BRENDA BREWER: Good day, everyone. Welcome to the IRP-IOT call #77 on the 28th of September, 2021, at 19:00 UTC.

This meeting is recorded. Kindly state your name when speaking for the record and have your phones and microphones on mute when not speaking. Attendance is taken from Zoom participation. We have received a note from Flip that he will be delayed.

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

SUSAN PAYNE: Thanks very much, Brenda. Hi, everyone. Thanks for joining so promptly. Let's get going on our call for the 28th of September.

So first up, as usual, we'll review the agenda. Let's start with that straightaway. So we have that usual look at the action items from the last meeting. We will then move on to continue our discussion about the times for non-IRP accountability mechanisms. In particular, I think we'll come back to the e-mail that Sam Eisner sent us about an hour or so ago. And then we'll move on and come back to reviewing and discussing the draft language for the repose safety valve before finally … Just to note that our next meeting is in two weeks' time, on the 12th of October, and that's at the 17:00 UTC timeslot.

So, first up, before we start in earnest, does anyone have any updates to their statements of interest?

Okay. I'm not hearing any and not seeing anything in the chat. So that's all good.

Number two. In terms of the action items, the first one that we had was for all of us, really, to review and provide some comments and input on the draft language on the repose safety valve. So thanks very much to those who were able to look at that and provide some comments. And hopefully everyone was in a position to at least look at it so that we can have a sort of substantive discussion when we get onto that agenda item.

The other action item was one for me, which I have not yet done, which is to put out some requests for volunteers for a selection of small groups to try to move forward the other outstanding items on our rules to try to wrap the draft rules up as promptly as we possibly can now. So I'm going to keep on the list for next time to make sure that it doesn't get accidentally overlooked.

Item 3 now on our agenda is to continue this discussion about the times for the non-IRP accountability mechanisms. And the thinking behind this and the reason why I had asked Sam and Liz if they could take a look at this was I think we had been talking for some time about the notion of tolling the time to bring an IRP for some of the other accountability mechanisms, such as the request for reconsideration, the document disclosure request, complaints of the ombud's, and so on.

Now, we separately, I think, have probably reached a feeling after our discussion with the ombud's that perhaps that's not necessarily a process that we might be considering tolling for. But the reason for this

request was to give us all a better understanding of, if we are seeking to the toll the time for filing an IRP for some or all of these other mechanisms, what we were really talking about, what kind of time we were talking about. Particularly that then would allow us to potentially look at addressing the concerns that some on the call—in particular, Kavouss, I think it is—had raised about sort of not just stopping the clock for an unduly long period of time and that there should be boundaries to this if we're going to toll.

So it was with that in mind that Sam and Liz were asked to look at this, but I know that they, in the course of doing so, have been giving it some further thought.

And I think, since your e-mail, Sam, was fairly shortly before this call, I wonder if perhaps we could turn to you or to Liz to kind of talk through your thinking. I know we've sort of had some discussion on the list call, and we did have your slide deck, but I know I did come away from the last call being not quite sure what it was that you were proposing or, indeed, if you were proposing something specific. And so I certainly did find your subsequent follow-up helpful in better allowing me to get my head around what your concern is. But I think, if you wouldn't mind talking to it, that would be quite useful for us because I'm not sure to what extent people on this call will have had time to give this a huge amount of thought. So if I could turn it to you, Sam, perhaps?

SAM EISNER: Sure. I'd be happy to do that. So I'd like to thank Susan for reaching out and suggesting that might be a good time to really try to firm up a little

of what we were discussing before because one of the things that we started really thinking about internally when we went back … because we had offered to come back and say, "Okay, here are the average amount of times of the process," just so we had a sense of the timeframes we were talking about. But when we actually started thinking about what tolling meant, we had just some broader thoughts about it come up that we wanted to share with the IOT and make sure we were all talking about the same thing and with the same purpose.

I know we have had two meetings where we had the slides up and kind of ran through them quickly, but there are lots of different concepts in there. And so I sent an e-mail this morning—I'm sorry it wasn't sooner—so, clearly, we're not expecting everyone to come and engage fully on that. But just to walk through … And, Brenda, and I don't know if you're able to put up that e-mail. But I identified three kind of vague topics that might help, from our side, frame what we're thinking about.

So first is the relationship with reconsideration. And I know that one of the points that we discussed last week that Malcolm had noted he wanted to talk about a little bit more fully and explore was understanding whether or not reconsideration/IRP were indeed sequential processes. So I think that's worth talking about a little bit more within this group and understanding the relationship between the two or, indeed, whether there is a relationship between the two.

And so there's this note in here where I refer to myself in the third person, which is, "What does Sam mean by sequential?" And here's where I think some of the current practice and how these things really interact currently, and understanding that might make sense.

