
BRENDA BREWER: Good morning, good afternoon, good evening, everyone. Welcome to the IRP-IOT Call #87 on 22 February 2022 at 18:00 UTC.

Today's call is recorded. Kindly have your phones and microphones on mute when not speaking. Attendance is taken from Zoom participation. Mike Rodenbaugh has sent apologies.

And with that, I will turn the call over to Susan. Thank you.

SUSAN PAYNE: Lovely. Thanks very much, everyone. And again, thanks for those who are able to join. Just to note that Flip has indicated that he will need to drop at the bottom of the first hour because there is a GNSO Policy Update during Prep Week.

By the looks of things, we still will be quorate. So we can continue. But if anyone else is proposing to drop at that point, if you wouldn't mind mentioning it now, that might indicate the point at which we have to wrap up.

And thanks. David noted. If you do have to drop, yeah. Sorry to hear that about your grandson, and hope he gets better soon.

Yes, if we lose too many people, we may have to wrap up early. But in the meantime, let's get going.

First up, as usual we'll review the agenda and updates to Statements of Interest. So we'll be looking at the status of the action items. Agenda Item #3 is to continue the discussion on tolling against Fixed Additional

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Time. And then time permitting and attendees permitting, we will continue our discussion on the repose and safety valve open questions. And then finally, our next meeting is due to be on the 8th of March at 18:00 UTC.

Updates to Statements of Interest. Let's just pause and see if anyone has anything they need to note. Okay, I'm not hearing anyone or seeing any hands, so I will assume that we're all good on the Statements of Interest.

Before we get on to Agenda Item 2, I did just want to note that Bernard had mentioned, when he circulated the agenda, that we weren't quorate on our last call. I think, strictly speaking, we were quorate for the first hour and so some of our discussion, we did have five members of the working group present. But we then were not quorate for the remainder of the time, and so there was a little bit of time spent after we'd lost the full five members where I think I just quickly introduced the proposed language on the repose and safety valve that I'd circulated.

We did wrap up early and we weren't really able to make substantive progress because we weren't quorate. But I did just want to note that I think, at least for the start of the call, I think we did have a quorum for our discussion.

Okay. On Agenda Item 2, we have some action items that are listed that we need to review. And indeed, as I say, we did cover this on our last call and I think we were quorate at the time. But the first action item was one from ICANN Legal who were considering giving us some

comments in writing on the idea of tolling or the alternative proposal of Fixed Additional Time.

And for the next call, we're going to take that off as an action item. I think whilst it is possible that Liz or Sam may circulate something in writing at some point, but I think they came to the call sort of ready to discuss in person. And so I don't think we need to keep that as an action item that keeps recurring.

And then the second and third bullets were a couple of action items for me, firstly to circulate some proposed language on the materially affected concepts to try and bring that language in the repose into line with the bylaws provisions.

And the second was, again, for me which I was to circulate a suggestion regarding who should be the decision maker for applications to seek leave to file an IRP out of time. On the first of my two action items, I did circulate some language which I sent around a couple of weeks ago now. So hopefully, you have all had time to think about that.

On the second item I didn't circulate, I think, proposed text exactly. But I did send around a suggestion as to how we might handle it in terms of who should be the decision maker, whether that should be something that gets decided by a single panelist or whether we have to find some means of putting in place a three-person panel for these decisions.

And so I circulated a proposal, but I felt that we needed to have some discussion and agreement on the concept before I was going to try and actually reduce that to proposed text for the rule. But we will, I think, if we come on to Agenda Item 4, we will get to talk about that, I hope.

Okay. And welcome, Malcolm. We now have Malcolm with us as well. So that's super.

All right, so Agenda Item 3 is really to continue the discussion on tolling or the alternative proposal of Fixed Additional Time. Again, we did have some discussion on this on the last call. I think we made some progress in our thinking, but we were sort of coming up against a deadline at which point we were losing our quorum. So I think it does warrant reverting back to that.

And if you wouldn't mind, Brenda, if you happen to have Malcolm's slide deck that contained the proposal to hand.

BRENDA BREWER:

I believe I do. Give me just one moment to pull that up here.

SUSAN PAYNE:

Sure, thank you. And actually, whilst Brenda is doing that, why don't I keep just sort of scene setting, if you like. And again, this is just a reminder. It's something that we have talked about a little. Some time back, Malcolm had volunteered to put forward a possible alternative to the idea of tolling of time to allow for other accountability mechanisms. And I think, to be clear, it was ...

Malcolm offered to do this. He's not necessarily advancing it as his preferred option, but he agreed to put this forward as a suggestion and a way of looking at this in order for us to discuss. And so we did look at Malcolm's proposal at a very high level. When then also ... Though there was a feeling from a number of members of the group that it was quite

hard to sort of visualize how this might work, and so Bernard took the unenviable task of trying to set out how the timings might interplay in a more visual manner for people.

And we did spend a couple of weeks looking through those scenarios that Bernard put together to help us visualize the respective impact of whether we toll timelines or we adopted this concept of using a Fixed Additional Time.

And so our next step, I think, really is just to come to a kind of conclusion on whether we feel that this concept of a Fixed Additional Time to allow for additional accountability mechanisms is a helpful path forward and one that we want to be suggesting for either some or more than one of the accountability mechanisms.

If we go to ... I can't recall which page it's on, I'm afraid, now Brenda. So I think it's about halfway through the deck where ... I unfortunately don't think it's numbered. Possibly a bit further back than that, sorry. Yeah, keep going back.

BRENDA BREWER: That is the end.

SUSAN PAYNE: Yeah, sorry. I'm looking at the page that's called "Options: supplementary time instead of tolling." I think it might be the page before that checklist.

BRENDA BREWER: This is the page before.

SUSAN PAYNE: That one.

BRENDA BREWER: This on. You want this one?

SUSAN PAYNE: Yes, please.

BRENDA BREWER: Oh, there you go.

