
BRENDA BREWER: Welcome, everyone, to the IRP-IOT call on the 16th of February 2021 at 17:00 UTC. This call is recorded. Attendance is taken from the Zoom room.

I would like to remind you to please state your name before speaking. Have your phones and microphones on mute when not speaking. And Susan, I will turn the call over to you now. Thank you.

SUSAN PAYNE: Lovely. Thanks so much. Yes. Thanks, everyone. Welcome to this week's IRP-IOT main working group call. I think we'll spend, again, most of our time talking about the time for filing issue, but we do have a few other agenda items to cover off.

First off, just a quick agenda review. We have a couple of action items to come back to. I will give a brief update on the Consolidation Sub-Group meeting that is going on in the alternating weeks from this call. And, of course, anyone from that group may chip in with additional comments as well on where that group is getting to.

Then, as I said, we'll spend the rest of our time taking up the discussion on the time for filing issue and the exploration of a potential scope for a compromise solution.

And then just noting that, as it says in the agenda, our next meeting will be in two weeks' time and would be in the 19:00 UTC slot.

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

So, just to circle back up to item 1, Updates to SOIs. Are there any updates that anyone wants to draw to the attention to the group?

CHRIS DISSPAIN:

Hey, Suze. Sorry I can't put my hand up here because I'm on the wrong machine. I just wanted to ... My SOI has been updated, but I just wanted to tell everybody that I am acting as the senior advisor to Donuts at the moment. Thanks.

SUSAN PAYNE:

Thanks, Chris. And thanks, very much for updating your SOI. That's super. And congratulations on your new role.

CHRIS DISSPAIN:

Thank you. I'll reserve judgment.

SUSAN PAYNE:

Okay. All right, so moving on then to item 2 on our agenda is just to circle back on the action items from our last meeting. One of those is to do with Flip who is going to expand on his compromise proposal that he had made. I'm not sure that Flip is on the call. He has messaged me to say that he has been tied up doing other activities including other ICANN activity like SubPro. And so, he is looking to get back to us for the next call.

And then the second action item was one for Bernard who did follow up after our last call and did circulate the summary of the previous

discussions on the amicus issue. So, that one has been ticked off and can be removed. But I think we'll keep action item 2A on the agenda for the next call.

Okay. Not expecting to see any hands particularly on that, and indeed not seeing any. To move on then, our agenda item 3 is just a brief update on the Consolidation Subgroup.

We are making good progress. I think we feel like we may be able to wrap that sub-group up, possibly after the next call, and refer our recommendations back to this main group. We, as sort of separately rather than ...

We certainly didn't spend the whole of our last call reviewing the document that Bernard had circulated, but we had all taken the opportunity to look at it in advance of the call and to take it on board.

Overall, I think where we're talking about the amicus role, there was some discussion—and this was the reason for circulating that document—about whether the amicus role was properly understood in the context of an IRP and, indeed, whether it was the correct role or whether there needed to be some sort of different role.

And I think, as a whole, the group has come down in favor of not trying to create a different category of participants in the IRP process, but we did come to ... We are edging towards a conclusion that the rules could be clarified to make it a bit clearer what that role is and, for example, to make it clear that a submission from the amicus might go further than merely correcting the record and could extend to making slightly more extensive input than that. At the same time recognizing that these

aren't a full party and that we feel that's actually within the scope of a traditional amicus role.

There's also a reference to parties who have participated in underlying proceedings having a right to join as an amicus, and that has proved in a previous case to have been a little unclear. And so, we will be proposing a clarification to that which I don't think will be extensive, but will just map better to what it says in the bylaws.

In the current version of the interim rules, there's a footnote about erring on the side of giving wide participation to an amicus once they've been allowed to join the proceedings. And we felt that it was appropriate to keep that and actually to move it into the rules proper.

So, yes, as I say, I think we're hoping that we will perhaps be able to wrap up after our next call and that we will be able to refer the output back to this group possibly for the call in two weeks' time.

I will just pause there and see if there's anyone from that Consolidation Sub-Team who wants to add anything. Okay. I'm not seeing anyone. I note Helen's not on the call, but a number of the other sub-team members are.

Okay. So, we can then, I think, move on and get to the meat of the discussion which is relating to the time for filing issue. And at this point, Brenda, would you be able to put the couple of slides up in the window?

And I can see Kavouss's hand, so I will turn the mic over to you, Kavouss.

KAVOUSS ARESTEH: Can you hear me, please?

SUSAN PAYNE: I do hear you now, yes.

KAVOUSS ARESTEH: I'm sorry. The quality of the voice is too bad. I don't know whether your microphone is not working. Whether you have some difficulties. I'm very sorry, excuse me for the words, but that you are not in good health. I don't ... This call is not good. We can't hear you at all. So, please, [kindly fix] something. I never understand what you're talking about. Very tired voice. Broken voice. Thank you.

SUSAN PAYNE: Okay. Well, if it's a very tired voice, that's probably because I am quite tired. But what I can do is go on headphones. When I plug in, it may not work and I may have to log out of the meeting and log back in. But I will do that.

KAVOUSS ARESTEH: I'm sorry. I can't hear you. I can't hear you well. Could someone else talk whether there is some difficulty? Could ask another person, another participate to talk for one minute, half a minute?

CHRIS DISSPAIN: Kavouss, this is Chris. Can you hear me?

KAVOUSS ARESTEH: Yeah. It's okay. Your voice is okay. But the voice of the speaker was not okay. Your voice is perfect. Loud and clear.

CHRIS DISSPAIN: Okay.

