
BRENDA BREWER: Good day, everyone. Welcome to the IPR-IOT call on 21 September 2021 at 17:00 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. Apologies have been received from Kristina, and Becky Burr will be delayed.

With that, Susan, I'll turn the call over to you. Thank you.

SUSAN PAYNE: Thanks so much, Brenda. And thanks to everyone for joining. This our 21st September call, rescheduled effectively from the 14th when I was away. We have a pretty heavy agenda, if you like. Certainly some things to review and some discussions to continue from the previous call that we had. So I hope that we can make some decent progress here.

First off I'll just do a review of the agenda, and so on. And then before we kick off, I'll just make a couple of quick comments about how I'd like to try and handle this call.

So, as always, reviewing the agenda we will circle back to the action items from the last meeting which relates to the draft language for the repose safety valve. And actually, that was just circulated for us a little before this call, so we will take the opportunity then for ... Hopefully, if Liz is willing to have her just talk us through that.

We then will turn to the matters outstanding and the next steps. That's a reference to the document that I circulated for our last call which was an

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attempt to put together a list of what else we need to look at, both in respect of the rules and, more generally, in terms of what we've been tasked to cover. I'd like to have just a review of that and a discussion on how best we break up the work going forward.

Agenda Item 5 is to continue the discussion on the times for non-IRP accountability mechanisms. And that is something that we got to at the end of our last call. We review reviewed some timeline information that Sam had shared with us, and I'm hoping that we can have a bit more time to talk about that on this call as we really only had time last time to introduce that.

So with that in mind ... Actually, I'll say this now. I'm hoping that we get to it before this point, but at a minimum I'd like to allow at least the last 30 minutes of our call for us to look at that agenda item. So if necessary, I think I'll be calling a halt to our discussion on the prayer agenda items if I need to. Given that we've already had one brief touch on this item and then didn't have sufficient time, I want to allow sufficient time for that.

And then just a reminder that our next meeting is next week, because this one was it was a postponed call, and at our other time slot of 19:00 UTC. So that's on the 28th of September.

Okay, circling back to the top of the agenda and just quickly checking in with anyone. Does anyone have any updates to their Statement of Interest that they need to draw to the attention of the group? I will pause briefly just to see whether anyone has anything they want to raise.

Okay. Not hearing anything, so we will come on then to agenda Item 2 which is the review of the action items from the last meeting. And as I said, the main action item that we had was this safety valve language that the ICANN Legal Team where we're drafting for us. And Liz kindly circulated that just a couple of hours ago before this call.

So just before I hopefully am able to call on Liz to take us through that, we didn't have that language when the agenda was put together and I had anticipated that we therefore wouldn't be having a substantive discussion on anything that was circulated. And indeed, given that it was circulated fairly close to the time of this call, I don't think it's fair to assume that everyone has had the time to review it and properly consider it.

And so I'd like to use this call as an opportunity for Liz to just introduce the draft and flag it up for us all. I think we can also perhaps take a few minutes if anyone has any really burning questions or comments, but particularly questions for Liz that they feel will help them when they're reviewing the language. But other than that, I would very much like us to come back to that with a more substantive discussion on next week's call. And with that in mind, I would really appreciate it if people could post comments in the documents, sort of annotate the document. And perhaps we'll ask Bernard if he wouldn't mind putting it into the form of a Google Doc so that we can work on the same draft but in sort of proposing or commenting [version].

The reason I say this is that when we've got specific draft language, it's much easier to really properly understand what people are suggesting and any suggestions for amendments or any concerns they have if we've

got something in writing. I think it will make our discussion on next week's call go that much more effectively.

Okay, so with that in mind, again I'm hoping I can turn to Liz and ask you if you wouldn't mind just talking us through what you circulated a little earlier. Thank you.

I don't know if it's just me, but I can't hear you, Liz. Are you double muted, by any chance?

LIZ LE: I'm not double muted.

SUSAN PAYNE: Oh, but you are there now.

LIZ LE: Can you hear me now?

SUSAN PAYNE: I can, yes. Thank you.

LIZ LE: Okay. Sorry about that. Thanks, Susan. So what we did in trying to encapsulate the conversations and discussions that we've had amongst the IOT on the rule for the time for filing is for us to address the limit of

the 120 days where it's at, and then also [outer] of the time to file which is currently set at 12 months.

But one of the things that we also took into consideration, as the group has requested, is to provide for a safety valve, so to speak. And where there are exceptional circumstances that a claimant may seek leave from the IRP Panel to pursue the filing of an IRP where the time frame—the 120 days or the 12 months—has expired.

So in that, you see that we first initially broke up what the rule is for filing under Paragraph A. And then we built in the safety valve to address the concerns that the group has expressed in terms of what if there are situations where a claimant either can objectively prove that they were prevented from becoming aware of the action that they're seeking to challenge, or from being able to file a written statement of dispute for things beyond their control within the current time period.

And we also add in a Prong 2 under Be which is add that any kind of request for relief that would be made by a claimant would not adversely affect a third party.

And last but not least in here, I think what we also added is that any requests for leave to file must be accompanied by the claimant's proposed statement of dispute, and it has to be filed within 30 calendar days of the claimant becoming aware of the challenge dispute or from being able to file.

And then what we also included is an outer-outer limit of, under no circumstances can you file a statement of dispute for more than four years. And as we explained in our e-mail, that's for us to be able to align

with the impact of statutory limitations on breach of contract claims which, under California law, is four years. So that's where you see us adding that consideration in there.

The last paragraph really is something that's currently from the old rules. There you only see that instead of ... At the end we change it from this declaration of the ICDR that the claim has been filed to a filing of the statement of dispute.

We did this with the considerations that have been discussed in mind so that the group can have something to discuss as part of where do we go from here. And we also provided a redline of the initial proposed Rule 4 as it currently stands to what we have proposed to revise.

SUSAN PAYNE:

Lovely. Thanks very much, Liz. Can I just double check with you? I think I'm understanding this as you're ... In the paragraph that has the sort of capital A partway through Paragraph B where it talks about "accompanied by the proposed statement of dispute," is the idea with that that effectively you're filing what your statement of dispute would be, but obviously you haven't given leave yet?