SUSAN PAYNE: That one. This is just to remind the people in the group. Again, we have had this presented before and we did look at the scenarios that Bernard put together. But this is just a sort of reminder of what we're talking about here.

And if we're using this as Malcolm has—for this example, if we're considering a Request for Reconsideration—the proposal envisages that instead of trying to stop the clock for bringing your IRP when a Request for Reconsideration is filed, that instead, effectively, we might give the claimant a period of time either when their Request for Reconsideration process comes to its conclusion, they either have the remainder of their

120 days to bring their IRP or they have a fixed period of time which, in Malcolm's proposal, is suggested as 60 days.

That is that time period to be confirmed and agreed by us, whichever is the longer. So if the reconsideration process wrapped up quickly for some reason—for example, because it was rejected—the time on the clock running for bringing the IRP might be longer than the 60 days. And so then they would just have that time period to file their IRP.

But if the Request for Reconsideration runs for a substantial period of time and under the bylaws it's envisaged, it could run, for example, for 135 days to get to completion. Then that claimant would be out of time for bringing an IRP. And so in that scenario, they would get this fixed period instead that ensures that they're not time barred.

So I think our next ... Really where we need to come to is to have some further discussion on whether members of the group feel that this is something that's workable. It certainly was intended to try to simplify things. And so whether people do feel it's simplifying things, and if so whether it's appropriate for the Request for Reconsideration. And indeed whether it's also ...

We need to consider other accountability mechanisms so other ones that we've been talking about, the Document Disclosure Process and a complaint to the Ombuds. Now in terms of the complaint to the Ombuds, I think, based on the discussions that we've had with the Ombuds themselves, he—certainly when he came and talked to us—was not in favor of us stopping our IRP clock to allow for the Ombuds proceedings for various reasons which we explored in detail.

So I'm not closing the door to that if there's strong view otherwise, but I think that's probably ... There are good arguments not to either toll time or to allow Fixed Additional Time in relation to Ombuds proceedings. But we do need to think about it for the Request for Reconsideration and for a document disclosure request.

And I guess we also ... It's open to us to also consider it in relation to the Cooperative Engagement Process. But noting that the current rules which have been in place for some time have always envisaged that the time for bringing an IRP gets tolled in order to allow for the Cooperative Engagement Process which is under the bylaws is a sort of—not an absolute requirement, but a strongly recommended precursor to bringing an IRP.

I feel like I'm doing a lot of talking here. I would also say on our last call, as I said, we had some discussion this. Sam's not here with us today, but I know Liz is. Sam had expressed some concerns, particularly around ensuring that if we're stopping the clock in some way, that there should be early and proper notice to ICANN and to the community about the intent to bring an IRP.

And so some of the concerns about the clock stopping and therefore there being an uncertainty about whether someone is going to bring an IRP or not was around that; that for this period of time when the clock is stopped, no one is aware, potentially, that this IRP might still be filed.

And so we did talk about that briefly. And I think we did feel that perhaps it was feasible for us to build in some kind of basic requirement to give notice of a potential intent to bring an IRP without, of course, us

putting in place so many hurdles that we were effectively requiring the claimant to make out their whole case.

So that was, I think, one area that we did discuss and seem to be reaching some agreement on, on our last call. And we also talked about timing. Like if we are allowing Fixed Additional Time—and I think we do need to come back to that “if,” first of all—but what should be the appropriate duration? And I think we had some people feeling that 30 days would be adequate, whereas potentially others may feel that 60 would be more appropriate.

Okay. I am going to stop now. And I see that Liz has her hand up. So Liz, over to you.

LIZ LE:

Thanks, Susan. This is Liz Le with ICANN Org, for the record. Sam sent her apologies. And I will first comment on the issue raised about notice. I think that's something that definitely warrants the group talking further about how would we go about giving notice while an IRP is still going on.

I think we've given a lot of thought to the proposal for Fixed Additional Time, and we are definitely in support of allowing the additional time where it's needed to have a potential IRP claimant that needs that additional time where it's appropriate in certain circumstances to prepare for and file either a CEP or an IRP because that person has also sought the reconsideration process and other accountability mechanisms.

But one of the things that I wanted to discuss a little bit with the group and get the group's thoughts back on is as we're doing the calculation in this, one of the concerns is whether or not this additional time is somehow becoming a de facto tolling. So, for example, if a claimant files a Reconsideration Request 29 days after the action or inaction occurred and that Reconsideration Request takes the entire 135 days in order to complete, does that end up, then ...

Under the current proposal, it seems that that claimant ends up getting the 91 days that's remaining because they filed 21 days going into the action. And then there's 135 days. And then there's an additional 30 or 60 days, whatever it is that we're agreeing on. So that means that the claimant could potentially get either 256 additional days in which to file or initiate an IRP or a CEP. Or if it's 60 days, then you're talking about 286 days as opposed to the 120 days. And so that's something where ...

That's adding in a substantial amount of time to a claimant. And that is, definitely, I think beyond the scope of or the intent in this discussion of whether additional time would be beneficial to the claimant.

SUSAN PAYNE:

Thanks, Liz. And I'm sure we'll have some discussion and thoughts on that, but I have quite a long queue. Kavouss, I see your hand.

KAVOUSS ARASTEH:

Yes. Thank you very much seeing my hand. Good morning, good afternoon, good evening. Susan, I have seen this slide 10 times. I think

you have to move forward. If you want, I can send a picture that I've taken from this file at previous meetings. This is point one.

Point two. It seems to me that we have some perfectionists in our team. They're looking for perfections. We cannot deal with all possible cases which may not happen at all. And we should limit ourselves not to propose alternatives over alternatives or options above other options.

So we rely on your competence and efficient way of meeting to allow us to progress and to come back to the point—tolling or additional time. Yes? No? So we have to stop sometimes, taking either of the ways that I would say the majority are in favor. I'm not excluding the views of minority, but I think we cannot cover everything, every possibility. It's impossible.

