
DAVID MCAULEY: I would like to welcome everybody to the IRP call for April the 6th. Thank you for being here and hopefully a couple of other folks might gather.

Number one on the agenda is admin business. If there's anybody who's participating on this call who's on the phone but not in the Adobe room, would they please identify themselves now?

Okay. Hearing none, if there's anybody in the group that has an update to their Statement of Interest that they should mention, would they please do that now?

Okay. Seeing none, we can get to the agenda item number two which is a brief agenda item on the status of the timing issue. As you may recall from last week's call –

Let me ask who just joined on the phone.

KATE WALLACE: Hi. This is Kate Wallace from Jones Day.

DAVID MCAULEY: Hi, Kate. Thank you.

We're on agenda item number two. Last week on the call we discussed the timing issue as we have done on the last two calls and we've made good progress, but there is still an issue over what we term "repose" that's not yet resolved and we decided in the last call that a small group – Malcolm Huddy, Sam Eisner, and myself – would get together on the

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phone or on the list to try and move this issue forward. So this is just a status to the rest of the group.

The three of us have met on the list – not yet on a phone call – and we have a phone call scheduled next Wednesday. We have briefly discussed it and we are prepared to discuss the issue next Wednesday, so we should have more information about this in next week’s call. I just wanted to let everybody in the group know the status of that. It’s not been forgotten. It’s moving forward.

The next item on the agenda – unless anyone has a question about that – the next item on the agenda is the draft Expression of Interest document that Sam kindly sent to us before last week’s call. What I’d like to do is get into this. ICANN has kindly asked us our thoughts on this document prior to them releasing it to the general public for people to go ahead and submit applications to be on the Standing Panel, and we can get into the document itself.

Last week and again this week I suggested that we first address the issue that Sam mentioned that ICANN was proposing, that at least for the initial appointment of panelists we entertain the idea of staggered panels, that is, that while some panelists would be appointed for five years as contemplated in the Bylaws, some would be appointed for three years. The purpose of this as I understand it – I’ll give the floor to Sam in just a minute – but the purpose as I understand it is to ensure that once the Standing Panel gets off the ground and starts moving forward, there’s never the potential for complete loss of a panel and a completely new panel coming in the losing experience and the insights

into ICANN. This was brought up I think in Footnote 3 of the draft Expression of Interest document.

My suggestion is we take up the staggered panel issue first. I personally would support it, but I'd like to ask Sam if she would like to make any comments about that issue.

SAMANTHA EISNER:

Thanks, David. This is Sam Eisner from ICANN Legal. We identified this as we were drafting it just because when we get to that initial composition of the group, we put everyone on a five-year term then we'll always be facing the situation of re-comprising the entire panel potentially. There's no term limit on how many terms a panelist can seek, but we'd run the risk of having their five-year term and contract come up and maybe having to reseal the entire panel every five years.

So the proposal for the three-year and five-year was really just kind of an example. It's not anything that's carved in stone. We wanted to just give some examples of how we thought it could play out. Clearly we're open to other ways to do it.

You'll also see in the note that just as we were thinking it through from an operational standpoint, there are obligations both for ICANN and the community on the continued participation of selection of panelists. And so we thought that only having two cycles during which panelists were selected might be easier to manage than having three cycles, which is why we didn't recommend like having a one, three, and five, year thing put in. But we're clearly open to any sort of design that the IOT thinks makes sense, too. And then if this is something the IOT's comfortable

with, we would work with the IOT to develop a rationale for why some of the initial terms would be separate from that five-year term set out in the Bylaws.

DAVID MCAULEY:

Thank you, Sam. I have put my hand up as a participant and so I'd like to make a comment or two and then ask a question.

My comment is, I agree with Avri that this is an excellent idea. I think it's a great idea. And I personally would support dividing – let's assume we're going to have seven panelists to start – that we would divide it four and three, and the three would be for the three-year term and the four would be for the five-year term. That would be my personal suggestion. Thank you for this idea.

My question is, the Bylaw says they'll be appointed for a five-year term so does this raise the issue of do we need a Bylaws change and should this group at some point consider what in the United States Congress they call a "Technical Amendments" kind of change. That is, not a substantive... not a major Bylaws change but a Bylaws change that would deal with administrative matters that come up in implementation? I'm just floating that idea and I guess the question to you is, do you think the Bylaws would allow for a staggered term like this? Thank you.