LIZ LE:

[Right].

SUSAN PAYNE:

And so then when you've been given leave, you've got 30 days to lodge it. Am I understanding that correctly?

LIZ LE: No, no.

SUSAN PAYNE: Oh.

LIZ LE: When you seek leave, you file a motion so to speak in U.S. courts. And then you have to attach to that motion what would be your points and authorities. In this instance, it will be your statement of dispute. The 30 day comes into the fact that if you're seeking leave, you have to do so no later than 30 days after the time that you've become aware of that action being challenged or you're able to file a written statement under the extraordinary circumstances that were criteria that were describing under 1. So if you're going to do it, you have to seek the leave within 30 days.

SUSAN PAYNE: Thank you. Thanks, Liz. I realized as I was asking you that, that I was being dense. Thank you so much.

LIZ LE: Of course. Sorry I [inaudible].

SUSAN PAYNE: Okay, I have Flip and David in the queue. Flip.

FLIP PETILLION: Thank you, Susan. Hi, Susan. Hi, Liz. And hi, everybody. I just wanted to mention that actually part of what Liz said was not ... Well, at this side, we couldn't hear it. I couldn't hear it. So we missed part of what Liz has actually said.

Second, it would be helpful if Liz could summarize, or Susan.

And finally, it would be really helpful for the non-American people on the call to explain what the difference is between "seek leave" and "file motion." Thank you.

LIZ LE: Do you want me to address that, Susan?

SUSAN PAYNE: Yeah. Thank you, Liz.

LIZ LE: Okay. That's a fair point, Flip. So normally, the way we split it up is that currently under the IRP if someone files a late claim, the issue of timeliness gets litigated as part of the IRP. And that goes into more merits as well. So that's not what we're talking about here. I mean, in this situation before you even get to talking about the merits, you have to ask. Seeking leave is a motion to ask the panel's permission to be able to file a late claim.

And in that motion, you would have to demonstrate the criteria that we propose under B which is that the extraordinary circumstances “objectively proven and not caused by the claimant” prevented the claimant from becoming aware of the action or from being able to file the statement of dispute. And also Prong 2 to which is that any relief requested would not adversely affect a third party.

So that motion would have to set up this argument. And attached to that motion would be the statement of dispute that the claimant proposes to file if the panel were to award or grant the motion and allow the claimant to file a late IRP.

Does that answer your question?

SUSAN PAYNE: I was just going to ask the same. Flip, does that answer your question? You still have your hand up, but that may be because you haven't taken it down as opposed to having a second question.

FLIP PETILLION: Hi, Susan. I just lowered it.

SUSAN PAYNE: Thank you.

FLIP PETILLION: There must be a tech issue at our side of the Atlantic. I apologize because a quarter of what Liz said is just disappearing. Sorry for that. In

any event, I will continue to stay on the call, but I will listen in again with a view to trying to catch up with everything that is said. And thank you, Liz. Thank you.

SUSAN PAYNE:

Okay. Thanks, Flip. I think probably it is a problem at your end. I certainly was hearing Liz fine. And I think, in the absence of messages from others, that the same is true for everyone else. If you wanted to dial off and dial back in, in case that helps, that might make a difference. But up to you. Otherwise, yeah, I appreciate it that you'll catch up afterwards if necessary.

Okay, David.

DAVID MCAULEY:

Thank you, Susan. And thanks, Liz. Thanks [inaudible] had the chance to review it, but not to consider it. I'm looking forward to considering it. I think it shows promise, from what I've read.

But I have a [question]. I'd like to adhere to what Susan suggested. That is that we reserve discussion until next week, but I'd just like to make a question or suggestion for next week. And that would be around this concept of having an exclusion for this extended time in the event it would adversely impact/affect a third party.

And this is for next week, I guess. How do you see that working? And I ask because, typically, people don't see these motions I guess until they're posted on the ICANN website. Who would represent the interests of a third party? So maybe ICANN could or would, or I just

don't know. So I would suggest that that's an area for discussion next week. So thanks very much.

SUSAN PAYNE:

Thanks, David. And I definitely think that's something that will be a fruitful area of discussion. And indeed I would add to that and suggest that we all sort of ponder on this in the interim. It seems to me that in the case of many IRPs—obviously an IRP is between ICANN and the party in question—but very often there is a knock-on impact on a third party of some form in the sense of, if a decision gets overturned that went in one direction, then potentially someone is impacted as a result of that who previously was perhaps the beneficiary of the decision.

And so also for us to ponder on between now and next weekend and to think about further next week is how do we see this playing out if, given that in many cases there is ... An IRP inevitably has some impact on a third party. Again, not for discussion now, but I think it's something that we will need to consider when we're trying to find the appropriate balance on the safety valve language.

Okay. I am just checking the queue. I don't have anyone in the queue, so I think this a really good point for us, I think, to move on since I don't see anyone with their hands up keen to ask any further questions or make any immediate—

Oh, Scott. Before we move on then, I will just quickly hand the mic to Scott. And then we will move on to our next point.

SCOTT AUSTIN: As luck would have it, whenever you say there are no more questions ... The only reason I'm raising my hand at this point, because I think you've said we won't discuss the specific comments on this until next week. And if that's the case, my question is ...

And especially, I'm having a real difficult time reading one—I think it's about seven lines up from the end—that begins “Any a request for leave ...” I just wondered if these were new. In other words, this is the first viewing of this or the first reading of this because I think I missed the last meeting. I had a conflict; or if these have already been reviewed by the group and considered. That's my question, especially in that sentence, because I'm really having a difficult time figuring out what it means.

SUSAN PAYNE: Thanks, Scott. I can answer that. And that's actually that point that you haven't seen this language before is exactly why we aren't having a substantive discussion this week. Liz very kindly circulated this language in an e-mail that I would say was probably maybe three or four hours ago now. So, today.

SCOTT AUSTIN: Great, thank you.

