

BRENDA BREWER:

Good morning, good afternoon, good evening, everyone. Welcome to the IRP-IOT Call on 25th January 2022 at 17:00 UTC. Today's call is recorded. Kindly have your phones and microphones on mute when not speaking. Attendance is taken from Zoom participation. Apologies are received from Mike Rodenbaugh, Malcolm Huty, and Sam Eisner. And what that, I'll turn the call over to Susan. Thank you.

SUSAN PAYNE:

Lovely. Thanks, Brenda. All right, thanks, everyone. Thanks to those who could join. Let's just quickly get going. So before I start the agenda review, does anyone here have any updates to their Statements of Interest? Okay, not seeing or hearing anything, then I'll keep going.

In terms of our agenda, we need to just review the status of the action items. I'm hoping to get updates from the two subgroups, the Initiation and the Consolidation one. And then potentially, if we're able to continue, we will move on to continuing the discussion on the repose and safety valve language. We got a substantial way through the draft language on our last call, and hopefully people have, at a minimum, been able to catch up on the notes.

And then after that, I was hoping to circle back to the topic of tolling or the alternative proposal that came up from Malcolm of Fixed Additional Time to account for participation and other accountability mechanisms.

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And just to note finally on the Agenda Item 6 is the details of the next meeting which is in two weeks' time in our later time slot that hopefully is a bit better for participation.

Okay. In terms of the action item, we have one action item that's been stood over for a while which is to get formal feedback from ICANN Legal on that Fixed Additional Time proposal. Liz, you're in the hot seat, I'm afraid. And really, my question is just ... I know you're in a position to discuss this during the call, or when we come to discuss it during the call. Should we anticipate receiving anything in writing or can we in fact remove that action item?

LIZ LE:

Thanks, Susan. This is Liz Le with ICANN Legal for the record. We are finalizing the draft on the Fixed Additional Time, and we anticipate that we'll be able to circulate one prior to the next meeting.

SUSAN PAYNE:

Okay. Thanks, Liz. So we will keep that on here as an ongoing action item. Thank you.

All right, so update from the subgroups. And forgive me, in the absence of Mike and Malcolm, I'm not sure who else is on this Initiation Subgroup. Bernard, do you know? Is there anyone else on there?

BERNARD TURCOTTE: [Scott] and myself, but there's [no update], as the last meeting was scheduled for 17:00 UTC [inaudible] from a lot of cancellations. So, no news. We're trying to reschedule for next week.

SUSAN PAYNE: Okay, thank you. So the problem with the last call for that subgroup was the time slot. Is that that issue, Bernard?

BERNARD TURCOTTE: In part. Liz couldn't make it, the 17:00 slot. And Malcolm and Mike could not either, for different reasons. And so we ended up not having the call. The next call, per the rotation should be at 19:00. Usually we do better at that time.

SUSAN PAYNE: Okay, thank you. All right. Well, maybe then as a separate issue to these plenary calls, could perhaps you work with Mike and the other volunteers on that subgroup and maybe see if there's a better time for them to have their meetings? We we're trying to use the same time slots on the basis that people would generally have them and be free for them, but if that's not working out we need to find an alternative.

BERNARD TURCOTTE: I would propose, also ... Well let's try it with the new proposed time slot of 18:00, 19:00 for the rotation. How would that account so that the next Consolidation Call, the Consolidation Call due for next week, instead of being at 17:00, would be at 18:00. Does that make sense?

SUSAN PAYNE: I think that works okay for me. We'll obviously have to see how it works—

BERNARD TURCOTTE: I'll send a note to everyone. The 19:00 for the Initiation Call, as I said, should be okay. I will check with everyone in those subgroups and see how that works out.

SUSAN PAYNE: Perfect, thank you. That's super. By the way, I don't know if it's just for me, but your audio is quite broken but it may be ...

BERNARD TURCOTTE: Oh, okay.

SUSAN PAYNE: Oh, yeah. David is confirming it's so for him as well. I don't know—

BERNARD TURCOTTE: Okay ...

SCOTT AUSTIN: I have the same problem.

SUSAN PAYNE: Yeah.

