
BRENDA BREWER: Good morning, good afternoon, good evening. Welcome to the IRP IOT Meeting #72 on the 8th of June 2021 at 19:00 UTC. Today's meeting is recorded.

Kindly state your name when speaking, for the record. And have your phones and microphones on mute when not speaking. Attendance will be taken from Zoom participation. Please note an apology from Becky Burr. And I'm happy to turn the call over to Susan Payne. Thank you.

SUSAN PAYNE: Lovely. Thanks very much, everyone. And thanks to those of you who've been able to join. I've also had a message from Mike Rodenbaugh to say that he has a conflict but will hope to join us as soon as he can. So, hopefully we'll have him join us as well at some point during the call.

Okay. So, first up just the usual processes. Ah, and indeed it looks like Mike has managed to join us already, so that's great. So, first up is just a quick review of the agenda, and we'll do the updates to SOIs. Let's do that first before we review the agenda. So, does anyone have any updates to their SOI that they need to flag to the group?

Okay. Thanks, Sam. Sam is just noting that she needs to drop at a certain point. It's not an update to an SOI, but I think perhaps this as good a place as any to mention it before we get into the agenda review. I have to pass on that, unfortunately, we have lost Helen Lee as one of our members, which is a great shame. Helen's being a great participant and had some very valuable insights. She has a new role outside of this

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industry, and so she has moved on, sadly. So, just sort of noting that sadly we've lost her as a member of this group.

Okay. Back to the agenda review. First up, we will circle back on the action items from the last meeting, then we'll move on to looking at the other elements which might affect the time for filing such as tolling for other accountability processes. And I think that will be the bulk of our call today. And then noting the proposal for the next meeting to be in two weeks' time in the 17:00 UTC slot. So, that would be the week after the ICANN meeting which certainly seems to make sense to me.

So, without further delay, just circling back then to agenda item #2 which is the action items from the last meeting. And we had one agenda item which was that Sam and Liz collectively are going to produce some draft language for us for dealing with the repose that would include the sort of safety valve, to use that term, as we've discussed it on previous calls. We don't have that language yet. I wonder if, Sam or Liz, is there an update at all. This is not to chase you, but just to get a feel for likely timing.

LIZ LE: Sorry, Susan. Hi.

SUSAN PAYNE: Thanks, Liz.

LIZ LE: Apologies. I was double muted, myself. Yes, we're working on it. We're hoping that we'll have something available by the next meeting. But if the timing changes, we'll provide an update to the group.

SUSAN PAYNE: Great. Thanks very much, Liz. Yes, and obviously recognizing that you may be quite busy during the next week or so with the ICANN meeting. So, we'll just look to either get some language from you or a sort of further update next time. Okay. So then, agenda item #3 is, as I said, the sort of main body of our call, hopefully. And hopefully we can make some progress on this. And really, it's to continue with our discussion or our consideration of what, if any, other elements could affect the time for filing.

In particular, we talked about whether it was appropriate or we discussed the feeling that it was appropriate to toll some of the time limits or both of the time limits for other accountability mechanisms. So, things like the Cooperative Engagement Process which is part of the ... It's a kind of precursor to an IRP, their request for reconsideration. And the other couple that we talked about in particular were complaints to the Ombudsman and document information disclosure procedure requests.

And I think, generally, there was support in the public comment input for tolling of time periods. And we've all reviewed that public comment input ourselves. And I think on the recent calls as well where we did discuss this, generally I'd say my impression of that discussion and where we got to the end of the last discussion on this was that there

was quite a bit of support within this group for also taking that on board and tolling for these particular accountability mechanisms.

So, with that in mind, I have put together a sort of draft proposal. It's really intended as a straw person so that we've got something to work from. I'm fully expecting that you will spot things that are missing or things that don't work that I haven't spotted. And so, I'm very much hoping that we can collectively improve that proposal or indeed, if you all feel that that's going in the wrong direction, then we can take that on board as well. But really, it's just to give us sort of a starting point for a discussion.

And obviously, I was only able to circulate that today, so with that in mind, I think we'll probably go through it fairly slowly in case some people haven't had an opportunity to look at it yet. So, Brenda, would you mind pulling up the little slide deck onto the first slide?

BRENDA BREWER: Give me one moment, please, Susan.

SUSAN PAYNE: Sure, no worries. And in the meantime, I'm just noting David's comment in the chat regarding Helen and what a wonderful colleague she's been and she'll be missed. And yet, I'd say I haven't worked with Helen outside, really, of this particular group, but certainly have found her input really valuable. And I think we'll definitely miss her.

Great. Super. Thanks, Brenda.

So, we may not spend very long on the first slide, but let's see how we get on. Basically, the first slide that, the information on here, was more of a recap than anything else. Certainly not seeking to reopen the discussion again here on this call about Prong 2.

So, just as a recap, we have the proposal being that there are two different prongs on the time for filing. Prong 1 relates to the claimant's own knowledge of the material effect of the action or inaction that's been made by the Board or by staff that's given rise to the dispute. And the proposal which mirrors what was proposed in the last public comment period and what has been included in the interim rules that are currently in place is that it's 120 days from when the claimant becomes aware or reasonably should have become aware of that material effect of the action or inaction.

And again, this a recap but I think to the extent that we've reviewed the public comment input, it was very much in favor of that 120-day period as being more suitable than the shorter period that had previously been proposed. And I think generally on our calls, we haven't had anyone particularly calling for this to be a longer time period. So obviously, nothing is fixed until it's all fixed, but I think we generally have been comfortable with that 120-day period.

And I just noted as a reminder for us all that the wording in the italics is taken from the interim rules, and it's also taken from the bylaws. It reflects bylaws language. So, in particular, one of the tasks for this group was to put together rules that deal with the time period from the action or inaction giving rise to the dispute. And the reference to the material

effect of the action comes from the definition of what a claimant is in the bylaws again.

