

**ICANN
Transcription ICANN Kobe
GNSO New gTLD Subsequent Procedures Part 2
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Julie Hedlund: Hello everyone. Thank you everyone for joining. May I ask that you begin to conclude your conversations and take your seats. We will be starting the next session momentarily.
The next session is the GNSO New gTLD Subsequent Procedures 2 of 3 that was due to start at 3:15. We will be starting momentarily so please do take your seats. We do have seats up at the table, so you may certainly sit at the table. But please do finish up your conversations so that we may begin.
Thank you.

Man: Are we off slide for this? I thought it starts in a...

Man: We got one minute.

Man: Yeah but I think we have - oh.

Julie Hedlund: Hello and good afternoon, good evening, good morning everyone who's joining today. May I ask those of you who are in the room to complete your conversations and take a seat now because we are going to be starting the next session.

Jeff Neuman: Thank you everyone.

Julie Hedlund: Thank you very much. So this is the GNSO New gTLD Subsequent Procedures Session 2 of 3. And this point I'd like to go ahead and turn things over to Jeff Neuman. Jeff please, it's over to you.

Jeff Neuman: Thanks Julie. This is Jeff Neuman and I am going to turn over this topic to Michael Flemming. Michael was one of the - was Work Track 2 co-lead and was also Subgroup C co-lead. So this fell into Subgroup C so I'm turning it over to Michael Flemming.

Michael Flemming: Thank you Jeff. I wanted to give Jeff and Cheryl a moment to rest. And so I volunteered to do this topic. Number two, some moons ago we covered this material in the Subgroup C. It originally came out of Work Track 3, okay, whose I believe co-chairs from then are not with us at the current moment.

So anyways, this is talking about limited appeals mechanism. Notice the term "limited" of course. So in the initial report we basically - we went through several aspects where we believe that a limited appeals mechanism should be developed separately from the current accountability mechanisms that are under the ICANN bylaws.

Comments that we got basically were very much in support for this. But there are also of course, you know, still open questions, still details that would need to be (fined) and further fleshed out before we can move for this.

What I'm going to do is talk about the items that overall we have support for and then cover kind of the questions that are still open at the current moment. And this means that I'll be going through three slides of material but rather quickly, and then we'll move back to the initial one, the initial item, which is allowing both subsequent and procedural changes but - and to talk about, so just bear with me for a few moments while I do that.

There also might be an error or two on the slides, and I will try to correct them verbally as we go through. So for the first overall aspect of support that we did was basically allowing – see right there, first one, allowing/allows – allowing both substantive and procedural challenges.

But however for the items that we need to clarify, we need to identify specific program elements. Evaluation objections, the CP, which is the community – no, see I can't think of the perfect...

Man: Priorities.

Michael Flemming: Priorities, community priority evaluation. Thank you. I want to say community panel evaluation. Then we need to confirm if this intended to apply to inconsistent application of the Applicant Guidebook, basically whether or not the rules were not completely followed, confirm that this intended to apply to outcomes that an applicant simply does not agree with.

And then we have a lot of comments from different members of the community that contributed to the comments during the public comment period for initial report which identified very detailed program elements which we will not be covering in detail today.

Going on to the next slide we also covered the topic of the appeals being granted and who they should apply to, who should be able to apply for this. And it was basically we talked about directly aggrieved parties and those that are also directly or indirectly affected, such as in string contention.

However – the however on this point – is what are the additional limitations? Are there additional criteria for qualifying to stand? We also looked at a quick-look mechanism that would limit the frivolous challenges, basically wants to cheat the system. However what is the outcome or the repercussion? How should they be penalized if an appeal is found to be frivolous?

And also on the question of multiple appeals, a limit of one appeal per applicant relating to a particular cause of action/facts in circumstances giving rise to the appeal.

And then another typo which is under how we should pay for this, it should be that establishing a loser pays model with the question that is actually on the third slide, so I'll quickly jump to that. The question is how would the mechanism be paid for? Should it be built into application fees for instance.

Okay and that should be under – yes, the loser pays model. And then the next element is what kind of remedies should be allowed, should come out of this appeals mechanism? Which should remedies be identified? What kind of remedies I think to be identified is how that question should be written.

And then on the next slide we have the topic of third-party, what kind of appeal organism - who should be the arbitrator in this. A third party should be the arbitrator to the appeals process. And I think the question was on this one, should that be - how many should be able to sit on the panel? Who – oh sorry, who should – yeah, who should the arbitrator be. It should be a third party, but who should that be.

And then the last element is ensuring that utilizing the limited appeals process will not limit access to current accountability mechanisms that are already offered under the ICANN bylaws. So thank you for your patience and what we'll do now is go back to the first element itself and talk about some of these questions here about allowing substantive and procedural challenges for this – for the limited appeals mechanism.

In order to give broader discussion I was thinking that perhaps we can just let anyone address any of the elements under any of the questions on here or we want to go in order? Go in order? Okay.

So identifying of specific program elements, what is it that we can specifically challenge, use this limited appeals mechanism to challenge? Would anyone like to contribute to this discussion about what types of elements we should be able to challenge? Next question.

Jim Prendergast: Yes thank you. It's Jim Prendergast for the record. So yes I think - I mean obviously you have it in the parentheses or brackets there about community priority evaluation. I think that was one where there was a lot of frustration on behalf of the applicants that participated in that process.

I think, you know, enhanced or at least complicated by the fact that during the application window they were limited to so many characters in their description of their community application and then several months if not years later were actually held to every single word in that without any opportunity to clarify for the evaluators who were judging them.

So I certainly think that's one that would definitely warrant some sort of appeal since, you know, frankly the stakes are so high on both sides.
Thanks.

Michael Flemming: Jeff, please go ahead.

Jeff Neuman: So to drill down a little bit brother on that – sorry, this is Jeff Neuman – Jim is an appeal both for the party that does not get found to be a community as well as a third party that doesn't believe that party should have been granted a community? Who is the appeal for – or both?

Jim Prendergast: Or I'll add a third, a generic applicant who's non-community for the same string who feels as though a community designation should not have been awarded. So for example Dot Hotels is one where there was an ICANN accountability mechanism filed by several applicants for the generic use of the term hotels which was awarded to a community designated applicant.

So I think, you know, my initial reaction would be anybody who's in contention for the string, I'd have to think about your question about a third party who is objecting to a specific applicant for a community designated coming from that same community.

Michael Flemming: Thank you Jim. Greg Shatan you are in the queue.

Greg Shatan: Thanks. Greg Shatan for the record. Following on what Jim said, I'm not sure - I don't want to get too legalistic about it, but perhaps - it sounds like the other two things you were describing besides an unsuccessful applicant appealing a decision are really more in the form of objections rather than appeals.

So I don't know if we want this - we either don't call this an appeals mechanism or we will have both appeals and objections and objections should be separate. You know, so it seems - because I think - and strategically and structurally I don't think they call for the same exact type of procedure or substance and the like.

But even in the case of the appeal there's an interesting question about whether third parties can essentially join the appeal either as a (miki) or as challengers. They could either - I expect that certainly any community appeal, a denial of a community, that you're going to get community members submitting things as happened the last time.

There seemed to be things trickling in for years for Dot Music for instance. And but then there was a question whether, you know, you can just - if an appeal is open, is that just between the panel and the applicant or is it at that point kind of anybody can kind of join in on any side of the issue sort of process? So that's - any time we start designing new quasi-judicial processes, we open up a hornet's nest.

