
BRENDA BREWER:

Good day everyone. I'd like to welcome you to the IRP IOT meeting number 74 on July 20th 2021 at 17:00 UTC. I'm just going to ask you to state your names before speaking for the record. Attendance is taken from the Zoom participation, and I'll turn the call over to Susan. Thank you so much.-

SUSAN PAYNE:

Lovely. Thanks so much, Brenda. Hi everyone. Thanks for joining. If you're not speaking, could I ask you to go on mute if you wouldn't mind, just to make sure we don't have any background noise? Let's kick off. This is our call of the 20th of July.

First up, as always, we'll do a quick review of the agenda and updates to statements of interest. We'll circle back and just touch base on the action items that we have carried over from the last meeting. Then we will continue with the discussion on the measures which might toll the timing for bringing an IRP. We will then again also revert back to the discussion that we had that we just really started on the last call on identifying other elements of the IRP rules that we still need to look at.

And thank you to David McAuley for his e-mail earlier today flagging some outstanding items that he feels we should be looking at. So we will come back to that, and then noting that our next meeting is scheduled to be on the 3rd of August at 19:00 UTC, so that's in two weeks' time as usual.

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

So updates to statements of interest. Does anyone have an update to their statements of interest that they would like to draw to our attention? Okay, I am not seeing anything or hearing anyone, so I will assume that that is a no and that we are all good and up to date. But as always, just a reminder to revisit your statements of interest from time to time and make sure that it is up to date and flag anything on future calls if there's a change, and particularly if there's a change that really impacts on the work we're doing here.

Okay. So agenda item two then is the action items from the last meeting, and we are awaiting some draft language on the repose and particularly on the safety valve that we've been discussing on previous calls. Sam, is it okay to just turn to you and get a likely timing on that? As we discussed on the last call, this is something that obviously needs to get socialized internally on your side before it could be shared. So I'm not pushing you, just looking to get a bit of a time check.

SAM EISNER:

Yeah. Thanks, everyone. I'm sorry that we don't have something delivered to you. We've been extraordinarily busy, as I know everyone else is in this time. We've had a couple big items that are going up and we're dealing with the summer holidays as well in terms of resourcing around our team. So we're working to get this done as quickly as possible. I know that we have a few different vacations staggered across the team in the northern hemisphere summer here, so hopefully we'll have something in the short-term, but we'll definitely have it shortly after the summer holidays time if we don't have it by the beginning of August.

We're trying to balance a lot of things. And if you're watching what's going on within ICANN, we're also preparing the SSR2 and we just had some other big Board decisions around our ICANN meeting and also—I'm sorry, we're just trying to balance everything here and find some time to make a meaningful contribution to the group too here. So we will get it to you as soon as we can.

SUSAN PAYNE:

Thanks, Sam, for that update. That's really helpful. And yes, as David's commenting in the chat, I think we all probably are feeling that there's quite a lot going on, and perhaps more than we would want to be facing and for those of us in the northern hemisphere holiday period. So if you don't mind, we'll just check in with you on the next call, but noting, I think, that there's some vacation time coming up. So if we don't have it for the next call, we may be looking more like the end of August, early September, I think, by the sound of it.

Okay, super. Thank you very much. So next agenda item is our sort of main agenda item, is to circle back again on the timing. The accountability mechanisms that might toll the timing. That is, to be clear, to pause the clock for bringing an IRP and then when that other mechanism, particularly other accountability mechanism has concluded, the clock would start again from the same point in time. That's what we mean by tolling.

I'll just pause and say, Brenda, would you mind pulling up that updated slide deck that I just sent around? And while you're doing that, I'll keep going.

We did review the sort of strawperson summary of where I felt that we'd got to on our last call and had quite a good discussion on the particular different accountability mechanisms that we're talking about. But there were some areas of ambiguity and some suggestions that came up on the last call, and so I've tried to capture them for the purposes of today and done so in red because I decided it was easier for you to see the relatively minimal amendments that I've made.

I don't know that everyone here was on the last call, but hopefully, you've had time to look at this, the previous iteration of this document anyway and to catch up on the recording from last time. But in any event, the fact that we now have, I think, a slightly different group of attendees this time around will hopefully mean that we can elicit further views if there are any, or concerns that haven't previously surfaced when we looked through this.

Just as an introduction, as I've now put right on the top of this slide, just as a reminder, this isn't intended to be the actual language of the rules. It really is more of a kind of capturing of the principles that we're trying to be agreed on. So if there are ambiguities in terms of the concept or the principle, then we certainly do want to amend those, but if it's something where we feel like the language is a bit wishy washy and it doesn't present well as an IRP rule, that is not necessarily the end of the world. As I say, this isn't intended to be what the rules actually say.

Again, just really reflecting on the time for filing, the first slide is basically what we've previously been talking about, about what the time for filing should be. We're using the terms prong one and two. As I said, that's definitely terminology that I don't think is intended for the rules

but is to help us when we're thinking about the principle of it, and it's terminology that someone—and I want to say it's Kurt, but I don't recall who suggested using this terminology. It may have been David. But either way, someone suggested it as a way of helping us gather our thoughts, and I think it's been useful so I'm continuing to use it. But to be clear, as I said, it's not the language for the rule.

And we have these two different elements or prongs. One is that once a claimant becomes aware or reasonably should have become aware of the decision in question and the impact that it has on them that is causing them damage, they have 120 days to bring their IRP.

And then sitting alongside that, we have prong two which is this concept of a repose which is that in any event, there is an outer time limit. And we're undecided at the moment on whether that would be 24 or 36 months so that if the claimant didn't become aware or had only become aware outside of that 24- or 36-month time period, that they would be out of time.

And whilst we've debated this at great length and so I don't think it's fruitful for us on this call to go back and debate that further, we're not unanimous on that within this group, but I think that is the position that the majority feel is the reasonable one to take, and that is the area where Sam and Liz and ICANN Legal are working on a language to provide some safety valves on that to try to ensure that someone is not unfairly disenfranchised.