And I think my understanding of that ... And I think, certainly, if others feel that's incorrect, we should certainly explore it at some point. But my understanding is that this is referring to the fact that it's not just the fact that the climate has to become aware of the action or the inaction itself, but it has to become aware of the impact and the damage that it has on them personally which then makes them eligible to be a claimant. And so, that's I think why that particular language is important and, as I said, that's already captured in the interim rules that we're all working from.

And then Prong 2, again, this is just a recap. This the concept of the repose language that, in any event, the time for filing should be no more than a period of months. And we've been talking about either 24 or 36 months from the date of the action or inaction of the Board or Org. And so, that is less about actual or presumptive knowledge of the claimant or indeed less about when they personally are impacted but sets a sort of outer time limit for bringing an IRP claim.

And as we know, that second prong is subject to the safety valve language that Liz and Sam are working on at the moment. And my proposal had been that for this Prong 2, that date of the action or inaction, it's important that we know when that time period starts to run from. And so, my proposal or my suggestion had been that it should run from the date of publication on the ICANN website.

And my reason for proposing that was, to my mind at least, that gave everyone equal opportunity to be aware of it rather than time

potentially running from an act which might not have been publicized, which may only be known to some people or indeed, in theory, might be known to no one.

And so, I felt that from publication on the ICANN website gave us a good fixed starting point. However, I will note here that Mike Rodenbaugh has expressed some concern about that. In particular, because the date of publication is basically something that is within the control of ICANN, inevitably, because it's their website and so outside of the control of any potential claimant.

And it may be something that ... Although in theory, something may be published on the ICANN website, we do all, I think, probably have good experience of how difficult it can be to find things. I mean, this wasn't particularly what I was proposing we covered on this call, but I think since Mike has raised it and it's on this first page of the proposal, I think it is a good time to for us to explore whether there's a better option than that. And, obviously, if Mike wants to expand on his e-mail, he could certainly feel free.

But in the meantime, I've got a whole bunch of hands. So, that's great. So, Malcolm first.

MALCOLM HUTTY:

Thank you, Susan. And good evening, everyone. A very short comment. I would have thought a bigger problem with the idea of basing the time [inaudible] something is published on the website that it may never be published on the website because many things are appealable which are not even Board decisions and are not going to be placed on the website.

SUSAN PAYNE: Yes. Thanks, Malcolm. I guess in making that proposal, my expectation was that things would have to be published on the website. But again, something we will have to explore if we can find a better solution.

Sam.

MALCOLM HUTTY: That's the old system, Susan.

SUSAN PAYNE: Sorry, what do you mean? That's the old system.

MALCOLM HUTTY: Well, when the subject matter for a dispute was a Board action under the previous bylaws. But now it's not a Board action. Now it could be even something that a member of staff did at a low level. I think I'll defer now to Sam because Sam, I'm sure, will be able to keep us up.

SUSAN PAYNE: Yeah, thanks. Thanks, Malcolm. Sam.

SAM EISNER: Thank, Susan. Thanks, Malcolm. As Malcolm and I have experienced before, there are times when we say the exact same thing. And today is one of them because, clearly, the old version of the time to file was based purely on Board action, as Malcolm noted.

And now that we've moved to also having staff action as part of it, I agree with him that a posting on the website probably is not a practical solution for embedding in the rule. I think it's one of those things that we can take into account as we're looking at language. And since we're in the middle of drafting anyway, we can see if there's maybe some possibilities that we could suggest for consideration by the group as to what might be some level of an objective measure. I don't know if we'll achieve that, but we'll take a look and see what we can do.

I do think that we have some concerns just with the reading of Mike's e-mail earlier today suggesting that ICANN then has an obligation to provide affirmative notice to those who are directly impacted by actions. I'm not sure how that could always be achieved. ICANN's not always in a position to know who would be a directly impacted party. If it's about a gTLD application action or something, that party should already got notice of it. If it's an action that the Board takes ...

There are many people who could be interested and feel that they're impacted, so I think it's both over inclusive and under inclusive. But really, it's kind of an impractical thing for us to do. I don't really understand how we would achieve that, and there are many things that you would time actions from or see that are already the subject of direct discussion with ...

You know, if it's like an application-based thing where we're already talking to the people, we're already giving them notice that something happened with their application, for example. So, just to keep in mind that ... I'm not sure that that's a practical solution for it either.

SUSAN PAYNE: Thanks, Sam. Flip.

FLIP PETILLION: Thank you, Susan. Actually, I liked the suggestion that you have made, and I think it makes sense. And sometimes it's good to stick to an old-fashioned way of publication. But we can fine-tune it. We can make it better. I think we should actually have a dedicated page where there is no excuse. It's a page. It's like the official ICANN Gazette where decisions have to be published. If they are not published there, well then, they are actually not communicated to the community. And if they are published there, they are supposed to be known by the community. A dedicated ICANN page. How vast the website of ICANN may be. A dedicated page will solve that issue.

But what we should add is ask and require from ICANN that whatever decision is made, it is published within a reasonable period of time and people should not actually wait until somebody at ICANN has time and is willing to do it. It should simply be done. And maybe some time, effort, and money should be invested in a proper publication on a dedicated page or section of the website of ICANN. Thank you, Susan.

So, to stick to my first comment, I liked your suggestion and I don't think we have to abolish it. We have to actually make it better. Thank you.

SUSAN PAYNE: Okay. Thanks, Flip. David.

DAVID MCAULEY:

Thanks, Susan. I tend to think the idea that Mike had in his e-mail and that Flip just spoke about, about an official Gazette, is probably not a bad one. If it could be created to list decisions that are made, anything on it would be considered published as of the date of publication. But that wouldn't cover all possible actions that could lead to an IRP. Malcolm made a good point.

