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BRENDA BREWER:

Good day, everyone. Welcome to the IRP-IOT Meeting #73 on the 6<sup>th</sup> of July 2021 at 19:00 UTC. This meeting is recorded. Kindly state your name when speaking, for the record, and have your phones and microphones on mute when not speaking. Attendance is taken from Zoom participation.

And I'll turn the call over to Susan. Thank you.

SUSAN PAYNE:

Lovely. Thank you so much, Brenda. So hi, everyone. Thanks for joining the call. We've got a reasonable turnout, so I think we can feel confident that we've got sufficient to be making some progress. So as usual, let's start off with the review of the agenda. And first off, are there any updates to Statements of Interest that we need to note? Okay. I'm not hearing anyone. Yeah. Put something in the chat if you prefer, but I'll assume that there are none.

So in terms of the rest of the agenda, we'll circle back to the action items from the previous meeting. I'd like us to do a recap and continue our discussion on the other elements which could impact on timing, such as tolling. We'll do a quick review of the remaining items that we have for discussion in respect to the IRP rules. And then, I just noted in the agenda that our next meeting is scheduled to be at the 17:00 UTC slot on the 20<sup>th</sup> of July.

So first up, or rather an agenda Item #2 is the action items from the last meeting. And Sam and Liz are drafting us some language with respect to

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the repose, and particularly thinking about the safety valve that we've been discussing on previous calls. We don't have that yet. Not to put you on the spot, Sam, but are you able to give us any kind of update?

SAM EISNER:

Hi, Susan. Hi, everyone. Sorry for the delay in getting this to you. With the ICANN meeting, it kind of put a hiccup in a lot of our work, and we're trying to make sure that whatever we give you is something that ICANN would also be prepared to support going directly into the rules. We're working on a couple. We might be presenting some options, but I need to make sure that I have some internal signoff because what we don't want to do is present you with something that we later come back and say, "Oh, by the way, ICANN can't support this."

We understand there will still be discussion, and we'll have back and forth, but I think it's really important that whatever we give to the group is something that we would make sure that we were all comfortable standing behind, too, as a recommendation to the Board to go into the rules.

I'm working towards hopefully having something on your plates before we get to our next meeting, so I can conclude my internal signoff before people go away in August for vacations and all.

SUSAN PAYNE:

Brilliant. Thanks, Sam. Yeah, I think that we probably—or I know I was sort of optimistic about what could get progressed during the ICANN meeting. And then subsequently had to have a bit of a rethink. And so I

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completely understand. We'll obviously look forward to seeing that when we can, and hopefully we might have it for the next meeting.

All right. So we can move straight on then to Item #3 which is to continue the discussion on the tolling and other elements which impact on timing. And apologies for circulating it so late, but I had previously produced for the previous caller a sort of straw person on how we might apply the tolling for other accountability mechanisms. And just sort of a couple of hours ago, I finally managed to finish an update to that and revised it to take into account what we discussed on our previous call. And so I circulated that.

I'm not anticipating that people will have had time to read it, but I thought we could use that for the purposes of this call, and hopefully it can be a sort of framework for our discussion and we can see whether I've captured the mood of the group or whether there's anything that I've either mischaracterized or that people have given further thought to and want to make changes to.

So Brenda, would you be able to pull up the document that I attached to my e-mail just a bit earlier. It's the PowerPoint one which I can't remember what it's called, but it ...

BRENDA BREWER: One moment, please.

SUSAN PAYNE: Yeah. Do I need to find it ...?

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BRENDA BREWER:

Is that the one?

SUSAN PAYNE:

Hang on. Yeah, that one. Perfect. Okay. All right, so the first page is really, as it was before, it was sort of capturing what we've been talking about in terms of the time for filing. And this is essentially where Sam and Liz are currently working, but I think it's worth just sort of reflecting on what I've changed and, indeed, what I haven't changed,

I think someone on our last call asked where the terminology Prong 1 and Prong 2 came from. And to be honest, I don't recall, but I think it was someone else from this group when they'd suggested a proposal. And it's not official language. I think once we get into the rules, we're not going to be talking about Prong 1 and Prong 2. But I think for the purposes of our discussion, we generally have found it useful to think of it in those terms. So I have kept that terminology for now, but recognizing that this isn't the language that would be in the rules.

And the main update that I had made was just to capture some of the discussion that we'd had about when does time start running. And previously I'd been proposing a reference to publication on the ICANN website or something that.

And I think there was a reasonable amount of support, generally, for us recommending or suggesting some kind of an ICANN official gazette where major decisions could be published. And that was, I think, recognizing that that's not really within our remit. We're working on the rules. We can't direct ICANN to produce an official gazette or have an official page on its website where major decisions get published. But

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that doesn't, I don't think, prevent us from pointing out that if there were such a thing, we think it would be very beneficial and it would help the community at large when thinking about these issues of timing.

But we did also discuss the fact that not every decision that could be subject to an IRP challenge will get published on the ICANN website in that way. And so we can't rely on publication the website as being the sole starting point for the clock to run. And that's one of the things that Sam and Liz are pondering on and hopefully we'll be making some suggestion in relation to that as part of their safety valve language, which is the safety valve being consideration of the carveout of when there might be an exception to the concept of the repose.

Yeah. I'm sorry. I'm just quickly looking in the chat. Kurt is saying perhaps a gazette might fall under something like implementation advice or similar. And I think that makes that makes sense.

Becky, did you have a question or have Kurt's comments addressed yours? I'll assume the latter unless you want to take the mic. Okay. All right, anyway. So that was all on that, really. As I said, I just wanted to kind of capture the discussion that we've been having.

This first page isn't specifically about tolling, but I will just pause and see whether anyone has any comments or feels that I missed anything from our previous discussion in relation to this aspect.

David. Thank you.