Michael Flemming: Jeff, feel free to jump in and then I have Kathy.

Jeff Neuman: So I'll do the same theory that - or same line of questioning I did in the last session. And I know Greg you're trying to eat, so sorry to turn it back to you. But what do you think it should be? Great job...

Woman: Perfect timing as well.

Jeff Neuman: Great job defining the questions but now we're at a stage where we want to answer those questions, so what do you think?

Greg Shatan: Pardon for eating with my - for speaking with my mouth full, but Jeff made me do it.

Woman: We can (find you) some more.

Greg Shatan: That's okay? So speaking on behalf of myself and the fish that's in my mouth, I think that the appeal should be literally just an appeal by the underlying - by the unsuccessful applicant. And I think that if you allow in support you may also allow in challenges.

But I'm concerned with the appeal becoming then a de facto objection. So I'd rather keep it limited. But then again, you know, the panel - the question also becomes whether the panel - how much fact-finding should the panel be doing as opposed to how much should be put forward.

So I think if you have a one-sided appeal, it kind of raises a problem. So then you don't get anybody who is saying, you know, why it should be decided differently. So I don't know that I have a good answer for it. I think you kind of have to design - I think part of the problem is you can't answer any one part in isolation.

You have to decide what rights or options for redress people have or, you know, have and who should be involved and you kind of have to sketch the whole thing out because if this were the only opportunity for anybody to speak up in favor or against it, then maybe it all goes into one pot. But if there are other options maybe it gets broken down more finely. Thanks.

Michael Flemming: Thank you Greg. Okay, I got two elements out of your input. One was the fact of how do you limit, how do you basically distinguish which mechanism to use. And the other aspect was can you name - can other people jump onto the - or basically who can apply for these appeals mechanisms, who can use the appeal in this mechanism. How can other third parties jump together.

But I have other people in the queue. You have - did you want to build on what Greg was saying but Kathy do you have a comment that's directed in the same manner or can she go first? Okay. Please go first.

Collin Kurre: Okay, thanks. This is Collin Kurre. Actually the community priority evaluation was one of the things that we looked at in the assessment that I was talking to you earlier about.

And one of the findings was that the panels from the community priority evaluations, the panel's research supporting findings often wasn't presented in a way that we found adequate or consistent, which means the applicants didn't have sufficient grounds to make an appeal always.

And in general an observation was that the accountability mechanisms like the reconsideration request or cooperative engagement process and different things like this were considered to be insufficient. And there's generally no recourse at all if an appeal is upheld.

So we generally found these kinds of – the elements that you're talking about – to be proliferated. There's so many of them that it's hard to keep track of. And then there are insufficient accountability measures in their execution. So with the community panel evaluation for example, panelists aren't meant to - aren't supposed to disclose any kind of affiliations that they may have.

It's inconsistent the way that they're meant to report on their logic or their findings. So right, we've generally found these measures to be, yes, lacking.

Michael Flemming: So a lot of the time - so a lot of the discussion that was around this limited appeals mechanisms was for example when you looked at other appeals mechanisms that were followed or perhaps were not followed directly how they were supposed to be followed but limited appeals mechanisms would be able to challenge the actions that kind of came out of that initial – or the error or how it was not properly followed in accordance with the Applicant Guidebook, that appeals mechanism is that which you are applying this to.

Woman: Slow down if you want (unintelligible).

Michael Flemming: More slowly, okay. A lot of the discussions that we had about what we can do with this limited appeals mechanism and why we would even have it in the first place is because there was no mechanism initially to basically challenge ICANN or an objector or somebody that basically didn't follow the rules that were already laid out for when they already were going through an evaluation or an application or even an objection.

For example, the community objections, if they were not followed properly, this limited appeals mechanism would be able to challenge how that was not properly followed in that aspect.

But what you do have is you have a lot of applicants that use the request for reconsideration with the ICANN board and that is not always the most appropriate mechanism that they felt - that applicants felt would be applied for their applications in this new gTLD area we like to play in. If you would like to respond, please...

Collin Kurre: Just quickly, it's interesting to hear that is the background, but I would say that if applicants are using the wrong appeals mechanism, maybe it's because there are so many and they're poorly explained.

Michael Flemming: Indeed. Building on that, I think Jeff wanted to reply and then we have to go to Kathy because she's been very patient.

Jeff Neuman: Yes, thanks. This is Jeff Neuman. So there was no appeal mechanism period. So in 2012 for that round there was no appeals mechanism. All applicants were able to do was file an accountability mechanism proceeding. And those accountability mechanism proceedings were not, and still are not, designed to make a determination on the substance of whether a panel got it right, got it wrong, acted inconsistent with the guidebook, right.

They could do whatever they wanted and the request for reconsideration, let's say, said well did the board of directors act in good faith, essentially. And that is a completely different question which is why the initial recommendation in the preliminary report – or initial report – was to create a new appeals mechanism.

And as Michael said when he was going through the slides, there was strong support from the community on adding this new appeals mechanism. And these points – not the italicized one but the points above each of the italicized ones for the next slide – are ones where the group generally agreed that yes we should recommend both allowing substantive and procedural challenges.

We should have a loser pay model. We should - you know, all these other things that are on it. But now we're trying to drill down further into the detail. And these are questions that need to be answered. So absolutely agree with that assessment, and that's why we recommended this.

Michael Flemming: Okay I've had a wave of good hands come up. But before that, let's have Kathy Kleiman. Then I saw Greg first. He did win. And then I have Katrin and did I have anybody else raise their hand? No, okay I've got (unintelligible).

Greg Shatan: Can you clarify that Kathy is a good hand even if she came up before the good hands?

Kathy Kleiman: Okay, Kathy Kleiman. So this is the type of discussion that came out in the initial report that was a request for information, and I'm going to request more information because I think there are so many terms in it. And I apologize if you talked about them before I came in.

But there are so many terms in it that it's hard to understand the question. And then as we go around the room, even more complications are being asked. So let me try some of this and tell you what I don't understand and why I can't even begin to answer the question.

So accountability mechanisms, I've heard it - I've heard the term used now for two meetings. I don't know exactly what we're talking about, and I filed a number of them in the first round. So what's the scope of what we're talking about?

Is it just community objections, legal rights objections, string objections? That's one question. And then are we talking about appeals to those accountability mechanisms, which is not what the question says. And then what is the problem that we're trying to answer with appeals?

Michael Flemming: Okay so I will try to answer this, and Jeff please feel free to jump in if I'm not saying this correctly. Question number one - I'm sorry, what was your first question?

Kathy Kleiman: That's fair and I can go through them - how to get them all out.

Michael Flemming: Oh yeah.

Kathy Kleiman: Because, you know, somebody's hand is going to go up. What are accountability mechanisms that we're referring to?

Michael Flemming: So what is the - what are we referring to in accountability mechanisms. So referring to accountability mechanisms, it's that first sentence right there that is really important in this. A limited appeals mechanism that is outside what is already established, not only in the ICANN bylaws but I should also emphasize what is also currently written as...

Jeff Neuman: Accountability mechanisms are only those mechanisms defined in the ICANN bylaws period, which are requests for reconsideration, independent review. And I am not an expert on all of them, apologize. But I think those are the two main ones. That's all it means, and that's all that applicants had at this point in time to very loosely use the term appeal because it's not a real appeal.

But applicants – their only redress if they felt something wrong was done to them – the only thing they had was to file an accountability mechanism, which is a request – or ombudsman, sorry, that's in there too. Ombudsman, request for reconsideration, independent review. There was nothing else built in.

