

---

SINGAPORE - Explaining the Reconsideration and Ombudsman Processes

Wednesday, February 11, 2015 – 11:30 to 12:30

ICANN – Singapore, Singapore

CHRIS DISSPAIN:

Okay. I was waiting for ALAC Alan to return to his chair. So thank you all for coming. I appreciate that this is an extraordinarily busy schedule and this is a session that is clashing with various others. I'm Chris Disspain. I'm the chair of the Board Governance Committee and sitting up here with me Chris LaHatte, Bruce Tonkin, the vice -- what do you call it, vice chair of ICANN, the ICANN board, and Amy Stathos who's here to keep us all safe and legal from ICANN legal.

We were asked to do this session effectively by -- by sort of representatives from At-Large, thought it would be a really good idea if we actually had a session where we could talk about -- not deliver a series of slides and explanations but actually talk about reconsideration requests and about the ombudsman and so on so that you could ask questions, we could have a discussion, partly because it's important to know what the existing processes are but also because these sorts of things are also being dealt with in the CCWG as accountability mechanisms and it's probably helpful that people are at least aware of what the existing processes are and why they might be good or why they might be bad.

So we're going to start with a very, very small number of slides from Amy and then from Chris. And then we will -- we will throw it open for questions and comments and discussion. Amy.

---

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

AMY STATHOS:

Thank you, Chris. As Chris indicated, we have basically two slides that we just wanted to share with you the standard of review and the basis for reconsideration and then a little bit about the process flow in terms of what happens when a reconsideration request is filed. And again, as Chris indicated, we're really just talking about the current processes at this point, so what's currently in the bylaws.

For reconsideration, there are two different types of conduct that can be challenged, either staff action or inaction and Board action or inaction. There are different basis for review for whether we're talking about a staff action or inaction that's being challenged versus a Board action or inaction that's being challenged.

As it relates to staff action or inaction, what can be challenged is whether or not the actions that were taken by the staff or failure to act was in contradiction of an established ICANN policy and over time it has been made, you know, clear through the decisions that when we say policy here, it's the little "p" policy or policy, procedure, or process. So if there is an action or failure to act that contradicts an established policy, procedure, or process, that is something that can be challenged and reconsidered.

With respect to Board action, there's two different types of conduct that can be evaluated. First, Board action or inaction that is taken without consideration of material information, and there's a caveat in that is that unless the -- the party who would be filing the reconsideration request could have submitted that material but did not at the time that the action was considered.



---

The second item, which is a relatively new add to the bylaws based on the recently implemented changes from recommendations from the expert group that evaluated the reconsideration process following ATRT1 is that Board action or inaction that is taken based on Board's reliance of false or inaccurate material information. So this is a manner that the Board can be challenged in terms of reconsideration.

The BGC is the place where these challenges are evaluated. For staff action the BGC has the right to make a final determination, and if it's Board action, the BGC makes a recommendation to the full Board.

So if you see just here in a short process flow once the reconsideration is filed, there's an option for the BGC to evaluate whether or not the request just is not sufficiently stated. It just doesn't have what it needs to allow the BGC to evaluate it because it doesn't set forth the criteria that they need to evaluate. And at that point there can be a summary dismissal at that time. Thus far there has not been a summary dismissal of any of the reconsideration requests that have been filed.

Then under the bylaws the goal is that within 30 days of receipt, unless impracticable, the BGC will make a determination and/or recommendation, depending on whether it's staff and/or Board action that's being challenged, and if that 30 days' timeline cannot be met for certain reasons, then the BGC does report why it cannot be met and an estimate as to how much longer it might take.

If there is a recommendation from the BGC to the Board, the -- again, the bylaws suggest that that recommendation be acted upon by the Board within 60 days of receipt, if feasible, and -- and if not, then at the next available Board meeting that is possible to put it on the agenda.



---

And with that, that's about really all we're going to present. And we have a lot of other information to share, but we'll do it in conversation. So let me turn it over to the ombudsman who has a similar volume of slides.

CHRIS DISSPAIN: And has broken his microphone.

CHRIS LaHATTE: That's fine. Hi, I'm Chris LaHatte. I'm the ICANN ombudsman. I wanted to talk in more general terms about what I do. I'm more of the entry level part of the accountability function, and because of that, my process is quite informal, which is important for the community to be aware of. Unlike the reconsideration process, which has got quite a structure and process to go through, time limits to be observed, papers to be filed, decisions to be made, mine is considerably less structured. And the purpose of my office is to act as a neutral -- to assist in, if you like, peace-making within the community. And war breaks out for all sorts of reasons, people bump into each other, they're upset about decisions which are being made by the Board or other parts of the community, and ultimately they think something has happened which is unfair. So I work between the parties. I talk to one, talk to the other, what they call shuttle diplomacy. Sometimes I do a formal mediation and occasionally I go as far as writing a formal report in which I make recommendations saying whether or not something should change. I don't have the power to tell anybody to do anything. All I can ever do is recommend. And that's quite different from what the reconsideration process is about.



