

IOT-IRP Meeting

Thursday, November 29, 2018—19:00-20:00 UTC

CART Disclaimer: This rough edit transcript, which may contain missing, misspelled or paraphrased words, is only provided for your immediate review and is not certified as verbatim and is not to be cited in any way.

>> DAVID McAULEY: Okay. Thank you all for joining, and I appreciate this opportunity to address what we need to do now. Especially on two fronts. On finalizing the rules that we have, and on perhaps reconstituting the IRP IOT team. So before we get started on the agenda, let me ask if anyone has a change to their statement of interest that they need to mention, and I would so let me ask that. If anyone has a statement of interest change, please note with your hand up in adobe or the audio. I don't hear or see any. So let me then ask, is there anybody who is listening and participating on audio who's not listed or who is not in the adobe room, would they please let themselves known? And again, I don't hear any. So I think we can proceed and go into go into the agenda.

>> BRENDA BREWER: Excuse me David, Greg has his hand raised.

>> DAVID McAULEY: Oh goodness. Sorry I missed that. Go ahead, Greg.

>> GREG SHATAN: Thank you. It's Greg Shatan. Can you hear me?

>> DAVID McAULEY: Yes, we can hear you.

>> GREG SHATAN: Great. It's been a while since I've been in one of these calls. I'm not sure if my statement of interest update was mentioned on this call prior, so I'll mention it again perhaps. And in September, I became the president of the New York chapter of the Internet society. Which is an at large structure, also a member of NCUC. As we have others who participate in NCUC on behalf of the group, I'm not associated with that aspect actively, but I do represent the group to at large. Thank you.

>> DAVID McAULEY: Thanks, Greg. Congratulations on that. And Malcolm's hand is up so go ahead. Malcolm, if you're speaking, we're not hearing you.

>> MALCOLM HUTTY: Sorry, I can't speak double muted. David, this is a principle SOI update. At the public meeting, following the board meeting in Barcelona Goran asking question about the state in community policy processes said that ICANN staff do not participate as and are not full participate in community processes but acting supporting law to provide staff advice. From the of that advice from Goran, as chief executive, I believe we need to revisit the vision to include ICANN legal stuff and as full participates in this group. I would ask that they be reclassified as a support role and full participates eligible for consensus course.

>> DAVID McAULEY: Okay. Thank you, Malcolm. Before I comment, I see Sam's well, Sam had her hand up. Greg, I believe that's an old hand or is that a new hand from you? Excuse me. Okay.

Thanks. Malcolm, I understand your point but it's I mean, I don't know what to say. I don't want to stop the meeting, because I'd like to press on and do the things we have on the agenda. Speaking as a personal participant and not as the lead of IOT right now, it would be my view that it's almost

inconceivable to have a group talk about IRP rules without ICANN participating in some substitutive fashion. The reason being that ICANN is the only person on this call or any setting that I'm aware of that's guaranteed to be a party in every single IRP. Be that as it may, that's my personal view. It's certainly not a company view, but having I see your hand up. I'll come to you. Having said that, I understand your point and sort of what I ask that maybe you make it in writing on the list but, I'd like to proceed with the substance of today's call, and then with respect to Joan's Day, I don't believe they are a full participant. Your hand's back up, Malcolm, go ahead.

>> MALCOLM HUTTY: Yes, I believe, it's precisely because of ICANN special interest, but I should participate only in supporting capacity. That said I was not as ICANN leave this call or not participate in any respect it was the state of their participation I was speaking to. I noted that the transcript didn't caption my words clearly. So if I may repeat my request for the benefit of the transcript more slowly.

>> DAVID MCAULEY: Malcolm, may I interrupt for second? I appreciate the fact you want to do that, and I encourage you to do that, because when you made the statement initially, at least at my end, a certain small portion of it was gargled. I would suggest you repeat the statement, and slowly as you suggest, and so therefore, that's a good idea. Go ahead.

>> MALCOLM HUTTY: Thank you. My request is that ICANN and Joan's Day be classified so that that a participate in this group as staff supports, not as full participating members of this group, and as a consequence of that, they would not be considered eligible for inclusion in quorum counts or consensus courts.

>> DAVID MCAULEY: Okay. Thank you. I think that's clear and I hope that that's been captured Bernie and Brenda on maybe you could, you know, after the call confirm that that's been captured, or we can go back and listen to the tape, but I suspect that that

>> BERNIE TURCOTTE: David?

>> DAVID MCAULEY: Yes, go ahead.

>> BERNIE TURCOTTE: My hand is up, when you have a minute.

