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BECKY BURR: Hello, everybody, and thanks for attending this morning. Hopefully, more people are joining. We usually take roll based on who's in the Adobe Connect room. If there is anybody who is not in the Adobe Connect room, could you identify yourselves?

Okay. And there are three participants in the Adobe Room who are identified by their telephone numbers: 202-XXX-8479, 310-XXX-5800, and 703-XXX-4154. Could you please identify yourselves so that we have a complete roll? 4154 is you, David, okay.

FRAN FAIRCLOTH: Sorry, I was on mute.

UNIDENTIFIED FEMALE: Fran is with us, at Sidley. She is dialing in.

BECKY BURR: Okay.

AMY STATHOS: Hey, Becky, the 310-5800 number, that's ICANN's main number.

BECKY BURR: Okay.

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*Note: The following is the output resulting from transcribing an audio file into a word/text document. Although the transcription is largely accurate, in some cases may be incomplete or inaccurate due to inaudible passages and grammatical corrections. It is posted as an aid to the original audio file, but should not be treated as an authoritative record.*

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AMY STATHOS:

I don't know who that is, but...

BECKY BURR:

Okay. All right. Well, if anybody is not identified in the room, just let us know. And I know that Ed is doing a speech today, but he has rearranged his schedule to be able to join us and should be here in a moment. Also, Marianne Georgelin e-mailed me to say that there is a transportation strike in Paris today, and she is stuck in traffic. So I think we will proceed here.

I've sent out a deck that the Sidley folks prepared that sort of outlines a number of the procedural issues that we need to talk about. And I propose that we walk through this document today. It is, at least on my screen, rendering partially. Some words are not showing. Is anybody else having that problem? Okay, it looks good there? All right, that's fine.

In addition, I sent out a document that essentially has this deck in Word format. And some folks may be interested in using that for noting things.

And finally, a very helpful document that essentially walks through the IRP section of the CCWG proposal and maps the provisions in the proposal to the IRP Bylaws, and other relevant sections in the Bylaws, just so that we can double-check that, going forward. Those are provided for background for members of the IOT.

In addition, I hope that you all got the background documents that I sent out last weekend for separate mailings. Sorry to flood you with

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background information, but I thought that as we go through this work, it may be very useful for people to have the documents in hand. And I have not checked the wiki, but I believe those documents, or the links, should also be posted there as well.

Okay. So just so we're all on the same page, what we propose to do is walk through this deck to talk about – sorry – several administrative things that we need to do deal with in the course of our work, the structural bodies being the IRP provider that the proposal calls for and the standing panel. Some administrative questions about pre-hearing processes. And there's substantive and policy, the emergency/injunctive relief process; also, cooperative engagement process and how that interplays with some of the Work Stream 2 work; filings and amended pleadings; motions; intervention, joinder, and consolidation; the panel itself constituting the decisional panel, choice of law, jurisdiction; arbitration format; discovery, evidence, and witnesses; settlements; and appeals and revisions to procedures.

Holly, [inaudible] hand is up.

HOLLY GREGORY:

Yes, my hand is up. I just wanted to say two things about the materials and the questions that we provided. The questions could use some fine tuning. And sometimes, I was just noticing that the questions almost – they don't mean to assume any kind of answer. And so this was a quick stab at sketching out the procedural questions that the Bylaws raise. But there are more, and they can be in more detail. And again, they're not meant to assume any answer.

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And the second thing I just wanted to say is we provided the chart that shows the sections of the Bylaws next to the procedural questions so that we can always make sure we are very cognizant of what the Bylaw framework is. Because I find that even though I'm working on these documents all the time, it's very easy to forget what it was that we specifically said in the Bylaws. And again, the Bylaws are also wrapped back to the proposal, and you have those materials so that we can keep this really grounded in accuracy around what the proposal said and what the Bylaws say. That's all.

BECKY BURR:

Perfect. That's very useful. And I do think it is very useful to have that, and also the correlation to the proposal itself.

Okay. So the first couple of questions we talked about in the proposal, an IRP provider. And last week, we talked a little bit about the process for selecting the IRP provider itself. And so one question is, should the rules that we're developing now talk about the manner in which the IRP provider's office functions? So, for example, would the provider be responsible for maintaining the online dockets and the like? The current IRP procedure calls for most filings to be made public as soon as they are filed, subject to some limited exceptions. And currently, I think the community relies on posting by ICANN on that function. But one of the questions that we'll want to think about is, what are the requirements for those sorts of things?

David?

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DAVID MCAULEY:

Thank you, Becky. I do have a comment on that question. And my comment is it strikes me that we should let the tender process drive this and maybe put placeholder language here with respect to what the provider will provide. And my guess is that when we go out with a tender, basically the tender will include a copy of the relevant Bylaws for the IRP. And we'll ask people to respond to us as to what services they provide, roughly the cost, obviously. And we should then look to what they've provided with respect to dockets, maintaining documents, etc., etc., and let that drive what the ultimate rule is. Because we may want to let the attractiveness of the provider shape this particular question. Thank you.