---

And one of the other things that I've always considered my role to be is a symbol for the community for good governance. Whatever else happens out there, if you think something's happened that's wrong and it's unfair, then you can always come to the ombudsman. And I don't just swing in at the entry level stage. I've also, over the last couple of years, been asked to look at the reconsideration decisions to see whether the process is unfair. And that's important because the way I look at the fairness of decisions is to see whether there has been fair process. Has everybody been given the opportunity to have their say, have all the documents been considered, those sorts of things. Some would call it a form of natural justice.

And I just quickly go to the next slide to tell you how it actually works. Thank you. There's a rule when you do PowerPoint. You have to have at least one complicated slide with lots and lots of boxes that you can't read from the back of the room.

So what happens? An issue arises, a complaint comes to my office. Occasionally I'll raise an issue myself. I might become aware of something and I'll go to the Board and say can I do this. The first thing I've got to consider is have I got the power to deal with this, yes or no. If no, then I'll tell the complainant, well sorry, can't help you. You should go and see compliance. I refer a lot of people to compliance, or you should go and see a lawyer or various other places. Then I open a file, which is just an electronic case management file. The first thing I say, is there substance to the complaint. Then I always want to look at alternative dispute resolution. Can I resolve this by shuttle diplomacy or mediation or just getting the parties together and talking to them. Sometimes that works, sometimes it doesn't. Sometimes I need to do



---

the more formal report, and I'll report to the Board when needed, and if the parties agree, I publish that on my Web site.

One of the things about the ombudsman process is that it's entirely confidential. That means if I write a report and the parties prefer that it remain confidential, it must remain just between the parties. I can only publish with the consent of the parties. And that's important because people often feel uncomfortable about an issue, occasionally with diversity challenges or bad behavior, they aren't always keen to have their own behavior exposed or they feel in danger or at risk and so confidentiality is critical to ensure that people feel safe in coming to see the ombudsman. With that, any questions you've got.

BRUCE TONKIN:

Can you give an example of where you've managed to resolve an issue, without going into people's names. But just give people an idea of where you've been successful in resolving something. Just so they'll get a feel for when can it be used successfully. I think a lot of people have a sense of that there's no success. You try all these things and none of them work. So just some examples of ones where both parties went great, really good result.

CHRIS LaHATTE:

Well, I've had a number of examples where some of the constituencies have not agreed on processes, election results, election methods, appropriate candidates, and I've worked to mediate between those groups and they have agreed to resolve it, and that's been reasonably



---

successful. But you can't win them all. I mean, you can't always solve the problems.

CHRIS DISSPAIN: I think often a fair result with an ombudsman process is that both parties are equally unhappy.

CHRIS LaHATTE: Well, that's sometimes the way mediations work.

CHRIS DISSPAIN: Exactly. Yes. Bruce, did you want to say anything else before we go to the floor for questions? Okay. No. So we're going to start the discussion and talk about whatever you want to talk about in respect to reconsideration and the ombudsman, et cetera. Go ahead.

SIVASUBRAMANIAN MUTHUSAMY: My name is Sivasubramanian and this is a question that relates to what the ombudsman said that I don't have the powers to do -- to tell anyone to do anything. Is it -- you said that, and is it the ombudsman's interpretation of his role or has ICANN limited the ombudsman and told the ombudsman not to tell anyone to do anything or not do anything?

CHRIS LaHATTE: It's in my bylaw that I have the power to recommend that things happen. But actually it's bigger than that because classically an ombudsman function, whether you're a country ombudsman or an ombudsman within an institution never has the power to tell people to



---

do things. We are here to recommend, and there's a slightly ugly term of phrase that they use called "moral suasion," in other words, if the ombudsman hopefully has the status to suggest that something should be changed, then I would hope that the person who that's directed at would take it seriously. And I must say, I haven't had to do that very often, but on the few times when I've made suggestions, people have said yes, we agree.

CHRIS DISSPAIN:

So in essence, the answer is, no, ICANN hasn't told them. That's what the ombudsman -- an ombudsman would normally do. Okay? And I --

BRUCE TONKIN:

With stating that yeah, there's not a lot of -- ombudsman isn't a widely used concept around the world, and ICANN has implemented it as it typically is used in different countries. But we recognize it's not widely understood. Generally I'd say at a really high level it's really a mechanism put in place for those that don't have funds or can't hire lawyers and things like that. So there's no cost to the person. In most countries like Australia, there would be an ombudsman for telecommunications, say. You might have had a really bad experience with getting your phone connected or something like that, you might have tried to resolve it yourself with the phone company, couldn't get anywhere, and then you report back to an ombudsman and an ombudsman is able to professionally look at it, you know, they've got resources and they would help you with that sort of scenario. But if you're a big company and had a problem with the phone company, you're not going to use an ombudsman. You've got your own lawyers





---

and would probably try to deal with it separately. So it's very much intended -- it's interesting, and I think Chris, in the opening remarks in this session, said, you know, this was put on for the benefit of ALAC. And I think ALAC and the noncommercial constituency, it's really something for users to use. Whereas you find very little use by, you know, new gTLD applicants, for example, which are often well resourced and they'll deal with it through other methods.