DAVID MCAULEY:

Thank you, Susan. I thought your summary was excellent and I very much appreciate the point that you made that we can't give directions to ICANN to create a gazette that's not within our remit. And the best that we could do on those lines, as I think I heard you say it, would be to say, "We think this would be a good idea if, in fact, you want to think of something like that."

I raised my hand just because I think, consistent with last call—and I may be in the minority on this, I'm not so sure I support the gazette idea because to me there's a risk of confusion. To me the clock starts whenever the action takes place. That'll be harder to determine when the cause of action, obviously, is not an action but an action. But for most of the causes, there's going to be an action. And that's when the clock starts. And that may be a question, in fact, the panel's going to have to decide from time to time.

But if you create a gazette or a compilation of what's important, then it's going to get thrown in with things like logs and announcements. I sort like the idea that if it's an action by the Board, look at the resolutions.

So anyway, I'm just a voice of caution. And thank you. But I think the was great. Thank you.

SUSAN PAYNE:

Thanks, David. Just to react to that, not necessarily disagreeing with you, even. I completely agree that if we're requiring people to look at all sorts of things like blogs and news announcements and this and that and multiple different places, I think it could cause confusion. And I think that's why certainly a couple of people on the call like this notion of a

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kind of official gazette-style page, being a sort of single page where you know that if something's been published, it will be published there. Whether it's achievable, I'm not sure.

And I do agree that, as we discussed last time, not everything is going to be on there because all sorts of actions or inactions by staff in particular would never necessarily get published. I suspect you're right. The challenge is that if time runs from when that action or inaction happens, well then what if people don't know about it? Obviously, you'd to think that they knew about it within 24 or 36 months, which is the particular key. But that was the challenge, and I think that's an area where, if I recall correctly from our previous call where Sam and Liz are giving this some thought and see if they can suggest anything.

Otherwise, I think perhaps we will need to just become comfortable that whatever the period of repose is, that we've built in enough time.

David.

DAVID MCAULEY:

Thanks, Susan. I agree with what you just said, but the way you said something just struck me. If the purpose of the gazette is to impute knowledge to people, in other words, I don't know how we do that, though. It means create sort of a [burden] to keep up with the gazette. If that's the purpose of the gazette, not to actually be the date of the action but to be the date that we can say, "You should have known" then I would want to think on it more because I did not consider that with what I just said a moment ago. Thank you.

SUSAN PAYNE: Yes. And there are pros and con, aren't there? I mean if there's a page on the ICANN website and everyone's got imputed knowledge running from that, then that can be both a benefit, I think, and a burden. I don't think we're formally decided on this, but it's one for us to perhaps circle back to when we're looking at the relevant language.

Okay, anyway, I think we can move on to the tolling now. So, next page if you don't mind, Brenda.

BRENDA BREWER: I'm trying.

SUSAN PAYNE: Perfect, thank you. Okay. Now one of the one of the downsides of me using a PowerPoint format was that I couldn't work out how to redline. I'm not sure if the facility really exists. This isn't redlined, but I think as we go through this, I hope it will be obvious where I made changes. And as I say, I tried to make changes based on what we previously discussed.

One of the things I did was in response to a comment that Flip had made about the order of applicability. And I'm not sure if this is exactly what you had intended, Flip, but I thought it wasn't ... The way I'd heard you was that perhaps we should be thinking about this in terms of what comes first or in terms of timing. And so I did flip the timing around further Request for Reconsideration and the Cooperative Engagement Process because the Request for Reconsideration would be the first item that we would be thinking of as tolling time.

So first off, I did sort of reject the order a little. But that, obviously, is not a fundamental change. And I also just captured what we discussed last week about the impact of tolling. And I think, in truth, this something that everyone else had probably appreciated, which is that where one of these accountability mechanisms is filed, the impact of that would be that the time clock for bringing an IRP would get paused. And then it would restart again when that accountability mechanism comes to conclusion, rather than the time clock being reset and starting again from day one at the end of that other accountability mechanism.

And I think probably everyone else had really appreciated that, and I had been looking at this in my previous straw person in the wrong way or not in the same way as everyone else had been understanding it. And so I thought it was helpful to reflect that.

And so basically, in summary, if I quickly run through them in relation to the Request for Reconsideration. It's time spent seeking reconsideration on matters directly related to the same dispute, so the time would pause when you file the Request for Reconsideration, and it would restart again ...

My suggestion is that it would restart again from the publication either of the Board decision on the recommendation—sorry—the Board decision which would be based on the recommendation from the BAMC, or on the BAMC summarily dismissing the Request for Reconsideration, which is another outcome from one of those requests. So you may not always get a Board decision, I think.

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That's essentially very similar to what we had previously, but I was trying to be very clear on when time starts and stops in response, in particular, to some comments from I think David and others saying , particularly with RFR and with Cooperative Engagement, we need to be really clear on when the time starts and when time stops.

Sam.

SAM EISNER:

Thanks, Susan. I have a question about “the matters directly related to the dispute” and the idea of tolling. Are we looking at tolling as a party-specific issue or as an issue-specific issue? Because if it’s party specific, this makes sense. As an issue-specific, I think we need to talk about that a little bit more.

And what I mean by that is, so you have Party A who files a Reconsideration Request. Party B, are we tolling for them as well? Or does Party B also have to also file its own Reconsideration Request, or file a CEP, or otherwise show its intention to file an IRP? And how does the Party A reconsideration impact the tolling? Or does it impact the tolling for Party B? Because “the matters directly related to the dispute” could be read fairly broadly.

SUSAN PAYNE:

Yes, good question. And David has commented in the chat that he’s been thinking of it as party specific. I think I’ve been thinking of it as party specific too. My thinking being that if Party B wasn’t filing a Request for Reconsideration, then that's a choice they've made. And

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they, therefore, know that their time for bringing an IRP, assuming they are intending to do so, is already running. But I can see that it could be either.

Kristina, what are your thoughts?