I mean, ICANN must take thousands and thousands of actions, even little ones—denying somebody funding to attend an ICANN meeting. Who knows? Somebody might get torqued off and bring an IRP. You can't catalog all of these things. And so, what I would suggest is that the standard would simply be when the action becomes public. And then it becomes a question of fact. And that's something the panel can deal with.

For instance, we're going to talk later and slide four about INTA's comment that "should have known" is not a good standard because it's not precise. I would disagree with that. It creates a question of fact, and a question of fact is something that a panel can deal with. It's something that they should be able to deal with. So, I have no objection to an official gazette. I wouldn't want to use the Federal Register. People outside the United States should not have to read that. But there's much more, and it's not going to capture everything. Thank you.

SUSAN PAYNE:

Thanks, David. And if Nigel will just bear with me, I'll just quickly note the comment Sam has made in the chat which is just that she's not sure

that we're able to impact ICANN's operations in that way as to basically be calling for some kind of an official, dedicated digest page. So, that's, I guess, more of a practical matter and perhaps a question of remit. But perhaps at a minimum we might want to explore, if we were to make a recommendation to that effect, whether it could be carried forward.

But anyway, turning back to Nigel in the queue. Thanks for your patience.

NIGEL ROBERTS:

That's no problem. In fact, David has actually, almost word for word, made the point that I was going to make. There's nothing wrong with the idea of having a central place for publishing important decisions akin to a gazette officialis, they have it here. But ICANN takes hundreds of decisions, thousands of decisions, all of which could potentially give rise to a claim under this process, and requiring every single decision ICANN makes to be published in that way would be disproportionate and impractical. Therefore, I would not like to limit it in that way. It's a matter of fact, as David says. Thanks.

SUSAN PAYNE:

Thanks, Nigel. Malcolm.

MALCOLM HUTTY:

Yes. I'd like to support Sam's comment on scope here. Whatever the merits of publishing something in a gazette like this, I think they're for others to look at. We need to remember that we're here to write rules and procure for the IRP. The issue on the table is how long after

becoming aware, or you ought to have been aware, of a cause for claim should you have to file it? That's the only issue on the table. To go into requiring ICANN to create a gazette or something like that is beyond our authority, whatever its merits.

SUSAN PAYNE:

Yeah. Thanks, Malcolm. So, hearing what you all say, I guess I just have a question back for you, though, which is, if it's merely a question of some time period of months—24 or 36—from the date of the action or inaction. If that effectively runs from when that action becomes public, that seems quite imprecise, particularly given that this is setting the cutoff period for bringing an IRP. Because this isn't about when the claimant became aware at all. This about the outside length of time from the decision for anyone to be able to bring an IRP.

And I hear what you all are saying about publication. I'm completely in agreement, but at the same time are we not then creating a scenario where a party doesn't know if they're out of time, and so they have to go to the trouble of bringing a claim only to discover they're out of time. Perhaps we can fix that in some other way, but I'm posing it to you all for further thoughts.

Nigel.

NIGEL ROBERTS:

No, that's an old hand.

SUSAN PAYNE: No worries. So, David, then.

DAVID MCAULEY: Thanks, Susan. I think Flip beat me to it, though.

SUSAN PAYNE: Okay. I have you first, but I'm absolutely fine. If you want to see to Flip, it's entirely up to you.

DAVID MCAULEY: Well, I'll go quickly. I think you make a very valid point, Susan, but I think it's actually something where we should say, "Let's not have the perfect be the enemy of the good." And I frankly expect that statute of limitations or time barring is probably very infrequent in an IRP. My guess is that people that are bringing IRPs are sort of immediately effective. They bring some kind of a reconsideration request. The item gets into the process pretty quickly. If we have a standard like "sufficiently public" or something like that, I really think the IRP can [inaudible]. So, that's my comment. Thank you.

SUSAN PAYNE: Thanks, David. Flip.

FLIP PETILLION: Thank you, Susan. I think the solution will probably be somewhere in a combination of a publication of important decisions and the possibility

within a certain time period for people to react, to act. That's the first comment I would like to make.

The second is that we are talking about IRPs. You don't launch or initiate and IRP procedure lightly. IRPs really relate to important decisions. These are not actions or inactions that people would not happen to see or be aware of. It's clearly something about people or following, focusing. It's on their agenda. So, I am sympathetic towards the idea that not everything can be seen, but I'm sure that people in the community who are sensitive to some actions or inactions that are underway, they will be aware of.

But the most important part of my intervention is, I think, that we need to think of a combination. There is a French expression, and you probably have exactly the same in English, which says, "[inaudible]." If we try to find the perfect solution, we will probably never find it. And so, we will have to, at the end, feel comfortable with some mid-solution which is a combination. Thank you.

SUSAN PAYNE:

Thank you, Flip. And lovely bird noises going on behind you. Sam.

SAM EISNER:

Thanks. I'm sorry. I'm dealing with an Internet outage, and that point I wanted to make has ... Oh, now I remember. I think that when we go back to the idea of the safety valve and we have this action—so, we know that the timeframe for someone to bring an IRP is going to be

longer than 12 months. Right? So, it's going to be somewhere, likely, 24 to 36 months. And then we have the ability ...

So, that the time frame from the action. And then we have 120 days from someone seeing how they were harmed by the action. And so, I would imagine that if there's an issue that ICANN did something to shield awareness of the decision or to not let people know that it happened or to keep that part from the public, that would be something that the safety valve would be there for.

And so, I think seeing if we can identify some objective standards from which you calculate that 24/36 months might make sense if there's a way to put it into practice. But I think that the mixture of it's not just the 24 to 36 months, but it's also that you have 120-day window from learning of the impact. And we can see if we have language in there like the "reasonably should have known".