CHRIS DISSPAIN: Thanks, Bruce. Edmon, I think you're next and then Malcolm.

EDMON CHUNG: Okay. Thank you. Edmon Chung here. The two presentations talked a lot about the process that's currently in place and I wanted to pick up on what Bruce asked and asked it again in a way more -- in a more detailed way. What is -- I guess from staff and Board and ombudsman point of view these two processes, how successful are they as accountability measures at this point?

CHRIS DISSPAIN: How do you define it? How do you define success?

EDMON CHUNG: That's part of the question, right? And I asked that in a larger -- I guess as a larger context of the whole accountability discussion we're having right now and what the experiences we have had, the learning that we have had can inform those discussions.



---

CHRIS DISSPAIN: So I think that's an interesting question. I think it's very difficult to define success because somebody who -- somebody who doesn't want somebody to be reconsidered considers it not being reconsidered as a success and somebody who does want it to be reconsidered considers it not to be reconsidered as a failure. So it's actually pretty hard to -- if you count success by the number of times the process is used, it's a raging success because we're -- we've got lots of use of it. But I think -- I think there's a lack of understanding about it, and I think that's part of -- shows it's not as successful as it could be. I think -- I mean, Chris can speak for himself about the ombudsman side of things as to whether you would classify it a success. I think it's abundantly clear -- it's clear to me anyway, that the reconsideration request itself, whilst it might be a very useful mechanism for doing what it does, doesn't necessarily do what people want and therefore there needs to be something else. But that's a different point. Do you want to talk about the ombudsman success factor?

EDMON CHUNG: Maybe not success but is it working, is really the right word, I guess.

CHRIS DISSPAIN: You answer.

CHRIS LaHATTE: On sort of a raw data label, the number of complaints to my office has increased greatly since I started doing the job. I think in the calendar



---

year I closed off about 420. I should immediately clarify that by saying only about 25% of those complaints were actually matters within my jurisdiction. So that's just the raw data saying that there's a lot of people who come and see me and certainly at the meetings where I have my office, I get a stream of visitors for the entire meeting. So on a raw data level, there is buy-in to the use of the office.

Whether it's successful, that's a very difficult question to say because are people happy with what they got out of the contact with my office? I hope they are. But there are surveys carried out but the problem with surveys is always that if someone's unhappy with your decision, they knock you down. And perhaps because I'm completely fallible some of them I may have got wrong, but I think what you have to do is to look at the trust you build up in the community, do people feel comfortable about coming to use me and for what purposes are they using me and do they regard it as a resource which is useful.

CHRIS DISSPAIN:

Would it -- it would be fair to say, would it not, that in the context of ICANN right now most of the ombudsman stuff is what I would call human issues rather than, you know, I disagree with a decision that's being made in respect to, you know, a panel report or something. Is that fair or is that unfair?

CHRIS LaHATTE:

No, I think -- I've spent a great deal of time looking at some of the new gTLD decisions and that was quite a learning curve because I was looking at issues before reconsideration and after reconsideration. But



---

in the end, my jurisdiction to actually do anything about that was limited because if the process was fair, even though you might not have liked the result, there's not really very much that I could do about that. But at the same time I also do get the human complaints. You know, people being rude to each other, the odd diversity issue, complaints about sexism. I've had complaints about privacy more recently as well. They're saying ICANN hasn't respected privacy or sometimes in their context of DRDP, they've said that decision was wrong, and occasionally I look at those. But there's a lot of issues where people are not communicating, and I think as one of my functions is to facilitate communication.

CHRIS DISSPAIN: Thank you. Bruce, go ahead.

BRUCE TONKIN: Yeah. I think -- my answer is I think both are not quite working to what the community would like to see. I think the ombudsman has been fairly limited use compared to what I think we would have originally envisaged.

And, as Chris was saying, my perception from talking to Chris over the years; whereas, talking to people but where it's been able to help people has mostly been people participating in the policy development process. And that, as you say, could be related to elections. It could be related to someone was not nice to someone else. You know, it's almost like an HR function that you would have in a normal company where, you know, when different staff have a personal dispute, you



---

would go to HR. And HR would try and facilitate a resolution. So it's been used more for that than for anything that relates, say, to a ICANN board decision.

With respect to reconsideration -- and I know some people have written about this in the online media as well -- I think the name is confusing. Because it's actually a process of appeal, predominantly. So really what it's saying, if I take a particular example, we have a gTLD policy which says that strings shouldn't be confusingly similar to an existing top-level domain. That's the policy. And then we have a guidebook that gives some criteria to making a decision on something like that.

