
BECKY BURR:

The recording is on. Good afternoon, evening, or I guess very early morning for some of you. I thank you all for joining us. We had an initial call several months ago, but given the [press] of getting the bylaws done and out, we thought it made sense to pause on the work of this committee. Now that that is nearly done and the transition is just upon us, it makes sense to get started here.

I wanted to just cover some preliminary issues here and get a general sense of the tasks that this group is facing and talk some about timing and then have a discussion with each other about how we will work together.

From my perspective, the work that we are doing here is absolutely critical to the accountability enhancements here. I certainly have long been an advocate for rounding out ICANN with an independent judiciary function. It's very interesting. It's very important. I think that the work that we do here will have a huge impact on the success of our accountability reforms that we've all been working on for the past two years or 18 months – I don't know.

If I could, I just wanted to just flash quickly information about the members of this Implementation Oversight Team. The CCWG Co-Chairs I expect will participate from time to time. Thomas Rickerts was planning to participate, but his plans were overtaken by events. But I know that they will be closely monitoring our progress here.

Holly Gregory and Ed McNicholas, from Sidley Austin, who have been [directing] the CCWG accountability work from the legal perspective will be joining us, and they have kindly offered to give us two lawyers for

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the price of one at these calls. [inaudible] lawyers from Jones Day on the phone. I see Kate is with us today.

JEFF LAVEE: And Jeff LaVee as well.

BECKY BURR: Oh, hi, Jeff. I should have asked if there's anybody who's on the call but not in the Adobe room.

JEFF LAVEE: I am not in the Adobe room.

BECKY BURR: Okay. Anybody else? Well, obviously the folks at Jones Day have a [lift] with the [IP] in its present form, so their insights are going to be extremely helpful.

We do have an IOT implementation Oversight Team page on the accountability wiki with the mailing list here, but I just thought that, for everybody's reference, since at least a couple of folks were not involved in every single call, it would be useful to have just this list here.

Let me make sure I didn't skip anything. In terms of our substantive tasks – and this may be short-handed – I essentially went through the CCWG report and the draft bylaws to identify what the work of this group will be.

One of our very first tasks will be to provide some consultation for ICANN staff in working out the selection of the organization that will provide the administrative support for the IRT.

The task of issuing the tender document does fall to ICANN. I did speak with John Jeffrey and Sam Eisner, and they are working on a draft RFP for administrative support providers. That will come to this group for review before ICANN issues its – that is something that needs to happen in the reasonably near-future so that we can get this process rolling.

In addition, the bylaws call on ICANN to issue, after consultation, a call for expressions of interest from potential panelists. Again, that's something we need to probably have the administrative provider in place for. But again, that's something that will come to this group for review.

This group needs to develop and recommend a proposal for the manner in which the community will review and select the proposed slate of panel members. As you guys may recall, the community proposes and the ICANN Board has the role of confirming or rejecting the proposed panelists. So that is something that I think we will need to do.

Finally, we will need to work as a group with the provider once it's onboard, and, I think, the panelists, once they're all onboard, to develop detailed rules of procedures for the independent review panel, which will be up to the Board to adopt to those rules of procedure.

The report itself and the bylaws that are under consideration right now specific some of the [test] confirmation with international arbitration norms, [inaudible], easy to understand and to apply fairly to all parties.

So that would be a very big chunk of our work. If I could just stop here and ask Holly and Ed if I've omitted any major work streams for us here.

HOLLY GREGORY: I think that's a good high-level description, Becky. I don't have anything to add.

BECKY BURR: Okay. Administrative issues that we need to resolve today – and I'd like to have some discussion on this – is our timeline. I think that the bylaws do contemplate that there may be some gaps between the time that the bylaws are adopted and when the panel is in place. So we then have to have these done by next week, which is a good thing because that would be not possible.

