# IOT - Chronological History of Amicus Discussions

This first section (20 pages) quotes the paragraphs from transcripts and emails that mention AMICUS. The second section has the actual transcripts and email.

- **Page 21 - 20160601 – Transcript**
  - First mention of amicus in IOT by EDWARD MCNICHOLAS - . “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.”
- **Page 24 - 20170302 – Transcript**
  - David McAuley - …..The IPC did, as well, using the words, "directly involved" in the action below, it should have a right to intervene, and I believe it was the IPC that said anybody that comes in as a party should have the ability to file equally detailed statements, whatever the limit is, I think it's 25 pages.
    So, there are ways that we can approach this. I think it's a fair request that involved below who won at the expert panel, and now see their win being challenged, should be able to be parties, and should have a right to be parties, I can see that. We can also consider whether there are ancillary parties that might have a right to file an amicus brief, a friend of the court kind of brief.
- **Page 28 - 20170329 – Email**
  - David McAuley proposed rule - 2. That all parties have a right to intervene or file an amicus brief, as they elect. If they elect to become a party they take on all rights/obligations of parties;
- **Page 31 - 20170406 – Transcript**
  - David McAuley - …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….
  - David McAuley - …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….
- **Page 42 - 20170427 – email**
  - Malcolm Hutty - So I would like to suggest that rather than joining the SO as a full party to the case, the commenter's concern might better be addressed by giving the SO an right to be notified of any challenges to Community Consensus

Policies they have recommended, an automatic right to file an amicus brief in response to such challenges, and that we place an obligation upon the IRP Panel to take note of that amicus brief (without conferring any duty of deference to it - the IRP must of course remain independent).

- **Page 44 - 20170427–Transcript**
  - Malcolm Hutty, David McAuley - >> MALCOLM HUTTY: A amicus would need to show harm because they are making sure the adjudicator is fully aware of the broader issues. But if you are talking about something broader, could you explain more fully that in a way that generalizes it as opposed to just [inaudible] because it may not be that at all. >> DAVID McAULEY: Yes. I think an amicus brief, in decent shape, what will happen, the panel will have discretion there. What I was talking about was appeals of expert panel decisions, such as community objection decisions, and it has to do with new gTLDs. Those are the only panels I can think of. But they are explicitly called out as being able to be appealed under the bylaws, appealed to IRP rather.
  - Malcolm Hutty - >> MALCOLM HUTTY: Thank you, David. I can foresee practical problems here both for the SO intervening and indeed given the, what is practical for the SO to do in the time frame that they would need to be able to respond as a party. I imagine that might well delay a case, rather slow down the case quite significantly in a way that neither ICANN nor the claimant would particularly find helpful to achieving a swift and efficient resolution. That said, I can see that the case why a SO might wish its views to be taken into account. I wonder if the better way of dealing with this issue is not to make them a party with all the obligations that would go in that, the procedural obligations, potential risk of cost being awarded against them and so forth but again to treat them as amicus and will be entitled to [inaudible] duty to consider a amicus brief from the SO whose policy it was, rather than actually to be a party with all the full obligations of the party.
- **Page 51 - 20170504–Transcript**
  - David Mcauley, Malcolm Hutty - And the next slide, in reviewing these applications the procedures officer will endeavor to adhere to bylaw 3.43S, hopefully within six months. And then point 4 says that parties that participate in the capacities as Amicus participants would be considered parties for the limited purposes of bylaw 4.3R which means if they bring frivolous arguments they might be tagged with costs. That's a suggestion I came up with as a participant and to the group. I see that Malcolm has his hand up. Why don't you go ahead. >> MALCOLM HUTTY: Thank you, David. I was just asking about the procedures officer. Certainly in determining whether or not somebody should be a party or should be a should be entitled to be a party or should be Amicus, isn't procedures officer and ICANN officer, the assistive process and essentially a

clock function rather than a  I don't want to use the word judicial but you know what I mean, a judicial function.  So I am really raising the question, these issues be taken by the procedures officer.

- **Page 54 - 20170511 – Email**
    - Malcom Hutty - I agree that amici should bear their own costs. I do not believe amici should be exposed to share in the costs in the event of cost shifting if they support the losing side, nor should they benefit from a share in the costs that are shifted if they are on the winning side. For that matter, an amicus brief may not obviously be tied to other "side". Amicus briefs can be purely informational, and they can often support or oppose one aspect of a party's position (or the question at issue) without taking any view on the core of the case or who should prevail. But even for amicus briefs that do clearly support one side, I think they should be exempted from cost-shifting either to their benefit or to their detriment.
- **Page 55 - 20170511 – Email**
    - Malcolm Hutty - If ICANN considers the amicus brief to add nothing substantive that's new, it can simply ignore it. And, as I said before, an amicus isn't really on either side. Even if an amicus does criticise or oppose one aspect of ICANN's argument, that doesn't necessarily amount to a view that the claimant should prevail.
- **Page 58 - 20170511 – Transcript**
    - Greg Shatan - >> GREG SHATAN: Thanks.  It's Greg Shatan for the record, and I guess the -- a couple of things on this.  First, in my limited experience, amici are generally considered to be nonparties and, therefore, are not subject to cost shifting in cases where cost shifting is available to parties.  So I think there's kind of an uphill battle here to say that there should be cost shifting for amici in this case.  I think it can also have a chilling effect on the participation of amici who may not have a dog in the fight financially to begin with to say that they could be subject to cost shifting.  Finally, especially where there is a question of whose side they may be on or nobody's side, it's a -- I guess it would be the other side who would submit costs, not the ICANN costs, would also have cost in the amicus brief…… We could also look at whether, in fact, amicus briefs need to be approved to be brought into the case.  Or whether they come in as a right.  And it could be that if an amicus brief is such a pile of dung that it might invoke cost shifting if that were an option.  The option would be just to say you are not a friend of the court, go away and take your pile of dung with you.
    - David McAuley - >> DAVID McAULEY: Thank you, Greg.  I see there's widespread agreement in the chat with what you said.  I think with the email Malcolm sent, I am happy to let this one go.  But let me mention a comment you were just saying.  This particular amicus brief would be allowed in as a matter of right

because these are from parties to an expert panel below. So they have intervention as a matter of right. It's up to procedures officer to decide whether that's as a party or as an amicus. So I don't think there will be an issue of accepting it, et cetera. But I do see the concerns you, Avri, Malcolm, and Samantha -- Sam -- has agreed with. So I am happy to let it go. So I think we are in agreement and will tailor this one not to have cost shifting for amicus briefs. Otherwise, I think that we are in widespread agreement on this, unless anybody else wants to make a comment. If not, I am going to move on to the next such update.

- Samantha Eisner - >> SAMANTHA EISNER: Thanks, David. You know, as I noted in the chat, I share the concerns Greg raised around this, but I do appreciate the effort to try to hold some level of accountability to those participating in an amicus fashion. I think that going to cost probably isn't the way to do that. So the other thing we could consider -- and we can consider more, you know, online -- is, you know, are there other tools we can build in, are there other concrete rules or guidance to the panel about weighing interest and harm or something like that and not use money as the detractor for participation in the IRP?
- David McAuley - One idea that comes to me in response to what you just said is perhaps we could write into the rules that even though someone has a right to intervene in amicus as a matter of right, that doesn't prevent -- or we should maybe expressly allow ICANN to immediately argue that such an amicus brief is abusive or frivolous and should not be considered, and the panel would have discretion to grant that. I mean, that's one potential.
- David McAuley - Thank you, Kavouss. I think that we have changed the slides that I provided. I think that number 4 on the joinder recommendation is no longer viable; that is, that these people who participate as amicus curiae in an IRP would not be -- would not be -- eligible for cost shifting based on the discussion that we just had, and Sam made a good point that we might want to look for another way to hold such folks accountable for the quality of what their participation is, but we haven't reached agreement on that. That's just a matter under discussion.
- David McAuley - This was an area that was addressed by Kathy Kleiman's law firm, which we refer to as Fletcher, and I think the noncommercial stakeholder group as well. But the recommendations boiled down to be along the lines -- you can see in the email that I sent -- along the lines of joinder. And the recommendations were specifically for -- let me read briefly -- that any supporting organization whose policy was being challenged would receive notice from the claimant of the full notice of IRP and request for IRP, which is the full body of the IRP claim, and all the documents that go along with it, contemporaneously with a service upon ICANN. That the SO would have a right to intervene in the IRP, but again, it would be up to the procedures officer as to

how the SO proceeds, as a party if the SO wishes. I am not sure they can do that under their budget and operating procedures. Or as an amicus, which may be of more interest to them, but that would be up to the SO as to what they are requesting, would be up to the procedures officer as to what is decided.

- **Page 63 - 20170518 – Transcript**
  - David McAuley - And, on the joinder issue, you've seen the slides that I sent before, and basically where we have come down on joinder is that anybody that participated in an underlying expert panel proceeding as a party would receive notice from an IRP claimant, and they would receive a copy of the notice and a request for an IRP, two separate things, but together they constitute the body of the request for IRP. And, they would be to get the documents, that they would have such people that participated below would have a right to intervene in the IRP, but the procedure's officer of the panel would have the final say on how that is executed, whether as a party or as an amicus brief, and the procedure's officer would be exhorted to do their best to stick within the timeframes that the bylaws call for in handling IRPs. And we have agreed to eliminate something I raised, and that is that people participating amici would be considered parties for the limited purpose of costs on frivolous claims or frivolous argument, so that would be -- that last bit is no longer part of it, and so we agreed to strike that.

    I think we've agreed on this joinder approach, and I think this could constitute a first reading, but I'm open to comments, questions right now, so the floor is open.
- **Page 64 - 20170519 – Email**
  - David McAuley - That such SO have a right to intervene in the IRP. How that right shall be exercised shall be up to the PROCEDURES OFFICER, who may allow such intervention through granting IRP-party status or by allowing such SO to file amicus brief(s), as the PROCEDURES OFFICER determines in his/her discretion. No interim relief or settlement of the IRP can be made without allowing those given amicus status a chance to file an amicus brief on the requested relief or terms of settlement.
- **Page 67 - 20170605 – Email**
  - David Mcauley - 2. That all such parties have a right to intervene in the IRP. How that right shall be exercised shall be up to the PROCEDURES OFFICER, who may allow such intervention through granting IRP-party status or by allowing such party(ies) to file amicus brief(s), as the PROCEDURES OFFICER determines in his/her discretion. No interim relief or settlement of the IRP can be made without allowing those given amicus status as a matter of right as described herein a chance to file an amicus brief on the requested relief or terms of settlement.
- **Page 69 - 20170709 – Email**

- Elizabeth Le - Who can intervene/join? By right or "interested parties" As noted in ICANN's 26 April email, there needs to be rules and criteria established as to who can join/intervene by right as well who may be properly joined/allowed to intervene at the discretion of the IRP panels. The second proposed clause of states: "That all such parties have a right to intervene in the IRP. How that right shall be exercised shall be up to the PROCEDURES OFFICER, who may allow such intervention through granting IRP-party status or by allowing such party(ies) to file amicus brief(s), as the PROCEDURES OFFICER determines in his/her discretion." Further clarification and development is needed on the standard of review that is to be applied by the Procedures Officer when determining the extent to which an intervenor may participate. What should the interested parties have to demonstrate (e.g., should the interested parties have to demonstrate harm based on an alleged violation by ICANN of the Bylaws or Articles? What are appropriate interests that will be supported?). What types of briefings and opportunity to be heard are needed in order to allow an interested party to petition the Procedures Officer to exercise his or her discretion and allow the party to join in the IRP? Also fundamental to this question is understanding if there are different levels of "joining" an IRP? Should a person/entity that can allege that they have been harmed by an alleged ICANN violation the Bylaws/Articles be treated differently than a person/entity that just has an interest in someone else's claim that the Bylaws were violated. Keeping the purpose of the IRP in mind, does it make sense to treat each of these as having "IRP-party status"? It would also be helpful to clarify if IRP-party status includes the ability to be a prevailing party, is entitled to its own discovery, and if such discovery would be coordinated or consolidated with that of the claimant?
- Elizabeth Le - Interim Relief and Settlement - Further clarification is needed for the proposed sentence in the second paragraph that states: "No interim relief or settlement of the IRP can be made without allowing those given amicus status as a matter of right as described herein a chance to file an amicus brief on the requested relief or terms of settlement." - This is another area where the Supplemental Rules would benefit from clarity between the types of intervention. An amicus curiae, as generally understood, typically does not participate as a party to a proceeding. The concept of allowing for briefing at the interim relief stage from an amicus, or a third party that believes it has an interest in the outcome (with IRP-party status or not), could be appropriate, but more information is needed as to the timing and expectation of what intervention or briefing is expected to achieve. - What standard is the panel adhering to when considering an amicus? Are there timing requirements of when the process should be invoked? The timing for an amicus curiae to comment on interim relief should take into account the fact that the interim relief process is an expedited process to provide emergency relief. - For

example, at what point in time can an amicus curiae comment on interim relief– during the briefing stage seeking interim relief or after the IRP Panel makes a determination an interim relief? - In regard to the settlement of issues presented in an IRP, the settlement of disputes is a private and often confidential process between two parties. It is unclear how and why an amicus curiae, who is not a party to the IRP, would be entitled to have input in the settlement amongst two (or more) parties to an IRP. - What is the procedure for such a process? What types of briefings and opportunity to be heard are needed in order to allow an amicus curiae to comment on interim relief or settlement? Parties are not even required to notify or brief the panel during settlement discussion, and the panel does not have an opportunity to vet a settlement, so what else would need to be changed (and on what grounds) to make this intervention into a settlement feasible and justified as to cost and burden to the parties? Parties should not be required to prolong an IRP if they would prefer to end it. - Also, as noted below regarding confidentiality concerns, how is the right of an amicus curiae to approve settlement terms balanced with the interests of the parties to the settlement to keep the terms of the settlement confidential? - Additional development is needed to ensure that an amicus curiae's exercise of its rights to comment on interim relief or settlement does not delay the emergency relief and prejudice the rights of the parties to the IRP.

- **Page 73 - 20170721 – Email**
    - David McAuley - 2. That all such parties have a right to intervene in the IRP. How that right shall be exercised shall be up to the PROCEDURES OFFICER, who may allow such intervention through granting IRP-party status or by allowing such party(ies) to file amicus brief(s), as the PROCEDURES OFFICER determines in his/her discretion. No interim relief or settlement of the IRP can be made without allowing those given amicus status as a matter of right as described herein a chance to file an amicus brief on the requested relief or terms of settlement.
    - David McAuley - The intent is to allow all "parties" at the underlying proceeding to have a right of intervention, but that the IRP Panel (through the Procedures Officer) may limit such intervention to that of Amicus in certain cases. It is not envisioned to allow non-parties from below (or others) to join under these provisions - noting that these provisions just deal with parties below. We are not displacing rule #7 (Consolidation, Intervention, and Joinder) from the draft supplementary rules<https://www.icann.org/en/system/files/files/draft-irp-supp-procedures-31oct16-en.pdf> that went out for comment.
    - David McAuley - My suggestion would be that anyone with party status (rather than amicus status) have discovery rights as coordinated by the IRP panel. - Fifth, An amicus curiae, as generally understood, typically does not participate as a party to a proceeding.The concept of allowing for briefing at the interim relief

stage from an amicus, or a third party that believes it has an interest in the outcome (with IRP-party status or not), could be appropriate, but more information is needed as to the timing and expectation of what intervention or briefing is expected to achieve. - Perhaps this right should be limited to instances where requested interim relief, if granted, could materially harm the amicus's ability to pursue/achieve their legitimate interest. - Sixth, What standard is the panel adhering to when considering an amicus? Are there timing requirements of when the process should be invoked? The timing for an amicus curiae to comment on interim relief should take into account the fact that the interim relief process is an expedited process to provide emergency relief. For example, at what point in time can an amicus curiae comment on interim relief - during the briefing stage seeking interim relief or after the IRP Panel makes a determination an interim relief? - If the above responses don't address standard sufficiently then a specific proposal is invited. As for timing, I propose notice of intent to file within 10 days of receipt of the claim (not business days) with timing for briefs (whether as party or amicus) determined by PROCEDURES OFFICER. - Seventh, In regard to the settlement of issues presented in an IRP, the settlement of disputes is a private and often confidential process between two parties. It is unclear how and why an amicus curiae, who is not a party to the IRP, would be entitled to have input in the settlement amongst two (or more) parties to an IRP. - What is the procedure for such a process? What types of briefings and opportunity to be heard are needed in order to allow an amicus curiae to comment on interim relief or settlement? Parties are not even required to notify or brief the panel during settlement discussion, and the panel does not have an opportunity to vet a settlement, so what else would need to be changed (and on what grounds) to make this intervention into a settlement feasible and justified as to cost and burden to the parties?Parties should not be required to prolong an IRP if they would prefer to end it. ... how is the right of an amicus curiae to approve settlement terms balanced with the interests of the parties to the settlement to keep the terms of the settlement confidential? - This seems a fair point and perhaps the right to intervene as to a settlement must be limited to parties. - Eighth, Additional development is needed to ensure that an amicus curiae's exercise of its rights to comment on interim relief or settlement does not delay the emergency relief and prejudice the rights of the parties to the IRP.

- **Page 80 - 20170727 – Transcript**
    - David McAuley - Two that such parties have take right to intervene the IRP. How the right shall be exercised to the procedures officer. How that could be allowing party stands a or allowing the parties to file amicus briefs. As procedures officer determines in their discretion. No interim relief or settlement could be paid with the IRP can be made without allowing those given the amicus

status as a matter of rights as described herein a chance to file a amicus brief on requested rove leave of the materials of settlement.

- David McAuley - So, Liz's points first. There needs to be rules and criteria established as to who can join intervene by right as who may be properly allowed to join, allowed to intervene at the discretion of the panels. My suggestion was intended to allow all parties at the underlying proceeding to have a right of intervention but that the IRP panel through the procedures officer could limit such intervention to being that of an amicus. Not in division to allow nonparties from below or others to join under these provisions. Noting that these provisions deal with parties below. Basically an expert panel hearings.
- David McAuley - Now, having said that, if they had a full right to be, as you put it, a voice in the hearing, I think that might make sense. But in a later point, you and Liz made the point that someone in amicus status couldn't really upset an settlement, and I think that, if you maintain both positions, that is that the winner below should not be a party but amicus in an appeal, but then the winner below couldn't have an active voice in settlement discussions.
- David McAuley - So, I think, I think you're persuading me on the element of party status, but my question was, if some of suggestions for those of us that are the IOT sort of came to your point of view on that, would you still maintain your position that the AMICUS should not have a decision on settlement.
- David McAuley - In other words, it's not always black and white. There may be gray cases. And so, what I'm saying is, if we agree with you that there is not a right to party status, but amicus status, wouldn't the people who won bow that are acts as a.m. cuss have some say if settlement broke out. I don't know how settlement discussions are handled if the breach of Bylaws or articles, but that's what's on the table.
- David McAuley - . I still have points 8, 9 and 10. So, let me ask, Sam, if you and Liz had any concern with what we said in that respect. - 8 was additional development as needed to ensure that amicus curiae exercises it's right to comment or interim relief does not delay emergency relief. I stated simply sedated the reference to the Bylaws in paragraph 3 of the original proposals intended to address. Just maybe we could beef it up. - Do you, what were your thoughts on that specific point?

- **Page 91 - 20170817 – Transcript**
  - David McAuley - …So I think their question was what standards apply to make sure that joining parties or joining amicus carry I stay within those bounds how do you control those bounds and, also, if someone is involved in that capacity, how do you make sure what their role is if there's settlement discussions.
  - Elizabeth Le - >> LIZ LE: Thanks David, I do. Thank you for the summary I think was a pretty accurate reflection of our position which we with preferred via email several times. I think, just to add to what you said, one of our other

concerns is just in terms of what the status that somebody joining would receive, whether that's an IRP status or amicus status. And, also, the impact of that on confidentiality issues, impact of that on the timing under certain procedures within the IRP….

- Elizabeth Le - But concern with what has it, are we leaving such a large vagueness for the procedure officer to figure out in terms of just the guidance of here is 6 months or here's what we are thinking. But we're not setting out, for one, the standards by which they should review whether someone should be allowed to join. The standards by which they would grant somebody IRP status or amicus status and what standards with which they would decide in terms of normally what that briefing looks like. Whether someone, how someone can impact that as a party who's intervening. So I think those are some of the concerns that we still have. With respect to these issues.
- Greg Shatan - >> GREG SHATAN: Thanks. Greg Shatan for the record. Obviously there's a number of issues that here that are significant. I do think David that your I tend to agree with your solutions to the issue. First there's obviously a significant distinction between joining as amicus and joining as an intervening party. And it needs to be clear in that we're essentially that there are two different statuses. Amicus is non party and amicus has no ability to influence other be part of a settlement. Settlement is really a private discussion between the parties. And I think that it really, I might even go a step further and say that any settlement between ICANN and IRP party regardless of what it the end result of it is, you know is between those two parties. And amicus has no ability to influence that. If we do allow for intervening, then the intervener is a party. In the action. And you know suppose presumably they could continue the action even if the IRP, the original complainant settled out of the case. That raises obviously some procedural concerns. But, overall, you know, I don't think that's beyond what we are doing. And I thought we at least as far as an intervener, we already have a standard, I believe, if not for an intervener specifically, but then for a party generally, party other than ICANN obviously. So it would seem they would need to meet the same standard as a party, whatever that is, materially effected or whatever we have as a standard. As amicus, standards for amicus are generally pretty low anywhere. And you know much an amicus submits anything that is not credible or not highly relevant, it basically just gets dismissed. You know, in terms of its relevance. It doesn't carry forward. So last thing I'll say, I can in many ways genres and in the you are providers is generous. We are not completely inventing the wheel for the first time. So if there's any kind of precedent we can look back at for this kind of stuff. I'm not just considering the current IRP but arbitrary procedures generally we should avail ourselves. Thanks.

- **Page 96 - 20170825 – Email**

- David McAuley - 2. That all such parties have a right to intervene in the IRP. The timing and other aspects of intervention shall be managed pursuant to the applicable rules of arbitration of the ICDR except as otherwise indicated here. The manner in which this limited intervention right shall be exercised shall be up to the PROCEDURES OFFICER, who may allow such intervention through granting IRP-party status or by allowing such party(ies) to file amicus brief(s), as the PROCEDURES OFFICER determines in his/her discretion. An intervening party shall be subject to applicable costs, fees, expenses, and deposits provisions of the IRP as determined by the ICDR. An amicus may be subject to applicable costs, fees, expenses, and deposits provisions of the IRP as deemed reasonable by the PROCEDURES OFFICER. 3. No interim relief that would materially affect an interest of any such amicus to an IRP can be made without allowing such amicus an opportunity to be heard on the requested relief in a manner as determined by the PROCEDURES OFFICER.

- **Page 99 - 20170907 – Transcript**
  - David Mcauley - . The timing and aspect intervention shall be managed pursuant to the applicable rule of ICDR except otherwise indicated here. The manner should be up to the procedure officer who may allow such intervention through granting IRP party status or by allowing such partying to file amicus by briefs. An amicus may be subject to applicable cost fees expense subpoenas and deposits provision of the IRP as deemed reasonable by the procedures officer. Number three. No interim relief that would be materially affected an interest of any such amicus to the IRP can be made without allowing such amicus an opportunity to be heard on the request relief in the manner as determined by the procedures officer. So that was my stab at trying to throw out together the thoughts on joinder.
- **Page 103 - 20171005 – Transcript**
  - David McAuley - Notwithstanding the foregoing a person or entity seeking to intervene in an IRP can only be granted "party" status if that person or entity demonstrates that it meets the standing requirements to be a claimant under the IRP at section 4.3B of the ICANN bylaws and as defined within these supplemental procedures. The timing and other aspects of intervention shall be managed pursuant to the applicable rules of arbitration of the ICDR except as otherwise indicated here. Subject to the preceding provisions in this paragraph the manner in which this limited intervention right shall be exercised shall be up to the procedures officer who may allow such intervention through granting IRP party status or by allowing such party, parties to file amicus briefs as a procedures officer determines in his or her discretion. An intervening party shall be subject to applicable costs, fees, expenses and deposits provisions of the IRP as determined by the ICDR. An amicus may be subject to applicable costs, fees,

expenses and deposits provisions of the IRP as deemed reasonable by the procedures officer. I'm just going to take a pause there for a second. Okay. I just wanted to see if there was anything in the chat. Moving on next two paragraphs. Number 3, no interim relief that would be that would materially affect an interest of any such amicus to IRP cannot be made without allowing such amicus an opportunity to be heard on the requested relief and number 4 in handling all matters of intervention and without limitation to other obligations under the bylaws the procedures officers shall endeavor to adhere to the provisions of bylaw section 4.3S to the extent possible while maintaining fundamental fairness. And that concludes the reading of the suggested language. 4.3S deals with expediting or trying to handle expeditious IRPs. So, with all of that on the table and as an attempt to take account of Sam's concern I have two questions. One, does anybody want to make a comment or concern? Otherwise I will consider this going forward for first reading I'll put it out on the list. But as I typically do for a couple extra days. And two, Liz, are you back with us on the phone? Those are the two questions. So, Liz if you're here you can speak up now.

- Elizabeth Le - >> So, I apologize. I wasn't part of the group when we came up with the initial language but I was focusing on the new language, the red. I see what you're saying. I guess to your point I guess the IRP panel can request to the first part. IRP panel can request written submission from whoever they want. But, I think other entities shouldn't be able to ask to be able to submit additional submissions unless they are a party or they qualify as amicus to the IRP.
- David McAuley >> Okay, that's a fair point. So maybe a tweak to this would be, you know, if qualified or something if qualified under the rules.