>> DAVID MCAULEY: No, go ahead. I'm asking if you would talk now.

>> BERNIE TURCOTTE: Okay. Thank you. I understand Malcolm's point; however, if we go back to the creation of the IOT, it was clearly stated and meant that ICANN would participate as a full member, but that regardless of the number of people representing ICANN, it would only be as one member. So I'm just putting that on the table from historical and factual perspective. Thank you.

>> DAVID MCAULEY: Thank you, Bernie. Excuse me, I'm sorry, I seem to have this problem with my voice when I get on these calls. Thank you for that. Malcolm has made a request. Here's what I propose, the agenda is drawn up today we are not heavy certainly not going to make decisions. It is it has been my intent and I hope I expressed it somewhat clearly. What I hope as lead that we can do between now and the end of January is finish work on the rules of procedure. We have interim rules that the board's approve and there was some disagreement at ICANN 63 about that. I think everyone was expressing themselves in good faith there, but there was some disagreement. We can sort of take that issue entirely off the table by finalizing the rules and not having interim rules anymore. And my goal is that this group should get this done by the end of January in the following manner. In this meeting and in the meeting, I

hope we can hold on December 13th and on the list, first address Rule 4, the time for filing rule and review the public comment, somewhat formally. We're not going to read them as they were written. Bernie and I will read parts of them, and put them on the table and discuss them both in this call and on the call on the 13th. That will be the rule for the time of filing and then move on to the other rules. I think there's one other that might not be fully done and that's on intervention joining, whatever you want to call it. My hope is that will be done by the end of the January. Greg, I see your hand up. That this group could with some focus finish the rules. And then I also think, as you know, that we could go to the SOs and ACs around the time that we finish them we can go to them now so they can get started on this process, to add new members to IRT and sort of reinvigorate our work because we do have a chain of things left for us to do. And there's no reason to continue with this pace. I think we should have a meeting at ICANN 64, a small discrete one-hour meeting, where we reorganize get into substance, and move forward wrap them up as efficiently and well as we can. I don't believe we're going to make a decision in this call. Therefore, I believe we can proceed on. Malcolm's point is noted. I would ask Malcolm to come to the list and repeat what he said on this call, assuming he does make this a formal item discussion. I appreciate what you said Bernie. I appreciate your point. It's not fair to us to sort of garner our arguments right now, because it's not something we prepared to do. So anyway, that would be what I suggest. I'm open to what people think about that. Greg's hand is up so I'm going to call on Greg right now.

>> GREG SHATAN: Greg Shatan for the record, and I don't have Malcolm's exact words in front of me. I just wanted to point out we're implementation oversight team and not working group and that implementation is hybrid tasks of staff and the community, so whatever Goran was speaking to, I would be very hesitant on applying it for all seasons, in particular, in IOT context. We need to look at exactly what's going on here. So and on a related point, I think we should consider, you know, calling out to members and asking they either step up or replace themselves, or we ask for new members if needed. If our problems is getting a quorum and whatever and we have to look at that quorum issue. I don't know that we have a quorum issue but the idea we're closed to business to any new members is exacerbating that issue. My main point is as an IOT, we are a different bird, and whatever discussion there is of roles needs to be taken in that context and not in the working group or kind of generic structure context. Thank you.

>> DAVID McAULEY: Thank you, Greg. Before I go on to Malcolm, I will say I do believe we have a quorum. We've been working under the that five working members would equal a quorum and I believe that we have that even irrespective of ICANN's participation. Having said that, thank you, Greg, I do have thoughts by the way on asking to add new members and asking members that are currently members to step up, and I plan to discuss that starting this call, and again on December 13th assuming we can meet then and also on list. I just want to make sure before I ask anybody to be on the list that that's proper. I don't know to do anything that's improper. I think that it would be fair at some point for us to say to people on the list, please step up or get off the list, but we have to find out how we can do that and whether we're authorize to do that. Secondly, with respect to adding new members I think as I recall this group was formed as a closed group during CCGW, but when this team was sort of adopted by

the Bylaws in October of 2016, Bylaws 4.3N does say the IOT will be established in consultation with the SOs and ACs and so I think we now have the opportunity to go to SO and ACs and say we're looking for new members. As you can see from some of my mailings, that's something I'm going to put on the table and hope to discuss. I think those are good ideas. Greg, you and I are thinking alike. Now I'll turn to Malcolm.