KRISTINA ROSETTE:

I think it's an interesting question but I do think it does, at this point, need to be party specific because, just taking a step back, if the purpose of tolling is to give a particular party or a potential IRP claimant an opportunity to pursue other less burdensome, onerous, expensive, time-consuming accountability mechanisms before having to proceed to an IRP, then it would seem to me that because the benefit is tied to that particular potential claimant, that the actual process needs to be tied to that claimant as well.

And I do think that there might be circumstances in which there's more than one potential IRP claimant, but I think in that event it doesn't seem unreasonable to me for us to put the onus on that potential IRP claimant to take the action they would need to take in order toll, namely to pursue the other accountability mechanisms.

But that then brings up—and this something that I've been giving a lot of thought to—what do we need to have almost kind of a safety valve to avoid frivolous efforts to toll? But that's a different conversation. Thanks.

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SUSAN PAYNE:

Thanks, Kristina. Yeah, and I think we might come onto that safety valve shortly, or hopefully we'll get to that point.

I'm just noting in the chat that Flip is saying, "Regarding the Cooperative Engagement 'one party' the claimant does not necessarily have an interest in giving that notice." Oh, sorry. Let's cover that first, and then we'll come back to Flip's comment.

But before we get to that, I think, subject to views to the contrary, we do seem to be generally in agreement that we're thinking of this as being party specific, the tolling, for the reasons that Kristina so clearly set out. That this about ...

You know, the purpose of the tolling is not to force you into an IRP when you've been trying to pursue another accountability mechanism. And if you're not pursuing another accountability mechanism, then arguably you don't need to be tolling. Okay. Yeah. Generally, I think we seem to be on the same page on that.

So on the Cooperative Engagement (CEP), again I'd suggested any time spent during the CEP would toll. So the time for filing the IRP would pause from the point of which notice to commence the CEP is given. I'll defer to someone else if anyone has better understanding of the process or better experience of the process and knows exactly how it works.

But my understanding is that the complainant in an IRP, or the potential complainant for an IRP, would give notice that they want to enter into Cooperative Engagement. And then time would restart. The time for filing the IRP would restart from the date that the Cooperative Engagement Process comes to an end.

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And what I've suggested is that it ... I think that that CEP could come to an end at the instigation of either party with them giving notice that they feel it's at an end. I believe that's the case, but I can see some chat going on on this. So that's the point where I'll turn to what it says in the chat and also welcome other thoughts.

Kurt, let me just quickly comment on what we have in the chat, and then I'll give the mic to you if that's okay with you.

So Flip has commented that the claimant does not necessarily have an interest in giving that notice. ICANN might have an interest, and he sees an imbalance. So he thinks perhaps we should consider this.

Yeah. Kristina has commented that she thinks that if we change the term "one party" to "any party," that would address it. And certainly that would address it from my perspective. That was what my intent was. Not sure if that has addressed what Flip's concerned about, but perhaps ...

We have Kurt and David in the queue. And then, Flip, if you want to chime in on this, do feel free.

Kurt.

KURT PRITZ:

Yes. I'm not going to be helpful. I'm just going to raise the problem. So the logical result of the last bullet on the page means that the CEP is optional and only takes place if both parties want to engage. So if one

party does not want to engage in CEP, they can just not participate. I'm not sure how it works, if there's a timeframe for it or there's suggested start and stop dates or timeframes.

But how do you balance between this proposal, whether it says one or any party, which would essentially make the CEP optional and the opposite that requires both parties to give notice which could mean infinite tolling? And so to me this really hard.

And I have some personal experience where one party wanted to keep CEP going well beyond what the other party was willing to do. At what point can we say, in good faith, "This CEP should be stopped and the tolling should be stopped?" Anyway, I think it's a really hard problem. And I'm sorry I don't have an answer, but David is right behind me in the queue so hopefully he'll be helpful.

SUSAN PAYNE:

Yes. I will give the mic to David and I can comment on that if necessary, but David may well address that. David.

DAVID MCAULEY:

Thank you. Thank you, Kurt. I hope to help. Anyway, I was going to say something else, but I'll first mention what Kurt just said. And it's a very good question, I think.

But in Susan's slide deck, I think it's on slide four, we will come to a discussion on putting a maximum time on this bit of tolling. So I think that'll be a real difficult balance to strike, but I do recall, I think ... I don't want to put words in his mouth so I will qualify this by saying I think that

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Mike Rodenbaugh told us last time that one CEP went on for years which sort of scared me.

But in any event, the point I was going to make, Susan, when I put my hand up is that under your bullet “restart from the date that one party gives notice to the other”—I think I made this point last time—I am one of those who would think it would not be a good idea to restart whatever the clock is, if it's a four-month clock or whatever it is. And that the time—[that lapse]—between the date of the action and initiating a CEP should still be time that has run.

And I think it's a fair point that Flip made. Well, there may be an imbalance here and that imbalance may accrue to ICANN's interest. So I guess if 119 days of 120 have gone by, could ICANN terminate the CEP giving a potential claimant one day to get its act together?

I think the one thing we could do to address some of these imbalances is to hope that when Liz and Sam come back with safety valve language, when we look at it, we try and make sure that it covers instances like this where we should trust the panel to say, “In these circumstances there needs to be a little bit of wiggle room” or whatever a panel can do to say that the equities here lie with giving a little bit of time, and trust that the panel can address things like this. I don't think we need to write rules to get to the perfect rule.

So anyway, those are my thoughts. Thank you.

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SUSAN PAYNE:

Thanks, David. Flip, and indeed the whole queue, if you'll forgive me. I'm not sure I understand your point, and so I hope you'll bear with me if I just try and drill down. If time is poor ... So let's just have a scenario.

Let's say 60 days after the decision in question—or the action or inaction—the aggrieved party tells ICANN that its considering and IRP and it wants to initiate a Cooperative Engagement Process, and the parties discuss for six months, let's say. At the end of that six months, time starts again from day 61—is my intent and what I think I've been suggesting.