- **Page 109 - 20171003 – Email**
  - David McAuley - 2. That, subject to the following sentence, all such parties have a right to intervene in the IRP. Notwithstanding the foregoing, a person or entity seeking to intervene in an IRP can only be granted "party" status if that person or entity demonstrates that it meets the standing requirement to be a Claimant under the IRP at Section 4.3(b) of the ICANN Bylaws and as Defined within these Supplemental Procedures. The timing and other aspects of intervention shall be managed pursuant to the applicable rules of arbitration of the ICDR except as otherwise indicated here. Subject to the preceding provisions in this paragraph, the manner in which this limited intervention right shall be exercised shall be up to the PROCEDURES OFFICER, who may allow such intervention through granting IRP-party status or by allowing such party(ies) to file amicus brief(s), as the PROCEDURES OFFICER determines in his/her discretion. An intervening party shall be subject to applicable costs, fees, expenses, and deposits provisions of the IRP as determined by the ICDR. An amicus may be subject to applicable costs, fees, expenses, and deposits

provisions of the IRP as deemed reasonable by the PROCEDURES OFFICER. 3. No interim relief that would materially affect an interest of any such amicus to an IRP can be made without allowing such amicus an opportunity to be heard on the requested relief in a manner as determined by the PROCEDURES OFFICER.

- **Page 112 - 20171010 – Email**
  - David McAuley - 2. That, subject to the following sentence, all such parties have a right to intervene in the IRP. Notwithstanding the foregoing, a person or entity seeking to intervene in an IRP can only be granted "party" status if (1) that person or entity demonstrates that it meets the standing requirement to be a Claimant under the IRP at Section 4.3(b) of the ICANN Bylaws and as Defined within these Supplemental Procedures, or (2) that person or entity demonstrates that it has a material interest at stake directly relating to the injury or harm that is claimed by the Claimant to have been directly and causally connected to the alleged violation at issue in the Dispute. The timing and other aspects of intervention shall be managed pursuant to the applicable rules of arbitration of the ICDR except as otherwise indicated here. Subject to the preceding provisions in this paragraph, the manner in which this limited intervention right shall be exercised shall be up to the PROCEDURES OFFICER, who may allow such intervention through granting IRP-party status or by allowing such party(ies) to file amicus brief(s), as the PROCEDURES OFFICER determines in his/her discretion. An intervening party shall be subject to applicable costs, fees, expenses, and deposits provisions of the IRP as determined by the ICDR. An amicus may be subject to applicable costs, fees, expenses, and deposits provisions of the IRP as deemed reasonable by the PROCEDURES OFFICER. 3. No interim relief that would materially affect an interest of any such amicus to an IRP can be made without allowing such amicus an opportunity to be heard on the requested relief in a manner as determined by the PROCEDURES OFFICER.
- **Page 115 - 20171023 – Email**
  - David McAuley - Please consider and agree on list or on next call (Nov. 14 at 19:00 UTC), or if you suggest a change please provide specific language and rationale. 2. That, subject to the following sentence, all such parties have a right to intervene in the IRP. Notwithstanding the foregoing, a person or entity seeking to intervene in an IRP can only be granted “party” status if (1) that person or entity demonstrates that it meets the standing requirement to be a Claimant under the IRP at Section 4.3(b) of the ICANN Bylaws and as Defined within these Supplemental Procedures, or (2) that person or entity demonstrates that it has a material interest at stake directly relating to the injury or harm that is claimed by the Claimant to have been directly and causally

connected to the alleged violation at issue in the Dispute. The timing and other aspects of intervention shall be managed pursuant to the applicable rules of arbitration of the ICDR except as otherwise indicated here. Subject to the preceding provisions in this paragraph, the manner in which this limited intervention right shall be exercised shall be up to the PROCEDURES OFFICER, who may allow such intervention through granting IRP-party status or by allowing such party(ies) to file amicus brief(s), as the PROCEDURES OFFICER determines in his/her discretion. An intervening party shall be subject to applicable costs, fees, expenses, and deposits provisions of the IRP as determined by the ICDR. An amicus may be subject to applicable costs, fees, expenses, and deposits provisions of the IRP as deemed reasonable by the PROCEDURES OFFICER. 3. No interim relief that would materially affect an interest of any such amicus to an IRP can be made without allowing such amicus an opportunity to be heard on the requested relief in a manner as determined by the PROCEDURES OFFICER.

- **Page 118 - 20171114 – Transcript**
  - David McAuley - 2. That subject to the following sentence, all such parties shall have a right to intervene in the IRP. Notwithstanding the foregoing, a person or entity seeking to intervene in an IRP can only be granted party status if; one, that person or entity demonstrates that it meets the standing requirement to be a claimant under IRP Section 4.3 B of the ICANN bylaws, or 2, that person or entity demonstrates it has a material interest at stake directly related to the injury or harm by the claimant to have been directly or causally related to the alleged violation at issue in the dispute. The timing and other aspects of intervention shall be managed pursuant to the applicable rules of arbitration of the ICDR, except as otherwise indicated here. Subject to the preceding provisions in the this paragraph, the manner in which this limited intervention rights shall be excised shall be up to the procedures officer, who may allow such intervention through granting such IRP party status or by allowing such parties to file amicus briefs as determined in his or her discretion. An intervening party shall be subject to applicable costs, fees, expenses and deposits, provisions of the IRP as determined by the ICDR. An amicus may be subject to the applicable costs, fees, expenses and deposit provisions of the IRP as deemed reasonable by the procedure's officer. 3. No interim relief that would materially affect an interest of any such amicus to an IRP can be made without allowing such amicus an opportunity to be heard on the requested relief in a manner as determined by the procedures officer.
- **Page 124 - 20171201 – Email**
  - Elizabeth Le - 1.A. If the person or entity satisfies (1.), above, then (s)he/it/they have a right to intervene in the IRP. 1.A.i. BUT,

(s)he/it/they may only intervene as a party if they satisfy the standing requirement set forth in the Bylaws. 1.A.ii. If the standing requirement is not satisfied, then (s)he/it/they may intervene as an amicus. 2. For any person or entity that did not participate in the underlying proceeding, (s)he/it/they may intervene as a party if they satisfy the standing requirement set forth in the Bylaws. 2.A. If the standing requirement is not satisfied, the persons described in (2.), above, may intervene as an amicus if the Procedures Officer determines, in her/his discretion, that the entity has a material interest at stake directly relating to the injury or harm that is claimed by the Claimant to have been directly and causally connected to the alleged violation at issue in the Dispute. I personally (DM) (not as IOT lead) find this acceptable and encourage each of you to consider it. If you object, or have comments, please come on list by Dec. 7th or join the call to make your points. This is drawing to a completed second reading at the Dec. 7th call.

- **Page 127 - 20171203 – Email**
  - Malcolm Hutty - First issue: Paragraph 1.A.i appears to say that if a person who was involved in the underlying procedure has standing, they may only intervene as a party and not as amicus. Is that intentional? If it is actually deliberate to deny people who have standing the right to intervene as amicus, I would like to hear the reason. However I suspect it is an accidental artefact of drafting. Second issue ========== Paragraph 2.A says that the Procedures Officer may award to someone who does not have standing the right to intervene as amicus, but only if "the entity has a material interest at stake directly relating to the injury or harm that is claimed by the Claimant to have been directly and causally connected to the alleged violation at issue" Standing requires the party to be "materially affected". So I think a party that can satisfy the test above will have standing. Accordingly, Paragraph 2.A is superfluous and should be removed. Third issue ========== As I said earlier in this discussion, I am concerned that in limiting rights to intervene to those that actually have standing, we are depriving people of the right to intervene who are satisfied with the current situation but would have had standing had ICANN done as the Claimant wants. I think such people should have the right to intervene in opposition to the Claimant.
  - Malcolm Hutty - David asks For changes to text I ask for specific language proposals, not just observations. We are entering the home stretch on these public comments to the draft supplementary procedures and we need specific text to consider. I would like to suggest the following alternative to Liz's text, which cures all three issues identified above: 1. A person or entity that satisfies any of the following tests shall have the right to intervene either as a party, or as amicus, at their option: a) a person or entity who also has standing under the bylaws to challenge the decision or action under review; b)

a person or entity who would have had standing under the bylaws to challenge ICANN's decision or action, if ICANN had decided or acted as the Claimant alleges it ought to have done; c) a person or entity who would have had standing under the bylaws to challenge ICANN's decision or action, if ICANN had decided or acted as the Procedures Officer, in his absolute discretion, considers a reasonably plausible outcome should be Claimant be successful. 2. A person or entity that does not have the right to intervene under paragraph 1 may nonetheless intervene as an amicus, but not as a party, if they participated in the underlying procedure that gave rise to the decision or action under review. 3. When an IRP case is filed challenging the a decision or action by ICANN, ICANN shall notify all persons and entities that participated in the procedure that gave rise to that decision or action." I also happen to think this wording is easier to understand, but perhaps that's just because I wrote it! Having written this out, I see that the effect is that everyone who participated in the underlying process has a right both to notice and to intervene as amicus. That's not something new in my text, it's also true of Liz's text, but my text makes it more obvious. Is it really intended to give these rights so broadly?

- **Page 133 - 20171207 – Transcript**
  - Malcom Hutty - And there were a couple if on of issues in there that I thought were probably accidental. The first one, was that it appeared to say that a person, if a person was involved in the underlying procedure, if they have standing, then they are only allowed to intervene as a party and not an am cuss. And unless that's intentional and I assume it's not. I haven't imagined may be someone will correct me I have not imagined why we would do that. I suspect that's an artifact of drafting that actually it was intended to give that person the option of being intervening as either a party or a amicus.
  - Malcolm Hutty - Second issue was on the paragraph 2 A which said that to the procedures officer may award someone who doesn't have standing, the right to intervene as an Amicus. But the criteria or when they can do so is only amongst those people and it's procedure that has discretion but they can only do so among people where the entity has a material interest at stake in relating to the injury or harm that is claimed by the claimants. Now actually if you have the material interest, if the criteria for standing. It's never going to be the case that there's going to be someone that doesn't have standing that has a material interest at stake directly relating to the material harm because that person has standing. So that paragraph seems to me to be superfluous. Because it could never be satisfied. And can simply be removed.
  - Elizbeth Le - Thanks, David. So I will address Malcolm's point in the order in which he addressed them. With respect to the first issue which is whether or not it was intentional for paragraph 1 a little one to state that the party from underlying procedure only may only intervene as a party and not as an amicus

that was not the intent so if it wasn't clear what we can do is clarify that by adding at the end of that provision as a party or as an amicus subject to the following conditions. And then we can make sure that the text flows that we are indicating to correspond to this revision. With respect to the second point, that he raised about determine maturely reflected in why paragraph 2 a is there and should not be removed this provision was added to address Malcolm's previous concern that an entity would not be able to intervene on behalf of ICANN. I agree the term materially affected language only applies to entities intervening on the claimant but again we added the provision 2 a to allow the opportunities for entities to request an event on amicus on behalf of ICANN. That's why the material interest language is in there.

- **Page 137 - 20180208 – Transcript**
  - David McAuley - - Next section addressed is USP 6 written statements. Where we say that, we ask Sidley to add language along the lines in addition, the IRP panel may request grant to (indiscernible) admitted as a party or as an Amicus, upon a showing of a compelling basis for the request. In the event the IRP panel grants a request for additional written submissions, any such additional written submissions shall not exceed 15 pages. Comments, questions, to this provision?
  - David McAuley - We also go on to say that people that did not participate in the underlying expert panel proceeding, these are usually with respect to new TGDLDs, things like legal objections that kind of thing, string similarity. They can intervene as a party if they satisfy the standing requirements of the bylaws. If the standing requirement isn't satisfied, they can intervene as an Amicus based on panelists discretion.
- **Page 140 - 20181009 – Transcript**
  - David McAuley - In addition, the IRP partner panel may grant a request for additional who is intervening as a claimant or who is participating as an amicus on the compelling bases for a request.
  - Bernard Turcotte (reading proposed rule) - All right, rule 7 consolidation intervention and participation as an amicus. The procedures officer shall be appointed from the standing panel to consider any requests for a consolidation, intervention and or participation as an amicus. Requests for consolidation and intervention and or participation as an amicus are committed to the reasonable discretion of the properties officer. In the event that no standing panel is in place when the procedure officer must be selected, a panelist maybe appointed by the ICDR pursuant to the national arbitration rules related to the appointment of panels for consolidation.
  - Bernard Turcotte (reading proposed rule) - Participation as an amicus any person or group or entity that has a material interest to the relevant to the dispute but does not satisfy the standing requirements for the claimants set forth in the

bylaws may participate as a amicus before the IRP panel. Subject to the limitations set forth below. A person, group or tenant tee that participate paid in an underlying proceeding and process for ICANN bylaws we no that one, shall be deemed to have material interest relevant to the dispute and may participate as an amicus before the IRP panel. All requests to participate as an amicus must contain the same information as the written statement that out in section 6 specified the interest of the amicus and must be companied by the appropriate filing fee. If the procedures officer determines in his or her discretion that the proposed amicus has a material interest relevant to dispute, he or she shall allow participation by the amicus curia. Any person participating as a amicus curia may submit to the IRP panel written briefing on the dispute or on such discrete panel questions as the IRP panel may request briefing in the discretion of the IRP panel and subject to such deadlines and page limits and other procedural rules as the IRP panel may specify in its discretion. The IRP panel shall determine in its discretion what materials related to the dispute to make available to a person participating as an amicus curia.

- **Page 146 - 20181011 – Transcript**
  - David McAuley - I'm starting with the first paragraph of rule 7. I will skip certainly portions if they are not indicated and mention that. Starting at the first paragraph a procedures officer shall be appointed any request of consolidation intervention and participation as an amicus. And this is where I said verbiage except where otherwise stated here in that's the end of my addition and intervention and as amicus as reasonable discretion, etc.
  - Sam Eisner - Thanks David. This is Sam Eisner for the record. So the places where you interlineated small additions we are fine with those. But we do have I have some concerns about the second section that the full paragraph that was added that said in addition any group, person group or entity should have a right as a claimant. You might want to move to a amicus status. But one of the things that we had talked about, many times as we were going over this, was the fact that claimant has a very specific definition under the bylaws. And only those people who are not just impacted by the action but impacted because they allege that ICANN us violated it's article or by bylaws those are the only people that qualify as a claimant. And having just a significant interest related to it, doesn't actually require that someone have an IRP claim against ICANN. It does recognize that they have an interest in what's going on. And I think we don't have any concern with allowing those people to be mart of a proceeding. But giving them claimant status, gives them certain rights under the bylaws that actually opens up the IRP to be used in ways that are not anticipated to if they don't meet the requirement that they are alleging a violation that ICANN violated the bylaws. We could see people that actually support the action that ICANN took. Who would have the interest and would

qualify under this paragraph. But they wouldn't meet the status of claimant. So they would be forced to make statements as to what ICANN did in violation of its bylaws but they actually wouldn't believe ICANN violated the bylaws. Let's take the common example right announcement if they were a competing a captain that benefit from ICANN's decision they are actually not going to say ICANN violated the bylaws in taking that decision. Where the claimant is taking that position. So we are requiring people to take positions that they would not take by this. So I think we could move that down either to amicus. So I think we put some things into the amicus section that covered this type of interest in a proceeding. And I'd say this is one of the things that we should bookmark and put more attention to before we get to a final set of rules. If there's a wish to change the scope of who can participate in an IRP.

- Malcolm Hutty - Thank you, Sam makes a fair point. But it's quite limited in its nature. It just points out that some people might not want to be a claimant they might only want to be an am I can cuss that may be a fair point to their claim. This can be easily resolved and better honor your proposal by leaving your proposal intact. But where it says to intervene as a claimant. To say to intervene as an am cuss or claimant in parentheses as appropriate to their position. Close parentheses. And then continue. That would leave it the options if option to the person to intervene as an amicus and they would also be entitled to intervene as a claimant if they had a claim.
- David McAuley - So, I didn't put my hand up by I'm speaking now as a participant. As the person that suggested this. I hear you Sam and I would be willing to look at language, it's possible Malcolm just provided it. But if it was moved to an amicus thing I would like to look at the language you come up with. You can tell between this and rule 8, where I'm coming from is a cot testify situation. Where members of contracted party houses or others who have contracts with ICANN or others that have contracts that effected by ICANN have to be able to prohibit their interest in competitive situations. That use language largely followed U.S. federal rules of board. But those rules are fairly I think, at least in common law countries fairly routinely accepted that someone has an interest can defend themselves they can't look pore the defendant to make sure argument for them. So I think that Malcolm may have just given the language but Sam if you take a swat what you want to do with this, and put it on list, I will certainly take a look at it.
- Samantha Eisner - This is actually an issue that we discussed even as we were developing the bylaws themselves with Sidley. This is where the IP differs from regular litigation because an IRP has a very limited standing rules. The IRP has a very narrow aspect to it. And so, we can look at the language and we can try to make some recommendations, I understand where Malcolm is coming from with the choice of the amicus versus claimant. I think it's very important that if we

have a right for someone to come in as a claimant, language such as significant interest here doesn't align with the standing requirements of the bylaws which require an allegation of material harm.

- Malcolm Hutty - Similarly if you even if you don't qualify as a claimant, but you satisfy the conditions in this paragraph you should be allowed to intervene as an amicus and it shouldn't be merely discretionary. That's the aim. Not the change the definition of who qualifies as a claimant. That should be untouched by this language.
- David McAuley - Thanks Malcolm. And I will also make a comment as a participant, Sam, I think that I can live with what Malcolm has just said. I think he's right in what he's saying and I think it's quite possible that we could crack this nut with amicus status as long as it's not discretionary it is a matter of right and as long as amicus can protect the language in did. And I notice too Bernie gave us a time check, we are running out of time for this call. That gets to point that I agree with you Sam we have the finish this and get through this. That's one reason why Bernie and I scheduled two calls for this. Get the interim rules out. We recognize that the time has come the get interim rules out and we have to move to repose, etc. I feel the pressures myself. So what I'd like to do is discussion on this one and ask you Sam to come back with your amicus language. I would mention to you, that I think I agree with what Malcolm just said I think that would work but I want to look at the language. I would like to move on to rule 8 now unless there's any other comment.

**20160601 – Transcript -**
**https://community.icann.org/pages/viewpage.action?pageId=59641145&preview=/59641145/59645193/irp-iot-3-01jun16-en.pdf**

BECKY BURR (page 2): 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 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.

BECKY BURR (page 25): 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 rom ICANN identified was a difficulty in some of these situations where, really, the 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.

**20170302 – Transcript -**
**https://community.icann.org/pages/viewpage.action?pageId=64062265&preview=/64062265/64076635/IRP-IOT_Meeting_2March_2017.doc**

DAVID MCAULEY (page 30): Thank you very much.

Getting back to the joinder issue, let me just speak to it. We really don't need to put it on the screen right now. I'm using Fletcher as a catalyst – they're certainly not the only part that talked about joinder and parties – for instance, the Non-Commercial Stakeholders Group made a similar comment. But Fletcher basically pointed to the fact that the Applicant Guidebook from the 2012 round of new gTLDs basically did not provide an appeal to people who lost before an expert panel. Those were the panels that heard legal rights objections, string confusion objections, and community objections. But now the Bylaw explicitly says that expert panel decisions can be brought to IRP.

And so Fletcher is making the point that we in the rules need to be clearer and explicit about parties who won before the expert panel, therefore they're not likely to bring a claim. Parties that lost are likely to bring a claim. And in doing that, Fletcher's question is – what about the parties that won? How are they going to be heard?

And so while we're in this particular call reaching the top of the hour I can't get into detail. I will in the list. That's really the issue, and I think they raised an important issue. Before I say more, Liz, you have your hand again so let me ask you to take the floor.

DAVID MCAULEY (page 32): Thank you, Kavouss. We have to wrap but just a brief response. The Bylaw Section 4.3N requires that the Rules of Procedure ensure

fundamental fairness and due process. And then it says, “Shall at a minimum address the following elements.” One of those is issues relating to joinder intervention. I actually think we’re within the scope of what we need to do but I take your point and will mention it in my summary and trying to move this issue forward.

We are out of time and I want to respect everybody’s time. So I will say thank you to everybody. Thanks especially to Malcolm for leading us on the timing issue, and thank you to all for participating. Please look for action items on the list and please engage on the list. And I hope everyone has a good day and thank you all for participating.

That’s the end of this call. Thanks very much.

**DAVID MCAULEY (page 28):** Thank you, Malcolm. I would like to pursue the timing issues henceforth on the list. If it's okay, I would like to initiate a discussion about the joint issue. But saying that, we've recognized Sam has some comments to make on list, and there are some additional issues as you point out. I think we've made great progress, and I thank you Malcolm for taking the lead on this. But let me move to the next issue, if no one has any concern with that. So, Brenda, if you could put the other slides up, the ones that I sent. The slides, by the way, are really just talking points.

What I've put up on the first slide, is as we consider issues revolving jointer, let's remember two fundamental bylaw provisions that are sort of the backdrop for this discussion and all discussions, and one is that the IRP is intended to secure just resolution of disputes and that the rules of procedures of the IRP are meant to ensure fundamental fairness and due process. And so in that context, I wanted to note that a number of commenters talked at jointer.

We have jointer issues raised in the context of parties that were involved in other panel decisions below. For instance, we're talking here about expert panel decisions, which are now subject to IRP review. These are things likes string confusion and legal rights objections, those kinds of things. And so there is a request of people who effectively won their cases below, are not ignored, if a claimant is unsatisfied with that panel's decision, goes to IRP, and could have a right to join. That's one of the issues about jointer.

The second bullet says that there is an issue over should a procedures officer from the panel decide questions of jointer, or should the panel decide questions of jointer. And then I think it was the IPC who said there should be a an express indication that there isn't a page limitation for other parties, so if we can scroll down to the next slide.

I mentioned two parties that commented. One is a law firm Fletcher, Hale, and Hildreth, I think Robert Baldwin was the author. But there is another author here who is the prime mover in this particular case, and that's Cathy Kleiman, who many of us know as a participant in the GNSO.

And then the GNSO's IPC also commented, and I should note that the non-commercial stakeholder group, and I failed to put them on a slide, that was my inadvertence, the non-commercial stakeholder group has made points that largely are similar to those made by the law firm Fletcher, Hale, and Hildreth. Cathy, in Robert Baldwin's note, asked for a couple of things to be done in the jointer issue. I see I have 6 minutes left. So I'm basically setting the table for further discussion.

One is, they would like actual notice to go to all the original parties in the expert panel decision that's being challenged. Two, they ask for a mandatory right of intervention, that is for people to be able to join, to people who were parties in the panel. That doesn't mean they have to intervene, that means they have a right to intervene.

And then three, there would be a right for parties to be heard prior to an IRP panel making an award of some intermediate remedy, like putting an action on hold, intermediate relief. Those are the things that motivated them and they thought that these rules address. The IPC said, and by the way, the non-commercial stakeholder group followed very much along those lines.

The IPC did, as well, using the words, "directly involved" in the action below, it should have a right to intervene, and I believe it was the IPC that said anybody that comes in as a party should have the ability to file equally detailed statements, whatever the limit is, I think it's 25 pages.

So, there are ways that we can approach this. I think it's a fair request that involved below who won at the expert panel, and now see their win being challenged, should be able to be parties, and should have a right to be parties, I can see that. We can also consider whether there are ancillary parties that might have a right to file an amicus brief, a friend of the court kind of brief. But as I set the table, I shouldn't take up all the air time, so let me just open the floor to ask if people want to comment on this subject, I mean, we're going to have to do more work on it, I'll have to address it in our next call, but are there people that would like to make a comment? And I see Sam Eisner's hand is up, so I'm going to ask Sam to comment.

## 20170329 – Email (recommended reading)

[IOT] Joinder issue

McAuley, David d mcauley at verisign.com

Wed Mar 29 08:14:17 UTC 2017

Previous message: [IOT] Notes-Recordings-Transcript links for IRP-IOT Meeting #16 - 23 March 2017 Next message: [IOT] Joinder issue

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Dear Members of the IRP IOT,

In this email, I want to move forward and seek your input on the issue of "Joinder" that was mentioned in several public comments and that was raised in the last call Thursday March 23rd.

The public comments on this topic were from (1) Fletcher, Heald & Hildreth<https://forum.icann.org/lists/comments-irp-supp-procedures-28nov16/pdfAkzQ0N4xz2.pdf>, (2) the GNSO's IPC<https://forum.icann.org/lists/comments-irp-supp-procedures-28nov16/pdft75S74tOev.pdf>, and (3) the GNSO's NCSG<https://forum.icann.org/lists/comments-irp-supp-procedures-

2 8nov16/pdfLoCFUVHjfN.pdf> (these three raised other issues as well).

The comments make these suggestions:

********* Fletcher: Provide actual notice to all original parties to an appeal to IRP of an underlying Third Party Proceeding (see expert panel decision appealability at Bylaw 4.3(b)(iii)(A)(3));

********* Fletcher: Provide mandatory right of intervention to all parties to the underlying proceeding being appealed to IRP;

********* Fletcher: Require IRP panel to allow all such parties to be heard before deciding on interim relief or protection;

********* IPC: Any third party "directly involved" in underlying action being appealed to IRP should be able to join or intervene as claimant of in opposition to claimant. (Multiple claimants should not have one collective 25-page limit for Written Statements);

********* NCSG: Right of intervention must be added for the winning party below. At the least they should be able to file briefs as Amici - meaning"friends" of the panel;

********* NCSG: Emergency panels/interim relief requests must be openly heard with all relevant parties present.

As mentioned in the call, we are directed by bylaws that provide for:

********* Just resolution of disputes (Section 4.3(a)(vii)); and

********* Fundamental fairness and due process (Section 4.3(n)(iv)).

In addition, the bylaws specifically direct that the rules address "Issues relating to joinder, intervention, and consolidation of Claims..." (Section 4.3(n)(iv)(B)).

The current draft<https://www.icann.org/en/system/files/files/draft-irp-supp-procedures-31oct16-

e n.pdf> of the updated supplementary procedures deals with joinder etc. at section 7 on page 8. The current draft leaves these matters up to a procedures officer and allows joinder by those who qualify as a claimant - which the winning party below is unlikely to be.

With these things in mind, as a participant in this group I propose that we agree the following points and, at a suitable time, ask Sidley to draft appropriate language into the draft supplementary procedures. I believe these comments have made reasonable and persuasive points about ensuring that the winning party below can defend the judgment below and will likely be a more motivated party in this respect than ICANN, although ICANN will be motivated, of course, to defend the notion that its compliance with an expert panel would not violate the article or bylaws. Suggestions:

1. That all parties to the underlying proceeding get timely notice (including copies of all pleadings and other filed documents) of the institution of IRP;

2. That all parties have a right to intervene or file an amicus brief, as they elect. If they elect to become a party they take on all rights/obligations of parties;

3. That all parties have a right to be heard in any petition for interim relief - whether amici can be heard on interim relief would be up to the panel or procedures officer (whichever is acting);

4. That all parties each enjoy equivalent rights/obligations with respect to pleadings - e.g. length, manner of filing, etc.