SUSAN PAYNE: Okay. All right, thanks. So, I have gone on headphones now, and microphone.

KAVOUSS ARESTEH: Yes. It's okay now. Now is okay.

SUSAN PAYNE: All right, perfect.

KAVOUSS ARESTEH: Very good. Thank you. Go ahead.

SUSAN PAYNE: No problem at all. Thank you for raising that. Then I will make sure for future calls that I will always use the headphones.

KAVOUSS ARESTEH: Yeah. I enjoy now hearing you. I enjoy. Thank you very much. I'm delighted.

SUSAN PAYNE:

No worries. Thank you, and I apologize.

So, this is good. We are now on agenda item 4 which is a continuation of our discussion on the time for filing and the possible areas for compromise. We had a very good, I think, a very collegiate discussion on our last call, and I feel that we did make some progress.

I had previously circulated a couple of slides which were just to capture areas for discussion. We had only gotten through a couple of the bullet points on those slides, so I would propose that we continue with this.

But I will give a very quick, if you'll forgive me, give a very quick summary of where I think that we got to both for the benefit of reminding people who were on the call and also, for course, reminding anyone who actually wasn't able to join the last call.

And of course, as we discussed on our last call, nothing was closed off for discussion that we talked about last time. So, if anyone who hasn't expressed their views before, or indeed anyone who has but has further thoughts wants to add anything on the two bullets that we did spend some time on, then they are quite fundamental to the notion of seeking to find a compromise. So, I would urge you to do so.

But just to summarize where I think we got to, we spent some time talking about the concept of a kind of prolongation or a waiver. If a repose was instigated, there might be circumstances where there could be an exception. We certainly had some agreements amongst the group

that we felt that was something that would be an application for an exception.

We weren't suggesting that a party should be making up their whole case on the off chance that they would be accepted for a late IRP in this particular circumstance for a waiver or an exception. But there should be a process whereby they could make an application to seek that approval, and that application would be made to the IRP panel.

In practice, I think the likelihood is that there wouldn't be an actual IRP panel in place. Or, potentially, there wouldn't be an IRP panel in place because you haven't got an IRP. So, more likely this would be some application to effectively a consolidation arbitrator, the kind of role that we've been ... Or rather, a single panelist.

We will have to work to identify the precise nature of the person who would be making the decision, but once we have a standing panel in place, it would be an arbitrator drawn down from the standing panel who would likely be the one who, in practice, would be making this decision. Those, I think, were the relatively easy parts.

We also had some discussion on the circumstances where an exception to the repose would be appropriate, and we had gotten a couple of suggestions that had come up on the previous call. On our last call, there was quite a level of support for the circumstances being basically a test based on demonstrable injustice or manifest injustice and unfairness. And that that would, to most people in this group, seem to be an appropriate place to set that bar.

Now, we did have a contrary view that was raised by Malcolm who felt that if we were to have a repose ... And I should express for the avoidance of doubt, that obviously Malcolm is of the view that a repose is inappropriate.

But we were talking here about, in the scenario where we have, as a group, decided to move forward anyway, that if there were to be a compromise, then perhaps the simple way to address this would be to allow an exception where it's necessary to achieve the purposes of the IRP which is some language that sort of mirrors the bylaws.

And we did have a degree of discussion about that, and I think, on the whole, most of those who spoke on the call ... I can't say that it was most of the participants in the group, but certainly most of those who expressed a view felt that whilst this might be very simple to express, it actually is potentially not that simple to apply and, indeed, could be potentially a very wide applicability because the nature of the purposes of the IRP is such that, essentially, all IRPs are to ensure, for example, that ICANN sticks to its mission and bylaws.

And therefore, if you qualify to bring an IRP, arguably you meet that [head] whether you're in time or out of time. So, we weren't convinced that that could be readily applied without potentially bringing all late claims back into scope.

Obviously, if others have further thoughts on this or on any of that in relation to bullet 1, this might be a good opportunity to raise it. But if not, I can keep going and summarize where we got to on bullet 2. And we can circle back if people want to discuss.

Okay. I'm not seeing any hands at the moment, so I will keep going. The second set of bullets were really a discussion about whether certain types of action ought to be excluded from the concept of a repose. And I would say our conversation or our discussion was a bit more wide-ranging than what is on the bullets because we then certainly got into other areas as we were talking about this.

But one of the issues that I had brought up was the concern, and the concern in particular, that had been raised in the first public comment period about excluding parties from—not parties—excluding potential claimants from bringing an IRP claim because they were out of time before they ever had become eligible under the bylaws to actually bring a claim; and whether that was a class of application or class of claimant, if you like—potential claimant—that ought to be excluded from the notion of having a repose applied to it.

On the other hand, it's possible that one might argue that in those circumstances, that might be something that, depending on the circumstances and the facts of the case, might well fall within that qualification of a clearly demonstrable injustice. So, it's possible that this could be addressed by that means.

Kavouss, I see your hand. Does your hand relate to this, or shall I continue with my quick summary first?

KAVOUSS ARESTEH:

I apologize. Continue with summary.

SUSAN PAYNE:

Okay. No worried. I will be very quick. We did also have a reminder from Sam that we do need to be clear what it is that is the action that's being challenged. And she pointed out that there are multiple places where the Board or Org can take an action, and that might found the claim for an IRP. And that perhaps if that were the case, then we need to be perhaps less concerned about the notion that there might be a repose imposed.

So, we did have some discussion on that and some perspective that it really does depend on whether it is the policy itself that is being challenged or whether it's the implementation of that policy. And it could well be that there is a circumstance where the implementation of the policy has been wholly appropriate, but it's the policy itself that is the issue.