Having said that, if [you see] on this slide that I have 10 times, the last bullet says, "This compares ..." What we mean by this demonstrative adjective of "this"? "This" is what? What compares? So this is something that we should avoid. When we say something, either we say "any bullet mentioned above" or "all above bullets" or this course of action. But this, for me, is not quite clear.

SUSAN PAYNE:

Thanks, Kavouss.

KAVOUSS ARASTEH:

Yeah. So I seek your indulgence to [inaudible]. Thank you.

SUSAN PAYNE:

Thanks, Kavouss. All right? I understand your comment. I think, in terms of what the bullets say, this is a slide that, as you say, we've seen before. I think you understand the proposal that was put forward, so I don't think we need to get into the detail of objecting to the bullets at this point.

But I've got a queue. So, Malcolm.

MALCOLM HUTTY:

Thank you. I was just going to say briefly that I don't think that you can add together the time before an RFR process and the time in the RFR process and then the time afterwards and say that's the total time that the claimant is being given to file an IRP. They don't know until the RFR has happened whether they wish to file an IRP. That's the whole point to the RFR, is to seek to avoid the need to file an IRP by asking the [Board] to reconsider. And I think Liz's addition of those is invalid.

I take my dear colleague Kavouss's frustration with the time that we're taking on all this. I'd hoped that this idea of Fixed Additional Time would have actually found a way through, that we'd achieve consensus. But if not, if you'd rather have tolling than this, if you don't actually support this and you think that tolling's better, then fine. In the interest of compromise, I'm willing to support tolling, too, and withdraw this idea.

SUSAN PAYNE:

Thanks, Malcolm. Well, let's see whether we do indeed have some feeling of consensus on this addition time. But as you say, and sensitive to Kavouss's comments, if it looks like this isn't something that people

are behind, then, yes, we have the concept of tolling that this was proposed as an alternative simpler way to deal with the issue.

David.

DAVID MCAULEY:

Thank you, Susan. I think I'm probably conceptually with Malcolm. I was a little surprised by how Liz read this. I didn't read it that way. And I hope this remains on the table and can help us get to a quick resolution. I think it was a good suggestion along those lines.

But my take on it is, using the example that Liz put out, if someone files and RFR after 29 days and the RFR takes the full 135, after that I think what they should have is 91 days, but not the additional 60 that we're talking about. I mean, that's the way I guess I had read it.

If someone doesn't file until day 110, then theoretically when the RFR is over they'd only have 10 days. I would be willing to say, okay, let's give a little bit of additional time there so they have the chance to get their act together, to do what Malcolm just said—see what the RFR does. Maybe it'll solve the thing. And give them 30 days, not 60.

But I think they should at least get the full time to file the 120 days. But I didn't see adding 60 to the 91 the way Liz did. And so that's my thoughts on it. I hope we can work this out, get the consensus. I think it was well-created to do that. Thank you.

SUSAN PAYNE: Thanks, David. I must say, and I hate to throw in some confusion here, but as I'm understanding the proposal and the example given, in Liz's scenario if the RFR filed on day 29, the IRP then runs for 135 days. That takes us to day 160 or so. The 120 days that is set for bringing an IRP is already over. There's not an additional 90 days. And so we're just talking about a fixed period of time that we add on to the end when the RFR finishes because the IRP is out of time to allow for the IRP to be filed and not be out of time.

I'm now concerned that I'm on a different page to the rest of you. So I'll turn to Liz because she's speaking next. But if you are all understanding this differently to me, then perhaps someone needs to correct me. Thank you.

Sorry, Liz. I see you. Oh, I'm sorry. Apologies. I see your hand, Kavouss, and I'm assuming that this is an old one. But I should pause and just check with you.

KAVOUSS ARASTEH: Yes. Thank you very much, Susan. In fact, it's a new hand.

SUSAN PAYNE: All right. I apologize.

KAVOUSS ARASTEH: Yeah. I'm sorry, no problem. I think sometimes somebody give the reason why we use "this" without saying what we mean "this" in the last bullet. That is a trivial point.

But I think all of this time that Malcolm mentioned, that David mentioned, that you mentioned—we need to have a simple, linear line which indicates this different timing starting from zero and going through all of these different things to see what is the benefit and what is the advantage and drawbacks of each of these.

I think we are talking about very [inaudible] and we don't know that 91 days. I don't know what is the composition of 91. What is the start. [Is it the start at] days? And then we have 31 days to that. Where did 31 days come from? And 120 days, 165, 60 days. We need to demonstrate that in a diagram or in the line or in something which is more understandable for all people. Thank you.

SUSAN PAYNE:

Thanks, Kavouss. Just before I go to Liz, I will just note that that is what we spent two weeks of calls doing. Bernard, as I mentioned, put together that more visual means of seeing how the times fit together, and we spent significant amount of time going through that. I'll perhaps ask him if he could circulate, afterwards, a link to that document or perhaps even a link to the two calls where we went through it so that you have that to hand if you want to go back to it. Thanks.

Liz.

LIZ LE:

Thanks, Susan. First, I just wanted to comment on the point about how providing notice of a future IRP—I think it was raised by Malcolm—and how could that be possible until you know the reconsideration process

is over. When we had discussed this previously, and I think ICANN's position on this is that it would be a notice to ICANN Org of a future intent to file an IRP if the reconsideration process does not resolve the anticipated basis for the IRP claimed by the potential claimant.

And that takes us back to the initial conversation of how we arrived to Fixed Additional Time, I think, when we first started exploring the other accountability mechanisms. What we raise, and has always been true and remains true, is that a claimant doesn't have to invoke the accountability mechanism in some kind of a critical path or linear way. They are mechanisms available to claimants that can be [both] simultaneously if that's what they choose to do so.

And I think from there, this conversation of Fixed Additional Time was raised because someone in the group—it might have been Malcolm—had raised the point that if someone wanted to file a Reconsideration Request and go through that route first on the same issue and could resolve things before invoking an IRP, which is a much longer and time-consuming and costly process, that there should be some consideration for additional Fixed Additional Time if they were to go that route and they were prejudiced for doing so.

