems quite strongly in support of the notion that this would be binding, you know, to the extent that it can be. And there are some issues for which it probably cannot be binding but those are pretty narrow.



But we do have these concerns about unintended consequences from the GAC that we should talk about. David and then Greg.

David McAuley: Thank you, Becky. I put my hand up back when we were also talking about the US government's suggestion about possibly having a test period. And I think it has some surface appeal, I just don't know how it would work because - for a couple of reasons. One is there's no guarantee that there will be a lot of IRP cases. It seems like the new gTLD program spurred a lot of IRP cases.

But even if there are the cases take some time to adjudicate anyway. DotAfrica was an exception by being so long but they're still going to take some time. So I just don't know how that would work and I wonder about that.

On the binding question, I like the idea of binding but I know that the lawyers have weighed in on some limitations on that. And we need to look at that - or at least I need to look at that language again and see what it is but I like the idea that this will be a real remedy and will not be the same old IRP that just looks at the process and is advisory only. That simply didn't work and wasn't good. Thank you.

Becky Burr: Thank you. Greg.

Greg Shatan: Sorry, I have trouble getting off mute there. I think the binding issue, you know, as I say, is something for which there's broad support. I see that, you know, we say under - it's kind of trapped under size but we - and it probably should be put under exhaustion or something else - that it's appealable to the full panel so that there is a form of appeals here so if there is somehow a bonehead decision I guess you have to decide what the right of appeal means and whether that's a right to appeal by both ICANN and by the complainant or is it only the complainant?

In my mind it should be both so if ICANN disagrees with the panel it has some recourse. But the issue of binding - I don't see how that really relates to the GAC issue. So and I have no idea why Kavouss is saying that the IRP is entirely different from dispute resolution. So I don't understand what the difference would be unless it's the point that would be - or could be a court of international - or could be considered an arbitral body under international law and allow for further use of courts to enforce a decision.

If that's where we're going I think that's kind of particular discussion that we have to have as to whether there is recourse for the courts. And I think clearly an aspect of this being binding is that it's enforceable through external processes. Thanks.

Becky Burr: Thank you, Greg. So, yes, we do have a process that says it can be appealable to the full panel. And I think Holly or Rosemary suggested a standard for that which I will circulate to the group and we can get some discussion on that.

And Kavouss is saying we do not want to be hostage to California court. And so I just want to clarify that what Greg was referring to was not any substantive decision by a California court but in any of these processes if you have a binding decision - so say there's a binding decision that goes in favor of the complainant and ICANN says, no, we're not going to do that and they don't have a good reason for it.

At that point the person who has won the decision at the IRP level could go to a court and ask the court to enforce the decision of the panel. But that is all that it would be doing, it does not have anything to do with basically except saying to ICANN you must abide by the decision of the panel. So I don't think that this is, in any way, holding ICANN or the community hostage to

California court, it's really just invoking a California court to support an ICANN process that the community has agreed on.

And as David points out, it need not be in California; any court that has jurisdiction over ICANN, and there are quite a lot of them, could bring that. So I hope that addresses your concern, Kavouss, because this is another point on which I think there's been misunderstanding.

Greg, is your hand a new hand? No, okay. Kavouss is asking in the chat whether the GAC members are participating - if you're in the room I think you can see the participants, Kavouss. And Finn Petersen is here from Denmark.

Okay, the independence issue, we - I think there are certain standard things that are pretty easy to do. But let's just talk about the term, what we think the term should be. And I believe that we have called for a single term as opposed to the opportunity for reappointment so that, in my mind, sort of pushes us to a slightly longer rather than shorter term.

And then - but we need to have a view on that. And also the time limits on preexisting and post term limits on relationship with ICANN. So how independent do they need to be coming into the process? And for how long after the - after their term do they need to remain independent? Any views on that?

No - oh, David, okay great.

David McAuley: Just to throw something out there, Becky, it would strike me that for purposes of preexisting and post term limits maybe two years would be a good period.

Becky Burr: Okay.

David McAuley: One year seems too short. With respect to the term, I would suggest three years just like a director but I did hear you say maybe longer. Maybe tied into this is there - and to the idea of removal and recall should be the idea that the community, not the board but the community, should have maybe like an ATRT, should have a periodic review that the court - or that the IRP is sticking to what its job is and is not, as Avri said the other day, is not a group of people running around looking for something important to do.