The really time critical piece is the RFP for the service provider, as I mentioned earlier. Assuming the transition [inaudible] – okay, I'm not sure who left the meeting, but somebody did – but we want to get going and do some work on that. I like that our near-term timeline – and I don't know if Sam or anybody else from ICANN wants to provide any information on timing or when we might see a draft RFP.

SAM EISNER: Becky, this is Sam. We haven't started drafting RFP. It's something we could do. We'll take a look and draft it based off of what's in the bylaws and what we understand to be so far as necessary.

One of the things that we've learned from the prior iteration of getting to the ICDR as the IRP provider that we have today is that, really, it's the

types of variances from their standard rules that really are where the providers look for as to whether or not it's even possible for them to step into that role.

I know, Becky, in conversations with you, we've discussed that this would be likely a more atypical provider; not necessarily one of the large arbitration providers but more along the scale of a more specified provider, such as the types that are used by the World Bank or something.

So we do have some work that we could start doing on that very quickly, but I think that would still need some guidance from the IOT regarding other special rules that would be really important, because it's really that that gives the providers the ability to understand whether or not it's a realm that they're able to step into and even participate and offer. So I think this has to be joint process.

So we could take the first step, do an RFP document. We'd need a few weeks to get that done. I think we have to get over the hump of the bylaws, so we'll have a clearer idea of timing next week. Then we could use that as a place for conversation with this group to see where there are holes that need to be filled in and how we want to collectively frame the RFP to make sure that it's actually stating the goals that we needed to state so that we have the most success of getting a provider that's capable of serving the role on the first pass.

BECKY BURR:

Okay. That's fair enough. Well, I think we will substantively move into some substantive conversations quickly. I do think it probably makes

sense to start drafting, just based on what's in the bylaws and the report, and then perhaps we can focus on some of the issues that we would want to clarify in the early calls to help make that process more meaningful.

The other thing that I wanted to talk about was meetings and frequency and timing. I think that, once we get rolling, we should try to have a weekly meeting and really dig into the substance insofar as possible. So what I propose to do is do some Doodle polling on dates and time. I would like the date and times to be relatively consistent, obviously with some rotation of hours to accommodate folks who are in different parts of the world. Hopefully we can get pretty consistent and predictable timelines on that. I'm interested in thoughts on that in anybody has views on it.

We were set up as members of the IOT, but I did think that we should have a conversation with CCWG itself. Of course, as both members and participants, the process that we use to get to this group includes both CCWG members and CCWG participants as members of the IOT. Given the nature of our work, although obviously anybody is permitted to be an observer, it's going to be important for us to keep a consistent group with pretty good discipline about attending the calls and the like. So I just wanted to raise that as an issue.

Does anybody have any thoughts or comments on the issue of other administrative issues? We have had some conversation, Holly and Ed and I, and it was our view that we would really try to talk through some of the substantive issues with respect to a detailed rules of procedure,

and we would get the groups thinking on those before we started putting pen to paper and creating frameworks on that.

Tijani, I see your hand.

TIJANI BEN JEMAA:

Thank you very much, Becky. A question about the members, observers, participants. I didn't understand your explanation. Can you please tell me who are the members and who will be the observers or the participants? [inaudible] All members of the CCWG would be members of this group, or only people who express their interest to be in? Thank you.

BECKY BURR:

The members of this group are the folks that were on the list who raised their hand, expressed interest, or volunteered by somebody else. It is a specific group who are the members here. Some of the members of this group are members of the CCWG. Some of the members of this group are participants in the CCWG. For example, we specifically wanted to make sure that we had people from civil law traditions who could speak to their experience on this, so we looked beyond the CCWG to include Marianne from .fr, who was kindly volunteered by Mathieu, who, as a French attorney, can bring that perspective to the table. So in general, the members of this group are the [inaudible] members who were on that list and who are part of a list.

