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YVETTE GUIGNEAUX:

Good morning, good afternoon, and good evening, everyone. This is Yvette Guigneaux speaking. Welcome to the IRP-IOT [meeting] number 79 on October 19th, 2021 at 17:00 UTC. Today's call is being recorded. We ask that you kindly have your phones and microphones on mute when not speak. Attendance will be taken from the Zoom participation. We do note that we have two apologies today. One is from Flip Petillion and the other one is Kristina Rosette. All right. With that, I will turn it over to you, Susan. Thank you.

SUSAN PAYNE:

Thank you very much. And thanks, everyone, for joining. As Yvette said, this is our IRP-IOT call of the 19th of October. Apologies. You will hear my dog barking in the background. He is being particularly difficult this evening but hopefully I can distract him with treats.

So first up, just in the usual way, we will quickly review the agenda. And before I start doing that, I'll just pause and see if there are any update to statements of interest from anyone. Actually, noting for myself. It's not exactly a change but I am the secretary of Intellectual Property Constituency and this is an annual appointment. So we have just held our elections. As I say, it's probably something where I need to go in and just check that my statement of interest is up-to-date but it's not an actual change. Not seeing any other hands or hearing anything from anyone else so I'll continue on with the review of the agenda.

As usual, we'll look back at the action items from the last meeting. I won't mention them both in detail here but we will come back to them.

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

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Agenda item three will be to talk about the initiation of the subgroups and the scheduling of meetings for those subgroups that we hope will take some of our work forward a bit more swiftly. And then agenda item four is probably our most substantive agenda item. That is to come back to the proposal that Malcolm Hutty had circulated to the group last week on tolling of time limits to allow for other accountability mechanisms.

And then, as we've previously discussed, we aren't having a meeting next week because of the ICANN 72 meeting but we will meet the week after that, so the 2nd of November, 2021 in our 17:00 UTC timeslot. Just to note, for some people, that may mean that the actual time of the meeting changes for you depending on when daylight saving happens for you and so on. There may be some local change that you need to just be aware of at your end. Kavouss, I see your hand. Is that a new one?

KAVOUSS ARASTEH:

Yes. Thank you very much. I don't know whether morning, afternoon, evening your time. Let me share with you my thought. Do we have any indication where we reach beginning of the end? The reason for that is one or two persons among us, bargaining and bargaining all the time. We had 120 days. It was increased to 12 months. We had 12 months plus some specific situations, extensions, [coming to] and other things. So it seems that these one or two persons bargaining and bargaining, increasing and increasing. I don't know whom they defend. I don't know.

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This is not correct. We have to define where we reach beginning of the end. In four months, in two months, in six months, or six years. Very frustrating, very disappointing, and very counterproductive, turning around ourselves, bargaining and bargaining, time and time, x plus y plus z. Time, plus time, plus time, plus time. Please kindly guide us. We need to hear from you very clear indication where we reach beginning of the end. Thank you.

SUSAN PAYNE:

Thank you, Kavouss. As you'll have seen—and we'll come onto this shortly—I am attempting to speed up the progress of this work by breaking the group into subgroups to cover off some of the other items that we still need to talk about. It would be very appreciated if you would volunteer for some of that work. If we have volunteers for the subgroups, they will be able to move more swiftly.

I do take issue with you in terms of saying that only one or two people are bargaining and trying to increase the time. I don't see that as what is happening. From the very outset, we had public comment input from various groups that expressed concern about the interplay between different accountability mechanisms and the utilization of something like the request for reconsideration would put a claimant out of time. So we have been trying to find a workable solution to that.

Indeed, Malcolm, as you recall from last meeting, put forward, effectively, a compromise to try to address the concerns that we shouldn't extend time indefinitely but that we wanted to make space to allow for genuine utilization of the accountability mechanisms. I don't

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believe that that is bargaining to increase time or that it is counterproductive. I think it's been increasingly very productive. I'm sorry if you think it is.

But we are moving as swiftly as we can. And if people would engage more actively on the e-mail list and volunteer for the tasks, we would move forward more swiftly, still. So thank you for your input. I am noting it but that's as much as I can say at this time.

Okay. So let us turn back to agenda item two, which is the review of the action items from the last meeting. The first one of these ... I will quickly go through them. I don't think we necessarily, on all of them, have actual updates. The first one was that ICANN Legal certainly had expressed a view that they would like to review Malcolm's proposal on tolling and give their more informed input than the initial reaction that Liz gave us on the last call. We have the discussion on the tolling proposal as an agenda item four. So I'm not proposing that we cover this one in any detail here.