BECKY BURR:

Thank you, David. That makes total sense to me, although I think we probably will have some views on minimum services with respect to transparency and the like. But I do think that that probably makes sense.

Any other comments, just sort of preliminary comments on the functionality of the provider that we should be looking for or that we should be specifically asking about in an IRP? Obviously, the ability to manage, identify potential candidates, help us vet those candidates, and then to manage cases is something that should be dealt with.

David, is that a new hand?

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DAVID MCAULEY:

It is, Becky. Another thought occurred to me, and that is – and this is probably a question for Bernie more than anyone. And that is, if we could get the views of the ICANN staff that handle the administrative side of IRPs to date and find out from them their thoughts on the question that Becky just asked, and if there's anything they see as an issue that might be fixed in this particular iteration. So if there are people that have routinely done this and have some insight as to how the administrative process functions or has some stickiness to it, it might be helpful to get their views, if there are such folks and it makes sense. Thanks.

BECKY BURR:

I see Amy on the line, and Kate. So let's turn to Holly and then Amy or Kate if they have any input at this point.

HOLLY GREGORY:

Terrific. I just wanted to mention that if you all think it would be useful, a document that we're creating for ourselves internally, so that we assure ourselves that we have a better understanding, is we're doing a little outline of how we think, based on public sources, it currently works. And so that we'll have something to look at, I think that might be helpful for you all as well. So let us know if it is worthwhile. We're happy to provide it. But we're in the process of doing that now, because we realized we had to have an understanding of how it currently works to be able to help you think about what it might be, where you might want some changes.

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BECKY BURR:

Okay. And I imagine that Amy can provide some support on answering those kinds of questions.

Amy, not to put you on the spot, but in terms of services and functionality for the IRP office functions, are there any things that jump out at you as things that we should be thinking about, particularly in terms of Rules of Procedure?

AMY STATHOS:

Yes, thanks, Becky, and thanks, Holly. Holly, just as an amendment to what you're saying, it may be helpful if you want to have a call so that we can share with you exactly how it works right now, in terms of the administrative aspect, our working with the ICDR, who is currently the sole IRP provider that ICANN has named.

Becky, yeah, in terms of some of the procedure, I want to think about the specifics, the things that we faced over the past several years. One of the things I think we want to think about is what decisions the provider itself might be empowered to make, short of having the panel in place, etc., if there are any type of administrative decisions. Because right now, the provider is loath to make, really, any decisions without a panel. And I think there's probably some things that a provider can make a decision on that you don't necessarily need a panel. I don't really want to say right now what they are, because there's just a bunch of stuff rolling around in my head that I think we can sit down and think what we've experienced over the past years that might be helpful for this group to think about.

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BECKY BURR: Okay. That would be very useful. I imagine this would function in some ways like a clerk of court. And sometimes, clerks can, in fact, be decision-makers.

Avri?

AVRI DORIA: One of the things I was thinking of in relation to that though, this will have a standing body behind it and can very well have some member of that, or some function of that, that allows for these earlier actions and decisions without [full-on paneling]. So that might be another way to look at it, as opposed to – because even a clerk may talk to a presiding judge, I would assume, though knowing less about this than many. So I'm just wondering whether that would be another avenue for that kind of issue. Thanks.

BECKY BURR: Yeah, that's also a very good point. So, Amy, as you are thinking about those decisions, it would be helpful for us to know – one of things that we'll even want to think about is what are the buckets of early decisions, and who can be empowered to make those decisions? So Avri is right. The nature of this, with the standing panel, may make some things easier. But we still need to draw lines about what the provider can decide, what the provider would need to consult with a member of the panel on, and the like. And any of the information, Amy, that you guys can put in front of us, in terms of your actual, real world experience with IRP, would be very helpful for us to know.



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AMY STATHOS: Sure, yes. Thank you.

BECKY BURR: So this is exactly the kind of conversation I want to have today, which is a preliminary brainstorming conversation. So we will probably end up with some assignments that bring our discussion from the abstract to the concrete.

Okay. In terms of the standing panel, one question is, should there be an application form for members? Is that something that this group wants to do, based on the criteria? Is that something that we should defer to the panel to do? Is there some halfway in between? Sort of we take the criteria for panelists that are in the proposal, talk through them, flesh them out a little bit, and then ask the provider to take that to the next step. And then should a method of ranking applications be developed? And those two things necessarily go hand-in-hand, because we have to have a developed list of criteria in order to be able to do any kind of ranking.

But one of the, I think, more challenging tasks for this group is to figure out what the process by which the community develops a proposed panel for the presentation to the ICANN Board. And I think we will need to have procedures in place, one for bringing information to the community, and then the process by which the proposed panel is put together. And I think that is something that there isn't a lot of... Well, I don't know. Maybe there are other processes out there that we can borrow from. I know in the United States, for example, that the

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American Bar Association does evaluations of prospective judges. I don't know if there are other bodies, that that is something that takes place elsewhere in the world. And I don't think that we have... Arun might have a sense of how that happens, for example, in India, if there's any sort of learning to be had by how other prospective jurists are evaluated.