We as a working group all realized that that is a problem. And for example there was nothing in there to say, you know what, ICANN evaluation panel or CPE evaluation panel or anyone else, you got it wrong substantively. You just got it wrong. You know you did your best but you're wrong.

There's no way to do that because that's not a violation of the bylaws. You can ask for a request for reconsideration but there's a reason why almost all of them were denied because they say that the board acted appropriately, in good faith.

Kathy Kleiman: This is an example of where you didn't get the input from the right group, from the right groups, because accountability mechanisms, you're talking about - there's a whole group of people...

Jeff Neuman: Sorry, we weren't seeking – just to interrupt – we were not seeking any comments on the accountability mechanisms. All we were seeking - and it's beyond our jurisdiction to comment on the accountability mechanisms other than to say as a group we thought additional (unintelligible).

Kathy Kleiman: It's okay I didn't mean that as an attack. What I meant is a lot of people saw the accountability mechanisms as the ones that the community filed against or vis-à-vis the applicants.

So if you're talking about ICANN accountability mechanisms I promise you no one who was involved in filing those objections understood what you were talking about so you didn't get the input from those of us who did file different types of accountability mechanisms and then had them appealed through what you're calling the ICANN accountability mechanisms, which I think of as IRPs, the independent review process, and were excluded from the process.

I'm just trying to give you a sense that on this question, there's a whole set of different input that you could have gotten that really would help. But the terminology is hard to parse because we're all interpreting the same words differently.

Michael Flemming: I think that is difficult but to answer your second question, what we are challenging though is those mechanisms that are I guess – Jeff might jump in and correct me again – but that are written into the Applicant Guidebook that basically going through objections, going through evaluation. These are - this limited appeals mechanism would be subsequent along those lines and basically be able to challenge how those processes were not followed correctly.

Whereas what the ICANN bylaws at the time of course was all they had as Jeff is jumping in. So I think - I hope that answers your second question. Now your third question which I've already forgotten.

Kathy Kleiman: Whether - and it looks like you're both saying - the question says - which is wholly separate from accountability mechanisms under the bylaws. But we're looking at appeals mechanisms wholly separate from the accountability mechanisms.

And I actually think we're trying to create appeal mechanisms for the accountability mechanisms that are created in the Applicant Guidebook. So they're not wholly separate so let's...

Jeff Neuman: All right, let me jump in really quick. If you read the initial report - I have to push back a little bit. If you read the initial report it does define what accountability mechanisms mean, okay, and it was very specific. So I understand like as we're speaking now it may be thought of by different people but I promise you in the initial report we defined what that meant, and it was very clear. So that's why I'm pushing back.

Woman: (Unintelligible) question.

Jeff Neuman: Yes so I got to push back a little bit on that and not - just because I know we defined it. But here we're - what we're talking about here is yes people did use accountability mechanisms as defined in the bylaws to have issues addressed that they felt were a result of being aggrieved in the new gTLD program.

What we as a group said in the initial report is that was not sufficient. And it still is not sufficient even in the new bylaws. That is what the group came to a conclusion. Because there was no ability and still is no ability for the ICANN board itself or even an independent review panel to say, you know what, ICANN board, you got it wrong. Substantively you just got it wrong, right?

What they can say under the accountability mechanisms is, you know what, you didn't follow the bylaws in making sure there were no conflicts or you

didn't follow the bylaws in not allowing one side to present their case, right.
That's what they're limited to.

But you couldn't just say, and you still can't file a request for reconsideration solely on the basis of, you know what, ICANN you said you were going to do A, B, and C under the guidebook and you only did B. You didn't do A and C.

That's not an accountability mechanism necessarily. So that's why we're trying to create an appeals mechanism. And I'm looking at David McAuley who seems to have a face on that and to disagree. But...

Woman: (Unintelligible)

Jeff Neuman: Sorry, you're in the view of...

David McAuley: I don't disagree. I think you're calling on me because I'm leaving the IRP implementation team. But no I don't disagree. I agree entirely with what you described as the ICANN accountability mechanism – ombudsman, reconsideration request, IRP.

They have some limitations. The IRP when it comes to these expert panels was fixed in the new bylaws in 2016 but there are still some questions about it. And the team is looking at that. So no I wasn't disagreeing. Maybe I was just suffering jet lag.

Michael Flemming: So I don't want to make one - we have a good momentum here but I do want to get back to the heart of what we're talking about here as for the - what these - the questions specifically that we're asking to have the material answers to this rather than more questions to ask, not that - more questions isn't bad but it gives us more to think about and we also like answers.

But I still have Greg, Katrin and then Steve, you have clarification points?
No, okay. And then I saw somebody else.

Woman: I see also Collin.

Michael Flemming: Okay, and then Collin, yes. Okay, so Greg please go ahead.

Greg Shatan: Thanks. So Greg Shatan for the record. I think maybe just to get back to first principles, what we're talking about is that in the prior round there were basically these decisional processes that took place often by third parties that were contracted like the EIU or other organizations to make decisions about either objections that were filed or about community applications.

And we created, you know, a single level with no appeals. It's kind of like, you know, the first settlers, you know, that set up a court will set up a trial court. And then they realize after a few decisions well gee, now we need an appeals court.

And, you know, in New York state for instance there are, you know, for state court there's two levels or even three levels of appeal. There's appellate term, the appellate division and the state court of appeals on top of the trial level court which oddly is called the supreme court, but that's because it was created first and then the appeals were created afterwards.

So the point is now we created something that's anathema to any really, you know, moderately developed civilization which is a decision-making process from which there is no appeal. And now we're solving that problem hopefully with this limited appeal.

So people, you know, did try to take advantage of the bylaws accountability mechanisms such as they were but that was - you know, that was a kludge. That was, you know, just something picking up whatever tool is at hand, which was not very good.

So now we need to create, you know, an actual appeal that takes, you know, kind of the trial decision or the initial decision and then, you know, looks at it again and have to decide - although I'm all in favor of that and I think, you know, largely the parties should probably mirror those who would appear in the initial trial level if you will.

I again get concerned about the idea that everyone can go into the pool. And I think that you have to decide whether either there's going to be a separate appeals process for each of these different mechanisms or objections processes or whether we're going to have like just one kind of general appeals division if you will that will sit on top of all this.

I might favor just having one because it seems like the appeals wouldn't be so - wouldn't come along so often. And I think some of the weaknesses would - it would be better to have coordinated set of appeals because one of the things I think we saw was that even within any one process there were decisions that were made, particularly say in string contention.

You know, why is one plural, you know, similar to another singular but not in a second set. So that'll avoid the idea of there being inconsistent appeals. So God forbid we would set up six appeals courts, each separate from, you know, over six trial decision-making process. That's like ridiculous.

So it really needs to be like kind of one setup that rides on top of all of these AGB processes and, you know, provides recourse and recourse on substance.

And one of the things that I picked up on what Collin was saying that was really important is that what happened at the initial decisional level would be hard to appeal from because the record of what this - how the decision was made and what it was based on, what their fact-finding was, was sketchy.

I'm not going to put words in Collin's mouth because she could describe better what she found, but I think that having an appeals mechanism also disciplines the initial mechanism because it means they have to create - it has to be accountable to somebody, to not just the community or the, you know, whatever, but to, you know, someone who will examine what they did and say whether they got it right or wrong.