Is that how you're understanding it? And if so, what is your concern about time restarting, David? I'm not sure I was following you. And again, apologies to the rest of the queue.

DAVID MCAULEY:

Okay, sorry. I can be very brief. That's my mistake. I'm reading the word "restart" there. I thought it was "restart from day zero." If it's "restart from" whatever date it was at before the CEP was initiated, I think that's exactly right. So my apologies, thank you.

SUSAN PAYNE:

Thank you. Yes, so in my efforts to redraft this to make it clear, I've still included some language which is open to interpretation. So, apology. Yes, I mean not "restart from zero." Restart from day 61. Okay, brilliant. Thank you.

All right, Flip. Apologies for that.

FLIP PETILLION:

Thank you, Susan. In the interest of time, actually, I'm going to pass because I think I'm afraid I'm going to repeat what others have already said. Except maybe one thing. I think we all have in common a concern about tolling and time that would be inappropriately used, and we are all concerned that that would be done without any reason or justified cause.

And I'm talking from practice, from experience. I've never experienced any unreasonable attitude by either party, and I've always experienced ICANN counsel, ICANN Legal, to be very cooperative and really solution minded. Timing has never been an issue. And when there was a party saying, "Well, now we should really proceed," that was ICANN. And that was quite understandable because the requests always came from the potential claimant.

There was one thing we should not forget, and that is that ICANN, of course, has to be able to justify why it is stepping into a dialogue with a party and why that dialogue can last for more than a couple of months. I think that should be taken into consideration in our thoughts.

But I do, of course, understand that what we are looking for is a system, a rule, that can give legal certainty and predictability to everybody and not only the ones who happen to have good experiences with how these timing questions have been handled. I hope that's helpful.

SUSAN PAYNE:

Thanks, Flip. Becky.

BECKY BURR: Yeah. This just a point of information. I just wanted to remind people that in terms of the foot dragging on CEP as part of the Transition process, we did change the CEP process so that a single party cannot drag it on interminably. After a good faith effort, one party has the ability to put this up into mediation. So I just want to make sure ...

I know the horror stories that people are talking about, about CEP going on and on forever. In fact, I think lots of people have taken advantage of the CEP process in order to have more time to write their IRP statement, frankly. But we did, I believe, create a tool to address that problem. So I just wanted to make sure everybody was aware of that.

SUSAN PAYNE: Okay. Thanks very much, Becky. Sam.

SAM EISNER: Thanks. And I think this follows along with Becky's and Flip's comments. One of the things that we might wish to do—because I know it's still on this group's agenda to look back at CEP and make sure that the rules and process surrounding the CEP fit the new bylaws and fit the IRP process as it's currently reflected—maybe we can take advantage of that effort to make sure that we define what it means to terminate the CEP under the bylaws and about who gives notice to whom and not define that so much here and make sure that we have that conversation when we're talking about CEP.

Because I think the bylaws say that either party may terminate the CEP through giving notice. And so we probably don't want to try to restructure something here to suggest that there has to be some consent to the termination. But I also think that within that, looking at CEP, we want to make sure that we have that practical experience that Flip has also talked about which is bringing some common sense to the timing.

So just as a note for those who haven't participated in the CEP process. Typically what happens if ICANN gives notice that it's terminating a CEP, it identifies the date, it tries to identify the time frame within which it understand remains and the timing to file an IRP. And so maybe there's some consideration to be given there for what notice ICANN is to bring. If there are only 12 hours left in the tolling period, for example, would we put into the CEP rules that there should be an additional week or two weeks or something to make sure that that process can conclude if the claimant wishes to file?

But maybe we handle that there so that we don't risk rewriting the bylaws too much as we're trying to allow for tolling.

SUSAN PAYNE:

Okay. Thanks, Sam. Yes, we definitely do have a task to look at the CEP rules as well. I think my concern is just that, well, ideally we're trying to get these rules finished and completed. But then there's a period of time which is, well frankly, is already the case that we're running on the old CEP rules even though the process has changed because there are no new rules yet. So we didn't want to leave too much to chance

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because I don't think that the old rules really fit the new process very well.

But if I'm understanding you correctly, you're confirming that either party in the Cooperative Engagement Process can give notice to bring it to an end. And if that's the case [unto] the bylaws, then we don't need to really do anything more than reflect that that's the case, I think, as you say.

Flip, is that an old hand or a new one?

FLIP PETILLION:

Sorry, Susan. Old.

SUSAN PAYNE:

Okay, thank you. All right. I'm just scrolling back to see if I've missed anything. Sam has very helpfully put in the chat what the bylaws now say which is that either party can terminate if it concludes that further efforts are unlikely to produce agreement, and that there's a process for remediation that can also be instigated. So I think we're okay with this, if I'm understanding everyone correctly.

Kurt, just to circle back, just to close this off to your comment about this kind of implying that the CEP is optional and that if one party doesn't want to participate it doesn't have to. I think I'm right in saying that under the bylaws, it kind of is optional. There's nothing in the bylaws that says that the complainant has to request a Cooperative Engagement Process, but there is something in there that addresses that

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there may be an impact on cost orders if you enter into an IRP without having gone through the CEP.

Great. Sam is saying that's correct. So it sort of is optional. No one can make the complainant bring the Cooperative Engagement if they really don't want to. I think on ICANN's side it's not really optional. The bylaws envisage that if someone asks for a Cooperative Engagement Process before they bring an IRP, then ICANN will participate in that in good faith.

And, obviously, if they're not participating in it in good faith or the other party feels that they're not, then they can take advantage of that bylaws provision that Sam flagged about bringing it to an end and/or seeking a mediation if they want to.

Kristina.

KRISTINA ROSETTE:

Hi. I guess one thing that I have been thinking about, and it seems like we've gotten a little caught up in it and I think, generally, the folks who are on this call have a much better understanding of all of these processes than perhaps the average ICANN community member.