BERNARD TURCOTTE: Okay, sorry about that.

SUSAN PAYNE: Actually, that sounds better already, so I don't know. You maybe have moved or something.

BERNARD TURCOTTE: Yeah, I moved my mic. Sorry about that, folks.

SUSAN PAYNE: Perfect, okay. All right then. Okay, so next up then, just a quick update from the Consolidation Group which I can give. We've basically been focusing on issues previously identified, some of which we went into that subgroup having already been looking at, and some of which we did a review of the public comment input just to see whether we could identify other outstanding issues that we ought to be looking at to make sure that we picked everything up, basically.

And really, we've been focusing our attention certainly on the last call in some of those discussions, on some of those issues, in particular on who should be hearing the request for a consolidation or an intervention—sorry, participation as an amicus or other intervention by a third party wanting to join the proceedings.

And whilst we had originally ... In the interim rules, we have this notion of the procedures officer and we were looking at some other sort of

person, probably a single panelist to take this responsibility and perhaps dispense with the notion of a procedures officer which is perceived to be poorly understood.

But during our discussions on more recent weeks, the suggestion and the group seems to be coalescing around the idea that it should be the full panel who makes a decision on this. And we therefore have a new draft of the rule, making the necessary changes to reflect that we might be deferring these requests to the decision of the full panel. And so that draft text has been circulated to the group and it's now out for the subgroup to comment on and basically sense check.

And we've also spent some time thinking about what should the role of a supporting organization be, specifically coming out of public comment. And as a consequence, the interim rules currently in place have provisioned for where a supporting organization has made the policy and that policy is essentially the subject matter of an IRP dispute.

And so arguably, therefore, for an example, the GNSO's policy on a particular issue is sort of in challenge as part of the context of the IRP. Provision has been made for having that supporting organization join as a claimant. And we've been talking about whether that's the appropriate role for them, particularly given that they don't satisfy the bylaw's definition of a claimant because the supporting organization hasn't been negatively impacted and damaged by the decision or ICANN. And indeed, they likely are coming to the proceedings from a different perspective to the claimant.

And so we've been talking about that and also about whether the interests of the supporting organization could be adequately protected by participation as an amicus and whether they lose anything, whether it's necessary for them to be actually a full party or whether it really does not make a particular difference.

I don't think, as a group, we're agreed on this, and so we basically still need to see whether we can come to a clear view within that subgroup. But it may be that we bring this back to the full IOT for the wider group to discuss and agree if within the subgroup we can't come to a clear understanding on that.

So that's where we are. We're meeting every other week. The pool of issues that we're still discussing is relatively self-contained, so hopefully we should only need a couple more weeks, hopefully, before we can bring some recommendations back to the full working group. Fingers crossed.

Okay, so that's all in terms of the update from the Consolidation Group. I'll just pause and see if anyone's got any questions. I'm also noting that we've now lost David for a period of time as he's had to step away. So just take a quick look and see if we're still quorate.

BERNARD TURCOTTE: We are.

SUSAN PAYNE: Okay—two, three. Okay, that's good. So we've got—

BERNARD TURCOTTE:

Until the top of the hour when Flip has to leave.

SUSAN PAYNE:

Okay. All right, well maybe that will be the natural conclusion of our call then. All right. So we then are in a position to keep going, I hope. And we can move on to agenda Item 4 which is to continue with the discussion the repose and safety valve language.

Brenda, if you wouldn't mind calling up that rule—I want to say Rule 4 comparison document—that would be super. Yes, thank you. Okay, and let me just come back to this.

On our previous call we started going through the revised language that had been proposed by ICANN Legal. We'd had some concerns about having lost the tracking of the document and some of the comments, and so hopefully you all recall that this, therefore, was my attempt to reflect both the previous language and the latest proposal—or rather the latest proposed text—so that we could see what the changes were as best we could, and also see where there had been comments and questions raised about texts previously and how those had been addressed.

So hopefully those who weren't on our previous call have had the opportunity to catch up with the recording, but at a minimum hopefully you've been able to review the high-level summary of that last call and the areas where we did reach a general sense of agreement or where we flagged some further input that would be needed from the group.