And obviously there are decisions that need to be made, a de novo review that gives no credit to the decision underlying it or, you know, how much discretion you need to give. But, you know, clearly there are some things that seem to have gone quite wrong. And maybe some of them got better as they went along.

But that still meant some of the earlier decisions weren't quite right. So, you know, I think there's a lot of nuts and bolts level decisions to be made here but ultimately I think the idea of having an appeals panel that rides on top of the AGB processes and creates a place for recourse on substance on the decision that has a fairly free hand to re-examine the substance of the decision but not completely de novo would seem to make sense. Thanks.

Michael Flemming: Thank you very much Greg. And really I think this is the kind of feedback we're looking for, you know, how one panel to look at all aspects of appeals. And then I do want to ask the question again as we move on to our next individuals that have their hands raised.

But in that thought, what is it exactly should we allow individuals to be able to appeal? We have the questions up here, aspects of evaluation, objection, confirm if this intended to apply to inconsistent application of the Applicant Guidebook. Just something to think about as we move on to Katrin.

Katrin Ohlmer: Thanks Michael. This is Katrin Ohlmer again. I think one learning from the last round was that an endless number of whatever mechanisms is not really helpful. So my strong recommendation would be to limit it also the appeals to

one appeal period window, whatever it is. But once a decision has been made it can't be challenged again and again and again.

With regards to who would be eligible for appeals, I'm of the opinion that a non-affiliated entity should be able to file an appeal because this entity or community or group, whatever, might not have applied for a string but might be affected by that entity who applied for that string.

So there might be communities who didn't apply for the community term but they might have an opinion whether the term is correctly planned or operated by - so I think this should be possible as well. Thank you.

Michael Flemming: Thanks Katrin. You touched on two good points there on aspects of limit and who. And then Jeff wanted to have a follow-up question to you. And then I have Collin and then Greg raised his hand again, so... Oh, I'm sorry Steve.

Jeff Neuman: Sorry, so my question to Katrin was the last example you raised of a non-affiliate, that sounds more like an objection of an appeal. And I don't remember if that was Greg that made the point. I think it was Greg. But that seems to be more - how would that be different than an objection, which they could have filed at the beginning?

Katrin Ohlmer: This is Katrin Ohlmer again. I think the issue with the objections is that there might be communities who don't have the money to afford an objection.

We saw several of these groups in the past application window that they kind of had to - because they are associations and they don't have the - in the bylaws they are not allowed to proceed or participate in these kind of international structures. So for them it's really hard to find a way to raise money from the budget to participate in ICANN objection process.

Michael Flemming: Thank you. I'm going to move on to Collin. And then, wait, was it Collin then Steve or Steve and then Collin? Okay, Steve you've given...

Steve Chan: This is Steve Chan from staff with a lot of pressure on me right now. So actually I'm going to start with just reading comments from someone else. That wasn't why I raised my hand but distract you. There's a couple comments in the AC room from Anne Aikman-Scalese, so...

The first one says, "It may help to distinguish between the decision made by ICANN versus a decision made by a designated panel outside ICANN, for example WIPO, ICC, et cetera."

And her second comment from there was, "I don't think one appeals panel would be qualified to evaluate all types of appeals. For example, legal rights objection is different from ICANN's evaluation of financial qualification of the applicant."

So the comment actually why I raised my hand actually is just hopefully a practical suggestion maybe for you all to consider. When I look at these questions it seems to make sense it might lend itself well to a mind map of some sorts.

If you look at something like the first question about which program elements should be subject to this appeals mechanism, it sort of depends maybe. And like who the aggrieved party is, it could depend. So in the case of the evaluation, it's probably going to be the applicant in most cases trying to challenge the outcome of the evaluation.

Whereas for objections, there's probably two parties that might have a reason to appeal the outcome. So I guess that's my suggestion really is just that mapping this out might lend itself well to answering some of these questions and trying to understand some of the nuance. Thanks.

Michael Flemming: Thank you Steve. Very good suggestion. Collin please go ahead.

Collin Kurre: This is Collin Kurre. And this is actually just a really brief comment from kind of way back in the conversation. But I would maybe encourage everybody to be forgiving of people who confuse the capital A accountability, capital M mechanisms because if you're looking at, for example, the cross-community working group on enhancing ICANN's accountability, we've got 112 proposals, many of which suggest new mechanisms.

So limiting the scope of that phrase, accountability mechanisms, to just these three things, while it makes sense in subsequent procedures, it might not make sense to like people who are parachuting in from other parts of the community. So I just wanted to make that little comment.

Michael Flemming: Thank you. Clarification always helps. Greg.

Greg Shatan: Thanks. Greg Shatan for the record. First I'll note the issue of, you know, whether one should actually be prepared before one starts talking about something by having read the thing upon which you are commenting. But of course that's a high bar we can't all meet.

But as Jeff pointed out, it was, you know, defined for the purposes of these discussions what the accountability mechanism was. No I think it's important. I think there's a lot of unprepared - people are not prepared.

Kathy Kleiman: Well I'm feeling targeted by that. And I...

Greg Shatan: I don't think you're feeling targeted any more than you put Jeff on the defensive. Look it's not you. It's endemic to the situation here, and we've all...

Kathy Kleiman: It's a community face-to-face session. You've got to be approachable.

Greg Shatan: I know. I'll say it myself that I have not read every word that I comment on. And sometimes I say things that if I went back and read it more carefully I might have a more formative opinion. You know, it goes with the whole issue of burnout and, you know, bandwidth and all sorts of other problems. So anyway.

Kathy, I'll decide when I have to say something. You know, you're not in here to be the boss of me. Thank you.

Michael Flemming: Thank you.

Greg Shatan: Thank you. So anyhow, let me get back to the substance of what I was discussing.

Woman: Or we will have a point of order and face this part of the conversation. I mean, the choice is yours.

Greg Shatan: So anyway, to get back to the question I think the question of whether a third party can get involved in them - can initiate an appeal, I agree that sounds more like an objection because I think that the appeal should be limited to challenging and to a decision that went against that party, that party was involved, so for instance a party makes an application.

And let's say it's a community priority and, you know, they fail the test. They get to appeal that decision. But if they succeed, nobody can kind of appeal the successful decision. Now maybe there should be an ability to object to that decision, but I think at that point we get into what Katrin was concerned about which is kind of creating endless layers of challenges where somebody could be boxed in.

At some point we have to trust I think that maybe, you know, some decisions need to kind of, you know, need to be moved forward on. But I think that kind of the idea that every decision that could be made about something that's

moving forward can be challenged, I think maybe that takes us too far down the road.

But where somebody has put their evidence forward, what they believe is a good case or the best possible case they have to be a community or to be a string that's not confusing to some other string in there, they're stopped dead in their tracks of, you know, this is ultimately an application process.

So I think we have to remember that we're all talking about what - the applicants coming through the process. And so I think it's applicants who should be appealing and third parties who should be objecting. I think if we keep - kind of keep to that very simple rubric, then I think we can kind of build mechanisms around that that kind of define what roles we have.

And we certainly had, you know, a whole series of ways that third parties could object. It's not like we're going to have fewer of those. But I think the point is that if applicants who have, you know, put up a considerable sum of money and who are - or maybe invested, you know, time and effort, whether it's a community or a business or whomever, you know, to be shut down by a decision from which they have no direct recourse kind of I think is something that we need to solve this time around. Thanks.

And apologies for the earlier thing. I'm just - I didn't mean to get heated about that. Apologies to Kathy.