It seems to me that just—and I don't know that we need to do it now—but I think we do need to make a point to specify which party we're talking about. For example, the time for filing an IRP. Again, this only by the potential claimant. ICANN isn't going to file a Request for Reconsideration on its own action.

Similarly, I don't know that ICANN ... Well, whatever it is we decide on the CEP process, I think we need to specify in these rules which parties, if there's going to be different ability to initiate CEP ... In other words, can ICANN initiate the CEP? Can only the potential IRP claimant? Another way to clean it up would be to require that the potential claimant terminate CEP before proceeding with an IRP. And that way we've kind of tied off that notice obligation in a way that's clear.

I just think the potential for confusion here is starting to seem much bigger than I would have originally thought, and I just think it's something that we need to make a point before we actually finalize anything to be very precise about which party has which obligation, and what a particular party has to do in order to benefit from whatever tolling or repose, etc., that we put in. Thanks.

SUSAN PAYNE:

Thanks, Kristina. That's a really good point. I think I've been tending to use shorthand and make assumptions, but you're absolutely right. And I think most of us on this call are also appreciating that in all of these cases it's the claimant or the potential claimant who is bringing the IRP and therefore who, if they want time to toll, it's their benefit and it's because they are pursuing some other accountability mechanism.

But you're absolutely right. Even for our own internal purposes, it's helpful for us to be really precise about that so that we don't have misunderstandings. And absolutely, in the rules it needs to be very clear because we can't assume that everyone in the wider community

properly appreciates that. So thank you. That's a really good suggestion, and I'll try to take that one on board if we have a next iteration of this.

Okay. Absent any other hands, I think we've probably got to a reasonable point with this one and maybe we could go on to the next page, Brenda, please.

Oh, I think I've missed one. Is there a previous page or did I ...? Yes. That one. The DDIDP one and the Ombuds one. This may generate a bit more discussion. I think we're less clear, certainly in relation to complaints to the Ombudsman, than I think we were on our last call about the Documentary Information Disclosure Policy request, the DIDP requests. I think generally there was agreement on our last call that people did feel that it was appropriate to toll to allow for a DIDP request.

I have continued in this version of the document with what I had suggested previously which is that we perhaps toll for just a single DIDP request. And because there's no specific timing for those requests that I could find, I had not entirely arbitrarily suggested that we pick a time period to reflect that it ought to be filed in a timely manner. And so I had suggested 60 days. And the reason I had done that was just because there's a 60-day timing in relation to Ombudsman complaints. Not that you're required to bring them within 60 days, but the Ombuds has a discretion whether to refuse to take a complaint if it's later than 60 days.

So, as I say, somewhat slightly arbitrarily I picked the same 60 days, but willing to be to be persuaded that we shouldn't set a timing or, indeed, for others to suggest a different timing than 60 days. But that was just a suggestion for a straw person. And so, effectively, I'm suggesting we

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allow for the time for one of these requests, but noted that when the Registries Stakeholder Group put comments in—and I think that was the only group that was very specific about this—they suggested that we allow the two.

So again, I think generally on the call, people seemed to be comfortable on tolling for the DIDP requests, although I wouldn't say we had an enormous amount of discussion on it.

So, very happy to get any thoughts people have now. Particularly, if there's any disagreement or discussion on whether we think it's appropriate to toll for this particular mechanism or not.

Sam.

SAM EISNER:

Thanks, Susan. I guess I have some general questions. I don't necessarily have a position formulated, but I have some general questions about the purpose of tolling for the DIDP and what the hopes are of discovering something, or what the hopes are that will come out of the DIDP that feed a purpose of the IRP. What's the linkage that we have if we were asked for a rationale for including the DIDP in the tolling?

SUSAN PAYNE:

Okay. I can respond with my thinking on this, and I'm sure others have thoughts on this as well. I know that a couple of the groups who responded to the public comment had suggested tolling for the DIDP. The Registries had and I think the IPC did. I can't recall if anyone else

did, and I'm afraid I can't off the top of my head recall if there was any particular rationale given by them.

But to my mind that is another of the accountability mechanisms, and it's a mechanism that hopes to elicit information. Now, I think quite often that information, the party seeking to elicit it is probably hoping to elicit information that actually helps them with their claim. But it's also entirely possible that that request could disclose information or documents that put a new light on it and perhaps make the IRP seem a less appropriate path to go down. So that would be my thinking as to why it makes sense to allow for this.

And I don't know if you can help with this. I don't know how long those requests generally take. Again, I couldn't really find any ... I don't recall if there's a specific time period within which there ought to be a response after one of those requests is made, but it seemed to me that it had the potential to run down the clock. And we don't want to discourage people from seeking information that might help to dispose of the case.

So, not sure if anyone else has any thoughts on this. Sam, is that a new hand?

SAM EISNER:

It is. And also to respond to some of your questions. So the DIDP itself expects a 30-day response time for ICANN. We're on the precipice of putting out for public comment some proposed changes to the DIDP as requested through Work Stream 2 which would harden the 30 days which has existed and give the maximum extension in case ICANN

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needed more time to respond to an additional 30 days. So you're looking at a total of a 60-day window for ICANN to respond.

I do wonder—and I don't know what the other members of the IOT think of this—if you note that the Registries Stakeholder Group proposed that there would be tolling for two DIDPs when were out for public comment over a 120-day time limit for filing. So that was 120 days from the date of the action from ICANN in order to file an IRP.

Is there a functional difference, though, if we think that we're at a 24- to 36-month window? So we're multiplying that time to file exponentially under that, that we might not worry about increments of 30 days that happened within there. Because the reconsideration process itself can be longer even though there's a tail on that now to require it under the bylaws.

But if we have a 24- to 36-month window, which is where we think we're heading towards as a group—something longer than a year, definitely—is that 30- to 60-day window for a DIDP, does that create a meaningful item? Or does that just create more confusion, particularly when you look at how you would measure if they filed within a certain amount of days?