So when I've said last week—you'll see it again here—that the bylaws don't set out and don't contemplate that the reconsideration process and the IRP process are sequential processes, what I mean by that is that the bylaws don't contemplate that there's to be an allowance for the same exact action to be challenged and that there should be the allowance for the same exact action to be challenged in the subsequent processes—so, first, in the reconsideration process and then the IRP process. And what I mean by that is the decision that happens on a date specific because we have the reconsideration process that has its own standard, its own conduct that it's challenging, and that's when ICANN is alleged to be acting in contravention to a policy or process. So you're asking the Board to say, "Do that over because you didn't do it. It was not done in the way that the process (or policy) said it was supposed to be done."

Then we have the IRP process, which says, "ICANN, when you did that, you violated your bylaws (or articles)." Those are two different standards.

Now, there is a possibility that conduct that is inappropriate under one could also be inappropriate under the other, and they could be the same. They could both lead to accountability mechanisms, but then we've also had this history that we've always—a reconsideration process that exists side-by-side with the IRP process—and the timing of those processes has always had overlaps that, in effect, did not allow them to be used sequentially.

We put in a little bit of information in here that, pre-2016, which is the most recent iteration before the current bylaws, the quickest a

reconsideration process could happen would be within 105 days. But we all know that is not the timeframe that reconsideration processes tended to go on. They could last for much longer. And the time for filing of an IRP could, at best, we within 90 days within the same action. So there has always been this possibility and reality that you make your choice between a reconsideration IRP. And there hadn't been any sort of directive in the bylaw that one would stop in favor of the other.

And there also is the reality that the way people have used the accountability mechanisms makes us think that they've been used sequentially, but they're actually challenging different actions. So what we've seen really happen is that, when there's an action by ICANN that gets challenged through the reconsideration process, when that reconsideration process concludes … Admittedly, most of the time, people who brought the reconsideration process are not satisfied with the outcome of that. We're not here to really discuss that, but I'll just acknowledge that. So once that reconsideration outcome comes, the claimant then has a new act of the ICANN Board that they chose to act upon. And they use that reconsideration decision to say, "ICANN, when you resolve this reconsideration decision, you did that in violation of your bylaws (or your articles). So I'm going to use that as a basis for an IRP."

So, while it looks like it has been a sequential process from the same act, it hasn't been. And there's nothing within anything we've talked about within the IOT that would stop people from using the reconsideration first and the IRP second the way that people have always done. You don't get timed out on that second act because you just challenged the first act. They're not preclusive of each other.

And so, really, what we're looking at is the question of whether or not there's a reason not put in the sequential process, which is acting on the same thing, the same exact act of the Board, and what the impacts are more broadly on the accountability mechanisms and how that looks.

So I'll stop there because I think that that's kind of the baseline for the rest of the items that we laid out.

Are there questions or conversation we want to have about that?

SUSAN PAYNE: I suppose I do have some thoughts on this but I would like to defer to others in the group first. So, David, I see your hand.

DAVID MCAULEY: Thanks, Susan. Thanks, Sam. And I did get a chance to read your e-mail. And what you say in your e-mail sounds reasonably to me, but I would like some time to think about it further.

My question is with respect to what you just mentioned towards the end of your comments, Sam. And I'm not sure I understood it. So my question is, have IRP panels been treating a claim at IRP that is essentially an appeal from a reconsideration request? Have they been considering the merits of the reconsideration request or have they been sort of basically considering whether the process of the reconsideration was conducted fairly in accordance with the bylaws on reconsiderations/ requests? It strikes me that that the latter would be the standard.

So whatever the merits are, if you brought a reconsideration request and it was handled properly and it simply came down against a claimant, it seems to me that's a different question than the merits of what came before the reconsideration request. Maybe I've garbled that, but that's my question I'm trying to get to. Thanks.

SAM EISNER: Thanks, David. That's a really good question. And the reality of what has happened is that, when claimants bring an IRP about the reconsideration process itself, inevitably we have had the actual underlying action being part of the discussion. We have never seen a panel that refused to, as far as I know … Kate Wallace, which is who works us from Jones Day, and Liz Le are here. I cannot recall a time when we've ever had a panel say, "Right, we're only going to limit ourselves to just this decision without looking more underneath it." Everyone who has brought an IRP based on a reconsideration has inevitably included in there why the reconsideration itself was wrong, too, because of different facts that existed. They're just all so connected that we've never seen a procedural separation at the IRP level, which I think is one of the things that has contributed to that idea that these are sequential processes. Of course, that's been what's happening, so let's make sure we have this IRT that allows it, but in reality, it is not what has been happening.

SUSAN PAYNE: Thanks, [Sam]. I'll come back to you, David, because you may have a follow-up question.

DAVID MCAULEY: Okay. Thank you, Susan. That's kind of you. So thanks, Sam. And I'd be interested in what Kate and Liz have to say about the history.

So it strikes me then that—this is just an observation—in the first case, if it hasn't happened already, where a reconsideration request is next [to appeal] to an IRP, if that question is "litigated," the decision of the panel is going to create a precedent. So it's really something of important. And I'm not sure what that means to us as the IOT, but it does give some importance to this whole discussion about sequential, etc.

So thanks a lot, Sam, and thank you, Susan.