So, then it comes to the question of why didn't someone know earlier? And then, if ICANN did something that made it hard for someone to understand what was happening, then maybe that's one of those perfect uses of the safety valve—if someone would otherwise be precluded. So, I think we might already have kind of all of the number of things that we need in here to make this work in a really meaningful way, but we definitely will look at this more as we're crafting the language, too.

SUSAN PAYNE:

Okay. Thanks, Sam. And I'm just noting Mike comments in the chat. He's asking if Prong 2 is meaningless if publication on ICANN's website were

to equate to “reasonably should have known”. Mike, I’m going to give you my answer to that. I don't know that ... Others may disagree, and so it would be helpful if people do, for them to raise it.

But my answer to that would be that Prong 1 is not just “reasonably should have known” about the action or the inaction. But it's also about the material effect of that and the harm to the individual claimant. So, you might know of a decision, but until you're harmed by it, you're not actually eligible to be a claimant. And so, I think that's where the two different prongs come in.

Malcolm is saying “reasonably should have known” is fact specific and for the panel to determine. That's also a good point in that, yes, if it's published on the website, for example, yes, you may maybe should have known. But if something was sort of hidden away on the website, I don't think we can presume that in all cases someone ought to be assumed to know something that's published, everything that's published on ICANN’s website necessarily.

Okay. All right. I can see Flip’s hand and Sam’s hand, but I think they're both old ones. Is that the case? Sam, is that a new hand? No, old one. Super.

Okay. Well, I think that's been a useful discussion. Perhaps let's leave this for the present purposes with Sam and Liz for whilst they're doing their drafting exercise on the safety valve. And we can come back to this when we have that language. Okay. Brenda, can we go on to the next page? Great.

So, this was this was really the sort of meat of what I was expecting we'd spend our time talking about. And I'll run through these next two slides, I think, completely before we circle back and start discussing it if that is okay with everyone. And essentially, this the straw person proposal that I'm suggesting in terms of the tolling of time periods or essentially the postponing of time starting to run, if you like, to take into account other accountability mechanisms.

And so, for the Cooperative Engagement Process, or the CEP, the proposal would be that anytime that is spent in a Cooperative Engagement Process should toll the time for filing. And so, that would mean, therefore, that whether there's been a CEP then the time for filing the IRP would begin to run. I've suggested from the date that one of the parties to that CEP gives notice to the other, that it's terminating it and, therefore, that the CEP is coming to an end.

There may be some scenarios here that I haven't thought of so, I certainly would welcome people spotting anything I missed on that. But I did have a question which is whether we think that this same point really, should this run instead for publication on the ICANN website, that the CEP has terminated in order for third parties, particularly someone who might want to be an intervener to be aware of the timing. So, that's sort of the same point as we've been talking about previously.

But moving on, as I said, just to run through the four of them. The next accountability mechanism would be the Request for Reconsideration. And the proposal would be that any time that's been spent seeking a reconsideration on matters that are directly related to the same issue in dispute would again toll the time period. And so, the time for filing of

the IRP would therefore begin to run from the publication of the Board decision on the recommendation of the BAMC, or the Board Accountability Mechanisms Committee. Or the BAMC summarily dismissing the Request for Reconsideration. So, the Request for Reconsideration never goes further in the process.

We can talk about whether it should be running from publication or whether it should be running from some other date in this case because there's a Reconsideration Request brought by the party. They will be notified of the outcome. And so, certainly from their perspective, it may be more appropriate that we have the time running from the notification to then. But, again, I was trying to take into account the knowledge by third parties. Again, it's the same issue as we've just been discussing.

Flip, if you'll just quickly bear with me, I will just go on to the next page and do the other two accountability mechanisms. And then we can come back.

FLIP PETILLION: Sure.

SUSAN PAYNE: So, Brenda, if you wouldn't mind just going to page three. Okay, the third one was a complaint to the Ombudsman. Again, we did talk about this. There had been, I think, some uncertainty about whether the Ombuds would have a sort of appropriate jurisdiction in the kinds of complaints

that would be subject to an IRP. But I think it's certainly at least possible that they do.

And so, again, my suggestion would be that any time that's spent pursuing an Ombuds complaints should toll the timing. But since there's no specific time to bring a complaint before the Ombudsman or Ombudsperson, that did give me some concern because it meant that if there's no deadline for bringing such a complaint, then how do you know whether there's going to be one you know? And it could be brought at the last possible moment, thereby starting the clock running all over again.

But in the Ombudsman framework, there's a reference to the Ombuds having the discretion to decline to consider something that's brought more than 60 days after the relevant event. And so, my suggestion was that we took advantage of that same 60 days and just said that if the Ombuds complaint is going to toll things, then it ought to have been filed in that timely manner. And that, then, time would run from either the date of the Ombuds' declining jurisdiction or giving notice that they didn't feel that they had jurisdiction over the particular complaint or their decision or determination or recommendation or whatever it is.

And I did make a note that I'm not sufficiently familiar with the Ombuds process, so I was hoping for some extra guidance on that from Sam and Liz. And then finally, just to run through the final one, the document information disclosure procedure request—I think that's the right acronym—DIDP. And again, we talked about this and it certainly was something on which some responders in the public comment, notably

the Registries Stakeholder Group—and I think also the IPC—had suggested that this should also be a process that halted the time period.

And again, there's no specific time limit for bringing a DIDP. Obviously, if one is looking to get disclosure of relevant documents, then the earlier one does that the better, arguably. But, again, I could see a scenario where you might wait until, say, 119 of your 120-day deadline and then file DIDP request and thereby set the clocks running again.

And so, I was proposing, again, building off of what we did for the Ombuds that we perhaps suggest that if the DIDP request is going to toll the time period, that it should be something which is made within 60 days of the particular action or inaction that this DIDP request relates to.