So the first test -- let's say we get an appeal from someone saying they didn't like the decision of the panel that decided that their string was or was not confusingly similar, the first thing is is it contradicting an existing policy? In virtually every case, it is not contradicting existing policy. The policy is pretty clear, the strings shouldn't be confusingly similar.

Then is there a lack of material information that's being considered?

Well, when we look into that, we find that has generally been very thorough. The panel that has done the work has looked at all the evidence. And we can tell that because they're actually referring to all the evidence in their judgment. So, clearly, they have considered material information.

And then was there any false information? We've had very few cases where anyone's been able to say the information that was relied upon



---

was false. And, again, when that allegation is there, we do a very thorough investigation. But, using those three standards, because the panels are being very thorough, all of those criteria are fine.

But what people are actually asking for is they don't agree with the decision, and they want the board to overturn that decision. And there is no grounds for doing that.

Now, what I think we could do as an improvement, Edmon, to answer your specific question, is I think with something like the gTLD program, you have decisions being made by a panel perhaps of one that are very material to the parties in that decision. I mean, they're massive decisions. And what we probably need to do is to build into the new gTLD process a specific appeal process within that new gTLD process. That appeal mechanism might have some other criteria in there. And, you know, we've talked about that and gotten some advice from, you know, former judges and things. There are some different types of appeal. You can have an appeal on -- a particular decision may not be in the public interest, for example. And you may have some other criteria there that are quite specific to that particular decision, let's say. Let's say it's a confusingly similar decision.

So I think, when we look at the new gTLD program, we need to build in some quite specific appeal mechanisms that can, in some cases, result in a reconsideration on its merits. And that probably means you're going from a single panelist to perhaps three panelists. There might be some reasons that would trigger that and you have some criteria as to whether it's a big enough issue to go from one to multiple panelists. And I think the classic example of that is where we've seen inconsistent



---

decisions. So at face value, you look at a decision made by one panel and at face value you look at a decision by another panel, and you go, if this was considered to be confusing, how could this case over here not be considered to be confusing?

And that might be grounds for saying that should go to a larger panel of three or five or whatever that looks at that overall case on its merits. But that's not convicting a policy. We don't have a policy to allow that. So we have to create that for the next round.

CHRIS DISSPAIN: Thanks, Bruce.

Malcolm, you've been standing very patiently. Malcolm, then Alan, and then Edmon.

MALCOLM HUTTY: Sorry. I didn't catch your name.

CHRIS DISSPAIN: Amy.

MALCOLM HUTTY: Amy. I wanted to ask you with the reconsideration process and the availability of the reconsideration process how the exclusion for the failure to supply information when given the opportunity to do so works. So, for example, if the board is considering or minded to take a decision and it publishes its current intention to do so and invites comments on whether or not it should take that decision and somebody



---

then does not take part in that comment round, does that then automatically exclude that decision from reconsideration on the grounds of anything that they might have put in during that comment round or on the grounds that, well, you had the opportunity to comment and you failed to do so, and therefore, this exclusion applies? Is that how that works? And so I guess that there would be the first thing.

Secondly -- so I've been standing so long, the things I was going to ask about --

BRUCE TONKIN: One at a time. That might --

CHRIS DISSPAIN: Gives you a chance to think. Yes.

AMY STATHOS: So, if I think that I understand the question that you're asking in terms of material information and whether or not it was available, in terms of the material information that the Board had when it was available or when it made the decision or decided not to act in a particular decision, is based on all the information that had been presented in the community, been presented by any of the parties through correspondence or what have you.

There is a point, once the Board makes a decision -- right? -- then that is when, if that decision was -- if there's additional information that somebody thought the Board should have had when they made that





---

decision, then that decision can be -- you can submit a reconsideration request and say, when the Board took a decision, they didn't have these three things in front of them that they should have.

Now, there is, you know, a nuance there that if that information, when they were reevaluating the reconsideration request was not presented to them, then that is when they would say, well, you know, that information -- we didn't have that information. And the party who wanted the decision reconsidered didn't give us the information that we should -- we needed and it was available at that time. They submitted a reconsideration request and didn't give us additional information that we should have had, then there's no way that they can consider that information.

So it's not when the decision was made. It's at the reconsideration time whether or not the material information was made available.

So you're showing that there is additional information that, when the Board originally made its decision, it didn't have and should have.

MALCOLM HUTTY:

Okay. So the fact that the Board had a public consultation period in which you could have put in anything will not exclude you from later -- or somebody come later coming and saying, "I didn't know that this was going on, but there is something you should take into account."

AMY STATHOS:

No.



---

MALCOLM HUTTY:                    You still have the opportunity to do that?

AMY STATHOS:                    Absolutely.

MALCOLM HUTTY:                    Okay. That's very helpful. Thank you.