And I think there are some areas where we're further input from the group would be helpful. If time permits we'll probably circle back to that

on this call, but rather than us come back to that and then still not finish the first pass through the through the text, I think it would be helpful for us to keep going from where we got to before, which is the new Clause D onwards.

But I will just pause and see if anyone has any corrections or suggested edits to that high-level summary that I circulated. I just want to make sure that everyone's comfortable with it as a reflection of where we got to on our last call. I suppose that's the best way to put it.

All right. I am not seeing anything at the moment. Obviously, if something later occurs to you, please feel free to perhaps suggest on the e-mail. But in the meantime then, we can scroll down, please, Brenda, a couple of pages probably to the new text D. I think we're just coming up on it now. Yes. Oh, sorry. That's it. All right.

As you can see, we've got the old language which previously was Clause B, but that's neither here nor there. And in the previous version of it, it was a single paragraph. As we saw previously when we looked at Clause C, the different grounds have been sort of broken out a little. So I think much of the amendment from ICANN Legal goes to just assisting in readability, if you like. But I want to just see whether there are any concerns from anyone about the new version.

I'm not finding it very easy to see the comment, or at least I can see some of it now. It is similar to the version previously. Sorry, I'm not seeing ... Let me just find ... Sorry, I'm going to try and find an offline version so I can actually read the comments. If you'll just bear with me.

But in the meantime, if anyone has any strong views about this text or indeed supports it in its current form, please do feel free to weigh in.

Apologies. Sorry, I'm having a bit of trouble finding the document. There it is. Okay.

Yeah, I think it's the same issue that we had previously about the reference to the material effect still isn't ... It had been proposed in the language on Clause B. So the reference being to when the claimant became aware of the material effect of the action or inaction. And that particular amendment, again, hasn't been picked up. It may not be quite the same issue as we discussed previously, but we did previously have a suggestion, I think, that came from Becky which was that we should think about using the reference to the material harm arising from the action or inaction. And I wonder whether that might perhaps be the way forward on this Clause D as well.

Again, pausing to see whether anyone has strong views on this.

BECKY BURR:

I just don't understand [why] material effect of the action or inaction is useful if the standard is material harm.

SUSAN PAYNE:

Thanks, Becky. You were a bit quiet, but I think I know what you were saying there. I agree but I have to say, I mean, I think the reason we were using that language was to mirror the language that's in the current rules. But I agree with you. I think your comment last time around about referring instead to the harm made a lot of sense to everyone.

And so I guess I'm going to propose that we have that same reference in this clause as well, at least so that we can see what it looks like. And perhaps when we review it in that form, perhaps we'll have some more thoughts. But in the absence of any anyone spotting a problem with that, that's what I would suggest.

Scott.

SCOTT AUSTIN:

I think it's good to use something that's consistent with what's in the rules, but I just wondered if "material effect"—because have the same question—has it ever been interpreted by any kind of a decision or an arbitral panel, interpreting those terms either in the rule that you're talking about, for example?

SUSAN PAYNE:

I don't know the answer to that, Scott, I'm afraid. I think we've got interim rules in place at the moment. We're trying not to make changes for changes sake, but at the same time I think if we're spotting something that warrants a change, then we're trying got make the rules work and understandable.

Flip.

FLIP PETILLION:

Thank you, Susan. I think we are adding something that's actually not in the rules, and so I would not support to add this wording of "material effect." "Effect" is actually enough, is sufficient.

SUSAN PAYNE: Apologies, Flip. I'm not following. Is your objection to including "material effect" or do you feel that the word "effect" alone is sufficient? Is that what you're saying?

FLIP PETILLION: Definitely the word "material" is a word that I would not add because you would add this here, whereas it's not in the rules.

SUSAN PAYNE: Okay.

FLIP PETILLION: I object.

SUSAN PAYNE: You object. Okay. All right.

FLIP PETILLION: [inaudible]. I mean, we should check but I'm pretty sure I'm right.

SUSAN PAYNE: Okay. That's an action item, then, that we can take back and have a look at. Becky.