And that happens with judicial panels. You know, they create something out of whole cloth that is just beyond - I just think the community needs some way to watch that the panel is sticking to what its job is. And so I think that relates to some of this. Thank you.

Becky Burr: Thank you, David. I think that's actually a really great idea so thank you and Avri for raising it. Clearly, you know, because this is - and I think this goes to the US government's concern about, you know, sort of a test period. Clearly that is - that's an important issue.

I guess I was thinking of like a four-year term as opposed to a three-year term but, you know, I could be - obviously the first panel would have to be staggered. So, yeah, Greg is saying three should be a periodic review of the IRP function. That seems absolutely sensible.

And David is okay with four years. Anybody else? So shall we go with four years and two years? Okay on the question of exhaustion what we would want is measures designed to encourage participation in the policy development process and disincentives to sit out or game the process. And I think that - I think that is something that - that set of requirements could be flushed out by

the ongoing group, you know, the sort of IRP subgroup aided by experts. But I think that's pretty - that's pretty - that's pretty clear idea that makes a lot of sense.

You know, somebody who is part of, you know part of the community shouldn't just sit on the sidelines while a policy development process is going on and then complain about it afterwards. On the other hand there could be surprises and things that we have to account for. David, is your hand a new hand?

David McAuley: It's a new hand but it was simply to ask Kavouss - I think he made a point in the chat that might be a good one about invoking IRP during a time when the same question is pending before an IRP. And if so - I mean, that's - I think there's the potential for that especially in a time of a new gTLD program or something like is pretty important. And so I was hoping Kavouss might be a little bit more explicit about what he's asking. Thank you.

Becky Burr: Kavouss. I mean, I think - until Kavouss rejoins us I do think that there are some important issues about sort of consolidating different cases. I mean, you wouldn't want two IRPs to be dealing with exactly the same issue and the possibility that they could come out in different ways. Although of course you could then have all of those cases go up to the full panel.

But that - there also needs to be some provision for, you know, directly affected parties to be part of the process even if they're not one of the complainants. So I think that, you know, the current IRP did not permit the, you know, the (unintelligible) to participate in the IRP brought by dotConnectAfrica.

Clearly they are a directly and immediately affected party. And it seems like we would want to have some, you know, some (unintelligible) rules here as part of the process that would get put together by the group. And I agree with David that these are questions for the subgroup but we should flag them as questions. So we will definitely do that.

Okay in terms of exhaustion, so that again will be fleshed out. Settlement efforts, I think we would just go with CEP but - and we would permit party at any time in that process to invoke formal mediation to move the process along.

The decision - the nature of the decision we've already talked about. And as to the binding - the standard that we have now is that three member decisions are binding subject to appeal to the full panel and subject to a carve out for matters so material to the board that it would undermine its statutory obligations and fiduciary roles.

Ed.

Edward Morris: Thanks, Becky. Yeah, can we quickly go back up to Number 9? I guess my question is is there any reason we want to keep the CEP around? I mean, I love mediation. Parties are certainly free to try to settle outside of formal structures. And my experience with the CEP is it's highly biased towards ICANN. And if we're going to have mediation as an option I really don't see the necessity of continuing to have it.

Becky Burr: Well is it a problem if any party can just say we don't want to do it? I mean, some parties may want CEP based on what I've heard.

Edward Morris: Okay, if - I didn't realize there was some support for it so I guess that's fine. It's just I can't imagine anybody wanting to go through it but I guess that's just my view. Okay thanks.

Becky Burr: No, I mean, what I meant to say, Ed, is not that we heard a lot of expressions of support for it but that if either party has the ability to invoke a mediation process from the beginning, literally, so if anybody who doesn't want to go through CEP just says, I want mediation...

Edward Morris: Well, I think if we're going to have CEP when we structure it we're going to have to make sure it's a little bit more - a lot more transparent than it is because what we don't want is a formal settlement advice that's completely opaque. Because when you go into a CEP nobody in the outside world knows what's going on.