With regards to the false information grounds, if there's a process of community discussion and all the various processes leading up to a decision and the Board takes a decision that appears consistent with having relied upon something that was very much one of the things that was submitted to the Board and that thing is said to be false but they were very -- a large degree of a number of other things that were submitted to the Board, will it be possible for somebody to argue they appear to have relied upon something that's false in taking this decision; and, therefore, I would like to make use of the reconsideration procedure on that basis?

Or will it be assumed that the Board has excluded from its consideration false things and, actually, took the decision on the basis of the broad range of other material that was available to it unless it explicitly states its reliance on that fact, that false fact?

AMY STATHOS:                    Actually, if the party who wants to seek reconsideration of a decision who has been adversely affected by it wants to challenge that decision and suggests that it was taken in reliance on false and inaccurate information, absolutely, they have a right to submit that request, submit

---

the information to show what they believe to be false and inaccurate. And then the full investigation will be made as to whether there was false or inaccurate information that the Board relied on in making its decision.

MALCOLM HUTTY: Okay. So they don't have to demonstrate the reliance on the false information, the requester?

AMY STATHOS: No. What the requester needs to do is submit the false and inaccurate information. And then it would be up to the BGC and then the Board to ascertain whether or not there was reliance on that or not.

MALCOLM HUTTY: Okay. Thank you. That's helpful.

BRUCE TONKIN: I think in really simple terms, Malcolm, is first to establish whether the information was false. Once it's been established it was false, then you can go back and look at the decision and say now we know that's false and it's not on the table. Do you still make the decision with all the other evidence that you were using at the time? So, in other words, you're able to make an assessment on whether or not you --

MALCOLM HUTTY: Right. So in that process then, will the decision be taken de novo, having excluded the now false information?



---

AMY STATHOS: Not necessarily. It really depends on the facts and circumstances submitted in the reconsideration request as to whether the BGC and the Board adopts a process where they would go back and retake the information. But, if there was no reliance on false or inaccurate information, then the recommendation would likely be that they don't need to reconsider the decision.

MALCOLM HUTTY: Okay. Thank you.

CHRIS DISSPAIN: Okay. Good. Alan.

ALAN GREENBERG: Thank you. A question for Chris. I'll try to rephrase an earlier one in slightly different words, not whether it's successful or not. Because that, clearly, is a judgment call depending on which side you're on or what answer you wanted. I'm not going to try to be very precise in what I'm saying. So don't catch me on a technicality.

If someone opens -- files a complaint and you accept that and it's within your jurisdiction, you investigate, what kind of outcome -- what are the range of outcomes in terms of satisfying the complainant that you agree that they somewhat did indeed do something that was improper or that kind of thing?



---

There's a feeling in some parts of the community -- perhaps the conspiracy theorists, perhaps others -- that you're just there to make sure that, you know, people have a complaint mechanism to vent. But you're paid by ICANN; and, therefore, really, you agree with what staff and the Board do all the time. And, because of the confidentiality issue, it's not really critical clear what kind of outcomes you see and how often you agree that, yep, someone blew it.

CHRIS LA HATTE:

I might deal with one of the last issues you raised. And that is I'm paid by ICANN; therefore, I am a tool of ICANN, if I can express it like that.

Thanks.

But, of course, if ICANN wants to have an ombudsman, somebody has to pay me. I'm not going to do this for free. Thank you very much. So there has to be a mechanism.

But the safeguards that are in place is that, unlike anybody else in ICANN, I can only be removed by a 75% majority of the board. So I have to get on the wrong side of an awful lot of board members before they got rid of me. So that's the protection. And I also don't report to anybody. I don't remember to Fadi. I report to the Board.

And that, hopefully, brings me outside of it.

In terms of the outcomes, I certainly see my office as a place where you can vent in a safe way. And I think that's an important function. Because sometimes people realize that, as something has happened, they can't do a great deal about it. If someone is being abused, called a



---

liar or something like that, you can't always withdraw those statements. But sometimes you can apologize.

And what I would like to do in situations like that is to maybe get the parties to agree to withdraw and apologize. And sometimes they do that. But there are some reasonably stubborn individuals in the community who don't like to withdraw things.

BRUCE TONKIN:

So, Alan, I think you might be asking about redress, potentially, if it's similar to some of the discussions in the cross-community working group.

So, really, what the scope of the reconsideration request itself is really finding is the grounds for reconsideration. And let's say it meets one of these three criteria.

Once we've decided that it does, that it did contradict a policy or it was done without material information, then what we'll tend to do is look at what's the actual action the complainant is asking for. So, in the form that the complainant submits, we actually ask them what redress they wish. And it's going to be case by case.

So in some cases they say, you know, I think they didn't rely on material information; we want this to be reconsidered by a panel. That's what we do. We send it back to a new panel. And we just did that recently with the .GAY reconsideration request. We, basically, said, yes, there is grounds. I think it was -- it was a process error essentially. So there was grounds. So we found, yes, there is grounds.



---

And then the redress is to actually go back and reconsider that as a panel request.