And I think under that scenario which is where ICANN—

UNIDENTIFIED MALE: [inaudible].

LIZ LE: Excuse me?

UNIDENTIFIED MALE: [inaudible].

LIZ LE: So under that scenario, we had this discussion. So when we did the calculation ... And my apologies, I inadvertently added the 91 days. When we did the calculation, there is no way for us to not include the 135 days because that is part of the process. If someone didn't choose to go to the Reconsideration Request route first and wanted to go the IRP route, the clock would be ticking at the same time. So whether or not you go to the reconsideration process, that time would still be added to what is the deadline for filing for a claimant.

So in this case if a claimant is to file on 29 days, then it would be 29 days plus the 135 days that it took to complete the Reconsideration Request. And also then if it's a 60-day Fixed Additional Time, that means that the claimant would end up with 224 days that they had before the time ran out to file an IRP. If it's less time than that, say if it's 60 days, then it's 194 days.

But I don't think that you can just not count the 135 because when you're doing the Reconsideration Request, the intent that is if this doesn't resolve the Reconsideration Request [issues], you're going to file an IRP. That 120 days is still going as part of the 135 days. That's time that the claimant has on his or her or it's hand in terms of preparation for an IRP. Thank you.

SUSAN PAYNE: Thanks. David.

DAVID MCAULEY: Thanks, Susan. So I was very interested to hear what Liz just said and I think, conceptually, I'm in agreement with that. However, I hear what she's saying about the vast amount of time, theoretically, that people can get ready for the IRP during the RFR. But to me the RFR is a chance to solve this at a lower level, which is something we should encourage. And I'm not sure they're going to want to incur the legal fees to put their briefs together or whatever it takes.

And so the way I see it, if someone tries to solve this at RFR and they've used up most of the time before they file the RFR, I still think it might be worthwhile for us to at least consider giving them 30 days after the RFR ends and they were unsuccessful to put their legal materials together to file the claim to encourage them and ICANN ...

I don't know. I see some value in sort of letting them focus on the RFR and try and get this thing resolved, or at least maybe even narrow the issues. Anyway, so I would ask ICANN maybe just to think about it again. I'm personally not in favor of 60 days if that's an extension of the 120 days. But to me, a 30 day administrative period to sort of put your materials together and file wouldn't be terribly untoward. Thank you.

SUSAN PAYNE: Thanks, David. Kurt, new hand.

KURT PRITZ:

So I agree with David's result, but I have kind of a slightly different take on it because I understand that some complaints are more amenable to Request for Reconsideration than others, and others should go straight to IRP. But when a company files a Request for Reconsideration, they to avoid making ...

I don't know. I'm kind of botching this, but the IRP is supposed to be a lower cost than litigation path solution to a dispute. But in fact while it might be lower cost than litigation, it's still, for many small companies, a you-bet-your-company sort of investment. I think this group needs to consider that.

A company, a complainant should not have to be making those investments while the RFR is going on. And there's considerable prep time before a filing—prep time and prep expense. And so that's why I think there should be some time between the conclusion of the RFR and the filing date of the IRP, because a small company will not want to make those company-changing investments until it's certain that they have to. Thanks. I hope that was clear in some way.

SUSAN PAYNE:

Thanks, Kurt. Yes, I think very clear. Liz.

LIZ LE:

Thanks. Thank you, David and Kurt for your comments. I appreciate it. And I understand the considerations that you are raising. I think that it's important to point out that there are different standards of review

under the Reconsideration Request versus the IRP mechanism. So I agree that the goal ...

If someone is trying to file a Reconsideration Request ahead of an IRP in hopes of resolving certain issues, that is something that we definitely want to encourage a potential claimant to do. And that's where this discussion about Fixed Additional Time and not putting prejudice on a potential claimant's time to file at IRP, if they were doing that.

But at the end of the day, they're very different issues. So under a Reconsideration Request, it's about whether or not an action or an inaction contradicted or violated established process or policies. Whereas the IRP is more of a merits challenge in whether or not an action or inaction violated the ICANN Bylaws' Articles of Incorporation. So I don't necessarily think ...

I think that issues could be resolved, but I'm not necessarily seeing how, if someone were to file the same complaint and challenge the same complaint for violation of process and procedures in an IRP, that would not be sufficient to meet the standing requirements in an IRP. And so I think a claimant can take care of certain issues but not resolve the entire thing. So I don't think you can say that the 135 are just a complete blackout period/silent period where there are no considerations given to what may potentially be brought into an IRP itself.

That said, I do want to also respond to the comment that Malcolm raised earlier, which is to say that he's happy to revert back to tolling in this case, given this conversation. I think that's our concern here. That

under this scenario, by adding all this additional time, it's essentially ad hoc tolling is where we are. We are not in situations where someone maybe has one or two days left in order to file an IRP and therefore needs some additional time to prepare for it at the end of the reconsideration process. Thank you.

SUSAN PAYNE:

Thanks, Liz. So I feel like we keep circling back to this view of what the Reconsideration Request is for. And you've expressed it previously that it's for resolving sort of more procedural issues, whereas the IRP is about bylaws violations.

So I've put in the chat the Bylaws 4.2 (c) and then subparagraph (i) which talks about "one or more Board or staff actions or inactions that contradict ICANN's Mission, Commitments, Core Values or established ICANN policies."

And so it seems to me that, yes, some Requests for Reconsideration go to process matters. But it seems to me, also, very clear that some Requests for Reconsideration, under the bylaws, could be going to seek to address the same harm that you might subsequently seek to address through an IRP. I don't think anyone is saying that every time you file a Request for Reconsideration the clock on bringing an IRP is stopped and extended if it's not the same dispute and the same matter, but ...

I'm not making myself very clear, but I think we keep having this point raised that the Request for Reconsideration is not about a bylaws violation, and I don't believe that that's correct. That's not what the bylaws say.