Obviously, with other people, if they want to be observers, I think that in the tradition of the CCWG we would certainly need to permit that. My only question or slight caution is that we really need to have stable

group of folks who attend, and it might be hard for this group to accommodate observers or participants who just drop in and out of the process. That was the only point I was making, Tijani.

TIJANI BEN JEMAA:

Okay. May I have a follow-up question, please? Is this list closed today, or is it open for anyone to join as a member? That's the first question.

The second question was: shall we use or apply the same rules of the charter of the CCWG regarding the members or observers, or shall we use other rules? Thank you.

BECKY BURR:

This group is a fixed group. We did essentially go through a process in the CCWG, where the members of the IOT were appointed. We did ask for volunteers, and as it happened, all of the volunteers were appointed.

The notion was – and the thinking of the co-Chairs that was endorsed by the group – that this should be a smaller rather than large and unwieldy group because there would be fairly technical drafting.

So I think that we would, if other people wanted to be appointed, need to go back to the co-Chairs for their input on it, Tijani.

As I said, our meetings are open, so anybody who wants to be an observer is clearly permitted to be an observer. It will be up to the group, should we have observers, to decide whether we want to have the same rules, which is essentially that, whether you're a member or just an observer participant, you have an equal voice.

Again, I think that we need to be concerned about the size of the group and the consistency of the group. So for me, that's the critical feature. But I don't think at this point we need to be concerned because I think essentially we had the people who wanted to be on this raise their hands, and all of us were appointed.

David McAuely?

DAVID MCAULEY:

Thank you, Becky. I'm just responding to your call for questions. It's a really question of clarification. I don't remember, but did we address what the amended bylaws' impact is going to be with respect to pending IRP cases, those that are underway right now? Is that anything to do with the work of our group?

BECKY BURR:

My understanding – and, Holly, you tell me if I am wrong – is that the standard of review would be adopted as the bylaws when they bylaws are adopted. My understanding, based on conversations, was that the Board was by some measure surprised by some of the changes in the standards and was comfortable with going back to substantive standards more or less right away.

But I don't think it was in our remit to decide how currently pending IRPs would be dealt [then].

Holly, am I wrong on that?

HOLLY GREGORY: I haven't been part of any discussions around how this all works in the transition, so I'd need to go back and think about it and be informed by whatever those discussions that have taken place have been –

BECKY BURR: Okay. David, that's a really good question. We'll take it offline and report back to the group on it.

Robin has asked in the chat about: is there an expectation as to when this subgroup would complete its work?

I think there are a number of dependencies that we can't predict, and some of that depends on when they provider is in place. But the proposal does contemplate the panelists would in fact be part of consideration of the details and procedures once they are in place. So it's hard for me to predict.

I would certainly like for us to get the bulk of our work done sooner rather than later. I say that for two reasons. In November I don't think that it would be appropriate for me to chair this group once I have moved onto the Board. Also, I think all of us are anxious to make sure that there's processes in place.

Having said that, I think it's also incredibly important for us to do high quality work here, and we are not operating under a drop-dead date. But my hope and expectation is that we could get this mostly rounded up in the fall.

Okay. Moving on to the substance here, I did speak with Holly and Ed essentially to create a library of resources of the kinds of examples of

detailed rules and procedures from a variety of different sources that we might want to look at. They came up with quite a number of examples, and we will be distributing to everybody in the group shortly after this call all of the procedures that are listed there.

The International Centre for Dispute Resolution procedures is ICANN's current IRP, which, generally but with some exceptions, some modifications, follows those rules now.

The International Chamber of Commerce rules of arbitration are very highly regarded. We wanted to have a European [model], and given the international scope of ICANN, we'll be sending out the Swiss Civil Procedure Code, also the U.S. Federal Rules of Civil Procedure.

We came up with a couple of different examples. The Stockholm Chamber of Commerce has arbitration rules. There is an International Institute for Conflict Prevention and Resolution that has rules. The WIPO arbitration rules were suggested as a fairly succinct set of rules. Now, we're not talking about the UDRP rules here, but rather the WIP arbitration rules. [inaudible] has a fairly thin set of arbitration rules and procedures that might give us an example.