And my suggestion had been that we just limit this to one document request, but I did note that the Registries Stakeholder Group in their comments had proposed that in relation to the Prong 1 time limit, it should be two DIDP requests. And they had also suggested two DIDP requests if the repose is 24 months long. So, I think that's an area, again, for us to discuss.

Okay. So, sorry, that's a really quick whistle stop tour. And I can see a few hands. I can also see that there are some comments in the chat, but on the basis that Flip put his hand up when we were on the previous slide, I'm going to ask Brenda if we could go back to slide two and I'll give the mic to flip.

FLIP PETILLION:

Thank you, Susan. Yeah, you're right. Actually, I made an observation for myself and I saw this slide, not having looked at the next one. Although I had previously, but I forgot to put this into context.

I have a couple of observations. Because this becomes quite complex/technical, I think it's important that we put the RFR at the right chronological place, which is actually top. I think it's important that we put the Ombuds complaint at the right position which is, for me, this a side thing. I don't consider this an important step, definitely not for an IRP which is what we are talking about.

And then, before entering into the impact of timing for these specific mechanisms, I think we will need to—and I don't try to be perfect here because I would typically contradict myself with what I said 10 minutes ago—but I think it's important that we know what CEP is, who runs it, what it is about. Are we happy with it? I think we really need to hear the practitioners who have been involved in it. And before really thinking of what the impact is of timing, I think we really need to talk about what the CEP really is, what it is meant to be and what it should be.

And also, I think we should find a mechanism that allows both parties in the CEP to feel equal. And I don't think that's the case for the moment. I think a lot depends on what is the inputs by a possible complainant, and a lot is actually controlled by the other side which is ICANN Legal which, as I said previously, doesn't really come back with feedback and uses the CEP for hearing out the possible complainant in an IRP.

I'm very sorry to raise all this, to make it probably more complex. But before talking about timing, we need to really agree on what the concepts are that we are dealing with here. Thank you.

SUSAN PAYNE:

Thanks, Flip. And noting, of course, that another of our tasks will be to work on new rules for this CEP. So, I think it's possible that some of your concerns hopefully might get addressed by that process. At the very least, something about the equality of the parties, I think, perhaps is something we could seek to work on when we're working on those rules, I hope. But your points are very well noted.

David.

DAVID MCAULEY:

Thank you, Susan. I have a couple of points. One is, first, thank you for this proposal. It's thoughtful and it's good food for thought. So, thanks for that.

Secondly, Sam made the point that I was going to make about one of these things in the chat. That is, I don't see the clock as being reset. I like the idea of tolling the time within which a filing has to be made for the RFR, for the CEP, and for DIDP requests. I'll talk about Ombudsmen in just a moment. But I think that the tolling should be for an exact period of time.

The phrase you use on the slides is a good one. "Any time spent" in CEP or "any time spent" in RFR, etc. And I think it needs to have a clearly defined beginning that we can recognize and that the panel can

ascertain. And it has to have a clearly defined end. And think those responsibilities to define those make them clear. That's on us, and so I think that's our role.

I'm coming at this as I typically do. I'm interested in making sure that disputes are heard quickly. I think they're best heard when they're heard quickly. The facts and circumstances are more fresh. And I just don't see the point in restarting the clock. I mean, there is a period of time someone has, and the delay should simply be for "any time spent" in the process.

The second thing I would say is that I thought Flip some very good points. First, on the Ombudsperson's office. And I don't mean this as criticism, but I don't think the Ombudsperson function arises to the request for—in nature or [in kind]—to a Request for Reconsideration or a CEP. Those latter two things have a docket. They have momentum. They have an agenda and they have staff moving them forward. I know there are critics in the community that say, for instance, RFR is too slow, etc. I'm not among those critics. I know the ICANN Board has loads of work. They almost have full-time jobs.

In my view, RFRs are treated appropriately. They do move forward. And I think CEP is probably the same way. But I think Flip's point on CEP is a good one. It would be good to hear from practitioners about how CEP works, how it's handled. How can we develop our rules and what impact would they have on tolling? I think that makes sense.

So, I'm okay. I mean, my personal view is great for tolling on CEP, RFR, and DIDP. But it should be limited to the time within their boundaries,

within which that process was underway. And the Ombudsperson—that’s a great office, but I don't think it has a role in what we're discussing here. Thank you.

SUSAN PAYNE:

Thanks, Flip. And noting, of course, that another of our tasks will be to work on new rules for this CEP. So, I think it’s possible that some of your concerns hopefully might get addressed by that process. At the very least, something about the equality of the parties, I think, perhaps is something we could seek to work on when we're working on those rules, I hope. But your points are very well noted.

David.

DAVID MCAULEY:

Thank you, Susan. I have a couple of points. One is, first, thank you for this proposal. It's thoughtful and it's good food for thought. So, thanks for that.

Secondly, Sam made the point that I was going to make about one of these things in the chat. That is, I don't see the clock as being reset. I like the idea of tolling the time within which a filing has to be made for the RFR, for the CEP, and for DIDP requests. I’ll talk about Ombudsmen in just a moment. But I think that the tolling should be for an exact period of time.

The phrase you use on the slides is a good one. “Any time spent” in CEP or “any time spent” in RFR, etc. And I think it needs to have a clearly defined beginning that we can recognize and that the panel can

ascertain. And it has to have a clearly defined end. And think those responsibilities to define those make them clear. That's on us, and so I think that's our role.

I'm coming at this as I typically do. I'm interested in making sure that disputes are heard quickly. I think they're best heard when they're heard quickly. The facts and circumstances are more fresh. And I just don't see the point in restarting the clock. I mean, there is a period of time someone has, and the delay should simply be for "any time spent" in the process.

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within which that process was underway. And the Ombudsperson—that's a great office, but I don't think it has a role in what we're discussing here. Thank you.