Okay, so we can go on to the second page, please. And hi Becky. Welcome. No need for apologies. Lovely to have you. Okay, so now this

is turning on to the question of when the time limit for filing within the claimant's 120 days, so the prong one time limit, should be tolled, by which we mean the clock being paused and then restarted again from the same point, not reset to zero or to day one, and the extent to which we should be pausing the clock to allow a potential claimant to utilize another accountability mechanism first before they go down the path of an IRP.

And again, we have discussed this on previous calls, and this is my attempt to capture where I think we got to. I think generally, we had a fairly high level of agreement on the pausing of the clock for the request for reconsideration or RFR, that essentially any time that has been spent during that process should not be lost to the claimant out of their 120 days I suppose is one way to put it.

And in proposing that, we're very conscious that many—if not all—IRPs do seem to have—the potential claimants in the IRP have previously taken advantage or sought the recourse through an RFR process first, and that whilst there are certain timings for the request for reconsideration process in the bylaws, they can, even when following that bylaws timing, run to a time period that would substantially exhaust if not run longer than the 120 days of prong one.

Since the idea of this is to allow a potential claimant to take advantage of other accountability mechanisms which might resolve the dispute, we don't want to put them out of time. So this is the proposal, that we would, as I said, toll for that. I'm going to pause briefly to see if anyone has any comments or concerns that they haven't previously raised on this point before we move on.

Kavouss, over to you.

KAVOUSS ARASTEH: Yes. Thank you very much. I think I had a point to the previous page. You were very quick. Please, madam.

SUSAN PAYNE: Okay. Happy to go back to the previous page.

KAVOUSS ARASTEH: Yeah, it's a simple issue. In the last bullet, it is mentioned not every decision which might be subject to IRP will be published. So we would like to put it mandatory. Every decision relating to IRP must be published in that gazette. That's all. What is more important on this? Why we say that every point will not be published? We put as our recommendation to the ICANN that any decision relating directly or indirectly to IRP must be published. Then we resolve this issue of this bullet point. Sorry to get you back to this page, but it is a simple solution.

SUSAN PAYNE: Kavouss, sorry to interrupt you. Were you finished? I don't want to cut you off.

KAVOUSS ARASTEH: Yes. I finished now, thank you very much, for this bullet. I have a comment on the next page. Thank you.

SUSAN PAYNE:

Superb. So thank you for that. And I can see Sam's hand, but I will just briefly respond first and then turn this to Sam. Apologies. This may be another circumstance where my shorthand bullet point language is a little ambiguous or open to misunderstanding. What this was intended to reflect is that the decision which someone may be objecting to and feel that they have been damaged by could be brought by the ICANN Board and then generally speaking, I think all Board decisions would be published, but it might also be brought by ICANN staff in kind of ordinary course of events. And whilst some might be published, there is no doubt that not everything that gets done or every action that gets taken by ICANN staff would automatically get published in a kind of formal manner.

So it was seeking to just remind ourselves that we can't assume that if we have some kind of an official gazette page that every single decision would get put on that page, because the reality is that there will be lots of day-to-day activities taken by staff which wouldn't be on there. It is not intended to suggest that we think the IRP panel decisions at the end of the IRP process wouldn't get published. In case that was the misunderstanding.

But whilst I would love to say that we should ask for every single decision that ICANN Org makes to be published in some way on their website, it simply is not realistic, I think. And that may well be what Sam has put her hand up to say. Sam.

SAM ESINER:

Thanks, Susan. I think that you've expressed some of our prior conversations really well in that response, but I also wanted to give the IOT a little bit of a preview of one of the things we're thinking about in terms of setting out the time frames. So don't look at the numbers. I'm going to drop into the chat—this is how we express in the bylaws the timing requirements for filing a reconsideration request.

And one of the things that we need to recall is that with the change of the bylaws to the IRP, we brought in the staff action issue and you were talking about that, Susan, but one of the things that that does is we've been forced to think about this a little bit differently because previously, IRPs were only about Board action, so we could just identify a time frame for the filing from when the Board action was identified.

But there's also that ability to bring an IRP based on inaction. So you see in the bylaws this three-prong task for either it's a Board action, it's a date on which the staff could have become aware of the staff action, or the time that someone would reasonably have known or not known of or should have known that there was an action taken either by Board or staff.

So we're trying to think about ways to be a little bit more explicit. Of course, we would have the different days. These are the reconsideration limits here, not the IRP limits. But we're trying to get a little bit more precise around this to help make sure that we're covering the range of potential actions. So while it won't go to the certainty that Kavouss just requested—and we've heard that from other members of the IOT—it does help to create a little bit more certainty and a little bit more

identification of the points that we're looking for within making the IRP a bit more streamlined here.

SUSAN PAYNE: Thanks very much, Sam. I think that will be very useful. Scott.

SCOTT AUSTIN: Just a brief question after those were put up. Thank you very much, Sam, for the detailed language. The question of resolutions, should we provide, or has it already been determined where the resolution is provided? For example, the USPTO has the official gazette. Is there such a thing, or is there something that could be reviewed or noted as a guidepost for where this resolution [inaudible] for such a resolution? Should it be included in the language?

SAM ESINER: Susan, may I respond?

SUSAN PAYNE: Yes, please do, Sam.

SAM ESINER: Thanks, Susan. That's a really good question, Scott. And this is where the bylaws themselves would be the guide. We have a very standard place where we post the resolutions that those always go, so we would make sure that we would have some sort of reference back to the bylaws. But I don't think that we need to create any more specificity. We have a

predictable place that resolutions are posted every time after a Board action happens, and we actually have a bylaws mandate on the timing of the posting of those resolutions. So we would likely just refer back to the bylaws mandate on that.