SUSAN PAYNE: And so you may well not have had the time to catch up on that e-mail before you came onto this call. So, yes, this language is new. It's obviously some language that we knew that Liz and team were working

on. But essentially we are just introducing it for this call so that people have had a chance to review it and to give it some substantive thought before we start discussing it.

SCOTT AUSTIN: Thank you.

SUSAN PAYNE: Okay. All right, so we can circle back to our next agenda item which is the matters outstanding and the next steps for how we handle that. And I wonder if it would be helpful, Brenda, if you wouldn't mind pulling up that matters outstanding document that was circulated by me prior to our last call. But we really didn't—exactly, thank you—but we didn't get time to really get to ... I gave it a quick kind of introduction our last call, but we didn't spend any substantive time on it.

For the benefit of those who maybe missed the last call and, again, because really we just touched on this briefly in about five minutes at the end last time. This was my attempt to pull together a composite list of our outstanding tasks in this IOT. So that is tasks basically with respect to the IRP rules themselves, and then also some of the other tasks—or hopefully, all of the other tasks—that are specifically or by implication allocated to the IOT group, many of which are listed in the bylaws as things that we are meant to deal with.

So I pulled this together from documents that was circulated when this new kind of reconstituted group of the IOT first started meeting, and also from some more recent e-mails—in particular some e-mails from David and Mike Rodenbaugh. And so I tried, as I say, to pull that

together and did ask if people could ideally take the time to review it and flag if they had any feedback on the list, particularly if they took issue with anything that was on the list or think that there's anything missing.

I haven't had any feedback, so I do hope that means that everyone is relatively happy with the list as it stands. But that's not to ... If you haven't had a chance to review it yet and you would still like to do so, there is still time. We clearly don't want to miss something, so if there is something missing on our to-do list, then please do flag it.

But for now, if you'll bear with me, I would like to just quickly run through the list so that we're sort of all on the same page and see if there are any immediate comments that come up as we're going through it. But just really pretty quickly.

So first up, the first section is matters relating to the IRP rules themselves. And that obviously has been the task that we've been viewing as our priority because we've got these interim rules in place, but we do need to finalize them and have a final set adopted. So there are some provisions related to the selection of arbitrators that were identified including ...

Potentially, we should consider—and these are not things that we have to do, but as I'm flagging things for us to consider—whether we want to better align the Article 3 language with the ICDR rules, particularly about the procedure for a third panelist; also considering whether we want to add anything about the nationality of arbitrators and particularly building in a sort of diversity element at all; and whether we want to include anything that specifies more clearly when the panel is in place in

order to, I think, give proper distinction between when there might need to be an emergency panelist and when we've got an IRP Panel firmly appointed.

The second item is around interim measures, which is Article 10. And that is a suggestion that perhaps we consider codifying the typical arbitral practice of clarifying that the emergency panelists and the IRP Panel, when they're appointed, have the authority to modify interim relief measures for procedural equity. And that we also might want to build in some page limits and rights of reply on interim measures.

I think this has a bit of overlap with some of the work that was going on consolidation/Amicus. But at a minimum, I think we'd want to make sure that it's been picked up.

The question of how we deal with the fee to initiate an IRP. This is something that Mike brought up. I'm not expressing a view on whether it's within our remit or not. There were certainly differences of opinion about this, but at a minimum I think it's appropriate for us to look at this and see whether there's anything in the current bylaws that determines whether we need to change or whether this something within our scope or not.

Mike, I can see your hand. Shall I a pause, or would you like me to come back to you at the end?

MIKE RODENBAUGH:

Just on this topic and real quick, Susan.

SUSAN PAYNE: Sure, yes.

MIKE RODENBAUGH: I would expand this slightly to include other administrative fees also. One I'm thinking of particularly, when the panelists are spread all over the world and they want hard copies of pleadings that have tons of annexes. Now these can literally cost hundreds of dollars just to copy and ship documents to panelists which I believe, again, under the clear language of the bylaws, should be an ICANN cost as an administrative expense of the IRP. But that's something that they don't agree with. And it literally costs thousands of dollars per case on top of the \$6,000 filing fee. So I think it is an important issue that we discuss. Thanks.

SUSAN PAYNE: Lovely. Thanks, Mike. And if you wouldn't mind, if you have the time to make a note to that effect—either on the e-mail or even annotate the document—that would be super helpful. But I will also try to capture that just in case.

Malcolm.

MALCOLM HUTTY: Thank you. I must say, following on Mike's comment about the disagreement between him and ICANN as to what constitutes an administrative cost, I would like to hear from ICANN Legal as to what they consider "administrative cost" means and what the limits of it. And

why they think that their view is to be preferred over Mike's, just in terms of interpretation of what this means. And also then, I suppose, to have some discussion as to what we consider to be required the bylaws in that regard. And what is open for rulemaking.

SUSAN PAYNE:

Thanks, Malcolm. Yes, I think that would probably be helpful. And when we're considering how we take all of this forward, I'm going to come on to talking about breaking some of the work up. But there may well be elements of this work, at least initially before it potentially got hived off into a small group, where it really would be appropriate for us to have a discussion amongst the full group. And it sounds to me as though this this issue is one of those. So I think that's a really useful thing for us to note for our future workload. Thank you.

All right, so moving on. Another item that I think we should consider whether we need to cover off is the procedure where ICANN elects not to respond to an IRP. I think this is probably something which is extremely rare, if indeed it ever happens. But it's covered in the bylaws that, theoretically, ICANN might not respond to an IRP. And at the moment, as far as I can see, there's nothing in the rules that deals with that. And so I think it is a gap that, at a minimum, we should look at and see whether we need to close off or not.

David.

DAVID MCAULEY:

Thanks, Susan. I actually flagged this, too, along with you as an issue because it's under bylaw 4.3(n). But when I flagged it, I also [said] I think

we need to balance it. There is a gap, as you say, when you measure it against the rules. But there's not a gap when you measure it against the bylaws. And I'm looking at the bylaw now. So despite what 4.3(n) says ...