David?

DAVID MCAULEY:

Thanks, Becky. Just to answer your question, my strong preference would be that we do develop an application form and not let the panel take care of this, even if it's a rudimentary form. But things such as the person's name; where they live, for geographical purposes; who they're employer is, for conflict purposes; whether they've been disciplined or are under a disciplinary proceeding; all those kinds of things that you might find in a Statement of Interest, that it's under control of ICANN, saying, "Here's the form. Fill it out," so that the people have an idea, at least a rudimentary idea, of who the service providers are. Thank you.

BECKY BURR:

Oh, I definitely agree on that. I think we definitely want to have something like that. The question is how much further we go in that.

EDWARD MCNICHOLAS:

Becky, by the way, I have joined into the call.

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BECKY BURR: Oh, hi, Ed. Thank you for joining. And please feel – we’re just walking through this document here. And the goal is, basically, to do some brainstorming and make things a little bit more concrete. So I am taking it that the sort of decision point here is that we would work up a kind of an application with basic information kinds of questions, and then also any more elaboration on the requirements that are in the proposal. But I think that’s something that we can easily put together and bring to the group specifically for review and discussion. So I’ll take that as a to-do.

EDWARD MCNICHOLAS: One thing with respect to that, the ranking of applications, one model might be something like the federal civil service, where there were certain points awarded for certain areas, so that the application and the – there’s a scoring system, in terms of having certain credentials would get certain points, having certain... And then other things, such as award veteran status, disability status, diversity, these sorts of things can be awarded an express number of points. I don’t know if that would be helpful, in terms of having the community express relative valuation of things, or whether that would cause such a long discussion that it would derail things. But that was one way of possibly doing it, in terms of scoring things and having the evaluation process tied to the application in a fairly rigorous way so that the applications can be evaluated more objectively, as opposed to subjectively.

BECKY BURR: Well, that’s an interesting proposal. To me, it feels a little bit that, at some level, we don’t know precisely who is going to apply and be

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available. And so I feel like at some level, we have general guidelines for what the requirements are. To me, until we have a better sense of who the applicant pool is, it would be hard to assign points to those things in a relative way. But others may disagree. Okay. I think –

EDWARD MCNICHOLAS: I do think it would be intensely bureaucratic. It might be too much of a system that's set up for the relatively small number of panelists that would be involved.

BECKY BURR: Okay. What I'm thinking is – and, David, I'm going to volunteer you and I to just go through the proposal itself and pull out the elements, to really bring that for a deeper-dive discussion back to the group next week, if we can do that?

DAVID MCAULEY: That's fine with me, Becky.

BECKY BURR: Okay. Thank you, David. Okay. Specific training, should specific training be required? I definitely think that there is a lot of ICANN-specific information that we need to have in place for these folks when they come on. And on that point, I'm curious as to whether ICANN already has training that it does, not necessarily for the IRP folks, but when it brings new people on. For example, how did you explain the world to

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our new CEO? Are there materials out there that could be the starting point for more in-depth training for panelists?

People don't have to answer that right now. But if the ICANN folks who are on the call could go back and talk with colleagues about how you do a new introduction to ICANN. I know there's also programs that get put on at the various ICANN meetings for Fellows and stuff. And maybe we could gather some of those resources, rather than reinventing the wheel on the basic background stuff. Obviously, as we go along and get a better sense of the rules and procedures here, there will be some IRP-specific training.

But at the very least, I think the point of having a standing panel is to get away from some of the...to have better-informed decisions, decisions that are better informed from the "what ICANN is" and what its goals are. So I'd like to put that on a list.

In terms of, obviously, conflict and impartiality, that was something that the CCWG was quite clear on, that conflicts and impartiality kinds of issues had to be addressed, that there certainly had to be disclosures. And although we didn't talk about annual updating, I would imagine that that is something that makes quite a bit of sense.

In terms of term limits, the CCWG proposal was quite clear that there would be one five-year term, with no renewals. So there was a strong feeling that we needed to have a long enough term, but that there should not be renewals. So I think that's something that the CCWG put together.

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Then, obviously, we did also talk about a period of post-employment preclusion, some period of time after the prohibition. So we didn't talk about what the period of bar from post-term appointments to the Board Nominating Commission or ICANN would be, but that is something. The CCWG definitely felt that there should be a post-term prohibition on appointments or employment, but did not set the period of time for that. And then the kinds of gifts and entertainment rules.

Ed and Holly and others? I see that David McAuley has his hand up and also has a good comment in the chat about conflict disclosures when they're first appointed and then when assigned to [any place]. David?

DAVID MCAULEY:

Thank you, Becky. On the terms of the panelists, I do recall the discussion in the CCWG. But I think in the Bylaws – and I have them in front of me – I think the appointment to the standing panel, the language is, "shall be made for a fixed term of five years, with no removal except for certain causes. The recall process shall be developed by the IRP." It didn't make it into the Bylaws, I don't think, that it's a one-term only.