One that I wanted us to at least have clear is the World Bank Inspection Panel's operating procedures. The reason I thought this was an interesting example for us to contemplate is because, although it's an advisory court – it issues advisory opinions – it has the same flavor of people who are affected by a World Bank project that is alleged to be performed in a manner that violates the World Bank's own rules from project development. So it had that internal looking at the internal rules

and reflecting the “is the organization following its own rules?” So I thought that would be useful.

Now, I would like to open it up for discussion about whether there are any other particularly good examples that we should be looking at and whether this list omits anything.

I don’t see any hands. Okay. David. David McAuely has said in the chat: “One thing we might add to any set of rules in the overarching rule that, in case of a conflict with bylaws, the bylaws take precedent...” and should not simply assume that that’s a really good point, and we should start keeping a list of these things.

What I would propose to do is, when we meet in advance of that, we will have circulated a document that Holly and Ed are preparing that identifies the main points that really need to think about it addressing and serves as a kind of discussion and consideration checklist going forward and also a roadmap to the relevant bylaws’ provisions themselves.

I would expect that we would spend the next call really focusing in on those issues, getting oriented, talking about some of the larger choices that we might make, and identifying examples of different ways that those choices can be made with reference to the reference document that we have.

Yes, Avri, all of the documents and/or URLs pointing to them will be on the wiki as well. So we will include these on the wiki as well.

So that is my proposal for going forward. Holly and Ed, if you want to, talk a little bit more about those two documents just to give people a

sense of what's coming and to help us think about whether there's anything else we need to have as a resource once we jump into the substance.

EDWARD MCNICHOLAS: Sure –

HOLLY GREGORY: Go ahead, Ed.

EDWARD MCNICHOLAS: Okay. On the document for topics to discuss next time, it's proposed to lay out those key questions that we would need to address in deciding how to approach rules of procedure.

For instance, it would go into whether you'd want to have some sort of preliminary legal motion – something like a motion to dismiss so that a claim that was legally unfounded or lacked jurisdiction or was frivolous could be confronted and disposed of early on – or whether you don't want to have that sort of thing.

On the question about whether or not you want to allow for any sort of a discovery process, a limited discovery process, a disclosure process, in some courts you simply disclose the things on which you're going to rely and there's no further discovery.

Another way of doing that in international models is to have an investigating magistrate model, in which the party presents their concerns and the magistrate conducts the investigation/the panelists

here conduct the investigation and then comes back and reaches a ruling.

So there are several different models. There are also styles of briefing, length of briefing, number of – do we want to allow reply [inaudible]? Do we want to do things in person? Do we want to do things telephonically? Some of this has been touched on in the bylaws, but there's a lot of latitude.

So it's developing a list of those items that are left open from the proposal and bylaws discussion, that were left open from implementation, so that we can then run through those and get a sense of the group as to how we want to write up those issues, at least in the draft-proposed set of procedures.

BECKY BURR:

Okay, great. Does anybody have any questions about our work or any suggestions for resources? Chris, I see your hand.

CHRIS DISSPAIN:

Thanks, Becky. Sorry. I'm just coming off mute. Morning, afternoon, evening. Sam touched on this, I think, when she made a comment. These lists of resources are great. Do we have any examples anywhere of systems that have been designed by someone who is not going to end up being their own provider and who is then going to have to put it out to tender for providers?

Because as Sam said, part of the challenge here is the cookie-cutter approach to this sort of thing: "Here are our rules. Use them." I have a

little bit of experience of that in a minor way because, when we designed the Australian dispute resolution process for the domain names, it took us a long time to persuade WIPO to become a provider because they simply didn't have the ability to do it without using our rules.

So I'm curious as to if we have any examples of processes that have been gone through by organizations that have ended up with an independent provider with their own set of rules.

