

Zoom Chat Transcript
IRP-IOT Call – 3 November 2020

12:59:02 From Bernard Turcotte : hello all

13:01:21 From David McAuley (Verisign) : I think my right knee may be next for surgery after Becky's

13:01:35 From David McAuley (Verisign) : yes

13:02:23 From David McAuley (Verisign) : cocktail hour here as well - 24-48 hours

13:03:17 From Kurt Pritz : Evidently, David has put himself on a 48 hour clock so he can get more done each day.

13:03:46 From Chris Disspain : a brilliant idea that flies in the face of Science..

13:04:08 From David McAuley (Verisign) : ;-)

13:05:19 From David McAuley (Verisign) : Board alum always welcome

13:08:35 From Chris Disspain : YAY Greg!!

13:09:02 From David McAuley (Verisign) : Great alacrity in replying Greg

13:09:50 From Chris Disspain : Did someone just speak?? ;-)

13:11:12 From Greg Shatan : Chris, you have a new freedom to speak your mind...

13:12:34 From Chris Disspain : Indeed Greg, although some would say that I've never really allowed the board position to prevent me...:-)

13:13:22 From David McAuley (Verisign) : Thanks, Susan

13:13:27 From Bernard Turcotte : Consolidation sub-group will meet Nov 9, 20:00 UTC

13:13:40 From Kurt Pritz : @Susan & Bernie: maybe we can have some sort of simple scorecard that indicates our big "lumps" of work that moves Translation into the "done" column. (Or maybe this exists.)

13:14:02 From David McAuley (Verisign) : +1 @Kurt

13:15:17 From Susan.Payne : Thanks Kurt, good idea

13:15:50 From Bernard Turcotte : will do

13:17:05 From David McAuley (Verisign) : Thanks, Bernie

13:28:22 From David McAuley (Verisign) : Clear, good point Chris

13:30:12 From Chris Disspain : Good point Malcom but, respectfully, that would be a court decision not an IRP one

13:30:22 From Bernard Turcotte : 60 minutes left in call

13:31:23 From Chris Disspain : Again, respectfully, I did not say it was impossible. I said I was trying to figure out why it made me so uncomfortable.

13:38:43 From Kurt Pritz : I am not sure, but my reaction to Malcolm's point is that there are other ways to amend ICANN Board decisions other than an IRP. AN IRP is to preserve the right of an individual or entity. There are the PDP, and community processes,

13:38:48 From David McAuley (Verisign) : Hand down - point made by others

13:38:50 From Kurt Pritz : — what Chris is saying

13:40:58 From Chris Disspain : could I respond

13:43:42 From Susan.Payne :

<https://www.icann.org/resources/pages/governance/bylaws-en/#article4>

13:44:11 From David McAuley (Verisign) : bylaw 4.3(o) is useful here

13:44:25 From Chris Disspain : My point, perhaps not well put, is that whilst the panel can say an action violates the bylaws they CANNOT order the Board to undo an action

13:45:33 From Chris Disspain : and that is why I say that a court is the right venue to solve th problem Malcolm set out

13:46:14 From Robin Gross : My memory from the accountability working group matches Malcolm's and Greg's. The IRP was meant to be binding.

13:46:33 From Malcolm Hutty : Bylaw 4.3(b)(iii) "Disputes" are defined as (A) Claims that Covered Actions constituted an action or inaction that violated the Articles of Incorporation or Bylaws, including but not limited to any action or inaction that:

13:46:36 From Chris Disspain : Oh, it is binding Robin...

13:47:04 From Chris Disspain : but what they can bind the board to do is the question

13:47:23 From Malcolm Hutty : (iii) "Disputes" are defined as:

(A) Claims that Covered Actions constituted an action or inaction that violated the Articles of Incorporation or Bylaws, including but not limited to any action or inaction that:

(1) exceeded the scope of the Mission;

13:48:32 From Greg Shatan : (x) discusses remedies and we should look there next.

13:55:18 From Chris Disspain : what about (x) A Greg

13:56:25 From Scott Austin : Sorry for the late arrival. Finished my election "oversight" volunteering shift and thought I would catch as much as I could of today's meeting.