And I appreciate the reasoning for the inclusion of that suggestion, Susan, but does this add more uncertainty that we might not need if we have the longer time versus the 120-day window where you think that there might be more and you're trying to get more information, but you're also running against a really fast clock? The clock's not that fast anymore. So I just wanted to throw that out there too.

SUSAN PAYNE: Thanks, Sam. So I've got some thoughts on that which I may weigh in on if that's okay, but I will give the floor to Kristina and then David first.

KRISTINA ROSETTE: Thanks, Susan. Sam, to answer your question, I think it still does make sense to allow for tolling for DIDP because in most cases—and I haven't gone back and done a full analysis—but if you look at the requests for DIDP and you look at the same time at the Request for Reconsideration, it very often appears to be the case that the DIDP is filed before Request for Reconsideration.

So in that way, if the DIDP was just the only mechanism that was being pursued by a potential claimant, then I think it would be less important, potentially, to have a separate tolling. But because, in so many cases, it appears to be a predecessor step to an RFR with the associated timelines of that, I do think it makes sense to have a separate tolling for the DIDP.

But I'm sure we could do a more elaborate analysis, but it just does seem to be the case that, very frequently, they're linked—first the DIDP and then the RFR.

SUSAN PAYNE: Thanks, Kristina. David.

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DAVID MCAULEY:

Thanks, Susan. I think I agree largely with what Kristina just said, and I'm struck by the fact that, for someone to build a case through discovery, they have to have an IRP started. The way that we've written the rules, Rule 8 on discovery reads to me as if the IRP has already started. So a DIDP request prior to initiating an IRP seems to me a good step in furtherance of economy on these accountability processes because maybe the case could be settled or avoided completely based on what is discovered through the DIDP process.

And so I think, Kristina, maybe it makes sense to have [one DIDP] process built into it or built into the CEP maybe. I don't know, but I can see how it would be useful prior to being able to get it at discovery. Thank you.

SUSAN PAYNE:

Thanks, David. And I will just also add my own comment on your question, Sam, which is just that it seems to me that because we have these two different prongs, the potential claimant, once they know or are aware of the action or inaction that's giving rise to the damage and all of those provisions, they're not on a 24- to 36-month window. They're on 120 days, and so 30 to 60 days is a big chunk of that. But it also is, in the grand scheme of things, not a huge extension of time.

I agree with you that on a 24 to 36, when we're thinking about the concept of the repose, maybe it's not such a big deal. But I do think it's a big deal when you're on your 120-day window for bringing your IRP.

Okay, let me just have a quick look in the chat. Sam is saying, "DIDP is for information that is appropriately publicly available. Discovery can lead to

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information that's not publicly available." So they're not quite the same thing. Okay.

I'm not sure where we've reached ... I think, generally, we've certainly heard from David and Kristina who seem to favor retaining this. Not hearing strong objections to it, although obviously Sam has expressed some reservations. I think for present purposes, I'm kind of minded to keep it here, but I welcome further input on this as we finalize this.

Let's move on to the Ombuds complaint. I'm conscious of the time. And this one I think is less clear, I would say. On reflecting back on the call last time, there certainly were a couple of participants—I think David and Flip, from my recollection, we're less in favor of tolling for the Ombuds complaint. I think perhaps not for quite identical reasons, although perhaps very similar reasons in terms of the utility of that process and the likelihood of a complainant to use that process where they're considering an IRP.

But we did have comments from Kristina who pointed out that, certainly in the case that she was involved in, they did indeed seek to utilize the Ombuds process, as well, in the hopes of resolving their dispute.

So for present purposes, therefore, in my straw person I've kept this in there. But certainly, again, willing to hear further thoughts on this and whether it's appropriate to keep it in as a mechanism that we do toll the time for.

We did have a bit of discussion also last time about confidentiality and the fact that the Ombuds process is not quite so open. Quite frequently these processes are confidential, and therefore there was a question

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about is it obvious to people when time is running or when time has been paused.

But we did conclude that, given that the tolling of the time is a benefit for the complainant, then if they want to take advantage of that benefit then they would need to waive their right to confidentiality. Okay.

Sam.

SAM EISNER:

Thanks, Susan. I still have some large concerns about how this would be phrased, and I think it would be important also to maybe ask the Ombudsmen for their view of how this could work. I think if we hold up the Ombudsman's office for the value of what it's supposed to be, while we hope that it reduces disputes and while we hope that it does that, the Ombudsman looks at issues of fairness and not at bylaws violations. Maybe the two are interlinked.

But the Ombudsman has a jurisdiction that starts and stops, and if someone thinks that there's a fairness issue as opposed to a bylaws issue, they already have a choice to make within ICANN because the bylaws are ... For example, the Ombudsman's jurisdiction terminates immediately once someone goes to a Request for Reconsideration or an IRP.

And the obligation, what does it mean to say someone has to waive confidentiality? There could be a lot bound up in there and there could be extraneous matters included within that. So what does that mean? And what does that mean for the Ombudsman process as well?

So I think before we consider putting this in as an element of tolling, I think we have to understand more, indeed from the Ombudsman side as well, as to whether or not we can get meaningful information about the tolling. How do we make sure that it's actually about the issue and not about something that's related to the issue? What are the protections we can build in? And what does it mean for the other parties that might be investigated under an Ombudsman dispute? Because an Ombudsman dispute might be only about ICANN's actions, but it might bring in other people too. And what happens to the confidentiality there?

So I think there are a few other questions that we need to answer before I would have any confidence in including this in this section.

SUSAN PAYNE:

Okay. Thanks, Sam. That's really useful input, and perhaps that's something that we can explore and put a series of questions perhaps to the Ombudsperson with regard to this. So, yes. So this one, I think, is very much in square brackets. Let's put it in those terms for now. I don't think we've got wholehearted agreement that we think it's appropriate to toll for this particular type of complaint.