If it was something else -- you know, it could be a case of that we stop the action. Like this is the difficulty with some of these mechanisms is to try and specify redress. Because the possible cases are so huge, you really -- we make a judgment with the complainant to come up with a redress that's appropriate to the particular case.

CHRIS DISSPAIN:

Did you want to come back, Alan?

ALAN GREENBERG:

I was very much specifically talking about the ombudsman, not reconsideration. I'll try to phrase it another way, because I don't think you answered the question.

Of the times people come to you and say ICANN staff or an ICANN body made a mistake -- I'm not talking about the personal insults in the corridor -- are the outcomes -- to what extent are the outcomes ever found that, yes, they made a mistake and, yes, they did something wrong as opposed to, no, you -- you know, you're wrong; you just didn't like the outcome?

CHRIS LA HATTE:

It's actually quite rare. And that's because I don't actually get a lot of complaints saying a staff member has made an incorrect decision on this. There just aren't many complaints about that.



---

Some years ago there were a flurry of complaints about things like travel subsidies and so on. People said the travel team had made some incorrect decisions. But, in fact, it was generally a misunderstanding of the way it worked.

And, I mean, I could also receive complaints about the Board. I've had a couple of complaints over the years about conflict of interest, for example, on the Board.

There's one that's fairly well publicized about .AFRICA.

And, in that case, when I looked at it, I found that it just wasn't founded.

But I looked at that independently. If there was a conflict of interest, I would certainly say so.

CHRIS DISSPAIN:

If you'll indulge me, sir, I believe we might have a question in the chatroom. Wendy, do you have --

WENDY PROFIT:

Yes. Question is from Jacob, Big Room, Incorporated. Question is: ICANN can agree to extend the cooperative engagement process for any length of time. Has the BGC given any thought to whether this is appropriate?

AMY STATHOS:

So, to clarify, he's asking about the cooperative engagement process which is a precursor to the independent review process, which is a third accountability mechanism on our bylaws that we haven't yet discussed.





---

CHRIS DISSPAIN: And the question is: Is there a time limit for that to run and can it be extended?

AMY STATHOS: I think the question is does the process does allow for extensions of the time limits that are set forth in the process? And I think the question from Jacob was has the BGC given any thought as to whether that is appropriate to allow the parties to extend the deadlines?

CHRIS DISSPAIN: Would that not be on a case-by-case basis?

AMY STATHOS: It is on a case-by-case basis.

CHRIS DISSPAIN: Right. John, did you want to say something?

JOHN JEFFREY: I would just add that this is a great example of something that could be subject to a reconsideration request or an ombudsman, just to tie it back into the process. I mean, these are exactly why the accountability mechanisms exist.



---

CHRIS DISSPAIN: So we can, basically, tie people up forever in a circle on all of our reconsideration requests.

JOHN JEFFREY: In all honesty, we should clarify that. The question, as I understand, is a very good question, which is there's --

CHRIS DISSPAIN: Absolutely.

JOHN JEFFREY: -- which is there is -- before the independent review process, which is the third accountability mechanism, there is a process by which there's an engagement with staff about a possible way to resolve those disputes.

CHRIS DISSPAIN: Yes.

JOHN JEFFREY: In the new gTLD process, there are a number of these CEPs that are very ongoing. Some are very long and some are used by the parties to try to delay the processes. That's a very appropriate question, if you believe you're being harmed by those processes, to raise through those processes or independent accountability mechanisms, questions about those processes. And I think it is an issue that is ripe for the BGC to consider.



---

CHRIS DISSPAIN: I completely understand that. I was actually looking at it the other way around. So, now that you've said it that way around, let me ask you some questions.

So is there a mandated time limit for a CEP to be done within?

JOHN JEFFREY: So I believe that there's a recommended time frame. And there's also a considerable amount of additional time afforded to the parties in order to try to resolve those disputes.

CHRIS DISSPAIN: Okay. So, therefore, presumably, it would be open to any of the parties involved after a reasonable period of time to ask for a deadline to be set.

JOHN JEFFREY: Yes. And, in many instances, parties do that. In other instances, that does not happen. And I think it is -- certainly, part of, when we look at these accountability mechanisms, we need to consider the impact of that CEP process.

CHRIS DISSPAIN: Right. So let's assume that you're one party and I'm another party. I could come to Amy and say I would like a deadline -- this has been going on for too long. I would like a deadline to be set. Who makes that decision?



---

JOHN JEFFREY: So the -- when they invoke the opportunity for the CEP, there's an engagement process that occurs and discussion begins. Often there are issues within that that aren't quite ripe yet. So they've started a process, but there might be other ongoing things that are occurring. So there might be a reasonable basis to extend it.

Often it's that the parties aren't ready to move forward yet with the dispute. And so there's additional time afforded to them to allow them to be appropriately served by the process.

In some instances, where we're aware that the dispute is being raised affects third parties -- so let's say there's -- it's a contention set -- then we'll try to stick to deadlines and move it along. In instances where there are not contention sets, we're more likely to provide an extend period of time allowing them to invoke our accountability processes rather than being forced out into lawsuits.