And Greg in particular had made a couple of interventions where he was concerned about the notion that if a policy was outside the scope of the bylaws in some way, in breach of the bylaws, and that it was a continuing matter, he argued quite strongly that surely it doesn't matter how much time passes, there's a continuing harm, if you like, because the policy in question continues to breach.

And so, in that circumstance, is it appropriate to have a repose? Because you have a circumstance where there's a continuing harm rather than a specific, if you like, one-off decision.

And I think, probably, I would be putting words in Malcolm's mouth, but I suspect that aligns somewhat with views that Malcolm would tend to have. But I'm sure he will correct me if he disagrees.

So, I would say that I don't believe that we really came to a conclusion on that. We did have some strong counter arguments or comments from Sam and from Chris expressing concern about the prospect of 5- or 10-year-old policies being reopened as you came down the line so that something that's very, very longstanding ...

Even if it might, at the time of adoption, have been considered to be not within the scope of the bylaws, is it really appropriate 10 years down the line for it to be reopened after so much time has passed? And I think essentially, that is fundamentally why we're having this debate about whether there should be a repose or not.

And I'm just throwing this out here. This isn't a conclusion we reached on the call necessarily, but perhaps some kind of test of clearly demonstrable injustice could adequately serve to address that, too. That if there were a circumstance where there is an ongoing continuing harm because whatever the policy is that's been adopted is outside the scope of the bylaws and should never have been adopted, then perhaps there's a scope for a late claimant to be arguing that there's a clearly demonstrable injustice, and that that's the basis on which we try and address the tension between having a repose and not having one.

That, I think, is kind of a summary of where we got to. I think I've highlighted the main comments, but at a very high level.

Kavouss, you had your hand up. So, unless it was a mistake, I think we can go back to you.

KAVOUSS ARESTEH:

Yes. Thank you very much. I understand and I consider that we have made progress. I think we are in good shape. We are somewhere that we could continue. I think the three bullets cover the high-level issues.

Later on, we will talk about how we put them. I think the first bullet is okay as a start, and after that, the third bullet should come after the second bullet because when you talk about prolongation, you need to talk about the start of the clock. So, it should immediately after that. And then exclusion from the application [inaudible].

Now, what you have to do ... In the first bullet, apart from the period to be determined that they will discuss it ... The first bullet that we're talking about for prolongations, we need to say how long we could prolong. No doubt it depends on the initial time. If the initial time is one year, the prolongation would not be more than one year. It would be less than that.

So, I think in order to have some further progress, you need to talk about the period to be determined—which period to repose, period to be determined. Once you determine that, you come to the prolongation time. And as I said, from the logical point of view, that should not be more than the initial reposing time. So, if your reposing time is one year, the prolongation should not be more than one year.

But I suggested six months, and it is subject to your agreement and discussion. That is this one. So, that is something that you have to.

Then, something which is not yet discussed, if the request for prolongation comes with justification, there would be some determination of that. Someone should determine, yes, they've

received a request of prolongation. There is a justification. But that justification should be reviewed and verified and agreed upon.

Then we have to talk about the criteria of agreement. Again, according to my experience, normally—please be careful—normally this should be by consensus. The panel by consensus agrees [to] the prolongation. Nevertheless, if they want to reject that, we should have a criteria. What is the criteria of rejection?

Again, according to the experience that I have, the rejections of that being that this justification is not sufficient and does not merit to give the prolongation, then I suggest for your consideration, two-thirds of the panel should be able to reject that. Otherwise, it should be accepted.

So, the first thing, you find consensus. What always we [go]. If not, two-thirds rejecting the request saying that, “No. It is not justifiable. The justification is not sufficient.” And these are the details you have to do that.

But now, something very new for you. For every one of you. And I suggest that. We are not in a position to go to the last mile details. This is a telecommunication expression. Last mile means up to the end, 100%. I suggest that we try to put something trial and error. That means we do and establish whatever criteria on the specification we have.

But if there is something, we cannot do everything at this stage. Once it goes to the practice then if there would be any, I would say, requirements for adjustment, they will be done. I don't know, but I

imagine, that [IOT] will not be dissolved. This oversight team will not be immediately dissolved or disbanded, and so on and so forth.

So [there's still], there is any room to readjust any shortcoming because this is a very, I would say, sensitive, theoretical application for you, for the ICANN. For me, it's not theoretical. It has been already in practice. But I don't want to impose my view to everyone, so you need to have time to reflect.

So, this is what I suggest. In summary, you have to determine the prolongation—the repose time, sorry, to be determined. The repose of some period. Once you decide on that, you have to decide on the prolongation. And you have to decide whether you agree with me that prolongation would not be more than the initial repose time. And then you have to study the criteria for the acceptance of the justification because justification, in the view of claimants, is justifiable. But in the view of the panel should prove to be justifiable and so on and so forth.

Once you do that one, you are almost—[I won't say]—almost done. This is my suggestion. I don't want to go too further, but this is what I would like to offer you for your kind consideration. Thank you.

SUSAN PAYNE:

Thank you very much, Kavouss, for your thoughtful input. On a couple of those issues, I certainly was anticipating we will talk about the length of the prolongation, for example. It just is on the second page of these slides, so we haven't quite gotten to it yet. But we certainly will.