SUSAN PAYNE: Thanks, David. So I sort of put myself in the queue as well. I hear and understand what you're saying, but I think I had the same question as David. And that is indeed that what you've said is kind of my understanding of how things have been treated. But does strike me as sort of fundamentally being quite a fudge in order to get around the fact that people were timed out. So it seems it's more a point that ICANN has chosen not to take a point on the timing rather than … I guess I'm just troubled with the fact that we're requiring a complainant to sort of—ugh, what's the right word?—manufacture, if you will, a new ground of complaint based on later act in order to not be out of time—yeah, "torture the complaint"; thank you, Kurt; that was what I was trying to say—when their complaint is not truly about the second act,

except to the extent that, of course, the second act didn't overturn the first. But it's about the first one.

And I suppose my question would be, could there be a scenario—I haven't got my head enough to know whether it could ever even come up—where the reconsideration process and the outcome of the reconsideration was entirely appropriate but still, fundamentally, there is still a complaint or a claim to be made about the original decision? So essentially, by challenging the second act, they're doomed to failure, whereas, if they had challenged the first act, they wouldn't have been doomed to failure. Does that make sense?

SAM EISNER: It does, and I think that this becomes a question. Not that this is an inappropriate conversation to have. I think that these are really big, really important questions. And it really comes to the other part of, is a tolling conversation for an IOT that was asked to address a time to file because we added additional grounds for IRP, we added staff action so we couldn't just time everything from Board action … Is this the purpose of the IOT to have a conversation? We're not asking the wrong questions in this group. Well, we're not asking the wrong questions, but one of the concerns we have is whether or not these are the questions that are within the purview of this group. These are fundamental questions about the accountability mechanisms themselves as they're defined in the bylaws.

So we agreed that, in many ways, this has become a tortured complaint in some ways. We would agree with that. But that doesn't mean that

this group is empowered to say, “Okay, so let’s add a lot of other times so that we change how these two interplay with each other,” because we have two different processes set out in the bylaws with two different standards. And if someone really believes that ICANN violated its bylaws or articles, I think we would all want ICANN to be held accountable for that. We’re not arguing that ICANN shouldn’t be held accountable for that, but a claimant makes choices in choosing where they go. A claimant could have a reconsideration and an IRP going at the same time over the same act because of the different impacts, because of the different thing. There could be a place where you have a reconsideration process because a process or a policy was not followed but also allege that that same act resulted in a violation of the articles of bylaws. And we all, I think, share the goal that we want ICANN to be held accountable on these broader issues in a timely fashion.

And so, if we’re looking for these things to have a different definition of how they interplay, that’s where I think we’re going into an important conversation but maybe not the conversation for this group. And I think it’s important to recognize that this isn’t just ICANN that has never had this timing conversation. We had the accountability process that went from the CCWG, where the changes to the IRP happen and changes to reconsideration happen, and here was never conversation in that group about whether we should look at changing the standards to allow them to better align or if we should look at changing the timing to allow them to go one after the other. There have been opportunities for the community itself to have these conversations, and maybe they just weren’t teed up well. Maybe we just didn’t look enough at the history. And maybe it’s an appropriate conversation to have. But that’s where

the tension is, I think, because we look at this and we think, "If we go down this path of requiring them to be sequential through a tolling mechanism, we're kind of impacting the bylaws in a way that we think this group might not be empowered to do."

SUSAN PAYNE: Thanks, Sam. Malcolm?

MALCOLM HUTTY: Thank you. I think Sam makes some good points there, but I don't think it necessarily leads us to quite where she's suggesting—that we don't have the power to do this if we want to.

Sam very correctly points out that the standards are different between the two processes but also that there is overlap between these standards. Looking at the reconsideration, the first ground or challenge under a reconsideration request is that one or more staff actions or inactions contradict ICANN's mission, commitments, core values, and/or established ICANN policies. Setting that last one—the established ICANN policies---aside—I'm not quite sure what that refers to—the preceding elements of that—the mission, the commitments, the core values—are part of the bylaws. And therefore, there's clearly, at least to that extent, overlap between the grounds for a request for a reconsideration and an IRP claim. An IRP claim must be based in consistence with the bylaws. The mission commitments and core values are a subset of the bylaws, and therefore it could be the case that you're alleging an inconsistency with, for example, the mission and would therefore have grounds to

bring a complaint as a reconsideration request. And also you have grounds to bring it as an IRP.

That being the case, there is then the possibility of doing these sequentially if time allows. You could say, "I would like the Board reconsideration panel to consider this"—whatever it's called these days; the … anyway, the reconsideration panel. And then if you don't get the answer you're looking for, if time allows, file an IRP. Or you could file them off both at once, but I'm not really sure why would want to encourage people to file them off both at once. Or you could just try your luck with one or the other and give up on the other.

And I think that comes down to a policy choice on our part. Do we want people to try the request for reconsideration before we try the IRP? The IRP is a complex and quite expensive process for all concerned, including ICANN. And it strikes me that, if things could be resolved for a request for reconsideration, there is good argument that it would be better that it were done that way, simply because it would be faster and cheaper. And that's, after all, our whole intention in this: to resolve disputes.