BECKY BURR:

I think you're right, although I went back to the proposal, and it clearly is. "Term limits should apply. Five years, no renewal." But I think you're right, it didn't make it into the Bylaws.

My question for Ed and Holly and others is whether there are examples of the kinds of conflicts and impartiality rules that apply in the federal

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courts, for example, or in other systems that we can actually just try to borrow from.

EDWARD MCNICHOLAS: There are things. Sorry, I'm not in the Adobe room. There are certainly different arbitral bodies – JAMS, AAA – have code of ethics and code of conduct, in terms of disclosure. There's also federal judicial rules that we can borrow from. Oftentimes, they are expressed in the civil rules or the criminal rules, and sometimes they're in a code of judicial conduct separate from that. We could certainly develop a few examples of that and see which ones read best in this context.

BECKY BURR: Yeah. I think it would be useful to give us the main point comparison of how a couple of places do it, or just take a look and make a recommendation of one or two for us to consider. Obviously, we should probably look at the ICDR, since that's what ICANN is operating under. But otherwise, just take a look and see what's out there so we don't need to reinvent the wheel.

Okay. Moving on to the pre-hearing process, so we do state in the proposal what the standard for emergency/injunctive relief would be. This question, the question that you're raising here really is more about do you have to have a panel formed beforehand? Do you have to essentially file a case? What's the nuts and bolts of the operation that we would use?

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I just want to go back. Amy note that International Bar Association Guidelines on Conflicts of Interest in International Arbitration, that's a good resource for us.

EDWARD MCNICHOLAS:

And there's two main approaches there. I guess one extreme would be the federal rules, where anything that is descriptably a complaint is enough to start the process. It could be a scrawl on a cocktail napkin saying, "This person wronged me, and I want to sue them." You could push it very far into they'll take anything and work with it, which is great for accessibility. I don't know that we have to have that same accessibility concern here, given the nature of people who would likely have ICANN disputes. It'd mainly be corporate entities, and you would assume that they can work in the model, I think, closer to, for instance, what they do for the Domain Name Dispute Resolution Policy, where there is a very specific formatting of complaints and a recommended form that is used so that it does cut down the cost a little bit, because people don't have to wonder about the format of the complaints. But it does also then create the possibility of complaints being bounced out because they are not in compliance with the procedural rules. And so sometimes if you have that, you could have the cure where the clerk gives you something nonconforming you didn't notice, and you have three days to cure or something like that. Walk the middle ground.



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BECKY BURR: Okay. Any thoughts on that? I think we want something more than a napkin but not so technical as to it has people bounced out on mere technicalities.

David McAuley?

DAVID MCAULEY: Becky, hi. My attention was diverted by somebody for just a minute. But I believe we're discussing still the ability to deal with emergency relief and issues like that. Is that correct?

BECKY BURR: Yeah.

DAVID MCAULEY: Something occurred to me that when Holly and Avri were talking earlier, about the idea of whether the pleadings were sufficient, can the IRP provider have the ability to wash out claims? And Avri made the point, there's going to be a standing panel behind there. So the idea that occurred to me, maybe the standing panel, we could adopt the concept that one of them will be sort of a motions judge or a magistrate – and it could rotate every quarter, something like that – to deal with questions of adequacy of pleadings in emergency relief to simplify it and have a person from the panel there available for that kind of duty in a formal way, in a sense. It might make it easy. Anyway, that's my observation. Thanks.

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BECKY BURR:

Okay. That's good. I think that fits into the kind of thinking that Amy was going to do about what kinds of decisions could be made and by whom, before a full panel is established and empowered. So we'll mark that down as something we want to come back to.

The next thing that we have on the pre-hearing process is the cooperative engagement process. Now, I will just tell you that what we put into the proposal was essentially there would be cooperative engagement, but that either party could decide, after the first meeting, that cooperative engagement wasn't going to work and invoke more formal mediation here. And that has the effect of allowing ICANN to continue to control its cooperative engagement process, or constructive engagement process, or whatever it is. But give people an [off-ramp].

I have to say that when the CCWG was really thinking about IRP issues, one of the most often heard complaints were complaints about CEP. And so I think we can make recommendations about CEP, but I had sort of thought of this as something for ICANN in the first instance to design, with the safeguard being that formal mediation could be invoked at any point in this process. And so one of the things that we will need to think about more is what the formal mediation process is here.

But, again, Amy, I don't know if you have views or inputs on this particular issue.

AMY STATHOS:

Yeah, I think the process of CEP was added back in 2013 without consideration of any particular issue. I don't know that CEP has been, as it's currently written, tested sufficiently in non-New gTLD related

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matters. And I think we should look at how it's written and what we can look at to modify it, because what you have to have, is you have to have the ability of somebody to actually provide relief. And who the CEP, parties are involved with CEP, to be able to actually try to narrow issues before they get any further down the path. And I think that's something the group can kind of look at and consider, to see... Seeing how it's worked with New gTLDs may not be an accurate test of a process that we have tried to utilize for just other general ICANN-related matters. That's just an observation I have, from what I've been involved in.