And I take on board and think it's certainly a very good suggestion this idea that we should consider building in some process for revision if we think we need to. I will need to revert to the bylaws at some point and double check. In my mind, I have a recollection that perhaps the standing panel, when it exists, can also make suggestions to revise the rules. But I think you are probably correct that, certainly for a period of time, we have other tasks that we have to do in this group, so the IOT will still be in place for some period of time, I imagine, after we hopefully have finalized these rules. So, thank you for those suggestions.

As I said, we only had covered the first two headline bullets. We hadn't dealt yet with clarification on when the clock starts, although I think that's probably fairly simple.

But before we do that, I did note in the chat that David has commented that he recalled the comment from Sam and thinks it would be a useful topic to explore what is the action that is being challenged. And so perhaps before we move on to that third headline bullet and then on to the second page, if there are views on that issue of the multiple places where the Board or Org are taking actions and that at multiple different places there could be scope for a challenge.

I would be very happy for us to explore that further if anyone has views on this. And it may be that we might need to consider this in the context of some examples. And I'm looking back to the, or casting my mind back, I suppose I should say, to the case study that Malcolm had proposed. And forgive me, I can't remember what the name of it was, but the one about the language services and the rollout to a new country.

And it seems to me that it's possible for the rollout of a policy to provide this particular service ... It's possible for the rollout to a new country to be perfectly appropriate, to have been no inconsistent action or not action inconsistent with the bylaws taken, potentially. Or is it possible for there to have been no inconsistent action in making that decision to rollout to the new country?

And so, it's not the rollout that is the issue. It is the actual underlying policy that decided to offer those services that is the issue, and that is being challenged. So, that's my question for consideration, if you all want to explore this topic. Malcolm.

Malcolm, I'm not hearing you. I think you're on mute, still.

MALCOLM HUTTY:

Thank you. I think that example, the scenario that I gave really helped flush out a basic disagreement that we have within the group as you said, Susan. You put your finger on the nub of it there. It might be that the essence of the complaint against ICANN by somebody who is newly affected, because it's arrived in their country, is not that, "Something about the way you brought this into my country is wrong," but rather the claim that ICANN should never be doing this at all and they want to be heard on that.

And that example has flushed out that Chris [who] is the most vocal observer, the most vocal member of this group—but supported by some others in this group—has said that he doesn't think that the IRP should allow that sort of decision to be heard at all. And he's thrown up reasons why it shouldn't be heard. And he's thrown up reasons why

alternatives, other places, that he thinks it could be dealt with. Maybe it should be done in court or maybe some other ICANN processes. Anything but the IRP that's before us.

But that's not really a question of timing at all. And what we're looking at here is timing. How long should the claimant have? And the question is, how long should the claimant have?

And if the claim here is, "Well, that should be zero. It should be minus one time or something. They should not be able to bring that at all," then this isn't a timing rule anymore. This is an attempt to subvert the standing rules and the scope of the IRP under a pretense of timing. But they're being dishonest.

So, if we're going to have some rule that says we're going to count timing in a particular way, it should be clear that no matter how that is phrased, the claimant must have some time in order to bring their dispute so that it can be heard if they meet the standing rule.

How much time? We can debate, but it should not be zero time. If the claimant acts promptly, for whatever value of "promptly" we choose to say, they should have their case heard. If the timing rule says "no, you can't, no matter how promptly you have," then it's not a timing rule anymore. It's a change to the standing, and since the standing is set out in the bylaws, that's outside the scope of terms of reference for this group.

Any comments about alternative means that you can have other than the IRP would be out of order, really, because they're not about the

issue on the table which is the timing rule. The only thing that we should be talking about is timing. How long should they have? Thank you.

SUSAN PAYNE:

Thanks, Malcolm. I understand that, and I think that's the fundamental of the difference of perspective that we've got in this group, really. I suppose the question is, in that circumstance where the party could not have brought a claim because they were not within scope until such time as the 12 months or two years or three years or whatever the repose is, is that going to be a circumstance where we would have an expectation that they would qualify for an exception to the repose because of a clearly demonstrable injustice?

I mean, does this compromise that we're attempting to craft go a very long way towards addressing what is your fundamental concern that they are being denied access to this dispute process?

MALCOLM HUTTY:

To be honest, I would have to see text to opine on that. I've just set out the principle, but so long as they act promptly, the timing rule should not bar them. Maybe the standing rule bars them. Maybe some other element bars them. But provided they act promptly, the timing rule should be no bar. If they act as soon as they can, then they should be within time. If they're not within time, no matter how prompt they are, then it's not a timing rule.

So, I'm kind of here thinking, do you know what? You've probably heard enough from me on the subject. I'll sit back and see what text you come

up with. And then if it's satisfactory, then great. And if it isn't, I'll suggest some qualifications that would need to be made in order to make it satisfactory. And we'll see whether that persuades the group. But, I don't know that I can be any clearer on the matter of principle.

SUSAN PAYNE: Okay. Thanks, Malcolm. Kavouss. I do not hear you at the moment, Kavouss. I think you are on mute, still.

KAVOUSS ARESTEH: Yes. I confess that I am not clear what timing Malcolm is talking about. Which timing [is] he talking about? Thank you.

SUSAN PAYNE: I think I can answer that. I think Malcolm is talking specifically about the time that a potential claimant is given to bring a claim.

MALCOLM HUTTY: Specifically, I'm talking about rules of procedures—4.2 and A, the time within which a claim must be filed which is the basis on which we're having this discussion at all. I've left off the words that I know provoke others. That's not a complete quote of that section, but that's the basis on which we're having this discussion.

SUSAN PAYNE: Thanks, Malcolm. Chris.