Now, if it's then the case that, in order to do that we would have to toll the time—because otherwise people would be timed out if they tried the request for reconsideration, they'd be timed out in the IRP and would lose their right to bring an IRP—then unless we allow for tolling, we won't get that behavior, and people will have to file an IRP instead of a request for reconsideration rather than as a last resort of their request for reconsideration fails.

Now, we may think that it's fine to say, "Well, actually, if you choose a request for reconsideration, that's your only option. Or you could choose the IRP instead," but I think there's a good case why we might wish to say that we would think it would be better if people tried the simpler, faster, cheaper option first and use the IRP as a matter of last resort.

Then that comes to the question of, again, whether we really can say that. Sam has suggested to us that, actually, that may be outside of power, outside our authority—to require that kind of sequencing. I would agree with her that it is outside our authority to require that kind of sequencing. I think that the bylaws clearly provide both these options independently as separate processes and that to require people to try the request for reconsideration before using the IRP is not something that we're empowered to do.

However, to simply toll the time or offer to toll the time of a request of for reconsideration, as maybe an incentive—or at least to enable the possibility of sequencing—doesn't actually require them to be sequenced in that manner. It merely provides that as an option. I don't see any reason why that is outside our power. We would simply be exercising the power that is granted to us to set the time that is available before a claim must be filed, which is one of the powers that is given to this group in the bylaws.

So I think that, if we wished to go down this route, it would be in our power so long as we don't say it is mandatory to take it up in that sequential way, which I would agree with Sam would be going beyond our authority. Thank you.

SUSAN PAYNE: Thank you, Malcolm, for those thoughtful comments. You obviously have had time to give this a certain amount of thought, and it's greatly appreciated.

David?

DAVIC MCAULEY: Thank you, Susan. And this will be my last comment. Sorry to take so much time on this. But I tend to agree with what Malcolm just said conceptually, but I would caution us against doing a tolling for the reconsideration request. I think Sam made a fair point. We don't want to get into the thicket that she described. I think Malcolm's nuanced approach may avoid that. But I think we ought to just fill in the brackets. We were talking about four months. Maybe we should talk about five months or maybe even six months. I'm not saying I would agree with that, but I'm saying maybe we should address that time needed for someone to bring a reconsideration request in the time […]

Let's just make this simple and move on because I think we want, especially on time for filing, to move on. And I think your idea, Susan, of breaking into subgroups is a good one in order to get some impetus back in this group.

The other thing I would say about this is I don't think it's unfair for a complainant, somebody who has a grievance, to make a choice at some point. If they bring a reconsideration request and it's not done when the clock is ticking down, then they should choose: "I'm going to stay here

in the reconsideration request world"—what we in the United States would probably describe as something like something a justice of the peace court—or, "I'm going to take it to a more formal, more expensive, but much more rigorous process, where I might get what I think is a fairer hearing." I don't think it's unfair to ask them to make a choice.

So I think it's in our interest to not give tolling […] give what we think is a fair amount of time within which to file and let the chips fall where they may. Thank you.

SUSAN PAYNE: Thanks, David. Sam?

SAM EISNER: Thanks. And thanks for the conversation on this. To Malcolm's point, I think that one of the concerns we have—because I agree with him that, as a group, we wouldn't want to require that an aggrieved party has to use these items sequentially; they can enter whichever one they believe is more appropriate for them, considering all their circumstance—is not necessarily that we would require a claimant to use them but that, if we mandated tolling for them, we would require ICANN to treat them as sequential, which is not something that's supported in the bylaws. So that's really where our concern comes from. It's in that requirement of ICANN to recognize them as sequential processes in a manner that we don't see as defined in the bylaws.

MALCOLM HUTTY: Sorry. Could you elaborate on that, Sam? I'm not following.

SAM EISNER: So if the outcome of this group was a supplementary procedure that said, "Time for following. An IRP will be … We won't count it," ICANN is not allowed to count it. ICANN is not allowed to challenge the timeliness of the filing of an IRP for a period of time until a reconsideration process has concluded. If that's one of the things that results in it, then ICANN itself is required to acknowledge and to act as if these are sequential processes as opposed to separate processes with separate purposes.

MALCOLM HUTTY: [Hmm].

SUSAN PAYNE: Sam, can I just ask you … I mean, I hear what you're saying, but what you said to us when you talked about how it has worked to date is a treatment of as sequential, even if it's a subsequent refusal of the request for reconsideration that then becomes the challenged act in order to sort of shimmy around the fact that the complainant is out of time. But you acknowledged that, then, in dealing with the IRP, the whole issue in dispute is wrapped up together. And so they are sequential.

And clearly not every request for reconsideration may relate to a particular head of complaint for that that would also give rise for grounds for an IRP. But we can see from the bylaws that there are grounds for requests for reconsideration which do also found grounds for an IRP. And both of those have changed under the bylaws. So to the

extent that we're even looking back at this long history of them not being sequential, the grounds have changed.

And so I feel like … I'm not sure. I'm not sure.