BECKY BURR: The only one I'm familiar with is ICANN itself, which essentially uses the ICDR rules with some minor caveats.

CHRIS DISSPAIN: Yeah, because we are likely to end up with, are we not, with some very specific – there are sorts of buckets of things, like Ed was just talking about: Do you want to be able to launch a thing to say, "This is frivolous" and so on? But we really are going to end up writing our own stuff out at the end.

So I just want to flag that we need to keep in mind that we do need to find a provider for all of this at the end of the day.

BECKY BURR: Right. I think that's right. I think, in some ways, they're getting into the Centre of – usually we can't call on Swiss government or the U.S., so of course the Centre provides us – but, yeah, several of the systems on the list are potential providers, and as we discuss the substance, it may

become clear to us for one more national provider is [inaudible] another.

CHRIS DISSPAIN: Than others, yeah. I'm wondering if we should consider – not at this stage but at various stages throughout the process – reaching to two or three of the identified providers to get some, when we're making critical decisions, input from them.

BECKY BURR: That actually is a really good idea. There's a continuing question: would you be willing to provide this if we change this?

Malcolm?

CHRIS DISSPAIN: Yeah. Thanks, Becky.

BECKY BURR: Thank you, Chris.

MALCOLM HUTTY: Thank you, Becky. Is it given that we are looking to contract this function to a dispute resolution provider that offers that as a service, as opposed to constructing a mechanism that will operate this function by a panel that has its own support mechanism to provide what is necessary for its support?

BECKY BURR: It's clearly not simply contracting out this function, and the description is an administrative support function to help us identify panelists and then obviously to help manage the panel and processes to be a provider of additional panels when the scanning panels are overtaxed and the like.

I think the assumption is, Malcolm, that the organizations that are most likely interested in doing that will be organizations that provide these kinds of services generally. But I do not think that we would limit the tender to those organizations if the proper group with the proper credentials came along. In other words –

MALCOLM HUTTY: Becky, if I may, that wasn't really what I was asking. It was more: are we looking for an existing organization to provide that function, rather than to construct one?

BECKY BURR: The notion is that there would be a tender for administrative support, and the assumption behind that is that you get an existing organization that comes with the economies of scale and the experience and resources to provide that service flexibly. But as I said, I don't think that we're ruling out any kind of proposal.

Am I answering your question now? Because I'm not sure I am.

MALCOLM HUTTY: Yeah. I mean, maybe. It certainly struck me that, if we are assuming that we're going to give it to an existing dispute resolution provider, and

given the last questions, choosing a dispute resolution provider entails adopting their rule set rather than a rule set that we have built. It raises the question as to whether we can be confident that an existing provider will necessarily meet our needs.

BECKY BURR:

Well, I think that Sam pointed out that there are probably some limits to what existing providers are maybe willing to do in terms of deviating from their standard rules. But that is something we need to examine. And let me just say, when ICANN came up with the UDRP, there were not providers of UDRP services. All of them were tailored specifically to this.

My instinct is that this is, if you are in the business of providing dispute resolution services, a fairly interesting project.

Avri? Your hand keeps going up and down. I can't really tell. It's down now.

Chris?

CHRIS DISSPAIN:

Sorry. Mine should be down as well, Becky. Apologies.

BECKY BURR:

Okay. Okay, any other questions or comments? Okay. Under those circumstances, I think we can close a little bit early today. We will get the documentation up in the wiki and circulate it to everybody on the group. We will also be circulating a survey for days of the week and

times to see if we can hit on a couple of reliable times that serve most of our needs, with apologies. There is always somebody who has to stay up late at some point or wake up very early.

Then we will start the discussion going on the list and plan to speak again next week.

Okay? Thanks, everybody. Have a nice evening or day, if it's the early morning for you.

UNIDENTIFIED MALE: Thank you, Becky. Goodbye.

[END OF TRANSCRIPTION]