We're simply trying to allow for the fact that the bylaws give this accountability right to potential claimants and we shouldn't be taking it away from them again because, basically, we run their clock down. And so we let them we let them bring a Request for Reconsideration. But by doing so we then went, "Ha-ha. Now you're out of time for an IRP." We're trying to ensure that we don't disenfranchised people here. That's my understanding, anyway.

I'm talking too much, so I will go to Kavouss. And then I have Malcolm after that. Kavouss.

KAVOUSS ARASTEH:

Thank you, Susan. If you allow me, I may not agree with you. This reconsideration was discussed at length many, many times during the Work Stream for accountability. It was a way to encourage the people to use that process, not [to do the end] of the process which is costly, time consuming, difficult, and so on and so forth. So we should not put in question the Request for Reconsideration.

And now, if you allow me, I would like to, with your permission, ask David. He said that he's against the 60 days. Is the against any day, any period—60, 30, or so on and so forth? And then if that is the case, if I were you I would have asked, "Who is in favor of additional periods, whether 60 or 30, or so on and so forth?" Thank you.

SUSAN PAYNE:

Thanks, Kavouss. Malcolm.

MALCOLM HUTTY:

Thank you, Susan. I wanted to intervene to thank you for adding the bylaws language to the chat because this really clears up why Liz thinks what she does because when we read that bylaws language, we can see in there clear evidence that this is new. This is under the new bylaws.

[Greg] doesn't seem to be here this evening, but let me channel him, if I may. The old system was different. The old system may not have had the opportunity to raise substantive things. But then, in the old system, many substantive things weren't reviewable at all.

I'm not going to speak, really, say very much about the old system because I'm not an expert in it, but this language here was added. And we know that it was added because the mention of the commitments—at the very least, that term [it turns up] from the bylaws—didn't exist under the pre-Transition bylaws. It was created in the CCWG Work Stream that Kavouss just referred to.

So it may be that this hasn't been used yet. But it is a provision that exists, and it's not merely procedural. It says what it is and it's quite clear in what it says. So the question is, do we want people to actually use this or do we want to push them into an IRP? That's really the only issue. Yeah? I mean, I'm not going to keep on arguing about adding days together and all this stuff with Liz. It's entirely irrelevant.

I rather sympathize with Kavouss's frustration at the time and the way that we keep coming back to this. I feel similarly, to be honest. It's time to move on now. If we are not to give a substantial opportunity for people that are contemplating an IRP to actually go through that and

bring that after they know the outcome of an RFR, then they're not going to [fight] an RFR. They're going to go straight to an IRP.

So that's the only question. Do we want to encourage them to do this or not? That's it.

SUSAN PAYNE: Thanks, Malcolm. Very well summed up. David.

DAVID MCAULEY: Thanks, Susan. Kavouss asked me a question, so I wanted to just answer it. And the answer, Kavouss, is that I don't support an additional 60 days. I'll tell you what I do support is that someone gets 120 days to file an IRP, and that if they have used up a large portion of it before they file an RFR, at the end of the RFR, I would give them not 60 days, but 30 days to sort of administratively get their act together and file the IRP.

So you're right, Kavouss. I don't support 60, but I would support 30. Unless they filed at such a time, like at 29 days. Well then I would give them 91 or whatever adds up to 120. Thanks very much.

SUSAN PAYNE: Thanks, David. Okay, all right. Notwithstanding the comments that you've made, Liz, you have also indicated that you do favor trying to allow people sufficient time to bring their action. I'm certainly hearing from David and from Malcolm and from Kurt their support for this Fixed Additional Time as a mechanism to allow the complainant time to bring

an RFR (Request for Reconsideration) and not find themselves out of time for bringing an IRP.

So I think—and please, if people disagree with me, they can speak up—but we seem, I think, to be agreed that we think that this is a suitable mechanism to adopt. And we have David, I think, who is arguing very strongly that we should make that 30 days so that it's a reasonable period of time to sort of finalize and get one's IRP claim in. But he certainly would not favor something as long as 60 days.

So absent comments from others, I think that seems to be where we are coming out. But I have a couple of hands, so I will turn first to Kavouss.

KAVOUSS ARASTEH:

Yes. Thank you, Susan. First of all, I would like to emphasize what Malcolm said. In the Work Stream we did not want to push the people to IRP. We wanted to avoid that. So that is the concept and philosophy behind this. [So I want to] [inaudible]. It is better or preferable to retain this Request for Reconsideration .

I'm grateful to David that he's got against any time, but he wants, instead of 60 days, to go to 30 days under the condition and circumstances that he described. So maybe, Susan, you focus the discussion around what David mentioned which is not in contradiction with what Malcolm mentioned in general. And it is not a contradiction of what I mentioned, and is perhaps starting to build the consensus. Thank you.

SUSAN PAYNE: Thanks, Kavouss. Scott.

SCOTT AUSTIN: Thank you, Susan. My only question is, we're talking about 60/30. We're talking about RFR versus the IRP itself and the different time frames. But have we actually had a real-life problem here that we're trying to fix where someone has claimed that they had too little time to then go back and file their IRP after a Request for Reconsideration was concluded?

We're speculating. I feel like David has certainly stated, somewhat, the voice of reason to get on with it. And to have a shorter period, a 30-day period, is something that is more of an incentive to move forward and get things going. On the other hand, as lawyers I think we can all consider times where the parties—or the party—may have clients or may have people who are traveling or are unavailable or have mountain of material to get together.

I just don't know if we're speculating that 30 days is enough. And I'd like to avoid speculation or belief, if possible, and know if we do have any examples where someone actually had a problem with the amount of time [they were given] or if this is all really sort of breaking new ground. Thanks.

SUSAN PAYNE: I'm not sure whether anyone's in a position to answer that, Scott. Liz.

LIZ LE: Hi, Susan. I can answer that. That's a great question, Scott. And no, there hasn't been a situation that an IRP claimant raised an argument that he or she or it could not meet the filing deadline because they went through the reconsideration process first.