5. That other "interested" parties be able to petition the panel or procedures officer (whichever is acting) to intervene (as parties or as amici) and the decision in this respect will be up to the panel or procedures officer (whichever is acting).

6. That such joining parties to be given a reasonable amount of time to file their pleading or brief but this can be a relatively short period. They will have actual notice and the time should run from that date. They will have been a party below and so are in some degree prepared on the issues. I suggest 30 days here.

I welcome discussion on list and, if we need, on next call. David

**20170406 – Transcript -**
**https://community.icann.org/pages/viewpage.action?pageId=64077895&preview=/64077895/64083732/IRP-IOT__18_6_April.doc**

KAVOUSS ARASTEH (p;age 18): 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]I 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 MCAULETY: 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.

KAVOUSS ARASTEH (p[age 30): 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 rethinked 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.

**20170427 – email (recommended reading)**

[IOT] Joinder by SOs

Malcolm Hutty m alcolm at linx.net

Thu Apr 27 22:29:53 UTC 2017

Previous message: [IOT] Caption Notes-Recordings-Transcript links for IRP-IOT Meeting #19 - 27 April 2 017

Messages sorted by: [ date ] [ thread ] [ subject ] [ author ]

On tonight's call, David invited me to post to the list to memorialise a point I made in relation to the issue of Joinder.

One public comment (I'm afraid I forgot whom it was) proposed that where an IRP case is brought to challenge a Community Consensus Policy, the SO whose policy it was should have an automatic right to join the case, to defend their policy.

My comment was that while I appreciate the SOs interest in their policy, I fear joining them as a full party this would be onerous and possibly unwelcome. An IRP case will engender lots of preliminary back-and-forth with which an SO is poorly equipped to engage. And an SO ought to be able to make its point without taking on all the obligations of a party, including potentially an obligation to cover ICANN's legal costs.

So I would like to suggest that rather than joining the SO as a full party to the case, the commenter's concern might better be addressed by giving the SO an right to be notified of any challenges to Community Consensus Policies they have recommended, an automatic right to file an amicus brief in response to such

challenges, and that we place an obligation upon the IRP Panel to take note of that amicus brief (without conferring any duty of deference to it - the IRP must of course remain independent).

Malcolm.

**20170427–Transcript - https://community.icann.org/pages/viewpage.action?pageId=64077897&preview=/64077897/64948111/IOT-IRP_0427ICANN1900UTCfinal%5B1%5D.docx**

>> **DAVID McAULEY (page 7)**: Sam, thanks. David here. I'll make a comment and then I'll ask if anybody else has a further comment. That sounds good. I'm glad you reached out to the policy folks. I'm glad they are in touch.

My only comment or suggestion would be, as they reach out, as they discuss, is that they try and share information among SOs and ACs so it's not silo'd contacts. And thus if the CCSO could find out the GNSO is doing a standing, I forget the term, but it would be good that there is a shared information and shared experience here because they may be able to help each other, and brainstorm ideas, etcetera. That is what we are looking to help with, but if they get on with it themselves, god bless them, that would be great.

Is there anyone else on the call that would like to speak to this, like to make a suggestion or make a comment about this process? Seeing none, I think that's an implicit sort of enjoinder to Sam and I to move -- yes, Bernie?

>> **DAVID McAULEY (Page 12)**: Thanks. Thank you very much.

I think we can now move on to the joinder issue, fifth item on the agenda. With respect to the joinder issue, let me summarize I had put on list a prospective way to treat this. I'll briefly summarize the points I made. They were based on comments that I summarized in that same E-mail from a law firm that Kathy was part of and I believe it was a noncommercial stakeholder group and maybe the IPC. I can't recall everybody that had a hand in it.

But I suggested that all parties to a underlying proceeding get timely notice, and copies of pleadings, etcetera of IRP, that all parties have a right to intervene or file amicus as they elect. If they become a party they take on the obligations of the party. I suggest all parties have a right to be heard in any petition for interim relief, although whether one could intervene as [inaudible] up to the panel. All parties enjoy equivalent rights as a party. That interested parties could petition the panel to intervene, but that would be up to the panel basically, and that joining parties be given a reasonable period of time within which to react. But the time wouldn't be long based on the fact that they were involved in the lower panel undertaking.

Greg weighed in on that and said he could agree as long as we limit the definition of parties in accordance with his E-mail. I thought that was reasonable. Then we have comments from Sam. If I could, I'm trying to summarize this, so we can move on. I think as Sam, the points I'll give you a chance to speak to, Sam, but as I read it you were basically saying, whatever we do here, as we do it, let us not lose sight of the fact that IRP is meant to decide whether ICANN has violated articles or bylaws and this IRP panel has no business deciding disputes between parties that have nothing to do with ICANN's articles or bylaws.

I thought this was a very good point.

You asked should the interested parties have to demonstrate harm based on alleged violation. It seems to me that if they were involved we could work on the concept of potential harm, but we have to keep the bylaws and articles in mind as we do all that. But you used the phrase, an appropriate tether to the subject of the IRP which is a important concept. I took your comments on board. I thought they were very well-made comments. What I'm going to suggest we do on joinder, since I've taken the lead on this as a participant, is that I try and stir together in one pot the comments I made, that Greg made and now that Sam has made and come to the list with a proposed solution.

But before I did that, I wanted to ask anybody on the call if they would have a comment or if they want to speak to this, or encourage us to go in a different direction. The floor is open, if anybody would like to talk to the joinder issue right now.

I don't see any hands. What I will take that to mean. I do now. Kavouss, you have the floor. If you are speaking, we can't hear you, Kavouss.

>> KAVOUSS ARASTEH: Yes, what do you mean by potential harm, because it is, everybody raise a hand saying that I may have potential harm, it is easy that everybody raise a hand.

>> DAVID McAULEY: Good question. Thank you. This joinder issue is in the context, I'm using the example of where someone appeals the decision from an expert panel below, and says the decision of the expert panel below, if adopted by ICANN violates the articles or bylaws, whatever the magic words are.

The winner below would be the party that would be seeking to join. The winner below has not suffered any harm because they won their case. No one has breached any bylaw or article with respect to the winner. The issue of joinder would have to be broached in such a fashion that someone like that could join in a ongoing IRP because they have an interest in this IRP, and they were a, quote, litigant, close quote, below.

But they haven't suffered harm, the potential harm that I'm speaking about is that their win may be taken away from them without them having a voice in it. I'm going to look at, I haven't done anything on this yet, because I just saw Sam's comments either today or yesterday, whenever they were put in but they were good comments about don't lose sight of the IRP's purpose.

I'm going to try and boil this down, at least that is what I'm suggesting. I recognize you, Kavouss, you raised a good comment. Malcolm, I'm going to give you the floor. Your hand is up.

>> MALCOLM HUTTY: Yes, thank you, David. Are we talking, I was a little surprised when you said that the winner there, because that seems to assume a much, almost seems to be presupposing what the nature of the dispute was.

I thought when we were talking about joinder we were talking about more something in the nature a amicus brief. Did I misunderstand that?

>> DAVID McAULEY: I think is to.

>> MALCOLM HUTTY: A amicus would need to show harm because they are making sure the adjudicator is fully aware of the broader issues. But if you are talking about something broader, could you explain more fully that in a way that generalizes it as opposed to just [inaudible] because it may not be that at all.

>> DAVID McAULEY: Yes. I think an amicus brief, in decent shape, what will happen, the panel will have discretion there. What I was talking about was appeals of expert panel decisions, such as community objection decisions, and it has to do with new gTLDs. Those are the only panels I can think of. But they are explicitly called out as being able to be appealed under the bylaws, appealed to IRP rather.

It was that I was speaking to. I think Greg was in his comments too. These are as I said community objections, or legal objections or string similarity kind of things. If there is an expert panel decision below, that there would be a loser and a winner and it would usually be the loser that would bring the IRP, changing the decision of the expert panel. And the winner below is what I was trying to, I was trying to refer to the party that won the expert panel decision below. That party has a interest in this IRP because they won below and here is the losers coming up to IRP saying, look, IRP, why don't you and I decide I should have won anyway. How does the winner below participate in the IRP was the question the joinder issue was trying to address. Does that help?

>> MALCOLM HUTTY: Yes, thank you. It does. I take it we are talking now just about joinder in the, only for appeals from expert panels and not joinder in other cases, is that right?

>> DAVID McAULEY: I believe that's right. That is my understanding. Frankly, when we wind (overlapping speakers).

>> MALCOLM HUTTY: Has to be clear, make that clear.

>> DAVID McAULEY: When we wind up our treatment of these issues we will hand them to Sidley to draft a language. That would be apparent.

>> MALCOLM HUTTY: Thank you.

>> DAVID McAULEY: Okay, Malcolm. Thanks. Does anybody else want to speak to this? What I was going to say is, I'll take a stab at joinder again on the list and try and put it in a concise form that we can make a decision on, but what I mean is I'll stir together my comments, Greg's comments and Sam's comments, take account of them all and see if there is a way to meld them all together. I will do that.

The next issue I had was challenges to consensus policy. We haven't discussed this yet really. It's similar to the joinder issue. It was made, these comments were made by Kathy Kleiman in the law firm Fletcher, I forget the full name. These were also made by the noncommercial stakeholder group, a similar comment. What they are saying is when a consensus policy is challenged by a party, or the application of consensus policy is challenged by a party, at IRP, shouldn't the developer of the consensus policy have the ability to join that IRP as an interested party?

I sent four slides along. Basically presented these comments that these people made and I'll summarize briefly that the three specific changes that Kathy Kleiman's law firm was asking for, first provide notice to the ICANN supporting organization, stakeholder group, working group chairs, etcetera, that developed the community that is under challenge. 2, give a mandatory right to intervene to those who helped create the consensus policy. 3, limit what the IRP panel can do when overturning a consensus policy.

Now, my comment, this is just me speaking as a participant, a IRP panel doesn't necessarily overturn things. They make recommendations to ICANN.

2, I think that these comments and those three specific requests make some sense but it's very broad. Working group chairs, ICANN community, I think that we would have to come up with a more narrow statement of this and who is involved in this.

That is my initial reaction. But I'm opening it to the floor for comments. I see that Kavouss has his hand up.

>> KAVOUSS ARASTEH: Yes, David. What do you mean by consensus policy challenge, you mean if a consensus has been reached by the panel to do something, and somebody doesn't like that, challenge that, and then the challenge is part of the decision-making, do you mean that? Why this consensus policy is challenged, consensus of whom, consensus on the decision made by the panel or consensus [inaudible] decision by the complainant or [inaudible] specifically explain what you mean by challenge consensus policy by whom, please.

>> DAVID McAULEY: It's my understanding, Kavouss, that the challenge would be by a claimant claiming that a supporting organizations, ccNSO or GNSOs developed policy and it's applied to them, well, I shouldn't speak for them. But that SOs policy violates in some form or fashion ICANN bylaws or articles of the incorporation. It's not another consensus, it's a policy developed by the SO involved, ccNSO or GNSO. These are fairly narrow in a sense. But it's narrow in that respect. It's not any policy.

>> KAVOUSS ARASTEH: Question which SO provides some policy [inaudible] will not be considered by the ICANN board, and then [inaudible] become policy or.

(muffled audio).

Already the ICANN [inaudible] issues be challenged.

>> DAVID McAULEY: It was my assumption, I have to say that as an assumption that it was an approved policy that was being spoken about. In other words, the application of a consensus policy to an individual who turns around and becomes a claimant saying this policy violates bylaws or articles. That is my understanding, Kavouss. (overlapping speakers) go ahead, Kavouss.

>> KAVOUSS ARASTEH: Why it should be [inaudible] approve the ICANN [inaudible] anyone has a problem, why not bring the problem at that time [inaudible] potential problem for us. Until it comes to the panel, and then we decide to challenge that. I see that you are advocating that

people challenging the policy will try to get into the decision-making issues [inaudible] make it easy for them to challenge a decision [inaudible]

>> DAVID McAULEY: I can understand the concern about that. Let me make two comments. Then I need to turn over to Malcolm. The comments I would say in that respect are, one, that is the way the bylaws read right now. We are not talking about claimant's ability to make a challenge here. We are talking about a ability to join, to become a interested party in that claim, the SO that developed it specifically.

The other thing I was going to say, it's possible that the claimant in this case may be a registrant wasn't involved in the community or wasn't around when the policy was developed. I can easily envision a claimant making a claim against policy. I don't think that is beyond the scope of conceivable.

I'm going to give the floor to Malcolm now whose hand is up.

>> MALCOLM HUTTY: Thank you, David. I can foresee practical problems here both for the SO intervening and indeed given the, what is practical for the SO to do in the time frame that they would need to be able to respond as a party. I imagine that might well delay a case, rather slow down the case quite significantly in a way that neither ICANN nor the claimant would particularly find helpful to achieving a swift and efficient resolution.

That said, I can see that the case why a SO might wish its views to be taken into account. I wonder if the better way of dealing with this issue is not to make them a party with all the obligations that would go in that, the procedural obligations, potential risk of cost being awarded against them and so forth but again to treat them as amicus and will be entitled to [inaudible] duty to consider a amicus brief from the SO whose policy it was, rather than actually to be a party with all the full obligations of the party.

>> DAVID McAULEY: Thank you, Malcolm. That is a good sensible suggestion. And it's brief. I urge you to put that on the list so we don't lose sight of it. I think that is a good idea. If there is a view to bring an SO in as a party, they have SOs and ACs have a quick turnaround time in community actions, I don't think there is any reason they shouldn't have a quick turn around time here. Sam made a good point in her comments on joinder that delay is a issue. Whatever we do we want to make sure doesn't defeat the purpose of the IRP being quick, etcetera. You made a good point. She made a good point in a different context. I don't think we will lose sight of that but I encourage you to put it on the list if you don't mind.

>> MALCOLM HUTTY: I'm always delighted to have the same perspective as Sam.

>> DAVID McAULEY: I didn't plan to say anything else right now about challenges to consensus policy, other than to invite comments like Malcolm just made, if anyone would like to make them on the phone, please do, or put them on the list in the next couple of days, because I intend to wrap this one up on list, maybe early in the week next week.

The next thing on the agenda is what I call segmenting certain issues. This relates to an E-mail that I put on list on March 29. It was trying to deal with a number of comments that we

received that were I think more easy to address perhaps than something like timing. I listed them and I'm happy to go through them now. I'll do it briefly.

But I would also ask you to look at the E-mail, I sent it March 29, and it would be in our archives if you have lost that E-mail. The title is segmenting certain IRP comments. I think what I summarized is fairly easily handled, perhaps with one exception on a thing that the IPC said. Anyway, I spoke to the comment about continuous IRP improvement, ALAC comment, and mentioned that the bylaws do provide for periodic review of IRP. I think that is a good thing.

I don't necessarily know that we have to do anything with respect to that comment, other than to acknowledge it and say the bylaws provide for something along these lines. I'm going to skip IPC and go to dot music. Dot music asked that we eliminate board confirmation of the standing panelists. Nominated by SOs and ACs.

The problem with that comment is that confirmation, not to be unreasonably withheld is in the bylaws. It's possible that people will come up with changes to bylaws I think that are appropriate, I think my personal opinion is they can suggest those in the appropriate fora. Our job as I see it and I'm open to other views obviously, is that we are to try and implement the bylaws as we are asked to in the bylaws, and so this is beyond our ability. We can't do that, we can't eliminate the board's ability to confirm standing panelists. I suggest we reject that comment. Dot registry makes a comment that seeks that any review of IRP decision can only be made in court. That is all fine but not something we can do. We have bylaws that we have to work with. I would suggest that we reject this. We are not going to overturn the fact that SOs and ACs vet applicants, SOs and ACs nominate panelists. And that ICANN confirms those nominations without being able to unreasonably withhold confirmation.

I would suggest we reject that.

The international trademark association comment seeks to enlarge the bylaws concept of standing and allow those to be claimants who haven't suffered harm but are at risk of imminent harm. That would be a change in the bylaws. We have talked about that concept in the joinder issue but that would come under the rubric of joinder and we have to decide whether that is possible. But in bringing an IRP claim to begin with, I can't see it. My recommendation would be that we can't enlarge the bylaws and we reject that.

Mr. Auerbach made a comment that the concept of materially affected as a standing requirement is too stringent. The party, had ability to bring a IRP claim should broadened to include people using IP addresses or domain names, basically everybody. I think again this is an expansion of the bylaws and we should say no. That would be my recommendation.

In here the IPC made a number of comments that I think we can easily agree to regarding the invoice date for when costs are due and when cost, in order to be considered the claimant, and other things. But they made some substantive proposals, one of which is that when there is an appeal of a IRP decision to the complete standing panel, that the three member panel that decide the case below not be included. Let's say we have a standing panel of 7 members, and you go to IRP and lose and you want to appeal the IRP decision to the full standing panel. That means you would appeal to four, those four that didn't sit on your case. I have personally, I'm

speaking personally, fundamental problems with that kind of thing. It seems to me the judges that heard the case or panelists that heard the case had every right, not a right but should for all reasons be able to sit on an appeal.

This may be separate from an easily decided one and I might have to deal with this separately and come to the list separately but I want to mention it's there. Having said that, about segmented stuff, I'll go to Kavouss whose hand is up. Kavouss, you have the floor. If you are speaking, Kavouss, we can't hear you.

>> KAVOUSS ARASTEH: I don't believe that the term, materially affected is the term because we discussed at length and some people proposed if I am not mistaken, I stand to be corrected, propose a term materially, could not be affected, affected by what, materially affected. I don't think that we can consider that as a term, thank you.

>> DAVID McAULEY: Thank you, Kavouss. I think we are probably of one mind on this. But I'll try to wrap this up on list as well. But it was out there and we have had time to look at it. I think we may be in a position where with one more mail I can say, let's see if this is a consensus approach.

I'm going to take one second to read Sam's chat comment here, requiring the IRP provider's invoice dates might not be something that the IoT could implement without agreement from the IRP provider. Good point. We need to double check that.

Any further comments on this issue? Malcolm, I see your hand is up.

**20170504–Transcript -**
**https://community.icann.org/pages/viewpage.action?pageId=64081164&preview=/64081164/64950379/IRP_IOT_0504ICANN1900UTC%5B2%5D.docx**

**>> DAVID MCAULEY (page 3)** : Okay. Thanks, Liz. Anybody have anything they would like to say or any questions they would like to ask about agenda item No. 3? That being the case let's move on to No. 4. I see that Greg has joined the call. Welcome, Greg. On the joinder issue, Brenda, I think you have some slides on joinder. And what's going to be shown in the slides is I mentioned last week in a call that I was going to try and consolidate or pull together the input on joinder in to items that we might be able to agree upon or at least to prompt some discussion around.

And so there you see, this is one of two slides. One of four points on this and I think this -- I think I sent this to the group. I can't remember. It was either yesterday or today. But there have been comments on joinder that as I mentioned before when I spoke about joinder the first time and then I spoke about it in a meeting and on list Greg gave some comments on list as Sam did, too. Sam had posed some very good questions about making sure that joinder, the notion of joinder didn't lose the concept of parties being tied to the IRP in the sense of what an IRP is. That is harm having been occurred in the nature of a breach of bylaws or Articles and that joinder wasn't an opportunity for parties to settle other kinds of claims. I think that's all well understood. I will read these out quite briefly. Slide -- the first slide, No. 1, one suggestion that all those who participated in an underlying proceeding as a party, using that term in its formal capacity received notice from a claimant, now these are IRPs under that section of the bylaw that is cited which deals with expert panels. That the claimant of the full notice of IRP and the request for IRP, two separate documents, including everything that comes along with them, contemporaneously with the claimant bringing the claim to ICANN's attention.

Two, that such parties have a right to intervene in the IRP. That is to take part in the IRP as a matter of right. How that right would be exercised would be up to the procedures officer who may allow the intervention through granting IRP party status or by allowing parties to file Amicus briefs as the procedures officers determine in his or her discretion. No interim relief or settlement could take place without allowing those giving Amicus status to file an Amicus brief on the requested relief or terms of settlement.

And the next slide, in reviewing these applications the procedures officer will endeavor to adhere to bylaw 3.43S, hopefully within six months. And then point 4 says that parties that participate in the capacities as Amicus participants would be considered parties for the limited purposes of bylaw 4.3R which means if they bring frivolous arguments they might be tagged with costs. That's a suggestion I came up with as a participant and to the group. I see that Malcolm has his hand up. Why don't you go ahead.

>> MALCOLM HUTTY: Thank you, David. I was just asking about the procedures officer. Certainly in determining whether or not somebody should be a party or should be a -- should be entitled to be a party or should be Amicus, isn't procedures officer and ICANN officer, the assistive process and essentially a clock function rather than a -- I don't want to use the word judicial but you know what I mean, a judicial function. So I am really raising the question, these

issues be taken by the procedures officer.

>> DAVID MCAULEY: There won't be a panel at this time because the claim will just have been filed but the procedures officer is actually a member of the standing panel under the rules. And that's why I put that term in caps. That's how that term appears in the rules.

>> MALCOLM HUTTY: Okay. Thank you for clarifying my misunderstanding of the status of that officer. Thank you.

>> DAVID MCAULEY: You are welcome. Good question. Any further comments on this? And I say that with this in mind, it is on the list and it will be here in the call. So probably within this coming week if there aren't further comments I am going to sort of put out on the list a request that we consider this issue for first reading and second reading as part of the rules. Again trying to wrap things up as best we can. If there are other comments, please speak now. Malcolm, is that a new hand? Oh, thank you.

>> MALCOLM HUTTY: Sorry, no.

>> DAVID MCAULEY: Okay. Thanks. So I need to get back to the agenda. Item No. 5 is challenges to consensus policy. And I have to say -- just one moment. I have to say that with respect to challenges to consensus policy, I had hoped to come to the list with a set of slides like these. And I just haven't had a chance yet. So my apologies on that. I'd like to move the discussion off of this right now and move on in the agenda and maybe come back to it, but I will ask in the meantime if anybody has a comment on the consensus policy on the mail that's taken place on the list.

Seeing none I'll move on to the next item on the agenda which is a discussion of recently posted issues. And what I mean by that is I had sent some e-mails on trying to draw together not only the joinder but an issue on retroactivity and panel conflict of interest. And so if I could ask Brenda to pull those slides up and again I tried to be economical with the slides. And present -- present what I was suggesting in the slides. And here you see panel conflict of interest issue. And if I -- I don't believe I have sent these slides to the list. I will do that after this call. But each of these two slides will indicate that this is simply a subset of something I sent in a certain e-mail. And it will have a link to the e-mail. With respect to panel conflict of interest I expect that you have all seen my mail where I sort of go through who made the comment, what the comment was and what the rules provision currently is. And then I get to my suggestion and there were three suggestions with conflict of interest. One from a law school in Delhi and one from .music and one from .registry. And the letter from -- the comment from the law school first basically spoke about term limits and read the bylaws as requiring us to create term limits. And they went back to the final report of the CCWG where there was language that said it will be a five- year term, no renewal as I recall, but the bylaws didn't capture that no renewal language but they did encourage us to come up with a rule on term limits. My suggestion would be that term limits make sense but it makes sense that panelists become familiar with term limits. There is not that many IRPs that someone may participate in. I guess that's not a good term to use. But IRPs have not historically been counted in the hundreds. They are less than that. That may change with the new standard. It is unclear but I thought that two terms of five years might make sense to allow people to get an understanding of ICANN, become comfortable in that and proceed on. Not that panel members would serve

two terms but they could.  But I also asked what do we think because maybe no term limits make sense or maybe as the law school in Delhi said one term of five years make sense. Malcolm, you have the floor.

**20170511 – Email - MH (recommended reading)**

Malcolm Hutty m alcolm at linx.net

Thu May 11 11:28:53 UTC 2017

Previous message: [IOT] Trying to coordinate Joinder comments Next message: [IOT] Trying to coordinate Joinder comments Messages sorted by: [ date ] [ thread ] [ subject ] [ author ]

Dear David,

I think your proposal on amici needs a little refinement, rather than simply applying 4.3(r) to amici.

4.3(r) says that parties shall generally bear their own costs, but that the IRP panel may shift costs to the losing party.

I agree that amici should bear their own costs. I do not believe amici should be exposed to share in the costs in the event of cost shifting if they support the losing side, nor should they benefit from a share in the costs that are shifted if they are on the winning side.

For that matter, an amicus brief may not obviously be tied to other "side". Amicus briefs can be purely informational, and they can often support or oppose one aspect of a party's position (or the question at issue) without taking any view on the core of the case or who should prevail.

But even for amicus briefs that do clearly support one side, I think they should be exempted from cost-shifting either to their benefit or to their detriment.

**20170511 – Email – MH1 (recommended reading)**

[IOT] Trying to coordinate Joinder comments

Malcolm Hutty m alcolm at linx.net

Thu May 11 13:35:16 UTC 2017

Previous message: [IOT] Trying to coordinate Joinder comments Next message: [IOT] Trying to coordinate Joinder comments Messages sorted by: [ date ] [ thread ] [ subject ] [ author ]

On 11/05/2017 13:45, McAuley, David wrote:

> Thanks Malcolm, fair point - we can discuss on call.
>
> My initial reaction is to agree but to keep the point I was making to
> some extent - because that section of bylaw deals with abusive or
> frivolous claim or defense - which presumably includes an argument by
> amici.
>
> Maybe we could narrow this to allow cost shifting "to the extent"
> that ICANN incurs cost to defend against an amici argument that is
> found by the panel to be abusive or frivolous.

> Let's discuss.

I may not be able to make tonight's call, so I'm going to make my contribution now.

You assume the amicus would be briefing against ICANN? I'm not so sure.

I would say that the potentially chilling effect of such a provision more than outweighs the benefit from dissuading frivolous amicus intervention, not least because I don't see much harm done.

There's a real difference between bringing a frivolous case and making a frivolous intervention.

A case must be answered, if only to defend against a default judgement.

If ICANN considers the amicus brief to add nothing substantive that's new, it can simply ignore it.

And, as I said before, an amicus isn't really on either side. Even if an amicus does criticise or oppose one aspect of ICANN's argument, that doesn't necessarily amount to a view that the claimant should prevail.