SAM EISNER: Yeah. So the grounds have only changed inasmuch as who's acting. So the reconsideration has always been about acts against established policies or process and has always had an ICANN Board or staff action component. The IRP previously was only about violations of the bylaws as committed by the Board. Then what we found after 2016 is that we have an IRP that can also be used to challenge acts of the ICANN staff that are alleged to be in violation of the bylaws because that's one of those places where there was collective agreement in the community that there was a hole that needed to be filled because that's really where we were really seeing a lot of the torture of the complaints: trying to say that the ICANN Board allowing a staff action to happen was in violation. So we closed that gap. There can be direct challenge to ICANN staff action. But the actual grounds of either mechanism were not changed.

The thing that happened for reconsideration—how that changed after the accountability review was implemented in 2016—also had to do with making sure the timing was a lot more intact, and they inserted a method of review that includes the ombudsman as well. Those are the major changes around the reconsideration. On the IRP, we didn't change the grounds but we expanded it to include staff action, and then we made it more specific to be binding as opposed to the non-binding

portion. What that means is ICANN can be held accountable if it chooses not to implement the declaration.

And I think, as we look at this on the whole, the reason that we're talking about the history is that there has always existed this possibility of people wanting to bring a reconsideration, an IRP, around similar actions. There always will be the ability, unless we do something different—we're not recommending that to happen—unless we say you can't then challenge a reconsideration process through an IRP, that backstop there, too, whether or not people are using it in a way to get to the underlying action or not.

But I think that the broader thing that we're discussing is, given that we know that this is how these all worked for 15 years before or a little less than 15 years before we implemented the transition-related accountability mechanisms, do we have a mandate to change the relationship of these two processes through supplementary procedures for the IRP?

And I think that one of the things … Brenda, if you can scroll up a bit so we can move down in that document. Keep going. If you can show 2 and 3 on the screen. I think that they'll both fit. None of our conversations today here is also … We're not trying to say that people shouldn't have the ability to bring meaningful IRP claims and to have the ability to have meaningful conversation with ICANN to try to narrow those claims. There's benefit across the community not only in bringing IRP claims in a timely manner but to also making sure that those are narrowly tailored to the issues that really should be put there. And we think that this is part of the whole effort that we're doing with the IOT. We're

engaging in a conversation about a safety valve so that there's always that backstop there in case something got missed and there's a reason. We'll talk about that language a little bit later.

But when we're looking at it, are we looking at do we stop a clock for 135 days because that's how long the reconsideration process is? And then how much other time? But it's really the question kind of as a whole, maybe, of … And this is more so the Kavouss question of, how much time is enough to make sure that people are acting accountably in how they're using the accountability mechanisms, that they're putting ICANN and the community on notice that there are deeper challenges than just the reconsideration process that's underway? What are the different goals that we're trying to achieve? Because we always can consider that we need to have an appropriate time left over after the conclusion of certain preexisting things to file an IRP, but it doesn't mean that we have to have a full 120 days left or things like that.

We also currently have, within the IRP processes that exist today—I know that this group is going to be looking at revising the rules for the CEP—tolling for the CEP. And there's a requirement to initiate CEP. You have to initiate that before your 15 days out from the end of your IRP filing with those. So if someone timely files a CEP, there will always be at least 15 day left for them to perfect a filing of an IRP if the CEP is closed without resolution.

And so one of the things we can look at is how many different contingencies do we need to [justify to] have tolling associated with it if we uphold some values of notice to ICANN and notice to the community of a deeper level of challenge and a deeper level of concern of the

conduct. And it is possible—because you can have these things running concurrently—that you could initiate a CEP on a timely basis without filing your IRP yet? Right? You don't have to have your IRP completed or drafted when you file your CEP or request CEP. Is the tolling within the CEP … could that be sufficient enough to take care of many of the concerns that we're talking about here? Because the basis for a CEP could be, "Hey, ICANN, we're still in this reconsideration process. We think that we have this bylaws issue that we have. The bylaws issue might go away if you look at that differently. So maybe we should wait until the reconsideration goes." Why couldn't we have some of the existing tolling tools we already have solve for some of these issues as opposed to defining many other places that we might toll?

SUSAN PAYNE: Thanks, Sam. Malcolm?

MALCOLM HUTTY: Thank you, Susan. And thank you, Sam. That prompted an interesting thought there of possibly a way forward, a compromised way forward here.

I think I would start by saying I'm not radically committed to the idea that we really must toll the request for reconsideration process because … I mean, maybe that's me being a little cynical that I don't have a great faith in it as a process at all. And I think that, if people felt that they were ultimately going to have to rely on the IRP anyway to give up the opportunity of maybe fixing it through the RFR, it's possibly not a huge loss to them. But maybe that's just my cynicism about that process.

But Sam said something interesting. How much would be needed? And that does raise a potential compromise here because it strikes me that, if there were some time after the RFR has turned you down within which you could file your IRP, you don't necessarily need the whole time that would otherwise have been available if there had been full tolling in order to do that because, yes indeed, you could well be preparing your IRP claim while the RFR process is ongoing. You just need to be able to file it.