BECKY BURR:

That probably makes sense. Bernie has noted that CEP is on Work Stream 2's list. So again, I think that brings me back to my sense that, to the extent that we have observations about CEP, we can feed those into the Work Stream 2 work. And anything that comes out of that can be folded into this.

Then kind of narrowing of issues is I felt that... Holly and Amy, you guys will remember when we were sitting in that conference room in Los Angeles at the very early stages of the Bylaws, we had this chart that addressed the narrowing of the issues. And I thought that the narrowing of the issues came after a formal filing.

AMY STATHOS:

Actually, no. At least the way it works currently is when we get notice of somebody who wants to initiate CEP, that will initiate the process before an IRP is actually filed.

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BECKY BURR: Okay.

AMY STATHOS: At least that's the way it currently works.

BECKY BURR: Well, I would think that that opportunity, and any kind of mediation, to narrow issues and proceed only with you were not able to resolve. So that makes sense.

Bernie, I see your hand.

BERNIE TURCOTTE: Thank you, Becky. Just a reminder for everyone, for transcripts and everything, if you're going to speak, please identify yourself. The voices that we're really used to and speaking a lot, like Becky, that's not required. But we have some voices [inaudible] on the call. Easier for the notes, and easier for transcription later. Thank you.

BECKY BURR: Great, thank you, Bernie. I see that Marianne has gotten out of traffic. Welcome, Marianne and Olga. And Tijani has joined us. Thanks, guys.

Okay. Moving on. And just for the people who have joined us as we've gotten into the conversation, we're really just working our way through a deck and brainstorming as a preliminary matter and identifying places

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and ways where we can get more specific. And so that's what we are doing here. And 40 minutes to go, so I think I should speed it up.

Okay. The next issue is filing notices/answer/counterclaims, formal guidelines for the filings, page limits and other restrictions. Now, I know that there were page limits in the Bylaws. And I am hoping that Holly can remind us about what the state of any of these kind of details, in the current Bylaws, are. Because I thought we had retained some of those page limits and the like.

HOLLY GREGORY:

I'm not sure that we did. I'm doing a quick scan through this, and I don't know that we did. I think what happened was it was decided that those were implementation issues. I could be wrong. It's hard to be familiar with all this.

BECKY BURR:

Now, I'm just looking through it myself. I think that for us to do a deeper dive on this, it would be very useful to have side-by-side of what the limits in the old Bylaws were and what other arbitration bodies recommend, so that we can just look at those things. And obviously, I think everybody's interests are in having some sensible rules to maintain some limits on the scope and the cost and all of that, of the process. And we just need to be informed by that. So maybe we can get that.

David McAuley?

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DAVID MCAULEY:

Thank you, Becky. I think it would be good too to get Amy's perspective, and the folks that worked on it before, to see if the 25-page limit that was in effect before caused any problems. But I do think a page limitation is a very good idea.

I also want to float an idea that I think this group should come up with, and I'd be happy to take a pass at it whenever the point comes up, that every pleading, whether it's a claim or a reply or whatever it is, include a certification that the person signing the claim has read the Bylaws, believes that this is a proper claim, understands the relief that's available – for instance, if the panel can only declare something is or is not within mission, etc. – and also maybe specify that they've read those provisions of the Bylaws that say, "If you file a frivolous claim, you might be liable for costs." So I think a paragraph at the end, a certification paragraph, would be a good idea. And I would urge that we do that. Thank you.

BECKY BURR:

Okay. That makes total sense to me. So if we could just get, I think, on these sort of, how the old Bylaws or rules treated these things. And by "these things," I mean filings, amended pleadings, and motions. And then maybe comparison to a couple of other forms out there so that we have some sense. And then very much would like to hear from Amy and the ICANN people on their experience with those kinds of procedures.

Holly, your hand is up?

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HOLLY GREGORY: Yes, just to say that we agree. And that was one of the purposes that we were thinking in trying to have a very high level outline of the current processes so that, as you go through these kinds of issues, you can give some thought to how it has been done here, from the experience of whether it's working well or not, and use that to guide the decision-making of this group.

We will sketch this out, work with Amy to make sure that it's accurate and get her feedback, and then get something to you. This might take a week or two. So I can't promise that we'll have it for you next week.

BECKY BURR: Yeah, that's fine.

HOLLY GREGORY: But we'll move as quickly as we can.

BECKY BURR: Okay. I don't know the answer to... But I don't recall there being any form of early dispositive motions allowed in the existing IRP. I think the CCWG –

OPERATOR: Pardon the interruption. Tijani has joined.

BECKY BURR: Thank you. Hi, Tijani.

TIJANI BEN JEMAA: Hi, how are you?