I would be concerned that cost shifting would simply dissuade public interest parties from contributing to the process, because they couldn't stand the cost if it occurred.

To be honest, I worry that cost shifting even against a claimant might have a chilling effect that is worse than what it brings in terms of dissuasion. But that's

where we ended up in the bylaws, a compromise. Extending it to amici I think is taking it too far.

Malcolm.

**20170511 – Transcript -**
**https://community.icann.org/pages/viewpage.action?pageId=64084338&preview=/64084338/66063100/IRP_IOT_0512ICANN1300UTC%20copy.docx**

**>> DAVID McAULEY (page 6)**: Thank you, Kavouss.

I think we are ready to move to the next agenda item, which is an update by me on issues as listed in the agenda plus one that I neglected to put in the agenda but later addressed in an email. And let me just explain what I am hoping to do here is I think we've had discussions surrounding these issues, joinder, panel conflict of interest, retroactivity of both substantive standards and USP rules and the idea of stanchion under the heading of materially affected as given to standing. We've had enough discussion that we may be able to move these forward. And so my hope here was to update these on the call, knowing that if we agree on the call, what I will do is put these out on list as a call for first reading that people can comment to on the list. I would commit to getting this done by tomorrow, Friday. People would be able to comment to as a master of first reading on the list, leading up to next week's call, which would be sort of the when we would decide that it's past first reading if, in fact, it does, subject to what people have to say. So that's -- excuse me. That is what I am attempting to do, and that answers a question that Liz posed last week about, you know, she was concerned that we might be getting to first reading last week. So that's what the plan is here, is to go through these things, and that's what I intend to do, and I will start doing it right now. But does anybody have a question or comment on the process?

If not, let's move on, and so the items I was going to give an update on are the first one is joinder, and let me briefly read through where I think we are on joinder. Excuse me just one minute. Where I think we are on joinder, and it's as follows: I think we've agreed that anybody that has participated in the underlying expert panel proceedings, and with respect to a certain section of the bylaw, that they would get -- if they participated as a party there and another person challenges that, then those participants below would get full notice of the IRP and the request for IRP, those two things together sort of create the statement of the IRP, at the same time that the complaint is filed. And all of these parties would have a right -- a right -- to intervene in the IRP. But how that right is exercised would be within the discretion of the procedures officer. And you can see from the text, you know, that that might be as a full party, it might be as an amicus, whatever is decided. And it goes on to say that interim relief could not be available, settlement could not be available for an IRP without allowing people that have this intervention of right to have some say in the matter.

And then it goes on to -- I go on to say -- and these are in the slides I sent yesterday. Let me just take one second here. These are in the slides I sent yesterday. The third point would be the procedures officer would, despite these requests, try and do everything they can to keep the case moving as expeditiously as possible, as envisioned by the bylaws.

And then finally -- and this point is subject to some discussion on list -- finally we say that people who participate in this manner as amici in IRPs would be considered for the limited purpose of Bylaw 4.3R as parties. What that point was they should be eligible for cost shifting if their intervention is found by the panel to be abusive or frivolous.

Malcolm brought up a point on list -- and it's a good point -- you know, that it should not be an open -- well, I shouldn't speak for Malcolm. He sent an email, and I would urge you all to read it. The way I took it is this would not be appropriate, that an amici would be subject to cost shifting because oftentimes they are just informational, et cetera, et cetera. I wrote back this morning saying maybe we could solve that particular part of it by saying the cost shifting would only be to the extent that an amici brief made ICANN incur costs in defending against a frivolous or abusive argument.

So I would propose that we agree with the joinder that I just summarized and with the change Malcolm submitted and with change submitted by me to the extent they require costs by ICANN to meet frivolous arguments.

So does anybody have a statement? Greg, you have -- your hand is up, so you have the floor on this respect.

>> GREG SHATAN: Thanks. It's Greg Shatan for the record, and I guess the -- a couple of things on this. First, in my limited experience, amici are generally considered to be nonparties and, therefore, are not subject to cost shifting in cases where cost shifting is available to parties. So I think there's kind of an uphill battle here to say that there should be cost shifting for amici in this case. I think it can also have a chilling effect on the participation of amici who may not have a dog in the fight financially to begin with to say that they could be subject to cost shifting.

Finally, especially where there is a question of whose side they may be on or nobody's side, it's a -- I guess it would be the other side who would submit costs, not the ICANN costs, would also have cost in the amicus brief.

It also brings the issue that cost shifting generally -- and I haven't looked at how it works in the IRP context -- usually involves, except in the case of, say, specific motion practice, all of the costs of a case. You know, loser pays type of thing. So you would have to deal with some sort of an accounting issue of how much time was spent dealing with an issue, which might be intertwined with other issues, not a discrete issue. So that creates kind of an allocation nightmare. So for those reasons, I am not in favor of putting a cost shifting burden potentially on amici. If there is an issue with frivolous or vexation briefs -- if they truly are, they are not going to be taken into account to a great extent, if at all, so that's a kind of punishment in and of itself. But I think that cost shifting is not the right tool to use to deal with the potential of frivolous, vexation, or bad-faith amici briefs.

We could also look at whether, in fact, amicus briefs need to be approved to be brought into the case. Or whether they come in as a right. And it could be that if an amicus brief is such a pile of dung that it might invoke cost shifting if that were an option. The option would be just to say you are not a friend of the court, go away and take your pile of dung with you. Thank you very much. And thank you very much.

>> DAVID McAULEY: Thank you, Greg. I see there's widespread agreement in the chat with what you said. I think with the email Malcolm sent, I am happy to let this one go. But let me mention a comment you were just saying. This particular amicus brief would be allowed in as a matter of right because these are from parties to an expert panel below. So they have intervention as a matter of right. It's up to procedures officer to decide whether that's as a party or as an amicus. So I don't think there will be an issue of accepting it, et cetera. But I do see the concerns you, Avri, Malcolm, and Samantha -- Sam -- has agreed with. So I am happy to let it go. So I think we are in agreement and will tailor this one not to have cost shifting for amicus briefs. Otherwise, I think that we are in widespread agreement on this, unless anybody else wants to make a comment. If not, I am going to move on to the next such update.

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

>> SAMANTHA EISNER: Thanks, David. You know, as I noted in the chat, I share the concerns Greg raised around this, but I do appreciate the effort to try to hold some level of accountability to those participating in an amicus fashion. I think that going to cost probably isn't the way to do that. So the other thing we could consider -- and we can consider more, you know, online -- is, you know, are there other tools we can build in, are there other concrete rules or guidance to the panel about weighing interest and harm or something like that and not use money as the detractor for participation in the IRP?

>> DAVID McAULEY: Thank you, Sam. David here. One -- let me just make my statement, and then I will ask if Kavouss has a statement.

One idea that comes to me in response to what you just said is perhaps we could write into the rules that even though someone has a right to intervene in amicus as a matter of right, that doesn't prevent -- or we should maybe expressly allow ICANN to immediately argue that such an amicus brief is abusive or frivolous and should not be considered, and the panel would have discretion to grant that. I mean, that's one potential.

But before I move on, I think I heard Kavouss. Kavouss, did you want to weigh in on this item?

>> KAVOUSS ARASTEH: Yes. I agree with what you put on the slides, but I don't follow with this counter proposal that you made. What you are saying is in the list as you provided, I have no problem with that. Thank you.

>> DAVID McAULEY: Thank you, Kavouss. I think that we have changed the slides that I provided. I think that number 4 on the joinder recommendation is no longer viable; that is, that

these people who participate as amicus curiae in an IRP would not be -- would not be -- eligible for cost shifting based on the discussion that we just had, and Sam made a good point that we might want to look for another way to hold such folks accountable for the quality of what their participation is, but we haven't reached agreement on that. That's just a matter under discussion.

I am going to try and move this forward to first reading, even though part of it may remain open, the part that Sam was just talking about, but I'll see if I can do it. But otherwise, I think this discussion is pretty much concluded unless you, Kavouss, want to make another statement or anybody else does.

**>> DAVID McAULEY (Page 17)**: Okay. Thanks very much.

The only thing we recommend against changing is those provisions in the rules that deal with breach of contract for the IANA naming functions contract. I mean, those are breach of contract claims that will be handled as breach of contract claims. I just -- I didn't see the need that this would be changed, but I am open to comments in that respect.

Hearing or seeing none, I may put this out on the list, and then I think we can move to the next agenda item, which is challenge to consensus policy, but I also note that we are running -- we have ten minutes left. So let's discuss challenge to consensus policy briefly. And I encourage everybody to respond to my email on the list about consensus policy that I sent I think on Tuesday of this week.

This was an area that was addressed by Kathy Kleiman's law firm, which we refer to as Fletcher, and I think the noncommercial stakeholder group as well. But the recommendations boiled down to be along the lines -- you can see in the email that I sent -- along the lines of joinder. And the recommendations were specifically for -- let me read briefly -- that any supporting organization whose policy was being challenged would receive notice from the claimant of the full notice of IRP and request for IRP, which is the full body of the IRP claim, and all the documents that go along with it, contemporaneously with a service upon ICANN. That the SO would have a right to intervene in the IRP, but again, it would be up to the procedures officer as to how the SO proceeds, as a party if the SO wishes. I am not sure they can do that under their budget and operating procedures. Or as an amicus, which may be of more interest to them, but that would be up to the SO as to what they are requesting, would be up to the procedures officer as to what is decided.

Stakeholder groups, working group chairs, and other community members. And frankly, thought that the supporting organization would be sufficient.

Fletcher also suggested some limitations on what the panel can do, what the panel's ruling can be. And my opinion on that was first of all, it's a bylaws matter, and the steps available to the panel in Bylaw section 4.30 were sufficient to handle this.

Here again, I am will be to -- or I am asking people please comment or state other views as they wish right now on the phone. Or on the list when I put this out for first reading. If anyone has a comment, please make it now.

Hearing or seeing none, I will just go ahead and send that to the list. Maybe we can wrap up a few minutes early.

But there's another agenda item, the call for volunteers, and it's something I have been asking. There are still issues left, obviously, if you go to the comments forum, and Bernie's very good Excel spreadsheet where he tabulated the comments under certain headings. There are still issues to pick off, and I think there's a reasonable template in place under which we can handle them. Greg did something in the jurisdiction group in his capacity as lead in the jurisdiction group that I really liked, and that is sort of pushing a bit on the volunteers. So what I intend to do is reach out to people and ask if you could take one issue or two issues and move them forward. Now, obviously, members of this group from Jones Day and ICANN Legal, I think we would put them in a horribly awkward position because ICANN is going to be a party in these, so I won't be reaching out to them, but others may be receiving an email or call from me saying could you help. We have a deadline looming at the end of this month, and I don't know how we are going to meet it even now. Maybe we should discuss timing at the next call. But the idea of getting help on these is very, very important. I encourage you to look at the issues, look at Bernie's spreadsheet summary, see if you can pick some off and help us move them forward. Everybody's participation is very welcome, even if you can't volunteer to take a lead on an issue.

Is there anybody that has any comments in respect to that or anything else that we've discussed on this call? Otherwise we can wrap up a few minutes early.

Well, not hearing or seeing any, I have to admit I haven't kept up with the chat in the recent minutes, but I will take a look at chat after the call.

Let me thank everybody --

**20170518 – Transcript -**
**https://community.icann.org/pages/viewpage.action?pageId=64084340&preview=/64084340/66067787/IRP-IOT_5-18-17%20ICANN%20200-300.rtf**

>> DAVID McAULEY Page 8): Okay. Thank you, Sam. Is there any comment or question about that?

Hearing none and seeing none, we'll move to agenda item number five, which is titled on the agenda, first reading ona certain number of issues. The first of which is joinder. Let me just pull up my document here.

And, on the joinder issue, you've seen the slides that I sent before, and basically where we have come down on joinder is that anybody that participated in an underlying expertpanel proceeding as a party would receive notice from an IRP claimant, and they would receive a copy of the notice and a request for an IRP, two separate things, but together they constitute the body of the request for IRP.

And, they would be to get the documents, that they would have such people that participated below would have a rightto intervene in the IRP, but the procedure's officer of thepanel would have the final say on how that is executed, whether as a party or as an amicus brief, and the procedure's officerwould be exhorted to do their best to stick within the timeframes that the bylaws call for in handling IRPs.

And we have agreed to eliminate something I raised, and that is that people participating amici would be considered parties for the limited purpose of costs on frivolous claimsor frivolous argument, so that would be -- that last bit is no longer part of it, and so we agreed tostrike that. I think we've agreed on this joinder approach, and I think this could constitute a first reading, but I'm open to comments,questions right now, so the floor is open.

**20170519 – Email - DM (recommended reading)**

[IOT] Status update

McAuley, David dmcauley at verisign.com

Fri May 19 17:37:28 UTC 2017

Previous message: [IOT] Fwd: FW: Trying to coordinate Joinder comments

Next message: [IOT] Caption Notes-Recordings-Transcript links for IRP-IOT Meeting #22 - 18 May 2017

Messages sorted by: [ date ] [ thread ] [ subject ] [ author ]

Dear members of the IRP IOT:

We have a call on Thursday, May 25, at 19:00 UTC - I will send an agenda by Wednesday - probably sooner.

(FYI - we have two further calls scheduled after next Thursday and prior to ICANN 59 - they are on Tuesday June 6, and Thursday June 15.)

We need to wrap issues on the supplementary procedures to get that part of our work finished. Here is where we stand:

First Reading Done:

********* Joinder issue - see 1-slide PPT attached (IRP IOT Joinder ...) Ready for First Reading agreement:

********* Retroactivity; and

********* Standing (Materially Affected) - see 2-slide PPT attached (IRP IOT First Reading May 25 ...). Ready for discussion (potential for First Reading):

********* Challenges to Consensus Policies -see my email<http://mm.icann.org/pipermail/iot/2017-

May/000213.html> of May 9. That email gives background and then in that email I made these recommendations:

I recommend that we create a mandatory right of intervention for the SO whose policy is under challenge. And I recommend that we treat it along the lines I recommended for other Joinder issues, specifically as follows:

********* That such SO receive notice from a claimant of the full Notice of IRP and Request for IRP (including copies of all related, filed documents) contemporaneously with the claimant serving those documents on ICANN; and

********* That such SO have a right to intervene in the IRP. How that right shall be exercised shall be up to the PROCEDURES OFFICER, who may allow such intervention through granting IRP-party status or by allowing such SO to file amicus brief(s), as the PROCEDURES OFFICER determines in his/her discretion. No interim relief or settlement of the IRP can be made without allowing those given amicus status a chance to file an amicus brief on the requested relief or terms of settlement.

********* I therefore suggest we stop short of providing such notice to SGs, WG Chairs and community members, and "those who helped create the consensus policy and those whose interests are represented in/affected by it."

********* I do not see the need to limit what a panel can do with respect to challenges to consensus policy inasmuch as bylaw section 4.3(o) seems well suited to address the matter.

Compromise approach floated, possible First Reading agreement:

********* Panel conflict of interest topic:

o See slides 3 and 4 of the attachment to my email<http://mm.icann.org/pipermail/iot/2017-May/000224.html> of May 12.

o Remaining differences over whether standing panel members are limited to one five-year term or can serve another. A potential compromise exists around the notion of "automatic" renewal for one additional term with some intervention by SOs/ACs (1) if the panelist is deemed ineffective (?) or (2) based on grounds used for removal (?). We need to flesh this out - please give this some thought.

Please also look at the sign-up sheet and consider volunteering to lead on an issue discussion:

https://docs.google.com/spreadsheets/d/1Hi_HgvrfsT33p5mfYWT4-x-uhEoy9nCK8owX5uTKC0U/edit?ts=591dda09#gid=0

David

**20170605 – Email – DM (recommended reading)**

[IOT] Second reading June 12 on 'Joinder' issues

McAuley, David d mcauley at verisign.com

Mon Jun 5 13:40:17 UTC 2017

Previous message: [IOT] Second reading June 12 on retroactivity issues Next message: [IOT] First reading complete on timing issue

Messages sorted by: [ date ] [ thread ] [ subject ] [ author ]

Dear members of the IRP IOT,

The purpose of this mail is to inform you, particularly those who do not regularly attend the teleconference calls, that at a recent meeting we gave a first reading to an outcome on "Joinder" issues, and to notify you that we have a second reading scheduled for June 12th (conference call at 19:00 UTC).

Our agreed approach at first reading deals with joinder issues concerning entities that participated in in an underlying proceeding (process-specific expert panel) as contemplated in Bylaw Section 4.3(b)(iii)(A)(3).

Our approach was agreed at first reading following consideration of various public comments received from the first draft public comment period.

Here is what we agreed at first reading:

1. That all those who participated in the underlying proceeding as a "party" receive notice from a claimant (in IRPs under Bylaw section 4.3(b)(iii)(A)(3)) of the full Notice of IRP and Request for IRP (including copies of all related, filed documents) contemporaneously with the claimant serving those documents on ICANN.

2. That all such parties have a right to intervene in the IRP. How that right shall be exercised shall be up to the PROCEDURES OFFICER, who may allow such intervention through granting IRP-party status or by allowing such party(ies) to file amicus brief(s), as the PROCEDURES OFFICER determines in his/her discretion. No interim relief or settlement of the IRP can be made without allowing those given amicus status as a matter of right as described herein a chance to file an amicus brief on the requested relief or terms of settlement.

3. In reviewing such applications, and without limitation to other obligations under the bylaws, the PROCEDURES OFFICER shall endeavor to adhere to the provisions of Bylaw section 4.3(s) to the extent possible while maintaining fundamental fairness.

If you wish to object to second reading being given please speak up now on list, and/or at the next call on June 12th at 19:00 UTC.

Best Regards,

David

**20170709 – Email – EL (recommended reading)**

[IOT] Open Joinder/Intervention Issues

Elizabeth Le e lizabeth.le at icann.org

Sun Jul 9 22:26:08 UTC 2017

Previous message: [IOT] IRP IOT teleconference July 11 at 19:00 UTC - Agenda

Next message: [IOT] Process flow for SO/AC work on creating standing panel [renamed subject line]

Messages sorted by: [ date ] [ thread ] [ subject ] [ author ]

As referenced on the 12 June IOT call, there are several open items surrounding the joinder/intervention process that need further clarification and development.

These issues were raised by ICANN during the IOT call on 6 April and in ICANN's 26 April email, and have not been addressed or developed as part of the proposal that has been presented for first/second readings. As we have previously stated, ICANN does not object in principle to a proper third party having the right to intervene or join in an IRP because allowing proper intervention and joinder is likely to enhance accountability. However, there needs to be further work on the rules surrounding the joinder/intervention process relating to the following issues.

Who can intervene/join? By right or "interested parties"

As noted in ICANN's 26 April email, there needs to be rules and criteria established as to who can join/intervene by right as well who may be properly joined/allowed to intervene at the discretion of the IRP panels.

The second proposed clause of states: "That all such parties have a right to intervene in the IRP. How that right shall be exercised shall be up to the

PROCEDURES OFFICER, who may allow such intervention through granting IRP-party status or by allowing such party(ies) to file amicus brief(s), as the PROCEDURES OFFICER determines in his/her discretion."

Further clarification and development is needed on the standard of review that is to be applied by the Procedures Officer when determining the extent to which an intervenor may participate. What should the interested parties have to demonstrate (e.g., should the interested parties have to demonstrate harm based on an alleged violation by ICANN of the Bylaws or Articles? What are appropriate interests that will be supported?). What types of briefings and opportunity to be heard are needed in order to allow an interested party to petition the Procedures Officer to exercise his or her discretion and allow the party to join in the IRP?

Also fundamental to this question is understanding if there are different levels of "joining" an IRP? Should a person/entity that can allege that they have been harmed by an alleged ICANN violation the Bylaws/Articles be treated differently than a person/entity that just has an interest in someone else's claim that the Bylaws were violated? Keeping the purpose of the IRP in mind, does it make sense to treat each of these as having "IRP-party status"? It would also be helpful to clarify if IRP-party status includes the ability to be a prevailing party, is entitled to its own discovery, and if such discovery would be coordinated or consolidated with that of the claimant?

Interim Relief and Settlement

Further clarification is needed for the proposed sentence in the second paragraph that states: "No interim relief or settlement of the IRP can be made without allowing those given amicus status as a matter of right as described herein a chance to file an amicus brief on the requested relief or terms of settlement."

This is another area where the Supplemental Rules would benefit from clarity between the types of intervention. An amicus curiae, as generally understood, typically does not participate as a party to a proceeding. The concept of allowing for briefing at the interim relief stage from an amicus, or a third party that believes it has an interest in the outcome (with IRP-party status or not), could be appropriate, but more information is needed as to the timing and expectation of what intervention or briefing is expected to achieve.

What standard is the panel adhering to when considering an amicus? Are there timing requirements of when the process should be invoked? The timing for an amicus curiae to comment on interim relief should take into account the fact that the interim relief process is an expedited process to provide emergency relief.

For example, at what point in time can an amicus curiae comment on interim relief– during the briefing stage seeking interim relief or after the IRP Panel makes a determination an interim relief?

In regard to the settlement of issues presented in an IRP, the settlement of disputes is a private and often confidential process between two parties. It is unclear how and why an amicus curiae, who is not a party to the IRP, would be entitled to have input in the settlement amongst two (or more) parties to an IRP.

What is the procedure for such a process? What types of briefings and opportunity to be heard are needed in order to allow an amicus curiae to comment on interim relief or settlement? Parties are not even required to notify or brief the panel during settlement discussion, and the panel does not have an opportunity to vet a settlement, so what else would need to be changed (and on what grounds) to make this intervention into a settlement feasible and justified as to cost and burden to the parties? Parties should not be required to prolong an IRP if they would prefer to end it.

Also, as noted below regarding confidentiality concerns, how is the right of an amicus curiae to approve settlement terms balanced with the interests of the parties to the settlement to keep the terms of the settlement confidential?

Additional development is needed to ensure that an amicus curiae's exercise of its rights to comment on interim relief or settlement does not delay the emergency relief and prejudice the rights of the parties to the IRP.

Timing Considerations

As discussed in further detail in ICANN's email of 26 April, further clarification and development is needed regarding timing of the joinder and intervention processes. The amount of time in which a party has to intervene or join in the IRP and the briefing schedule for such motion should take into consideration the intent under the Bylaws for IRP proceedings to be completed expeditiously with a written decision no later than six months after the filing of the Claim if feasible.

Confidentiality Concerns and Other "Party"-Related Concerns

As discussed in further detail in ICANN's email of 26 April, another issue for consideration pertains to the extent to which confidential information can/should be shared with parties intervening/joining. For example, if a claimant wants to submit confidential information in support of its IRP, it should be able to protect that information from being accessible to intervenors, some of whom could be competitors or contracted parties. Do intervenors get access to information exchanged between ICANN and the claimant? How will discovery methods apply to intervenors? Do intervenors have all rights as any other party to the proceeding, up to and including the ability to be determined as the prevailing party?

Elizabeth Le

Senior Counsel, ICANN

**20170721 – Email – DM (recommended reading)**

[IOT] Issues Treatment - Joinder

McAuley, David d mcauley at verisign.com

Fri Jul 21 13:57:11 UTC 2017

Previous message: [IOT] Issues treatment going forward Next message: [IOT] Bringing CEP into IRP IOT Messages sorted by: [ date ] [ thread ] [ subject ] [ author ]

Dear members of the IRP IOT:

Let's move some issues along on list -see our sign-up sheet<https://docs.google.com/spreadsheets/d/1Hi_HgvrfsT33p5mfYWT4-x-uhEoy9nCK8owX5uTKC0U/edit? t s=591dda09#gid=0> for issues. This email deals with the joinder issue.

These following three numbered paragraphs constitute the previous proposal<http://mm.icann.org/pipermail/iot/2017-June/000251.html> on joinder:

1. That all those who participated in the underlying proceeding as a "party" receive notice from a claimant (in IRPs under Bylaw section 4.3(b)(iii)(A)(3)) of the full Notice of IRP and Request for IRP (including copies of all related, filed documents) contemporaneously with the claimant serving those documents on ICANN.

2. That all such parties have a right to intervene in the IRP. How that right shall be exercised shall be up to the PROCEDURES OFFICER, who may allow such intervention through granting IRP-party status or by allowing such party(ies) to file amicus brief(s), as the PROCEDURES OFFICER determines in his/her discretion.

No interim relief or settlement of the IRP can be made without allowing those given amicus status as a matter of right as described herein a chance to file an amicus brief on the requested relief or terms of settlement.

3. In reviewing such applications, and without limitation to other obligations under the bylaws, the PROCEDURES OFFICER shall endeavor to adhere to the provisions of Bylaw section 4.3(s) to the extent possible while maintaining fundamental fairness.

On July 9th Liz Le of ICANN Legal listed concerns/questions with respect to this proposal in an email<http://mm.icann.org/pipermail/iot/2017-July/000265.html>.

My comments (as participant and issue lead):

I will note the gist of Liz's concern/question in italics and then my proposal/answer in red.

One overall note: This joinder proposal is strictly with respect to "parties" to expert panels as per

#1 above - when we deal with challenges to consensus policies we can there deal with how SOs may intervene in those matters (remembering that we will ask Sidley to come up with actual "rules" language once we finish our work).

Liz's points (not necessarily her entire comments):

First, there needs to be rules and criteria established as to who can join/intervene by right as well who may be properly joined/allowed to intervene at the discretion of the IRP panels.

The intent is to allow all "parties" at the underlying proceeding to have a right of intervention, but that the IRP Panel (through the Procedures Officer) may limit such intervention to that of Amicus in certain cases. It is not envisioned to allow non-parties from below (or others) to join under these provisions - noting that these provisions just deal with parties below. We are not displacing rule #7 (Consolidation, Intervention, and Joinder) from the draft supplementary rules<https://www.icann.org/en/system/files/files/draft-irp-supp-procedures-31oct16-en.pdf> that went out for comment.

Second, clarification and development is needed on the standard of review that is to be applied by the Procedures Officer when determining the extent to which an intervenor may participate. What should the interested parties have to demonstrate (e.g., should the interested parties have to demonstrate harm based on an alleged violation by ICANN of the Bylaws or Articles? What are appropriate interests that will be supported?). What types of briefings and opportunity to be heard are needed in order to allow an interested party to petition the Procedures Officer to exercise his or her discretion and allow the party to join in the IRP?