SUSAN PAYNE:

Thanks, David. I won't respond. I'll just move on to Kristina. Thank you.

KRISTINA ROSETTE:

Hi. A few points. I agree a little bit with David and a little bit with Flip. I do think that, in the interest of trying to come up with a tolling—not mechanism, but kind of timeframes. In the interest of consistency, I do think that we should try to develop something that pertains to CEP. But I also take Flip's point that because we are charged with reviewing and making recommendations on CEP itself, that we may want to revisit that. So, I would just suggest that we just make a note to ourselves that when we do complete that work on CEP that we would come back and just ensure that what we've identified for tolling is consistent.

I am going to disagree, actually, with both Flip and David with regard to the Ombudsperson. And I will note, and it's on the blog if anyone wants to read it. But in connection, Amazon did in fact file an Ombuds complaint that was a follow-on [and a] direct consequence from one of the decisions in the Request for Reconsideration that it had filed regarding the .amazon application. So, I do think that mechanism has some value and utility here, and I think in the interest of completeness, that we should include it in this process.

And I also agree that the time limits should be tolled, as opposed to reset, picking up on David's point. But I do then think it's going to be important that there be a mechanism whereby the potential complainant has an opportunity along the way to check in with ICANN and say, "According to our clock, we have X number of days left. Is this what you have?"

Because what you don't want to have is a situation in which the time limit for filing is within a week or so and there turns out to be a dispute about how much time is left. That, I think, frankly, would be inevitable if there isn't some kind of requirements somehow. And maybe it would go in as [part of the] CEP. But I do think that the framework that you've suggested, Susan, is really good starting point. Thanks very much.

SUSAN PAYNE: Thanks, Kristina. Yeah, and David's supporting your point of checking in on the status of the clock in the chat.

Kavouss.

KAVOUSS ARASTEH: Susan, are you giving me the floor?

SUSAN PAYNE: Yes, I did. Sorry.

KAVOUSS ARASTEH: Yes.

SUSAN PAYNE: Thank you.

KAVOUSS ARESTEH: No problem. I think I have seen since a few meetings, new elements—CEP, RFP—time and time. Do we have a list of all this time that we need to put on a paper, look at them to see which are additive to each other and which are not additive? Coincident. Because at the end, we will come up to a total time. We started to have some time before, and now they have a new time added starting from the time of the publication of the Board decision, from the time that the parties be aware that his or her or its interest has been affected. And now we have more time. The CEP, any time on that is spent.

So first, we need to have a list of all this time and identify which one of the other coincidences, which other additive or not additive. And then to see whether we have knowledge of all this time spent, at least to come up with something or we have some average or we have some case used or use case. Because at the end of the day, we need to come up with a total time. Do we have that?

Thank you.

SUSAN PAYNE: Thanks, Kavouss. And I Liz's hand, but I will just quickly answer to the best of my ability. Prior to a previous call—and I circulated it earlier today—I attempted to work out the timings for these various

mechanisms. And, unfortunately, they are not all very clear. In some cases, there is a sort of outer limit of ...

So, with something like the Request for Reconsideration, there is an expectation that the Board, where possible, will make its decision within a certain number of days of the filing of the Request for Reconsideration. But even then, it is not an absolute outside time limit. It's only a kind of expected good practice. And I would say it's not always possible for the Board to meet that. And for some of them, there really is no clear time at all.

I mentioned, in particular, the Ombuds case where there is no specific deadline for when you have to bring such an action or for how long it takes, I think. I'm sure Liz can answer this better than I can, but I think this information is simply not there. My suggestion, therefore, was based more on the actual facts of the case so that if a particular claimant took advantage of a particular mechanism and it caused a delay of six months, then that would be the period for them. But that does not mean it would be the period for anyone else, necessarily.

Again, Liz has her hand up and I know it was to answer something else. But she may well also have some more expertise on this area, too. So, I'll turn the mic over to Liz.

KAVOUSS ARASTEH: I have a follow up question.

SUSAN PAYNE: Okay. Liz, is that okay with you?

LIZ LE: Yes, absolutely.

KAVOUSS ARASTEH: Yes. I said that may I have a follow up question?

SUSAN PAYNE: Yes, please do.

KAVOUSS ARASTEH: Yes. If I have that, for each case all of these different times are not the same. Certainly, they are not the same. And still, I am in a way of thinking that some of these times are coincident fully, that in overlapping or partly overlapping, they are not sequential to each other. So, they are not additive to each other. What we could do, if you want to put all of this, we need to have some sort of guesstimate from the ... if there is any use case. And then, to the best of our understanding and information available, we put some margin as the total amount of this time that we can guess. And we add that to the timing that we have and then put it into practice to see what happens.

You, perhaps, may have already understood my sense of working. It's always thinking of implementation, not theory. Theory may be good, but implementation is very difficult. And still, I am thinking of the third party, that all of these things may not end up adversely affecting the rights of the third party or may create a sort of instability of the situation. I don't know whom we are thinking of. Still, I don't know.

Maybe we are thinking of one category of users of this process, but not other categories. I know the overwhelming majority of participants at this meeting are belonging to that one category but not to other categories. That his or her rights may be impacted by all of these things—the degree of total instability, and so on and so forth.

At the end, you may come up with 36 months. Maybe we are advocating that 36 months, putting all this together. But for the time being, I don't want to make any conclusion. But I would like to know, to clearly know, whether these times are additive or not additive, whether they are coincident, whether they are overlapping, not overlapping, and whether we have any information at least as a guesstimate—even not estimate, guess of estimation—for this. And then put them together to see whether we have some idea of the total time. And then to see whether this total time to be added to the other time and to have a total period in which we could grant to the claimant to use this situation.

