BRENDA BREWER: I'd like to welcome you all to the IRP IOT meeting on the 6th of October 2020 at 17:00 UTC. The meeting is recorded today. Kindly state your name when speaking for the transcript, and keep your phones and microphones on mute when not speaking. Attendance will be taken via Zoom. I'm turning the call over to Susan Payne. Thank you so much.

SUSAN PAYNE: Thank you, Brenda. That's really nice. It's much nicer having an intro from you, I think, to ease us into the call. So, welcome, everyone. As I mentioned before we started the recording, we've got a good turnout, and a few more people just seem to be joining as we start up. So I think we're good to go in terms of having a decent quorum for this call.

In terms of our agenda for today, we're going to view the agenda and do updates to SOIs. I will circle back to the SOIs. Why don't we just go through the agenda?

We've got a couple of action items from the last meeting that we'll just quickly refer back to. Then one of those related to getting a small group together to work on the consolidation language. So our third agenda item is just to try and take that forward. And then the bulk of our meeting will be spent starting our discussions on the timeframe for filing, which is ... I can't remember what rule number that one is, but I think we're all aware of that issue. Hopefully, everyone's had time to do the reading in so that we're starting from a reasonable level of knowledge of what's come before.

If there's Any Other Business, then we can raise that towards the end, and also, we'll need to agree when we have our next meeting. So I will just circle back to agenda item one in terms of updates to SOIs. If there are any, please speak up now or put something in the chat if you're not in a position to speak.

Okay. I sort of have one, although actually when I looked at my SOI, it probably doesn't actually require a change. But I think my GNSO SOI refers to me as being the IPC secretary for a particular term, and that's just been renewed for another year. So just out of abundance of caution, I'm just noting that I'll be continuing to be the IPC secretary for a further year.

Not hearing anyone else, we, I think, can move on to looking at the action items from the last call. The first one of those was one for Liz, which was to just refine the translation document and edit it to update with the comments that we discussed during our last meeting. And Liz has done that and circulated that text yesterday, and indeed, here it is.

And I will let Liz speak up and flag if I've missed anything or if there's anything she wants to add, but from my recollection, the main change that was being made was to paragraph 11 in there where we discussed basically changing the language on where one might discontinue translation services.

We had previously had the word "may" in there, and as we discussed on our last call, we felt there should be some slightly higher obligation on that without going so far as to make it absolutely obligatory. So that's the edit that I particularly recall that needed to be made. I'll just pause

and see if there's anything else that Liz had changed. I don't think there was, but Liz, is there anything else you wanted to flag to us?

LIZ LE: Thanks, Susan. There was one additional change to that paragraph that was requested by a few members on the IOT call, and if I recall, the group agreed to it, which is you see the phrase, "At any point during the course of the proceedings." That phrase appeared in the prior version at the end of the sentence and it was requested that we move it to [after a claimant.] So that was the only other change from the prior version.

SUSAN PAYNE: Excellent. Thanks, Liz. And I had forgotten that, but you're absolutely correct. I think that's right. Perfect. So, we've all seen this language before, of course, and those two changes are fairly minor. I think what I'd like everyone to do is just because this was circulated yesterday, I think let's allow everyone time to just have a final look over on the whole of this rule 5b on translation between now and the next call we have, and if possible, raise any substantive concerns that you might have by e-mail if you can do. And then we'll do a sort of final review of that text and hopefully put it to bed on our next call at the beginning.

Obviously, I don't want to stop anyone from raising things that are important and substantive, but perhaps can I urge people that if it's more of the nature of a sort of drafting tweak, then let's try and restrain ourselves if the current language does the job well enough? Just so that we can fell that we've actually finished with something. And huge thanks to Liz—other people are putting that in the chat as well—for

making a number of edits over the course of the last few weeks to kind of reflect what we've been talking about on the calls.

So, thank you. Unless anyone has any comments now, I think we can move on. And again, just a reminder for everyone to look at it between now and the next call. Okay then, yes, returning to our agenda, the other action item we had from the last meeting was one for me, which was to try to seek some additional volunteers to join Kristina to do some work on trying to improve the language on the consolidation rule.

It seemed to me that we'd reached a point where it would perhaps be helpful for a small group of people to try and work on that language and take it offline into a small working group so that we could kind of move our discussions on. As I said, Kristina Rosette very kindly volunteered on the last call. I did also get one volunteer subsequently, which was Sam Eisner kind of also volunteered, and actually, I'm just seeing in the chat that Liz is interested too but just needs to confirm in the next day or so. So that's great, Helen. Sorry, I think I said Liz. I meant Helen.