CHRIS DISSPAIN:

Thanks, Susan. I may have misunderstood, but I thought we had already reached a point where we'd acknowledged that it was relevant to talk about purpose rather than just [bald] timing because there were some things that quite clearly would not fit within a pure timing point.

Maybe I'm wrong, but I thought we'd come to some sort of conclusion, tentative conclusion or whatever that, for example, a new gTLD or a ccTLD redelegation, etc., would be outside of this sort of discussion. So, if I'm right about that, then I'm not clear that it is just a simple case of timing.

SUSAN PAYNE:

Thanks, Chris. So, I will defer to Malcolm in a minute. I will just say I think all of our discussion last week was prefaced by Malcolm's clear statement that he doesn't believe that a repose is appropriate. However, he was willing, for the purposes of the discussion, to talk about ways in which we could try to adopt a repose bearing that in mind.

We did also, or I at least had flagged all the particular types of dispute. In my case it was all the particular types of dispute where a repose might not be appropriate, but I think you could argue it the other way around. Are there particular types of dispute where an exception from the repose is not appropriate. And I would say I'm not sure that we reached an agreement on that in the last call. I don't really feel that we went that far. I don't think we drilled down to that level. But others can—

CHRIS DISSPAIN: Could I just clarify something?

SUSAN PAYNE: Yes.

CHRIS DISSPAIN: Sorry. I apologize, just because I don't want to go off on a tangent. I wasn't suggesting that that was a discussion we had on the last call. I was suggesting I thought there had been discussion previously in the context of specifically new gTLDs, the delegation of the TLD, and redelegation of the TLD as examples of circumstances where the ability to bring a claim after a certain period of time would, in fact, not be appropriate.

But as I said, I may be wrong. But I certainly wasn't suggesting that was what discussed on the call the last time.

SUSAN PAYNE: Thanks, Chris. We certainly have ... Yes, you're absolutely correct. We certainly have had some suggestions like that raised. I'm not sure that we've captured them very fully, and perhaps it would ... I think that's a fruitful area for further discussion as well. Yes.

Malcolm.

MALCOLM HUTTY:

As for treating different types of claims differently, I don't actually see any reason in the bylaws that precludes us from saying that the time that you have to bring the claim varies according to the type of claim [or] that prevents us saying that if your claim is of this description, then you have this much time; whereas if your claim falls into this other category, you have this other amount of time. I think that's open to us if we should wish to go down that route.

I'm afraid that [in] some of our previous discussion, it was argued that you shouldn't have the right to bring a claim at all. And that's not within order for what we are talking about now which is Rule 4, I believe, which is labeled Time for Filing. And if others wish to bring that up for elsewhere inclusion in the rules of procedure, then you need to point where the authority is to do so.

But insofar as [what you're] saying, that we can identify, for example, one category such as the allocation of a registry, a new gTLD registry, and to say, "Well, in that case any claims against the process for that, for example, or the manner in which that was done must be done within this amount of time; whereas other claims such as a claim that ICANN has acted in some way entirely ultra vires its mission has a different deadline by which you must file," that would seem to be an option that was open to us if we choose to go down that road.

It might even be a good one. I would be interested if others wish to propose it. I'm open to that.

SUSAN PAYNE:

Thanks, Malcolm. Kavouss.

KAVOUSS ARESTEH:

I am sorry. The theory of Malcolm doesn't work. That does not work. He suggests that the timing to bring a case depends on the type of the claim. Here, either we could have various types of the claims, which would be difficult—Claim Type 1, Claim Type 2, Type 3, Type 4—or we could say that there is no timing at all because one claim, maybe in view of Malcolm, needs only three months to bring it. The other would be three years. I don't think ... That doesn't work.

It would be difficult to do that. Totally difficult. This is theory. Could not be implementable. I think he was about, if I understood well, previously some specific period of 12 months or X months. And now he says the timing depends on the type of the claim.

Are we in a position to determine various types of the claims from now? Do we have all information about the future of potential claims? Or we want to have different categories of claims, and that also would be difficult to define whether the claim is category 1 or category 2 or category 3. For the first one, X months; for the second one Y months; and for the third one is Z months. I don't think ... That doesn't work.

That [is a] complicated situation. Totally complicated. And we are far from our discussion that we have 120 days. Then we have one year. Then people propose to do it three years. And now Malcolm proposes some variable situation. It's very, very difficult to implement.

And who is going to decide on the type of the claim saying that this claim must be provided within three months with a prolongation of another three months? Otherwise, it falls out. The second ...

We can't do that. It's impossible to do that. It is unworkable theory. So, I'm very sorry. This is totally impractical. Totally impractical and we should not go back from the zero. We had 120 days, then we have 12 months, then we have [six] months. And now we [put] a variable. No months, depending on the case.

So, we want to have total freedom on the expensive of the difficult to decide on the matter. This is relaxations. Total relaxations, but on the expensive of the total instability of the situation. To reply to Malcolm, time should not be too short because the claimant should have sufficient time to do that; should not be too long because there should be [a stability].

You cannot come back after three years saying, "I have difficult with that. What happened to those three years?" The people [inaudible] and so on and so forth. So, there are these two limits. I don't think that ...

I am not in favor of the total variable timing depending on the type of the claim which would be difficult for the people deciding whether IRP panel or anyone saying that this claim is Category 1 and the other claim is Category 2.

I don't. That doesn't work. That will put everything in a total instability. And I don't think, after so many months of the discussion, we should come back and start from scratch one. We have progress. We had some time. And we have to follow that. So, I am sorry I cannot ... I'm not happy with this sort of theory. Thank you.

SUSAN PAYNE: Okay. Thanks, Kavouss. Chris.