SUSAN PAYNE:

Thanks. Kavouss, let me know if we should move to the next page, but I turn the mic to you.

KAVOUSS ARASTEH:

Yes, I'm very sorry, you didn't pay any attention to what I said. I mean no one paid attention to what I said. This publication is start of the clock. If you say that not all of the decisions made in IRP will be published, therefore, the clock does not work always properly. Sometimes yes, sometimes no. So the entire process, 120 days, 24 months, 36 months, etc. is totally out of question. You need to resolve this issue. Every decision, whether from the ICANN—I don't know, management or staff—relating to IRP must be published. Otherwise, all of this prong one and prong two is totally useless, because the start of the clock is publication, unless you delete that publication reference. I have no problem. But you cannot dissociate that. We're spending our time, wasting our time for nothing.

So we have to work logically. You want to have a magazine or gazette be a start of the clock, then everything related to IRP should be published in that gazette. That's all. I don't understand any other argument of ICANN staff or anyone else that no, this is not ... So please, delete reference to gazette or references made as the start of the clock we

must put everything relating to the IRP be published. That's all. We can't work ... Community should have something reliable. Thank you.

SUSAN PAYNE:

Thanks, Kavouss. I wasn't ignoring what you said. In fact, I heard what you said. I was responding that this is a conversation that we have had over more than one call, and whilst there were a number of us, I think, who would agree with you that in an ideal world, everything would be published somewhere and so that would deliver to us the certainty that you talk about, but the reality of the IRP is that it can also relate to an inaction as someone has pointed out in the chat. So an inaction is an ongoing thing, effectively. There is no decision. So that's one place where nothing could be published because no action or decision has been taken. And that is the thing that's being objected to.

And the other area is that ... Again, we can come back to this. I think we may want to come back to this when we're talking about the safety valve language that ICANN Legal are working on. It may be that that helps us here. But there are decisions by staff or activities or actions taken by staff that aren't subject to some kind of formal resolution that gets published.

Now, in relation to prong one, obviously, the 120 days is from when the claimant has actual or implied knowledge of the decision in question. But I agree with you, it does pose a challenge for the second prong, the outside time limit of 24 to 36 months. And hopefully, this is something that we can come back to when we have the safety valve language that ICANN legal are working on, and perhaps that will help to address this

slight uncertainty about when actions happen or when decisions get made.

We were not ignoring your point, it's one that we're all very alive to. And thank you for reminding us that it's a concern. So I see your hand again. Yes. Okay, thank you.

KAVOUSS ARASTEH:

Yes. Excuse me. My hand is following. Yes, I agree with you. With respect to the inaction, there will be nothing, nobody knows, no publication. Yes. But put some note or editor's note below bullet two. In case of inaction that there would be no record, the issue of the timing would need to be revisited. Not to forget. Yes, I agree. Because I'm working systematically. I have been grown up like this. There is a case, exceptions, maybe 10-20%, I don't know, that there is inaction. Nobody knows, therefore there was no need for publication because there was no action. But you have to address that under second bullet. In that case, the timing in prong two will need to be revisited. That's all. Thank you.

SUSAN PAYNE:

Thanks, Kavouss. Malcolm.

MALCOLM HUTTY:

Thank you, Susan. Yes, we do have a bit of a problem with this because the IRP extends to cover actions that could be disputed but will never be published in some form of gazette. It really extends to include things that will never be published.

For example, if one member of this committee were excluded from it on a wholly and avowedly discriminatory basis, then a case can be made that that was in breach of commitments that are made in the bylaws. and while it might be unlikely that anyone would seek to resolve that through an IRP process, on the other hand, if it were thought that it signaled some new and heinous discriminatory policy by ICANN, it might well be thought to be a test case to bring it to remind ICANN that such heinous behavior cannot be tolerated.

Now, of course, I'm not suggesting that any such thing is really likely to happen. I'm just pointing out that that decision is not a decision that would be published. It's certainly not a decision that's going to make it into an official gazette. But it falls within the bounds of things that nonetheless give rise to a potential dispute within the meaning of the IRP.

And even if you were to say [that—limit the list of things] that are published, published where and how would anybody know? Published could mean all sorts of things, and you could have a great dispute about what constitutes publication and whether something actually was published. Just because it appeared somewhere, does that constitute publication?

It would open up endless cause of dispute and lack of clarity. Not about resolving the actual issue but about whether an IRP should take place in the first place, which is just [inaudible] up unnecessary and legalistic arguments instead of actually getting on with the practical business of resolving the material cause of action.

So the framers of the bylaws did actually understand this and provided for it, and they avoided the option of framing it based on publication or some form of gazette or something, and instead based it on the standard of when the claimant became aware or should reasonably have become aware.

What we're struggling over now is how to make workable a prong that we've invented ourselves that has no basis in the bylaws and no justification for existing, and we are now discovering why it was not included in the bylaws and why it is unworkable to add that prong. So the obvious answer commands itself, I would have thought, to anyone that considers it. Thank you.

SUSAN PAYNE: Thanks, Malcolm. Kavouss.

KAVOUSS ARASTEH: Yes. I simply ask you to put a note under bullet two that the issue of inaction for which there may be no publication would need to be addressed and the prong two time need to be revisited. Only a flag, a memoire for us. Thank you.

SUSAN PAYNE: Thanks, Kavouss, and I've made a note of that. So in the next iteration of this, I can do that.

KAVOUSS ARASTEH: Thank you.

SUSAN PAYNE: And if I for some reason fail to do so, please do remind me. It won't be a deliberate omission. Thanks.

KAVOUSS ARASTEH: Then once you go to second page, I have a comment on second page, when you decide to give me the floor. Thank you.

SUSAN PAYNE: Then I think we are going to the second page now. I ran through just the request for reconsideration so far. So Kavouss, is your comment in relation to the request for reconsideration, or should I run through the cooperative engagement?