And I know one of the things we're talking about establishing is a sort of precedent here where people know what's going on, know what comes out of the structures. And the CEP is currently structured is a thing you go into, it's closed, there's ICANN, there's you, there's no record, no transcript. And folks in the outside world and third parties that may be affected by the settlement negotiations never know what's going on inside of there and there's no requirement to make any agreement in the CEP public.

So I think if we're going to go down that road we do have to take a look at how it's currently structured and try to make it a little bit more transparent and less opaque.

Becky Burr: I think that is an excellent point. And we will - and that is definitely on the Work Stream 2 list..

Edward Morris: Thanks.

Becky Burr: Greg.

Greg Shatan: Thanks its Greg Shatan for the record. You know, looking back at what the CEP consists of it is not mediation because there is no mediator as far as I can tell. It's a discussion between the party which by definition is not mediation.

We have not actually had the or taken this opportunity to review the cooperative engagement process to decide whether it is worth improving or could be improved.

But I think that's actually a good point. We may want to make this almost certainly a work stream two issue since work stream one is about to - it doesn't have much time left in a sense.

But I think the CEP should be examined. I think that turning the CEP into an actual mediation process with a mediator a trained mediator; a trained neutral would change the CEP substantially as well.

I think the view of people who have been involved in the CEP has not been that it was a creative chance to resolve differences and I think without a third party in there trying to make that happen and someone who is trained in that regard it probably will continue to be viewed that way.

So I guess my overarching point is that we should make review of the CEP a work stream two issues since talking about the IRP without talking about the CEP is like discussing the architecture of a building without looking at its ground and its walkway.



So I think our review in a sense is incomplete by not having looked at the CEP. More specifically I would suggest that the CEP should be a mediation process. So it's a thought about how to deal with that thanks.

Becky Burr: Okay, that seems like a very good way to deal with it, the question of whether how the CEP functions, whether it can be fine-tuned and enhanced or whether mediation is the way to deal with this all together as a work stream two item. I take that on board and I think that's an excellent suggestion.

Okay, and then so then the last thing here is that we would create a subgroup assisted by counsel and appropriate experts to continue the work on the implementation details.

And so we just need to think about what exactly has to go into the bylaws change for work stream one. And then let's just talk a little bit more about this binding, non-binding training whatever.

As I heard the comments there was very, very strong support for making this binding. There was also some concern about what do you do if there is just a really bonehead decision.

And so, you know, one of the, you know, one of the suggestions was maybe there is sort of, you know, high threshold community acting through the sole member both decision that says this is a bonehead decision that doesn't make any sense.

You know, you could have -- you could say in the binding nature over not time but number of cases. You could have a review and I do think that people would expect a strong review, strong support for the notion that there would

be a process to review the functioning of the independent review panel periodically.

Other thoughts on that? (David).

David McAuley: Thanks (Becky). I like the suggestion that you posed just a few minutes ago of a narrow high level community ability to say this decision makes no sense. And would suggest if we went that route the subgroup could come up with some kind of gaiting rules and description that would make it workable discretely and narrowly and not undermining IRP.

But we have to recognize and it's a good point to recognize the panel's from time to time come out with some real clunkers that make absolutely no sense. So I like the idea thank you.

Becky Burr: Other thoughts. Okay, thoughts, questions in general about this and what I propose to do is to revise and expand this along the lines to reflect our discussion this morning and to sort of create the report and then I will circulate it to work party two in advance and I think that we will probably discuss it at the full group in the call on Thursday. So I guess I am going to do that today.

(David) do you have a new hand or an old hand?

David McAuley: It's a new hand just to say and by the way (Becky) thank you for all this work that you do in revising these documents on short order. I think we should be prepared tomorrow to we should anticipate the question of well when you speak of a subgroup when you the WP2 speak of a subgroup can you tell us what you're talking about with respect to composition and time?

I mean there is the concern that Avri raises periodically that, you know, sometimes we're just creating things to kick things down the road. So I anticipate that will come up and hopefully we can give that some thought today and be prepared to talk about it. Thank you.

Becky Burr: Okay, okay and then look I don't think that, you know, that we have done an awful lot of work here but I do not think that we have a process that's ready to roll out and there are a lot of details that need to be put down on paper.

So I don't think that this is a kick the can I think this is, you know, a very important critical issue that we have to get right and, you know, we're invoking the work stream one, work stream two part of this.