Thank you, Kristina. You've linked to the Ombudsman's blog. Ah, thanks. You've got your hand up. I was just going to ask you. Over to Kristina. I am not hearing you. I don't know if you're still on mute.

KRISTINA ROSETTE:

Okay. I think I'm off mute now. So just to obviously say, again for the record, that I don't currently represent Amazon but I was at Amazon at

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the time that the Ombuds complaint was filed that was the subject of the blog that I linked to. And while it is the case that the Ombudsman looks at issues of fairness and the IRP is obviously focused at violations to the bylaws, there are circumstances in which the two are linked and often potentially interrelated.

So I do think that, and in particular, just using the .Amazon blog as an example, although the Ombuds ultimately decided not to recommend a rehearing, it would have led—had he come out the other way, it would have resulted in a rehearing on our Request for Reconsideration which would have given the Board another opportunity to ... Well, I forget who—the Request for Reconsideration Committee. I don't think the AMC existed then. Maybe it did.

So I do think that there are circumstances under which there is enough of a nexus between what is within the purview of the Ombuds and what is in the purview of an IRP claim that we should provide for tolling. As for the waiver of confidentiality, I certainly take your point, Sam, and I do think that we can be more specific about that.

At a minimum, it would have to be a waiver of confidentiality as to the existence of the complaint that the potential party had filed with the Ombuds. And I think there would have to be a general description of the nature of the complaint such that the potential IRP claimant can show the nexus between the complaint and the material effect of the action or inaction.

I agree that there doesn't need to necessarily be a full-on disclosure of the complaint or any kind of recitation of the what the Ombuds did to

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investigate, etc. But I do think that there does have to be some waiver of confidentiality as to those two issues—the existence of the complaint and a brief summary of what it asserted and how it meets that nexus. Thanks.

SUSAN PAYNE:

Thanks, Kristina. That's really helpful, and I will certainly reread that blog from the Ombudsman. It's been a while since I've read it. I hope all of us will read it.

But I'm also noticing in the chat that Kurt, I think, is also favoring tolling, or at least is presenting another argument for favoring of tolling which is that the Ombuds office is specifically mentioned as an ICANN review mechanism, and that a claimant pursuing a claim can rely on that avenue.

So I think I'm understanding Kurt to be just giving additional grounds that might go to support allowing for tolling for an Ombuds complaint where it's appropriate. We're not obviously tolling for every complaint to the Ombuds. It would have to be related to the same dispute.

And I agree with Kristina that in order to have the benefit of tolling of the time period, it's inherent on the complainant to be able to give sufficient information to be able to demonstrate why it's appropriate.

Okay. Again, I'm conscious of time. We're now at 13 minutes past, so I'll turn quickly to the next page. And, yes, this is the safeguards on timing. We talked about this a little bit on the last call. Initially, it was a concern

that Kavouss was raising about how long are all these processes going to take and how much extra time are we building in?

And Sam also made some comments to the effect that, to her mind, there have been at least some circumstances where accountability mechanism after accountability mechanism after accountability mechanism has been used, and certainly could be perceived as having been a sort of gaming of the processes in order to just waste time, arguably.

And so there was some suggestion that we perhaps, whilst we want to allow for tolling of accountability mechanisms, perhaps we ought to build in some maximum time period in order to strike an appropriate balance between allowing access to the accountability mechanisms but not allowing them to be utilized to endlessly delay. We didn't really get into any detailed discussion on how we might do that.

One thing that occurred to me as I was going back and reviewing the transcripts again and thinking about this was that there are a couple of these mechanisms—the RFR and the DIDP, in particular—the timing of them is not really in the control of the complainant. And therefore, it seemed to me that if we are going to build in a maximum time period for tolling, it arguably needs to take into account the maximum time that those processes might take.

Whereas in the case of the Cooperative Engagement Process, it's a collective responsibility, and so both the complainant and ICANN have the ability to reach the conclusion that that process needs to come to an end. And so perhaps then we don't necessarily need to be looking at the

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longest Cooperative Engagement Process that ever occurred—which I think Mike Rodenbaugh told us was eight years—but look at something that might be a more reasonable time period that one could build in for allowing for a CEP.

That's as far as I got with this. Definitely very interested in thoughts on how we might build in a maximum time period. Sam.

SAM EISNER:

Thanks, Susan. I'm going to go back to a previous question that I raised as well, which is about what tolling means when we have a much longer time to file than the 120 days or even the one year that were anticipating, and the impact of tolling and the impact of allowing potentially too much time in and of itself to frustrate the purposes of the IRP.

So if we just look at the quickest possible ... So we have 135-day requirement now for the Board to reach a decision when it gets a Request for Reconsideration. If we assume that request is filed within 30 days of the action, that's 165 days there. If we add in 60 days tolling for a DIDP, that gets us to 265 days. We're looking at just shy of nine months there already.

And then let's put the CEP to the side for a second. Now let's assume we have a 24-month window and people start their window within that time. They go for the DIDP. And then the Request for Reconsideration already has a faster time frame on it, so we know that they're at 165 days or 200 days. Even if we have a 24-month window, you still have

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over a year from the time that the reconsideration process is completed until the time for filing an IRP.

So given the quick reaction time that's needed for the Request for Reconsideration, if we have at least a 24-month window, how much do we need to toll in addition? Do we need to say, "You already have a year to file your IRP, but you get an additional eight months because you had those other processes?" Does that make sense? Do we need to look at how much time exists after that?

SUSAN PAYNE:

Thanks, Sam. So if I can I'll respond to that since I'm not seeing any hands. And I would say I'm coming around to agreeing with you. If we're having a conversation about Prong 2, I'm coming around to agreeing with you. And indeed that was the next conversation that I thought we might get onto, but I think we won't have time on this call.