The other action item or set of action items is also one that sits with ICANN Legal, which is to review the feedback and this discussion that we had, both in the Google Doc and on the last call, about the safety valve language for the repose. And ICANN Legal will be reviewing that and coming back to us with a new proposal on that language.

Sam, on behalf of ICANN Legal, took these as action items. But she did also indicate on the last call that with ICANN 72 commitments, that she wouldn't be in a position to come back to us on that this week. So we will keep that action item on our agenda for the next call but we don't

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have any sort of substantive response or substantive language on that for the moment.

Agenda item three is to review the initiation and initiate the subgroup work and to begin to schedule meetings for those subgroups. We have had various volunteers. Three or four people have volunteered so far for those subgroups. We definitely could do with more volunteers. And I would like to be able to kick that work off and start scheduling meetings after the ICANN 72 meeting. So at the moment, if we think of the subgroups as four different potential groups, as identified in the document that you've already seen, as I say, we have four different groups.

Okay. I'm going to pause briefly before I keep going because I see, Kavouss, you have a hand up and I assume this is a new one.

KAVOUSS ARASTEH:

Sorry. Why we need four different groups? What are the four different subjects, first, before discussing on the four different groups? Because I may end up to have so many generals but no soldiers. So there would be no success in the war. We need soldiers. So why we need four groups? Which are the topics that we need four groups? I don't believe so but I don't reject that. Please kindly specify where or which are those four groups?

SUSAN PAYNE:

Kavouss, the list of the groups was circulated last week.

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KAVOUSS ARASTEH: Let me finish, please.

SUSAN PAYNE: Okay. Carry on.

KAVOUSS ARASTEH: Let me finish. This is the standard of behavior. Let the speaker finish unless you establish a deadline for one minute of discussion and then you can close everybody and interrupt. So what are the four subjects and who are those four people for four subjects? Same people in different subjects? Different people in different subjects? Thank you.

SUSAN PAYNE: If you could allow me to answer you, Kavouss, I could answer your question. You wouldn't have to ask it three times. The list of the proposed subgroups was circulated before our last call, which was last week. We looked at it briefly on the last call, which you were on. And everyone was asked to review that over the course of this week so that we could come back to it on this call and look at it further, and ideally, that people would have volunteered.

We also talked about the fact that it wasn't realistic to run four subgroups simultaneously but that, nevertheless, that was my proposal for how we break the work up and then we would try to, perhaps, have two groups going at a time to start getting through the work.

You are the person in particular who keeps raising concerns about how long this is taking, as indeed, I think many of us are concerned about

how long this is taking. The best way to try to address that is to crack on with the work. So I can ask Yvette if she would kindly pull up the list of the subgroups, if you have the document at hand, and then you'll have it in the screen, Kavouss, and perhaps it will remind you.

YVETTE GUIGNEAUX:

Okay. Susan, I'm looking for that. There we go. I've got it. I think I've got it right here. Just give me a moment and I'll get it right on screen for you. I think this is the one you're looking for. Is this the one you're looking for?

SUSAN PAYNE:

It is. Thank you. Okay. So as I said, we have four groups. One is a subgroup on consolidation. We did have a small group who'd volunteered to work on consolidation. So I have three or four people who I hope will reconvene that work. And that is one of the groups that I am proposing that we will get underway in the first stage because that is work that, as I said, had already been looked at to some extent and just needs to be finished off. But we did lose a member of that group so that group is certainly not closed, if anyone else would like to join that effort.

Arbitrator selection is the second area where it seemed like a useful topic to consider as a standalone item. Thanks, at the moment, go to Flip, who has volunteered for that group. But at the moment, he is the only volunteer to look at that. Ideally, it would be nice to have at least one or two other people who would be interested in working on that.

We then have—looking at a couple of topics around the notion of initiation of the IRP. One of those includes questions around the payment of fees. In relation to that topic, thanks are to Mike Rodenbaugh and to Malcolm Hutto, who both have volunteered at the moment. Again, since this work hasn't started yet, if anyone else would like to volunteer for that group, there is certainly space for them.

And then the final one, where there are currently no volunteers, so perhaps this one is on the back burner for the moment, is to develop a procedure or to look at the procedure that currently exists and consider whether we need to expand on that, where ICANN elects not to respond to an IRP. At the moment, the rules are very, very brief in that regard.

Liz is commenting in the chat and reminding that, actually, ICANN Legal also volunteered to participate in all of the subgroups. Apologies for not recalling that, Liz. Thank you, again.