So I don't think that, I think that the subgroup will have a very serious task on its hand and it will involve a lot of work getting these rules and processes right.

So I wouldn't want to minimize it's not going to be a walk in the park for those folks. Kavouss.

Kavouss Arasteh: Yes (Becky) I am in favor of the subgroup it works very well for working party one that (unintelligible) several small groups, a design team with a small group and I think that is a good idea in view of the limited time that we have (unintelligible) to people who devote their time and come up with a idea that this could easily take it (unintelligible) the next meeting. Thank you.

Becky Burr: Thanks Kavouss .Okay, other thoughts? How do we want to address I mean I think that the thing that, you know, we don't have cross constituencies, cross (unintelligible) consensus on is the sort of binding or binding at the outset.

So I think I'll reflect the notion that there would be a very narrow opportunity for the community to overturn the decision that's a bonehead decision and we'll talk about the ways in which the GAC consultation rights can be respected in this process and then I'm sure we'll have a lively discussion about it on that basis.

I mean this conversation was very helpful to me because I didn't understand that the nature of the GAC's concern and I think, you know, addressing the concern that this is not undermining the consultation right that they have under their advisory committee bylaws provision makes sense.

Kavouss do you have a new hand?

Kavouss Arasteh: Yes (Becky) once again the issue is quite simple. GAC is dealing with the public policy issues and based on this they provide advice with consensus, (unintelligible) consensus advice. This goes to the ICANN.

If they agree with that so far so good if they don't like it they could reject that. They should give the reason for the rejection. Nevertheless they should come up and find a solution.

That way the issue will not be one-sided. There needs to be a solution for that advice of this (unintelligible) the issues and that is an issue we would like to be maintained without any alteration and we would like that the binding IRP would not have any impact on this negotiation and on this finding solution.

That is very, very simple and there is no idea to give any additional advantage to the GAC. That is what has been worked for many, many years and we would like to continue to work at the minimum. Thank you.

Becky Burr: Thank you Kavouss And I think that's a very helpful clarification or articulation at least for me. My question is this issue already addressed by the fact that the decision of an IRP is not going to specify exactly how ICANN reacts to a response to a decision that it's violated its bylaws.

The ICANN board, you know, subject to the guidance and the thinking in the independent review panel decision will have to make a decision on how it's going to implement the decision.

And nothing would preclude the GAC from providing advice on that at all. But if we accept the premise as I think we do that ICANN cannot violate its bylaws.

I don't see how this process would cut off any of the GAC's existing rights.  
Greg.

Greg Shatan: Yes I think that, you know, right now clearly a decision that the board makes as a result of GAC advice with or without consultation can be challenged through an IRP as long the challenger has standing before the IRP.

That can't change, that shouldn't change the fact that its quote on quote binding doesn't, you know, shouldn't somehow exempt those board decisions from the IRP.

And I'm not sure if that's the GAC's problem that the GAC wants decisions that the board makes based on its advice to be unchangeable through an IRP. But if it is, you know, that's a grave concern that would essentially mean that the dot Africa decision couldn't have even been started in the first place.

That would seem to be me to be going in exactly the wrong direction of an accountable from an unaccountable board to an accountable board. That would leave the board unaccountable perhaps to anybody but the GAC which is clearly not the direction that the multi-stakeholder community wants to go. Thank you.

Becky Burr: Thank you, I don't hear Kavouss to be supporting the notion that anything would make a GAC, a board decision on reviewable. I hear him to be saying that, you know, if a decision was to come down they would still want their ability to provide advice and engage with the ICANN board about how a decision is implemented.

So the notion that something violates the bylaws but, you know, ICANN can't act on the GAC's, the device that requires it to violate the bylaws that's just sort of a fundamental principle here.

But maybe I could be wrong and Kavouss you have the ability to clear it up.

Kavouss Arasteh: Yes I'm very sorry I see many words that when you put them all together that is frightening me they are not compatible. What we are saying or what I am saying is that I (unintelligible) should not put in question the nature of the need for consultation of ICANN board to come to some sort of understanding and mutual agreement with the GAC if the GAC advice is not taken by the board.

This is what I am saying. IRP should not have any challenge or any imposition or any adverse effect to the nature of the consultation. That is consultation needs to be undertaken by the board with the GAC with the view to arrive at an acceptable and satisfactory solution for any advice to reach provided, to reach consensus to the work.