CHRIS DISSPAIN: I understand that. But what about the reverse? What about when I come to -- I'm one of the parties, and I come to Amy and say, "This has actually been going on for too long. Please set a deadline"? Who makes that decision?

JOHN JEFFREY: So in the instance you are referring to Amy would make the decision to extend it and may refer them to the ombudsman or the reconsideration process.

---

CHRIS DISSPAIN: Right. So if the decision is made to call a deadline, to say it's been running for a year, enough, it's got to be finished in the next month or whatever, that decision is made by staff.

JOHN JEFFREY: Yes. And there have been no instances, that I'm aware of, that we've cut that off causing someone to form a complaint.

CHRIS DISSPAIN: Right.

JOHN JEFFREY: So it is made by staff, and in almost all instances we're trying to work with the parties to resolve it before heading to the IRP and summons since we tell them it's done, there's not much more we can do and we request them to go ahead and file their IRP.

CHRIS DISSPAIN: Fair enough. Jacob, I don't know if that's covered what you wanted to, but if you want to type something else in there, that's fine. We'll get back to it. But right now I'm going to go with the gentleman here at the microphone.

BRUCE TONKIN: I think it's probably --



---

CHRIS DISSPAIN:                      Sorry, Bruce.

BRUCE TONKIN:                      Just picking up on that, we could one, improve the explanation of that, just what John has said. Sorry, I'm not talking into the mic clearly. But I'm hearing that from a number of people that are tied up in these processes. There is a frustration in that going on forever and they -- not the right terminology. They're going on longer than they would like, and it's not absolutely clear to them in the process what their options are. So I think we need to one, provide some clarity, but independently of that, as part of the ATRT2 recommendations to review these things, we need to improve the process. So I think, you know, staff and the Board will agree, the process needs improving.

CHRIS LaHATTE:                      And in fact, I've received in my office some complaints from people who are saying exactly that, that people are gaming the system by using them for a bit of engagement and it's a little bit difficult to say what you can do for those people except to listen to them think because once the process starts, it has its own juggernaut.

CHRIS DISSPAIN:                      I'd argue that the clue is in the name. It's cooperative. And if the parties stop cooperating then the process is effectively at an end. If they're not cooperating, it's at an end, basically.

BRUCE TONKIN:                      That's right.

---

CHRIS DISSPAIN: But I think -- I think it would be quite useful for us to do some more work on this, John. I'd quite like the BGC to get a note of how many there are, how long they're running for, that sort of thing would be quite useful. Yes, John.

JOHN JEFFREY: I would just say I agree, but I encourage the ombudsman, if he sees an unfairness, to please make us aware of it.

CHRIS DISSPAIN: Yes. And now, sir, your chance.

ANDREW MERRIMAN: Andrew Merriman, Top Level Design. I'd actually like to ask a question about the .GAY reconsideration that Bruce just mentioned.

CHRIS DISSPAIN: You can ask your question, but we probably won't respond on specifics. Ask away.

ANDREW MERRIMAN: Okay, I'll ask. I'm wondering what grounds an entirely new CPE was called for, including a new panel, when the evidence and issue was found only to be with one criterion. The CPE, as you guys probably know, has four different criteria, and the support criterion was the one



---

that was affected by the evidence presented. Why are these other three criteria being reevaluated? Specifically with the new panel.

CHRIS DISSPAIN: So all I can say is that the Board -- the BGC looked at it and made its decision and published minutes, et cetera, and papers set out our thinking. That's really it. And John, do you want to add to that?

JOHN JEFFREY: I think for -- we're deep in ICANN acronym speak, so I think it's probably useful for us to back up a little bit. One is that the CEP that we're referring to in front of the IRP is not the subject of your question, right? So there's the Community Priority Evaluation which is different than the part of the contractibility mechanism. And I just thought it's -- I think it's useful for us to unpack that to make sure everybody's clear.

CHRIS DISSPAIN: Yes. We're now having confusingly similar acronyms, which is very concerning. So I can't really say any more other than --

ANDREW MERRIMAN: It just doesn't seem to recognize the reality of the CPE process. Sorry to continue with the acronyms but it's kind of the reality we live in. So I wanted to flag that out as potentially an incorrect decision on the part of the committee.

CHRIS DISSPAIN: Thank you.





---

EDMON CHUNG: Edmon Chung here. So I guess following up on an item that both Chris, you, and Bruce mentioned, in terms of the reconsideration process, it seems like you are identifying that there is a difference or a gap or expectation gap between the community and what -- you know, the process is supposed to address. So the question is probably, you know, what do you think that gap is and, you know, how -- how do we address that gap and --

BRUCE TONKIN: I think the fundamental gap is that people think there's a reconsideration of the case on its merits when -- and you might think that from the title because it's called reconsideration. In other processes you would refer to it as an appeals process. So if you don't like a decision made by a jury in a Criminal Court case, there are grounds for appeal. And those grounds for appeal could be that the judge didn't give them proper guidance. There's a set of grounds for appeal. But you don't just basically form another jury because you didn't like the view of the first jury. So I think the big perception gap is that we shouldn't call it reconsideration as it's currently formed. It is an appeal on those three grounds. So it's an appeal process. We don't generally reconsider on the merits. And if it is merits, it's usually because, you know, we found one of these criteria applied and then we send it back, just like you would an appeals process. You send it back for a retrial effectively. But we don't actually reconsider it. We're not the jury.