Now, I don't think you would be right to not allow any time after the conclusion because, if there's any point in the RFR at all, you must allow for the possibility that the RFR will come out in your favor[.] And filing the IRP is not wanted and we don't do that. So you would want to hold back the final decision on whether to file your IRP claim until after you received the outcome of the RFR. Nonetheless, the time that is required to construct and to prepare that claim could potentially be done in parallel.

So it seems to me that what Sam was speaking—I don't know if she meant to offer this as a compromise or not—to indicated a way to a possible compromise, which is to say, "No, let's not toll the time for during a RFR—i.e., stopping the [fork] and "let's start again as though nothing had happened at the end of an RFR"—"but instead just allow some small defined period after the conclusion of an RFR within which to actually complete the filing if you would otherwise be out of time"—I don't know, maybe something like two weeks, three weeks; something of that order—"where you could simply go through those sort of mechanical processes of making sure that your IRP is filed, which you'd

been preparing in parallel with the RFR process, and you may push the button on the final decision if the R[F]R goes against you."

That might cut down on this real expansion of the time that I can see concerns about, Sam, considerably, while still preserving the possibility or a claimant to seek to resolve their case, their dispute, through the lower-cost mechanism before going to the higher-cost one.

If this doesn't meet with approval, then I think David's point comes in, where, "Well, okay, what's the harm if you make people choose between the two? Make them choose." And it's like, well, it doesn't seem to be the intention of the IRP, but I don't think it's the end of the world if we do that. But it does seem to me that there is some value here in trying to resolve it through the RFR if it could be resolved that way, some value that I would have thought that ICANN would be more keen to achieve because it would cut down on the number of cases that get put through what certainly an expensive process for ICANN. It's clearly much cheaper for ICANN to resolve things through the RFR if they can be.

So I would have thought that you'd be more eager to find a way of encouraging that if one can be found [than what] I've heard so far. I'm surprised that you're not. If it's simply about the expansion of this time, I wonder whether Sam finds herself at all attracted by the suggested compromise I suggest. Sorry, too many "suggests." Anyway, I'm done.

SUSAN PAYNE: Thanks, Malcolm. And I know Sam has to leave at the top of the hour, so maybe I'll see, Sam, if you have any immediate thoughts on that.

Otherwise, maybe that's something for further reflection on. But I'll turn the mic over to you.

SAM EISNER: Thanks, Susan. And thanks, Malcolm. Every once in a year a so, you and I have a place where we mind-meld sometimes, and I appreciate that this might be one of those moments where it's happening.

MALCOLM HUTTY: [I'm laughing].

SAM EISNER: You know, that's really kind of the thought behind this #3 that's on the screen, right? If we have a way to get to a point where we have better-stated IRPs, even if the IRP needs to come, I think you're right. It's a benefit to everyone. And you really expressed some of our timing concerns. You don't need a full additional four to six months, maybe, because you should be thinking about this anyway. How are we holding ICANN accountable?

So I think that some of the language around it needs some specific though, but it's still that idea … I think, in many ways, we agree with what you were expressing in that we see, likely, the fact that we have the CEP process and that we have a place already for tolling that exists. If we look at that and we look at the running of that, we know that the CEP, depending on when you initiate it, will always guarantee that there's at least that 15-day window after the close of CEP for someone to perfect their IRP filing because it did stop the clock for that.

And then it really encourages people to make sure that they're having that conversation with ICANN, too. It's not that they have their reconsideration process going but really starting to explain to ICANN how they think their reconsideration process also serves as an IRP violation, also serves to start narrowing some of those issues, where there could be overlap but that they're different. So I think that there's a lot of place for considering how these can go together without also coming out with the language that requires either side to consider these items as sequential but really encouraging the level of conversation and coordination that we would hope to see amongst the claimants in trying to have a meaningful conversation with ICANN and for ICANN as well to participate in those conversations in good faith to try to narrow those topics that go into the IRP.

So I think that we're a lot closer than it sounds like you understood me to be because we agree that there's value in that, too. A lot of our concern has to do with the language that we would use to express that.

SUSAN PAYNE: Thanks, Sam. So I've put my own hand up just to kind of get in the queue. But I see you asking us whether we need to toll for the other mechanisms because we have tolling for the CEP. And so what's to stop the claimant just filing a CEP? And it may be that part of that question is, how onerous is it to file a CEP? Is it literally just sending an e-mail or are you having to set out effectively what your claim is and kind of binding yourself for your future in an IRP in a way that maybe you don't want to yet?

But just a couple of things did occur to me. And one is that this feels to me, first of all, that it does kind of assume the request for reconsideration is only about narrowing issues, whereas of course, if successful in the request for reconsideration, theoretically the whole decision may be reversed. And it's not a narrowing of the issue. The issue has gone away. And that's great, but you've spent then time and money and ICANN's time in starting to go down the path of the IRP, if you like, completely unnecessarily because the decision has just been revered.

And it also feels a little like it has been treating the cooperative engagement process not as an attempt to narrow the issues, a genuine sort of negotiation of perhaps even verging on a mediation-type process, but it's a mechanism no to stop the clock so that you don't run out of time. And that feels like an improper use of the CEP to me. But I'm not opposed to us exploring it further. Those are kind of my jut gut reactions.