This is what I'm saying nothing else and nothing more. I don't think that we are talking a particular advantage so on so forth. Consultation is required and should result in some satisfactory solution.

IRP should not have any impact on this process. Thank you.

Becky Burr: So could I just ask a question Kavouss and sort of pose a concrete scenario and see if we're understanding it. Suppose GAC provides consensus advice. The board and GAC engage in consultation and come up with a solution that is acceptable to the GAC and acceptable to the board.

Someone could say still that solution violates the bylaws. That solution requires ICANN to take something, to do something that violates the bylaws. It requires ICANN to discriminate against somebody for no good reason or it requires the board, you know, to regulate in a way that is not permitted by the bylaws.

So they could bring an IRP and then the IRP panel would hear that and they might say okay, yes that solution that you've come up with actually does violate, does require ICANN to act in a way that violates the bylaws.

There is no reason that nothing would stop further consultation between the GAC and the board on how to address that issue. The GAC could provide advice and that would trigger the obligation to negotiate.

But the GAC and the board can't agree on matters that are outside the bylaws. And so all this says is if by change they do that they agree on something that would cause ICANN to violate the bylaws the affected parties have a right to challenge that.

Kavouss Arasteh: Yes allow me, if you allow me to reply to the question. You said that the GAC providing advice to ICANN and ICANN did not accept that. Then go to the negotiations and negotiations and something satisfactory both for GAC and for the ICANN.

Then someone in the community may say that this is in violation of the bylaw. If they give the good reason for that is in violation of bylaw to the (IRRP) and then you must prove that this violation is still GAC and ICANN should continue the discussions with you to comply with the provision of the bylaw.

However the negotiation should be continued and the advice should be taken. This is something that they cannot (unintelligible) that is a very critical and delicate issue requires further examination and discussion.

But the idea is that the consultation needs to be continued even needs a motion of violation by, of the bylaw by ICANN and to the community. That would not end the consultation.

The consultation needs to be continued taking the account of the view of the community in a possible or likelihood of violation of bylaws in order to correct the issue but that does not put an end to the consultation.

Consultation needs to be continued. We know that now the satisfactory provision consistent with the ICANN bylaw and so on so forth would report advice which was given by (unintelligible).

This is a very, very preliminary idea but needs to be heard and developed.  
Thank you.



Becky Burr: Okay I think that's entirely workable and I think that your explanation and clarification has been very helpful to me at least to understand what the GAC's concern is and to understand what we need to do to reassure the GAC that the consultation rights do not get cut off here.

So I think that's been a very helpful and very good discussion thank you very much. And I see there's a similar conversation going on in the chat. Okay I feel much better because I feel like the one area where we could potentially have a really big problem, you know, we have some new clarification and insights on and hopefully we'll be better able to address them going forward.

Any other closing comments from the group? Just to let you know we will be circulating a draft of the responses and revised reconsideration request section. We should be doing that shortly.

I am not sure that we're going to have a - well we will have an opportunity to discuss it next week. I'm a little confused about the timing but in any case we do want to get a discussion going on the list.

Kavouss Arasteh: (Becky) I have a suggestion if you allow me.

Becky Burr: Yes.

Kavouss Arasteh: Yes, I just make this point as a participant. When we deal with the ICANN the board, the GAC advice to the ICANN and anything after the (unintelligible) there should be some sort of consultation in order to arrive at satisfactory solutions.

We could ask to arrive to a satisfactory solution for both GAC and ICANN. We should have consistent with ICANN bylaw. That means this satisfactory solution in no way should contradict the bylaw.

It is very simple and very legal and very constitutional rather than getting some sort of thing I understand that even GAC and board may decide something which may be inconsistent with the bylaw.

That should be corrected because there should be accountability. Nevertheless the discussion should continue until the time that a satisfactory solution is found.

No doubt we should (unintelligible) consistent with the ICANN bylaw. That means any solution should be consistent with the bylaw. That is quite clearly legally. Thank you.

Becky Burr: Thank you Kavus that makes perfect sense to me. Okay, thank you very much for a very, very good discussion this morning. Please look for something from me later today and have a good rest of the day. Thanks everybody.

Man 2: By all thanks.

END