So on basis that we have volunteers in relation to the group on consolidation and we have volunteers for initiation of the IRP, my suggestion is that we will start with those two groups and the other topics, we will come to as time allows, depending on how quickly that work gets dealt with. As I say, I would very much like additional volunteers. If anyone want to add their name to those two efforts, that would be appreciated. David, thank you.

DAVID MCAULEY:

Thank you, Susan. I raised my hand just to volunteer for all of the groups, with the exception of consolidation. My colleague, Helen, was the one that had to leave. She's moved on from Verisign. It's a shame.

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We miss her. She was a valued colleague. But I think since that work is close to being done, I would prefer not to jump into that one. Thank you.

SUSAN PAYNE:

Thank you, David. And I'm seeing Scott as well. Thanks to Scott. He is volunteering for initiation of the IRT. So I think we have a reasonable set of volunteers that we can least kick, certainly, those two groups—the consolidation group and the initiation of the IRP group—off. So we will look to schedule those two subgroups for after the ICANN 72 meeting. I'm not proposing to try to get anything into your schedules before then, obviously. So that, at the moment, is probably as much as we can say on this. But I'm noting a hand. Bernard?

BERNARD TURCOTTE:

Sorry. I'm getting off mute. All right. Our next call for the full group is scheduled for November 2nd, after the ICANN meeting. We had mentioned that the subgroups should get together, since we have a two-week rotation, during the week we do not have a call. We have two times we oscillate between, which is 17:00 UTC and 19:00 UTC.

I would propose—and maybe we can get some feedback on that, trying to get things organized and people lined up for calls, etc.—that those two working groups meet on the week of November 9th, on a Tuesday as usual, one group at 17:00 UTC and one group at 19:00 UTC. Does that make sense?

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SUSAN PAYNE: Bernard, that makes sense to me. I see a hand from David.

DAVID MCAULEY: Thank you, Susan. Just wanted to say that makes sense to me, too.  
Thanks, Bernie.

BERNARD TURCOTTE: All right. So I'll write up a list of participants and a proposed schedule and I'll post that on the list for those people who can attend today and see if we get some reactions. But for those people that are here, on the second week where we do not have a plenary call, it would be one of the subgroups at 17:00 and the other subgroup at 19:00. For our first call, we should probably aim for just an hour. All right? I'll write that up and put it on the list. Thank you.

SUSAN PAYNE: Thanks very much, Bernard. David?

DAVID MCAULEY: Thanks, Susan. It's David again. I just wanted to mention that with respect to the group where ICANN fails to respond, that may not involve that much work. I'll point to Bylaw 4.3(g), which ends with this sentence, "If no response is timely filed by ICANN, the IRP panel may accept the claim as unopposed and proceed to evaluate and decide the claim, pursuant to the procedures set forth in these Bylaws." There may be some tweaks that we need to do for such cases but the case will move on. Thanks.

SUSAN PAYNE:

Thanks, David. You may well be right. It seemed to me that the rules were a little light on that topic and it merited at least looking at. But it may well be that on a number of these things, the task for the subgroup is really to consider the topic. And in some cases, they may conclude that the rules that we have are adequate and do not need any change.

It's worth noting that just because we have a subgroup on something it doesn't automatically mean that we consider that the rules are inadequate. They may be adequate and it may be just a review of that to assure ourselves that that's the case. Okay. Thank you very much for that. As Bernard says, we'll look at kicking off the subgroup work in the week of the 9th of November.

All right. And now our agenda item four. I don't see Malcolm with us, which is a shame. But Malcolm did give us a very useful presentation of his proposed compromise during our last call. So as I say, whilst it's a shame that Malcolm is not with us, or I don't see him here, I don't think that that is the end of the world because we have already had the benefit of Malcolm presenting last week and didn't have substantive discussion on his proposal during the last call because we were allowing people time to consider what he was suggesting and to give this further thought.

With great apologies, if you wouldn't mind, I will one minute. I just need to let the dog out.

Apologies. I'm back. Okay. So hopefully, you have all had time now to review Malcolm's proposal. I haven't seen any particular feedback on it

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on the list. And as I say, we didn't really discuss it substantively. We did get some preliminary reaction from Liz on our last call. But certainly, that was very much subject, also, to Liz and Sam considering this in more detail and coming back on this or expressing more considered thoughts when we return to the discussion.

Just to remind everyone, Malcolm went through a really useful presentation, which is now up in the screen, where he set out some of the thinking behind why one might toll the time limits to allow time for other accountability mechanisms and what the pros and cons of doing that would be. And then he moved on to propose that there might be an alternative to try to bring the benefits of tolling but without some of the downsides.