EDMON CHUNG:

Right. So -- but one thing that I guess Bruce you mentioned earlier, in terms of whether it follows the policy or process, the question I have, it seems to me that there are many cases where the heart of the contention is exactly the interpretation of such policies and processes. So therein lies I guess a gray area, whether -- the question is whether it was following a particular policy and process, but the heart of the, you know, kind of disagreement may not be whether you like the decision or not, the merits or whatever, but the actual interpretation of such policies and process. So, you know, I guess that's -- that's, you know, something that's worth thinking about and whether it's --

BRUCE TONKIN:

One of the things that we're concerned about too is the independence. Most of the actions have been in that category of staff action. We haven't had that many Board re -- we haven't had that many reconsiderations of actual Board actions. In which case I think the process is appropriate sort of as it is. You've got a committee of Board members that investigate it pretty thoroughly with staff. BNC though is a bit vaguer and that's really when, you know, I think we're thinking that something with more independence would help in that case. In other words, if the Board is trying to interpret a policy and whether they think they followed it or not they're probably more likely to say yes because they came up with the policy sort of thing. That I think some independence is useful.

The only thing I can say on the independence front is that we do get an external law firm to review these things. So they're looking at it. But, you know, I know in terms of the CCWG and some of the other ongoing



---

work, some of these things probably better sit in a truly independent panel when it relates to a Board action.

EDMON CHUNG: And the last part of what I want to add was really, you know, back to one of the things I said earlier, is I think it's important for the larger discussion that's going on right now about how and what, you know, the past experience on these mechanisms could inform the discussions there. We need to, you know, distillize the learning that we've had.

BRUCE TONKIN: Agreed. Which is why I'm a Board liaison to the cross community working group on accountability which hasn't actually gotten into this stuff yet.

CHRIS DISSPAIN: No, exactly.

BRUCE TONKIN: But when it does, you can engage.

CHRIS DISSPAIN: Edmon, my personal opinion, I think -- my opinion is, for what it's intended to do the reconsideration redress actually works fine. For what it's intended to do. With possibly the exception of the fact the Board ends up reviewing the Board's stuff which I think doesn't make sense, in general. It doesn't pass the sort of -- the test of -- is it clear -- independence, yeah. But it actually does what it's supposed to do. It's



---

just that it doesn't do what you guys want it to do, which is not really the same thing. And we need to solve that problem. And whether we're going to solve that problem by tinkering with it or whether we solve that problem by something new is a different issue.

EDMON CHUNG:

I think that's exactly what I wanted to point to. If that's something that needs to be brought up to the larger discussion, not just by, you know, one person -- I guess Bruce you being there but some form of maybe a report or an opinion of some sort from the current BGC might be useful, I think, for the discussion.

CHRIS DISSPAIN:

That's fair enough. I'll take that. We are rapidly approaching the end of the session. I've got Wendy, go ahead.

REMOTE INTERVENTION:

This is another question from Jacob. Since the Board must act on the outcome of an IRP could someone ask for a reconsideration of a Board decision on an IRP and then file an IRP on that decision and so on? Where does its end, in other words?

CHRIS DISSPAIN:

Okay, I'm just making sure that I've understood. I think I have. Amy, do you want to have a go?



AMY STATHOS:

Technically the answer is yes. And it could go round and round. There is a provision in the IRP process in terms of the bylaws that says -- that was added after, in fact, one of the -- the only reconsideration -- or independent review that's gone to -- come to fruition because the second IRP actually was challenging the decision of the IRP in and of itself, saying -- or challenging the Board's action on the IRP. So the IRP said, you guys did something wrong, so the Board changed their -- the Board did take into consideration and made a -- a new decision based on the IRP decision. Then somebody challenged the Board's new decision because they -- the Board followed the IRP decision. So they've tried -- you know, the experts suggested that that would be a vicious cycle and it could continue to go in cycle, cycle, cycle, and you could never bring a particular issue to a conclusion. So there is a recommendation in a bylaws now that says that you can't rehash the same issues with the same facts and circumstances. But technically, if you can create different facts and different circumstances, then there is basis for filing an IRP, if there is a complaint that the Board violated the articles of incorporation or bylaws in taking the decision it took.

CHRIS DISSPAIN:

Thank you. I think we may be -- we may be done. One last call for comments. Well, thank you all very much. And enjoy the afternoon.

[END OF TRANSCRIPTION]