Michael Flemming: Thank you Greg. We're all a little bit jet lagged except for me who lives here. But Greg that was very helpful. Thank you for the input. And then I want to move this over to Kathy.

Kathy Kleiman: Great, this is Kathy. So I think Anne got it right, that there are different types of processes that might be appealed. And some of them were specifically outsourced from ICANN. She mentioned the International Chamber of Commerce, which is what handled the community objections in Round 1 and

WIPO which handled the legal rights objections. And I forget who handled the string objections.

But ICANN didn't want to make these decisions. I'll extrapolate or speculate that it was because they didn't have the expertise as Anne said. So they wanted to give it to a set of professional people to handle this. I'm not sure they're going to want to take on the appeals.

We treated it in the first round like arbitration. That was fairly closed, that the process was fairly closed. Certainly that was not acceptable to some applicants who lost these objections and then came to ICANN and asked for an appeal.

But if we want to create an appeals process we may want to create it outsourced as well for these things that were outsourced for expertise whereas bringing certain things if ICANN makes the decision whether it's an operational decision, a technical decision, a community priority evaluation. I'm not sure how much those were outsourced.

But so that we might want to look at the appeals with that level of expertise that Anne was talking about.

Michael Flemming: Thank you Kathy. So I got from that that depending on the content of which we're basically appealing is subject to be appealed, if it was, you know, originally a contention set, if it was originally judged by a third party itself versus whether or not ICANN did it, how we allow a third party to basically undertake that appeal in some way. But then - yes, go ahead. Jeff wants to build on that.

Jeff Neuman: No just a question for Kathy. So just so I understand it, you're not saying - you're saying that all of them should be subject to an appeal. However, they may - who the appeal goes to may be different depending on whether it's

ICANN that the decision - the initial decision with ICANN as opposed to a third party. Is that just...?

Kathy Kleiman: Actually I'm not. I'm not sure everything should be subject to an appeal, in part because everything will be appealed if you let it. Nobody's going to want to stick with that. And then, I mean, talk about endless cycles.

But what I understood you were saying from the comments was that most people did want that appeal and then if you're going to do that, hence what follows is this expertise, whether it goes back to the International Chamber of Commerce or whether we work with them on seating some kind of sitting panel that will take all the appeals of community objections.

But beware. Beware what you're creating, which is that anything that can be appealed will be appealed, and that's going to be a problem.

Man: I want to follow up with a set of questions. So Steve, go ahead.

Steve Chan: Yes so the next question is if you look at, sorry, the next slide. So that third main bullet point, a limit of one appeal per applicant relating to a particular cause of action and/or facts and circumstances giving rise to that cause of action.

So in other words we're trying not just to - does it mitigate your concern if we say that, look, if you're going to bring an appeal, you got to bring it every kind of type of appeal at once and that's it. You get one shot. Does that help, hurt?

Kathy Kleiman: I'm not sure that helps because it combines the expertise. So you're talking about a community objection and then some kind of technical evaluation. I mean, what are the appeals that would be merged?

Steve Chan: Oh I guess - sorry, just to respond to that. That's a fair point as far as if they're very - those are two different facts and circumstances, right, usually giving rise. So that would be two separate appeals.

But it's basically trying to get away from a Dot Music case or others where they just keep appealing based on the same facts and circumstances that have already been before the initial appeal. Maybe I shouldn't have said Dot Music because I don't know the whole facts.

But there are lots of - we're seeing repeat appeals based on the same facts and circumstances that because these appeals are in the form of requests for reconsideration and there's nothing currently in the bylaws that allows the board to just say okay enough's enough.

You've already filed a reconsideration. You can't file a reconsideration based on our decision of your reconsideration and then file a decision based on our reconsideration of the reconsideration of your decision, right?

What that third bullet point is trying to achieve is that look you're going to have one appeal based on that facts and circumstances. And you're not going to get to appeal again and have this endless loop. Does that help/hurt?

Kathy Kleiman: But then the group that loses - so let's say you have a community objection. And the applicant loses. The community wins. The applicant then comes to ICANN to appeal. And then are you going to let the community re-appeal if ICANN changes? And are you letting ICANN, which outsources to begin with, are you letting ICANN make that...?

You know, where does that loop change? You solved one problem, which is good, but have we opened up another problem?

Michael Flemming: So is there some endless loop and where's the supreme court lie I guess in a way. But before we move on with this, there's something I wanted to

raise but I'm not going to raise it because Julie's been patiently waiting and then I'll raise my point when I can.

And then we have - oh sorry, I have Greg and then Collin again. And did anybody else raise their hand? No? Okay. Just one question. How long are we talking about this one topic?

Man: It's fine.

Michael Flemming: Oh come, we've got momentum. Let's use it, okay. Julie please go ahead.

Julie Hedlund: Thank you. This is Julie Hedlund from staff. We do have a comment in the chat to be read out. It's from Christopher Wilkinson. Comment is, "To Anne Aikman-Scalese, it won't be difficult to identify panels that are qualified, component, non-conflicted globally balanced (SO/AS) balanced, et cetera." End comment.

Michael Flemming: Thank you Christopher. Does anyone want to respond? Observation, okay. I'm going to turn over to Greg then. Go ahead.

Greg Shatan: Thanks. I think Kathy touched on two critically important parts of this, one which I think has hadn't quite been named. But it's grounds for the appeal. Appeals can't come on just any ground. Just because you lost doesn't give you grounds for an appeal. There has to be - we have to make a decision what those grounds are.

And they need to be somewhat limited so that there isn't just an appeal for every loser. Some losses come because of, you know, our - I think we need to look at that. There should be grounds.

And secondly if we establish a clear appeals level then it will be clear that you get one appeal to that level. And I think it's an objection which involves - an

objection essentially involves two parties, which involves the applicant and the objector. The applicant and the objector would go up together to the appeal. So it wouldn't just be the applicant.

And whoever this is being appealed to, it's not ICANN. It's being appealed to some panel or body. It may be quasi-independent, maybe like what David and I have been working on for years, you know, the IRT, or the IRP rather, or something like that. But it's not kind of - you're not appealing it to the ICANN corpus or to the board or anything.

So I think the whole RFR or request for reconsideration because it was not the right tool for the job, that was one of the reasons why you got repeated appeals, that and because there was a loophole that allowed you to appeal every decision including the decision on your previous appeal which was just - it's absurd. But that hopefully will be solved.

But the point is we need grounds for an appeal, you know, an appeals level, which at least administratively should be I think integrated. There could be – as Collin said – different panel or panelists assembled based on expertise.

But I think having - you need to have some sort of unity about how appeals are handled and some form of, you know, an organization around that that keeps the appeals process as consistent as possible even if not every panelist is qualified to appear on every panel. Thanks.

Michael Flemming: So Greg, you touched on three very good points. Grounds in the case is that basically I think that we're trying to define this as basically rules not being followed for how the objection was - sorry, before I say my next words, let me choose them carefully.

For example a panel that did not - something was found to be fishy in a way. There was a conflict of interest or something in that aspect. It wasn't followed. The rules weren't followed to a T or some aspect. But this goes

into the next question specifically. What we're looking at here is what can we appeal to or what exactly can we appeal?

But then the next question in that is so who is named in that appeal? So are we challenging ICANN specifically for not following the Applicant Guidebook and the evaluation? Are we challenging the other party in the original objection? Are we challenging the panel that didn't follow the rules for how they evaluate...?