So Yvette, if we could go to slide seven, this is essentially the suggestion, which is that rather than the clock for bringing an IRP being tolled, or rather the clock being stopped and then beginning again from where it left off once other accountability mechanisms had concluded, that there might be an alternative option, which would essentially ensure that the claimant has a period—for example, 60 days—at the end of their alternate process.

So by way of example, if there's a request for reconsideration, then if that request for reconsideration is concluded very swiftly and more than 60 days still remain of the time to file an IRP, then the complainant has the balance of that time continuing.

But if the request for reconsideration runs longer and the timing for a request for reconsideration does envisage that it could run for

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something up to, say, 135 days, then when that time finishes, because notionally, the complainant might be either almost out of time, or indeed, already out of time for bringing an IRP, that we set the rules in such a way that they are, nevertheless, granted 60 days from when that request for reconsideration completes to allow them to prepare and bring their IRP.

So that, essentially is ... It's basically the notion of allowing a minimum time. So it's the remainder of the time running on their time for filing for the IRP or 60 days, in Malcolm's proposal, whichever is the longer.

So really, I'm looking on this call to get feedback on that proposal from working group members and see whether, as a group, this seems to be a reasonable compromise, or indeed, whether you remain committed to the notion of tolling of the time period or whatever. I've got a couple of hands. I'll go to you first, Liz.

LIZ LE:

Thanks, Susan. I agree with you. It's too bad that Malcolm's not here because I do think, as we said in the last meeting when we talked about this, that we do appreciate that time that he's spent on this. I think we're a lot closer than we previously were.

And I think that we probably all share the common goal here, which is for us to talk about an option that would work to everyone's benefit and avoidance of an IRP if possible, to see if the parties have the time to be able to work out their issues in dispute and also, at the same time, afford the claimant to opportunity to file an IRP if all the other

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standards for an IRP is met, if they couldn't come into some kind of an agreement or compromise in the CEP.

I just want to clarify and add to what we said as our initial reaction to this at the last meeting. I think that idea, which was Malcolm proposed, is making sure that's there's sufficient time when one process ends for the parties to work out what the facts may be that would be litigated in an IRP and what facts to do need to be litigated because they can agree upon, or issues. Or if, in the best-case scenario, they can work out all the issues and there wouldn't be an IRP.

So when we're talking about tolling to afford that time, to us, it seems that that's more appropriate we support some sort of tolling as part of the CEP process because under the IRP, that is what the CEP is intended to do. We don't see that adding an automatic fixed period of time to the end of, say, the reconsideration process, which challenges an entirely different thing and is a different set of standards, and it's a different set of standards, and it doesn't look at whether or not the Board or ICANN in general violated the Articles or the Bylaws. But it looks at whether or not there's a process violation.

So it doesn't really seem appropriate to add additional time to the end of that process because that doesn't still go towards affording time for how are the parties going to come together to try and resolve their issues. So putting that tolling time, whatever might be the appropriate period, as part of the CEP, for us, seemed to be able to accomplish what both sides want to add as a support in the concept of tolling. Thank you.

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SUSAN PAYNE: Thanks, Liz. David?

DAVID MCAULEY: Thanks, Susan. First of all, thank you to Malcolm. He did a lot of good work on this. And I think there's a reasonable way forward here. I'm not quite where Liz is on this but it seems to me that to give someone the longer of the period of time that they have to file or 60 days is too long. I was thinking more that if someone gets turned away at the request for reconsideration, they're probably quite close to filing what they have anyway. They have the information at hand. And it will take a week, two weeks—at the maximum, three or four weeks, I think. I think 60 days is too long.

I think if we were to go down this road, I would suggest that 30 days would be the max, maybe three weeks—something like that. And when I make these comments, I'm talking with respect to the request for reconsideration. When it comes to CEP, it seems to me that our working group on CEP, when we get there, ought to be able to come up with a way to delineate what's the beginning date of CEP and what's the ending date of CEP and addressing tolling with those two dates in mind. Come up with something reasonable.

And then, with respect with DIDP, which Malcolm also addressed in this proposal, I think that that is a matter for maybe requesting a stay from the panel. I don't know how you would do tolling for DIDP. It's too elusive for me to think through how that might work. But anyway, my comment on the request for reconsideration is it seems reasonable. But I think 60 days just strikes me as extraordinarily long. Thank you.