SCOTT AUSTIN: Great. Thank you, Liz. I really appreciate that. That does give me some guidance at least in the sense of saying, then, fine, I'll defer to those with a considerable experience here, like David and Malcolm, with the process itself. And I wish that Mike was here because I think he's been through enough IRPs that he might have some specific examples of how he would feel about 30 versus 60. Thank you.

SUSAN PAYNE: Thanks, Scott. Kurt.

KURT PRITZ: Thanks. I think Scott, in his very last comment, kind of said what I was going to in trying to pick between 30 and 60 days. To someone like me, that's a dart throw, and I think it would be dependent upon when somebody's filing an IRP. Not just making the investment decision, but when they actually have to spend the money.

So I think a party could do prep work for the IRP while the Request for Reconsideration is going on, but we'd want to leave enough time for them to actually spend the money and get the results needed to complete a filing in time. Intuitively for me, 30 days would work but I have zero experience with this.

I particularly [thought of] Mike. And there are others here that have IRP and other arbitration experience that would be valuable there in choosing the time frame. Thanks.

SUSAN PAYNE:

Thanks, Kurt. And that is a good point. There are a few in our group, and I don't think we have any of them on the call, unfortunately. But we certainly have Mike and Flip. And indeed Kristina, historically, has been involved in an IRP.

So perhaps we are tentatively, I think, coalescing at 30 days. But perhaps it would warrant some input, a request specifically from those with more day-to-day experience for their views or at least the opportunity for them to react and persuade us that 30 days is insufficient.

Liz, is a new hand or an old one?

LIZ LE:

It's a new hand.

SUSAN PAYNE:

Okay, Liz.

LIZ LE:

Thank you, Susan. This is Liz Le with ICANN Org for the record. So I think with respect to the conversation, the direction of the conversation is taking and I think the points that have been raised here. What is

realistic? We should be focusing on that. And as somebody who is a practitioner of IRP, and this has not been an issue. I think if a claimant—where I think there might be benefit for a claimant who wishes to prepare for an IRP following a reconsideration request, isn't necessarily to add 30 days, automatically 30 days or 60 days to the reconsideration process because there's still an opportunity for the claimant to whittle down, try to resolve the issues and figure out what are the issues that should be brought into an IRP.

And that process is the cooperative engagement process which is what the bylaws is encouraging claimants do. And during that process, I think that's where a claimant can figure out if there are any issues that have been resolved or during the reconsideration process that does not need to be brought into an IRP and what can also be resolved otherwise, through agreement with ICANN Org. And so, I think there's the opportunity for the claimant to do the preparation.

And I think one of the things that this group has talked about is, if there is some additional need for time, at the end of the CEP, because there's certain issues that were not resolved that they intend to go and file an IRP, that can be considered as being added on to the CEP. And that's part of what this group, the IOT is tasked with in terms of developing CEP rules.

One of the things I will say is, right now, in CEP, there's an automatic tolling time for the number of days that a claimant is engaged in the CEP in terms of deadline to file an IRP. So if there's no written agreement between the parties, then that tolling time can be up to 14 days. And if there is a written agreement, it could be more than 14 days whatever

the parties deem appropriate. So there's already that additional 14 days built into the time that someone would have to file an IRP in addition to the 135 days or whatever the time is that the reconsideration process takes.

So I think that if we wanted to afford the time for a claimant to be able to have their accountability mechanisms really go through the process, the accountability mechanism, and be able to file an IRP if that's where it goes, then it seems that the focus should be on adding time if needed to CEP and not at the end of a reconsideration process. Thank you.

SUSAN PAYNE:

Thanks, Liz. And Kavouss, if you will bear with me, I just want to clarify something that Liz said before I turn to you, if you don't mind. Liz, you said, all right—I understood you to be saying that at the end of the CEP, there's 14 days added on, a minimum to allow for filing of the IRP but as I understand it, the way that that is built in is that you have to have commenced your CEP with at least 14 days left to run on your deadline for bringing your IRP. Is that not correct?

LIZ LE:

So yeah, if there is a deadline in which to commence the CEP but what I'm saying is that with the 14 days afforded in terms of the tolling is, a claimant can—the time in which you engage in the CEP whether it's two weeks, a month, two months, that time has tolled and then you also have—it's tolled up to 14 days absent written agreement. And then if there's a written agreement, then it could be more. But again, those are

the current rule that are in place which this group is tasked with reviewing and updating.

SUSAN PAYNE:

Okay, thanks. Kavouss.

KAVOUSS ARASTEH:

Yes, Susan. Believe me, I am dealing with this timing for various process since at least 40 years. There is no something universally agreed. It is by consensus and by considering various aspects of the things. If somebody is lazy, if somebody is inattentive, if somebody is losing the time, adding more time does not help. But this adding time would be on the expense of the other side that we always forget. As I mentioned three times, this is the fourth time, there is a tendency at this group that they want to give more time and time to the claimant but what is the result of those to the third party.

So I suggest that we concentrate about 30 days and I express my apology to you. You are the chair. You should not have any position. If you want to have a position, take off your hat as a chair and express your views as a participant. But as a chair, you should build up the consensus.

And I don't understand the 14 days and so on, so forth. We are diverting to the main question. The issue is that, do we need additional time or not. According to what I heard, yes. Do we need 60 days? According to what I heard except otherwise specified, no. Could you review who said that, yes. What is the area that we could use the 30 days? So we

request everybody to be tolerable. We request everybody to be flexible and everybody to think of other people.

We tend to tell people we cannot decide [inaudible] of the people giving our wishes and our appetite and so on, so forth. We should think of the practicality. We should think of the pragmatism. We should think of the reality and so on, so forth. Thank you.