>> MALCOLM HUTTY: I just make one quick reply to Greg because he made a specific point there relating to the fact this is a slightly different group than other kinds of working group within ICANN. I spoke to what Goran had said at the public meeting what Greg might not be aware. I'd like to share with him. When Goran said that, it was relation to a question from me, it was specifically in relation to this group. But specifically

>> DAVID McAULEY: Malcolm, can I interrupt for a second.

You have been pretty clear up until about a sentence ago. You seem to be cutting out. I think everything you said is clear but if you could repeat the last sentence and get a little closer to your phone.

>> MALCOLM HUTTY: Yeah, I just wanted to make Greg and everyone else to understand that Goran was speaking specifically in relation to a question in this group not about ICANN not about ICANN community processes in general. So that's information, but having said that, I think we've done on that subject to write to the group, I will do so David. However, I think now we need to think about what comes next and your proposal that we should complete the work on the draft rules before we go out to expand the group. Now, I have consulted with some colleagues since you sent your proposal to the mailing and the response, I got back was that there was an to expand the group before we complete the rules. So I would like to add on the table and ask first to you David to say whether you have considered that as a possibility, and if so, what your reasons were for proposing that we attempt to complete it before we enlarge the group and to hear the groups views on the matter.

>> DAVID McAULEY: Thank you, Malcolm. A couple points starting at the back end of what you said. With respect to why I said what I said, as I see it, the group that currently exist is the group that's worked on the rules and probably be most efficient and fair to finish the rules on that basis. I never thought about asking that the rules be thrown up to expanded group just for efficiency purposes. I'm not that's I mean, it's already catching me cold. I haven't had a chance to think about it. I thought that you almost among others would appreciate that fact to get the rules done. I don't think that we should throw open to whom to people that are not yet members of IOT, how the IOT should run. Anything that you want to propose, I think you should propose. What I don't want to do is try and stop you from proposing anything. Then with respect to your point in response to Greg, I think as I recall that public meeting, I think you're right there was in response to a question you were raising about this. I think it's fair to say at least that question it took Goran right there in the moment. I don't know that he was preparing for that. Be that as it may, if you I don't want to put on the table as you obviously have, it would be a good catalyst to put it on the list and say what you wish. I don't think we can substitutivity address it now any more than we already have. If others have thoughts on that, please certainly weigh in. Malcolm, I see your hand is up I take it you would like to respond? No.

>> MALCOLM HUTTY: No, your invitation that I come back I'm quite happy with. I consider that a way forward we the close that or move forward.

>> DAVID McAULEY: Okay.

Okay. So that is that. In the meantime, I would like for us to visit the discussions surrounding Rule 4. In that respect, Bernie and I have spoken about this and we will read parts of the summary. Not the comments itself but parts of summary to remind what the comments were. However, having said that, I would invite everyone in the group and on IOT and as I get on the list everybody in our group to you know the link is there to go and look at the comments. It's interesting when you look at the comments, I think they were universally from groups of groups of people not individuals. So they have some added for instance, you have comments from registrars stakeholder group, registry stakeholder group, ISSPCP, IPC, BC, NCSG I think I remember, so those comments have have merits another look. I'm going to take another look myself. It's been some time since I read the full extent of the comments, but I have read Bernie's summary more recently. I would invite folks to take a look at full comment as we get into this process. Again, it's my hope we can do this sort of with some to get the rules done. In any event. Having said that, Bernie and I talked about this I think the best way to proceed, we're going to simply ignore comments with respect to changing the rule of 45 daytime limits to 120 daytime limits or time within someone can bring a claim. That's no longer an issue as I understand it. I believe even ICANN is okay with changing 45 days to 120 days. It would be no point in reading those. And so what I'd like to do is begin going down Bernie's summary. I'll read parts of the first one on changing the other time period limitation.

And the first comment is from the business contingency. And the business constituency basically said, The BC further recommends that the calculation of any time period should not include the time within which the parties are formally engaged in any ICANN accountability mechanism relating to or in connection with the issues being referred to IRP. I doubt that will be very a very contentious aspect of of the rules. And then in removing the one year period the BC said, The current revisions to the updated supplementary Procedure rule number 4, time for filing, addressed these time limitation concerns by extending the 45 day aspect of the time for filing language to a 120 day period for filing after the claimant becomes aware of the material effect and the 12 month limitation to file an IRP has been eliminated in the new amendment. The BC supports these revisions and urges the IOT not to revert on these essential changes to IRP procedure.

Okay. Bernie, if you would like to take on the IPC comment.