Let me just read the last sentence from 4.3(g). And it sounds to me like I'm getting way too familiar with these bylaws. But in any event, that last sentence is, "If no Response is timely filed by ICANN, the IRP Panel may accept the claim"—and that's MAY accept, doesn't have to accept—"as unopposed and proceed to evaluate and decide the claim pursuant to the procedures set forth in these bylaws."

So there is some guidance, and I just wanted to note that when we come back to this issue. Thank you.

SUSAN PAYNE:

Thanks, David. And that's very helpful. And I think, yeah, you're absolutely right. And nonetheless, not to prejudice this, I think it might be helpful at a minimum for us to have some reference back or duplication of that language just to give those who are pursuing an IRP one place to look for the procedure or the process, and particularly for panelists. Although I'm happy to hear other views on that as well.

But I think it's definitely one for us to keep on the list for us to consider and decide whether we need to do something about it. So that's the basis on which a lot of this stuff is on this list of items.

Mike and Malcolm, you've both still got hands up. And I think they're probably old ones, so I will keep going. But if they don't come down, then I'll come back to you [inaudible].

Appeals is the next one that I put on the list. This is Article 14 in the rules. We have a provision. I think it's under the bylaws. I would have to find the relevant section. There is some provision for appealing IRPs. And the in the current interim rules, we've got this Article 14 which allows for decisions to be appealed to the full Standing Panel. And that's all fine, but it's a very brief paragraph that deals with this, with no real procedure for how one initiates an appeal. There is some timing, but there's no particular process on how you initiate an appeal, if there are any page limits, etc.

And so I think this is potentially an area that, again, may warrant some consideration to whether we need some additional rules on appeals. And indeed, whether we feel that the best thing to do is to actually amend these rules to expand that Article 14 to pull in some procedural elements, or whether we feel that, in the interest of getting these interim rules turned into final rules, it makes sense to effectively hive off the fuller consideration of the rules governing and appeal into a separate set of rules. So that's, again, something for us to consider and circle back to.

The other issue on appeals was, off the top of my head, I think is one that David raised which was do we wish to establish any limitations on appeals. And I think it goes hand in hand. For example, if it's a non-binding IRP, should they be appealable? I think this, again, requires some and reconsideration of the bylaws to see what's in scope for us in that regard. But in any event, if we're considering appeals, that's another element that we may want touch on.

Moving on again. And I'm conscious that I'm taking a very long time. Again, something David raised which was about non-binding IRPs and whether they should be precedent or not. And again, I think this one that requires us to look to the bylaws and see to what extent we have scope to be making any particular ruling on this.

And finally, also again something that, from recollection, David raised was whether there was any ambiguity regarding the Standing Panel's ability to adjudicate a stay or just to recommend a stay. And he refers to two particular bylaws provisions. And again, I think it behooves us to look at those and determine whether we think there is anything missing. And if so, if indeed the bylaws are ambiguous, it may not be something that we can fix in our rules. But it may be something that we would want to be, at a minimum, making some kind of a recommendation on.

Okay. I'm going to move a bit more quickly. So issues that are in progress. These are, again, still on the rules. But just to flag that we had a team looking at consolidation and Amicus, and it did sort of go into abeyance a little. So that group does need to step back up and come back to this group with a final suggestion. The elimination of the procedures officer was related to that and was being proposed as part of that work.

And the work on time for filing is also something that we obviously have in hand. But for completeness, I didn't want to miss that off the list because it is obviously something that we are still working on. And so included within that is the question about whether we need to clarify if time for filing is an affirmative defense that ICANN could raise or if it's

something that the panel should evoke of its own without an exemption.

And I think this goes hand in hand with that language that we were looking at from ICANN Legal earlier. It's something that we should be considering in that regard as well, and some confirmation about when the IRP is officially commenced. And again, I think that's something that Liz has picked up in her language that we were just looking at. But again, I wanted to make sure that we didn't miss things that are currently being worked on.

And then moving on to the next page, we have various other matters that are allocated to us either expressly or, I think, presumably seem to have been assigned to us, the IOT group, under the bylaws. And these include ...

If you have a moment, Brenda, could we flip to the next page? In the meantime, I'll just keep talking. We have the recall process for the Standing Panel which is something allocated to us under the bylaws. Standing Panel conflicts of interest, in particular to consider the development of additional independence requirements for members of the Standing Panel. And some term limits and restrictions on post-term appointments to other ICANN positions. Recommendations for training of the Standing Panel.

And then obviously quite a big task for us is that we should work on the rules for the Cooperative Engagement Process where we currently are working off of, effectively, the former rules under the old bylaws. And that's something that needs to be modernized, shall we say.

And then under the bylaws again, 4.3(a)(v), it's suggested that we might consider designing specialized rules for a PTI service complaint. And so that's, I think, also on our to-do list, if you like.

And then, finally, this is something that came up in e-mails. I want to say it was something raised by Mike. I can't recall if that's correct or not. But a question about summary dismissal of a Request for Reconsideration by the AMC, and it being unclear how and when this could be challenged. I've put it on the list. I'm not sure that this is within our remit. It's possible that it intersects in some way with Article 4, time for filing. I think at a minimum, it's something that we should look at and see whether it's within our scope and something we should address or not. So rather than lose it, it's here on the list as sort of under "other."

And so that's our list. It's quite a hefty list of tasks for us still to do, and I'm really conscious that I think, quite rightly, we've been discussing some of the thornier issues on the interim rules, particularly the time for filing is one that we always knew was going to be difficult and time consuming. And it, I think, was important for us to be doing that as part of the full IOT.

But I'm really conscious that this is taking an extremely long time, and I think we need to pick up the pace a little. So what my suggestion would be, and obviously I'm really keen to get people's thoughts, but I think in order to try and make progress, we should at a minimum initially for the tasks that we have under these rules, I think we may need to cover these off in small groups.

And so my suggestion would be that we look to putting some small groups together who can work on one or more of these topics outside of

the main group meeting and then bring recommendations back to the full group for approval. So that's not to usurp the role of this full IOT in any way. But really just to hopefully have, as I say, people work on things in smaller groups offline out of the main meetings and then come back with suggestions which we all then will review/consider/discuss as necessary before finalizing.