KAVOUSS ARASTEH: For both of them. I would like to have some idea about the timing of [RFP] and timing of CEP. Is it a matter of months, matter of years? Because that has influence, impact on the total process. I heard from somebody that CEP would have been on the order of some six to eight years. Is that right? And what about [RFP]? Do we have an average timing of [RFP]? That's the question for clarification. Thank you.

SUSAN PAYNE: Thank you, Kavouss. In an earlier e-mail from a few weeks ago now, I did do my best to try to identify the timings of these various mechanisms,

and if you'll bear with me, I can attempt to find it or I can give you my best recollection now and others—particularly Sam—will correct me. That may be good enough.

The request for reconsideration, there is a provision in the bylaws and off the top of my head, I believe the Board is encouraged in the bylaws to reach a decision within 135 days of the request for reconsideration being made. I think I'm correct in this. It's something of that length of time.

However, it's not an outright time limit, and all of these decisions are somewhat dependent on other activity because for example, the Board accountability mechanism committee considers the request for reconsideration first, the ombudsman is asked whether he would like to make any input on it, and so on.

So there's certainly a sort of firm desire in the bylaws that the decision should be within 135 days, but I think it can be longer. And of course, our timing that we have agreed for bringing an IRP from when the complainant knows about the action—and so they are already on notice in this circumstance—is only 120 days. So you can see that they completely run out of time if they bring a request for reconsideration.

On the cooperative engagement process, there is no specific time limit, timing for this, as I recall. And again, I'm really hoping that someone like Sam will correct me or add to this if I'm wrong. There definitely have been cooperative engagement processes which have gone on for a very long time indeed.

I think in some cases, these have been proceedings under the old bylaws and under perhaps the old process. But they have also gone on for a period of time because one would like to think the complainant and ICANN are seeking to resolve their differences.

Becky reminded us on the last call that there is now in the new bylaws a process which says that if one party feels that the CEP is being dragged on and the other party is not properly engaging, there's a default to refer it to a mediation if they want to. So there is now a mechanism built in so that it doesn't run on forever. But I think the expectation is that the CEP would always run for some months. So again, there is a distinct possibility that the 120 days for bringing an IRP can be exhausted for by this CEP process.

And I'm going to pause and see if anyone with more practical and up-to-date knowledge than me can correct anything I've said. But I will make a note after the call to resend around what I had best identified as the timing for all of these different mechanisms. Sam.

SAM ESINER:

Thanks, Susan. I think in general that the timelines that you stated are accurate. I think on the CEP, as it relates to CEP, the current process for CEP already allows for tolling and so that's a normal practice within the CEP process. There are some CEPs that have gone on for a very long time, there are some CEPs that haven't, and we do maintain a publicly available register just identifying which items are in CEP, the contents of those CEPs are not disclosed. So there's not an outer time frame on

CEPs, and of course as this group reviews the CEP as one of our later items of work, maybe that's something that we consider.

One point that I would flag—and I think this is some of the concern that I was raising last week or two weeks ago on the call, is there are some situations where people or entities who are wishing to challenge a decision of ICANN, their ability to use one of the processes might actually not fully overlap with the IRP process. And I agree, need to make sure we leave the proper time for people to challenge items appropriately through the IRP. But an example is on the request for reconsideration.

So we know that whatever timeframe we're expressing it from, that there will be no less than 120 days of timeframe for people to file an IRP. A reconsideration request, as you see from the bylaws text that I've put into the chat, is from a 30-day window.

So it's likely that there are some times when people can file a reconsideration request, and indeed it's possible that most of that reconsideration process timeline, because there is that full 135 days, might pass before the full time of the IRP comes, or maybe even before it's triggered.

We know that someone might file a reconsideration request before they're even on the clock for filing an independent review process. So I think one of the things that we need to consider is if there's a gap between when someone even has—their 120 days is starting, do we need to account for any of that time that's elapsed before?

So here, when we [see—we pause] from the request for reconsideration, maybe we need to update this language and there might be other situations such as the DIDP one that I know is on the next page where it's about only those timeframes that overlap and not necessarily about the original filings.

So I just wanted to put that out there. I don't think it's something that we need to solve today, but it's just that cumulative timeframe that I think we need to consider so we don't wind up pushing things out way too far when we're thinking about some of the efficiency needs for an IRP but also making sure that we preserve the appropriate amount of time for the filing of the IRP and for allowing the other accountability mechanisms to expire.

So I don't have the answer but I just wanted to put that on the table.

SUSAN PAYNE:

Thanks, Sam. If you don't mind, I'll just ask you a few questions because I'm not sure I entirely followed that. I'm thinking in particular of you commented that sometimes the filing of the IRP might occur at a time when perhaps they weren't actually on the clock yet for bringing an IRP and how do we account for that. But I'm struggling to understand where the problem is with that. And it's probably me not understanding you correctly, but if there's a request for reconsideration and for whatever reason it relates to a different action or whatever so that the action that's being challenged in the IRP is ... The time is not yet running, then when the time starts to run, surely it just begins at one and the request

for reconsideration is kind of a red herring here, isn't it? It's nothing to do with it.

I'm missing something. I'm sorry. I wonder if ... Maybe it's just me.

SAM ESINER:

No, I think that we need to look at this. And I've been trying to think about how to express this, and I think maybe trying to put down some timeframes on paper and to show how they overlap might show some of the concern, because I agree we don't want to build in or weigh everything on a red herring, and I think we need to test it to make sure that it's not. Is there anything that needs to change or not?

It could be that maybe the proper way to look at it is if there's a request for reconsideration that's been filed, and even if an IRP is later needed on that, do we want that rule to be that the 120 days basically starts on the day after the notice of the disposition of the request for reconsideration, right? Is that what we're working towards?