I don't think the intervenor would have to allege or show harm - that is the job of the Claimant (presumably the "loser" below) - and that Claimant will have to allege/show that the decision by the panel below, if implemented by ICANN, would violate the Articles or Bylaws. The intervenor here would simply need to show party-status below. I would think that a request for joinder would have roughly the same information required of a Claim as per Bylaw 4.3(d) and would also require an equivalent filing fee.

Third, Also fundamental to this question is understanding if there are different levels of "joining" an IRP? Should a person/entity that can allege that they have been harmed by an alleged ICANN violation the Bylaws/Articles be treated differently than a person/entity that just has an interest in someone else's claim that the Bylaws were violated? Keeping the purpose of the IRP in mind, does it make sense to treat each of these as having "IRP-party status"?

I think that in these circumstances (dealing with an expert panel below decision) the "winner" below would most probably be accorded party status and would have an obvious interest. The more difficult case might be an intervenor who was also a "loser" below in cases where there may have been more than two parties. Maybe we should require that they allege and show a material likelihood of winning on rehearing if the IRP panel were to advise ICANN to call for a rehearing.

Fourth, It would also be helpful to clarify if IRP-party status includes the ability to be a prevailing party, is entitled to its own discovery, and if such discovery would be coordinated or consolidated with that of the claimant?

My suggestion would be that anyone with party status (rather than amicus status) have discovery rights as coordinated by the IRP panel.

Fifth, An amicus curiae, as generally understood, typically does not participate as a party to a proceeding. The concept of allowing for briefing at the interim relief stage from an amicus, or a third party that believes it has an interest in the outcome (with IRP-party status or not), could be appropriate, but more information is needed as to the timing and expectation of what intervention or briefing is expected to achieve.

Perhaps this right should be limited to instances where requested interim relief, if granted, could materially harm the amicus's ability to pursue/achieve their legitimate interest.

Sixth, What standard is the panel adhering to when considering an amicus? Are there timing requirements of when the process should be invoked? The timing for an amicus curiae to comment on interim relief should take into account the fact that the interim relief process is an expedited process to provide emergency relief. For example, at what point in time can an amicus curiae comment on interim relief - during the briefing stage seeking interim relief or after the IRP Panel makes a determination an interim relief?

If the above responses don't address standard sufficiently then a specific proposal is invited. As for timing, I propose notice of intent to file within 10 days of receipt of the claim (not business days) with timing for briefs (whether as party or amicus) determined by PROCEDURES OFFICER.

Seventh, In regard to the settlement of issues presented in an IRP, the settlement of disputes is a private and often confidential process between two parties. It is unclear how and why an amicus curiae, who is not a party to the IRP, would be entitled to have input in the settlement amongst two (or more) parties to an IRP.

What is the procedure for such a process? What types of briefings and opportunity to be heard are needed in order to allow an amicus curiae to comment on interim relief or settlement? Parties are not even required to notify or brief the panel during settlement discussion, and the panel does not have an opportunity to vet a settlement, so what else would need to be changed (and on what grounds) to make this intervention into a settlement feasible and justified as to cost and burden to the parties? Parties should not be required to prolong an IRP if they would prefer to end it. ... how is the right of an amicus curiae to approve settlement terms balanced with the interests of the parties to the settlement to keep the terms of the settlement confidential?

This seems a fair point and perhaps the right to intervene as to a settlement must be limited to parties.

Eighth, Additional development is needed to ensure that an amicus curiae's exercise of its rights to comment on interim relief or settlement does not delay the emergency relief and prejudice the rights of the parties to the IRP.

The reference (to Bylaw Section 4.3(s)) in paragraph 3 of the original proposal is intended to address this.

Ninth, further clarification and development is needed regarding timing of the joinder and

intervention processes. The amount of time in which a party has to intervene or join in the IRP and the briefing schedule for such motion should take into consideration the intent under the Bylaws for IRP proceedings to be completed expeditiously with a written decision no later than six months after the filing of the Claim if feasible.

Suggest 10 days for notice etc., as noted under SIXTH above.

Tenth, another issue for consideration pertains to the extent to which confidential information can/should be shared with parties intervening/joining. For example, if a claimant wants to submit confidential information in support of its IRP, it should be able to protect that information from being accessible to intervenors, some of whom could be competitors or contracted parties. Do intervenors get access to information exchanged between ICANN and the claimant? How will discovery methods apply to intervenors? Do intervenors

have all rights as any other party to the proceeding, up to and including the ability to be determined as the prevailing party?

I would think that the panel, operating under ICDR rules, can handle these matters - e.g. I believe the rule on confidentiality here would be Article 21, subsection 5, which provides:

The tribunal may condition any exchange of information subject to claims of commercial or technical confidentiality on appropriate measures to protect such confidentiality.

(I am referring here to these rules:

f ile:///C:/Users/dmcauley/Downloads/ICDR%20%20(1).pdf

Best regards, David

**20170727 – Transcript -**
**https://community.icann.org/pages/viewpage.action?pageId=66087375&preview=/66087375/69274781/IRP-IOT%20SUBGROUP_07272017-FINAL-en.docx**

**>> MR. MCAULEY (Page 20):** Thank you, Anna. And, we're very happy to have you join us.

We will now, unless anybody has a comment, question, anything they want to say on this agenda item.

If not, we will move on to the next agenda item, which is the joinder issues, issue.

I think what I'll do here is just do a lot of reading. I'll do it very quickly. But roughly speaking we had come to a statement of our proposed program on joinder and Liz and Sam brought up some issues. Good issues to think about as we think about joinder. And so, I think it was this past weekend or Friday I wrote back which suggested a response and I would like to go through that now.

So I'm hoping to move this to near conclusion.

The position that we ridge three came to on joinder was as follows. It's three points. One that all those who participated in the underlying proceeding as a party, and remember we're talking about joinder of people who are coming from expert panel decisions only in this respect; that those people receive notice from the claimant in the IRPs. In IRPs under the bylaw section for the expert panels. That they get notice of the full notice of IRPand request for IRP, including all the documents. And they get that contemporaneously with the employment of serving ICANN.

Two that such parties have take right to intervene the IRP. How the right shall be exercised to the procedures officer. How that could be allowing party stands a or allowing the parties to file amicus briefs. As procedures officer determines in their discretion. No interim relief or settlement could be paid with the IRP can be made without allowing those given the amicus status as a matter of rights as described herein a chance to file a amicus brief on requested rove leave of the materials of settlement.

3. We (indiscernible) procedures offer, moving links things along with dispatch.

So, then Liz's comments came and I boiled them down to a number, different number of things and I'll read them and my suggested answer. And then I'll invite comment.

So, Liz's points first. There needs to be rules and criteria established as to who can join intervene by right as who may be properly allowed to join, allowed to intervene at the discretion of the panels. My suggestion was intended to allow all parties at the underlying proceeding to have a right of intervention but that the IRP panel through the procedures officer could limit such intervention to being that of an amicus. Not in division to allow nonparties from below or others to join under these provisions. Noting that these provisions deal with parties below. Basically an expert panel hearings.

We're not displacing rule number 7 will consolidation, intervention joinder from the draft supplementary rules were up for comment.

So, that's the end of the first part. Anybody have any comment or concerns or desired out comes? And I particularly interested, Liz, and Sam in what your reaction is.

>> For this, for this portion, I mean it seems fine. I don't, I'm not trying to reopen a bag of worms, or can of worms, whatever that statement is. But this only discusses cases where there is a challenge to a expert panel or one of the evaluation panels, like that happened in the new detailed program.

So, you I'm not suggesting we need to go further, but I just want to make sure that we have, that we're clear within the IOT, that we're not addressing situations where people might be able toe intervene when, when there is not that kind of underlying procedure that's been, someone was designated a party to.

>> MR. MCAULEY: Thanks, Sam. So I think what that means is on section 7, the joinder session, we need to be, take these comments into account. I think that's fine.

And the second, let me go to the second point. And I will paraphrase here, because I was reading so quickly that the captioning wasn't able to keep up.

Second, clarification and development is needed on the standard of review to be applied by the procedures officer. What should the interested parties have to demonstrate? Harm based on alleged violation by ICANN? What are the appropriate interest that will be supported? What types of briefs and opportunity to be heard are needed in order to allow an interested party to petition? To join in the IRP?

My response, the intervener would not have to allege or show harm. That's the job of the claimant, presumably the person or the party that lost the expert panel below. In that case, the claimant is going to have to allege that the decision by the panel below, if ICANN implemented it would violate the articles or the Bylaws. Here the intervenor would simply need to show that they were a party below. Would have roughly the same kind of information required in a claim and perhaps an equivalent, or yes an equivalent filing fee. That's a suggestion.

Again, does anyone want to comment on this? And, Sam and Liz, I put you on the spot last time. You don't need to comment, but if you don't, I'll sort of assume that you are okay with the explanation subject to what Sam just said about joinder and other instances.

>> Yeah. I think on this one, we still have some concerns. I mean if you're giving someone a party status to an IRP, IRT is for the demonstration of, for someone to allege that ICANN violated Bylaws or the articles of incorporation. And that that person experienced harm because of it.

And so, if it's about bringing a, bringing someone in to support a briefing, that's one thing. And this is I think where we go to that, our comments around the levels of what does intervention mean, what does joinder mean, what rights are we giving to people? Because, you know, what is the value of adding people to an IRP? Not about adding voices, but adding people to an IRP when those people or entities actually don't have a claim or don't wish to state a claim that they were injured by ICANN's violation or alleged violation of the Bylaws or articles of incorporation.

Because that seems to not really be in support of the purposes of the IRP.

Now, if this is about how do we get voices into the IRP, so if someone, if there is a party who says, I fully agree with, claimants position and I want to show that, I want the panel to know that I

agree with them and to give some information about that; that's one thing, but we wouldn't then say that they have, that they're then considered a party to the IRP.

So, some of this might be language issues in getting clearer on our language, but also about the intentions and the different levels for which we think people are joining.

>> MR. MCAULEY: Thanks, Sam. I understand your point. And I too have a little bit of concern about party status. On the other hand, the Bylaws give the loser below, an explicit right to an IRP hearing. Basically an appeal of the expert panel below.

And so, I think the desire for party status is a desire for equivalence. And recognizing that the party that's going to? Be intervening is the winner below. Which after all, they won the case, so they have, they shouldn't be relegated to secondary status.

Now, having said that, if they had a full right to be, as you put it, a voice in the hearing, I think that might make sense. But in a later point, you and Liz made the point that someone in amicus status couldn't really upset an settlement, and I think that, if you maintain both positions, that is that the winner below should not be a party but amicus in an appeal, but then the winner below couldn't have an active voice in settlement discussions.

I don't know, I have, I'm just struggling with that. So that would be my comment to your comment. And I think your hand is up, is that new?

>> Yeah. That is new.

So, first, I think we have a much different understanding from the CCWG process of what the, what it means to have included the language around the expert panel decisions into the Bylaws.

So, we agree during the CTWGworkstream one, that it was important for the community to have that specific example of a time when ICANN might have violated its Bylaws or articles of incorporation listed as a time when the community could come, when a claimant could issue an IRP, but is actually not an automatic right of appeal.

The party that wishes to challenge ICANN's conduct in terms of whether or not ICANN's conduct violated the articles or Bylaws in its acceptance of a panel decision like that, has to allege that it

is against ICANN's articles or Bylaws. And so there could be multiple places where someone could lose at an evaluation panel and actually not have a claim that ICANN violated its Bylaws in accepting that.

So I think we need to make sure we're not talking about an automatic right of appeal.

Then we have to think about what the out comes of IRP are. Because my reaction to what I was hearing is that, this is, it becomes a redoing of the evaluation process and that's not what the IRP is intended to do. The IRP is intended to look at whether or not ICANN violated its Bylaws in accepting a panel decision. And so, the potential out comes of that, of that IRP review of it are a finding that, yes, ICANN did, or no ICANN didn't. But even a yes, ICANN did doesn't require that the outcome of the panel, the evaluation panel be changed. It could require many different things to happen. It could require the panel evaluation to happen again, or ICANN to deal with rectification its Bylaws violation, but it doesn't automatically displays the loser or the winner with the loser.

So, it's important, I mean, I think it's important, in these situation, around panel decisions, of course, the person who won, or other people who might have also lost, want to do something to preserve their position if future process needs to happen around the decision after the IRP panel decision. So of course they want to have a voice in it; but it's not clear how, how giving them a party status in an IRP might be necessary if they're not actually saying that they're, that they experienced a violation because of what happened.

>> MR. MCAULEY: Sam, thanks. It's David.

So, I think, I think you're persuading me on the element of party status, but my question was, if some of suggestions for those of us that are the IOT sort of came to your point of view on that, would you still maintain your position that the AMICUS should not have a decision on settlement.

And I'm with you all the way through, an I understand the standard is, you know, for a successful IRP is did, or would ICANN breach its Art calls or its Bylaws. And that's very, it's a very tough and narrow standard, but it's possible that the loser below could come up with an argument that

looks convincing, that implementing the expert panel judgment would violate the articles or Bylaws, whereas another party may be able to blunt that argument.

In other words, it's not always black and white. There may be gray cases. And so, what I'm saying is, if we agree with you that there is not a right to party status, but amicus status, wouldn't the people who won bow that are acts as a.m. cuss have some say if settlement broke out. I don't know how settlement discussions are handled if the breach of Bylaws or articles, but that's what's on the table.

>> So, there are situations where someone might file an IR.

P and they file an IRP in good faith, that they believe that there is a violation of ICANN's Bylaws or articles of incorporation, but there could be a really big question as to whether or not that happened and the parties could find that there are other terms that they want to settle their dispute on, and it might not be necessary to reach the question of a relation of bylaws or articles in order to do that.

So, one of the things that I feel very confident in saying today is, let's give the example. If an expert evaluation panel outcome was something that was part of the challenge raised in an IRP, and ICANN's acceptance of that was part of challenge raised in the IRP. ICANN settlement of this dispute with the claimant, if it included ICANN just over turning and changes its position and accepting someone else has the win error modifying the outcome of that evaluation panel action, that would be a problem for ICANN. That in and of itself should be challengeable conduct to ICANN, because the outcomes of the IRP process aren't supposed to be about eventually, of course it's about changing and making sure ICANN is acting in accordance, but ICANN shouldn't be settling claims within an IRP in a way that just totally just changes what happened, only in favor of one party. That in and of itself isn't the outcome.

What would people do to settle their dispute? Maybe there are other issues and things that are, are at play. At no other place does ICANN, or do we know of, this isn't just about ICANN, that we have people who come in other than in a class action type will situation, where people comment on terms of a settlement. Settlements are often between and amongst people. Settlements, you know, who knows what the terms of the settlements are. They could be for very little. Who

knows if the it would be anything of monetary. I have no idea what settlements we're even talking about, but those are not things that you would expect the IRP panel itself to have a view on, if two parties agreed amongst themselves that they no longer wanted to pursue an IRP? I think it would be really difficult to say if two parties no longer want to purchase sigh an IRP or if a claimant doesn't want to pursue an IRP, and if they, if they come to a point that they think maybe they're not going to win after going through the process a bit; that neither the ICANN community which is funding these, because of the way that the funding has changed, or the claimant should be compelled to because there is someone who is standing on the outside telling them to keep doing it.

So, I think we need to look back some more at the settlement issue.

>> MR. MCAULEY: Hi. It's David again. Fair point. I think you make sense. I'm not fully convinced but let me ask you a question.

I think the points that you're raising go all the way through the first seven points that I listed in my list. I listed them first, second, third, et cetera. I think that they're all sort of wrapped up one through seven in this discussion.

Is there any chance, Sam, that you and Liz could, like within the next week, come out on list and say here is what we're suggest, what the language would look like. Doesn't need to be long, but I think it would be helpful; as a way to move this forward.

>> So, David, you know, I know that you're really trying to kick start some conversation on the IOT list. And I think from our perspective, we would like to hear some other voices, if other voices are willing to come in, to make sure that it's not just two positions. I think that there are, there are some gray area here, where maybe some other people who are listening have some ideas of how to maybe bridge the gap here.

You know, I don't, we could try coming up with language, but I think it wouldn't be a surprise if the language that we came out from today would be something that people might not be fully accepting of. And so, I think we would like to hear some other voices too, because I don't want this to just become a part of ICANN taking too hard a position and the IOT doesn't agree. I think

we would like to hear some other voices of disagreement to see if other places that we could innovate and move this forward.

>> MR. MCAULEY: That's okay. I would love, I would love to encourage other people to weigh in. So what maybe your suggestion is a good one. I'll go out to list. This will be my action item, to say I've made a point in the red comments. You all have made the point in your email. We're at logger heads. We really need other voices to weigh in and make other suggestions.

If the they do or they don't, we'll have to move from there in the next call or two calls from now. So, I, that's fine. That makes sense to me, as a matter of fact.

So, let me ask you if, I think what we're discussing is the points one through seven. I still have points 8, 9 and 10. So, let me ask, Sam, if you and Liz had any concern with what we said in that respect.

8 was additional development as needed to ensure that amicus curiae exercises it's right to comment or interim relief does not delay emergency relief. I stated simply sedated the reference to the Bylaws in paragraph 3 of the original proposals intended to address. Just maybe we could beef it up.

Do you, what were your thoughts on that specific point?

>> So, we haven't gotten this far down the list in terms of discussing it together.

>> MR. MCAULEY: Okay.

>> We can take the action on this to come back on the 8th, 9th, 10th and give some reaction. Well be happy to do that.

>> MR. MCAULEY: If you would do that, that would be great.

So, let me ask if anyone has a comment now. Otherwise we're going to move to the next agenda item. So I don't see any hands or hear anybody. Let's move to second reading.

By the way, I think we can get through this fairly quickly, but at the end on AOB, if there is any other business, I want to talk to Bernie about schedule, so we do need a few minutes for AOB.

Anyway on second reading for retro activity. There was a mail that I sent on Monday, June the 5th to the list and it December jibed what we had agreed at first reading. This was with respect to retro activity issues, there were two issues. One dealt with retro activity of the substantive IRP standard and the other dealt with retro activity of the new updated supplementary rules of procedure.

And we decided or we said at first reading, one, with respect to new substantive IRP standard we said no retroactive (indiscernible) to IRP pending on 2016. That's the date the Bylaws became effective.

And 2, with respect to retroactive application of new updated supplementary procedures, once they're adopted, the procedures shall be amended would to allow a party to request the panel to decide this is a matter of discretion. And we proposed adding a standard for the panel to review these requests, specifically that if all parties did not consent to that, then it would not allow the new rules to apply pending cases, if that action would work a substantial unfairness, or increase in costs to a party, or otherwise be unreasonable in the circumstances.

So, this is the second reading and it's open for people to comment, object, suggest additions, et cetera. And the floor is open for that. I don't see any hands or hear anything. So and I haven't seen anything on list. I think I'll make one last call on list and this will be done.

So that agenda item is now done. The second reading on retro activity.

There is now a slot for further discussion on ongoing monitoring, this is a comment that Avri is leading. I know Avri divided attention on this call, but I also know that she may make a brief comment. Avri do you have anything you would like, your hand is up so the floor is yours.

>> Thanks. This is Avri speaking. Yeah, my other call ended at the hour, but thank you.

So, yeah, what I wanted to say is that I have not really caught up in the writing on this. In fact I most definitely haven't caught up. Since our last conversation where we started extending towards one of the particular choices. So, with apologies, I'll get that done before the next meeting and then hopefully, you know, the proposed way forward will be there for people to comment on. And as soon as I get it done, I'll send it to the list.

>> MR. MCAULEY: Many thanks, Avri. And thank you for hanging in while there were two calls going on. I've done that and it's not the easiest thing to do. So thank you.

Moving on to the next agenda item, discussion first reading for challenges to consensus policy. This mail is one I sent out to the list on may the 9th. The comments roughly were from the noncommercial stakeholder group, I'm sorry that Robin had to drop off the call. And from Kathy Cleiman at the Fletcher Law Group. But it's basically that the comment was, fair is fair. If an SO has labored on a PDP and gotten it into policy, and someone comes and challenges the PDP, then the SO that was involved in developing it should have some say in the matter.

This is very similar to the joinder discussion that we just had. And I mentioned recommendations in the mail that I just cited saying that we should create a mandatory right of intervention for the supporting organization whose policy was under challenge. And I recommended that we treat it along the lines of the joinder issue so it will be subject somewhat to what we agree in joinder, but still open and under discussion as we just heard.

I recommend that the SO involved receive notice from the claimant of the full package; at the same time they serve it on ICANN. That such SO have a right to intervene in the IRP and that would be treated simply to what we agree on jurisdiction.

I suggested that we not go as far as some had encouraged us, providing notice to stakeholder groups, Working Group chairs and community members, and those who helped create the consensus policy and whose interests are represented and affected by it. I thought those were very broad terms, I mean those who helped create the consensus policy and whose interest are represented.

Seemed to me that a notice to the SO was adequate. And I did not see a need to limit what a panel could do with respect to a judgment, thinking their abilities as described in 4.30 were sufficient.

So, that was what's on the table. And, as I said in the agenda, this is really for first reading, and probably can't even get that far because it's subject to much of what we just discussed on joinder. But substantively it's very similar. So I would like to get out on the discussion now. If there are

any objections to or different interests that want to be, people want to state about IRP's dealing with PDP, policy developed as a result of a PDP developed by an SO. So the floor is open for anybody that wants to comment on this issue.

So I see no hands and don't hear any. As I said, this really won't get the first reading because it's going to be wrapped up in the joinder kind of issues, but there is enough here to move this forward to the list and say we're making progress on this. It's going to be treated like joinder. If you have thoughts you better raise them fairly quickly. And that's probably what I will do with this.

So, having said that, we can wrap this up fairly early. We're through everything except AOB. And then on AOB I wanted to talk about schedule.

We're in the dog days of summer it's difficult to get people to teleconference meetings. I'm going to ask Bernie if he could tell us what our current quelled is what's available to us and if anybody has any thoughts, let's discuss them right now. And as Sam said earlier, I'm sort of very interested in moving things on the list.

**20170817 – Transcript -**
**https://community.icann.org/pages/viewpage.action?pageId=66087377&preview=/66087377/69278281/IRP-IOT%20MEETING_08172017-FINAL-en%5B1%5D.docx**

>> DAVID McAULEY (page 2): Okay in the meantime I will keep saying that my hope is, we can through the list and through the phone move the rules to first and second reading and my goal is to get the rules done within 8 weeks. Hopefully sooner. There's been a lot of discussion over the preceding months about a lot of them. And there's some difficulties in some of these. But hopefully we will be able to work our way through it.

So, let's move to the agenda item number 2 which is joinder issues.

And let me just recap in the last meeting we discussed joinder. And what led up to the last discussion was the fact I had put on the e mail list my suggested treatment for the joinder issues. And it deals with a suggestion that I put in my email.

Following that, Sam and Liz made some comments and then Liz sent an email furthering those comments, seeking clarification and having some questions and concerns about the joinder issue. And we discussed it on the last call, on July the 27th and you have seen them in the emails. Basically, if I could sum up what I think is concerns of Sam and Liz boil down to principally was, and Liz you can correct me if I'm wrong, but generally, what he standards would apply to allowing someone to join, you know should the procedures officer apply in allowing someone to join, keeping in mind the role of IRP and the goal of IRP in what a panel is limited in rendering judgment. That is a panel's judgment is generally whether an action or inaction by ICANN did or did not exceeds it's mission, etc. It's not awarding remedies it's not giving specific are performance dictates. So I think their question was what standards apply to make sure that joining parties or joining amicus carry I stay within those bounds how do you control those bounds and, also, if someone is involved in that capacity, how do you make sure what their role is if there's settlement discussions.

And, at the end of all this, when I ask Sam and Liz if they could further elaborate on the list, I think they asked a pertinent question, what is we would like to hear other voices. And I think that's sensible. But since that time nobody else has weighed in. So I think we are moving close to a point where we need to close this issue down somehow. I will give Liz a chance to comment in just a minute if she would like.

But I would like to say if anyone has any thoughts along these lines, they would certainly be welcome now. We have to get this thing rolling. So with all that having been said, I will mention that it seems to me that we could add to my suggestion on joinder, we could add some treatment that would say the procedures officer, in allowing someone to join, must keep in mind the goals and limited remedies available at IRP and with accept to settle. If I can in a claimant settle in such a manner that the IRP case simply goes away without further action, then I think an intervener would not have a say in it. That would be my suggestion. Now I've on spoken a lot and I'll ask Liz if she wants to make a comment about this or anyone else would like to follow. I see Greg's hand is up. Maybe I should let Liz speak first since I invited her. Then Greg.

>> LIZ LE: Thanks David, I do. Thank you for the summary I think was a pretty accurate reflection of our position which we with preferred via email several times. I think, just to add to what you said, one of our other concerns is just in terms of what the status that somebody joining would receive, whether that's an IRP status or amicus status. And, also, the impact of that on confidentiality issues, impact of that on the timing under certain procedures within the IRP, I think where we last left off last time was you had asked us to take a look at items 8, 9 and 10 on your email, I think it was of July 21. Right in terms of addressing the issues that we set forth as to the impact of somebody of someone joining on interim relief and on the timing of interim relief and the rights of the party and I see that in that you've referenced going back to bylaws section 4.3 S which talks to, about IRP's goal being completed within 6 months and then there's also you have referenced there being discretion of the precedents officers in trying to move it along and taking into consideration all of the nuances that come a long with IRP including intervention but I know where you're going with that. But concern with what has it, are we leaving such a large vagueness for the procedure officer to figure out in terms of just the guidance of here is 6 months or here's what we are thinking. But we're not setting out, for one, the

standards by which they should review whether someone should be allowed to join. The standards by which they would grant somebody IRP status or amicus status and what standards with which they would decide in terms of normally what that briefing looks like. Whether someone, how someone can impact that as a party who's intervening. So I think those are some of the concerns that we still have. With respect to these issues.

>> DAVID McAULEY: Okay thanks Liz and Brenda has put up that e mail for me of the 21st and given scroll control to folks. Greg's hand is down. Greg, your point is not one you want to make any more about?

>> BRENDA BREWER: My apology, I lowered Greg's hand to put the document up.

>> DAVID McAULEY: Greg, your hand is back up. Over to you Greg.