Greg Shatan: You're not really challenging anybody. You're appealing from the decision made by the decisional body below, whoever that was. And you bring that up to an appellate decisional body that will examine the decision made below.

Michael Flemming: But then we have the aspect of loser pays model. Oh, I'm sorry. Okay. Okay so we have - I have Collin. I have Collin first.

Collin Kurre: Sorry, I just wanted to follow up on this. I said a couple things in the chat which I think I'll just reiterate here. I do - I completely understand the need to limit the number of appeals that you don't have this ad nauseum for infinity and beyond.

However I do think that that would have to be coupled with really strong lower case A, lower case M accountability measures. And some of the things that I mentioned in the chat were having - because in response to Christopher's comment about needing to have people who are balanced, you know, don't have conflict of interest and all of that, that's also - you know, that's definitely what we should aspire to.

But the conflict of interest one is particularly difficult because as Heather noted, a lot of times expertise is perceived as interest. So I think that from having - making a mandatory disclaimer from the very beginning of all panelists' affiliations, background, things like that, could probably do - would help with that.

Transparency from the outset might help with people saying that they had - that the judge was biased against them if the outcome is not in their favor.

And then we would also - I think it could also be good to have all panelists third party or ICANN regardless of the topic physically sign off on knowledge of public interest commitments and other ICANN kind of macro level rules so that we don't have the situation where judges or panelists act on a case that - and then the decision is found to be, you know, in violation of these public interest commitments.

And having those two things might lessen the number of further appeals that you would have. And then you could maybe boil it down to like a two or three system, appeal system. Like Greg was saying you could have like a lower appeal and then a higher appeal.

Michael Flemming: Thank you Collin. That was very helpful. Do I have anybody else in the queue? I have Katrin and then - okay, Katrin you please go ahead.

Katrin Ohlmer: Katrin Ohlmer. Maybe we should then consider whether we have appeal mechanisms including objections eligible for gTLD application rounds, whatever, if we have rounds or subsequent procedures, whatever. And the accountability mechanisms which are not dedicated to gTLD application rounds at all.

So mixing those two I think would be really bring us back to the situation we had since 2012. So if we just have one group of mechanisms dedicated to existing operators or the ICANN community at large and one silo of mechanisms dedicated to applicants and people associated with these applications, these would be the new appeal mechanisms.

Michael Flemming: Thank you Katrin. I have - oh, please feel free.

Justine Chew: Justine speaking. Katrin in what you said, if the decision was made by ICANN org, which mechanism applies for appeals?

Katrin Ohlmer: This is Katrin Ohlmer. You mean for instance...

Justine Chew: Or for example evaluation decision that's made by ICANN org.

Katrin Ohlmer: Yes.

Justine Chew: So it's not a third party. It's not something that ICANN outsources to. So someone should - well the applicant should be able to appeal if they feel aggrieved, right? So the question is - my question is - who does that appeal go to and what mechanism is available to that applicant?

Katrin Ohlmer: Katrin Ohlmer again. I wasn't really relating to whom would that mechanism go to but rather than separating between accountability mechanisms and appeal mechanisms because for instance I'm thinking of this gaming situation we have right now where a certain party can file accountability mechanisms one after the other.

And if we were to substitute that in the next round with okay first of all we have an appeal mechanism and afterwards we have the regular accountability mechanisms we won't gain anything from adding that through the process. That was my point.

Justine Chew: If I could just clarify again - Justine speaking. So what you're suggesting is we set up a limited appeals process entirely outside of the capital A/capital M accountability mechanisms, right? This limited appeals process would only apply to new gTLD applications.

But in the event an applicant has a technical evaluation decision that it feels aggrieved, a decision, a bad decision has been made, they may file an

appeal but it still goes through the limited appeals process. But it would still go through ICANN.

Michael Flemming: Did I - oh, sorry, I had Jeff in the queue and...

Man: (Unintelligible)

Michael Flemming: Oh I'm sorry, you're... I'm sorry did you raise your hand? No.

Woman: (Unintelligible)

Michael Flemming: Oh I'm so sorry. Heather please go ahead and then...

Man: No, no, you go first.

Michael Flemming: Okay I have Heather, Jeff, Flip and then sorry, Jim.

Man: (Unintelligible)

Michael Flemming: Oh really, okay.

Woman: (Unintelligible)

Woman: I cede to (Jim).

Michael Flemming: Heather please go ahead, thank you.

Heather Forrest: Thanks very much. Heather Forrest. So I just want to - I want to encourage us to just take a deep breath here because I think we're getting very deep into this topic and I don't disagree that that's a good thing. And I responded to a number of the comments in the chat.

I am a little bit nervous when we start talking about an appeal from an appeal and a sort of hierarchical structure of appeals here in a sense that I don't think - you know, the point that Collin just raised kind of raises a concern here about are we simply reinventing the wheel?

We have - I mean, David McAuley's in the room. We have an IRP. We don't want to take something away that rightfully sits in an IRP. The IRP actually has its - gets its standing from the bylaws.

I think what we need to be doing here is a gap analysis to identify what is falling out of - what's not falling into an IRP and not be trying to invent some mechanism that's a step before an IRP or something like this.

That may have the impact of lessening the number of IRPs. It may not. It may simply keep that the same. I think we need to be focusing on what needs a challenge mechanism if we call it maybe that as opposed to an appeal mechanism, what needs a challenge mechanism and focus on how we go about fixing that problem.

And I wouldn't like to think that we come straight out of the box with oh and let's have a mechanism to challenge that challenge to the decision. I think that sets us up for death by process in ICANN and will only lead to more decision-making, more challenges, if you like.

And just because we reduce the number of challenges in one box and put them to a different decision maker doesn't actually reduce the overall number of challenges. The one way obviously to reduce the number of challenges is to make the next applicant guidebook as crystal clear as possible.

Two is to implement it properly. Three is to carry out what we do to Jeff's example if whatever. If the guidebook says A, B, and C are going to be done then A, B, and C need to be done. So that needs to happen. A lot of that is out of this community's control, not all of it.

Two, let's identify where the challenges might lie and then address those specifically. Thanks.

Michael Flemming: Thank you Heather. I have Jeff, Flip, Greg, and - okay, thank you.

Jeff Neuman: Yes thanks. This is Jeff Neuman. And I think Heather made part of my point I think where if we just go back - and I agree with not setting up multiple layers.

The problem we're trying to solve for is twofold. One is that there was no – and still is – no challenge mechanism if ICANN - we have a guidebook. But if ICANN says, "I don't care what the guidebook says," and just doesn't do it the way it's in the guidebook, that is not properly subject for a reconsideration. That's not properly subject for an IRP. And there's basically nothing to hold ICANN to follow what it is supposed to do in the guidebook. That's number one.

Number two, the second area where there's a gap – I guess to use Heather's term, the gap analysis – is where an outside panel or even ICANN just gets it wrong. They just made the wrong decision either based on whatever. They just - they got it wrong.

That's not a proper subject for a reconsideration. It's not a proper subject for any of the other things. Potentially ombudsman, potentially. But the reality is - and you've seen this in a number of reconsideration decisions and even in IRPs.

You've seen it says well you know what? It's true that they might not have done A, B, and C, but you know what? They acted in good faith and there's no violation of the bylaws here. I mean, if you go through every single reconsideration decision - and I went through a lot of them, probably about all

of 90% of them before a year ago or two years ago when we were discussing this for the first time.

And all the reconsiderations were the board acted the way it was supposed to act and it was essentially acting in good faith in what it did even though we all knew - and even in some reconsideration opinions they cite and they agree that the third party may have gotten it wrong.