Bernie, if you're speaking, we can't hear. If you're having difficulty following, just let me know. I'll be happy

>> BERNIE TURCOTTE: Sorry about that. I was double muted as Malcolm said. Going to the IPC removing one-year repose. Can you hear me now?

>> DAVID McAULEY: Yes.

>> BERNIE TURCOTTE: Okay. Excellent.

On the removal of the separate 12 month limitation, as the IPC commented during the previous public comment on the draft supplementary procedures, the previously proposed overarching limitation period

would appear to be inconsistent with the constructive knowledge requirement under the ICANN Bylaws, as confirmed in the advice by the Sidley Law Firm. The IPC therefore supports its removal. In the event that the outcome of this public comment and the further deliberations of the IRP IOT do conclude that some overall limitation period, or repose, is nevertheless required, the IPC asserts that there must be a reasonable limitation period from the date of ICANN's action or inaction. We believe that 12 months is inadequate, and that 24 months or 36 months is far more in line with analogous statute of limitations principles in established statutes and case law. Again, any such 24- or 36-months period should not prevent a party from raising a violation of ICANN's Articles of Incorporation or bylaws when the harm only results from a later implementation of an ICANN action or inaction.

And then there's a second part.

The IPC believes that the starting point of the time for filing period must be unambiguous. The time for filing period should not start running before the publication of the adopted minutes setting out the reasoning of the action or inaction. Whenever an action or inaction immediately affects a party, or multiple parties, that can be identified in the action or inaction, ICANN should immediately communicate to the publication of the minutes to the parties concerned and inform them about the possibilities for redress and the timing and procedure for introducing redress.

Finally, there is also something on interplay with other accountability mechanisms.

Interplay with other accountability mechanisms remains unclear. We, and others, have previously expressed our strong belief that it is necessary to amend the time for filing periods to ensure that the deadline for filing an IRP be tolled during the time within which the parties are formally engaged in other accountability mechanisms over the issues being referred to IRP, in particular: A. the Cooperative Engagement Process which is a voluntary but strongly encouraged step prior to the commencement of an IRP Bylaws Section 4.3(e); B. An ongoing Reconsideration Request process, including any Ombudsman review which forms a part of that process pursuant to Bylaw Section 4.2; C. A request under ICANN's Documentary Information Disclosure Policy (DIDP); and D. A Complaint to the Ombudsman pursuant to Bylaws Article 5. Since complaints to the Ombudsman generally are not subject to set time limits, we recognize that this might give rise to concerns of undue delay. Nevertheless, Ombuds complaints are out of the hands of the complainant and they should not be penalized for something which they cannot control. An IRP is an extremely costly and time consuming process. It is not to be entered into lightly. All members of the community deserve the opportunity to attempt to resolve their dispute using the other accountability mechanisms in place without the concern that they will serve to exhaust the limitation period for bringing an IRP.

That's it. Back to you David.

>> DAVID McAULEY: Thank you, Bernie. And what we're trying to do is create a record along with the comments so people can look at the phone call come back and take a look. I'm going to go ahead and read a comment from noncommercial stakeholders where they say, hence we support the following change: "Under the prior text, a claimant would have had to have filed their IRP within one year of the action/inaction that is being challenged. Under the new text, the only timing requirement that the

claimant has to meet is the 120 day requirement above, whether the challenged action/inaction happened 3 months, 3 years or 5 years prior or more.

The NCSG under no circumstances accepts the return to the previous text, as the IRP is a critical tool to keep ICANN accountable and as transparent as possible. However, we reiterate our previous comment that while the time limit might be appropriate for commercial actors, it is not for consensus policy.

That's the end of that comment, and so Bernie, if you want to go ahead and take a stab at the registrar stakeholder group.

BERNIE TURCOTTE: Sure. The Registrar Stakeholder Group would like to thank the IRP IOT for their work and the proposed amendment to its original updated supplementary procedure number 4, time for filing. The registrar stakeholder agrees that extending the time allowed for filing a dispute from when the claimant first becomes aware of the action/inaction is necessary. Likewise, having no limitation instead on being able to file a dispute, from the date when said action/inaction occurred, is a sensible idea.

Back to you, David.