BECKY BURR: Good. We're good. One of the things that the CCWG was very concerned about was the possibility of dealing with frivolous or abusive claims. And so I think that is something that early dispositive motions that can be used to sharpen the issues and to identify abuses of the process and resolve them expeditiously is something that is important.

Amy, was there a specific provision in the ICDR rules for this? If so, was it ever used? Was it effective? What are the things that we should be thinking about, based on your experience with this?

AMY STATHOS: Thanks, Becky. I just noted in the chat that I have to drop off in a couple of minutes, because I have another meeting starting at 11:00 on my calendar. So I apologize in advance. But there was no specific provision about motion practice of any kind. I do think one could be beneficial for things, just like what you're talking about, which is frivolous filings or things that just clearly, on their face, are not sufficient to even – if you want to state a claim, using a legal term, in the United States here. But there was not anything specific in place, and is not at the present time.

I don't think that anybody, as I recollect, to date has actually attempted to impose motion practice. That said, there have been times where the panelists have asked for advanced briefing on particular minor issues so they can understand. But it didn't necessarily result in any final



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decisions that would eliminate the need for continuing the IRP or anything along those lines.

BECKY BURR: Okay. So this is something that definitely we want to think about, because we are making the IRP much more accessible. And that is a good thing, but we have to be conscious that, at the same time we do that, we want to be very disciplined about sharpening issues and ensuring that the panel is looking at issues that are properly before the panel. So I think that's something that we definitely want to give some serious thought to.

AMY STATHOS: Okay, thanks, Becky, again. I apologize for having to drop off. I've got to go now. Okay.

BECKY BURR: All right. Sorry about that.

AMY STATHOS: Thanks. Bye-bye.

BECKY BURR: Okay. Another issue that we did talk about in the CCWG was intervention, joinder, and consolidation of issues, and intervene processes for intervention. I know that one thing that folks from ICANN identified was a difficulty in some of these situations where, really, the

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dispute may have been between [inaudible] and one and another party, but the dispute also implicated the rights and interests of other folks.

Now, I believe when I looked at it that the ICDR rules did provide for some forms of intervention. But it seems like that is something that we do want to think carefully about. Obviously, you don't want to allow anybody to intervene in a dispute, but you also do want to make sure that all of the parties and interests are before the panel at the right time. And so that, I think, is something that, as we go through the documentation, we really want to think about, that we are making sure that there's an efficient way for other parties who have an interest in the dispute to make their views known or to be participants.

And then the other thing is consolidation and the rules for consolidation and bifurcation. Again, I don't think that has ever really come up. Kate may be able to correct me if I'm wrong. But this is something that was identified as a problem.

Ed, I see your hand.

EDWARD MCNICHOLAS: Yes. I don't know if you can hear me well. One of the issues would also be whether there should be something short of full intervention, such as an amicus brief, so that people who feel that they want to say something about a dispute can present arguments and present concerns to a panel without having to jump fully into the dispute.

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BECKY BURR: Okay. Yeah, and I think that probably makes sense in some of these things.

KATE WALLACE: Becky, with respect to bifurcation, it hasn't been an issue to bifurcate proceedings in their entirety. We have had questions from panels on various IRPS who ask the parties to brief a specific issue, separate and apart from other issues that are pending in the case. But it hasn't resulted in any sort of bifurcation of the proceedings as a whole.

BECKY BURR: And any consolidation?

KATE WALLACE: Yes, we have had consolidation. I am trying to remember which IRP it was, but it was recently. And basically, the same types of issues were presented, and the claimants agreed to consolidate. So that has happened.

BECKY BURR: Okay. Okay. So moving along, the process for selecting the IRP panel, I think that since the general notion in the CCWG is that each party would select one panelist, and those panelists would select a third. That's sort of an odd notion in a standing panel, but I believe that is what we proposed here. Is that correct? I think that is what was proposed. So a system that essentially says ICANN picks one, the claimant picks one. And that is obviously from a list of otherwise available panelists,

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because panelists are engaged in other things. There could be problems about that.

So I think we're going to have to think through some of these processes. I believe that there are processes in place in the existing IRP for challenging in partiality. Those are part of the [ICRB] rules, and we may want to look at those to determine whether they are adequate.

In terms of choice of law and jurisdictional questions, I think this is an important discussion for us to have here. Currently, ICANN is, and will remain for the foreseeable future, a California corporation. It is incorporated in California. Presumably, the meaning of its Bylaws would be read by California law. Ed and Holly, correct me if I'm wrong on that. But it would seem odd to have the interpretation of the Bylaws or the Articles of Incorporation be subject to another law. But I think we should discuss that, and I just shouldn't assume that I understand that.

EDWARD MCNICHOLAS: That would be my understanding, that it would be under California law, yeah.

HOLLY GREGORY: Yeah, the Internal Affairs Doctrine, which is a choice of law construct, provides that bylaws are interpreted under the law of formation, jurisdiction of formation. So here, that would be California.