And now I think what I would proposing then is to put some requests for volunteers out to the list. And I'll try and just break some of the workload up into some chunks. And as I said, really I obviously appreciate any feedback now on this idea. I would very much appreciate people volunteering, assuming we do go forward with that. But I'm really conscious that we've lost some of our members because perhaps they haven't felt that we're moving fast enough.

And indeed, I'm really conscious that we've got interim rules and they've been standing now for such a long time, and we really need to pick up the pace.

David.

DAVID MCAULEY:

Thank you, Susan. I think this is a great idea. And I think that if and when we do this, we ought to put an e-mail ... You should put an e-mail on the list mentioning this to the folks—not dropped away, but maybe who are in the process of drifting away—to bring everybody back. I think this is very important.

And this discussion of all these issues sort of illustrates the fact that this small group that we are in, we're going to become rather knowledgeable

about Bylaw 4.3, much more so than [any] other people in the community in most cases. And so it's it would behoove us to get all of us back together. And working on small projects, I think, is a great idea.

The one question I have is—and I'm going to ask it with a backdrop of having worked in small groups in other places where there is no staff support and it didn't work—will there be staff support? Will there be the ability to pull together Zoom meetings and that kind of thing for the smaller groups? Thanks.

SUSAN PAYNE:

Thank you, David. I guess I'm going to be asking Bernard and Brenda on that. And it may be that that's unfair to put them on the spot, but certainly my hope would be yes. I agree with you that I think where small groups break away and start using their own platforms and that kind of thing and they don't have the benefit of recordings, it tends not to be terribly effective. It can be quite problematic. And so I'm not looking at this as being something that goes offline. I'm just looking at trying to break this up into some manageable chunks that we can move forward with in parallel, really.

And I see Bernard is commenting in the chat that usually, yes, there ought to be staff support for this. Great. Okay, thank you. I'm not sure if you're waving, Bernard. Do you want to speak or is that just a [inaudible]?

BERNARD TURCOTTE:

Yeah.

SUSAN PAYNE: Thank you.

BERNARD TURCOTTE: I think it would be ... Any effort to speed this up would be certainly welcome by ICANN. And [we'll] provide, I would expect, any support that is needed for these groups.

SUSAN PAYNE: Excellent. Thank you very much. Yeah. I do hope that people can find the time. I'm not looking to hugely increase your workloads. Depending on how things go, we may even slightly reduce the frequency of these full group calls, although I don't necessarily want to do that immediately. But I just would really like us to move things forward.

Okay. So please look out for more on the e-mail list about this, and that will also give the opportunity to bring this to the attention of those who haven't been able to join today and, as David says, those who are slightly drifting away from our group. We can hopefully convene some small teams to move things along.

All right. I've spent a bit longer on that than I really meant to. And I'm conscious of my own comments at the beginning that I said I was going to give us 30 minutes for looking at the timeline.

So very briefly then, I thought it would be helpful. We spent much of our call last time in a discussion with the Ombuds. And I really hope that, to the extent that people weren't able to join that call, that they've had a

chance to listen to the recording or read the transcript. If you haven't, I think it still would be very beneficial to do so.

I feel that we had a really useful discussion with Herb Waye. We were particularly seeking his views on the practicality of tolling time limits or tolling the time to bring an IRP to allow for a complaint to the Ombuds.

And if I could summarize really briefly, I think what we heard from Herb was that he was concerned about the confidentiality of his office. And that, the Ombuds, felt that disclosure of Ombuds proceedings undermined the credibility and the trust in his office. And so he had real concerns about effectively having to disclose that there were proceedings before his office in the context of seeking to toll a time limit.

He also commented that he always strives to deal with complaints really promptly and he also takes into account things like the potential for other processes and would try to take that on board in how swiftly he deals with something.

He also did comment that his is an informal process and the moment that some kind of formal procedure such as a Request for Reconsideration or an IRP is starting, he steps away, usually having had some kind of a conversation with the party in question about whether they want him to step back in later.

And so my sense from our last call is that all of the comments from Herb would seem to argue against tolling of the time limit to bring an IRP for an Ombuds complaint. And I think that some of ... I got the sense on last week's call that a number of our members were all of that mind. I

would say that I don't think that everyone was of the same mind. I certainly noted comments from Kurt, in particular, who expressed some concern about that and didn't necessarily feel, for example, that on Ombuds procedure ought to be speeded up in order to ensure that someone wasn't out of time for an IRP.

But as I say, overall my set my sense from last week's call was that the Ombuds who obviously adjudicates that procedure was not in favor of us tolling for that process. And that does seem to me to be quite a significant piece of the puzzle, if you like.

We're not necessarily making a decision here and now, but I think my proposal would be that we would not be proposing to toll for an Ombuds complaint. But I would be interested in any immediate views on that and, more particularly, I think this is something that we can cover off further with people's more fuller thoughts after this call by e-mail and the like.

Bernard.

BERNARD TURCOTTE:

Thank you. I seem to remember Herb telling us also that it was in the best practices of Ombuds associations that Ombuds activities not be linked to any such activities as tolling, if I remember correctly.

SUSAN PAYNE:

Thanks for that, Bernard. I recall him saying something along those lines. Certainly he talked about the kind of best practices of his industry, and

he particularly talked about the best practices of confidentiality and the like and remaining informal and not a formal process. Thank you.

And perhaps I might double check exactly what he said to remind myself, but I agree. I think, overall, there were a number of reasons advanced by Herb as to why he wasn't really in favor of us tolling for proceedings before his office.

I'm conscious of the deadline that I imposed, and therefore it's my fault that we're coming up against it. But just before we move on to the next agenda item, does anyone have any strong views that they want to raise now?

Kurt.