SAMANTHA EISNER:

David, is that to me?

DAVID MCAULEY:

Yes. I'm sorry, Sam. I was asking what you thought about that.

SAMANTHA EISNER:

I think the Bylaws are clear. They say for a five-year term. As we've been in the initiation process there have been things that we've handled on an initial set of things and I think we have a way to distinguish this. I think, as I said before, we want to have some documentation about why a decision was reached to have some not on a five-year term at least initially.

In terms of amending the Bylaws, I think if we were to go through the process of amending the Bylaws – and the IRT is part of the fundamental Bylaws – we're looking at a six to nine-month process to get the Bylaws amended for a staggering that we actually only need to avail ourselves of once, right? Because once the first initial term is over, then everything else would happen on the five-year term. I don't want to give advice that says we can ignore the Bylaws at all, but I think there's some practical solutions that we need to consider. Maybe one of the ways to do it, we could stagger the time frames in which we start the panelists. That's the other way to make sure that every person who gets seated has a five-year term but then we risk not having a full composition of panelists for a one to two-year period after we start seating the panelists. So I think it's a matter of weighing efficiency over a well-documented decision of why we would create initial terms from the outset.

DAVID MCAULEY: Thanks, Sam, for your practical advice and for those suggestions. Next in the queue is Kavouss.

Kavouss, go ahead please.

KAVOUSS ARASTEH: Hello. Do you hear me please?

DAVID MCAULEY: Yes. We can hear you.

KAVOUSS ARASTEH: David, I think when Sam speaks, she speaks far from microphone. I have difficulty to understand what she is talking about. I full understand yours, the way you are talking, the way you are separating the syllables, the way you... but I don't understand half of what she said, number one.

Number two, in the chat or in the text, there are some colloquial expressions. Boots [chap] or boots – talk English but not local language. Could the people talk normal, standard, professional, [BBC] English but not something with colloquial or something nobody understands except American?

I have difficulty. I did not understand half of the things that's said by some. I apologize her. I hope it is not interpreted as in any way meant to have any significance but I don't understand. That is that. I have the right to say I don't understand. Please some speak clearly, separate

syllables from one to the other, and explain that what you want to talk about.

And also I have comment on David. David, I don't understand "Technical Amendment" in the American law and so on so forth. Amendment is amendment. There is no technical. There is no [inaudible] and so on so forth. Change of Bylaw, fundamental Bylaw, requires certain action. However, in the CCWG we may come to the conclusion that the [inaudible] need to change the Bylaw either standard or fundamental. We don't need to go through the process for change of the Bylaw. We need as a consequential changes due to the work of Work Stream 2. [That is] CCWG agrees with that and go to the ICANN and approve that and publish. That's all. We don't need after the public comments. We don't need to go to those process of the community and so on so forth. Who is in favor, who is against. This is a very, very, [serious]. Otherwise, I don't [inaudible] change the Bylaw. That is that.

We have to [inaudible] up and we have to pay for that. Please make it quite clear. Speak clearly. Don't use colloquial language. Don't use national or local language. Use international English please. Thank you.

DAVID MCAULEY:

Kavouss, thank you. I think you're right. I did use a colloquialism when I spoke about Technical Amendments so I regret that. And you and Sam are both right. This involves fundamental Bylaw and so that is that, and we should put my thought aside on the Technical Amendments. Let's just forget about that if possible.

I agree with you. You make a good point. We should all try and avoid colloquialisms going forward. That now being said, does anybody else want to comment on the staggered appointment or the staggering of the panelists' terms at this time?

Seeing no hands, I would like to move on to some comments on the draft Expression of Interest. I have some comments so I'm going to raise my hand as a participant. And I have a few comments, Sam, that I'd like to mention to you. I have some minor comments that I'm not going to mention on the phone. I'll put them on the list for the entire IOT Team. But they're minor in the nature of drafting, maybe a question or two.

The questions that I think are maybe a little bit more than that are, ICANN uses the expression "required or highly preferred skills" and "required or highly preferred experience." And I think that's a good expression because it includes "preferred." But in that, in some respects it goes a little bit beyond the qualifications that are in the Bylaws 4.3J. For instance, in the Skills section it says a "demonstrated ability" in one section, a "demonstrated awareness" in another section. And I guess my suggestion would be that it should say "ability" or "awareness" without the word "demonstrated," because "demonstrated" seems to narrow the pool to people that have done this in some way that can be demonstrated and I'm not so sure that that's a proper narrowing. In other words, it might discourage people that want to apply to become an arbitrator that have not yet much service as an arbitrator. Does that make sense? I'm just curious what your reaction is to that comment or that question.