>> GREG SHATAN: Thanks. Greg Shatan for the record. Obviously there's a number of issues that here that are significant. I do think David that your I tend to agree with your solutions to the issue. First there's obviously a significant distinction between joining as amicus and joining as an intervening party. And it needs to be clear in that we're essentially that there are two different statuses.

Amicus is non party and amicus has no ability to influence other be part of a settlement. Settlement is really a private discussion between the parties. And I think that it really, I might even go a step further and say that any settlement between ICANN and IRP party regardless of what it the end result of it is, you know is between those two parties. And amicus has no ability to influence that. If we do allow for intervening, then the intervener is a party. In the action.

And you know suppose presumably they could continue the action even if the IRP, the original complainant settled out of the case. That raises obviously some procedural concerns. But, overall, you know, I don't think that's beyond what we are doing. And I thought we at least as far as an intervener, we already have a standard, I believe, if not for an intervener specifically, but then for a party generally, party other than ICANN obviously. So it would seem they would need to meet the same standard as a party, whatever that is, materially effected or whatever we have as a standard.

As amicus, standards for amicus are generally pretty low anywhere. And you know much an amicus submits anything that is not credible or not highly relevant, it basically just gets dismissed. You know, in terms of its relevance. It doesn't carry forward. So last thing I'll say, I can in many ways genres and in the you are providers is generous. We are not completely inventing the wheel for the first time. So if there's any kind of precedent we can look back at for this kind of stuff. I'm not just considering the current IRP but arbitrary procedures generally we should avail ourselves. Thanks.

>> DAVID McAULEY: Okay, thanks Greg. Let me just, this is David McAuley speaking again. Let me make some comments in light of your comments and Liz.

One is, with respect to looking for precedent or some help, I think that's a good point. And Liz, I would ask you, I think if I'm not mistaken Amy is the one in the ICANN legal shop that may have the most experience with IRP, I'm not sure if that's true. If much there is a person may be ask see if there's indents where a party has joined an a action. And if there's any prior history, in that respect, that might be helpful.

The other thing I would say with respect to Greg and whether a party would meet a standard, there's clearly going to be one instance where a party won't meet the standard here that's with respect to an appeal from a expert panel. Because presumably a loser of the expert panel below is the party that going to be the materially effected. Meaning they allege they have been harmed and the winner below will be able to come in as an intervener in the case and they will not be materially harmed by ICANN. So they will not have claimant status otherwise. Then our writing of rule to allow them to intervene.

So all of that having been said, I wonder the way forward here. If we don't come up with an idea, the best I can offer is that I read the transcript from this call and the comments of Liz and Greg, solicit more comments on the list, but then within a couple of days, take another stab at that, come up with also come up with a list, and we will just have to hammer it out.

And if someone has a better idea, let me know. I see Liz's point that there's been know intervention in IRPs in the past. I think in this case it's going to be inevitable because of the appeals from expert panel below, if nothing more.

So Greg your hands backup, I'll give you the floor.

>> GREG SHATAN: I think just Greg Shatan again just on the point of an appeal from a expert panel it doesn't tweak materially effected to include the winner below as intervener. Because either they they certainly they would be materially effected by the reversal of the matter of the expert panel's decision. And they you would probably say they would be materially effected if not materially harmed by the decision of the expert panel below. Assuming that they is because if it had no effect on them either way, then it seems they are their relationships to the expert panel is tenuous. So I think we just need the play with those kinds of ways of extending the concept of materially effected or materially harmed to include those kind of analytical sieves or filters. Thanks.

>> DAVID McAULEY: Okay thanks Greg.

I see Liz is typing. I'm attempted to move on in a minute to the next let me just take a second to read. Liz writes David we have had briefing submissions by third party seeking permissions to attend IRPs hearings allowed to join.

Thanks Liz. I think what I'll do is I'll do my best to cobble together some kind of solution bolting together pieces we have heard today and previously. And put it on the list. It won't be acceptable, I don't think because of some of the different points of view. But I'll try to present it with enough focus that it will help us move this forward. So where we can look for support for it.

And Liz, in the meantime, if there's anyone on staff that deals with the ICDR, if there's any insight we can get from ICDR with respect to this, it would certainly be helpful. If that's possible and doable I say put it on Liz fairly soon.

So all that being said, we can move to the next agenda item which is Avri's and it's further discussion on the discussion on ongoing monitoring. I want to preface it by saying thank you to Avri for joining us I think it's from a retreat from an organization she's affiliated with in South Africa. So Avri, over to you.

**20170825 – Email – DM (recommended reading)**

[IOT] Joinder issues toward FIRST READING [renamed subject line]

McAuley, David d mcauley at verisign.com

Fri Aug 25 19:10:11 UTC 2017

Previous message: [IOT] Raw Caption Notes-Recordings-Transcript links for IRP-IOT Meeting #28 - 17

A ugust 2017

Messages sorted by: [ date ] [ thread ] [ subject ] [ author ]

Dear members of the IRP IOT:

This email is intended to accomplish the First Reading of the Joinder issue - note also that whatever we agree on Joinder will also affect our work on the rule concerning challenges to Consensus Policy.

You can see a summary of some of the joinder discussion in the email of July 21st forwarded below.

This proposal is my attempt to draw the various joinder views together in an acceptable final proposal. Keep in mind that the final language we adopt will be our instructions to Sidley as to how to amend the applicable rule - our language will not be the actual rule itself.

The aim is to confirm first reading at our next meeting, Thursday, September 7, at 19:00 UTC. Second reading should then be a largely pro forma exercise at our subsequent meeting on September 21st at 19:00 UTC.

If you object or propose different treatment please say so on list as soon as possible prior to September 7th and be specific and suggest specific alternative language.

HERE IS THE SUGGESTED JOINDER LANGUAGE:

1. That only those persons/entities who participated in the underlying proceeding as a "party" receive notice from a claimant (in IRPs under Bylaw section 4.3(b)(iii)(A)(3)) of the full Notice of IRP and Request for IRP (including copies of all related, filed documents) contemporaneously with the claimant serving those documents on ICANN.

2. That all such parties have a right to intervene in the IRP. The timing and other aspects of intervention shall be managed pursuant to the applicable rules of arbitration of the ICDR except as otherwise indicated here. The manner in which this limited intervention right shall be exercised shall be up to the PROCEDURES OFFICER, who may allow such intervention through granting IRP-party status or by allowing such party(ies) to file amicus brief(s), as the PROCEDURES OFFICER determines in his/her discretion. An intervening party shall be subject to applicable costs, fees, expenses, and deposits provisions of the IRP as determined by the ICDR. An amicus may be subject to applicable costs, fees, expenses, and deposits provisions of the IRP as deemed reasonable by the PROCEDURES

OFFICER.

3. No interim relief that would materially affect an interest of any such amicus to an IRP can be made without allowing such amicus an opportunity to be heard on the requested relief in a manner as determined by the PROCEDURES OFFICER.

4. In handling all matters of intervention, and without limitation to other obligations under the bylaws, the PROCEDURES OFFICER shall endeavor to adhere to the provisions of Bylaw section 4.3(s) to the extent possible while maintaining fundamental fairness.

Best regards, David

**20170907 – Transcript -**
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>> DAVID McAULEY (Page 2): Please be aware that the IOT is willing to assist. I know that we can probably gather up folks that would be willing to assist. I certainly would be if there's any need for something like that. And I also participate in the registry stakeholder group and we have just been discussing that we started discussing that within that group to bubble up to GNSO. So thank you for that update, Sam. Does anybody have any [Indiscernible] you're welcome. Does anybody have any questions or comments with respect to that agenda item update Sam just gave?

Seeing or hearing none, I'll move on to next agenda. That's joinder issues. You've seen the mail. The brief background is that this is a discussion of joinder issues really in the context of people bringing appeals from expert panel decisions. The discussions in this group will affect what we do with the challenges to consensus policy. I think that point has been made a number of times. When we get challenges consensus policy it should go fairly. In the joinder issue, I described about challenges from expert panels below there's been a series of e mails and discussions in the past and I made a proposal Liz had made comments from the perspective of ICANN legal and organization with concerns about it and sum of all that work in the mail I sent out last Friday I tried I think it was last Friday. I'm losing track. In any event I tried to pull together a proposal for joinder language and it's on the screen and I think you have scrolling capability, and this is my suggestion for where we go, and I'd like to read it just to make sure that everybody gets a grasp of it. So what I'm doing is suggesting only those persons or entity participating in the under lying proceedings receive notice from a claimant, this is the expert panel challenge instance, of the full notice of IRP and the request for IRP including copies of all related file documents. And they receive that contemporaneous with the climate serving the document on ICANN. The second point I'm suggesting all such partying have a right to intervene in the IRP. The timing and aspect intervention shall be managed pursuant to the applicable rule of ICDR except otherwise indicated here. The manner should be up to the procedure officer who may allow such intervention

through granting IRP party status or by allowing such partying to file amicus by briefs. An amicus may be subject to applicable cost fees expense subpoenas and deposits provision of the IRP as deemed reasonable by the procedures officer. Number three. No interim relief that would be materially affected an interest of any such amicus to the IRP can be made without allowing such amicus an opportunity to be heard on the request relief in the manner as determined by the procedures officer.

So that was my stab at trying to throw out together the thoughts on joinder. I'm happy to hear comments, challenges, concerns, et cetera, now. And so I would invite anyone to make a comment. And I don't see a rush to the adobe cube or phone, so what I'm going to say is that absent any such thing I'm going to consider that this Sam, I see your hand. I'll get there in a minute. This would get to first reading. And one thing I'll state in the background whatever language we come up with here is not is probably not going to be the language of the rule. Our final report which will have a section on what we think should happen to the rules in light of the public comment it will have another section dealing with recommendation with respect to bylaws the language of the rules will be drawn up by due to the instruction of final report. Anyway, Sam, you have your hand up. So you have the floor.

>> SAMANTHA EISNER: Thanks. So you know I think this does pair back in issues we raised previously. I think there's still one things I reflect on when I read is that I don't anticipate for someone to achieve party status someone must have appropriate standing to assert a claim in an IRP and so I'm wondering if we have that reflected anywhere because otherwise it's it seems to expand the IRP if we allow people to join as party without having a requirement of standing that's important for the initial claimant.

>> DAVID McAULEY: I guess where I'm coming from Sam is is that the value with respect to people who were parties at the expert panel decision. And the bylaw provides for appeals from those decisions. And so

>> SAMANTHA EISNER: Well, the bylaw allows for those to believe that there was a that ICANN violated its bylaw and article in accepting the expert opinion to take that manner to IRP it's not necessarily an appeal.

>> DAVID McAULEY: Okay. I appreciate that distinction. But still it would seem to me that if a person an entity that was a party at the expert panel proceeding felt ICANN was making a mistake by accepting the judgment. I think that's reflected here. I'm open to suggestion of change. The one thing I'd like to say we're at the point anyone has concern can offer specific language not necessarily here in the call in the next day or two. Offer specific language we can look at because the whole point I think we're getting to or I'm wanting to get to is to drive things to a successfully first reading. Get them done and dusted.

And so Sam, the invitation to you I'm sorry.

>> SAMANTHA EISNER: Yeah, we can a proposal around that.

>> DAVID McAULEY: Okay. Please do it pretty quickly. I'd like to get this one done now. Having said that, I would like to ask if anyone else has a comment about any other provision of this, any understanding that my drive is to get this to first reading with a view to considering the language Sam will send forward. I don't see anything Sam, your hand is still up. Is that new?

Okay. Thanks. So then good this one is resolved. With the resolution, here we haven't achieved first reading what we have done is made a point of discussion. Sam has lingering concerns about standing and she will offer specific language in fairly short order with that language comes in, I will try and incorporate it into what I've proposed or note that I think there's an issue we need to discuss on the next call. If we do if I'm able to get into language, I'll put it to the list and say, okay, here's the latest draft for first reading, and hopefully we would confirm that in the next call and be plenty time on the list to take a look at it. That would be that's the treatment there. And Brenda, if I could ask you to go to the next slide, which would be on the next issue. I believe it's trying to get the first reading on the issue that described as other ongoing monitoring.

Okay. Next one. We have an issue about ongoing monitoring I think it was mentioned the issue in public comment. It's a good idea about making sure the community reviews IRP and the standing panel not go off into the sunset on their own. And the background here is that Avri took the lead on this and you can see from my e mail she made a suggestion I'd like to read it quickly. I may snip along the way but basically Avri suggestion was this after the IOT finishes its current

work, it will terminate as implied in the bylaw Section 4.3. Two Section 4.3(n) needs to be amended once rules of procedure are approved to remove subsection (i).

Three, a new section should be added in bylaw Section 4.4 on reviews. That would be a Subsection (c) that says in cooperation with a review team chosen by the SO and AC and comprised of the members of the global Internet community the IRP shall periodically review the rules of procedure. They should conduct no less frequently than five years. Based on feasibility determined by the rule. Each five-year cycle computed by the moment of reception by the board from the previous rules of procedure review.

I then came out in an e mail in made just suggested a couple of changes first. I said after the IOT finishes current work, work items terminate as implied and it wasn't we terminate after the after the rules. In any event Section 4.3(n) should be amended to remove Section (i) once IOT terminated and then three review IOP under bylaw Section 4.6BF it's an ATRT review. And different from Avri came back last Friday and said not a dime ditch moment but you speaking to me you switch responsibility from the review to AT to RT from one in cooperation review chosen by SO/AC and comprised of members of the community et cetera.

And Avri said this seems a larger change I think that's a good comment. I tried to take advantage of provision that was existing but I think Avri is right and I'm happy to go with Avri's final suggestion in other words going back to first one. Avri, you have the floor.

**20171005 – Transcript -**
**https://community.icann.org/pages/viewpage.action?pageId=69282208&preview=/69282208/71601616/IOT-IRP%20MEETING_10052017-FINAL-en%5B1%5D.docx**

**>> (page 2)** Thanks very much. Appreciate it. So, we will have one more meeting before ICANN 60 as we just discussed. Thank you for that, Bernie. Moving on to some issues of substance. The joinder issue I had hoped to get the first reading in the last call and while I'm setting this up if I can ask Brenda to put the joinder slide up on the screen. It's one of the slides I sent you earlier. I believe it's slide number 2. But, I had hoped to get this to first reading in the last call and then at that time Sam expressed some concern and she followed through as she said she would with some language with some suggested language after the call noting her concern and as a consequence of that I tried to redraft the joinder treatment that I had suggested. And so, I'm going to read it out on the screen and just in order to get folks a chance to think about it as we go through it. And let me pull up my slide to do that. Okay. Joinder, here's what I suggest for joinder language. Number 1, that only those persons, entities to participated in the underlying proceeding as a

>> The host has left the meeting and will rejoin soon.

>> No problem. Let me start that again. That only those persons/entities who participated in underlying proceeding as a party referendum notice from a claimant in IRPs under bylaw section 4.3B III A3 of the full notice of IRP and request for IRP. Including copies of all related, filed documents contemporaneously with the claimant serving those documents on ICANN. And number 2 the new language is indicated in red. That subject to the following sentence, all such parties have a right to intervene in the IRP. Notwithstanding the foregoing a person or entity seeking to intervene in an IRP can only be granted "party" status if that person or entity demonstrates that it meets the standing requirements to be a claimant under the IRP at section 4.3B of the ICANN bylaws and as defined within these supplemental procedures. The timing and other aspects of intervention shall be managed pursuant to the applicable rules of arbitration of the ICDR except as otherwise indicated here. Subject to the preceding provisions in this

paragraph the manner in which this limited intervention right shall be exercised shall be up to the procedures officer who may allow such intervention through granting IRP party status or by allowing such party, parties to file amicus briefs as a procedures officer determines in his or her discretion. An intervening party shall be subject to applicable costs, fees, expenses and deposits provisions of the IRP as determined by the ICDR. An amicus may be subject to applicable costs, fees, expenses and deposits provisions of the IRP as deemed reasonable by the procedures officer. I'm just going to take a pause there for a second. Okay. I just wanted to see if there was anything in the chat. Moving on next two paragraphs. Number 3, no interim relief that would be that would materially affect an interest of any such amicus to IRP cannot be made without allowing such amicus an opportunity to be heard on the requested relief and number 4 in handling all matters of intervention and without limitation to other obligations under the bylaws the procedures officers shall endeavor to adhere to the provisions of bylaw section 4.3S to the extent possible while maintaining fundamental fairness. And that concludes the reading of the suggested language. 4.3S deals with expediting or trying to handle expeditious IRPs. So, with all of that on the table and as an attempt to take account of Sam's concern I have two questions. One, does anybody want to make a comment or concern? Otherwise I will consider this going forward for first reading I'll put it out on the list. But as I typically do for a couple extra days. And two, Liz, are you back with us on the phone? Those are the two questions. So, Liz if you're here you can speak up now.

>> Hi David, it's Liz. I'm back on the phone.

>> Thank you. So, let me invert those questions a little bit. Liz, since you're on the phone do you have any concerns with this attempt to take account of what Sam put on the list?

>> No. Not as to this.

>> Okay.

>> I do have I do want to talk about when we get to discussing the suggestions that Malcom noted.

>> I was just going to mention Malcom's. So, before I do that is there anyone else? I don't see any hands and I haven't heard it so I'm assuming we can move forward. Liz, why don't you go ahead and speak to what I'll ask you this Liz then I'll go to Kavouss. Why don't you speak to what you were going to say about Malcom's intervention on the list?

>> Thanks, David. Well I don't think ICANN actually has any objections in theory to what Malcom has proposed but what we would like to see is proposed language that captures his position.

>> Thank you. Basically, my reaction as a participant is the same as yours and I was going to try to capture some language after this discussion. Before I go any further, Kavouss your hand is up so you have the floor.

>> Yes, good morning, good afternoon, good evening. Just very, very small point. Why in two areas we have the upper case? Is it to indicate that this is something new? Usually any text we don't have upper case sometimes you might have an exception in something with bold but upper case, just [Indiscernible] and importantly in number 4, why we say shall endeavor? Because whenever we are not sure that somebody should do something with shall, sometimes we try to soften that by saying shall endeavor. That means it may not do that but they'll try to do that. So is it the reason that it says shall endeavor to adhere or they shall adhere or should adhere. So, shall endeavor, should endeavor or shall endeavor. Is that the intention. Thank you.

>> Thank Kavouss. There are several instances of upper case reference toss irrelevant RP, to ICDR and procedures officer. The IRP and ICDR frankly I believe I just capitalized those because they are institutions and it seems like a normal thing to do. But procedures officer is capitalized because it's a defined term in the rules. As I recall. I believe it was capitalized in the rules. I will double check that and there's no particular reason for it to be capitalized. So, in the next iteration I may lower case that one. But, leave the IRP and ICDR up cased. Does that address that issue?

>> Yes. Now with the second issue, why shall endeavor?

>> The second issue is my thought on it was that there's no guarantee that in handling a matter of intervention, it will be as timely as if there was no intervention. So, it was giving a little bit of leeway to the procedures officer. It was basically my thought was stating 4. S as a standard not

to be forgotten. That's really what the intent of this is. And not to allow the fact of intervention to let 4.3S become an afterthought. And that was my attempt to capture that. I'm happy to look at alternative language and I'm open to any suggestion. But that's really the thought behind it. So, my question now becomes Kavouss do you have further comment?

>> No, on this comment shall endeavor or should endeavor or shall adhere, I think I suggest that you take either the upper level or lower level, either should adhere or shall adhere but not shall endeavor to adhere. That is my suggestions. I'm just saying [Indiscernible] endeavor. Yeah.

>> Thanks, Kavouss. I will put this back on the list to confirm first reading. So, let me take that and think about it and take a look again at 4.3S. I think if I may separately email you in the meantime. But, that is so thank you for that. Any other comments on this joinder issue? If not, why don't we move forward to the next slide.

**>> (page 14)** Thank you, Kavouss and I'll bring it up on list. But basically, they asked that there be language included in the rules to the effect that nothing in the new rules is intended to supersede some ICDR rules. And those were rules that dealt with allocating costs from a party's delaying things or otherwise. And so, it was just a request for clarity as I understand. Greg is on the call and Craig if you have anything to offer or shed lights I may have thoughts that refreshment of ideas but I would be happy to hear it. Otherwise Kavouss I'll put something on the list. Greg, is that you coming on the line? I take it not. So Kavouss that's roughly what it was about. And not having any other hands let's move on to the first treatment of evidence, discovery, evidence, statements. And this is something I put in the slide that I mailed just prior to the call and Brenda can throw up on the screen. And it came out under an email that I put out several days ago. But there were requests, various requests from members from the public comments about certain evidentiary issues, statements and things like that. And after considering all of them I came up with the idea that we should make an addition to rule 6. The rules that actually apply here are rules 6 and rule 8. But I recommended that we make a change to rule 6. I'll read out the language of rule 6 then the last sentence is what I'm suggesting that we add. The initial written submissions of the parties shall not exceed 25 pages each in argument, double spaced and in 12-point font. All necessary and available evidence in support of the claimant's claims should be part of the initial written submission. Evidence will not be included

when calculating the page limit. The parties may submit expert evidence in writing and there shall be one right of reply to that expert evidence. The IRP panel may request additional written submissions from the party seeking review, the board, the supporting organizations, or from other parties. I'll now begin that last sentence that I suggest we add. In addition, the IRP panel may grant a request for additional written submissions from the party seeking review, the board, the supporting organizations, or from other parties upon the showing of a compelling basis for such request. And that's in response to the comments about there should be additional chance to make comments to submit evidence. But then I also went on and dealt with some of the other requests in which I said this. Whoops. Oh, otherwise, with respect to rule 8 discovery method I recommend no change. That's me David McAuley speaking as a participant. The rule directs the panel to be guided by considerations of accessibility, fairness and efficiency both as to time and cost in considering discovery requests. This leaves the matter to the panel where it will be better handled than by us trying to imagine a context to fix. I also note that ICDR Article 21 states that depositions, interrogatories and requests to admit are not appropriate for these arbitrations. Article 21.5 deals with exchanging confidential information. We should keep in mind that the IRP is not just for U.S. lawyers and is meant to be stream lined and efficient. Those were my words. I cited Article 21.5 confidential treatment. That's in response to a comment from the international trademark association. I mentioned that Article 21 of the ICDR deals with depositions, interrogatories and that's in response to a number of people that said we should have provisions for depositions and interrogatories, et cetera. So that's my suggestion. And I would like to move it to first reading on the list. But here's an opportunity for folks to weigh in who are on the call, tweak it, comment, suggest something else as you wish. Liz, you have a hand up.

>> Thanks, David. I think with respect to the proposed sentence that you have in red, our concern is with the reference to allowing the panel to seek written submissions from the board or supporting organizations or other parties. It would may be circumventing the joinder intervention rule. So as a way around. And it doesn't tie it to the requirements of what a party has to meet in order to intervene under the joinder rule.

>> Thanks, Liz. Excuse me. If I'm not mistaken the sentence just prior to that that says the IRP panel may request additional written submissions from the party seeking review, the board, the supporting organizations that language before the red sentence is actually in the rule that we came up with as I recall. Does that make a difference to what you're saying? How's that factor in?

>> So, I apologize. I wasn't part of the group when we came up with the initial language but I was focusing on the new language, the red. I see what you're saying. I guess to your point I guess the IRP panel can request to the first part. IRP panel can request written submission from whoever they want. But, I think other entities shouldn't be able to ask to be able to submit additional submissions unless they are a party or they qualify as amicus to the IRP.

>> Okay, that's a fair point. So maybe a tweak to this would be, you know, if qualified or something if qualified under the rules.

>> Yeah, I mean we can tie it back to perhaps like under the rule anti it back to the joinder rule or someone reference that back and any other section that is might be applicable. Then I think that language would be okay.

>> So then let me ask you to do that, Liz. If you would submit that language to the list. But when you do it let me ask you to take a look at rule 6 in the current draft that was out for public comment. Because, those entities that are listed there, the board, the SOs, other parties, et cetera, those are in the rule in the preceding sentence. So just take a look and keep that in mind as you make a suggestion on the list.

>> Absolutely. We'll do that.

**20171003 – Email - DM (recommended reading)**

[IOT] Joinder issue - revised proposal for First reading

McAuley, David d mcauley at verisign.com

Tue Oct 3 18:00:19 UTC 2017

Previous message: [IOT] IRP IOT teleconference Oct. 5 19:00 UTC - Agenda Next message: [IOT] Joinder issue - revised proposal for First reading Messages sorted by: [ date ] [ thread ] [ subject ] [ author ]

Dear members of the IRP IOT,

I am hoping we can move the issue of Joinder to successful first reading at our meeting Thursday, Oct. 5th, at 19:00 UTC. In order to allow those who cannot attend a chance to weigh in I will not move this to first reading (should we agree on this) until Monday, Oct. 9. Please comment by then if you have a concern.

The suggested language for Joinder is below, with underlined language (also in red) to reflect a change requested by Sam and written up by me. Only paragraph 2 has been changed.

My summary can be seen in my email<http://mm.icann.org/pipermail/iot/2017-August/000298.html> of Aug.

25 and Sam's requested addition can be seen in her email<http://mm.icann.org/pipermail/iot/2017- S eptember/000306.html> of Sept. 7.

SUGGESTED JOINDER LANGUAGE:

1. That only those persons/entities who participated in the underlying proceeding as a "party" receive notice from a claimant (in IRPs under Bylaw section 4.3(b)(iii)(A)(3)) of the full Notice of IRP and Request for IRP (including copies of all related, filed documents) contemporaneously with the claimant serving those documents on ICANN.

2. That, subject to the following sentence, all such parties have a right to intervene in the IRP. Notwithstanding the foregoing, a person or entity seeking to intervene in an IRP can only be granted "party" status if that person or entity demonstrates that it meets the standing requirement to be a Claimant under the IRP at Section 4.3(b) of the ICANN Bylaws and as Defined within these Supplemental Procedures. The timing and other aspects of intervention shall be managed pursuant to the applicable rules of arbitration of the ICDR except as otherwise indicated here. Subject to the preceding provisions in this paragraph, the manner in which this limited intervention right shall be exercised shall be up to the PROCEDURES OFFICER, who may allow such intervention through granting IRP-party status or by allowing such party(ies) to file amicus brief(s), as the PROCEDURES OFFICER determines in his/her discretion. An intervening party shall be subject to applicable costs, fees, expenses, and deposits provisions of the IRP as determined by the ICDR. An amicus may be subject to applicable costs, fees, expenses, and deposits provisions of the IRP as deemed reasonable by the PROCEDURES OFFICER.