SUSAN PAYNE:

Thanks, David. Certainly, my impression is I think the 60 days was an example. So I think, in Malcolm's proposal, that was a suggestion as opposed to a fixture. So good to get that input from you. I see Kurt's hand. But if you wouldn't mind if just go back to David to ask for clarification. I didn't follow what you said in relation to the CEP and I want to be sure I didn't misunderstand you, if you don't mind. Could you bear with me and say that again?

DAVID MCAULEY:

Sure. Malcolm addressed, as I recall ... And I think it was the last slide, which I had in front of me a minute ago. But in any event, Malcolm addressed requests for reconsideration, DIDP requests, ombuds—which frankly, I think tolling isn't appropriate for the ombuds process, anyway—and finally CEP.

To me, when it comes to CEP, our group is going to look at the rules of the CEP. It seems to me that one thing we might be able to do there is actually come up with a process where the community, or at least someone in the community, would know what's the starting date and what's the ending date of a CEP. So if we're going to address tolling or some kind of an extra time process for CEP, we need to understand what are the limits of CEP? When does it begin and end?

I think it's fuzzy right now. So my goal is ... That's why I was carving CEP out of this thing that Malcolm was talking about in this proposal, is I don't know how you would judge days because to me, the CEP goes on and on and then, all of a sudden, it doesn't. So I think it's incumbent on



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us to come up with some specificity around the start and end date of the CEP. Thanks.

SUSAN PAYNE:

Thanks, David. Thank you. I do understand that. Noting, of course, that the current rules that exist for the CEP, which obviously are out-of-date—they relate to the previous process—they do have some element of tolling in there.

But noting what you say, it may be that when we're thinking about the rules for the IRP, that we either need to circle back once we've done the rules for the CEP or we want to include some kind of a cross reference so that we deal with this when we're dealing with those rules, rather than trying to do this in isolation, if I'm understanding you correctly. I think that may be a very sensible suggestion. Sam?

SAM EISNER:

Thanks, Susan. You might have just taken the words out of my mouth about consolidating some of this conversation about tolling to see what happens within the CEP because I do think that there are many areas where, as Liz has said, some of the tolling that can happen through CEP could adjust for some of the contingencies we're talking about here. So it might be helpful to mark the progress that we've made here.

I do think that the progress that Malcolm really helped move is also this discussion on what is the amount of time that someone needs at the end? It's not about giving all the time but focusing more on after processes are concluded, how much is a reasonable time to have left at

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the end in order to perfect an IRP claim? I think that's a really valuable conversation and also makes sense to discuss within the CEP.

Maybe we make sure that we appropriately catalog all benefits and the positive movement of this tolling conversation and then make sure we consider that when we come to the CEP and see where we need specific rules and where we don't. I don't want to lose the benefit of the work that this group has done on these topics but I think that there is the more holistic view that we need to take.

SUSAN PAYNE:

Thanks, Sam. David is noting in the chat that that seems to make sense to him in relation to the CEP. And I would agree with that. That does make sense to me in relation to the CEP. I'm not sure if your suggestion was that we park this discussion completely in relation to other accountability mechanisms. That doesn't, to my mind, seem so obviously to find a home in the CEP rules. But I do see a number of other hands so I'm going to go to the queue. Kurt?

KURT PRITZ:

Thanks very much. The reason I find Malcolm's presentation so powerful is, as part of his analysis, he listed the problems we're trying to solve and then, "Check, check, check," and risks that we're trying to avoid, and "check, check, check," and that's what led him to his compromise. So that's why I found this so powerful.

Maybe, in determining whether the time period is 60 days, 30 days, three weeks, we take that same approach. Would these time periods

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check, check, check these problems off? Would they avoid these risks and that sort of thing? So maybe we can use his analysis on the timeframe.

I'm not convinced that the request for consideration and the IRP are mutually exclusive issues and can be approached in parallel or choose one or the other as your remedy of choice. I feel sure that there's overlap there—that there can be an IRP for policy errors, or the other issues that could also be the subject of an RFR. And even to the extent there are different issues, a complainant would want to use the RFR avenue first if there was an issue to be decided there.

So the argument that there should be no tolling or this sort of time period that Malcolm is suggesting, that argument doesn't work for me. I think Malcolm's approach is a good one, with the exception of the issue that they've brought up. Thank you.

SUSAN PAYNE:

Thanks very much, Kurt. Kavouss? I do not hear you at the moment, Kavouss.

KAVOUSS ARASTEH:

I'm sorry. Do you hear me now?

SUSAN PAYNE:

Yes. Thank you.