CHRIS DISSPAIN: Thanks, Susan. I think that part of the problem we have here is [that] we're talking in so many different context and what are the actions about and so on. It's no wonder that people, including me I suspect, get confused. And there's a level of misunderstanding. So, I just wanted to try to be as clear as I possibly can be.

If I understand Kavouss's position correctly, he's talking about there being a fixed process or a fixed time. You must make your claim within a certain period of time. And he's talked about two times frames has 120 days, and then there's 12 months, and so on.

And in those circumstances, that's a very simple and straight-forward scenario which, if everything fits into it, would be very easy and we could all agree.

The challenge is that, as Malcolm has correctly pointed out on numerous occasions, it doesn't all fit equally and easily into that. And if you take his example of the education/philanthropy thing, that seems to me to be a really useful example to explain what ICANN considered to be the challenge.

I don't have any issue with the education company in Mauritania bringing a claim five years down the line because it is now affected by the fact that the philanthropy project has moved into its country and it believe that it is being affected by that and brings a claim. I don't have an issue with that, and I think that's covered by the ...

And again, I'm not an expert on this, I may get some of these things wrong. But I think covered by the fact that they become aware of it, if affects them, they have a cause of action, and they can bring a claim. And the claim would be for what I believe Flip has referred to as personal relief, even though they're a company. Personal relief is relief between them and ICANN, and that relief is, "You will withdraw from or retain ..." or whatever it might be.

Where my distinction is drawn and where I do think it's necessary to define different types of action—and that's where I was getting at before about have we not already done that when we talked about delegations and redelegations—is if you're going to bring the policy question in five years down the line, that's where I consider it to get very challenged.

To address Malcolm's point that he was making earlier, I don't think I'm saying, I don't think I have said it shouldn't be possible to bring an action at the time that the policy is made to say, despite the fact that I don't actually believe the IRP's necessarily the right thing to do, I acknowledge that it exists as a mechanism to bring a claim that says, "We've just set this policy. We think this policy is outside of scope or outside of mission."

But it is the timing issue. It is the five years down the track. It is a new player. It is someone who hasn't been around who wasn't affected at the very beginning. And my question has always been, should they have the right to overturn the whole policy when, in fact, the community has been operating on that policy, has accepted that policy, and has used that policy for the last five years?

That's the crux and the nub of the issue. And it does involve differentiating different types of action. And it does involve saying some things should be subject to a repose and some things should not. And the only, for me, simple solution to that would be—which I accept is unacceptable—to say everything has to be done within 12 months or everything has to be done within 24 months, which is don't think is fair on those people who come across a problem further down the line and have a right to what Flip has referred to as a "personal remedy."

I hope I've made myself clear. Thank you.

SUSAN PAYNE:

Thanks, Chris. You have, and I've got a couple of questions but I will defer first to Greg and then to Kavouss. So, Greg.

GREG SHATAN:

Thanks. One concern I have is that if there is a policy that is, in fact—it's a continuing policy, of course, as all of them are, essentially—and it is in fact or would be found to be a violation of the bylaws, it seems to me that that should be open to challenge at any time because it is a continuing violation.

The question we've had about repose based on how long one has known about something, I think, is something we've discussed and can continue to discuss so that if you know or should have known about a problem, you don't have forever to challenge it. So, there's that aspect of repose. But it seems that ...

I have trouble with the idea that there is a policy that is in violation of the bylaws and yet there is no dispute-based remedy within the ICANN ecosystem. I think it's probably not a good idea to put that out to the courts. And the other alternative would be a complaint to the California AG which also takes it out of the ecosystem. I think part of the question is what would be the remedy for such a thing? To my mind, the remedy would take it back to the ICANN community to decide how to revise the policy to make it compliant, assuming it's a community-based policy.

I think part of the concern, maybe, that we all have is the idea that the court fashions a remedy that actually changes ICANN policy as a matter of a court decision in which there's only the claimant and ICANN, and perhaps amicus going on. So, I think part of ...

And I hate to add yet another tangent to our discussion, but part of the issue here, I think, is not just about timing or subject matter but also about remedy. I think what Flip was getting at, in a sense, was a personal remedy in the sense that the policy itself would not be overturned, but something that was unjust would be rectified even if it violated the policy.

But I guess underneath it, even the policy at some point needs to have violated the bylaws because we can't just challenge policies because we don't like them or because they are unjust to us. The whole point of consensus policy is that they're always ... They may be a little bit unjust to everybody, but they're decided. And as long as they are within the power of the ICANN system to make those policies occur, that should be sufficient and should not be open to challenge.

Touching on Malcolm's point, now or ever, not an issue of timing, but really an issue of jurisdiction. Policies that are not in violation of the bylaws, and correct me if I'm wrong, should not be even within something that we're discussing. Whether we think they're good policy or bad policy, the remedy for changing policy is the policy system. What we're talking about here is ICANN violating it bylaws.

SUSAN PAYNE:

Thanks, Greg. Kavouss.

KAVOUSS ARESTEH:

Thank you, Susan. I think we all maybe forgot what we have done when we had the provisions in bylaw discussed. The number of the people, the number of the experts, the participants, the time, arguments presented were very, very, I would say, extensively discussed and we came to something. And now it seems that we either expressly pretend that we don't know anything about the timing, or we want to [inaudible] or loose our discussions or criteria not to have any stable situation.

Once again, the timing should take into account that not too short does not allow the people to react; not too long which does not result in [stability] of the situation. So, there is a limit here on [there and we have to discuss]. And we have to think of something which is implementable, not theory. Instead of very vague and variable thought, we should have a concrete proposal rather than going to the philosophy and trying to give explanation.