>> DAVID McAULEY: Here's a comment from registrar stakeholder. On the separate 12 month limitation, the registrar stakeholder does not support the new proposal that deletes this idea – we believe there must be a reasonable limitation period from the date of ICANN's action or inaction. We believe that some cap is needed to allow for predictability and for the final establishment of a reliable body of precedent. We believe that 12 months is inadequate. The registrar stakeholder believes that the calculation of the overall limitation should not include the time in which the IRP Claimant was engaged in certain accountability mechanisms. We provide alternative proposals, either of which is acceptable to the registrar stakeholder. A. 36 month limitation, excluding the time in which the IRP claimant was engaged in CEP or an ongoing reconsideration request process relating to the issues being referred to IRP; or B. 24 month limitation, excluding the time in which the IRP claimant was engaged in CEP an ongoing reconsideration request process, the first ongoing Ombudsman review, or the first or second ongoing documentary information disclosure policy request, relating to the issues being referred to IRP. So that was that. So next over to you Bernie or I believe it's ICANN comment.

>> BERNIE TURCOTTE: Yes. I will get into that.

We seem to have lost Robin also. Robin, if you're around let us know. We can't see you in participant list. Excuse me.

So the first, I'm going to go to the full text of the ICANN since we abbreviated it in the summary. ICANN org's objection relates to the second question. The new language posted for comment by the IRP IOT removes any outer limit from the date of ICANN's action giving rise to the IRP to the time of the filing of an IRP. This means that an IRP could be filed 2 years, 5 years, even 10 years after the act being challenged, so long as an IRP is filed within 120 days of when the claimant learned of ICANN's act and the alleged harm caused. This removes any finality to ICANN's actions, ignores the principles supporting the IRP, and depletes, rather than upholds the principle of accountability. Removing an outer time limit on filing fundamentally changes the nature of the IRP from holding ICANN accountable to its Articles of Incorporation Articles or Bylaws into an individualized grievance mechanism for matters that were long thought to be closed. It also provides an ability to raise challenges to ICANN's actions long past any

established statute of limitations that might be available in a court of law. The use of outside time limits on potential challenges is a concept accepted across legal systems, often referred to as a statute of limitations. When the IRP was first introduced in ICANN's Bylaws, there was no time limit to file. Time limits were introduced in 2012, upon the recommendation of a panel of dispute resolution and corporate governance experts, to bring the IRP more in line with accepted dispute resolution standards. The time limit then put in place was approximately three months from Board action. Even with a time limit of 12 months, as initially recommended by the IOT, the outer limit to file an IRP would be approximately 9 months longer than claimants have had for the past few years.

One, the IRP is a tool to hold ICANN accountable to the Articles of Incorporation and Bylaws. The IRP is a way to identify if ICANN violated its Articles of Incorporation or Bylaws, and to hold ICANN accountable to those findings. The IRP cannot result in individual damages or awards or relief from ICANN. No one in the ICANN community is benefited by long delays in identifying ICANN's improper actions.

Two, placing an outer time limit to file upholds the purposes of the IRP. Placing an outer time limit on how long a claimant can challenge an act of ICANN is consistent with the purposes of the IRP as defined under Article 4, Section 4.3(a)(vii) of the Bylaws, which is to secure the accessible, transparent, efficient, consistent, coherent, and just resolution of Disputes. Through the Enhancing ICANN Accountability Process, the ICANN community agreed that the IRP should be transparent, efficient and accessible both financially and from a standing perspective and designed to produce consistent and coherent results that will serve as a guide for future actions. One of the purposes of the IRP is to reduce disputes going forward by creating precedent to guide and inform the ICANN Board, staff, Supporting Organizations (SOs) and Advisory Committees (ACs), and the community in connection with policy development and implementation. Removing any time frame within which one must file an IRP works against these principles. The longer it takes to challenge an action of ICANN, the less consistent or coherent a review of that act will be. Board members, organization personnel, and community members change; memories fade; documentation may no longer be available. Instead of guiding future actions, the outcome of an IRP on an action taken many years prior would be backward looking, and raise bigger questions of how would the community move forward? In short, allowing an IRP to be brought years after the action in question removes: (1) incentive for the ICANN community to be vigilant in raising issues of ICANN's accountability to its Bylaws and Articles; and (2) any sense of stability or finality to ICANN's actions. In its deliberations, one of the primary examples that the IOT relied upon to support the removal of a statute of repose is the possibility that a policy recommendation addressing content and therefore outside of ICANN's mission came out of the GNSO's policy development process (PDP) and was approved by the ICANN Board. In the example, years later a potential registrant was impacted by the policy approved by the Board and wished to bring an IRP. The suggestion that ICANN should never have finality to its decisions is therefore based upon a presumption that all parts of the ICANN community allowed an out of mission policy to pass through the PDP including public comment and that the Board then approved an out of mission policy. Further, once implemented, no one came forward to challenge that action for a matter of years. This example shows that eliminating any outside time limit on filing encourages participants to wait to hold ICANN accountable, as opposed to addressing potential Bylaws violations when they are thought to have

occurred. This does not serve accountability or the purposes of the IRP, and is based on a complete breakdown of the multistakeholder model that the IRP is not designed to fix.