13:56:57 From Susan.Payne : welcome Robin

13:57:05 From Kurt Pritz : The Board could overturn a decision it made 10 years ago. Circumstances change, for example, and what might be within icann's mission now could change. But I think the way to revisit that decision would not be through an IRP but through other icann processes. (And if the board does not follow the community processes to consider the newly raised issue, then there could be an IRP)

13:58:08 From Susan.Payne : I agree we're not talking about those who slept on their rights Greg, that would be Prong 1

14:00:00 From Chris Disspain : While a finding of a violation of the Bylaws is binding but that is not an order of specific performance. There is nothing in the Bylaws that allows a panel to order the Board to undo an action or redo an action

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14:00:09 From Chris Disspain : oops

14:00:19 From Chris Disspain : I seem to be repeating myself for some reaon

14:00:21 From Bernard Turcotte : time check - 30 minutes left in the call

14:00:26 From Chris Disspain : Apologies...Cmputer glitch

14:00:45 From Greg Shatan : Let's recall that this was a Great Leap Forward at the time, In any event,the scope of the IRP should not be at issue at this point. Just the issue of repose.

14:01:27 From Chris Disspain : Agree Greg

14:01:31 From Greg Shatan : I disagree Chris. You are trying to reduce the IRP to an advisory body. It is not. As you

14:02:50 From Greg Shatan : have noted, damages are unlikely and may not be within the power of the IRP. If neither damages or equitable remedies are avaiailable to the IRP, the IRP is left with nothing but chatter,

14:06:18 From Greg Shatan : (p) is also helpful in that it specifically acknowledges the power of the IRT to grant equitable relief, even before a final decision is made.

14:07:13 From Greg Shatan : Susan I think that scenario goes to the issue of retroactive application.

14:08:40 From Greg Shatan : Kurt, those are all arguments ICANN can make.

14:09:23 From Greg Shatan : Bad faith is something we have dealt with separately. Not a reason to shut down the power to bring good faith claims.

14:10:11 From David McAuley (Verisign) : I think Kurt makes good points

14:12:57 From Malcolm Hutty : Kurt, alternative ways to constrain ICANN to its mission, and alternative ways to protect the individual claimant from ICANN doing so, and whether the claimant needs or is best served by an individual arbitration as a remedy, these are all things that could have been (and were) debated by the authors of the Bylaws. But we have to deal with the bylaws as they are written, and they promise that a claimant can bring such a case. That decision is taken. Using the timing rule to defeat the effect of that is, in my view, an abuse of the timing rule.

14:14:03 From Malcolm Hutty : @Chris, you're arguing against the bylaws as written

14:14:22 From Kurt Pritz : Hi Malcolm. I think David, in his email, laid out that the Bylaws provide for a time certain for repose.

14:15:59 From Malcolm Hutty : They do not provide for repose. they only provide for a deadline for filing

14:21:06 From Kurt Pritz : I am not uncomfortable with a radical change to the IRP from before, which I thought was inadequate. I am uncomfortable with actors coming to ICANN some years after decisions were made (and not disputed through ICANN review processes) and challenging those decisions outside of the community processes. (This is a “way-too” abbreviated form of a cogent argument.)

14:22:12 From Malcolm Hutty : Kurt, I would be very happy to discuss limitations. I'm just not OK with ruling everything as time barred regardless

14:23:08 From David McAuley (Verisign) : The words 'at a minimum' in the bylaws mean something or they would not appear there

14:23:49 From Malcolm Hutty : Indeed. But they do not mean that you can add further limitations on eligibility to bring a case.

14:24:08 From Greg Shatan : We have discussed a two tier system where there would be complete finality after a longer period of time.

14:24:52 From Greg Shatan : We can start the next meeting with a group recitation.

14:24:57 From Greg Shatan : From memory.

14:28:05 From Brenda Brewer : Next Meeting: 17 November @ 17:00 UTC

14:28:14 From David McAuley (Verisign) : not Thanksgiving in US

14:28:15 From Greg Shatan : Is AOB what you get when you combine AOC and ACB?

14:28:18 From Kurt Pritz : It is ok to meet at the 17th in the US

14:28:47 From Greg Shatan : National Unfriend Day is Nov 17

14:28:53 From David McAuley (Verisign) : Thanks Susan and Bernie and Brenda and all

14:29:00 From Kurt Pritz : thanks Susan

14:29:07 From Greg Shatan : Also National Homemade Bread Day

14:29:16 From Bernard Turcotte : bye all

14:29:39 From Kurt Pritz : Maybe it is a day of international repose

14:29:41 From Greg Shatan : Thanks all for a spirited and sophisticated discussion.