LIZ LE: Hi, David. I think we're in agreement with that and it was just a linguistic suggestion that I think what you're saying makes sense and we'll go ahead and make that revision to the Expression.

DAVID MCAULEY: Okay. Thank you. Liz and Sam, I also had a question – the second bullet under “Required or Highly Preferred Experience” talks about extensive experience working with multinational organizations. My question is of the same nature – isn't that a bit beyond what we really need? To me that would be a desirable qualification but not one that if it was lacking would be disqualifying. And I'm just curious what you think.

LIZ LE: I see what your point is and I think it's something that we can definitely take out I think because it's something that definitely is desirable. I don't think it's a required experience and if it seems to create some kind of impression that it would be required on interested members, then let's definitely we can back that out.

DAVID MCAULEY: Thank you, Liz. I don't necessarily think it needs to be backed out but maybe stated more as a preference.

Having said that, I have one or two other comments and I'm going to leave my hand up but I'm going to ask Kavouss to take the floor while I go through my notes to my other questions. And I won't go through too many, but Kavouss, you have the floor right now.

KAVOUSS ARASTEH:

First of all, I'm sorry to Avri that [inaudible] that I don't understand boot strap. I don't understand that, believe me. Boot strap I don't understand. What we do – strap the boot or your boots for the strap above [inaudible]. I don't understand. Put it in different language.

Now, coming to you, David, you are going to oversimplify the quality [inaudible] of the panelists by saying that there's no need to say demonstrate [inaudible] ability. Who knows what is ability? This should be demonstrated by everyone. This word we have discussed extensively in Work Stream 1 and it was put expressly as to demonstrate. Otherwise, there are many areas we did not put demonstrate. It is as normal standard word saying that to have the ability [inaudible] but demonstrate is something that you have to show. You have to have [evidence].

And therefore, the high [inaudible] we also trying to simplify that. I think you are going to adjust something to something else in order to facilitate or simplify this task. I am not in agreement with that. I have serious difficulty in saying this is very important element because we are talking of IRT. We are talking of panelists. Something which decides on the fate of a issue before going to court.

So I do not support any change or any interpretation or any simplification of any of these words until we go to the total process. So no interpretation, no [inaudible], and no particular consequential changes and so on so forth. I disagree with that and I put [what] disagreement [formally]. Thank you.

DAVID MCAULEY:

Thank you, Kavouss. I'm not sure I agree with you on this one. The Bylaws require ICANN to come up with a draft Expression document, and ICANN has kindly asked us our thoughts on it and so it seems to me – this is not a statement of the Bylaws. This is simply a document for Expressions of Interest – and so it seems to me that we ought to respond to ICANN and give our thoughts but I have to additional thoughts/questions for Sam and Liz.

One is, the Compensation section looks like properly panelists will be paid as cases are heard. My question is – and I don't know the answer. I don't know how these panels operate internationally – is there a retainer payment to panelists just to join a panel and to be willing to serve? I'm just curious what your thoughts are on that.

SAMANTHA EISNER:

Thanks, David. This is something that we've discussed a bit with the ICDR as we were previously trying to put together a Standing Panel. Our thought is there has to be some level of retainer that would give us some assurance of availability as well as, now that we're having terms, to it could all kind of be tied into kind of a contractual basis of that they'd agree to make themselves available across the number of years. And so I think the only way this process will eventually work is through the use of retainers so that we don't keep running into availability problems once we have a Standing Panel.

DAVID MCAULEY: Okay. Thank you. The only other thing I was going to suggest now rather than on the list is, it seems to me – and maybe I missed it but I don't think I saw it – is a question to prospective panelists, an invitation to them, to say why they want to serve on the panel and what value they would bring to the panel, and that might flush out from them what their understanding of ICANN is and what their interests are. In other words, sort of a subjective statement from them as to why are you applying for this? And I'm wondering what your reaction is to this as well as the reactions of anybody else in the group.

SAMANTHA EISNER: From the ICANN standpoint I think that's a great suggestion. I think it's always helpful to understand motivations and interests and understanding of why someone's stepping into this space. So we'd be fully supportive of that.