But because the board justifiably relied on a third party, it acted in good faith. That might not be the exact term but essentially it acted in good faith and therefore there's no violation of the bylaws. That's the two problems the gap analysis are trying to solve for. And unfortunately the new bylaws, while there's a little bit of improvement, it still has those two gaps.

Michael Flemming: Thank you Jeff. Flip please go ahead.

Flip Petillion: Flip Petillion and I'm speaking in my personal capacity. The more I hear you the more I have to say that sorry but everything is there. You don't have to reinvent the wheel. It's really there. You have all mechanisms.

And I think the confusion is coming from the use of the word appeal. We have the three bodies that have been installed in 2011 and used as of 2012, the ICC, the ICDR and WIPO. They were the ones who were handling complaints. Objections we call them.

And the outcome was then taken over by ICANN. And ICANN then took a decision. And if you did not agree with that decision then you could file a request for reconsideration. If you did not agree with the outcome of that, you ultimately went to the IRP.

Important to note is that the approach by ICANN board was a process approach, a process-driven approach. The purpose was not for ICANN and it

has repeatedly said that that was its understanding and that was in the guidebook, that it was not to the board to make a substantive review.

That was the task of the service providers, ICC, ICDR and WIPO, before which the objections were actually presented. ICANN has at a couple of occasions - and I'm just on the top of my mind I remembered the online shopping case which was ridiculous because it was said that online shopping in Japanese was confusingly similar to shop in Latin script.

And ICANN board clearly understood that there was an issue there and it intervened and it allowed the applicant to proceed.

Where there is a possible criticism is that there is no clear line in where ICANN board took the view that there was some opening, that there was a need to review substance.

So at some point ICANN board has been looking into substance. And in other cases it has not where it should have. That is at least the criticism of some applicants. Also there have been some decisions where the ICANN board has been clearly invited to do a substantive review.

And the outcome was that ICANN board ultimately did not do that. And if there is something we should clarify it's that. It is make clearer where ICANN board should following the objection request for reconsideration review substance yes or not in what circumstances. That is where we should make a clarification.

Michael Flemming: Thank you Flip. I have Jeff as responding and then Greg is in the queue as well.

Woman: And Kathy.

Michael Flemming: I'm sorry, and Kathy.

Jeff Neuman: So Flip I appreciate your thoughts on this and I know that you've been involved in some of the requests over the accountability mechanisms. But I do think you'll find from the work we've done on the initial report and the comments we got back I think there's a big difference of opinion there.

And just putting on my own personal hat and taking off the chair hat, if you - what ICANN did and did not do was completely ad hoc in nature. And it chose to get involved where it wanted to get involved and chose to not get involved where it did not want to get involved.

But when every case went to reconsideration it was always the same standard. And if you look in the bylaws now it's still the same standard. And one of the - from all of the work that was done for the past several years one of the things asked for was predictability.

And nothing about what ICANN did or can do under the bylaws is predictable. The bylaws basically state the covered actions. I mean, you look at all that.

None of it - if the ICANN board chooses to interpret it in the way that I believe they would and have, they can choose to say that yes, ICANN, there is no accountability mechanism, capital AM, that you can use if ICANN itself decides not to enforce any part of the guidebook.

In fact there is a - being a lawyer - there's a nice little clause in the terms and conditions that says that ICANN in fact cannot be held liable for not following its own guidebook, a big disclaimer of warranties, which has yet to be tested in courts.

Anyway in order to provide more predictability, in order for applicants to - if there was a decision that they felt was unfair or wrong or inconsistent with the guidebook that is very different than a cause of action under an accountability mechanism, capital A, capital M, under the bylaws because as the ICANN

board has said, it's something - sorry, I'm going to do U.S. law and Greg will know what I'm talking about.

But there's something called the business judgment rule which basically says well as long as a board acts in good faith, even if they don't do the right thing, that's still not something that we can hold a board accountable for. The board's fine. That's all they have to do.

And so this appeals mechanism has come in from the study of a lot of applicants that filed comments initially that expressed an issue of, you know, when there was inconsistent decisions. And yes, the board picked up on online shopping.

But it didn't pick up on – I think Greg pointed out – in some cases where in some plurals were considered confusingly similar because they were plurals and others were not, based on the same rationale. And the board said well we'll take it up in two situations but not these other ten situations.

Flip Petillion: May I complete this?

Michael Flemming: I'm going to allow a response from Flip and then a comment from Anne that is really relevant to what we're saying and then the queue to proceed in its natural order.

Flip Petillion: Jeff you are presenting - Flip Petillion for the record. You're presenting this as questioning what I said but you were actually 100% confirming what I'm saying. And by the way I have handled 8 of the 17 IRPs against ICANN so I know what I'm talking about I think.

And I have - and I will repeat it. ICANN is right when it says that it is in its capacity of reviewing processes. Where it is problematic is where it should be clearer where it intervenes. For example, plural/singular. For example

online shopping and other cases. And that is something that we should clarify and make better.

Michael Flemming: Thank you Flip. Julie, please, thank you.

Julie Hedlund: Thank you. This is Julie Hedlund from staff. This is a comment from Anne Aikman-Scalese from the IPC. Comment begins, "I think that protecting the board from responsibility for decisions made by independent panels is the correct structure.

If the independent panel needs a challenge mechanism, it should be to an appeals panel that requires the specific expertise involved in the matter being decided. That is not the proper role of the board members." End comment.

Michael Flemming: Thank you Anne. Greg, you have the queue.

Greg Shatan: Thanks. Greg Shatan for the record. I think it's very interesting to listen to Flip talk about the layers of the process. I think where the appeal or mechanism thing that we are talking about would lie is before the board adopts the decision of the panel.

And that would be a direct challenge to the panel's decision on the merits. Once it gets to the board, the board has discretion.

In many ways that's appropriate discretion, you know, as a board to make the decisions that it does in ways that may seem unknowable to us, which is why the board isn't the right thing - the IRP isn't the right way to challenge it because when you're challenging a board decision you're challenging it based on the laws of what boards can do and not on the substance of whether the EIU got it right when they applied the decisional mechanisms that they were contracted to apply.

And so we're looking at something that is below the board and that is a direct appeal from those decisions. And that's what's missing because once it becomes ICANN's - the board's decision, it takes on a whole different path which legally makes it much more difficult to challenge.

And I think at least before the accountability mechanisms change the only challenge really was on process. And that's why the challenges were all on process because that was the only challenge you could make. So you could never talk about substance. And sometimes the panels were looking at this and clearly saw a substantive problem.

So they would basically say our hands are tied. On process your process was right. On substance your decision was wrong but that's - we cannot - we can't actually overturn your decision because your process was right. But God you got it wrong and will you please, you know, clean up your act?

So clearly something is broken in that whole process of going forward. And so the idea is that really isolate and appeal this directly from the decision body.

Where I think we might be getting into some - the more turbulent waters is appealing every decision in the evaluation process by ICANN. I think that's its own - that's separate I think from these third party process challenge processes.

And so I'm not saying we shouldn't have an appeal from them but I think that in a way it's different because there isn't kind of like a - an action hasn't been started in essence in front of a decisional body with kind of a beginning, a middle and an end, you know, on specific terms.

But, you know, it may be there should be, you know, an appeal from all levels of the evaluation process. But I just don't think it's quite the same as these kind of panel oriented types of decisions.