BECKY BURR:

Yeah. I just want to say whether something's in the rules or not is significantly less important to me than whether something appropriately reflects the standard in the bylaws. And so if the drafters of the rules in the past got this wrong and my recollection is that the bylaws talk about a material harm, then I just want to explain to Flip why I'm comfortable with a standard in the rules that doesn't match the standard in the bylaws.

SUSAN PAYNE:

Thanks, Becky. I think it does, but perhaps this is something which requires a bit of reflection on what the bylaws specifically say. And maybe that's easier done out outside of this call rather than us trying to interpret the bylaws and draft on the call, if you all agree. Although I'm happy to call up the bylaws and look at it.

My feeling was that the language being used was an attempt to reflect what the bylaws say, but also from recollection that it's sort of spread out in the bylaws. There's not a single place where the language comes from. I feel like it's language taken from a couple of different places.

Scott.

SCOTT AUSTIN:

Yes. Thanks, Susan. I am pleased that Flip weighed in because he's been in a number of different proceedings that maybe they've seen how these words have been interpreted. And listening to him and listening to Becky, I think that the word that's creating a problem is the question "material." And I think of "material" used contract law in terms of a material breach

versus a technical breach, or just a breach. That “material” raises the bar to a somewhat higher standard of having a higher effect or impact. And I’m not sure that really fits in this relating to a time period.

So I think I’m in agreement with Flip that if “effect” is consistent with the bylaws and/or the rules, that's okay. But I also just heard Becky mention something about “material harm” in the bylaws. At least I thought I did. So I’m okay with “effect,” but now that I’ve listened to Flip, I’m better with leaving out “material.” I think it raises the bar or alters it in some way.

SUSAN PAYNE:

Okay, all right. Well, I think perhaps the best thing to do is if I take an action after this to come back by e-mail and just set out precisely what language is in the bylaws and therefore a suggestion of the path forward.

Oh, someone actually ... Bernard has put in the chat the bylaws, but I must say I’m ... Yeah, the bylaws refer to having been materially affected by a dispute. I think that was where the language has come from. In the meantime, I will call on Kavouss.

KAVOUSS ARASTEH:

Yes. Good morning, good afternoon, good evening to everybody. I’m sorry I was not following the last few minutes. The end of your last meeting, I raised a point about challenging the GNSO critical foundation or policy. And I mentioned that it should be added [to qualify that they follow the procedures of challenge] but not simply saying that I challenge the PDP or I challenge the policy or challenge the recommendation.

So they should be following the rules or procedures or rules or procedures how to challenge, giving justification and so on and so forth. [But not so.] That is something already. I don't know what has happened.

Another issue that I sometimes maybe, having parlor meeting, I listened and I saw in your document that you're referring to the certain circumstances you want to have a one-person panel. I totally disagree with that. One person is not acceptable because one person is one person, and human beings is human being. So we need to follow that we do not agree with just one person even if sometimes referred elsewhere.

So these are the two points. I'm very sorry to raise these two, and I request you to kindly consider and take note of that and adjusted that appropriately. Thank you very much.

SUSAN PAYNE:

Thanks, Kavouss. Just for clarity, the call we had last week, as you know, was the call of the Consolidation Subteam. So the team that's specifically looking at the language of that clause dealing with consolidation of cases—intervention and participation as an amicus. And I think your concerns relate to the discussion we were having in that group, and indeed they are live issues.

Although to be clear, we were never proposing a one-person panel. It was merely a question of whether a decision on consolidation gets dealt with by a single panelist before you have the full panel in place. But our current proposal, as we've been working through in the group, is that we shouldn't have a single panelist make that decision. We should wait until we have the full panel in place.

But this this week, this the full plenary call and so we are looking at the draft text on the rule about timing and particularly about the language providing a safety valve for if we impose a repose for the time for bringing in IRP. And hopefully you have had the opportunity to review this draft text, but just as a reminder—because I think you may have joined after I explained this—we have this table.

On one side we have the previous version of the proposed text with any comments that the group members had inserted into the Google Doc at the time. And on the right-hand side, we have the latest draft proposed text put forward by ICANN Legal reflecting the discussions that we had been having in the group.