DAVID MCAULEY: Thanks, Sam. I will commit to come to the list with the other things I have that I don't think are significant enough to raise on a telephone call, to do that by tomorrow or Saturday. And then I'm guessing – and I would invite anyone else on the team that has comments on this to please make their comments either now or on the list so that, Sam and Liz, I guess that you would revise the document or finish it off or whatever you think is appropriate and so can you talk a little bit about what your plans are once you get the final comments from us. And I might be a little too aggressive because there's some folks that may be interested who aren't on the call right now. But let's say I come out with

my comments tomorrow or Saturday and invite others on the list to comment by next Wednesday. What do you expect would happen then, Sam and Liz, following the finality of our comments?

SAMANTHA EISNER:

Thanks, David. We would update the document based on inputs received, and having an outside time frame within which the IOT can provide inputs would be really helpful. We would then turn the document, we'd send it back to the IOT probably for a short period of confirmation that we took on the changes and then we would then put the Expression of Interest up. I don't know that we've talked internally about how long we want to keep it up for. There is a possibility that we would, depending on whether or not we're receiving the adequate number of responses or responses to gather a large enough pool from, that we would have to expand it, we would also be working with our Coms team on appropriate mechanisms to push it out. We'd also ask the IOT at that point to... We'd give you guys notice of when it came up and ask you for help to circulate it to your communities or interested people to try to get more Expressions in.

And then at that point we'd have to see how many Expressions were received and how long each one is, and then we'd go through a process of vetting applications and ranking them, etc. There likely would be some interview component of that to make sure that the prospective panelists are worthy of the position and that we can actually talk to them just like you would in selecting people for anything else.

But we won't really have a timeframe for how long that process is until we see how many Expressions we receive and the timeframe in which we receive it because if it's hitting around the Johannesburg meeting maybe we need to push it up a little bit more, etc. So that's kind of the general scope of where we see it. Of course, out at the end of that process ICANN would be returning to the SOs and ACs along with the IOT when we'd probably, if this group is still together, we'd look to you to help us push out to the SOs and ACs the list of the candidates that meet the requirement level to then facilitate the community conversation on selecting the final panelists from that list.

DAVID MCAULEY:

Okay. Thanks, Sam. If you do consider the questions like to a panelist, "Why would you want to do this and what value do you bring?" you might consider a word cap on that kind of thing because if there are a lot of applications, the SOs and ACs are going to have to go through this with a view towards nominating members so it might be nice to see what discipline people can bring to making statements like that.

The IOT through me has been making presentations to SOs and ACs about their upcoming role in all of this. As the IOT, I believe that we would be very happy to ask SOs and ACs to take on the Expression of Interest and push it out themselves in order to widen that field. So unless there's any objection to that, that would be my expectation.

I see Kavouss – Kavouss, is that a new hand?

KAVOUSS ARASTEH:

Yes. David, you mentioned something that I supported that asking in one way or the other what is the intention or your intention to be member of the panel and how you think that you could contribute to development to the issue or to the responsibility and what happened to that. That is I think good way. And second I don't understand you said that asking SO/AC. What is SO/AC? They are not involved in that [inaudible] mean in that first selection of seven people by three people by each of the seven? Or what you want? Why you want to involve SO and AC in this matter?

DAVID MCAULEY:

Thank you, Kavouss. What I'm speaking about is first of all, the question I asked about why do people want to join I think that Liz and Sam have said they will consider putting that question into the Expression of Interest in some form or fashion, so I think that's handled for now.

With respect to involvement of SOs and ACs, they have a role not in picking any three panelists to hear any specific case but they do have a role in nominating the Standing Panel under the Bylaws. At ICANN58 I mentioned to a couple of SOs that this is coming their way and we've written – remember the letters that we sent, Kavouss – we've written to SOs and ACs saying this is coming your way, and I hope to make such a presentation to the GAC sometime in the near future and have mentioned that to Thomas. And so they have a role in nominating Standing Panelists. That's really what I was speaking about but they also have a role in taking efforts to make sure there are well-qualified candidates and I think they can help disseminate the Expression of

Interest just like anyone could. There's no prohibition on it. That's basically what I'm getting at. Does that answer your question?