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BECKY BURR: And we really wouldn't have much by way of interpretation of agreements, unless it's the contract between PTI and ICANN, which would come up in the IANA context.

HOLLY GREGORY: And any of those agreements will probably have a provision that says what law they should be interpreted under. It's a fairly standard concept, provision.

BECKY BURR: I agree. So Bernie has noted that jurisdiction is a Work Stream 2 topic also. I think that the discussion there are both broader and narrower, in the sense that the question would be, in some of those, should ICANN be entering into contracts where the choice of law is other than in California? Which would obviously implicate, if a contract was in some way before the IRP, would implicate that. But I think the question of whether the Bylaws themselves are interpreted in accordance with jurisdiction in which ICANN is incorporated, whatever that may mean, as [that going] in principle seems to make sense here.

Holly, your hand is up. I don't know if that's a new hand. And then David McAuley.

HOLLY GREGORY: Yeah, I just wanted to say that while jurisdiction may be a Work Stream 2 topic, also I think it's jurisdiction in a different respect. So long as ICANN is a California corporation, its Articles and Bylaws were drafted under California law. And California law is the law that applies to their

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interpretation. There's simply no way to apply some other law to have the California bylaws get interpreted. It would make no sense. We would have bylaws that we now wouldn't know what they mean. So they exist in a framework of California law. They were drafted under California law. And the only way to interpret them is under California law.

Of course, that all changes if you decide to reincorporate someplace else. And then we'll have Articles and Bylaws that are drafted under whatever the law of that jurisdiction is. But for now, California law applies to the interpretation of Articles and Bylaws.

BECKY BURR:

Okay. David McAuley?

DAVID MCAULEY:

Thanks, Becky. Maybe I should have lowered my hand, but listening to what Holly said just now makes me just think a little bit more. But I was going to say that it's possible that an issue before IRP also must be hinging on an interpretation of Bylaws as the application of the Bylaws to a certain set of facts, where both parties agree to the interpretation. And I don't know. I don't know. I have to think this through a little bit more, based on what Holly just said.

But I also wanted to note, as Bernie did, that it's a Work Stream 2 issue, although it is cabined a bit, as Holly said. So I just need to think it through a little bit more, Becky. Thank you.

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BECKY BURR:

Okay. Well, I do think that this is a complicated issue. There are certainly a lot of feelings in the community about this. And in some ways, what the community decides to do in Work Stream 2 would be naturally woven back into this if, for example, there was a decision to reincorporate ICANN in some other jurisdiction.

But here, the discussion really needs to be, is there a circumstance under which the choice of law would be something other than either ICANN's incorporation, to the extent where talking about the meaning of the Bylaws, or the choice of law in any agreement, should that be at issue, although most of the IRP issues really should be about what do the Bylaws say about this? And then standard, traditional jurisdictional decisions about where harm occurred. And so how those all get woven out, I think we are going to need to think about more carefully here. Because in a typical arbitration proceeding, what you have is a choice of law that is clearly specified in a commercial agreement. And we may not have that. So this is an issue that I think we are going to need to do a deeper dive in.

Another thing that I think we need to think about is where hearings take place and what kinds of accommodations need to be made to different stakeholders where those resolutions are being resolved.

There's a question in here about currency for the award. But I don't think that we contemplate any sort of monetary damages coming out of this process. The decision of the panel, based on everything in the CCWG, is a – and I'm setting aside just for a moment the PTI ICANN IANA functions aspect of it. The decision really is, was ICANN's action or

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inaction in a specific circumstance consistent with its obligations under the Bylaws?

Holly?

HOLLY GREGORY:

Hi. So we drafted this question poorly. It's not for an award. It's, do we need to address any kind of currency issue as for fees that need to be paid in order to participate or fees that are shifted? There are circumstances under which, if something is really frivolous, there could be an award of a fee-shifting kind of mechanism whereby the complainant would have to pay fees. So that's why there's a currency question. But we agree, it should not say, "What currency for the award?" It's a currency for the fees would have to be paid in or fee shifting. Okay?

BECKY BURR:

Okay. That's very helpful. Kate?

KATE WALLACE:

Hi, thanks. I just had a question about the question that says, "Where should hearings take place?" And I was wondering if it made sense to look back at the Bylaws. But I think whether hearings should be permitted in the first place, and then if so, what they're going to look like, meaning if they're going to include witnesses being presented, traditional opening/closing statements and arguments, and the extent to which that would occur would also be a topic of discussion. So I just wanted to make sure or clarify that that wasn't permitted or already



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happened, or would be something that would be discussed here before figuring out where they would take place.

BECKY BURR: Okay.

HOLLY GREGORY: And we agree with that. And that was one of the things I was thinking about when I said early on that we didn't mean to presume any outcome. And that was one of the questions where I was actually uncomfortable, that we should said, "Whether hearings will be allowed," not, "Where should hearings take place?" Whether they should be allowed and, if so, where they should take place. So again, poor drafting on our part.

KATE WALLACE: Okay, thanks for the clarification.