Three, removing an outer time limit creates unprecedented rights and destabilizes ICANN. Removing an outer time limit on filing an IRP removes any certainty from ICANN's authority to enter contracts, including with its registries and registrars. It allows people to come forward, years later, to try to upend binding agreements. ICANN's contracted parties already agree to be bound by consensus policies that can change their obligations mid agreement, and have agreed with that level of flexibility in contracting with ICANN. This proposed change would remove any certainty in ICANN's authority to enter each of those agreements, and would greatly impair ICANN's ability to perform its mission. Each of the over 2,500 contracts that ICANN holds with registries and registrars is grounded in law and has legal limitations on when disputes related to that contract may be raised. The suggested removal of time to file an IRP could allow challenge to an ICANN action taken a decade ago on a contract, or could impair a contract entered into years before the IRP procedures went into effect. In either situation, even if an IRP were filed to challenge ICANN's old actions in relation to a contract and ICANN won, the mere fact that ICANN would allow the IRP rules to be modified in a way that would interfere with these contracts could subject ICANN to legal liability under the law. This would create confusion, uncertainty, and put ICANN at risk of facing staggering costs to address this situation. ICANN is not aware of any other organization that allows a challenge to be raised against any action at any time. Similarly, the members of the IOT pushing for the removal of time limits to file an IRP have offered no examples of other organizations that open their actions up to challenge at any time. The removal of time limits to file an IRP is unprecedented and puts the entire ICANN model at risk.

Four, the time to file an IRP runs from each individual action or inaction. Multiple opportunities exist to challenge ICANN's acts in a timely manner. Every time the ICANN Board or organization take an action, that comes with the possibility that someone might declare that act to be outside of the Articles or Bylaws and allege that act caused material harm. For example, if the ICANN Board approves a policy recommendation, and then the ICANN org implements that policy in a way that is alleged to be outside of the Bylaws or the Articles, the implementation decision is a separate act from the policy approval, and has the potential to give rise to new grounds for an IRP even if that implementation date was years after the policy approval date. If ICANN org later takes compliance activity related to that policy in a way that is alleged to be outside of the Bylaws or the Articles many years after the policy approval date, that action, too, is a new act of the organization that can be challenged through an IRP. There is no need to draft a procedural rule that allows challenge of the very first act on an issue, no matter when taken, as the IRP can be timely used to challenge the specific act alleged to cause the Articles or Bylaws violation.

Five, an outside time limit to file an IRP is consistent with the Bylaws. In building its first set of Draft Supplementary Procedures for public comment, the IOT developed the time for filing rule in accordance with its obligations under the Bylaws. The Bylaws state that the Supplementary Procedures must identify the time within which a Claim must be filed after a Claimant becomes aware or reasonably should have become aware of the action or inaction giving rise to the Dispute. The IOT proposal stated both the 45 day window from becoming aware or reasonably should have been aware of the harm caused by the

action, as well as the outer limit of 12 months from the date of the action. The CCWG ACCT deferred the issue of setting a time frame, leaving the issue to the IOT. It is fully within the IOT's power, and in alignment with the Bylaws, to determine that there is a time period after which it would not be reasonable for a claimant to bring an IRP.

ICANN org stands behind and supports the enhanced accountability measures that the CCWG ACCT recommended, including the expanded IRP. However, each of ICANN's accountability mechanisms need to be viewed in context to make sure they fit with ICANN's work and support the ICANN community. ICANN's actions do not exist in a vacuum: they are actions on community made policy recommendations; actions that impact ICANN's contracted parties and the business decisions they make; and actions that end users, registrants and all other parts of the multistakeholder community rely upon. All parts of ICANN rely upon ICANN acting within its Articles of Incorporation and Bylaws, and have an interest in swift action when ICANN is not doing so. The IRP does not exist to provide relief to a single individual or entity; the IRP exists to hold ICANN accountable to its Articles of Incorporation and Bylaws. The ICANN community has every need to bring swift challenges when ICANN has acted improperly. Removing any outer limit on when that act can be challenged only serves to harm accountability across ICANN. Over to you, David.

>> DAVID McAULEY: Thanks Bernie. I'll go ahead and read the comment from the international trademark association.