KURT PRITZ:

Thanks very much. This is out of ignorance and I can be talked out of this, but it seems like the time allowed before filing an IRP is to do the work necessary to file a competent IRP. And that requires significant investments. So the investment happens during the whole time allowed for filing an IRP, and by not tolling that time, it forces the complainant to invest in the Ombuds process while she or he or they invest in the IRP process putting together all the material in order to file a competent IRP.

So it seems to me that it's just not that the complainant still has time because the Ombudsman will hurry up, but theoretically the complainant needs that time in order to make the appropriate investment and to do the work properly. So to me, by not tolling, you're forcing the complainant to invest in the Ombudsman process while he's investing or she's investing in the much more expensive IRP process. And

it seems like the complainant shouldn't have to make that investment decision until they hear from the Ombudsman.

So that's my theoretical look at it, but I stand to be corrected by real practitioners here with experience in this that say it's not really a material effect. Thank you.

SUSAN PAYNE:

Thanks, Kurt. And I think that's definitely a really good point. At a minimum, a really good theoretical point. And like you, I welcome the views from anyone who has experience on the ground. I think generally that experience is relatively limited in this group.

But we won't make any definite decisions on this, obviously, on a single call. This is something for us ... I hope we can express further thoughts on this and perhaps advance it a bit further between now and our next call or next couple of calls, and we can come back to this.

But yes, I think that's probably as much as we should say for now if that's okay. But duly noted. And I speak as someone who, up until the point of the call with Herb, had been very much of the view that you have expressed, Kurt. But it did seem very telling that the Ombuds themselves, or himself, was very reluctant for us to do this.

Okay. All right, so moving on again because I said that I would ensure that we have 30 minutes for the final agenda item that we have. And this is to come back to the discussion on the times for non-IRP accountability mechanisms. Now actually, I'm just noting ...

Oh, Sam is here. Sorry, I didn't see you join us, Sam. So I'm really pleased you are here. This is something that we turned to towards the end of our last call, and I don't think that, really, you were given a great deal of time to go through the slide presentation that you had. In particular, we did look a bit at the timings and the assumptions that you'd made on timings on the first slide.

But when Bernard circulated it, I didn't note that there were a few other slides after that I'm assuming you had wanted to talk to. And I think it would be beneficial for us to have that conversation now or at least to have that conversation initially and then, as with the safety valve language, I think we will undoubtedly be coming back to this. And again, I'd like to ask that people share their views in writing so that when we come onto a call, we have something to work from and we are already sort of partway into the discussion.

Sam, I'm assuming that you would be happy to pick this back up and spend a bit longer on this than I allocated to you last time.

SAM EISNER: Sure, Susan. Whatever is helpful for the group.

SUSAN PAYNE: I think it would be. Particularly, as I say, I noted that there were some follow-on slides, and I think it would be beneficial for us to look to them.

SAM EISNER:

And I know that Bernard had circulated the slides again to the team, so here we go. They're up. And if we recall, we did that really fast run through last time we were on the call. And I know I probably raised more questions than answered anything, so I don't know if there are some questions from the last time this was looked at that the group wants to talk about or if this might be a good time just to enter back into this conversation with a little less urgency based only having 10 minutes to talk about it.

SUSAN PAYNE:

Thanks, Sam. I did actually have one question, and it was really just about the assumption on when the clock starts for the IRP and the CEP. The assumption there is that it looks to be 30 days after resolution posting, as in the knowledge wouldn't be inferred for 30 days. But I wasn't really sure where that comes from because it seems to me that knowledge is kind of a factual thing.

And so if, for example, someone were formerly notified of the particular decision or they had acted in such a way that it was clear that they had knowledge, it seems to me that there wouldn't be a presumed knowledge after 30 days if actual knowledge is sooner than that.

But I wasn't sure, I mean, whether this was just for the sake of argument for the purposes of a hypothetical or whether you're suggesting that knowledge would never be inferred before 30 days and that we can treat that as a hard and fast rule.

SAM EISNER:

Yeah. I think that's a really good call out here, Susan. One of the things that we were basing it on is that there has to be a moment that people are deemed to be on notice. And we don't think that it's just the fact that something happened in an IRP or that something happened in a Board action is probably the best way to account for that because while ICANN continues to enhance its transparency in the location of information on its website—and we are hopefully, in the next few months, launching some really good updates to the Board material section to make things much easier to find and to really highlight for people what's important at Board meetings and things like that as part of our information transparency work—we still need to account for the fact that people will know about things.

And so one of the things that we looked at, and this another component of language that we're looking at, is that we already have ... So what we used to have for IRPs was that there was a timeframe of a certain number of days from the posting of ICANN Board minutes. And so it was the posting of the Board Minutes that started the clock.

So there was a lot of time before that during which people had the opportunity to also initiate reconsideration requests. You would have already had your resolutions published in accordance with our requirements for the timing that we publish the resolution. There might have been discussion in the ICANN community. And it's the resolution publication that actually is embedded within the bylaws on when you have a reconsideration time clock.

And there's also some other language in the bylaws because the bylaws now, for reconsideration and IRPs ... And I'm sorry for confusing the two

here, but I think it's important to step back for a second. So after the transition, one of the big changes for the IRP was that it now accounts not just for Board action, but also for staff action. And we already have both Board and staff action defined within the bylaws for what notice means under reconsideration.

And so we were thinking that it might make sense, now that we have this broader IRP ... Because it's indeed the fact that we added staff actions to the IRP that made it so that we couldn't just keep the same deadlines in the bylaws. That's the whole reason why we have this time for filing situation that came up. We knew that we now had more situations that we had to think about in order to make sure that we had an appropriate time for filing.

And so given that we have room within the bylaws now and we have a defined cadence in the bylaws for how notice can be inferred for staff action for reconsideration that allows for both staff and Board action, we're thinking that it makes sense to use that same structure for giving an affirmative date of notice for the IRP as well.

And so we also think it's important that [during] reconsideration you time things from the publication of the resolutions. For IRPs it's always been time from the publication of minutes because minutes are also accompanied by Board briefing materials. And one of the things that you want to make sure that you have for an IRP is as much information available about the action that happened within ICANN. And so that would be supported by the Board briefing materials that were also presented to the Board to accompany those decisions.