But I think we need to see it on paper first, just to make sure that we're all talking about the same thing and not trying to talk about different things or assessing the impact differently. So I'll work with my team to see if we can come up with a way to maybe express the time frames a little bit on paper so we see if there's something meaningful that we're actually discussing or not.

SUSAN PAYNE:

Thank you, Sam. I think that would be really helpful. I think I'd certainly find that helpful in order to be able to get my head around this, and I

suspect others would be in the same boat. Obviously, there was a reluctance, shall I put it that way, to have day one start at the end of the request for reconsideration, because I think the feeling was that that way, someone might run down their 120 days, get to day 119 and then know that they've reset the clock by simply filing an RFI regardless of the merits of it.

So I think it would be helpful to kind of grid this out a bit and see if it's a real concern or not. Thank you. Okay, let's move on. I haven't followed the chat at all, I'm afraid. I'm seeing the final one from Mike saying it is a real concern, but I haven't certainly followed the chain. Mike, do you have anything you want to add to this now?

MIKE RODENBAUGH:

Not really. I think the point is an important one we need to consider though, because the way this is drafted now, it restarts from the date, let's say, ICANN terminates a CEP. We don't necessarily know when that's going to be, and if ICANN's not playing nice for whatever reason and they don't give you extra time to file your brief—which they have done in the past willingly but may not necessarily always do, then you're in a real spot.

If you filed your CEP on the last possible day to do so, then now the way this is written, you wouldn't have any additional time to file. So there has to be a balance both ways.

SUSAN PAYNE: Thanks, Mike. And I think that's something we did talk about last time, and I think particularly on the CEP, again, it might be something that we revisit, and that's what the bullet point that talks about maybe [inaudible] checking this against the CEP rules when we've drafted the new version was to touch on, because we might perhaps need to build in a little bit of extra time if the clock is practically down to zero. But I suppose on the other hand, one could say the date that the claimant asks to start the CEP is entirely in their control, and under the previous bylaws, they only had whatever it was, 45 days or 30 days to bring their IRP, and they now have 120.

So, is it sensible for any complainant to be waiting until day 119 before they tell ICANN they want to enter the cooperative engagement process? I would say no. But ...

MIKE RODENBAUGH: Wait a minute. They will have done the CEP before the IRP.

SUSAN PAYNE: Exactly, which is why we're talking about tolling the time.

MIKE RODENBAUGH: To file an IRP, correct.

SUSAN PAYNE: Yeah.

MIKE RODENBAUGH: So the CEP is happening, your IRP filing time is tolled, but you may not have filed your CEP until the last day to do that, the 120 days, let's say.

SUSAN PAYNE: Yeah, I get that, but that was my point, is, is that a sensible course of action for a complaint, to wait 120 days before they tell ICANN they want to enter a CEP?

MIKE RODENBAUGH: Well, okay, maybe it should be 90 days, whatever. Then set a rule. But if the rule is 120 days to file an IRP and you don't have to file a CEP before then, then you should not expect anyone to file one before then.

SUSAN PAYNE: Okay. Interesting. Well, again, I think perhaps this is a perfect example then of something that we need to revisit when we draft the CEP rules. And I hear what you're saying, that perhaps we need to give some kind of time limit to enter into cooperative engagements to ensure that a claimant doesn't wait until day 119, because then there's a risk they put themselves out of time for their IRP by having delayed so long. So perhaps we need to help ensure they don't do that by picking that up in the CEP rules.

MIKE RODENBAUGH: Either way.

SUSAN PAYNE:

Okay. I'm not seeing any other hands. I hadn't run through the CEP element on this slide specifically, but I think we have touched on it quite considerably while we've been talking. One of the changes that I did make was just a sort of slight change in terminology. I have been talking about one party giving notice to another about terminating the cooperative engagement and I changed it to any at the suggestion of Kristina better reflecting that either of the parties, either ICANN Org or the complainant, could be the one to terminate the CEP. That had been what I intended, so it was just a clarificatory amendment there.

I am not seeing any other hands. I am seeing lots of stuff in the chat which I'm not managing to really follow, so if anyone is saying anything in the chat that they would like to say on the microphone, do please feel free to put your hands up. Otherwise, I will ask Brenda if we can move to the next page.

Thanks, Brenda. Then the other two accountability mechanisms that are covered on this slide that we have been proposing that we also toll the time for bringing your IRP, the DIDP or the documentary information disclosure procedure—I think that's the right term, let's call it DIDP for short—and this one, we did discuss a little on the call last week, and Sam in particular had expressed some reservation about the need for tolling of the timing of the IRP for this particular process.

And whilst we didn't have extensive comments from other working group members, I did note that both Kristina and David on the call felt that this was a mechanism where it was appropriate to also toll the timing, particularly because the information being sought by that DIDP

process could help to clarify or narrow the issues in dispute or indeed could even dispose of the dispute altogether.

Very keen to hear from others on this call if people have strong views one way or the other on this. Kavouss, to reflect your question about timing, there is no specific timing on this that is expressed under the procedural or in the bylaws?

And as such, this one is difficult. There's no specific timing for—I think there's a timing for once request for a document disclosure has been made, I think there's some expected time limit that ICANN should endeavor to meet in terms of making the response, but there's no start date for when you can make such a request. So this is a challenging one.

And as I said on the slide, I had suggested that we give some kind of a time limit on this and so had suggested that it be provided that the request is filed within 60 days of when the claimant becomes aware or reasonably should have become aware of the action or inaction that this document request relates to.

And that 60 days is a slightly arbitrary date that I selected, but I selected 60 days because it reflected some timing in relation to an ombuds complaint, so it seemed to be a sort of reasonable length of time to me. But I am very open to other thoughts on that. Kavouss.