SUSAN PAYNE:

Thanks, Kavouss. So as I said already, I thought we had come to some agreement around the 30 days. And that seems to align with your wishes too. So we have reached some, or at least I had hoped that we had reached some meeting of the minds. I'm not so sure that Liz is there with the rest of us but it does seem on this call that the majority are in favor of allowing this fixed additional time. And absent feedback from our practitioners that 30 days is inadequate. We seem to have, where people have been expressing an opinion or feel that they have an opinion on this, it seems to be coalescing at 30 days.

So I think we have reached some area of agreement. If anyone has been putting things in the chat that they want to raise, perhaps you could put your hand up and do so because I must confess, I'm not managing to follow the chat as well. Thanks, Scott.

SCOTT AUSTIN:

Well, I did this in response to what Liz was raising because I got the sense that perhaps ICANN is supportive of the CEP or would like to encourage the use of the CEP and so I just—and again, this is just off the

cuff, but I felt there was—at least I'd throw it out there. See if anyone was interested in it because we seem to be—at least I thought at that point, we're going with the determination whether 60 days is better or 30 days is better. If we just want to go with 30, get this all over with, that's fine by me. I will go along with that.

But if we wanted to create some kind of an encouragement for the CEP, then perhaps a dividing line would be created upfront that it would provide a benefit to those who had engaged and [inaudible]. That they would have more time available to them. I agree with Kavouss that usually those who need the extra time are those that are need extra time even if you do have extra time.

But there are always those who are not in that case. There is an exception [inaudible]. And so, I think that there's still a possibility that someone could in fact actually need 60 days. And I'm thinking that in terms of what Kurt raised and the various client concerns that range from funding to the availability of witnesses, to the availability of documents. There are a myriad of things that come up that have to be discussed with a client to make a determination whether or not they really can get something done within a specific period of time.

If the CEP is as good a benefit, as much a benefit as stated, then perhaps this is one way to encourage its use. Thanks, that's all. That's the only reason I had about the chat.

SUSAN PAYNE:

Thanks very much, Scott. And there is some encouragement to use the CEP which is a cost one rather than a timing one already built in. I'm not

suggesting that you're arguing to replace that. So we do have in the bylaws a provision that you're not required to use the CEP process. You can bring your IRP without going through the cooperative engagement process.

But there are some potential cost sanctions if you go down that path and then lose your IRP. So I'll just see if there's a fairly strong incentive to use the cooperative engagement process. But I think perhaps what I'm—I'm not sure if this is what Liz was saying but perhaps this is what I'm inferring from what Liz was saying, is that, once you've decided, once you've reached the point where you've exhausted your other avenues and you're bringing your IRP, then the likelihood is that the party will bring a cooperative or enter into the cooperative engagement process. And we have certainly in the current rules and I'm guessing we would do envisage that time does toll for them bringing the IRP to allow for that cooperative engagement process because it is intended to narrow the issues or whatever.

And so, with that in mind, if we're applying a fixed additional time to your time period for bringing your IRP, then we don't need to be looking at a substantial period. And with that in mind, 30 days does seem a fairly reasonable, adequate time period perhaps. Again, I think I might be putting words in Liz's mouth because the claimant will then be entering. First off, they will be entering into their cooperative engagement.

And so, I think given that there is a time limit to enter a cooperative engagement. We do still need to have the clock—we do still need not to be out of time before we get to that point. But I'm hearing from what

Liz has said that perhaps a shorter period could be adequate for a complainant in these circumstances. Kavouss.

KAVOUSS ARASTEH:

Yes, thank you very much. First of all, this is a multidimensional process. You could not talk about CEP in isolation from the reconsideration, in isolation for many other things. We should look into the overall process and so on, so forth. Secondly, I am not opposing to anyone. I want to build-up a consensus, building up, not yet consensus, building up consensus. And I would like that this plenary had some results. Lastly, I am confused by what you quoted from Liz that you're looking for a shorter period. Shorter with respect to what, 30 days? What is shorter period? Thank you.

SUSAN PAYNE:

So just to react, yes, I was talking 30 days rather than 60 because we—and I'm not suggesting 60. I'm trying to suggest that that perhaps is an argument that favors 30. Thanks, Kavouss. Liz.

LIZ LE:

Thanks, Susan. This is Liz Le with ICANN org for the record. ICANN org is definitely in favor and supports having conversations where we allow claimants sufficient time in which to invoke the accountability mechanisms that are afforded to them under the bylaws. I think the discussion of what that appropriate time looks like and whether it belongs at the end of the reconsideration process or belongs at the end

of the CEP process or some combination there has to be taken together. I think it's very typical and it's not a complete picture.

In this sense, I agree with Kavouss to have this discussion in the absence of having the discussion about the CEP rules which is what we're tasked—the IOT is also tasked with reviewing and updating. So I think this is one of these discussions where I would encourage us to consider having this discussion or putting this discussion aside until we've had the discussions about the CEP rules and we can look at this in its totality and as a whole and see where does it make sense? Does it make sense? Have we factored in the interest sufficiently for a claimant to file an IRP by putting it at the end of the CEP or do we need to do it at the reconsideration process? But I don't think we can have the discussion and make a decision without looking at the both of it at both sides and then also the entirety of the rules at hand. Thank you.

SUSAN PAYNE:

Thanks, Liz. And I hear what you say but that does cause me a great deal of concern given how long this whole process is taking. That we've been talking about this now for many months to the frustration I think of everyone in the group. And to park it and then at some point in the future when we will finally get to this CEP rules, I think is unsatisfactory because in the meantime, any claimant who is bringing an IRP is left in limbo. And I don't think that's satisfactory. I'm happy to hear if everyone else in the group is of similar mind to you but I think it's—that causes me real concern particularly after we've been talking about this for months. Kurt.

KURT PRITZ:

Thanks, Susan. So I agree with Kavouss that it's sort of a multi-body problem that's very complex and trying to sort out all the interdependencies and making a one size fits all set of rules might be impracticable. What Malcolm's suggested here is a pretty simple, straightforward way to address an issue we've been discussing.