Which is known INTA. INTA commends the IRP IOT's removal of Rule 4's 12 month ultimate deadline for commencing an IRP, and its expansion of Rule 4's period for filing from 45 days to 120 days.

The next comment is from ISPCP. I could have read through that Bernie if you're tired of reading.

>> BERNIE TURCOTTE: That's fine. They're short now.

Removing one-year repose ISPCP. The ISPCP therefore strongly supports the decision to remove from draft rules the supplementary deadline of one year from the date of ICANN's action or decision. The deadline of 120 days that the IOT now proposes is entirely sufficient to ensure prompt action and meet the purposes of the IRP as set out in the bylaws. We urge the IOT not to revert to this change.

Back to you, David.

>> DAVID McAULEY: Thank you. There's a comment from Verisign on the one-year part. Yes? Did I hear a voice? I'm sorry, Malcolm's hand is up.

>> MALCOLM HUTTY: Yeah.

>> DAVID McAULEY: Go ahead.

>> MALCOLM HUTTY: David, you've just allowed or asked Bernie to read ICANN's whole reason input into this even though it was five pages. You now read merely the conclusion from the ISPCP but not it's reasoning. I would therefore ask for once this is very rare but for once I'm going to ask formally on behalf of ISPCP that in the interest of fairness, we should similarly read reasoning that the ISPCP provided for its position into the record. Unlike the ICANN or so-called input this is actually less than a full page. It won't take very long. May I go ahead?

>> DAVID McAULEY: Yes. Let me just say, yes, you can go ahead. The reason for that was a miscommunication between myself and Bernie that was my fault. And so I didn't it caught me a little bit

by surprise. Bernie did exactly as we discussed. I just missed the part of the block summary of the ICANN thing that indicated that it would be a full reading. So you raise a fair point, go ahead. You can read the ISPCP now or wait until I finish with Verisign.

>> MALCOLM: I'm happy to go now.

>> DAVID McAULEY: Go ahead.

>> MALCOLM: Okay. I'm happy to admit the page portion on the other issue and read only that portion that relates to repose issue on the discussion. That reads as follows: The ISPCP especially with cause of criticisms raised in previous public comment rounds that the then draft rules could have prevented certain actions from ever being challenged through the IRP in some circumstances because the deadline for filing the dispute would have elapsed before filing a dispute was permitted under the rules. The ISPCP would regard that as completely unacceptable. As set out in the Bylaws, the IRP should be available to resolve disputes between material affected party and ICANN. Claimants should be required to act promptly to make the IRP, but the ability to set deadline for filing must not be used to exclude certain claimant for types of disputes entirely.

Under the draft rules, claimants may only challenge ICANN in the IRP, if they been materially affected ICANN's action. This rule must be aligned with the rule on the deadline for filing. It is therefore entirely correct that the permitted time to file IRP claim must run from the date when the claimant was so affected. The time for filing cannot be calculated from a date, such as when ICANN took the decision complaint about. As this disregards the time may elapse from decision and implementation which could amount to a considerable period, even years. To do so would in some circumstances entirely deprive claimant the opportunity to challenge legitimacy of ICANN's action regardless of how promptly the claimant's act. That cannot be acceptable and entirely outside the proper purpose of the timing rule. We are grateful to those who spotted this this flaw in the original proposal in the previous public comment ground, and to the IOT to acting to correct it. The IRP strongly supports to remove from the draft rule that quote, unquote supplementary deadline of one year from the date of ICANN's action or decision. The deadline is 120 days that the IOT now proposes. It's entirely sufficient to insure prompt action and meet the purposes the IRP set out in the Bylaws. We urge the IOT not to revert this change.

That concludes the comment. Thank you.

>> DAVID McAULEY: Thank you, Malcolm. There's one comment left from Verisign. It goes as follows. The elimination of a period of oh, Leon said my voice is sounding like a robot. Am I being heard now if I speak slower?

>> BRENDA BREWER: You're sounding fine.

>> DAVID McAULEY: Okay. Here's the comment. The elimination of a period of repose that requires that all claims be brought within a period of time from the date of the challenged action or inaction, however, is not consistent with the bylaws. Verisign proposes that a repose period of 24 36 months be added back into Rule 4; the longer time period would address the concerns raised in the comments while at the same time ensuring fundamental fairness and due process to other members of the Internet community impacted by the challenged action or inaction.

Now let me make a couple comments as the lead chair of the group. We should have a discussion --

[Dogs Barking]

We are short on time, if you could mute your lines.