KAVOUSS ARASTEH:

To some extent yes, but not totally. I would think that at least this group should ask the SO/ACs what is the procedures or policies by which we select these three selections or three people for the panelists. We ask them what are [the] procedures. I don't think that there is any procedure [inaudible] SO/AC. Could you ask them what is their procedure? How do you select that? I hope that it would not become political selections or commercial selections. It becomes really the professional selection. No matter whether they are from one region or two regions, no matter whether the distribution among all or distribution among one sector, so we have to ask them what is the procedures or how do you imagine or how do you consider the process by which you select these people. Or we could propose them something.

DAVID MCAULEY:

Okay. I think that's a fair request. I frankly think that what we should do first and what we've been doing is telling them, advising them, that they have a role under the Bylaws in nominating the panel and we have been doing that and will continue to do that, but asking them what their procedures are may spur them to develop some objective procedures. They know themselves better than we do.

I participate in the ccNSO and I can tell you that they are aware of this and are looking at it in the Guidelines review work they do. It's a good suggestion. Thank you.

Anybody else have any comments on the Expression of Interest right now?

Avri, your hand's up so you have the floor.

AVRI DORIA:

Yes. Thank you. I will try to be very careful in how I speak. I am confused by this last interchange about trying to do some apriori. And by that I mean a process that we decide on before the process occurs that determines that the choice of a nominee by a Supporting Organization or an Advisory Committee i.e. an SO or an AC, how that can [be] controlled for the absence of accusation of political.

Each of the SOs and ACs will pick on its own criteria. Looked at outside by someone who thinks that body is innately commercial or is innately political will be colored as political. So I think that this notion that we are trying to determine in some prior way how a group will make its decisions [inaudible] and problematic. Thank you.

DAVID MCAULEY:

Thanks, Avri. I think you make a decent point and I have a response but first I see that Sam has her hand up so Sam, I'll give you the floor and then I'll comment on Avri's comment. Thank you.

Sam?

SAMANTHA EISNER:

Thanks, David. I think there's some intermediate position between what we heard Kavouss say and Avri's position. I agree that there could be some issue with having a fully established process from the outset, but if you look at the text around the appointments and the SO and AC roles within it this is different from how, for example, the SOs and ACs are involved in selecting reviewers to the specific reviews. The Bylaws themselves don't call for each SO and AC to develop their own nominations for that, and so there could be some benefit in facilitating among the SOs and ACs some agreement on some common principles around how the final slate will be reached and are there types of diversity among the panelists that would be desired? Are there any other kinds of principles that could be established so that when the slate comes from ICANN after ICANN's viewed the qualifications and rated them against the qualifications that could help the SOs and ACs as they're doing their collective work to nominate the slate of proposed panel members to make sure that there's a slate that actually serves ICANN. So maybe there's some middle ground here.

DAVID MCAULEY:

Thank you, Sam.

Kavouss, you have the floor.

KAVOUSS ARASTEH:

Let me explain my difficulty. Some SO and AC, as I heard several times, may in this process take into account the diversity as the first element.

They look into the geographic diversity, cultural diversity, age diversity, language diversity, and any other that I don't want to mention, but forget about the competency and real qualifications and abilities and knowledge about dealing with this very important issue. So [they measure] the secondary qualifications competence, and so on so forth, to the primary as age diversity, language diversity, cultural diversity, geographical diversity, disability diversity, and I don't want to say. That I want to avoid. This is not the case that unless we say that the most important element is competency and qualifications. We should go together with any of those [that] would not be one of the elements is the most important element of that.

I'm sorry if I have not properly mentioned at the first intervention. That is the risk that some SO/AC may go that far. I have heard already. There are people they want to be popular with the others and they try to go to the geographical diversity [inaudible] which I don't believe that [is] the case. If you have competent people, no matter all of them coming from one region. Not exactly one but at least but we should not sacrifice that because of the geographical diversification or age or language or culture or [whatever] so on so forth. I hope perhaps I have explained now what is my anxiety and problem. Thank you.

DAVID MCAULEY:

Thank you, Kavouss. I'll comment now as a participant. What I meant to say is that I think the IOT has a role in helping the SOs and the ACs go through this because the Bylaws give them obligations but the Bylaws are not detailed in this respect. In other words, there's some room for them to work.

These are short. I'm going to read the two Bylaw provisions I'm speaking of. They appear under 4.3J2 B and C. And what B says is: "ICANN shall issue a call for Expressions of Interest from potential panelists and work with SOs and ACs and the Board to identify and solicit applications from well-qualified candidates and to conduct an initial review and vetting of applications."