And so that's where this assumption came from that we needed a date certain to trigger notice calculation from. And we don't think it's appropriate, and I don't think that anyone on this IOT would also support that we would do this just from the random date that something went up on the ICANN website. And if you're talking about a minute publication, you've already had a lot of other time for this information to be within the realm of existence.

You've already had the opportunity for people to come and avail themselves of reconsideration processes and all of that. So likely, people are already actively working to watch what's happening. They're aware that things are happening. They're aware that impacts are happening. So then they're kind of waiting to see when that minutes come out on an issue.

So that's the basis for that. Do you have more questions on that part, or can I proceed?

SUSAN PAYNE:

I think I do have more questions in the sense that I'm struggling at the moment to understand how that aligns with the actual knowledge element under the bylaws which we can't really supersede. But I think perhaps that's one for further thinking and consideration, and maybe you should proceed for now.

SAM EISNER:

Thanks. So what this shows, again, if we look at the chart ... And one of the things that we've been talking about ... And I think we have some

really fundamental issues that this poses to the IoT because as we talk about tolling, we're talking about an idea that's never been expressed in the bylaws before and was not expressed in the CCWG as were updating that IRP and the other accountability mechanisms. Which is that they're intended to be sequential mechanisms as opposed to intended to each serve different purposes.

We know that they're related. We know that sometimes people do you use them sequentially, but we also know that the bylaws don't specify them to be used sequentially because they each have different standards that they're testing against and they can be used in whatever order is proper. And some things might be appropriate for reconsideration but not for an IRP, and some things might be appropriate for an IRP but not a reconsideration. And the Ombudsman's world is its own world.

So if we're thinking about how these things flow together, if we're having a discussion about when the clock should stop to allow for certain things and when the clock shouldn't, we wanted to help think about what that all looks like. So reconsideration. If we're just looking at Board action, reconsideration starts after a resolution is published. That's when the timing happens. And so here, if you see, we have 30 days already. And let's just assume ...

And I know that Mike has put into the chat that there are times when minutes can take much longer than 30 days to go up. That's true. The soonest time period really would be 30 days after the publication of the resolution. We wait for the next Board meeting. We try not to handle minutes on an ad hoc basis between Board meetings. And sometimes it

takes longer to get those minutes approved than others. We've had some minutes that have had a really long tail. We try not to have that too much.

But you have an expectation of, typically, a 30- to 60-day window after the resolutions are published for the Board minutes to be approved. And so that's where you see this blue period. There's nothing that anyone would anticipate they're even on the hook to do for an IRP or a CEP until that blue period's over. And likely, the soonest timeframe you'd imagine someone having their clock start on an IRP is at that 30-day window.

So you then have time for the processes themselves to run. So you have time from knowledge—so that's the orange—in order to file. And then the gray would be assuming the process length. Now of course, for the CEP and the IRP, you could trail the gray part out for a long period of time.

We're not trying to show that it's just that short time, but we didn't want to make this over the long chart. But we figured that the other items fit within this 180-day period and so it made it easy to visualize about things that happen before and IRP, and how those could impact.

So you have a potential for someone filing a reconsideration, for example, prior to a clock even starting on an IRP. And so if we have a rule that we're using within the IRP that tolls, that stops the clock for an IRP even during a reconsideration process, for example, that's supposed to toll for the entire 135-day process within which reconsiderations are now required to come to a close, what do we do about the fact that the

IRP might not have even started to count until, who knows, day 30 of that 135-day process if it took 60 days to get the minutes up?

So you already have this disassociation of clocks, and so that's one of the things we're trying to just put out there and show that there are multiple things that we're thinking about.

And so instead of thinking about when we're stopping clocks, maybe we can think about this from a different way which is what do we think makes sense in terms of making sure that our people have the ability to have meaningful review for accountability's sake before they come to an IRP, but still making sure that we're going through the process and making sure that we're also upholding the import of the IRP.

Because if you were to add a full 135-day tolling, because there's a 135-day reconsideration process, onto when you start a clock for an IRP, that's different than making sure that after a reconsideration process closes that there's a sufficient went window of time left in order for a claimant to evaluate whether or not they wish to bring an IRP.

So I think we wanted to just start that conversation of, are we really looking at tolling or are we looking at preserving a sufficient amount of time for people to bring their appropriate claims?

So I can go through some of the other slides if that would be helpful.

SUSAN PAYNE:

Thanks. Yeah, I think it would, Sam. Thank you.

SAM EISNER:

So if you can go to the next slide, Brenda. Great. So some ways that this already plays out in the system is that under the current tolling process that we have, we have a CEP initiation that's required to be found 15 days before the end of the filing of an IRP deadline. So we know that the CEP currently tolls the filing date of an IRP, and neither ICANN nor the IOT is proposing that that concept changes.

But what that does is that it guarantees that there would be a 15-day window for a complainant to complete an IRP filing process after the close of a CEP, even if they waited till the very last day to initiate CEP. So there's that concept that you want to leave time at the end of your process to make sure that you then have some meaningful time to file an IRP.

And so if you start with ... That's what we're already working under, that concept that we don't just add as much time as people might want. But we look at it in terms of backing out from the end, how much time is needed to have a meaningful filing? That helps us, I think, come to that conversation of how much time is too much. And so maybe we can consider this in terms of the remaining time to file instead of fully stopping the clock. And so here's where you can see this come out.

And this was drafted before we were having a conversation with the Ombudsman. But let's just assume ... Forgot the Ombudsman conversation and just say it's DIDP. So if you have a 30-day stop the clock for DIDP plus 135 days for the reconsideration process, then you would have stopped the clock for 165 days and still allowed for the full 120 days remaining for filing of an IRP after the stopped clock. And then, of

course, there's the CEP, but I really consider a CEP a little bit different because of the purpose of the CEP.

And so that means a claimant would then have 285 days total to file from the time that they're supposed to have knowledge of the action. And so that more than doubles the timeframe that has already been established.

So before I go on to the next slide, do we want to talk through this?