But in discussing the comments, I would bring to our attention an e mail that Malcolm sent to the list August 14. You can search the archive to see his mail. I put it in a link about a week or so ago saying what the agenda will probably look like. And Malcolm in an e mail that's longer that I'm now going to state, basically in his opinion, we had three options. First option would be a a clear majority expressed a certain point of view. The second option is to spend yet more time attempting to find a compromise reach a compromise, and third option is report we're unable to reach full consensus. And instead include a report, a faithful representation of the opposing viewpoints and arguments, et cetera, and send that on. Those are three options. If anyone can think of anymore, I ask you put them on the list. We should have this discussion our meeting on December 13th. I hope everybody can attend the meeting the 13th. Setting one later in December is probably not a good idea.

And so that is what I would propose. We can start discussing now in a few minutes, but I do want to before we do that at least draw your attention to a couple things that I put in the agenda. One, we already spoke about already that is an attempt to get to finish the rules by the end of January. Malcolm may come to list with other thoughts and will whether that should be impacted by adding new members. We'll wait to see what he suggested in that respect and we can discuss that. And secondly, I have proposed a letter that would be something that this group would send to the SOs and ACs to start the process for adding members, but that's not nothing I can do on my own. It's something I'm looking to IOT to us to discuss and agree. And so you should see that letter in your e mail box. We'll put that on the agenda for discussion on the next meeting. Excuse me.

That letter also indicates the remaining work that we have. And so, you know, you can put your arms around that, we can discuss it, and also, I would be interested in the next meeting what people's thoughts are in having organizational slash substitutive meeting ICANN 64. Having said all that, I would open the floor to any discussion of the rules that Bernie and I the comments the summary of the comments Bernie and I just read through and see if anybody has comments on that or comments on the three suggestions that Malcolm made or otherwise I don't want to close this discussion today. I want to come back to the list. Say this is where we are. We should discuss this again on the 13th. We'll see mail from Malcolm on the interim. Would anyone like to venture a comment for time for filing rule? Malcolm, your hand is up. Go ahead.

Malcolm, can I be heard? I'm wondering if

>> BERNIE TURCOTTE: We can hear you quite well David.

But I cannot hear Malcolm.

>> DAVID McAULEY: Malcolm? We can wait a moment or so for him. I would also be interested in anybody's thoughts on the suggested letter to the SOs and ACs. I think we should move forward and add members, but again, something we should discuss and agree. And then secondly, I like to say that on list, I'll ask folks take comment. The purpose of this call to create another record where we indicated what the substance of the comment is so we can get to decision point on this.

Malcolm's hand is down.

In a comment in chat says he thinks only his first option is correct. So that's his comment on those options.

I certainly would agree that option number two is not attractive, spending more time on attempting to reach a compromise. Option three strikes me as being viable, but to be honest, we only have five minutes left. Malcolm is a participant in this discussion, his line is dead. I suggest we end call early. Bernie and I will tee up the call on the next one, but I do urge those on this call please try to be available for a follow up call in December.

>> MALCOLM HUTTY: Sorry. That was me reconnecting. My apology for that. I had technical problems.

>> DAVID McAULEY: We're just in the process of closing down the call. You're certainly welcome to make a comment. We're closing down the call with the view of having this discussion in the next meeting, December 13 is my hope for that meeting.

>> MALCOLM HUTTY: I just wanted to say in listing those options, I was just simply being logically complete. I don't consider in any way legally valid given the nature of the feedback that's been received. My own view only the first option is valid, and the option of giving up and leaving to the board, I consider to be both completely wrong and actually a direction of the charge that this group has been given under the Bylaws. So I would rule out that third option completely.

>> DAVID McAULEY: Okay. I think we should continue that discussion on the 13th. I thought I saw Avri typing. We're in the process of closing down the call. I appreciate that Malcolm. Avri, if you had a comment, you're welcome to make it on the phone. Otherwise, I suggest we end the call now, and pick it back up on the 13th. Avri said by the end, we were back down to the stalwart participant group. I think that's a fair comment. Again, I'll reiterate, I hope that we can all reassemble on the 13th. It will just be a 60-minute call. We can have other calls in January. We can talk on list. I appreciate the fact we had good discussions recently and look forward to moving forward. Having said that, then I'm going to end the call. Thank you all for being here.

We can end the recording.

>> BERNIE TURCOTTE: Bye everyone.

>> DAVID McAULEY: Bye bye.

This rough edit transcript, which may contain missing, misspelled or paraphrased words, is only provided for your immediate review and is not certified as verbatim and is not to be cited in any way.