Oh, and a final, third, one is that, under the bylaws, either party can bring an end to the cooperative engagement process at a certain point. So doesn't these leave a claimant theoretically open to the risk that they bring the CEP because they want to stop the clock? And ICANN then calls an end to it, and so then they're back to where they were, having to continue with their IRP and actually make their claim whilst their request for consideration is still going on because ICANN pulled the plug unilaterally on the cooperative engagement process?

And I'm not suggesting you do that. I think history to date has shown that you actually have been very reasonable in interpreting the rules on

timing. But it does concern me if we end up setting rules that could be worked around by some future ICANN that we're all no longer involved in.

Sorry. That was very long-winded.

Liz?

LIZ LE: Thanks, Susan. And thank you for your comments. In terms of what you said, I think we're not—and what we're talking about in terms of timing, cep—worried so much about ICANN's timing that helps hold ICANN accountable. And we're not suggesting to initiate a CEP as a some way to preserve time and that it becomes meaningless because part of the requirements for cep is that the parties participate in good faith.

So what we're looking at is to really properly use the CEP and encouraging a meaningful use of it to either whittle down the issues that would be brought to IRP or, in the best-case scenario, resolve the issues entirely. There are penalties for bad faith for participation in CEP.

So in terms of how long a CEP would last and whether or not an ICANN would unilaterally close a CEP quickly or at all, ICANN has never closed a CEP too quickly and we've always participated in good faith with the claimant that initiated the CEP. As far as process is concerned, under the current CEP rules, it's not a very time-consuming process to initiate a CEP. It really is just a simple as sending an e-mail and notifying ICANN that the claimant wishes to initiate a CEP and setting forth the issues to be discussed in the CEP.

Ultimately, the cep is intended to be a meaningful process. So I think what we're talking about is that there is still that time afforded to the claimant in the CEP process to allow the sufficient time that I think Malcolm has spoken to, which is the time for the person to really then be able to address the IRP claim if it's not resolved in CEP without necessarily adding additional time to the reconsideration process. Thanks.

SUSAN PAYNE: Thanks, Liz. And I do think I will … Clearly, I will go back and look at exactly what the bylaws say on the CEP. And I'm not suggesting you've ever … I don't think I did suggest you ever participated in bad faith or lacked good faith in the CEP process. But it was a question I had about whether, if there's an ability for one party to unilaterally bring it to an end, that puts a claimant at risk.

But I'll turn to Malcolm, and then perhaps we'll then move on to our last agenda item and just see if we can make some progress on that one as well. Malcolm?

MALCOLM HUTTY: Thank you, Susan. I'd like you to consider the other way around—not that the claimant is the one that is seeking to use the CEP to spin it up but rather the other way around.

As you know, I'm not someone who has brought a great number of cases before the IRP and has got a long history of experience with it and some dissatisfaction with it that I'm bringing to the table here. There

are others who have had those sorts of experiences. But I did participate at length on this subject in the CCWG. And I do recall that there were those in that group who expressed the view, whether well-founded or otherwise, that their experience under the previous process had been that the CEP went on an inordinately long time, as they perceived it, that they felt trapped within the CEP, that they couldn't bring it to a close for fear of being told, "Oh, well you collapsed it too early, so there's going to be a presumption against you in the IRP."

And as a result of that, the language that we now see in the bylaws, expressly setting out that both parties have the right after one meeting to say that this isn't working and to end a process, was put in at the request of those whose view was that ICANN was spinning out those too long, racking up time and racking up expenses that were preventing them in achieving in a timely resolution of the dispute through the IRP process.

Now, I've got absolutely no evidence one way or another on that subject. I don't even know whether they were suggesting that that was being done by ICANN and alleging bad faith or just the way that it was and that was their own experience and so forth. And I don't know whether those statements were well-founded. What I do know is that they felt those things and made those representations and that that was the source of the language that we now see about the early termination of the CEP by either party [and that that] was to protect against that concern.

That being the case, I think we should not only consider the possibility that a claimant might be starting a CEP just to provide themselves with

extra time but also the concern that the claimant may wish no to spend a great deal of time in the CEP and may wish to proceed in a timely and a fairly forthright fashion, direct to a panel hearing.

So, from that point of view, I'm slightly sort of surprised at this idea that the claimant is just starting this at the beginning so as to spin out a lot of time and then have how much on the end? I mean, under the current rules, after rule, if ICANN feels that the CEP is pointless, they are entitled to simply terminate it if it's not achieving anything.

I have to say that I think the new rules are an improvement because the CEP ought to be, at its best, as exactly as Sam has spoken to before and Liz has spoken to now: an opportunity to narrow the issues, refine the nature of the complaint, and, if there ends up still being a dispute, nonetheless narrowing it and getting it to precisely what needs to be decided in as narrow as possible a fashion. Again, it makes the IRP process swifter and less expensive. And, again, that is in everyone's interest.