BECKY BURR: I think those are both questions that we're going to need to resolve. So in terms of the format of arbitration, I'm not sure, "What forms of representation are allowed?" is really getting at. Can I ask Holly or Ed to help us understand that question?

HOLLY GREGORY: I can, because it's a question that I asked a few minutes before the call. It means, is representation by counsel allowed? If representation is

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allowed, could you be represented by someone who's not a lawyer? Are there any requirements about having someone represent you? So those kinds of – who can appear before the panel? Is it only complainants with some sort of form of representation? Those kinds of rules.

BECKY BURR:

Okay. Okay. That's a good question. We also have the question about paying a filing fee or a deposit. And it seems like that really goes along with the questions about prevention of frivolous suits. I know that we provided that cost shifting could take place, where someone was found to have been abusing the process itself. But we really didn't spend a lot of time talking about filing fees or deposits or anything like that. And that's something that we will need to talk about.

I'm just mindful of the time here, so I want to just kind of cruise through the last couple of pages here. Rules about confidentiality, I mean, clearly the notion here and the sort of default is that these things should be transparent and public. All the filings should be transparent and public. But obviously, there has to be some exceptional process to protect truly proprietary, trade secret kind of information.

Rules about ex parte communications and hearings, again, hearings on the record, open and closed, in person, electronic, telephonic, and different forms of waiver.

There are also questions about – Holly, you've got your hand up there. Is that a question, input?

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HOLLY GREGORY: No, I'll put it down. Sorry.

BECKY BURR: We have a very serious question about discovery and evidence and witnesses, and the model. Judges in common law jurisdictions play a very different role than judges in civil law jurisdictions. Or in places where there's an investigating magistrate model where, to the extent where there is discovery, it's really undertaken by the judges or magistrates themselves, as opposed to the opposing parties conducting discovery.

And again, I'm hoping that we can get some input from Amy and Kate when we get to talking about this, about ICANN's experience with it. I am not aware of any of any discovery having gone on. And generally, that's what makes things in the United States expensive. On the other hand, we need to be sure that our transparency rules in general are such that, if we decided that we would have limited or no discovery, that [all the] protections under ICANN's document disclosure policies and the like are adequate. So that's something that we're going to have to talk about.

KATE WALLACE: And, Becky, just real briefly, the only type of discovery that has taken place in IRPs is document discovery. We haven't had anything along the lines of depositions or interrogatories or requests for admissions, or things like that. But there has been, certainly, document exchange.

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BECKY BARR: Okay. Ed?

EDWARD MCNICHOLAS: Yeah, I just wanted to mention another midway model is having a model of disclosure where parties need to affirmatively provide the information upon which they intend to rely. There's a weak part of that in the civil rules and federal procedure now that you could imagine a more robust version of disclosure could be a way of having the exchange of information that you get from discovery without the burden and expense of the discovery.

BECKY BARR: Right. And I think that would be optimal, right, if we were sure that those rules were adequate, the document disclosure rules were adequate, then the need for discovery... On the other hand, the questions about what the panel itself can ask for and what kind of investigation the panel itself can conduct are also interesting questions, and questions on which I certainly don't have a lot of experience.

Then just quickly going through the next couple of pages, rules for witnesses, rules for settlement. Two judges out of three, is that sufficient for a determination? I think that is actually in the proposal, the RFP proposal.

Ed, you've got a question?

EDWARD MCNICHOLAS: Sorry, old hand.

BECKY BURR:

Okay. And then following that, rules for appellate procedure, there is a specific appellate limited appeals rights set forth in the proposal.

So going through this feels like an introduction to the topic, but I thought it was important for us to begin to get the scope of our work laid out here and understand what we're looking down the road to. I'd like to just take the last couple of minutes to get general observations from folks in the group about our path forward and how we tackle these issues going forward. I'd also like to suggest that we have some work to do and it may make sense to not have a call next week, take this week to organize the calendar and the topics to be discussed at calls as we go forward, circulate that on paper, get people's buy-in in the list, and then begin to move forward substantively in two weeks' time.

So other comments from folks on that approach? On what we've seen here? Everybody is... David is in agreement. Okay.

So obviously, we have a lot of resources, in terms of topics and the examples that we sent out. I'd like to ask that the people in this group start thinking about these issues and looking at the resource documents that we sent out. We will regroup here and try to come back to you in two weeks with a calendar and suggested approach for organizing our work, and then move forward with another call in two weeks' time. And we will take a look at people's responses to the Doodle poll on times so far and see if we can identify a good time from that, or if we need to do another Doodle poll.

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With that, I want to say thanks. I don't think, Holly, that we are planning to have in-face discussions about this in Helsinki, because I am actually not sure how many of us will be in Helsinki. And in any case, if there was a call during that week, we would have remote participation. So our work for the time being is intended to be via call, as opposed to via face-to-face.

So with that, I will say thanks to everybody, and look for communications from us in the next week. And we'll talk to you in two weeks.

[END OF TRANSCRIPTION]