KAVOUSS ARASTEH:

Yes. I think you put many elements which have timing, [RFB,] CEP, DIDP, ombudsman. Before we even give our views on this process, we have to know some idea of all of these timings to put them together to have an

aggregate timing. We don't want to end up 24 or 36 months plus 120 days, means four months, that means 40 months, plus all of this time together, it comes ten years. This is not the route, this is not the IRP and this is not the IOT. We need to have some average guesstimate of all these four timings, RFB, CEP, DIDP and ombudsman. We have to have an overall guesstimate of all of these timings to add to the 24 to 36 months added to the four months. I hope I am clear. Thank you.

SUSAN PAYNE:

Thank you, Kavouss. Yes, you are, and we will come to this on—I think it may even be the next page. But I did want to just remind you that the 24 or 36 months or 120 days is not cumulative. The complainant, once they are on notice or are deemed to have notice of the action or inaction, they only have 120 days. They don't have 24-36 months

The 24 or 36 months—whichever one we decide that time is—just relates to a cutoff point so that if it was 48 months after the decision before the complainant knew about it or could even reasonably have known about it or been impacted by it, then they're out of time, because it doesn't matter—that 120 days doesn't matter because they're out of time for the repose. But when they're aware of the action, they don't then get 24 months. The 24 months is irrelevant at that point once they're aware, unless they're already out of time. I hope that makes sense. But yes, we will come on to, do we need to have some maximum time period?

KAVOUSS ARASTEH:

Yeah. I correct myself: forget about 24 months or 36 and forget about the four months. All these four other times, [RFB,] CEP, DIDP and ombudsman; how long? Guesstimate of these four times, irrespective of 24 or 36, whether they're inside or outside. These four elements which we added since last six months because of some other people trying to prolong this process of IRT. That prolongation. I don't know.

There are very few people that are trying to put the interest of the entire community in big difficulty because of all of these ideas, theory that they bring, DIDP, ombudsman, [RFP,] CEP. I would like to have an idea of these four elements, whether they're cumulative, whether they're not cumulative, whether they're overlapping, whether they're interleaving, whether they contain the one time, the other.

So we need to have overall timing of these four elements irrespective of 24 or four months. Is it now understood? So I change my statement for these [inaudible] four times, because these times were added during the last six months. And I hope that there will not be more time added to that. So people are going to add time and time and time and try to put more time for their own interest at the expense of the interest of others. Thank you.

SUSAN PAYNE:

Thanks, Kavouss. So, yes. Understood. As I say, we will come on to a slide, it's either the next slide or the one after, which refers to exactly this point, because it is one that you have made before and I appreciate your point. So yes, we will come to this shortly. But recall that the IRP, it

is not just an individual party that can bring an IRP under these new bylaws, it's also the community itself, the empowered community.

So we're not just talking about one party trying to game the system, to put words in your mouth. We are potentially talking about the empowered community seeking to hold ICANN accountable. So we're trying to strike the right balance, I think is the best way to put this, and maybe that's what we say on the next slide.

But let's just briefly refer to the ombuds complaint. Again, the proposal is that we should toll the timing for the complaint of the ombudsperson. And again, I had suggested that we try to limit this to a complaint that was filed with the ombuds within 60 days, and the reason for picking 60 days is because the ombuds themselves is able to decline to hear a complaint if it's filed after 60 days. But other than that, there is no specific timing, there's no cutoff for when you can complain to the ombuds specifically apart from this 60-day discretion on the ombuds' part, and there's no specific timing for when a decision might get made.

So the ombuds complaint is one where there's nothing set out in the process or in the bylaws that constrains the timing on this. So I was trying to somewhat arbitrarily constrain it in our rules, but when we talked about this on the last call, there are some I think in this group who were less convinced that a complaint to the ombuds should also allow for a tolling of the time period to bring an IRP. But we did hear from one of our members who with a former employer had brought an IRP but prior to that had used other accountability mechanisms, and that did include making a complaint to the ombuds.

So overall, I think in the chat there was reasonable support—not many people spoke up on this topic but there was reasonable support in the chat for us also tolling the time for a complaint to the ombuds. But again, I would welcome any thoughts on this from people. David.

DAVID MCAULEY:

Thanks, Susan. Hello everyone. I spoke up before on this, and I think I would describe my stance on this as fairly skeptical. The difference I see is to me, a request for reconsideration and CEP are more formal, hence it's more clear that a serious dispute is on the way to being resolved in one form or fashion.

I tend to view—it's probably just a personal view, it's not a criticism by any means—that an office of an ombudsman serves the function of being a place to go and vent, a venting space to let off steam. DIDP, I would put in the following area because it relates to discovery, it's not a dispute resolution mechanism itself. But I'm concerned about ombudsman.

I think it's a new bullet on the bottom of the page that it may be beneficial to seek the ombuds' views on this. And I think we might want to invite the ombuds to come and to talk to us and be aware of questions like mine. Is this something that should toll the road towards another IRP? So that's where I stand on it, but I would be interested to hear the ombuds' views if that's something we want to do. Thank you very much.

SUSAN PAYNE:

Thanks, David. And yes, I noted that it came up during the course of the last call. It's not something I've done yet to reach out to the ombuds, but I agree, and thanks for your support for the notion of getting the ombuds' input on this. I think it would be helpful. Malcolm.

MALCOLM HUTTY:

I don't have a strong opinion on the ombuds, but I think I do have an opinion on the basis for deciding whether it should be. I think that the kinds of processes that should be tolled are those that are needed preliminarily to the IRP or that might result in the matter that would otherwise be the subject of the IRP being resolved or that might be needed in order to ensure that it can be resolved within the IRP.

If the ombuds complaint falls into any of those, then I would tend to think that it would be a good idea to toll that. However, if it doesn't, I think it would be a good idea to leave it out and not toll that time. I'm not sure what the actual basis of that is, and I would support asking the ombuds for their view.

But if I correctly understand the view of the ombuds, it's more of an interpersonal mechanism, not really designed to solve complaints between institutions or complaints on matters, but more to ease the frictions between people so that they can work together in a calm, respectful and professional manner.