What is the concrete proposal? Timing. 120 days? 6 months? One year? No doubt extendable to another period subject to justification. But they should not come back again to something that we have discussed. Otherwise, we continue this group for, I think, meetings and after the meetings and without any conclusions.

We should wrap up as soon as possible to have something. I don't see why is it so difficult? All of you, you're knowledgeable people. You have many cases in mind. You have many cases [that] maybe seem practical. You have an idea about the type of the case. There might be some exceptions, and we cannot have all exceptions.

There's always something left for further discussions and further adjustment, but [inaudible] we should have some ideas about that. But not talking about a total valuable things and something total theoretical and not implementable. Thank you.

SUSAN PAYNE:

Thanks, Kavouss. So, I will just quickly respond. I wish it was simple. I realize that we do seem to be talking about this at length. And we, arguable on this call, seem to have taken a backwards step a little. And I'm sorry for that.

But if we were going to talk about can we have a proposal on the table and just move forward, well, this group before I was a member had a proposal on the table which was that there should be a timing period of 120 days to bring an action after you knew or had reason to know, and no repose. So, no outside time limit of 12 months at all. Just that.

So, from the time when you become eligible to bring a claim and you know about it, you have 120 days. That was put out to public comment and received widespread support from the community and was not supported by ICANN Org and one or two other commenters from the community.

And so, this is why we're having this discussion. Because we have this fundamental difference of opinion within this group about whether we should go forward with a rule which has no repose whatsoever; but knowing that ICANN Org and ICANN legal have told us that they will recommend to the Board to reject that. So, we're trying to find a solution that makes everyone happy.

And I agree. We are struggling to find it. But that's why we're talking about this and why we haven't got a simple solution.

Okay. So, David, I've seen in the chat that you have commented that perhaps it might help to focus on the definition of "action" or "inaction," as Sam suggests, to see if that helps to narrow down the difference. Action or inaction in the definition of "dispute."

I think perhaps you may be right. I'm not sure whether any of us are in a position to really have that discussion now, whether anyone has given sufficient thought to it, or indeed whether Sam is back on the call. I know she had to step away. If, indeed, she has ...

I think it would be helpful for us to try to consider that. I was trying, as Greg was talking, to look at the bylaws and interpret them in a different way, such that perhaps the inaction is a continuing action and therefore

time is always running. And it's possible that that's the case. It's possible that we can all reach an agreement that that's the case.

I'm not quite in a position where I can express that very lucidly, but I'm hoping perhaps others have given this more thought. If not, perhaps that's what we have to come back to.

And I've got Greg's hand, but I'm not sure if that's an old one, Greg, or a new one. And David. Greg, is yours a new hand?

GREG SHATAN: Ancient hand.

SUSAN PAYNE: Okay. So, David.

DAVID MCAULEY: Thank you, Susan. And by that chat comment, I didn't mean to suggest that we would launch into such a discussion now. But I think one or two times, Sam has suggested that we should look at what is the action that's causing the IRP because looking at it and understanding it may help us determine that we don't have an issue, or if we do, they're more narrow than we think.

And I think it's possible we could get wrapped around the axle on the concept of inaction. But putting that aside for a moment, I would think the discussion would be one where we ask people to speak about it who are practitioners. And I know that at least Flip and Mike Rodenbaugh on

the side of claimants have been. And obviously in the ICANN side, in-house or maybe Kate could speak to it. I don't know if it's ever been a contested issue—[if] timing has been a contested issue in prior IRPs, or if the definition or the concept of, “what is this action that we're talking about” has ever come up before.

But the practitioners may be able to help us get our arms around this. That's all I was suggesting, so thanks, Susan.

SUSAN PAYNE:

Yeah. Thanks, David. I think Flip had to drop off, and I don't believe Mike joined us this time around. But I think probably we will find that this hasn't come up as an issue yet because of the nature of the change in the rules and how timing was previously expressed as compared to how it's expressed now.

And indeed, speaking as an outsider, I think parties tended to bend over backwards to bring themselves within time in a way that seemed convoluted. And I'm sure there could be a better solution to that. In other words, they would file a new request for reconsideration and then run their timing off that because they knew they were out of time otherwise. That kind of thing.

Sam.

SAM EISNER:

Thanks, Susan. I can't recall—and we'll go back through and check to see if there's been any sort of IRP practice around that timing issue—we did have ...

As you referenced, that the prior IRP in the old bylaws had a very firm date. Right? It was 60 days after the publication of the Board minutes of the action or inaction being challenged. And so that's why this became an issue with the CCWG because we then brought in staff action. And so, we couldn't just rest on the fact that there were Board minutes being published because if you're actually going to challenge staff action, you won't find Board minutes on that.

That's how this kind of came into the IOT'S realm when the CCWG elected to move that into an implementation position as opposed to [trying] to solve is during CCWG deliberations.

You know, I think that we have had some IRPs that looked at the issue of inaction. I don't think that there's been a view than inaction is about a continued choice to not take an action. It's more that the Board possibly ...

One example of an action could be if someone wished for the Board to take a position on something and then the Board didn't take an action. By virtue of doing that, the issue that was being challenged came into being. So, that could be, for example, in the New gTLD Program, while the Board tends not to take ultimate decisions on individual applications, there might be, for example, a situation where an issue rose to the Board level and the Board chose not to take a decision on it even though there was clear documentation [to the] community that the issue became a Board bubble issue, at least to get information on it.