3. No interim relief that would materially affect an interest of any such amicus to an IRP can be made without allowing such amicus an opportunity to be heard on the requested relief in a manner as determined by the PROCEDURES OFFICER.

4. In handling all matters of intervention, and without limitation to other obligations under the bylaws, the PROCEDURES OFFICER shall endeavor to adhere to the provisions of Bylaw section 4.3(s) to the extent possible while maintaining fundamental fairness.

Thank you and best regards, David

**20171010 – Email - DM (recommended reading)**

[IOT] Joinder, again

McAuley, David d mcauley at verisign.com

Tue Oct 10 18:57:52 UTC 2017

Previous message: [IOT] Recordings, DAIRs, Raw Caption Notes for IRP-IOT Meeting #31 - 5 October 2 017

Next message: [IOT] IRP IOT Meeting Thursday, Oct. 19, 19:00 UTC

Messages sorted by: [ date ] [ thread ] [ subject ] [ author ]

Dear members of the IRP IOT:

I propose this as final "Joinder" language - it takes a stab at addressing Malcolm's question/concern<http://mm.icann.org/pipermail/iot/2017-October/000316.html> of October 3rd. (Only this latest change is in red and underlined.)

Please consider - if there are no comments by October 17 then I will propose confirming First Reading at our next meeting (October 19, 19:00 UTC)..

If you have a concern please describe it and propose alternative language.

Thank you and best regards, David

David McAuley

Sr International Policy & Business Development Manager Verisign Inc.

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SUGGESTED JOINDER LANGUAGE:

1. That only those persons/entities who participated in the underlying proceeding as a "party" receive notice from a claimant (in IRPs under Bylaw section 4.3(b)(iii)(A)(3)) of the full Notice of IRP and Request for IRP (including copies of all related, filed documents) contemporaneously with the claimant serving those documents on ICANN.

2. That, subject to the following sentence, all such parties have a right to intervene in the IRP. Notwithstanding the foregoing, a person or entity seeking to intervene in an IRP can only be granted "party" status if (1) that person or entity demonstrates that it meets the standing

requirement to be a Claimant under the IRP at Section 4.3(b) of the ICANN Bylaws and as Defined within these Supplemental Procedures, or (2) that person or entity demonstrates that it has a material interest at stake directly relating to the injury or harm that is claimed by the Claimant to have been directly and causally connected to the alleged violation at issue in the Dispute. The timing and other aspects of intervention shall be managed pursuant to the applicable rules of arbitration of the ICDR except as otherwise indicated here. Subject to the preceding provisions in this paragraph, the manner in which this limited intervention right shall be exercised shall be up to the PROCEDURES OFFICER, who may allow such intervention through granting IRP-party status or by allowing such party(ies) to file amicus brief(s), as the PROCEDURES OFFICER determines in his/her discretion. An intervening party shall be subject to applicable costs, fees, expenses, and deposits provisions of the IRP as determined by the ICDR. An

amicus may be subject to applicable costs, fees, expenses, and deposits provisions of the IRP as deemed reasonable by the PROCEDURES OFFICER.

3. No interim relief that would materially affect an interest of any such amicus to an IRP can be made without allowing such amicus an opportunity to be heard on the requested relief in a manner as determined by the PROCEDURES OFFICER.

4. In handling all matters of intervention, and without limitation to other obligations under the bylaws, the PROCEDURES OFFICER shall endeavor to adhere to the provisions of Bylaw section 4.3(s) to the extent possible while maintaining fundamental fairness.

**20171023 – Email - DM (recommended reading)**

[IOT] IRP IOT – moving toward second reading of JOINDER issue

McAuley, David d mcauley at verisign.com

Mon Oct 23 12:58:56 UTC 2017

Previous message: [IOT] IRP IOT plans for coming weeks

Next message: [IOT] IRP IOT – moving toward second reading of JOINDER issue

Messages sorted by: [ date ] [ thread ] [ subject ] [ author ]

Dear members of the IRP IOT:

Here below is suggested language for second reading on the Joinder issue we have been discussing.

I have deleted the word “endeavor” in paragraph #4 as requested by Kavouss but have maintained all- caps for PROCEDURES OFFICER inasmuch as that is how it appears in the draft rules.

Please consider and agree on list or on next call (Nov. 14 at 19:00 UTC), or if you suggest a change please provide specific language and rationale.

SUGGESTED JOINDER LANGUAGE:

1. That only those persons/entities who participated in the underlying proceeding as a "party" receive notice from a claimant (in IRPs under Bylaw section 4.3(b)(iii)(A)(3)) of the full Notice of IRP and Request for IRP (including

copies of all related, filed documents) contemporaneously with the claimant serving those documents on ICANN.

2. That, subject to the following sentence, all such parties have a right to intervene in the IRP. Notwithstanding the foregoing, a person or entity seeking to intervene in an IRP can only be granted "party" status if (1) that person or entity demonstrates that it meets the standing requirement to be a Claimant under the IRP at Section 4.3(b) of the ICANN Bylaws and as Defined within these Supplemental Procedures, or (2) that person or entity demonstrates that it has a material interest at stake directly relating to the injury or harm that is claimed by the Claimant to have been directly and causally connected to the alleged violation at issue in the Dispute. The timing and other aspects of intervention shall be managed pursuant to the applicable rules of arbitration of the ICDR except as otherwise indicated here. Subject to the preceding provisions in this paragraph, the manner in which this limited intervention right shall be exercised shall be up to the PROCEDURES OFFICER, who may allow such intervention through granting IRP-party status or by allowing such party(ies) to file amicus brief(s), as the PROCEDURES OFFICER determines in his/her discretion. An intervening party shall be subject to applicable costs, fees, expenses, and deposits provisions of the IRP as determined by the ICDR. An amicus may be subject to applicable costs, fees, expenses, and deposits provisions of the IRP as deemed reasonable by the PROCEDURES OFFICER.

3. No interim relief that would materially affect an interest of any such amicus to an IRP can be made without allowing such amicus an opportunity to be heard on the requested relief in a manner as determined by the PROCEDURES OFFICER.

4. In handling all matters of intervention, and without limitation to other obligations under the bylaws, the PROCEDURES OFFICER shall adhere to the provisions of Bylaw section 4.3(s) to the extent possible while maintaining fundamental fairness.

Best regards, David

**20171114 – Transcript -**
**https://community.icann.org/pages/viewpage.action?pageId=71601167&preview=/71601167/74582091/IRP-IOT%20SUBGROUP_11142017-DRAFT-en%5B1%5D.docx**

**>> DAVID MCAULEY (Page 2)**: Cherine, thank you very much. And I would like to comment on that and again say welcome. We're very glad you are here. And then I will open it to the floor if anyone else would like to comment in the meantime. And you are absolutely correct, the supplemental, the IOT, the team itself, is a small team. It was capped at 25 members by the CCWG on accountability workstream one and we now have 26 members. We took on Anna Loop as an additional member when we took on the CEP process. And it's a small group but it's an active group at times. It's a mix of legal skills and other skills and we've been working on supplemental rules. The initial leader of the IOT was Becky Burr and she's still a member of the team. Becky stepped away from the leadership of the team when she stepped onto the ICANN board last year. Last November I guess it was. And then I took over as lead of the team. And just as Becky was leaving we had the first draft of the supplemental rules that are basically suppments to the International Center for Dispute Resolution rules to take advantage of ICANN and the supplemental rules to primacy if there's a conflict between the supplemental and ICDR rules. They are put out for public comments. The public had comment closed in February of this year. We started working on the rules, and the staff report came out in May, and we spent a lot of time discussing them.

We are we have moved some through to conclusion, and we are basically very near the end. We've discussed the rules at great length including the timing, retroactivity, all those kinds of things. We are very near the end. So that part of it is very good.

So the supplemental rules, I hope, will be done and presented to the board in the January/February time frame. I'm hoping we get all of the heavy lifting work done by the end of this year (indiscernible), on this and on another call in addition to this one.

Secondly, we expect the standing panel  Liz Le is on the call, and she will be talking later about where the preparation is.  But the standing panel is something that will be created for this IRP under the bylaws, and it will involve an expression of interest, a document that has been prepared seeking people to apply for the standing panel.  But we  the ICANN legal and ICANN policy are waiting on people to help, supporting advisory committees to nominate for the standing panel.  Under the bylaws, it's the role of the ACs and SAOs to nominate.  It's the role of SAs and SEs and ICANN to put them in two qualifications, qualified and unqualified.  Once you have a pile of qualifications, it's the SAO's job to nominate to that panel, and ICANN policy is working to get organized doing that.  We in the AOT have offered our assistance in that respect because we're developing some facility with the IRP bylaw.  That's moving on.  And I think Liz can speak to that a little bit later.

And then with respect to the cooperative engagement process, that was a separate subgroup of Workstream 2, and at that time Jill Burke  there was a change in the CCWC Accountability Co Chairs  asked us if we would take that work on, and we've agreed to do that.  And that will probably follow the issuance of the rules.

Our first order of business, I believe, as we see it right now is to get the rules done and then step on to some further work.  And I'll speak about that in a little bit.  But thank you very much for your interest.  That's exciting for us, and that's roughly where we stand right now.

Today's meeting is to discuss and hopefully wrap up issues of joinder of parties to an IRP, work on how parties can do discovery and gather evidence, and also work on translation services, all with a view towards recognizing IRP as an arbitration is meant to be quick, to the point, fair, not prolonged and not necessarily expensive, at least when compared to litigation.  And so I hope that we will have some fruitful discussion on that, and I have invited discussion on the list waiting up to this call.  So that's roughly where we are, and I will invite others in the group if they wish to make a comment to please, you know, indicate by their hand now.  Charene, you're certainly welcome to comment, in light of what I've said, as well.

Hearing  hearing nothing right now, let's move on.  Liz, let me ask you if I could move you up on the agenda from Number 6 to  to right now before we get into the joinder of discussion,

inasmuch as the issue about preparations for getting to the standing panel have been have been mentioned.

Are you able to do that now?

>> LIZ: Hi, there. This is Liz. I'm happy to do that. So just to follow up on your recap, as you know, we circulated the we drafted the call for expression of interest. We'll also served related to the group for comment the process flow that we mapped out in terms of the four step process that is establishing the standing panel that the bylaws calls for, and we have identified in there certain points where we needed additional input from the community, and we've received some input from the IOT group, and we've also identified that we should get input and need input from the SNLAC leaders.

Weaving working with ICANN policy team in terms of figuring out, what is the best way to go about that. And I think the goal is leading to do a webinar, as we've discussed with this group here to do.

We are one of the things that we have been working with policy team is to recalculate to AOC leaders to identify for them what issues and probably what we planned to see get some kind of get their input in suggesting a planning call. I don't I think that might be the first step that they find to be appropriate, and then following that, a webinar, or if they feel that the webinar and the planning call can be done at the one step, that would be the next thing that we identify.

So from our standpoint, we are hoping to get that out to the SNLAC leaders this week, and depending on when they feel and identify is the time they are available to do so, we're hoping that we would be able to get this planning call up and going within the next couple weeks.

>> DAVID: Liz, thank you. So and thank you for that. In a moment, I will turn to Aubrey and Becky who joined the call, both members of this group, and see if they have any comment. Let me respond just briefly, Liz, and thanks for the update.

You've heard me speak about this before. I think the webinar is a good idea, the sooner the better. We would be happy to participate. We can find folks. I would be happy to participate

and having read the bylaw now, I don't know how many times, I'm certainly gaining some knowledge of it.

The other thing I think we need to do is identify in conjunction with leaders from the SLACs is whether they need time for face to face, because the planning for Puerto Rico is done I don't know and maybe for Panama, I guess, will come up soon. It's amazing the lead time that's needed. While I hoped we could wrap all this up before then, if we need to preserve some time at one of these meetings, it would be nice to identify that fairly early. I'm looking forward to what you want to send out and looking forward to getting this moving.

Having said all that, Aubrey and Charene is a welcome observer today. I have given a recap of what we've done and where we are, and if you have any comments, you're certainly welcome to make them now.

>> AUBREY: Hi, this is Aubrey. I'm not sure I can be heard. Can I be heard?

>> DAVID: You're heard, but very, very faintly.

>> AUBREY: Sorry, this is the first time I'm looking this connectivity. I have no comments to add at this point. Thanks.

>> DAVID: Okay. Thank you. Becky, do you have anything that you want to say at this point?

>> BECKY: Not at this point. Thank you, David.

>> DAVID: Okay. Thank you. So, Liz, unless you have anything in light of what I said, then we can move on to the next agenda item.

>> LIZ: Nothing from me.

>> DAVID: Okay. Thanks. So let's move on to joinder. And as I mentioned in E mails, I have had a little bit of a time challenge. So I didn't send out anything more extensive than the E mails that I sent out following the last meeting to try and move these issues to closure.

We've discussed joinder quite a bit. And what I would like to do is just read the language as to where we are now. It will take two or three minutes, but I think it's good for the record to go

ahead and read this now. And this is where we presently are on joinder. And if anybody wishes to say anything different, I have urged them to do some on lists. You can do it on the call, too, but to give specific language as an alternative. Here on joinder, only those entities who participated in the underlying (Indiscernible) of the full notice of IRP and request for IRP, including copies of all related file documents, contemporaneously with claimants serving those documents on ICANN.

2. That subject to the following sentence, all such parties shall have a right to intervene in the IRP. Notwithstanding the foregoing, a person or entity seeking to intervene in an IRP can only be granted party status if; one, that person or entity demonstrates that it meets the standing requirement to be a claimant under IRP Section 4.3 B of the ICANN bylaws, or 2, that person or entity demonstrates it has a material interest at stake directly related to the injury or harm by the claimant to have been directly or causally related to the alleged violation at issue in the dispute. The timing and other aspects of intervention shall be managed pursuant to the applicable rules of arbitration of the ICDR, except as otherwise indicated here.

Subject to the preceding provisions in the this paragraph, the manner in which this limited intervention rights shall be excised shall be up to the procedures officer, who may allow such intervention through granting such IRP party status or by allowing such parties to file amicus briefs as determined in his or her discretion.

An intervening party shall be subject to applicable costs, fees, expenses and deposits, provisions of the IRP as determined by the ICDR. An amicus may be subject to the applicable costs, fees, expenses and deposit provisions of the IRP as deemed reasonable by the procedure's officer.

3. No interim relief that would materially affect an interest of any such amicus to an IRP can be made without allowing such amicus an opportunity to be heard on the requested relief in a manner as determined by the procedures officer.

4. In handling all matters of intervention and without limitation to other obligations under the bylaws, the procedures officer shall adhere to the provisions of bylaw Section 4.3(s) to the extent possible while maintaining fundamental fairness.

That concludes the reading of the suggested language.

Just as background, I believe this addresses some of the concern you had last time. And the notion of fundamental fairness is something that is stated in the bylaws where it says that the rules of procedure are intended to ensure fundamental fairness and due process and shall at a minimum address certain elements. So that's where we are.

And the floor is now open for people to speak to this. Otherwise, we will consider this having reached second reading conclusion.

Liz, you have a comment? You have the floor.

>> LIZ: Thanks, David. One question that ICANN org has his with respect to the second provision second clause in Paragraph 2 where at the end of that it states that it's claimed by the claimant to have been directly and causally connected to the alleged violation at issue in the dispute.

We're not clear what you intended for that clause to mean.

>> DAVID: Thanks, Liz. I'm looking for it. Where is it again?

>> LIZ: So Paragraph 2.

>> DAVID: Okay. It's in Number 2?

>> LIZ: Right.

>> DAVID: So let me just read that out loud. That person or entity demonstrates that it has a material interest at stake directly relating to the injury or harm that's claimed by the claimant to have been directly and causally connected to the alleged violation at issue in the dispute.

I actually think this may have come from somebody else. But it seems to me that what's involved here is that this has to be directly tied to the dispute. It can't be tangential. There may be better language to state that, and if you have a concern with that language, I would urge you to maybe give me something else. But it's basically, you know, this has to be directly stemming or directly tied to the dispute in question.

>> LIZ: Okay. I understand that. I think what we would propose to change that to is that that person or entity demonstrates that it has a material interest at stake directly relating to the injury or harm that is claimed by the claimant that has resulted from the alleged violation.

>> DAVID: Okay. So if that's what you want, then we I don't think I wouldn't sense any objection to that on my part. If there's anyone else, they will have to raise their hand and make a statement about it, but I think that would be fine. And I would ask you to send that to me in the E mail and send it to the list; yeah.

>> LIZ: Absolutely. Happy to do so.

>> DAVID: Okay. Any other questions about joinder or any concern with what Liz just proposed?

Since that involves a bit of a change, what we will do is, I'll get the language from Liz. We will incorporate the language, and before we give this a second reading, we'll have to leave it on the list for several days to give people who are not in the call a chance to respond.

So absent any requests to speak, we'll move on to the issue of discovery. Of course, I have lost my place. We'll move on. Liz, your hand is still up. Is that old or new?

**20171201 – Email - DM (recommended reading)**

[IOT] IRP IOT call reminder AND Joinder issue text

McAuley, David d mcauley at verisign.com

Fri Dec 1 19:18:31 UTC 2017

Next message: [IOT] IRP IOT call reminder AND Joinder issue text

Messages sorted by: [ date ] [ thread ] [ subject ] [ author ]

Dear members of the IRP IOT:

Reminder - we have next call on Thursday, Dec, 7th, at 19:00 UTC. Please double-check that time in case you are located where a daylight savings time change has taken place.

I will send an agenda by Tuesday and will be sending some issue-specific emails in the interim as well.

In this email I also address the Joinder issue we have been discussing. On our last call on Nov. 14th, Liz le of ICANN Legal suggested a tweak to the language we have been focusing on and she promised to send along drat text in that respect.

Here is what Liz has proposed:

1. If the person or entity participated in the underlying proceeding, (s)he/it/they receive notice.

1.A. If the person or entity satisfies (1.), above, then (s)he/it/they have a right to intervene in the IRP.

1.A.i. BUT, (s)he/it/they may only intervene as a party if they satisfy the standing requirement set forth in the Bylaws.

1.A.ii. If the standing requirement is not satisfied, then (s)he/it/they may intervene as an amicus.

2. For any person or entity that did not participate in the underlying proceeding, (s)he/it/they may intervene as a party if they satisfy the standing requirement set forth in the Bylaws.

2.A. If the standing requirement is not satisfied, the persons described in (2.), above, may intervene as an amicus if the Procedures Officer determines, in her/his discretion, that the entity has a material interest at stake directly relating to the injury or harm that is claimed by the Claimant to have been directly and causally connected to the alleged violation at issue in the Dispute.

I personally (not as IOT lead) find this acceptable and encourage each of you to consider it. If you object, or have comments, please come on list by Dec. 7th or join the call to make your points. This is drawing to a completed second reading at the Dec. 7th call.

For changes to text I ask for specific language proposals, not just observations. We are entering the home stretch on these public comments to the draft supplementary procedures and we need specific text to consider.

**20171203 – Email - MH (recommended reading)**

[IOT] IRP IOT call reminder AND Joinder issue text

Malcolm Hutty m alcolm at linx.net

Sun Dec 3 18:11:49 UTC 2017

Previous message: [IOT] IRP IOT call reminder AND Joinder issue text

Next message: [IOT] FW: Discovery, Evidence, Statements issue discussion IRP IOT call Oct 5 (19:00

U TC)

Messages sorted by: [ date ] [ thread ] [ subject ] [ author ]

On 01/12/2017 19:18, McAuley, David via IOT wrote:

> Dear members of the IRP IOT
>
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> to a completed second reading at the Dec. 7^th call.

I have some questions about this language (three issues).

First issue:

==========

Paragraph 1.A.i appears to say that if a person who was involved in the underlying procedure has standing, they may only intervene as a party and not as amicus.

Is that intentional? If it is actually deliberate to deny people who have standing the right to intervene as amicus, I would like to hear the reason.

However I suspect it is an accidental artefact of drafting. Second issue

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Paragraph 2.A says that the Procedures Officer may award to someone who does not have standing the right to intervene as amicus, but only if

"the entity has a material interest at stake directly relating to the injury or harm that is claimed by the Claimant to have been directly and causally connected to the alleged violation at issue"

Standing requires the party to be "materially affected". So I think a party that can satisfy the test above will have standing.

Accordingly, Paragraph 2.A is superfluous and should be removed.

Third issue

==========

As I said earlier in this discussion, I am concerned that in limiting rights to intervene to those that actually have standing, we are depriving people of the right to intervene who are satisfied with the current situation but would have had standing had ICANN done as the Claimant wants.

I think such people should have the right to intervene in opposition to the Claimant.

David asks:

>

> For changes to text I ask for specific language proposals, not just

> observations. We are entering the home stretch on these public comments

> to the draft supplementary procedures and we need specific text to

> consider.

I would like to suggest the following alternative to Liz's text, which cures all three issues identified above:

1. A person or entity that satisfies any of the following tests shall have the right to intervene either as a party, or as amicus, at their option:

a) a person or entity who also has standing under the bylaws to challenge the decision or action under review;

b) a person or entity who would have had standing under the bylaws to challenge ICANN's decision or action, if ICANN had decided or acted as the Claimant alleges it ought to have done;

c) a person or entity who would have had standing under the bylaws to challenge ICANN's decision or action, if ICANN had decided or acted as the Procedures Officer, in his absolute discretion, considers a reasonably plausible outcome should be Claimant be successful.

2. A person or entity that does not have the right to intervene under paragraph 1 may nonetheless intervene as an amicus, but not as a party, if they participated in the underlying procedure that gave rise to the decision or action under review.

3. When an IRP case is filed challenging the a decision or action by ICANN, ICANN shall notify all persons and entities that participated in the procedure that gave rise to that decision or action."

I also happen to think this wording is easier to understand, but perhaps that's just because I wrote it!

Having written this out, I see that the effect is that everyone who participated in the underlying process has a right both to notice and to intervene as amicus. That's not something new in my text, it's also true of Liz's text, but my text makes it more obvious.

Is it really intended to give these rights so broadly?

--

Malcolm Hutty | tel: +44 20 7645 3523

**20171207 – Transcript -**
**https://community.icann.org/pages/viewpage.action?pageId=74581854&preview=/74581854/74586236/IRP-IOT%20Meeting_12072017-FINAL-en.docx**

>> DAVID McAULEY: Thank you Malcolm. Let me react to as a partner reaction as a participant I attend to agree with you. You made a very good point in the last comment about if there's something new that wasn't on the agenda the first time that people didn't have a chance to comment that may have to go out for public comment. With respect to the reaction of the public commenters who had a chance to comment, my thought would be there would be many people potentially who offered no comment the first time on the timing issue because they saw what the rules said and it was fine with them. And felt no need to make any statements. So I tend to be on the side of the fence right now that a second round will probably be needed.

Is there anyone else that would like the comment on this? Then we can wrap this up on the list keeping in mind what Bernie noted a few minutes ago that the time of the call was moving on. Anyone else have anything else on this? Let's wrap this up on the list. A joinder. In that respect we had text, we have this has been out here a number of times and I put some text out there a number of times much then recently Liz came to the list with some suggested tweaking to it which I personally as a participant thought was fine and I thought we were largely there. But then Malcolm has put another male on the list.

Which I mentioned on the agenda which he wanted to suggest an alternative. To Liz and cures it but states it differently. So I didn't you know I tend to be personally I guess I have a personal preference as a participant with the language we came up with last time that I put on the list as tweaked by Liz but Malcolm if you would like some time, thank you Brenda you're putting it on the screen now with the yellow background. Malcolm if you would like to make the case you're welcome to now.

>> MALCOLM HUTTY: Thank you David. The text I was reacting to I don't know. Maybe it was I mean it rather looked like clearly when you circulated it, it had got lots of mark up on it. And

it did rather read to me like it had gone through several stages that had possibly diminished the level of coherency. I found it very hard to pause.

And there were a couple if on of issues in there that I thought were probably accidental. The first one, was that it appeared to say that a person, if a person was involved in the underlying procedure, if they have standing, then they are only allowed to intervene as a party and not an am cuss. And unless that's intentional and I assume it's not. I haven't imagined may be someone will correct me I have not imagined why we would do that. I suspect that's an artifact of drafting that actually it was intended to give that person the option of being intervening as either a party or a amicus.

And secondly sorry you wanted to come in, please do.

>> DAVID McAULEY: That was a change that Liz suggested and I just simply took that as suggested as intentional. So when you're done speaking Malcolm we would can ask Liz if she wants the weigh in.

>> MALCOLM HUTTY: Second issue was on the paragraph 2 A which said that to the procedures officer may award someone who doesn't have standing, the right to intervene as an Amicus. But the criteria or when they can do so is only amongst those people and it's procedure that has discretion but they can only do so among people where the entity has a material interest at stake in relating to the injury or harm that is claimed by the claimants.

Now actually if you have the material interest, if the criteria for standing. It's never going to be the case that there's going to be someone that doesn't have standing that has a material interest at stake directly relating to the material harm because that person has standing. So that paragraph seems to me to be superfluous. Because it could never be satisfied.

And can simply be removed.

And the third issue, I had raised this in a previous discussion that we had, I find it difficult to dig out emails, maybe it happened in a meeting I don't know. It's limiting rights to those that intervene that actually have standing we are denying people the right to intervene who would have standing if the claimant was right. If the claimant had said that ICANN should of done this,

and it may be that you know somebody has is personally satisfied with what ICANN has done but would not be satisfied with the prevails and that should have a right to review if the claimants case was upheld. So my text there seeks to ensure that the standing rules are preserved but for those that have standing to intervene turned actual facts and actually those that would have standing to intervene turned counter factual that the claim was upheld so they could intervene rather than having to bring a new IRP case against the outcome of the first IRP case which seems to me to be nobody's interest to delay like that. So that's what the issues that I have identified are.

And then I've set it set out you asked me to produce text. You asked everyone that wanted to make comment produce text to make it capable of being adopted. Maybe it's because I wrote it I found it easy to understand. If you don't find it easy to understand that's fine. To my mind I can pass this wording more easily it seems more clear to me. That's why I recommend it to the group.