That doesn't fall into any of the categories that I described. And if that is indeed how the ombuds sees its role, then I think it would be better that it were not tolled.

SUSAN PAYNE:

Thank you, Malcolm. Yes, I think that's a very good way of putting it. I would say on the previous call, the perspective of certainly one of our participants was that it could go to do that. In theory, they felt it worth making a complaint to the ombuds in the hopes that it might help to resolve the dispute. Needless to say, by very virtue of the fact that they then went on to bring an IRP, it obviously didn't resolve the dispute. But certainly, there was a perception that it was a worthwhile avenue to pursue in order to perhaps try to resolve things without having to resort to an IRP.

And I think the ombuds' own blog or report of his activities suggests that that's how he views his role as well. But you're absolutely right, I think this is absolutely ... We should hear it from the horse's mouth, really, and ask the ombuds.

MALCOLM HUTTY:

Yeah, I think it's the role here, because the request for reconsideration, I'd be very interested to hear what the actual data was on whether or not the request for reconsideration had ever reversed any ICANN decisions and given satisfaction to those raising it. I'm not aware of any such cases. There may be cases, but I'm not aware of them.

But nonetheless, it is clearly the role of the request for reconsiderations that seek to do that. So even if there is not much hope on the part of the claimant that it might result in it, it nonetheless is its purpose and is properly considered a preliminary action.

The ombuds complaint, it might be that one might hope for it if you're not well informed, but if it's not the ombuds' role to seek to resolve disputes between ICANN and the organization or to do anything that might result in that being done, then I would think it doesn't qualify even if some individual thought that they might try it just in case. That wouldn't be sufficient in itself.

SUSAN PAYNE:

Thanks, Malcolm. Okay, I'm not seeing any other hands so I think that's an action then for us to reach out to the ombuds and ask for their input on this, on how they see their role and whether they see a merit or an appropriateness to tolling of an IRP based on someone having brought a complaint to them.

Okay, I'm conscious of the time, so if we could move to the next slide, please, Brenda. Okay, and this, Kavouss, is what I was referring to earlier when I said that I had noted your previous comment about what is the maximum timing of all of these mechanisms.

So as I tried to summarize, I think what our aim is here in allowing for tolling is to try to strike a balance. So we want to allow genuine access to other accountability mechanisms that might hopefully ... That would be, as Malcolm said it, preliminary to or might be anticipated to resolve the dispute so that there was no need to go to an IRP. So we want to allow for genuine use of other mechanisms which after all are part of the suite of mechanisms given to individuals and the community. But we also want to ensure that IRPs are adjudicated in a timely manner whilst the recollections and the evidence is fresh.

And we don't want to encourage sort of what might be perceived to be endless delay by mechanism after mechanism just to keep drawing things out. So as I say, I don't have a solution on this necessarily, but my suggestion had been that we perhaps consider making an assessment of what the cumulative outer time limits taken for reconsideration requests and document disclosure requests are.

And the reason I'm saying that is because those two mechanisms really are outside of the control of the complainant. They have to bring them, obviously, but then how long they take to be decided is not really in their control. It's with ICANN.

And then plus, some reasonable time that we would allow for a reasonable cooperative engagement process to be run. And the reason I say that is because the complainant, or jointly the complainant and ICANN, have control of the timing for a cooperative engagement process and a complainant can bring it to an end.

So as I say, we want to allow for some reasonable period of time, but we don't want to just allow for Mike's six or seven years that he's sort of horrified us with. So that was my suggestion. Kavouss.

KAVOUSS ARASTEH:

Yes. My question is what happened to the ombudsman timing. It's no there. [It's not yet under] prong two. Where is it, the other one? There are four elements. [RFB,] CEP, DIDP, and then ombudsman. What has happened to that one?

Second, what do you mean by reasonable period of time? What is reasonable, what is not reasonable? Who decides that the time is reasonable or not reasonable?

Lastly, for your next meeting, I would like to have affiliation of the participants of that meeting, to know which part of the ICANN community they come from, from the Contracted Parties House or from Noncontracted Parties House, and whether they represent the entire community or represent their particular group of community, they're taking care of their own interest prolonging this, adding time and time. Then I will say in my view this is an open ended situation, open ended totally. It may take 10 years, it may take 20 years, it may take 24 or 36 months. Totally open ended because of these new elements. You attach many things that is not even available for us, many accountability, many things that people don't have any idea about this timing. So this will get us to nowhere. Thank you.

SUSAN PAYNE:

Thanks, Kavouss. Sam.

SAM ESINER:

Thanks, Susan. I appreciate the opening of the conversation about what the maximum time for tolling looks like and how we might get to it. I think we might need to treat CEP a little bit differently from what we would add to the request for reconsideration and DIDP if we were to include those in a tolling mechanism.

And I think that the time frame listing that I was talking about earlier might also help us come to this discussion and be part of it. I do think we have some critical decisions to make. We want to make sure that we're not exhausting people's ability just because time is running, working on other ways to solve an accountability issue within the ICANN system. We don't want to deprive them of an RFP.

But I think that also, when we know that a claimant is on notice of an IRP-related issue—because one of the reasons that we have that 120-day window is it gives people the opportunity to become aware of it. We also look at the past history of—we've always had the potential for reconsideration and IRP to coexist even before we had time limits on handling reconsideration. We used to not have time limits, and those used to take a lot longer, but people still could do both and there wasn't any sense of tolling between the reconsideration and IRP.