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KAVOUSS ARASTEH:

I'm sorry. This presentation is incomplete. First, we need to have a diagram indicating all that—a linear diagram, starting claimant C wishes to file an IRP. Then, putting the assumption of starting zero time, then going 60 days. Okay, after that you have RFR takes 135. You have to break down 135 days, where it comes from. Then C may file up to 60 days. What is this, with the first 60 days? How many 60 days? Is it after 60 days they file an RFR, then C may file up to 60 days after RFR? What does it mean?

This is incomplete explanation. So please, kindly, put in a clear manner, in a line, starting from time zero and also indicate the end. No matter, with any assumption of x days, of y days. But we should see from the a to z—the end of the process. Where some of them are not yet clear, you put it, "Yet to be defined. Yet to be decided." But we have to see the whole picture. This is incomplete and I cannot accept that. Thank you.

SUSAN PAYNE:

Thanks, Kavouss. I would say that Malcolm has just given an example to try to explain so that it was for ease, for people to try to understand what he was saying. It's not a fixed timeline there. It's an example so that you can get your head around what he's proposing. But I'm sure it could be ... That example could probably be displayed in a linear manner and perhaps we can try and do that before the next call if that would be helpful. Sam?

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SAM EISNER:

Thanks, Susan. I put some comments into the chat as well because I do have to drop off the call a bit early and I apologize. But I wanted to clarify what I was discussing about CEP, and reconsideration, and DIDP. I understand that there might be different purposes and the CEP might not be the full solution.

But I think we would find it difficult to conclude on setting the proper tolling rules as it relates to reconsideration and DIDP without also seeing the remainder of the tolling opportunities that exist. I think the CEP is a tried-and-true place where we've used tolling before. So it's important that we don't bake in something here without seeing how that concludes—whether or that means we stop all conversation now or come up with some more guidance about what we want to make sure we rereview once we conclude this, or as we're looking at the CEP part.

But also wanted to put in another note because one of the things that sometimes is missing from this conversation, particularly when we're talking about reconsideration and how it overlaps with IRPs, is because they have two different tests—because they're two different processes and look at two different things—if there is an intention and if there is a belief from the person seeking a reconsideration that they also believe that they might have grounds to seek an IRP based on the same conduct, one of the things, and one the benefits that we see from the CEP timing, is that that's really the opportunity for that claimant to put ICANN as well as the ICANN community because of the public nature of the fact of a CEP, on notice that they believe that there is a matter worthy of IRP. I think we can't lose that concept as we think about how long someone can wait to file an IRP or to initiate a CEP.

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I also think we need to consider, if we're in a position that this group thinks that there's going to be specific recommendations issued about how a tolling process may go for a reconsideration itself, that we need to understand how reconsideration and then some level of time left afterwards, after decision on reconsideration—whether or not CEP is then allowed, how that falls into CEP, whether that falls into another set of tolling timeframes, and whether there's a full extent of tolling, but also where that notice comes in. Where is the notice coming in that there's conduct that's intended to be challenged on a different level? Because that's one of the things that happens through the CEP.

So those are just some concepts that I'd recommend that we keep in mind as we keep working through this.

SUSAN PAYNE:

Thanks, Sam. I think we've touched on this in a previous call. I don't recall if we ever got chapter and verse on it but my recollection, from when we've discussed this before, is that when we think about the IRPs that there have been to date, none of our group members, anyway, were able to think about an IRP that took place, which hadn't, previous to that, been subject to a request for reconsideration.

I do know that, obviously, the Bylaws have changed a bit in recent times. But still, there clearly are scenarios where people consider that both types of accountability mechanism are applicable, whether rightly or wrongly, I guess. But since the IRP is so much more complex, and expensive, and onerous a process, this is one of the pros that Malcolm was trying to call out, was this idea that we don't want to be pushing

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people down the complex and costly path if there's a chance that it could be resolved in another way.

That's certainly how I've understood the discussion that we've had to date on tolling. But obviously, would be interested in your reaction to that, if you have one. Perhaps I'll let that sit and go to the queue that I have, which is Scott first.

SCOTT AUSTIN:

Thank you, Susan. A couple of points of clarification. One is that I'm much less familiar with the Cooperative Engagement Process. But some of the footnotes and the materials that we've seen seem to look at it as a precursor or a means of narrowing the issues prior to actually filing an IRP. I'm curious. It almost seems like maybe it's a declaratory judgment type of thing, where you're trying to determine if there really is sufficient cause to go through with the IRP process.

So my question is to Sam and to you, Susan, or anyone else who's in our group that has been through a Cooperative Engagement Process, is that the case? Am I seeing it as a precursor to an IRP that gives that benefit? And two, of the IRPs that have been filed, has there typically been a CEP engaged in prior to IRP?