SUSAN PAYNE:

Thanks, Sam. Yeah, I can Mike has his hand up. So, yes. Mike.

MIKE RODENBAUGH:

Yeah. With all respect, Sam, I don't think that's a very fair statement to say that you've got 285 days to file the IRP. I mean, over half of this, you're engaging in processes. In fact, all of this, you're engaged in processes specifically designed to try to avoid an IRP. You're not even thinking about an IRP complaint. So I just don't think that's right to say that that's such a long time and to stack these all together. We just need to keep them separate. We're dealing with the time to file an IRP regardless of how long the prior processes took because that's not within our remit. Thanks.

SAM EISNER:

So Mike, does that mean that we shouldn't be having the tolling conversation? Because I think what we're trying [inaudible].

MIKE RODENBAUGH: I think we should be having a tolling conversation, but it doesn't matter how long it's tolled. If ICANN doesn't meet its 135-day target for reconsideration, well that's not the applicant's fault. Or even if it is, it doesn't matter. They're engaging in a process designed to avoid an IRP, so it shouldn't really be relevant to when the IRP clock starts ticking until that process is over. Once the RFR is done, ICANN issues its decision and informs the requestor about it. Then that starts the 120 days, no matter how long it's gone on before. That's my view.

SUSAN PAYNE: Thanks, Mike. Malcolm. I'm assuming, Sam, you didn't want to specifically respond to that. But perhaps you'd come back after Malcolm, if that's okay.

SAM EISNER: That sounds good. Thanks.

MALCOLM HUTTY: Yeah. If you have something that you're concerned about with ICANN and you file, say a DIDP, you may not really know whether you even have grounds to bring an IRP until the DIDP makes the disclosure. It seems to me that the decision to actually bring the IRP, from the point of view of the applicant, they don't know whether they want to do it at the beginning of this time frame that Sam's laid out. They only know it as a result of these processes haven't gone against them.

ICANN may know that there's likely to be an IRP out of it because ICANN knows the information that it's being forced to disclose under DIDP. But the applicant doesn't necessarily know. Likewise, the applicant doesn't know under the Request for Reconsideration that they're going to bring an IRP because they don't know that the reconsideration isn't going to uphold their case.

So you can't really count a time before the decision went against them as part of the time in which they should be considering filing an IRP because the whole idea of this is that they shouldn't be filing an IRP during that time. That's kind of what the Request for Reconsideration process exists for, to encourage them not to file.

I think that there's a risk here that if we make it too difficult for an applicant to file an IRP when they are going through these other processes, they're simply going to fire off premature IRPs at a time when, actually, maybe we could have avoided IRPs. And that doesn't seem to be in ICANN's interests any more than anybody else, and certainly not in the interest of a timely and efficient resolution of disputes. Thank you.

SUSAN PAYNE:

Thanks, Malcolm. I'm conscious of the time. It feels like there's quite a lot to discuss on this.

David, you have your hand up so I think you might end up with the last word. Although I will come back to Sam briefly after you, David, if that's

okay. But I think we'll also, perhaps we can all review this and we'll come back to it by e-mail and on our next call.

David.

DAVID MCAULEY:

Malcolm makes a fair point that a person may decide to bring an IRP after they do their document request. But that's not the whole universe of folks. Many people will have decided to bring an IRP and they're using DIDP just for discovery. This is a complex area, and as an advocate of—you've heard me say this before—swiftness, certainty, predictability, move on, make the claim, I don't agree with tolling for the Ombudsman. I just don't agree with what Mike and Malcolm are saying. It's just a difference of opinion. I just wanted to note it so it's not forgotten. Thank you.

MALCOLM HUTTY:

[inaudible], I wasn't arguing for tolling for the Ombudsman. I've never been in favor of that.

SUSAN PAYNE:

Yeah, okay. I think we're talking more generally about tolling here, though, I think.

Sam, did you want to come back on this or shall we park this as a discussion to continue?

SAM EISNER:

I would like to just flash to the next slide because I think that we're building in presumptions that are not based in the bylaws and haven't been tested, which is that these items are supposed to be sequential. I think it's really important to remember that the reconsideration process has always coexisted, since at least 2002, alongside the IRP process in the ICANN bylaws. And until 2016, the IRP was set for filing within 30 days of the posting of the minutes. We're already moving to a place where that's a much longer time period.

And so some of the concerns that we've heard expressed, while we share in the goal that we want to make sure that we're meaningfully reducing the items that go to IRP, they're based on some presumptions that don't necessarily fit what's in the bylaws or fit the different purposes of the processes. And so I think we need to keep that in mind. And we are already at a position now where we're giving people more time and more opportunity to meaningfully file an IRP than they had before.

And we can really look at how we expect these things to be related while also upholding the goals of efficiency of the IRP as well, and where that fits with the accountability of people coming to ICANN to use the accountability processes and making sure they're raising those items on time. And so it's not that there's not a place to make sure that these things complete appropriately, but there are places where maybe it doesn't have to be a 10-month window as opposed to thinking more concertedly about what it means to meaningfully have some time to file an IRP after other processes conclude.

So I think that might be a helpful way to think about this as we move forward.

SUSAN PAYNE:

All right. Thanks, Sam. And apologies. I've let us overrun a little. And so I think we do need to wrap this up. We clearly need to keep this discussion going. I'm not entirely clear of what it is you're suggesting in terms of the tolling, Sam, but I think this is something we should come back to our next call.

But in the meantime if we can continue this debate on our e-mail list, I think it would be very beneficial if we could try and do so. So perhaps we can all take an action item to review Sam's slides and share perspectives by e-mail before we come back on next week's call.

Okay. And again, apologies everyone for my poor time keeping. Brenda, I think we can stop the recording. And thank you very much, everyone. This, again, I think has been a useful call. More to discuss.

SAM EISNER:

All right. Thank you.

SUSAN PAYNE:

Thank you.

UNIDENTIFIED MALE:

Thank you.

MALCOLM HUTTY: Thank you, everyone.

[END OF TRANSCRIPPT]