But I would still say that here we're not talking about 24 months or 36 months because for the individual complainant, they still have 120 days according to the rules, or according to the rules that we're crafting. And so that's what we need to toll because, otherwise, their 120 days is already passed before they even have the Request for Reconsideration finished.

And so that's where I think that this still applies, but I agree with you in terms of the Prong 2; that perhaps we don't need to also be tolling time on Prong 2. Does that make sense?

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SAM EISNER:

Yes. And I think that's where some of my confusion came in, was from that first slide that had the prongs. So if we're looking at the 120-day window, I agree that it's worth having a conversation of how much time is too much time in the end? Is there too much time? Maybe the answer is no, but I do think it's worth having that broader conversation.

SUSAN PAYNE:

Thanks, Sam. I hope that's what we can do in terms of having some kind of a maximum time period and hopefully striking some kind of a balance. But I do think if we are talking about tolling to allow for a Request for Reconsideration or something of the like, then we can't put someone out of time before that RFR has even finished. So we either don't allow for it or we accept that we do need to extend time because we collectively have agreed that we think it's appropriate to allow for the utilization of these other accountability mechanisms first.

I'm going to leave this with people to ponder on between now and the next call. Ideally, we can even be sharing thoughts on this by e-mail. But I would really welcome people's thoughts on how we might set a reasonable and fair maximum time period for the tolling, particularly on if we're thinking about tolling on Prong 1.

And I just want to circle back to our agenda. And the other item that I was hoping we could briefly cover was just to look at what else we need to be looking at or what else had been identified as needing looking at in these rules in terms of what else is on our plate in our review of the IRP rules in particular.

And I circulated with my e-mail where I attached this particular document we've been looking at. I also circulated some documents that we've had for quite some time. One was produced by, I think Sam it was, that was a summary of some of the lessons learned and some of the issues that ICANN Legal felt that we should be addressing. And the second one was the mark up of the current rules with some areas where we need to be to be focusing our attention.

I don't think we necessarily need to pull them up now. Everyone has seen them. It may be some time since you've previously looked at them. But in essence, the areas where it had been flagged that we particularly needed to do work—which is not saying that we shouldn't also have an overview of the rules generally and see whether we think anything else needs to be done—but was looking at the role of the procedures officer which is something that we've done but I think we do need to circle back to was the time for filing, which we're working on now; translations, which we did address and I think we have got to a fairly good point on.

And then the other aspect in particular was the one on consolidation, intervention, and participation as an amicus. And we did have quite a lot of discussion on this, and then we took a side group away to work on it a bit more. But that work has rather sort of fallen by the wayside, so I think that's something to be reconvened and see if we can get that across the line. And so I wanted to flag that.

I'm going to try and get that small group back together. We have lost Helen Lee who was one of those group members. So if anyone is

interested in joining that small group effort to try and get that across the line, you'd be very welcome.

But I think those are those are certainly the big issues that we need to address, and I think we're well on the way to doing so. When we feel that we've addressed the big issues, we will also, I think, need to spend some time doing an overview of the rules generally. And I'd also welcome anyone—and probably this is mainly aimed at Sam—but welcome for anyone to flag if they think there are other issues in the rules that we really ought to be turning our attention to that I haven't mentioned.

We obviously have a list of other things to do which are outside of these IRP rules, and I'm not ignoring that. I do think we have, yes, quite a lot to do ,as David is saying in the chat. But I'm conscious of the time. We've only got a few minutes to go. So just pausing briefly to see if anyone has anything they want to add to that list now in relation to these particular rules.

David.

DAVID MCAULEY:

Thank you, Susan. I remember from my days chairing this group that I had a list. And I think there are just a couple of things. I'll mention them quickly and maybe I'll repeat them on the list.

And this should be addressed, I think, in our work—maybe not necessarily in the rules—but there's a panel recall process we have to come up with. There's a conflict of interest. We have an invitation to

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create more standards around conflict of interest of standing panelist members. We have the ability to create limitations on appeals if IRPs under bylaw 4.3(w). I think we should perhaps discuss among ourselves clarifying ...

I think there's maybe a little bit of conflict between 4.3(o) and 4.3(p) on stays. Are stays something that a panel recommends or are they something that a panel decides?

And then there's one final thing I'll mention now, and I'll put the rest [in a summary on this somewhere]. And that is that there's the ability to have a non-binding IRP. It's really up to a claimant. If they ask ICANN, "Can I have a non-binding IRP?" and ICANN agrees, then that would be a non-binding IRP.

So it seems it may be for us to decide or to discuss should a non-binding IRP be appealable? Should a non-binding IRP be considered precedential? Maybe we can't decide those, but I think we should at least discuss and, if not, maybe make a recommendation for further action. Thank you.

SUSAN PAYNE:

Thanks, David. Yeah, that's very helpful, and I do appreciate that we do have a fair list. And some of those items that you mentioned perhaps need inclusion in these IRP rules. Some of them maybe have their place somewhere else. That non-binding IRP is an interesting one and not one that I had paid a great deal of attention to. But indeed, perhaps we need to build something into these rules about that. I'm not sure. I'm

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speaking off the top of my head, but certainly something we need to think about—where that gets addressed.

Yeah. Malcolm is commenting that if an IRP isn't binding, then is that really an IRP or is it something else? All good points and one for us, certainly, to pick up.

I very much welcome your list, David. That would be really useful. And we've probably seen it before, but it's easy to lose sight of things. And I think it's really helpful to keep an eye on what else we need to do.

Okay. I think that's probably it for this call, and we will obviously reconvene in a couple of weeks. And thanks for the reference to 4.3(x) which I certainly will go off and have a look at.

Okay, thank you very much, everyone. Good discussion. Thanks for your continued engagement. Let's hopefully keep working on these, hopefully make some final progress on these timing rules, and get them across the line.

Brenda, we can stop the recording. Thank you so much.

BRENDA BREWER: Thank you very much.

**[END OF TRANSCRIPT]**