So we are looking at that text now. And just to circle back, I think that material effect language, as Bernard has pointed out in the chat, it is intended to reflect what's in the bylaws. Nevertheless, I do think it's probably worth, rather than us having formed this assessment on the hoof, I will endeavor to do a proper review after this call and put something around by e-mail either explaining where the language comes from or even making a suggestion of some alternative language, if that seems appropriate.

So that's for Clause D. If we can scroll down then please, Brenda. And we can look at the next Clause E. Clause E is new text in this latest proposed draft, so we didn't have this previously in the draft language. It's new text basically confirming that if there is a request from a claimant for leave to file their IRP late, under the terms of this rule ICANN can have a right to respond to that.

As I say, we didn't have that language before. It seems to me that it would have been that even without that language, I think it would be unlikely that a panel would refuse to hear ICANN submissions on this. But by that token, I think it's probably helpful rather than not to have some language that expressly states this.

And to me this seems reasonable, but again I'm just pausing to see whether the rest of the group are in agreement or indeed whether this causes any concerns. Okay, I'm not seeing any hands and not hearing from anyone, so I think ...

Scott.

SCOTT AUSTIN:

Thank you, Susan. Just noting that I did put some language in the chat. You were talking about proposed language for the prior item that we were discussing. I have no comments on this one.

SUSAN PAYNE:

Oh, lovely. Thank you. And yes, sorry, I was missing the language in the chat, but thank you. I think that's exactly the sort of exercise. You may well have done the job of suggesting something more specifically tracking to the bylaws language, as you've put in the chat. I'll have the benefit of the chat language when I'm looking at this. So thanks for that, Scott.

Alright, so not hearing anything on Clause E, I think I'm going to certainly, for the purposes of this call, assume that there's comfort with that and we can move on to Clause F which was the previous Clause C. And this one, I think, is perhaps a more substantive issue for us to think about.

And basically, the text which is, as I say, more or less identical to what we have previously is proposing that “Under no circumstances may the claimant seek to file a statement of dispute more than four years after the date of the action or inaction being challenged in the dispute.”

If you’ll bear in mind that what we’re doing in this clause is building in a process earlier on in the clause setting up the time limits within which a claimant must bring their IRP, and also setting out Clause C above the circumstances where a claimant might be able to seek leave to file late if they can meet the particular sort of relatively limited criteria.

And then here in Clause F, there's a proposal as, if you like, a sort of additional repose almost of ... There's a time limit of X number of months within which the claim must be made, but we've built in a provision that in certain particular circumstances, a claimant might be able to file later than that. And then we're now building in a further backstop saying that even if we let them or even if we would be amenable to them under the terms of Paragraph C above filing late, if we've got to more than four years after the date of the action or inaction, that's it. They're out of time again.

And so again, question for the group is do we think that this is a reasonable additional backstop or, indeed, is it needed? We already have the repose language that cuts off the ability to bring the claim for most claimants, and only in the very limited circumstances are set out in this proposed rule do they get to file later than that.

But if those limited circumstances apply and there has been some sort of circumstances beyond their control that prevented them filing within the

necessary 12 or 24 months, or whatever we determine the repose is, is the interest of fairness for that potential claimant being ... Is that fairness that we're just granting them by allowing them to file late being removed from them again by setting a four-year deadline? Or do we feel as a group that this is sufficient—that provided that they can make their claim within four years, they should be fine?

I'm not hearing from anyone so far, but I would very much welcome the views of the group, generally. And in the absence of that, I guess I'm going to have to assume, at least for the purposes of this call and for the purposes of our preliminary review of this language, that we're all feeling quite happy with the four years. Okay, I'm not hearing from anyone, so all right.

And then finally we've got the language in Section G here which, again, I think is new, making reference to the payment of fees. So it just makes it clear that in ... Or at least it's proposed in this proposed text that in order for an IRP to be deemed to have been timely filed, all fees must have been paid within three business days of filing, as measured by the ICDR who are the IRP provider.

Now I think this provision as it currently stands, is probably okay as holding text, but as we've noted somewhere else in our review of the rules, we have got the Initiation Subgroup looking at issues around initiation of an IRP. And they include issues around the payment of fees. And so I think to my mind, this may be suitable as holding texts. But it is something that we will need to revisit when we have heard back from the Initiation Subgroup with their recommendations on the question of fees more generally. If that makes sense to everyone.