SUSAN PAYNE:

Thanks, Scott. A really quick reaction. I'm sure Sam will answer it more fully than I. The Bylaws anticipate that there will be a Cooperative Engagement Process. It's not obligatory but if you don't bring one then

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there can be cost penalties against an unsuccessful claimant who didn't take advantage of that process.

I think when you talk about it as a precursor to narrow the issues, I think that's a reasonable way to consider it. But to my mind, I've always considered it to be more along the lines of an information negotiation—not a mediation because there is no mediator there. But it's a settlement discussion, if you like. Without prejudice, settlement discussion is how I would categorize it in my own mind, if you like. But I have Sam in the queue. And if she feels very differently to me, I'm sure she'll say so. But before that, Kavouss, I see you.

KAVOUSS ARASTEH:

I'm sorry. I need explanation from Malcolm. Bullet three, 60 days. Bullet five, 60 days. Which are these two 60 days? And please decompose. 135 days is composed from what? How we arrive all these? How do you connect 60 days in bullet three, 135 days in bullet four, 60 days in bullet five? And then, what is the end of the process. If you don't have any time available, put x days or x months.

We need to see the whole picture in order to start to be in a group, we have to understand the process. It is not clear. I'm very sorry. Maybe clear for someone but is not clear for me. Knowing that, I may not be as stupid as some of you think. Thank you.

SUSAN PAYNE:

Thanks, Kavouss. Again, it's just an example. It's a scenario. It's not everyone files a request for reconsideration after 60 days. It was just,



“Let’s think about a scenario and how would this work?” But I hear you. And if we can find a way to present this in a linear manner so it’s more visual, then we’ll do so. But it’s just an example. It’s not setting things in stone. Sam?

SAM EISNER:

Thanks, Susan. First, to Kavouss, I think some of the timing might have come out of some the last days of filing conversation that we had. We tried to put out some examples a few weeks ago. And I appreciate this is confusing. We’ll support Susan in trying to figure out if there’s a more linear way to handle it, in addition to the fact that there are just some example dates proposed by Malcolm.

But I appreciate that many people looking at this would be confused. I do that think, personally, and I don’t think anyone else on this call would ever dare to suggest that you are stupid for raising this question. I think it’s a really good question to ask. I think you’re asking the exact right questions about the timeframe. So thank you for continuing to bring that up.

In terms of the CEP, Susan, in the overall gestalt of it, I tend to agree. It is, in some ways, a settlement. It’s a conversation that is expected to happen, where the parties come together—the parties being ICANN and the person who’s intended to become a claimant—as to whether or not there is any way to narrow the issues that would be brought within an IRP. So it could be helping to share additional information or really getting things that are concrete and help form in a better way. Sometimes CEPs are more successful than others.

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But it also is a required ... It's not necessarily a required phase but if the parties are not participating in good faith, there are some outcomes on the end on fee shifting that could come out. But avoidant it's been in existence since, I believe, 2012 or 2013.

And then, as Susan likened it to settlement, neither ICANN nor the claimant releases information about what was discussed within the CEP. We do track on a publicly-available list the fact that CEP items are ongoing over a certain act.

SUSAN PAYNE:

Thanks, Sam. Sorry. Scott?

SCOTT AUSTIN:

Yeah. I guess I'm with Kavouss on the issue of clarifying this with, perhaps, a more graphical depiction that gives some of these timeframes in more of a typical setting. And I understand that if we're doing it in the abstract, we're this circle with an initial IRP, and then an RFR in the middle of it, and then eventually getting back to that and an avoidance of tolling.

But the other thing that I would like to see, if in fact a CEP is essentially, while not obligatory, it's urged or highly recommended, how those timeframes add into this entire process because I think we're starting to look at the trees and maybe we need to go back and see a bit broader view of the entire timeframe of the process. How much time do the parties typically spend in a CEP, whether it's winnowing the issues down

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to what's really most important or trying to determine who's got more strength in terms of evidence on particular issues.

My apologies for not having actually been through one of these processes. There may be people here who are very comfortable about not including that timeframe. But I'd really like to see how that compares because I also thought I saw, at least one place that a CEP could be considered one of the alternative processes or something like an RFR. I don't know if ... I thought I saw that but if that's not the case ... But I think it should be included as far as the overall depiction of what the process is from beginning to end so we can see these timeframes.