I think we should decide on this and put it on the shelf. When we're done, we might take it off and say, well now that we've learned this, this doesn't make so much sense anymore. But at least I think we should memorialize this as our decision that, this is how we're going to proceed on this issue of tolling. That we're going to adapt Malcolm's recommendation instead, so we can go on the next thing but with having concrete result against which we can measure our other decisions. I hope that was strong enough. I think we should make a decision to go ahead with this.

SUSAN PAYNE:

Thank you, Kurt. Thank you, Kurt. Scott, you probably will have the last word.

SCOTT AUSTIN:

Okay. Well then, real quickly, yeah, I totally agree with Kurt and essentially with Malcolm with what he's proposed that we need to have some kind of a—I'm trying to remember what it is when you tap one of those nice pins into the side of a rock as you're climbing to hold your place so that you could continue to grow higher. Hopefully higher, but I

think that's what we need to do here. We need to reach a certain level of ground on a particular issue and make a decision. And then, if we need to revisit it at some later date, great. But we need to have [inaudible] the number of all these balls that we're balancing in the air or plates spinning. I think we need to have some specific points of reference that we reach agreement on. Thanks.

SUSAN PAYNE:

Thank you, Scott. And I think in the chat, it apparently is a piton. And I think we have a piton. I would like to propose that we have a piton here which is that we are favoring, with respect to the request for reconsideration process, we are favoring this proposal for allowing some fixed additional time at the end, so that if there's less than 30 days left of the IRP clock which has been continuing to run, then we are favoring allowing that the claimant, that this additional period of 30 days when their request for reconsideration is concluded in order that they were not put out of time for bringing an IRP before that request for reconsideration was completed.

So I think, generally, I appreciate that Liz is perhaps not quite in the same place as the rest of us or the rest of this group, I should say, not us. But it seems to me that from what I'm hearing from everybody else, there is strong support for that. So I think that is our piton. I've got two hands. One from Liz and one from Kavouss and then we will wrap this call up. Thanks. So, Liz.

LIZ LE: Thanks, Susan. So I think there are also a couple other considerations if we were to go that route that we need to—that ICANN org has concerns about with respect to fixed additional time. And also, it's something that in terms of the timing that's being proposed, I think that's something that I just need to take back too internally and then I will be able to get back to the group on that.

SUSAN PAYNE: Great. Thanks, Liz. I mean, obviously, we have been looking for ICANN org's input on this now for a couple of months, so thanks. We'll look forward to getting that by our next call, please. Kavouss.

KAVOUSS ARASTEH: Yes, Susan. Thank you very much for summing up this situation. I think there is broad—I will not say some because some is an uncountable number. I think I would say among these participants there is a broad agreement on the additional period. This additional period is not the first time in this [inaudible] IRP. As I have mentioned, I have sufficient experience handling all deadlines in all other cases outside the ICANN. Always you have some sort of the additional flexibility of some time and whether it is 15 days, whether it's [inaudible]. But I think the 30 days seem to be a good way. It is not perfect. It is not I would say something that we have agreement but it is something that we could build up consensus.

Please kindly take from this meeting these 30 days as something we could vote on that and not come back to that. Again, I'm not insisting to any position that each of us have. All the views are respected but the

general view is different things and we have to be tolerable. We have to be flexible and we have to agree with the, I would say majority or with the consensus building, so please say these 30 days as an outcome of this meeting. Thank you.

SUSAN PAYNE: Indeed. Thanks, Kavouss. Good summing up. Okay, so we have five minutes left, but I think this is a very good point at which to stop for this call. We have our next meeting on the 8th of March which is after the ICANN meeting. Sorry, Liz. Your hand is up. Is that a new one?

LIZ LE: My apologies, it is an old one.

SUSAN PAYNE: Okay, super. Our next call is on the 8th of March which will be after—we have all had the pleasure of another virtual ICANN meeting, so I will look forward to seeing everyone on that call and we will hopefully have been able to move on then and come to some final conclusion on the [inaudible] and safety valve language and at which point perhaps we'll have put to bed our discussions on timing.

BRENDA BREWER: Excuse me, Susan. I am so sorry to interrupt but actually, March 8 is during ICANN73.

SUSAN PAYNE: Oh, aha. Thank you, Brenda. In which case I don't think we are anticipating a meeting during ICANN73 are we, Bernard?

BERNARD TURCOTTE: No. I saw that on the list and I just was wondering also. That could take us to either the 15th or the 22nd, whatever is our choice. The 22nd would match our current two-week rotation. The 15th is also valid, so it's just this group will decide what they prefer. A lot of people like a week off after the ICANN meeting, including staff.

BRENDA BREWER: Exactly. This is Brenda, just to agree with Bernie, my team is suggesting not holding calls the week after due to attendance and staff recovery, so across the board.

SUSAN PAYNE: Okay, I mean maybe will have to take this offline because I won't be able to do a call on the 22nd and I'm very anxious that we shouldn't go more than a month between this call and our next one. So perhaps I'll take this offline with Brenda and Bernard. Kavouss.

KAVOUSS ARASTEH: Susan, I'm very sorry. I don't want to impose any views to anyone but 22nd of March, it's the new year of my country. Old, old date. 4,000 years ago, that has been established. The beginning of the spring, the beginning of year, new life. That is the logic behind that. There is no other logic. This is just the beginning of the spring, the beginning of

year. If possible, please avoid to have that day, 22nd. Thank you. If possible, thank you.

SUSAN PAYNE:

Thanks, Kavouss. That's very helpful as well. We'll take this discussion on our next call offline and we'll come back to the group with a proposal on when our next school will be. We will not be meeting on the 8th just for clarity because that is during the ICANN meeting and we don't have a session scheduled. Okay. Thanks very much, everyone for your input. I will circulate a sort of summary of our piton, so that all of us on this call can see it and those who are unable to make the call [inaudible], so up to speed on our professional agreement here.

All right. Thank you, everyone. We can stop the recording and thanks for your time. Bye, everyone.

[END OF TRANSCRIPTION]