So I think the current rules will help on this. I don't see any reason why ICANN need be concerned that a claimant would be using the CEP to spin it out, given that they have at their unilateral discretion the ability to end it if the ever should feel that that is what's happening in any given instance.

SUSAN PAYNE: All right. Thanks, Malcolm.

Liz, is that a new hand?

LIZ LE: Yes, it's a new hand.

SUSAN PAYNE: Okay. Liz?

LIZ LE: Thank you. I just wanted to add to some of the things that Malcolm said. While I wasn't part of the underlying discussion within the Work Stream 2 Group, to the argument that there is some kind of concern that what ends up happening in a CEP that's spun out that would somehow negatively impact the claimant in an IRP, I am not sure how that would be the case, given that the CEP is a confidential process. So nothing that transpires within a CEP can be brought into an IRP. So I don't think that negative impact would be there.

And I understand that you were just bringing up examples of what people in that group were saying. It's not necessarily what you're saying. But I just wanted to make sure to bring that confidentiality issue back to flag for the group.

And in terms of spinning out a CEP, as somebody who has been a practitioner of the IRP process, including CEP, generally speaking, without going into any specific CEPs, ICANN has never spun out a CEP to stall time. The duration of a CEP, in terms of how long it lasts, is a mutual decision that ICANN and the claimant, as part of the process, discusses. So I don't think there would be a concern for that.

And the other thing is, given that there are penalties for acting in bad faith, the fact that the claimant can also bring up the reconsideration challenge—challenge of reconsideration, [requesting] an IRP—I don't think that ICANN would ever gain anything to either close a CEP too quickly or to spin it out as a way to stall time. It hasn't been the case, and I don't see how that would be the case in the future. Thank you.

SUSAN PAYNE: Thanks, Liz. I haven't kept a really good eye on the chat, although I did notice David's comment that he felt we might be on the cusp on a quasi-Occam's Razor amendment, where we were entering a thicket where a more simple solution might be possible.

And it's possible that that is the case. I mean, it is possible that our notion of tolling does create quite a bit of complexity. And perhaps trying to find a way to make utilizing the CEP process as a means of stopping the clock is a realistic way forward. I think it certainly warrants us giving some more thought on that.

And going back to where Malcolm had come from, where he … The other suggestion we had one the table, I think, is the one that came from Malcolm, which may not be the same but seemed to be going in a similar direction, which was along the lines of, how much time do we actually need? If we don't really think we need the full 120 days at the time the request for reconsideration finishes, maybe there's some shorter time period. As long as that time is allowed for, that might adequately address the concerns to give a party enough time to get through the process without unduly delaying everything.

Without wanting to put you on the spot, Malcolm, would you be interested in putting some more flesh on that proposal, on that suggestion, and maybe making a proposal to us that we could consider alongside—

MALCOLM HUTTY: [inaudible]

SUSAN PAYNE: Thank you.

MALCOLM HUTTY: You'd like me to carve some language? Yeah, I could give that a shot.

SUSAN PAYNE: Yeah, if you wouldn't mind.

MALCOLM HUTTY: I could take a stab at it.

SUSAN PAYNE: I think that notion and trying to build in safeguards for the complainant using the CEP process as the tolling mechanism … We could consider both of those as two potential options. I'm sort of hearing you say that you'd be happy to do so, so is that something you—

MALCOLM HUTTY: Yeah, I could take a stab at it.

SUSAN PAYNE: Thank you.

Other than that, I'm looking at the time. It's 15 minutes or 14 minutes after the hour. And it does feel to me that the next agenda item is quite meaty in terms of reviewing the safety valve language. We did some fairly sort of substantive comments about aspects of that. And I do wonder if perhaps trying to address that or trying to start that discussion now on this call with only 15 or so minutes left to run is the best way to proceed. Perhaps it I would be preferable for us to start that as the first item on our next call.

But in the meantime, that also gives those who perhaps haven't reviewed the comments that people have made a good opportunity to do so and feed in their own thoughts into the Google Document or even by even by circulating comments on the e-mail. And that's with great appreciation to those who did take the time to comment on that document in time for this call. And I certainly don't think that's a wasted effort. But I do feel we won't really do it justice in the short time that's left on the call and that we perhaps we would be better coming to it with sort of fresh thoughts on the next call up.

So with—

MALCOLM HUTTY: And, Susan, we made such constructive and amicable process here. Why start on a big contentious one right at the end of the call? Surely, in the interest of collegiality, let's end on a high note.

SUSAN PAYNE: Well, particularly when you and Sam were having a moment, Malcolm, I do feel it would be a shame to ruin that.

All right. So with that, then, I think we will be wrapping up a little early, but I think that's probably a sensible thing to do. And I can encourage everyone then to look at that draft safety valve language in between [turns] and indeed give more thoughts to this discussion we've been having today and look out for Malcom's language. Then, if we wrap up now, I may well see some of you on the SubPro ODP webinar that I think has already started.

Thank you very much, everyone. This, I think, has been a really constructive call. We may not have reached a solution yet, but I think it has been very helpful.

Brenda, we can stop the recording. Thank you.

[END OF TRANSCRIPTION]