The next Bylaw section is Subsection C. It says: "The SOs and ACs shall nominate a slate of proposed panel members from the well-qualified candidates identified," in what I just read.

And then there's another final section. It says: "The nominations are subject to Board confirmation which won't be unreasonably withheld."

In that – and when I went through our slide presentation that I think we've all taken a look at that I was using at ICANN58 – I think we agreed that we will assist the SOs and the ACs as they need. We won't take over their role. This is their job to nominate panelists. But we are going to be the experts on the procedures and on the rules and we should, and I think we will, assist. Anyway, that's the position that I think is correct right now and I think that the SOs and ACs will design the way they pick the panelists in accordance with the way they normally work. And I know the ccNSO is doing that.

I also participate in the Registry Stakeholder Group. I don't think it's really turned its attention to how it will work within the GNSO on this, but I'm sure they will at some point soon.

That's the end of my comment on this. Does anybody else have a comment they want to make in this respect?

I see Sam put in the sections I was just reading. I apologize for the redundancy.

If there's nothing else on this – and by the way, on the Expression of Interest document, as I said I'll come out to the list by Saturday – but I encourage others in this group to please take a look at the Expression document, give it some thought, and if you have some suggestions or comments for edits, please let them be known on list and let's get all those done by the close of next Wednesday just prior to our next call.

Moving on on the agenda, the next issue is what's called the "joinder" issue, and I actually sent an e-mail to the list on the joinder issue. I'm trying to remember the date I sent it. I believe it was on March the 29th, but I sent a note to list and this e-mail that I sent will also play in agenda item number five – "Working Methods" – but that's the next agenda item. On the joinder issue, I summarized briefly some of the comments that had come in on joinder. Joinder, of course, means when a claimant brings a claim against ICANN at IRP, are there other parties that can join in the same IRP that have an interest and can take part as a party in the IRP or by presenting a brief to the IRP commonly known as amicus brief. I don't think that's a colloquialism but basically a friend of the court brief. So there's two levels – somebody participating as an actual party in the dispute and another that might want to say, "I don't want to be a party but I would like to send a brief to the panel letting them know our thoughts on this important subject."

So on this issue of joinder, I actually made some suggestions in the hope that we could address this on list and come to a resolution because there were some good comments, most specifically from the Non-

Commercial Stakeholder Group and from a law firm that Kathy Kleiman is a partner in. I'll briefly discuss the six things that I mentioned and then I will mention a couple of comments from Greg Shatan and see if anybody has any thoughts on these.

The suggestions that I made are that we come up with rules that allow everybody that was a party at the underlying proceeding – the Expert Panel basically such as a string confusion objection. Those kind of panels – everybody that was a party there would get notice and an opportunity to be a party at the IRP if the loser below brings an IRP, that all parties have a right to intervene or file an amicus brief, and that if they become parties, they have the rights of a party under this kind of conflict, that all parties have a right to be heard in any petition for interim relief. Some IRP panels can grant interim relief such as a recommendation ICANN stand fast and not do anything and all parties would have an opportunity to participate in that. The suggestion that all parties enjoy equivalent rights and obligations with respect to pleadings and other documents and obligations in an IRP. A recommendation that interested parties be able to petition the panel to intervene either as parties or [amici] if they weren't involved below. That would be at the discretion of the panel. And that whoever comes in as a joining party be given a reasonable amount of time within which to submit their documents, etc. I suggested 30 days.

Greg Shatan in an e-mail basically thought that these were okay and agreed with them, I believe. But he felt that we should limit the parties that could come in by right as to being those parties who were parties below in the Expert Panel hearing below, and the same with respect to amicus briefs – friends of the court briefs. He also suggested that the

time limit, where I suggested 30 days, be 45 days simply because I was just being too aggressive on the timeline.

I would encourage everybody to look at that mail of March the 29th and Greg's response to it, but I'm hoping that we might be able to discuss and close the joinder issue based on this mail.

Kavouss, you have your hand up so you have the floor.

Kavouss, you may be on mute.

KAVOUSS ARASTEH:

Sorry. I was on mute. I'm sorry. I apologize.

I have a question of clarification nature. Does the initial or main party and the joinder have the same status in application of various parts of the process or they have different status, different [inaudible]? Someone who joined as a joinder has the same rights and the same priorities or same status as the main party or not? This is my question.