Michael Flemming: Thank you Greg. I have Jeff that wants to respond to that directly. And then I have Kathy. But I'm going to close the...

Woman: It's actually David.

Michael Flemming: Oh I'm sorry.

Woman: She was pretending to be David.

Michael Flemming: Okay so I've got Kathy David – sorry, Kathy and David. And then I'm going to close it there because - so we can finish on time. Okay Jeff please (unintelligible).

Jeff Neuman: Yes so thanks. Real quick, sorry. I do think that there may be differences between a challenge of an ICANN decision as opposed to a decision from a third party.

But that said, I do see a need for a challenge mechanism from things like you failed the technical evaluation. Or actually we don't know in the future which parts of the guidebook that ICANN is going to take on itself versus parts that it may outsource to third parties.

So we're kind of thinking in a 2012 mindset but string similarity for example may actually be taken on by ICANN. It may not be. We just don't know. So we need to account for all possible situations as far as they're foreseeable.

And to the extent that ICANN takes on some of these decisions we need to make sure that they still have the challenge mechanisms albeit they may be different depending on the grounds and all sorts of other things. But, yes, thanks.

Michael Flemming: Thank you Jeff. David?

David McAuley: Thank you. It's David McAuley speaking for the record. And I appreciate the chance to speak. I'm not a member of the plenary. I am a member of Work Track 5 and I want to speak because of the mentions that have been made about the IRP.

Under the bylaws of October 2016 there's a new IRP process. And there's an implementation oversight team to implement them and I'm the lead of that team. But I'm speaking now in my personal capacity. It's a small team. Greg is on it. And if you turn to Greg for help on figuring out how this fits, I promise I will be happy to consult with Greg and try and help.

One of the things about this new IRP is it's brand new. And the decisions that will now come from an IRP panel are going to create binding precedent. And so we're operating on a bit of a clean slate.

But I will say that the new bylaw - check Bylaw 4.3(a) and (b) and you'll see that it covers not just violations. It covers appeals of expert panel decisions. And so that is now part of it and there will be a precedent buildup around that and what that means.

That bylaw can always be changed. If this group were to be a catalyst for implementing a good administrative appeal of these expert panel decisions, maybe the need for the bylaw would go away and somebody may suggest that that go away. I don't know but that can always change.

But IRP tends to be a bit formal. It usually involves lawyers on both sides. Doesn't have to. And it's expensive. It's very expensive or at least history would indicate that it tends to be expensive. Again, doesn't have to be but that's usually where they go.

And so if this group were to consider a nice appeal of the expert panel decisions, that may make some great sense. But if you have questions about

IRP and how it's looking to pan out, I think Greg as your member participant and I as a help to Greg and a member of Work Track 5 would be happy to give you the benefit of our personal opinions.

A lot of this is in trained. It's working its way into fulfillment right now. And it's complex. Thank you.

Michael Flemming: Thank you David. I don't think I have anybody else in the queue but - I'm sorry Kathy.

Woman: Kathy.

Michael Flemming: No they were together. They were together.

Kathy Kleiman: Okay so we had a problem with appeals of the expert panels in Round 1. That should now be addressed as we're trying to come up with different solution. First I wanted to say Jeff to what you said that there are - that I think we should rephrase.

There are applicants who allege ICANN didn't follow the guidebook. There are applicants who allege the panel got it wrong. The reason why is there's going to be another side. I assume there are going to be evaluators who think they got it right, you know, whether an applicant wasn't technically or operationally, you know, a fit.

And Lord knows there were community members who think the panel got it right because they filed the objections that then went to a request for reconsideration in an IRP that excluded them because the request for reconsideration of community rejection wound up being a request by the applicant who lost against ICANN for not having proper procedures then going to an IRP that was secret that also excluded the community who had filed against.

I mean, it's just - it went into an ICANN black hole that the actual participant in the community objection who was a community couldn't participate in. So I don't - you know, now we need to get data on this because it wound up being - I know because several of my clients had this problem.

So there were appeals that didn't include us, which was a real problem because they were procedural appeals and not substantive appeals. So we really do need to think about making sure all the parties are there.

We definitely need to think in the context of the new (fast) about loser pays because you may lose your communities right there. They've already spent the money to do a community evaluation - sorry, not an evaluation, a community objection. Very expensive and now if you're coming in what is the loser paying for and does it go back to the original - you know, does it go back to the original filing before the International Chamber of Commerce.

This is not clear. There's a lot of background here. There's a lot of detail and there's - and now we're really talking about three parties. We're talking about the applicant who lost. We're talking about ICANN for overseeing procedure. And we're talking about whoever made - you know, whatever the other party was who's also making that decision who would stand to lose from changing that decision.

You know, how do you include everybody's interest. And I'm glad you're talking about this because again interests were excluded in the Round 1.

Michael Flemming: We have Flip and then I'm going to close it. Yes, okay so Flip go ahead.

Flip Petillion: Flip Petillion. Sorry but IRPs are public. All information is on the Web site of ICANN, everything, the requests for the IRP, the briefs of the parties, the decision of the panel. Everything is (unintelligible).

Kathy Kleiman: Do you know what the delayed factor is on that? It's huge.

Flip Petillion: ICANN publishes...

Kathy Kleiman: You cannot participate. You can't - but you can't participate (unintelligible).

Flip Petillion: ICANN publishes very rapidly the information that is filed in the cases. And second I refer to the Dot Sport case where the party that was of course having an interest but that was not a formal party because it was the applicant against ICANN board. That party was allowed to file its briefs by the panel.

Kathy Kleiman: And other parties weren't.

Michael Flemming: Thank you everyone. I'm going to give it to Jeff just to point of summarization. We've got a lot - thank you everyone - we've just got a lot of good feedback out of this, a lot of good to do. Aspects like clarity, a mind map would really help, a gap analysis to see what do we already have - how is what we already have not helping us and why do we - what will this assist us in. And I'm going to let Jeff have the last word and then give - let everyone go.

Jeff Neuman: Yes thanks Michael. This is a really good discussion. Thank you everyone for coming to this. The only other thing to sum up this limited appeals is I think we've spent a lot of time focusing on the real large decisions that were made.

But I encourage everyone in the future discussions to also think about the smaller decisions, things like, you know, on the technical evaluation, the financial evaluation, ICANN added some criteria for certain things. You know, for the ones that aren't as public as all the things that go to IRP there's lots of points in there.

But all that's going to be drawn out as we think of things like for grounds and we come up with appropriate grounds. So there are the big, big decisions like whether someone's a community or not but there's also the smaller decisions where applicants felt or believed that they were aggrieved and didn't have the option to take redress anywhere.

So it's great discussion on limited appeals, a great discussion before that on - I hate calling it closure it's only term we have. But - so that's great. We have a third session on Wednesday which will be for the purpose of going over a couple of the areas where we think we are getting towards closure on those subjects - sorry to use the same term - where we see general agreement from the community with the initial recommendations.

And if we can close out some items in order to get towards a final report eventually on those things like systems and communications, yeah, for the most part and - what am I forgetting - communications, systems. Okay there are some others.

Anyway - oh, the Applicant Guidebook, things like that, topics that were very noncontroversial. But we'll use that - well, of all the topics were noncontroversial, the recommendations that we had, where we can use that to show the community, show the working group in the community how we summarize the comments and can draw conclusions from those.

So that's the exercise. Look forward to seeing you all on Wednesday. Thank you very much and have a great rest of the night.

Woman: Thank you.

END