I again will assume that that's the case, absent seeing any hands. Okay, all right. Well, in which case then I will ... Bernard's just given me a quick time check. Thanks, Bernard. I will just ...

I think rather, then, than us moving on and starting to talk about the Fixed Additional Time and tolling proposal, since that seems a bit of a meaty discussion to start with a relatively short period of time, what we could perhaps do is circle back one of the issues that I think was a particularly live issue when we were going through this text earlier. Yes, and that is who should hear the application for leave. And so if we could scroll back up, Brenda. And I'm not quite sure. I'll have to tell you when to stop because I'm not quite sure when that is. Yeah, perhaps it a bit further up. Okay, pause. Thank you very much. Sorry.

So it is this Clause C. And not to get into the meat of it, but as sort of came up when we were looking at this language on our previous call, the draft rule is proposing that the IRP Panel may permit a claimant to file late. So we're in a situation where the claimant hasn't brought their IRP. They are, strictly speaking, out of time based on the time periods that we're giving them under these rules. And they're going to be seeking leave to file a late IRP. And in the rules as drafted, it's proposed that this is an application that gets made to the IRP Panel.

And so the question that I captured for us to think about, that I captured in the notes from the last call was that at the time this application for leave is being made, there isn't a panel because you don't get a panel appointed until you've already got an IRP underway. And ICANN and the claimant each select a panelist and then the two panelists select a third panelist. So you don't have an IRP Panel.

So we're deferring, at the moment, this question to a panel which isn't in place. And the panel won't be in place until there's permission given for the IRP to continue. Just again, really seeking views, and particularly seeking views of practitioners on how best this sort of thing might be addressed. I don't know if it's the kind of scenario that comes up in other arbitral proceedings that you're engaged in. It seems to me that this may be not ...

It may be the sort of decision that does have to be deferred to a single panelist. And if we have the Standing Panel in place, a single panelist from that standing panel would be tasked with just considering this particular question of, can the claimant have leave to bring an IRP or not. And I think the ICDR rules also have provisions where you can have certain preliminary questions considered by a single panelist before the proceedings are underway in their full form.

But really, as I say, to the extent that anyone has thoughts on this now on how best we can do this. Or indeed whether, on reflection, if we feel that this is a decision that really ought to be made by the three-person panel, then maybe what we really need to be proposing is that the late claimant just brings in IRP. But as part of their claim, they also have to ask for leave to be able to pursue it. And in which case, ICANN and the claimant would go a certain way through the process in terms of appointing a panel before they know for sure whether they're going to be given leave to continue with their case.

So again, I'm going to pause and just see whether anyone has any input or thoughts or suggestions they want to share on this. And absent that, I can make a proposal between now and when we have our next

discussion. But again, I do feel like those who are sort of active practitioners may have insight on this.

All right, I'm not hearing anyone. Then what I'll try and do is perhaps I can make a proposal. I'll also be suggesting some language, as we discussed, on that "material effect" point to make sure that's tied in adequately to what it says in the bylaws. I welcome others giving their feedback either in response to that or if anyone reflects on this, and particularly on this, who should be hearing the application for leave. If anyone outside of this call reflects on that and has some thoughts that they want to share, please share them on the e-mail.

And at this point, I think there's not really a great deal of benefit in us continuing further. Certainly, it doesn't make sense for us to start talking about Fixed Additional Time and tolling of time periods at this point when we have to wrap up at the top of the hour. So I think this is a good point to call an end to this call for this weekend. And we will reconvene in a couple of weeks. And we'll be in the later time slot, so hopefully we will have a slightly fuller turnout and people with fewer conflicts.

Okay, so I'm just pausing in case anyone has anything else they want to raise before we wrap up. All right. Okay, so our next call is in two weeks' time at 19:00. That's the 8th of February.

Thanks very much, everyone. And thanks to those who have had some conflicts but have done their best to join for the time that they can.

Brenda, we can stop the recording. Thanks.

[END OF TRANSCRIPTION]