DAVID MCAULEY:

That's a good question. Under my suggestion that is what I was implying but I didn't state that explicitly so that's a good point to make explicit. In my suggestion, when a claimant brings a claim against ICANN at IRP they are a party to that. And if anybody joins as a matter of right or if anybody joins as a matter of discretion of the panel and joins as a party, they would have all the rights of the party and the original claimant would have those same rights simply because it's already a party. That's my assessment.

Go ahead. If you have a follow-up please go ahead.

KAVOUSS ARASTEH:

The follow-up question – if the joinder has...would it be a possibility [inaudible] that the joinder say something which contradicts with the main complainant or main party or they should coordinate with each other and not conflicting each other views and asking two different questions, two different process and inconsistent or incoherent with each other or that should be one of the conditions that it should be coherent, they should be consistent, and they should not contradict in application of the process.

DAVID MCAULEY:

I did not envision that and believe that would be very difficult to arrange. I need to think about that, Kavouss. But the way I drew this up, my recommendation was that they would be a party completely independent. They would make whatever case they wanted to make and the panel always has the ability to manage what people are presenting as arguments and claims. But I'd need time to think about that. That was not something I included so I can't fully answer your question right now.

Sam, you have the floor. Your hand is up.

SAMANTHA EISNER:

Thanks, David. We have a few points I think we want to raise from the ICANN side. First, I think it's important... There's no fundamental opposition to the idea of allowing proper people to join into the IRPs. I

think there's a lot of argument and support that that helps bring us to a just and fair resolution of items that are appropriately brought at the IRPs. I think it's important that the rules surrounding that make sure that the focus of the arguments brought by those who are seeking to join or who are joining are focused on the question at issue in the IRP and don't make the panel go into resolving a dispute between the two parties. That's not within the competence of the IRP Panel. That's not why we have it there. So everything has to be focused on was there a violation of ICANN's Bylaws and Articles? And so there has to be some guidance [to] people who are joining that that's what they need to tailor their submissions to.

Within this of right versus interested parties issue, issue, I think that that's where a lot of details need to be worked out. So in this area of Expert Panel discriminations, for example, it's very easy to understand who are the competing parties within that, who are the competing applicants if it's within the New gTLD Program, etc. So that's a very easy way to identify the pool, give notice, and have something running from that.

In terms of interested parties, there probably needs to be some other work at defining what that means if it's not from a defined pool of people. If they had the same rights as everyone else, should they also have to demonstrate harm? What other things would they have to demonstrate? And what types of briefings would have to happen if someone were to go to the discretion of the panel to allow them to come in? What types of opportunities to be heard just on that intervention would have to happen and how does that impact the whole timeline? Because as you know, we do have stated within the

Bylaws itself a preference that the IRPs conclude within six months, and so any opportunities you give to move the panel's focus from the substantive issues at hand to more procedural issues of who should be there, risk that timeline.

Also, in terms of interim relief, it's not clear that extending... We haven't really looked at how the 30-day rule that David suggested would impact that but I think the longer you make that such as the 45-day limit suggested by Greg, the more you impair people's ability to actually seek interim relief and the more you create the possibility for fights of, "I wasn't appropriately allowed to participate in that interim relief." I think we need clearer rules, particularly around that interim relief section, and then just as a whole on timeframes and what are workable timeframes for people to submit briefings and would there be reason for parties external to ICANN to have, for example, a longer timeframe to respond than ICANN would because ICANN often can't control when it gets an IRP or not. Those are just some questions to think about.

DAVID MCAULEY:

Sam, those are excellent questions to think about. I don't take notes when I'm chairing a meeting. Is there any chance you could come to the list and summarize these points? I could always listen to the call but it might be helpful if you come out on the list and repeat these. Would you be willing to do that?

SAMANTHA EISNER:

Yes. We can have them circulated, maybe not this afternoon but probably by tomorrow.

DAVID MCAULEY:

That's fine. I think that would be helpful, especially since there are some folks who are not on the call right now. Those are very helpful comments and thank you for that. I think it would give us all food for thought.

Does anybody else want to comment on this joinder issue at this time? Okay. I don't see anything.

Let's move to agenda item number five, and it has to do with our working methods. That relates, in a sense, to the joinder issue that we just discussed because, as I mentioned, on the try and encourage us to do more of the working on the list and to sort of recast how we handle meetings and list. And so in my expectation, the joinder issue was the first attempt at this although I did subsequently come out – we won't get to it today – I did subsequently come out with another e-mail last week in which I tried to segment issues that might be a little bit easier to take on and so that might be another example.