>> DAVID McAULEY: Thank you Malcolm. David McAuley speaking again.

First I want to thank you for actually providing text for us to consider. That's extremely important and you did it so thank you very much.

I tend I see that Sam made a comment pretty much in chat the way I was thinking about it. So let me stop talking and recognize Liz. Liz you have the floor.

>> LIZ LE: Thanks, David. So I will address Malcolm's point in the order in which he addressed them. With respect to the first issue which is whether or not it was intentional for paragraph 1 a little one to state that the party from underlying procedure only may only intervene as a party and not as an amicus that was not the intent so if it wasn't clear what we can do is clarify that by adding at the end of that provision as a party or as an amicus subject to the following conditions. And then we can make sure that the text flows that we are indicating to correspond to this revision.

With respect to the second point, that he raised about determine maturely reflected in why paragraph 2 a is there and should not be removed this provision was added to address Malcolm's

previous concern that an entity would not be able to intervene on behalf of ICANN. I agree the term materially affected language only applies to entities intervening on the claimant but again we added the provision 2 a to allow the opportunities for entities to request an event on amicus on behalf of ICANN. That's why the material interest language is in there.

And then with respect to the issues that Malcolm raised for the third point, I think we that's what we, his concern with respect to his concern that's what paragraph 2 A was aimed to do and not I'm not understanding how it does not, what were he sees the differences in why his concerns are not resolved in paragraph 2 a.

>> DAVID McAULEY: So thank you Liz, it's David McAuley speaking again.

So we have point and counter point that are discussed very cogent comments from you both. Thank you. As you saw what I said in the chat we are not going to be able to make decisions in this call. So I think what I would like to do is ask anybody else here if they have other insights on this particular issue otherwise we can move on and try to close this somehow on the list.

So I'll just wait for a second and sigh if there's any hands coming up on this issue from anyone else that would like to speak.

**20180208 – Transcript -**
**https://community.icann.org/pages/viewpage.action?pageId=79430443&preview=/79430443/79434479/IRP-IOT%20MEETING%20_02072018_FINAL-en.docx**

>>MR. McAULEY (page 24) - Next section addressed is USP 6 written statements. Where we say that, we ask Sidley to add language along the lines in addition, the IRP panel may request grant to (indiscernible) admitted as a party or as an Amicus, upon a showing of a compelling basis for the request.

In the event the IRP panel grants a request for additional written submissions, any such additional written submissions shall not exceed 15 pages.

Comments, questions, to this provision?

Thank you, Sam. You can take the floor.

>> Thanks David. Just as one of the things that we'll be submitting, I know one of the comments we had made earlier during this deliberations is that 15 page limit should be collective among the appointment. But the issue in the IRP is still unified issue, not, and should be very similar to each claimant, because the issue of I can violated the bylaws or not. So that would, that would be one of the changes that you see. And I just wanted to flag that, so may see that as more substantial than others.

>>MR. McAULEY: Thanks, Sam. I do recall seeing a page limit where in a different context, it was 25 pages. I think in making the claim or something like that. And treating that cumulatively when other parties are added. And I thought to myself.

>> Yes.

>>MR. McAULEY: That didn't make sense.

>> Yes.

>>MR. McAULEY: Okay. So, anyway. I will anticipate and we will look at what you submit on

the list.

>> Great. And also we will be submitting one of the Ed it's on the clarification that these are double spaced and limited pages that we're talking about.

>>MR. McAULEY: Okay. I think that's consistent with what was in the preceding rules and in the ICRrules.

>> Yeah.

>>MR. McAULEY: Okay. Thank you.

Next section is the USP 7 with respect to consolidation intervention and joinder. And I made it a comment in the column here.

And, the comment in the column was, that the language that I suggest that we put, and you can see it there, it's fairly lengthy, So I don't know if I'll read it. But it's sitting there. And you can take a look at it. But I noted that in recent discussions, Malcolm and Liz hopefully a little difference of opinion and to be honest with you, I thought they had resolved it. And I thought it was resolved. But I simply wanted to flag it to Malcolm and lids. -hi Liz. That the language that I put in this particular section, may or may not capture what they agreed.

But rather than read it, you can see that I'm dealing here with people, groups, entities, that came from expert panel decisions below. Those kinds of appeals. And how they could be, how they could intervene in IRP. These are consistent with what we discussed. And consist at the present time with, largely consistent with the comments that were in the public comments.

We also go on to say that people that did not participate in the underlying expert panel proceeding, these are usually with respect to new TGDLDs, things like legal objections that kind of thing, string similarity. They can intervene as a party if they satisfy the standing requirements of the bylaws. If the standing requirement isn't satisfied, they can intervene as an Amicus based on panelists discretion.

And then finally, we give supporting organizations intervention rights who develop a consensus policy involved when the dispute challenges that policy.

So, you can see those there.

At the end of paragraph 3 under USP 7 is where that 25 page, 25 page limit came in. And I added a comment there. Sam, if you have a comment on that one too, we'll look for your comment on the list; unless you want to comment now. But I see no hands but I will invite anybody to raise your hand, make a comment, ask for the floor with respect to anything in this USP7 section.

And if not, we will have run through the string of what I've accomplished So far.

I will note at the, I will note at the bottom that, at the bottom of the draft that I suggest certain administrative items that we at least want to consider. One, we'll ask Sidley to give us a red line in the clean version. There are footnotes that we have to attend to. I see Malcolm has his hand up, So I'm going to ask Malcolm to take the floor now.

>> Yes. Thank you David.
You mentioned the discussion that Liz and I were having about the precise wording in that USP 7. From Liz's clarification, I think we are both actually aiming for the same thing. We're not actually having a debate about what is a desirable outcome, just whether these words clearly express it and accurately express it.

So, we're going to in any case, have the benefit of Sidley's review of this, So I think the main thing is to make sure that we are as clear about what we are intending as possible, So that we get the benefit of their advice as well, without constraining them too much on, to a particular form of words.

**20181009 – Transcript - (recommended reading)**
**https://community.icann.org/display/IRPIOTI/IOT+Meeting+%2340+%7C+9+October+2018+@+19%3A00+UTC?preview=/90770283/96209794/Transcript_FINAL_IORP-IOT_10Oct2018.docx**

**>> DAVID McAULEY (Page 11):** So that's an action item for Bernie could you make a note of that? That I'll take -- that's something I'll take on. But I'm not able to make notes right now. If you would mention that to me.

So if there's no other hands, I see Malcolm and Sam you still have hands up. Unless those are new, I'll move on.

Excuse me.

And so it's my turn to read, we will move on to written statements, number 6 we have 23 more minutes remaining. A claimant's, this is written statement section 6, the dispute claims that give rise to a particular dispute but such claims are independent or alternative claims. The initial written submissions of the parliamentary shall not exceed 25 pages double spaced in 12 font in available evidence of the claimants claims or claims should be part of the initial written submission. The evidence is not included when calculating the page limit. The parties may submit expert evidence in writing and that's one right to reply the IRP panel may request additional from the review, the board the supporting or other parties.

In addition, the IRP partner panel may grant a request for additional who is intervening as a claimant or who is participating as an amicus on the compelling bases for a request. In the event the IRP panel such additional written submissions shall not exceed 15 pages, double spaced in 12 point font any dispute from process decision expert panel that is claimed to be articles of incorporation or bylaws as specified bylaw section 4.3 BIIIB 3 any person or group entity previously identified in contingent set regarding the issue under consideration within such party panel shall receive notice from ICANN the independent review process has commenced. ICANN shall provide notice by electronic notice within two business days calculated at ICANN's personal place of business in receiving notice from IDCR that commenced that's rule 6.

Comments or questions welcome?

And I see Kate Wallace has her hand up.

>> KATE WALLACE: Thanks David this is Kate Wallace from Jones Day for the record. This is thoughts from an observer from the last sentence of the provision about the notice that ICANN shall provide notice by electronic offer for consideration that we reflect on the fact this is mandatory language and in some instances it might be difficult to comply with. Instead

perhaps we can consider I suppose it would be more of a reasonableness standard. Something like did he ever to provide notice or under take reasonable efforts to provide notice. By electronic message. Which would allow for circumstances when perhaps notice couldn't be effect waited for reasons of contact information not being perfect or otherwise.

>> DAVID McAULEY: Thank you Kate. Let me react to that as a participant and not as the lead. And that is, two things, one is I would carbon you to send language, suggested language to the list on or before the Thursday call to address that. And I take it that the point that you're making is to address instances where the notice cannot be effect waited. And I think that's fair. But when you use a word liken did he ever and again I'm speaking as a participant, I think it should be noted that but for inability to get done, maybe it's a technical glitch, I don't know. That would be my suggestion. That it be to are given where it's simply impossible to achieve. But if you kindly come up with the language and submit it, would you be willing to do that.

>> KATE WALLACE: Sure I'd be happy to do that.

>> DAVID McAULEY: Okay thank you. Any further comments or questions on rule 7?

Seeing none, and hearing none, let's move on Bernie you're back up with rule 7.

>> BERNARD TURCOTTE: All right, rule 7 consolidation intervention and participation as an amicus.

The procedures officer shall be appointed from the standing panel to consider any requests for a consolidation, intervention and or participation as an amicus. Requests for consolidation and intervention and or participation as an amicus are committed to the reasonable discretion of the properties officer. In the event that no standing panel is in place when the procedure officer must be selected, a panelist maybe appointed by the ICDR pursuant to the national arbitration rules related to the appointment of panels for consolidation.

In the event that requests for consolidation or intervention the restrictions on written states set forth in section 6 shall apply to all claimants collectively for 25 pages exclusive of evidence and not individually unless otherwise modified by the IRB panel and it's discretion consistent with the purposes of the IRP.

Consolidation. Consolidation of disputes may be appropriate when the procedures officer concludes that there's a sufficient common nucleus of operative fact among multiple IRPs such that joint resolution of the disputes would foster a more just and efficient resolution of the disputes than addressing each dispute individually. If disputes are consolidated each existing dispute shall no longer be subject to further subject consideration. The procedures officer may in its discretion order briefing to consider the probe tee of the consolidation of the disputes.

Intervention, any person or entity qualified to be a claimant pursuant to standing requirements set forth in bylaws may in IRP with admissions to the policy after p officer as provided below. The person, group or entity participated in an you understand lying proceeding an ICANN

bylaws section 43 B 3 AI 3 intervention is appropriate to be so the when the perspective participant does not already have pending related dispute and the potential claims of the prospective participants from the common combing louse of operative facts based on such briefing has the procedures officer made order at its discretion. In addition, the supporting organization which developed a consensus policy involved when a dispute challenges a material provision or provisions of an existing consensus policy in hole or in part shall have a right to intervene as a claimant to such challenge. Supporting organizations rights in this respect shall be exercisable through the chair of the supporting objection.

Any person group or entity who intervenes as a claimant pursuant to this sections will become a claimant in the existing process and have all of the rights and responsibilities of the other claimants in that matter and be bound to the outcome to the same extent as any other claimant.

All motions to intervene or for consolidation shall be directed to the IRP panel within 15 days of the initiation of the independent review process. All requests to intervene or for consolidation must contain the same information as the written statement of the dispute and must be companied by the appropriate filing fee.

The IRP panel may accept for review by the procedures officer any motion to intervene or for consolidation after 15 days in cases where it deems that the purposes of the IRP are furthered by accepting such a motion. The IRP panel shall direct that all materials relayed to the dispute be made available to entities that have intervened or had their claims consolidated unless the claimant or ICANN objects that such disclosure will harm such confidentiality, personal data or trade secrets in which case the IRP panel shall rule on objection and provide such information as is consistent with purposes of the IRP and the appropriate preservation of confidentiality as recognized in article 4 of the bylaws.

Participation as an amicus any person or group or entity that has a material interest to the relevant to the dispute but does not satisfy the standing requirements for the claimants set forth in the bylaws may participate as a amicus before the IRP panel. Subject to the limitations set forth below. A person, group or tenant tee that participate paid in an underlying proceeding and process for ICANN bylaws we no that one, shall be deemed to have material interest relevant to the dispute and may participate as an amicus before the IRP panel.

All requests to participate as an amicus must contain the same information as the written statement that out in section 6 specified the interest of the amicus and must be companied by the appropriate filing fee. If the procedures officer determines in his or her discretion that the proposed amicus has a material interest relevant to dispute, he or she shall allow participation by the amicus curia. Any person participating as a amicus curia may submit to the IRP panel written briefing on the dispute or on such discrete panel questions as the IRP panel may request briefing in the discretion of the IRP panel and subject to such deadlines and page limits and other procedural rules as the IRP panel may specify in its discretion. The IRP panel shall

determine in its discretion what materials related to the dispute to make available to a person participating as an amicus curia.

Over to you David.

>> DAVID McAULEY: Bernie you got the short extra when it came to sections to read. So thank you very much for that.

I had my hand up because I want to speak as a participant here.

And I do have concern about this and what I believe is that on joinder intervention, whatever we are going the call it it's essential that a person or entity have a right to join an IRP if they feel that a significant -- if they claim that a significant interest they have relates to the subject of the IRP.

And that adjudicating the IRP in their absence would impair or impede their ability to protect that.

And in addition when there's a question of law or fact that the IRP is going the decide that is common to all that is are similarly situated.

And especially given the finality of these kinds of proceedings it's my view that intervention, whatever term we are using needs to capture that.

So I'm putting that on, I would be happy to provide specific language with respect to this concept tomorrow on list. And we talk about it on Thursday. But that's what I wanted to mention as a participant with respect to this particular rule.

**>> DAVID McAULEY (Page 16):** So it's my turn to read I go exchange of information rule number 8. I don't see any hands. By the way, it's now 8 minutes before the hour. Let's get through this. And then may be summary dismissal then we will call it quits. But there's by in large we are through the meat of it and there's only several pages left. So on Thursday we may not have a full call but we will discuss some administrative stuff I'll put in email. Reading number 8, exchange of information. IRP panel should be guided by considerations of accessibility and fairness and efficiency a as to both time and cost in its consideration of request for exchange of information on the motion of either party and upon finding of the IRP panel that such exchange of information is necessary to further the purposes of the IRP, the IRP panel may order a party to produce to the other party and to the IRP panel if the moving party requests documents or electronically stored information in the party custody and control that the panels are likely to be relevant to the material to the resolution of claims and or defenses in the dispute and are not subject to attorney privilege and work product doctrine and otherwise protected from applicable law.

Where such methods or exchange of information are allowed all parties granted the equivalent rights or exchange of information.

Motion or exchange of documents should contain specific document and classes of documents or other information taught to subject of dispute along with a explanation of why documents are likely to be relevant and material to the resolution of dispute. Depositions and interrogatories to dispute will not be permitted. In the party expert opinion such opinion must be provided in writing to the other party must have the right of apply to such opinion with a expert opinion of its own.

So, I will say that concludes the reading of that. I'm going to put my hand up as a participant not as lead and ask if anyone else has comments. I don't see any other. And so I will comment as participant. This is in part related to the joinder I just mentioned. And what I suggest and what I think we need is to tighten the rule to ensure that an IRP panel cannot disclose materials or information amongst joined parties that will compromise competitive confidentiality. I think it's possible to gain the system through intervention. But I think we should tighten up the rule.

Make sure that can't happen.

And again, I'll provide language probably by tomorrow that would clarify this and we can discuss it on Thursday.

Or on list.

Does anyone have any comment to that? Or anything else about rule number 8? Gnat seeing or hearing any, I'll ask you Bernie to go through rule number 9, then we will call it quits.

>> BERNARD TURCOTTE: Yes sir, rule 9, summary dismissal IRP panel may summary dismiss any request for independent review where the claimant has not demonstrated it's been materially effected by a dispute. To be materially effected by a dispute the claimant must suffer injury or harm that is causally connected to the violation an IRP panel may also sum rarely dismiss a request for independent review that lacks substance or is frivolous or review.

>> DAVID McAULEY: So rule number 9 is now open for comments or questions? I don't see any hands or hear anything. Before we finish the call, let me just harken back to one thing that Bernie read under rule number 7. And it was paragraph, the second paragraph, he read it directly but that paragraph currently reads in the event that requests for consolidation or intervention comma the restrictions on written statements set forth in 6 shall apply. I believe it's missing two words, are granted. I think that the request for consolidation or intervention are granted the unwritten statements shall apply if nobody objectives that we will make a note to that as well. We are getting to wind up the call fairly early. By it's a fair break point after number 9 and before we get into interim measures of protection. Anyone have any comment or question or concern they would like the express at the point?

If not I'd like to say two things, one, thank you all for attending. And please I encourage you all to be on the call on Thursday. I recognize Avri may not be able to be. But I encourage us all to be on the call and, also, on list. And to those going to ICANN 63, I look forward to seeing you all there. Thank you for your participation. I believe we are done. Thank you Bernie. I think we can call it off.

**20181011 – Transcript - (recommended reading)**
**https://community.icann.org/display/IRPIOTI/IOT+Meeting+%2341+%7C+11+October+2018+@+19%3A00+UTC?preview=/95094963/96210665/ICANN-10112018-FINAL-en_IOT.docx**

**>> DAVID McAULEY (Page 10):** Thank you I have a language in front of me.

So, Kate made a suggestion, this is with respect to the last paragraph in rule number 6.

The title of rule number 6 is written statements. So here's -- I will read through it and I will note when I get to language that Kate has suggested that we add.

For any dispute resulting from a decision of process specific expert panel -- sorry, for -- let me start again.

For any dispute resulting from a decision of a project specific panel that is claimed to be inconsistent with ICANN's articles of bylaws with articles 4.3 B triple IA 3 any purpose entity personally identified within a contention set with the claimant regarding the issue within such expert panel proceeding shall -- and Kate suggests adding the word reasonably after shall.

Shall reasonably notice from ICANN that the reprocess has commenced, ICANN shall. And Kate suggests adding the next four records. ICANN shall under take reasonable efforts to provide notice by two business days calculated at ICANN's principle place of business with notice IRP has commenced period, end of tweak. Do I hear any comments or concerns or questions?

I don't see any hands.

Or hear any.

Thank you Kate. And moving forward then let's move to rule 7.

Consolidated intervention, etc.

And I -- consolidation and intervention., etc. I suggested tweak to this yesterday and I put -- I will read this.

I'm starting with the first paragraph of rule 7. I will skip certainly portions if they are not indicated and mention that. Starting at the first paragraph a procedures officer shall be appointed any request of consolidation intervention and participation as an amicus. And this is where I said verbiage except where otherwise stated here in -- that's the end of my addition and intervention and as amicus as reasonable discretion, etc.

I then moved over to add a paragraph in the section dealing with intervention.

And I added after the paragraph that begins in addition the supporting organizations which developed a consensus policy, etc., etc.

And before the paragraph that begins any person or group or entity that intervenes as a claimant pursuant to this section will become a claimant, etc., etc.

What I added is the following in addition any person group entity should be a claimant that person group entity is significant interest to subjects of independent review process and adjudicating the group or entities absence might impair the person's group and ability to protect such interests or two any question of law or fact similar situated as group or entity is likely to arise in the independent review process.

The next change I made was in the very paragraph after the next one that begins any person, group or entity that intervenes with the pursuant will become an claimant. In the next paragraph I at the next. Persaunt to rule 8 exchange of information below the IRP panel should direct et cetera, et cetera.

Then the other change I made is in rule 8, exchange of information, I'll read them together since they seem to be related to me. Then I'll get to the hands.

Well no, before I get to rule 8, let me recognize the hands that are up. I see Bernie, Malcolm and Sam. Bernie I'll ask you to tell us who was first.

>> BERNARD TURCOTTE: The order looks like Malcolm then Sam.

>> DAVID McAULEY: Malcolm go ahead.

>> MALCOLM HUTTY: Okay I'm speaking really relation to rule 7. Thank you for these suggestions David. I support them. In relation to rule 8 I have a view on that thank you.

>> DAVID McAULEY: Thank you. Sam?

>> SAM EISNER: Thanks David. This is Sam Eisner for the record. So the places where you interlineated small additions we are fine with those.

But we do have -- I have some concerns about the second section that the full paragraph that was added that said in addition any group, person group or entity should have a right as a claimant.

You might want to move to a amicus status.

But one of the things that we had talked about, many times as we were going over this, was the fact that claimant has a very specific definition under the bylaws. And only those people who are not just impacted by the action but impacted because they allege that ICANN us violated it's article or by bylaws those are the only people that qualify as a claimant. And having just a significant interest related to it, doesn't actually require that someone have an IRP claim against ICANN. It does recognize that they have an interest in what's going on. And I think we don't

have any concern with allowing those people to be mart of a proceeding. But giving them claimant status, gives them certain rights under the bylaws that actually opens up the IRP to be used in ways that are not anticipated to if they don't meet the requirement that they are alleging a violation that ICANN violated the bylaws. We could see people that actually support the action that ICANN took. Who would have the interest and would qualify under this paragraph. But they wouldn't meet the status of claimant. So they would be forced to make statements as to what ICANN did in violation of its bylaws but they actually wouldn't believe ICANN violated the bylaws. Let's take the common example right announcement if they were a competing a captain that benefit from ICANN's decision they are actually not going to say ICANN violated the bylaws in taking that decision. Where the claimant is taking that position.

So we are requiring people to take positions that they would not take by this.

So I think we could move that down either to amicus. So I think we put some things into the amicus section that covered this type of interest in a proceeding. And I'd say this is one of the things that we should bookmark and put more attention to before we get to a final set of rules.

If there's a wish to change the scope of who can participate in an IRP.

>> DAVID McAULEY: Thanks -- before I go to you Malcolm Bernie you initially had your hand up, is their something you want to say?

>> BERNARD TURCOTTE: No thank you.

>> DAVID McAULEY: Malcolm you have your hand backup, go ahead.

>> Thank you, Sam makes a fair point. But it's quite limited in its nature. It just points out that some people might not want to be a claimant they might only want to be an am I can cuss that may be a fair point to their claim. This can be easily resolved and better honor your proposal by leaving your proposal intact. But where it says to intervene as a claimant. To say to intervene as an am cuss or claimant in parentheses as appropriate to their position. Close parentheses. And then continue.

That would leave it the options if option to the person to intervene as an amicus and they would also be entitled to intervene as a claimant if they had a claim.

>> DAVID McAULEY: Thanks Malcolm.

So, I didn't put my hand up by I'm speaking now as a participant. As the person that suggested this. I hear you Sam and I would be willing to look at language, it's possible Malcolm just provided it.

But if it was moved to an amicus thing I would like to look at the language you come up with. You can tell between this and rule 8, where I'm coming from is a cot testify situation. Where members of contracted party houses or others who have contracts with ICANN or others that have contracts that effected by ICANN have to be able to prohibit their interest in competitive

situations. That use language largely followed U.S. federal rules of board. But those rules are fairly -- I think, at least in common law countries fairly routinely accepted that someone has an interest can defend themselves they can't look pore the defendant to make sure argument for them.

So I think that Malcolm may have just given the language but Sam if you take a swat what you want to do with this, and put it on list, I will certainly take a look at it.

>> SAM EISNER: I have a new hand.

>> DAVID McAULEY: Sorry, go ahead. I didn't see it.

>> SAM EISNER: This is actually an issue that we discussed even as we were developing the bylaws themselves with Sidley. This is where the IP differs from regular litigation because an IRP has a very limited standing rules. The IRP has a very narrow aspect to it.

And so, we can look at the language and we can try to make some recommendations, I understand where Malcolm is coming from with the choice of the amicus versus claimant. I think it's very important that if we have a right for someone to come in as a claimant, language such as significant interest here doesn't align with the standing requirements of the bylaws which require an allegation of material harm.

And so, that's -- that might be where we make some changes to that.

But if we have -- I understand on the whole that this is an issue that we need to make more progress on for -- as the IOT before we have a final set of rules. If we are not able to completely satisfy, because I think there's definitely room to put in some language to account for a bit broader of representation than is currently within these rules. I hear that, I see that, I think we can do something quickly on the I went rules to get there.

But will there be a point that we can agree that we could get a set of interim rules in place so that we have something, because from our standpoint, from the ICANN Org side, we are getting very nervous that we are on the precipice of having IRPs filed for which we don't have an adequate set of procedures to meet the bylaws. So we have that pressure. And so your hearing from me kind of -- the dual pressures. I want to work with IOT, I want to help get this right. I want to help these items be reflected appropriately in the rules. But I also think it's essential forever the protection of the organization and everything that this group has worked so hard to do so far to get a set of rules in place quickly. I'm wondering where that balance is. I will come back on list with some proposals of how to integrate some of these ideas into the set of interim rules. But I also would ask that there be some commitment to getting it even more right in a final set of rules. If we can move to that.

>> DAVID McAULEY: Thanks Sam, Malcolm you have your hand backup, go ahead.

>> MALCOLM HUTTY: Yes I wanted to get a quick clarification to for Sam so she knows we are not as far apart as maybe she might thing we are. I'm not suggesting -- mostly for you David,

for me I'm not suggesting for a moment that we should allow this language in this paragraph to change who is qualified to be claimant.

All this paragraph is intending to say, is that if you are otherwise qualified to be a claimant. If you additionally satisfy the situation described in this paragraph you should be able to intervene as a claimant as of right. Rather than wait for another case.

Similarly if you -- even if you don't qualify as a claimant, but you satisfy the conditions in this paragraph you should be allowed to intervene as an amicus and it shouldn't be merely discretionary. That's the aim. Not the change the definition of who qualifies as a claimant. That should be untouched by this language.

>> DAVID McAULEY: Thanks Malcolm. And I will also make a comment as a participant, Sam, I think that I can live with what Malcolm has just said. I think he's right in what he's saying and I think it's quite possible that we could crack this nut with amicus status as long as it's not discretionary it is a matter of right and as long as amicus can protect the language in did.

And I notice too Bernie gave us a time check, we are running out of time for this call. That gets to point that I agree with you Sam we have the finish this and get through this.

That's one reason why Bernie and I scheduled two calls for this. Get the interim rules out. We recognize that the time has come the get interim rules out and we have to move to repose, etc. I feel the pressures myself. So what I'd like to do is discussion on this one and ask you Sam to come back with your amicus language. I would mention to you, that I think I agree with what Malcolm just said I think that would work but I want to look at the language. I would like to move on to rule 8 now unless there's any other comment. Malcolm is that a new hand or old hand?