We are now working more and more in theory and we don't have any idea of a practical case and, in fact, its implementation. I'm sorry to raise this question, but that is something that we have to reply to this. And we have to defend from [inaudible]. Thank you.

SUSAN PAYNE:

Thanks, Chris.

LIZ LE:

Thanks, Suzanne. This is Liz Le with ICANN Org for the record. So, you asked a question from a practitioner standpoint about tolling which I'd

like to address. And then I also would like to address the point that Kavouss just raised about total time limit.

So, from what currently has been done with respect to tolling for any accountability mechanism, really it has been ... We currently do toll for CEPs, but keep in mind that the CEP rules were established under the old bylaws. And I know that this this group of tasked, also, with reviewing the CEP. Although that's probably different than what we're talking about here, and that we should discuss about the fact that we shouldn't overlap the two except to the point that Kristina raised, which just to make sure at the end that we sync up our areas and make sure that everything's cohesive. Currently, I think the way the CEP tolling works is that you toll for the time in which—the duration of the CEP.

So, aside from CEP, there isn't really any other formal tolling process for the other accountability mechanisms except to say that during the new gTLD, last round, there was tolling done for accountability mechanisms that were filed with respect to the any applications relating to the last round so that you would not ...

Basically, if a party initiated a Request for Reconsideration or initiated a CEP or an IRP, that would toll—I wouldn't say toll—but it would stop, basically, the processing of that contention set. So, it's not tolling anything, but it doesn't move anything forward so that it basically gives people that opportunity for the accountability mechanism to see itself through.

I think the comment that had been raised about the Ombudsman, as Sam flagged in the chat, there are some concerns that we have about

how we would go about tolling for the Ombudsman because the Ombudsman process itself is a confidential process. So, unless the party or the Ombudsman, as part of his investigation, needed to disclose somehow that there's an Ombudsman investigation undergoing with respect to a certain matter or a certain party, there is no way that ICANN Org would have an ability to know that there's been an Ombudsman complaint that has been filed. So, I'm not really sure how we would go about getting notice and that a party, then, can be aware that there's an Ombudsman complaint going on that we could apply such a tolling [role].

So, to Kavouss's point—and I think it's a very important one—tolling does have its benefits. There is a concern that we should look at, which is the idea of gamesmanship. So, Kavouss's point of making sure that there's a total time is one that I think we should really look at because we saw, doing the last round for the New gTLD Program, a lot of gamesmanship going on because things would pause, contention sets would be placed on hold whenever there was an accountability mechanism filed.

And so, in this sense, I want to caution that there could be gamesmanship if we start applying tolling without some kind of a final outer point to say how long something can be tolled because this can go on repeatedly.

Someone can file a Reconsideration Request and then file a DIDP and then file a Reconsideration Request on top of the DIDP; and then not like the Reconsideration Request response or outcome, then file CEP and

then do an IRP. So, you can see how it's a continuous thing, and that could end up tolling for an indefinite period time.

So, I hope that provides some kind of insight from a practitioner standpoint how the timing, tolling, and accountability mechanism that's currently in play right now.

SUSAN PAYNE:

Thanks, Liz. And thanks to all of you for your suggestions and feedback so far. So, what I'm hearing from Kavouss, if I've followed correctly, and also from Liz is that, I think, in respect of Prong 2, the reposed time period, I think I'm hearing that you favor some kind of setting of that time period for the repose that effectively takes into account or allows for a party to have had time to pursue reasonable other accountability mechanisms. I think that's what I'm hearing.

LIZ LE:

I'm sorry, Susan. Could you repeat that part?

SUSAN PAYNE:

I'm getting the impression from you—and I may have misunderstood—but I'm getting the impression from you and from what Kavouss has said that, in relation to Prong 2 (the repose), you feel that a more sort of practical solution is to set some kind of outer of time limit. And obviously, the repose itself is an outer time limit. So, it sounds to me like perhaps a suggestion is that when we're setting whatever the time period is for the repose, we could potentially build in adequate time for

a reasonable pursuit of other accountability mechanisms. And you can react to that in a moment, and indeed it looks as though you are.

But just to finish. Where I'm less clear, however, is the intersection between these other accountability mechanisms and the time limit for Prong 1 because, as David has rightly pointed out, in very many cases, the repose itself is not really the time period that the claimant is working to. They're working to the Prong 1 time period of when they have knowledge or ought to have had knowledge of being impacted by the decision in question or the action in question.

And so, that's a much shorter time period. That's 120 days. That time is almost certainly eaten up by these other accountability mechanisms. And so, to my mind, the tolling of the time limits has to reply ...

My thought was that the tolling of the time periods had to apply to Prong 1 and Prong 2. But perhaps it's only applicable to Prong 1, and we instead work out what we feel an outer repose time limit is that allows for adequate pursuit of other mechanisms. Just a suggestion to elicit thoughts from people. I'm not wedded to this at all. It's a reaction to what I've been hearing.

Liz.

LIZ LE:

Hey, Susan. I wanted to clarify the outer limit that I was speaking of. It wasn't with respect to the outer limit for the total time to file an IRP. What I intended to mean is that if we are going to be talking about tolling and there is the potential to stack different tolling periods—one

on top of another—depending on the accountability mechanisms that may be invoked both by one party relating to the same subject matter.

What I was suggesting is that if we're looking at tolling, we should look at an outer limit on how long something can be tolled so that this has not just become an endless years and years of tolling on one matter. Which is also what I understood the point Kavouss was raising, but I just was expressing concern that we don't endlessly toll a matter because of repeated mechanisms that may be invoked by one party. I hope that's clear.

SUSAN PAYNE:

Yes. Thank you. Thanks for the clarification. Okay, I'm just noticing in the chat that there's quite a bit in the chat. Let me see where we've got to.