What I'm looking at today is an e-mail that I sent to the list earlier today about this. I don't know if people have had time to take a look at it. What that e-mail is basically doing is say, "Let's turn things around here and move our substantive and deliberative conversations to list on a discrete basis – comment by comment." We have a lot of thoughtful comments from people and we need to give them fair treatment, and my hope is we can give them fair treatment in a fairly quick way and move this process along. This is an important part of the new IRP and we want to get it in place.

And so I'm hoping that we can move to the list. That way people can think and reply in their own good time, and that what we'll do is turn meetings into sessions that will address things that have been mentioned on list. We would sort of have the meeting regimen where we would discourage people from bringing anything up new in the meeting. We don't do things in one instance and so if someone has a new thought they could mention it briefly but put it on the list so that we could discuss it next time and get it done and dusted.

I would encourage you to look at my e-mail this morning. I think the staff can help us in this. They can take whatever we put on the list and sort of organize it for us when we do get together on the phone call. We might be able to move to biweekly calls instead of weekly calls. So what I'm asking is, if anybody has a comment on this. I see a red X from Avri so I think that means, Avri, you're not supporting this? Do you want to comment on that? You don't have to but I'm asking if you want to.

AVRI DORIA:

No. Yes. I might as well comment. I think requiring that everything be discussed on the list prior to a phone call and that if you're in a phone call and you hear an argument and at that point you understand your opposition or your comment to something that it not be allowed because it wasn't first discussed on the list, is an incredible problem and will hurt the discussion.

I certainly see "recommend." I certainly see "requesting." But making it a barrier that people have to do everything on a list before they can discuss it would seem to me extremely exclusionary to those who may

not feel comfortable typing arguments out long hand on a list or what have you. We have multiple methods of communication because different people communicate in different ways. So I would argue strongly against that. Thank you.

DAVID MCAULEY:

Thank you, Avri. Before we go to Kavouss let me ask you a clarifying question. I think you make a decent point. I guess what I'm trying to do is make the calls different and would you be as concerned if someone who had a new thought on a call could make that but the Chair – me – would be a little bit more assertive in trying to move things along as well. In other words, let the point be made but trying to move things along as well. I'm not stating that well, but I'm curious what your reaction would be to what I just said.

AVRI DORIA:

I certainly support a Chair trying to move things along. There is all kinds of ways of doing that, of having people speak only once or twice on a subject as opposed to frequently, as keeping people to a certain time limit, but I think if there's a new concept, a new idea, that occurs to someone on a list there should be an ability for them to bring it in and to be able to clarify it if someone asks a clarifying question. Thank you.

DAVID MCAULEY:

Thanks, Avri. That gives me something to work with on trying to tweak my suggestion and Kavouss, your hand's up. You have the floor.

KAVOUSS ARASTEH:

Yes. David, first of all, with respect to [Avri], that point that we have to consider and comment. There are many documents from here and there. Would it be possible that someone put them together as in one single document on which we could comment, otherwise [this is a] different element and we may have a difficulty to find that. So it is possible that whatever you want to receive comments on that, put them together in a single document? That is one.

Second, the issue I raised that if you said that the question four about joinder, if the main complainant and the joinder are completely independent so they might raise questions and issues to the panel which could [take] the panel into the problems because they are contradicting each other's views and the panel does not know which [they should] have to go and I don't have any answers to this. So it need to be discussed or to be examined or rethought of in order to see whether that possibility exists. That's the one contradicting the other and put the panel into the problem. Thank you.

DAVID MCAULEY:

Thank you, Kavouss. Again, food for thought for me on tweaking these suggestions.

The next item on our agenda is consensus policy where I was... there are a couple parties, again the NCSG and the law firm that Kathy Kleiman is in talking about when consensus policies are debated at an IRP that some allowance be made for making sure that the initiator of the policy have a stake in this but it's too involved to get into now. We just have a minute left and so I'm going to invite any final comments if anybody has

any. Otherwise, we're going to close the call down and proceed on list which I hope to encourage more of.

Does anybody have anything final?

Seeing none and hearing none, I would like to say thanks, everybody. I thought it was a productive call and I'm very much appreciative of people participating. Off we go. We'll see you on the list and on the next call. Thanks very much.

[END OF TRANSCRIPTION]