So, I think that's one of those situations where we've seen the issue of inaction. And we can take a look through and see if we have any other

examples of how inaction has been pled, but I think we have to make sure that we don't create an interpretation of inaction that makes it either an obligation for the organization or Board to see if they want to just go and undo a prior decision because the Board has obligations when they take their decisions that they believe that it's within the mission and within the public interest, etc.

And so, relying on precedent of Board decisions the Board tends to ... Under corporate governance, the Board stands behind the decisions of its predecessor boards even if the people have changed. And then, of course, if there's documentation or we find out that it was against the bylaws, we would want to correct that. But we wouldn't claim that there was inaction in the Board or Org, for example, not going back through and doing a review of each of its decisions to see if it really was within the bylaws.

I think that would be something that could come to frustrate the purpose of having any conversation around statutes of limitations or anything. So, as we understand it, it tends to be something that someone thought would come up for decision or action, but there wasn't any documented decision or action. And that resulted in harm to someone and was in violation of the bylaws.

So, those are kind of the world of it. But we will, again, take that back to our team and see if we can come up with any examples of how inaction might have been pled during IRPs just to give a sense of that to the group. Thanks.

SUSAN PAYNE:

Thanks very much, Sam. I think that would be really helpful.

Okay. Kavouss, I think you probably will have the last word and then I will wrap us up.

KAVOUSS ARESTEH:

I think we are running examples of difficulties because some [are] going to have another definition of "inaction." If there is a case before the Board and the Board finds that it cannot decide on that, this is not inaction because the decision of the Board not to act would be accompanied by some justification that it was not in a position [inaudible] it was not in line with the bylaw. It was not in line with the mission of the Board. It was not in [in line] with the fiduciary responsibilities of the Board. This is not inaction. This is justified inaction.

Inaction means that they ignore without any reasons. This is inaction. You present something. They don't care. This is inaction. But if something has justification not to be acted, it is not inaction. So, I don't believe that we should go too far in defining what is inaction and so on and so forth.

And still, I don't understand the difficulty. But I have another suggestion to make with respect to the timing, and that would be the two-step of timing. Step one, extension without justification. People are saying, "I was not aware of the situation for some reasons, and I want a prolongation. But if that prolongation is not sufficient, I'll ask an extension of that prolongation."

Then you should provide sufficient justification subject to the consensus by the deciding body or subject to two-thirds of the majority by the deciding body. This is also another theory which has been [worked] elsewhere.

You give a simple extension, half of the initial one. If you have four months, you give another two months without any justification. Just saying that I was not aware and I want the prolongation. And then if, after that, or 15 days before that expires, you come back. "Sorry. Now the situation is so difficult for me, I want an extension." And now the second extension would be given which would not be more than the total time of the four months plus two months. That means not total one year.

We should do something which is workable and should not go to the inaction by the Board and so on and so forth. We think that the Board just does not care about anything. Any inaction of the Board has some reasons. And the simple example of that, if the GAC advice comes to the Board and the Board is not in the position to decide on that advice, they don't decide on that advice.

But give the reasons and that should not be interpreted as inaction. This is justified inactions. Some will ask that the Board should do this. The Board is not in a position to do that. They say, "No. I don't do that and this the reason why I don't do that."

So, please kindly don't go back to the definition of inaction because there will be variety. Once again, all you have examples of the use cases and so on and so forth. You are in a position to see what is a [initial]

time, what is the non-justifiable extension or without justified extension, and the last one [inaudible] justification for extension.

But don't go back again and start from zero. Thank you.

SUSAN PAYNE:

Lovely. Thanks, Kavouss. So, I think our reference to "inaction" ... Well, to "action" and "inaction" is because that is what is expressed in the bylaws, and so it's firmly within scope for what can be the subject of an IRP. But, of course, just because there's an inaction, or indeed just because there's an action, it doesn't mean that you can successfully bring an IRP.

You may be able to bring an IRP, but it doesn't mean you'll win. If an inaction is justified, then it doesn't automatically mean that an IRP would overturn it.

Sam, is that a new hand or an old one? Okay. Old hand.

Okay. I think we have had certainly a few people who would support trying to drill down on the notion of "action" and "inaction" and to see whether when we do so whether we can feel ourselves to be less far apart than we perhaps seem at the moment. And so, I think that is where we will pick this up next time.

Yeah, okay. So, Sam is saying, "The inaction has to be alleged to be against the Bylaws and to cause harm in order to serve as the basis for an IRP." Of course. Yes, indeed. And if that were not the case, you clearly wouldn't win.

So, Sam has offered to do some looking back to see if there are some examples of how inaction has been pleaded. I certainly will take myself back to the bylaws and give some thought to this further. I think it would be helpful if people have some ... I think we would find it helpful to have some hypothetical examples that people examples could share that would help us drill down on where the disputable action or inaction falls, and therefore where the time should begin to run from.

We do have Malcolm's scenarios that he very helpfully circulated a while back, and at a minimum we can look at this with an eye to those. But if others in the next two weeks gives some though to this and want to share further thoughts ...

Yeah. Greg is saying, "This is too much like work." Yeah, you're too right.

Hopefully, we can come into this next call having given this further consideration in the two intervening weeks. And so, we can drill down on it further then.

Okay. So, I'm giving you back a few minutes of your time. Our next call is in two weeks' time as set out in the agenda for this one. Thanks, everyone, for your participation and your patience. We will get there, I'm sure. We will get there.

All right. Thank you very much. Brenda, we can stop the recording. I'll speak to you all again in a couple of weeks.

[END OF TRANSCRIPT]