I also just want to add that I think I'm in agreement with David, that perhaps 60 days is more than would be necessary. But I do that, essentially relying on his experience, that perhaps 60 days would be more than would be needed and that perhaps 30 would be sufficient, or 45 [for that matter]. Thank you.

SUSAN PAYNE:

Thanks, Scott. Noting that we've lost Sam, unfortunately, as she has a clash at the top of the hour, Kavouss.

KAVOUSS ARASTEH:

Sorry. I am not arguing about the 60 days or 90 days. I am asking what is the relationship between 60 days in bullet three and 60 days in bullet five. Are they two different periods, irrespective 60 or 70 or 80, or they are the same? This is not clear. And then, what is the composition of 135 days? Decompose that 135 days. Put that in start of another period.

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And put it in a linear way to indicate. And then, at the end, please indicate where we go for this alternative process instead of tolling. It is not clear.

So I am not objecting to the example. I'm objecting to the process. They are mixed up. There are two times x period of 60 days, bullet three and bullet five. There is unclear on 135. No relation between 135 and the first 60 days. No relation between the 135 and the second 60 days. Please understand me. Thank you.

SUSAN PAYNE:

Thanks, Kavouss. I do understand you. There's not much I can do during the course of the call to address your concern that you've already raised three times now. I've said it's an example. It's been pointed out in the chat that the 135 days is the maximum length of time under the Bylaws that the Board should endeavor to decide a request for reconsideration. That is where that time came from.

The two 60 days are just examples, one of which is Malcolm's example of the additional period for filing. The other 60 days is just a random number of days. But I've already said we will try to show this in a linear way so it's more easy to understand. I'm hearing you say it's challenging. So I don't know what more you expect me to do on this call.

With that in mind, I'm not seeing any more hands. We have, as I say, lost Sam, who has had to move on to another call. I'm very happy to keep going with this but I don't see any more hands. So does anyone have anything else that they want to either ask or any other comments they would like to make? Otherwise, perhaps this is a suitable time to

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wrap this call up. We will come back to it again after the ICANN 72 meeting on the 2nd of November. David?

DAVID MCAULEY:

Thank you, Susan. I do have a comment. I've been thinking about the subgroups. So it's not on Malcolm's thing but I do have a comment on the subgroups. It strikes me that ... I'm going to ask you to do something. If you would kindly, fairly soon, issue an e-mail to the list of everybody in the IOT to mention this, with an implied encouragement to those who have been less frequent attendees to give this some thought.

It's possible the subgroups may not work but I think that they will and I applaud you for trying it. I think it's a good thing. And I think if we give a message to all of those folks in the IOT that this is a chance to focus and expedite, we may attract them more frequently. And there's some very bright folks in our group. There's some that are less frequent attendees. I'll just give some examples—Mike Silber, Mike Rodenbaugh, Chris, and others. So this is an opportunity—going to subgroups to encourage them—pick one, pick two, whatever, to have a voice.

So I would encourage you to use the list to try and get, maybe, more participants in the subgroups. It's just an idea. Thank you.

SUSAN PAYNE:

Thanks, David. Yeah. Good suggestion. In the case of Chris, since you mentioned him, he was an observer. I think he was observing while he was on the board. So I'm not so clear on Chris's status anymore. But I

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may ask Bernard if he can clarify that for me off-call so we can work out. I think he may have dropped. But you're absolutely right that we do have some other participants who have been, perhaps, less frequent on the calls and Mike Silber is certainly one of them. Good suggestion. Thank you.

All right. I'm not seeing any more hands. So we have an action item, which I think Bernard has perhaps volunteered for, to try to present the example in a more linear fashion, or the timeframes and how this would fit together in a more linear fashion. Perhaps Bernard and I will work together on that.

We also, I think, have ... As you say, David, there's an action item for me to just remind people about the subgroups and encourage some more participation. I would like to encourage all of you to give some more thought to this.

Kurt raised the suggestion that I think was a good one of trying to approach what period of time, if we are considering a period of time, trying to use the same approach that Malcolm had of sort of what are the risks? What are the benefits? What do we need in order to deliver what we need? Perhaps, that is something that ... Let's all think about that. I would encourage anyone. If anyone wants to take that on as an action item, I'd very much encourage it. I don't want to voluntell anyone but if not, I'm sure we will be coming back to that discussion on our next call.

Okay. I'm going to wrap this up and let you all have some time back today. Thanks, everyone, for your participation. I'm sure many of us will

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see each other during the course of the next 10 days or so at various ICANN 72 sessions. And then we will reconvene after that meeting. Thank you. We can stop the recording, Pamela.

**[END OF TRANSCRIPTION]**