I'm not saying that that's where we should remain, but there's a history of being able to work within the accountability mechanisms at ICANN and not have all the different types of tolling. So I think we need to consider, when do people actually express that they're aware of the issue and what time is needed after the running of other accountability mechanisms that relate to the same issue to continue? And how does that all fit in so that we're not necessarily looking at a 120-day period that we then, because we had a reconsideration happen within it, we have a maximum time for reconsideration of 135 days, and because we had a DIDP that happened in it, and that 60 days that we then more than doubled the total amount of it me that someone has to bring a reconsideration request? Are there ways that we can craft that additional time? Because people still need additional time to make sure

that they have the correct filing that reflects everything that's happened, but does it have to be essentially the doubling of it or is there a different way to look at that number?

So again, we'll be putting together that time frame, the assessment of the different times and when things might happen before an IFR is even—the clock is started on that versus not, so that we can look at how this all comes together.

SUSAN PAYNE:

Thanks, Sam. So if I understand you correctly, in that work you had been proposing to do about gridding out the timing or thinking through some of these timings, it will hopefully help to inform how we might set a maximum time limit that we can come back to for further consideration. I hope I've understood that correctly.

Kavouss, I did want to just reflect on a couple of the things that you said. I do want to make it clear that I understand your frustration and your concerns that this is becoming too ... Extending the time for bringing an IRP exponentially, if you like, but this was the absolute intent here, was to try to find a way to strike the right balance so that we aren't doing that, so that we are allowing people access to the accountability mechanisms that exist under the bylaws and are not cutting off their avenues of recourse and forcing them into an IRP if they might have been able to dispose of the dispute in another way but that we are trying to find a way to strike a balance so that it doesn't go on forever, as you are expressing concerns.

And the purpose of this group is for us collectively to come up with some solutions rather than get frustrated about this. But the idea of tolling for other accountability mechanisms is not out of the blue. It came up during the public comment period that happened last time around, and so it's our responsibility to consider it and see whether it works. And I would say over the course of our recent calls, collectively as a group, we all feel that it's the right thing to do and we are trying to find a way to do it in a reasonable manner which strikes an appropriate balance.

I don't understand your comment about affiliations. I think you're asking what is for us all to put in against our name, which group we come from. Personally, I don't have a problem with doing that, but I think you might find it easier to look at people's statements of interest because for a number of us, we sit in more than one group. So speaking for myself for example, I'm a member of the IPC but I'm also an active participant in the Registries Stakeholder Group and I work for a number of .brand TLD operators, and my company is a registrar. So, which one do you want me to put in against my name? Because all of those relate to my personal background, if you like, but I'm not in this group on behalf of any of those organizations specifically. We all volunteered as individuals.

KAVOUSS ARASTEH:

I'm sorry. I'm not interested to know who is coming from where. I would like to know whether the overwhelming majority represent registry, registrar, and Internet provider. That's all. Not others. So you're either registry or registrar or .brand and so on. I don't know. I'm not getting

into the specificity of anything. But I would like to know really whether we represent the entire community or not.

I am representing GAC. That's all. No other seats. But if people are representing three groups, I don't know which group—put together, the overwhelming majority from the Contracted Parties House. Is that right?

SUSAN PAYNE:

No, I don't think that is right. But if you would like me to do so, I will endeavor to provide you with a summary based on the statements of interest that all of us have filed, if you find that helpful.

KAVOUSS ARASTEH:

I would like to have a summary of that. Now, having said that, I have two more comments. I would like to put a cap on the maximum timing for tolling. This is something that I would like, to put a cap on the maximum of timing for this one, to see where this maximum is, because we don't want to have an open-ended process. Thank you.

SUSAN PAYNE:

Perfect. Then I think we're all on the same page, Kavouss. And as I said, I think it's the task of this group collectively to work out the way to find the cap. Thank you.

I am noticing the time, and I think we are really out of time, effectively, for this call. We have not come on to the other topic which was other elements that we need to be working on. And I apologize for that. David

had very kindly circulated his thoughts on this matter. I have some comments and indeed some additions to David's list.

Since we have not got to that on this call at least—and we certainly can talk about it on the next one, but I will respond on the e-mail to David in the meantime, and I'd like to encourage everyone to do the same. I'm specifically or particularly keen for people's thoughts on other elements of these IRP rules that we need to look at further or things that are missing.

I know we have a number of other tasks that are also on our plate, but I'm particularly interested in what else do we need to do on these rules before we can feel that we have reached the end of them and we can put them out for a hopefully final public comment. So I think we can hopefully make some progress on that on the e-mail before our next call.

I probably should check in with you, Sam, if you're still here in terms of that timing piece that you and your team will work on. Is that something we would have for the next call which is in two weeks' time? I do think it would be incredibly useful for us in order to enable us to make progress on this outer limit, which is obviously concerning. But if you feel that that is unachievable, it would be helpful to know that. And we can think about what else we might usefully do on the next call.

SAM ESINER:

I'll try to retackle—those are different resources in my team and on the other issue. So we'll work hard to get that done. I think it would be really helpful for any future conversation on this point.

SUSAN PAYNE: Thank you very much. That would be very appreciated. Kavouss, you have the final say.

KAVOUSS ARASTEH: Last comment today. May I repeat what I have asked several times? Would it be possible that I ask you respectfully and kindly provide an estimated workplan where we have to finish, what time we have to finish? Within next two years, three years? So we have to have some timing. We could not continue and add and add to that and becomes, I would say, a workshop of open ended. We have to have some plan for timing. Could you provide some timing? What is our timing objectives? In what time frame we expect to finish this business?

SUSAN PAYNE: Thank you, Kavouss. As I said on the last call, which I don't know if you were on the last call, hopefully you've seen the recording. Part of the reason for asking everyone to flag up to me where else they think we need to focus our attention on these rules is in order to be able to do exactly that. So yes, that is something that I have taken onboard your request. Thank you.

Okay, we are out of time. In fact, we are overtime. So, thank you all very much for joining and for your very useful inputs. We can stop the recording, Brenda, and we will meet again in two weeks' time. But please do engage on the e-mail in response to David's of earlier today. Thank you.

[END OF TRANSCRIPT]