Kristina has commented about the Ombuds complaint, "Tolling could be calculated after the fact, and if the person/entity filing the Ombuds complaint wanted to, they could waive that confidentiality."

I think that's a reference to the comment Liz was making about how, because the Ombuds complaint is confidential, how would anyone know that it was underway and therefore the time should toll? And thank you for that, Kristina. I think that makes sense. If a party were to be seeking to rely on the time they spent in a Ombuds complaint to toll the time period, then it seems to me to be inherent on them to be waving that confidentiality if they want to have the benefit of that tolling.

Yes. And Liz has confirmed that, yes, the claimant can waive that confidentiality. And then Kristina is just, again, commenting, I think, on

some of Liz's comments that, "What one person characterizes as gamesmanship could be characterized by another person as an effort to seek resolution without having to file an IRP."

And I think Mike Rodenbaugh is agreeing with that and he's commenting that that ICANN has just closed a CEP that lasted for eight years, and therefore he doesn't think it's practical to put an outside limit on that. I guess that's something for us to discuss and agree.

I mean, on the one hand, I think an outer limit would address the concerns that that Liz has raised about multiple sequential accountability mechanisms being filed, which might certainly be perceived from the outside as being done to kind of drag out the complaint at infinitum. Versus the downside of putting the parties—both the complainant and ICANN—under pressure on something like a CEP (Cooperative Engagement Process) to bring it to an end perhaps sooner than they would have done because they're running out of time when, perhaps, the CEP, if allowed to run for longer, might have resulted in a resolution.

On the other hand, I mean, I'm not sure about the case Mike is referring to. But I suspect after those eight years, the IRP maybe still has been filed. It would be lovely to think that after eight years, the CEP did resolve the situation, but I suspect it didn't. So again, that's I think something that we will have to ...

Mike says, no, there wasn't a resolution. And so, in that sense, perhaps we want to find a balance so that we are not forcing the parties to forgo the opportunity to explore resolution. But equally, we're not allowing a

process to just simply drag on for years with ultimately no successful outcome.

Yes. And Liz is commenting that, yes, there have been claimants that have utilized accountability mechanisms as intended to resolve disputes, but there have also been claimants that have abused the accountability mechanism process for gamesmanship. Yeah.

Okay, so I have hands again. I'm not sure. Liz, is that a new hand?

LIZ LE: Oh, I'm sorry. Old hand.

SUSAN PAYNE: Okay. So, Kavouss, then.

KAVOUSS ARASTEH: Yes, Susan. I think the way we are progressing is bringing several new elements which were not even in the public comments. When I look to the result of that public comment, I have various time frames. The maximum of that is 36 months. I was shocked when I heard somebody saying that there has been a recent CEP of eight years. I don't know how many cases you have like that. Do we have something of two months, have another six months, then we have another four years and then we have eight years, and so on? I think we are going far beyond what we expected to do.

We were expected to come up with a result of an average of the time submitted or proposed in the public comments, the maximum of which is 36 months. What I'm suggesting is not to ignore CEP or RFR or any other elements, but to put a cap on that, a cap which is an average of use cases that we have, and to see whether we're exceeding a certain period.

First of all, we are not expected to exceed 36 months. Secondly, we are not expected to go below the 12 months. So, our area is between one year and three years. What I'm suggesting is that you discuss all of this, but first of all you put some time limits for bringing these new elements and then try to have some average, and put that average as a margin to the initial 12 months. You may come to three years. You may come to two years. But not expanding the situation.

In other words, the oversight team should not become a Ph.D. course that may take years. We have to have some timing to see what is the maximum timing that we should have some results. We should not continue and open and open the discussions without having any clear understanding or knowledge of what we are talking about. I didn't know that we had the CEP of such a long period, but some people have examples.

My third request is that you, sometime next or next to the next meeting, first establish a deadline to complete this work. Everywhere we have these deadlines. I am attending IGO and deadline is November this year. We had the Accountability Phase 1 or Phase 2 and ICG, and so on and so forth. All of them, CWG, had a time frame. So, you need to establish time frame. And you need to have a work plan. What we have to achieve

at each group of meetings. Maybe we have the first three meetings. We have to achieve work plan one, paragraph one of work plan. Then paragraph two.

So, you have the work plan. You have to find and table all the subjects that we have discussed. And we have to [inaudible] to that. At the end of that, we should look for the total time that we have available. I don't think that we expect to work two more years on this one.

I have not seen any timeline from this group from this beginning after David McCauley gave it up to you. And you take it up very competently, and I'm not complaining at all. But I say that we need to have some time guide. [Maybe we work that]. What is our deadline to submit the result of this? And then, what is the work plan to achieve that deadline? And then, what are the topics with that work plan?

Now you have CEP. You have RFR. You might have other elements to add. Then we need to have something to give us some output. What I understand is that the key performance indicator of our work is very low. I said our work. I'm not saying your work. I'm not putting to the chair of this group. Our key performance indicator is very, very low. We have output, but we don't have outcome because our objective still is not clear. We don't have any goal. Nor do we have an objective. And nor do we have a plan to achieve that objective.

These are the things that we have to establish, although we meet 26 time per year. But I think there should be some end. Within one year, we have to finish. One and a half years, we have to finish. So, first discussing the deadline—definitive deadline to finish this work. Then you have

work plan. Then each work plan should have elements of that world plan associated with time. This is what I suggest to consider kindly. Thank you.

SUSAN PAYNE:

Okay. Thanks, Kavouss. And I'm afraid that with that, we have actually run out of time for this call. So, we'll reconvene in two weeks.

However, I would very much like people to continue sharing their thoughts on this by e-mail. And if we can make more progress between calls, that would be very beneficial. Thanks for your input, Kavouss. I will take that on board. Thanks.

Okay. Thank, everyone, for your participation. Have a good rest of day.

[END OF TRANSCRIPT]