And indeed, I think I probably—sort of time permitting, I'm happy to try and work on this with Kristina and Sam, and hopefully with Helen as well. So really, moving on to agenda item three, which is [inaudible] group and try and set it working. If anyone else is still interested in being involved in that small team effort, as you'll have gathered, there's still time. And thanks, Flip is also noting he'd be willing to volunteer. So I think now we have a good group, and really, I think what makes sense is for that group to kind of organize themselves if they're happy to. I've no doubt that if you all would like to have a call to discuss, then I hope—

and I'm sure that this would be okay—that Brenda would hopefully be able to help in scheduling something.

If that's okay with everyone, we have a small core of volunteers now who want to take that forward, and hopefully, we can let them do so. I'd also like to give you all a sort of reasonable time to work on that. And it may be that it's reasonable to report back on the next call, or it may be that, especially given the fact that we have the ICANN meeting now running over the next sort of three weeks in a rather extended manner, that actually, it may be a bit challenging over the next couple of weeks for much progress to get made on that. So it may be that it's better to give you time until perhaps the call after next to sort of report back, although obviously, possible to report back by e-mail in the interim. Bernard.

BERNARD TURCOTTE: Thank you. On this topic, usually when we try to organize such things, we'll send around a Doodle poll for the week. So if we're blocking off—might as well talk about the next meeting right away. A lot of my groups are blocking off the rest of October and starting up at the beginning of November. Is that what we want to do here? That would push us to Tuesday, November 3rd at 19:00 UTC, keeping to our schedule.

SUSAN PAYNE: I'll defer to the US citizens of the group, but I think it may be Thanksgiving. Someone had mentioned to me that Thanksgiving is coming up. I may have misunderstood.

BERNARD TURCOTTE: Let me check. Good point. November 3rd is the election though.

SUSAN PAYNE: Oh, that's what it is. I forgot. I knew there was something.

BERNARD TURCOTTE: So that's not really a good day. Yes, good point.

SUSAN PAYNE: Yes, so again, to kind of defer to the Americans amongst us, does it being election day cause an issue? And if so, are we better to leave that day? Chris is saying in the chat, "Is there an election?" I certainly wouldn't want to interfere with you all exercising your democratic rights. Kurt is saying it's not a holiday in the US and that most people are voting by mail. If that's the case, and it's not something that's going to interfere with everyone, then the 3rd of November seems fine from my perspective. Yeah, I'm seeing people say that they'll be poll watching, but probably not otherwise too challenged by this. And presumably—

BERNARD TURCOTTE: Well, might I suggest the following, then? That we aim to have the meeting of the small group on the 10th of November and that our next meeting would be on the 17th of November.

SUSAN PAYNE: Sure. And can someone remind me when Thanksgiving is going to be? Because we will start running out of time then.

BERNARD TURCOTTE: Yeah. Thanksgiving is November 26th, Thursday, so that would be before then.

SUSAN PAYNE: Okay, we've got a bit of time.

BERNARD TURCOTTE: Yeah. So putting the small group meeting on the week of the 9th sometime, we would send a Doodle poll and organize that for hopefully early in that week, and then we would have our next week on the 17th at 19:00. Would that seem to be okay? David?

SUSAN PAYNE: Possibly. David, yes.

DAVID MCAULEY: Thanks, Bernie and Susan. Here's my question. Since ICANN 69 is virtual, could we meet in the last week of October? And the only reason I mention that is it's a long time otherwise until the next meeting. And I think we're gathering momentum, and so I would ask us to explore that. Thanks.

SUSAN PAYNE: Thanks, David. And actually, that was what I was starting to say myself, is I'd kind of hoped that we could have this work on the consolidation text going in parallel, rather than that it would prevent us from keeping on meeting, and also agree that perhaps we could meet the week after the ICANN meeting, for example, in this group, even if that small drafting team hasn't been able to get a Doodle poll together and get on with having their own meeting.

BERNARD TURCOTTE: That would be October 27th.

SUSAN PAYNE: Yeah, either that date, or if that seems very challenging as a result of the ICANN meeting having just finished. it seems as though we could meet on the 3rd, from the comments that everyone was putting in the chat about their election watching, it didn't seem as though we necessarily had to dispense with the meeting on that date. So I'd be happy to go for either the 27th or the 3rd.

BERNARD TURCOTTE: Maybe we can just ask for green checks for those who are happy with the 27th.

SUSAN PAYNE: Sure. let's try that. There's a few people in the chat saying they're happy with the 3rd, but does anyone want to indicate enthusiasm for the 27th?

BERNARD TURCOTTE: Seems limited.

SUSAN PAYNE: Just a handful. How about the 3rd?

BERNARD TURCOTTE: Clear your checkmarks please, and please give a green tick if you're okay for the 3rd. Not much more indication.

SUSAN PAYNE: I'm not seeing much difference, but there are about three or four people who've put in the chat that they could do the 27th, more than did checkmarks. So maybe we should just stick with the 27th. We seem to be pretty evenly matched on those two dates, I think.

BERNARD TURCOTTE: All right. So Tuesday, October 27th, 19:00 UTC.

SUSAN PAYNE: Yeah, let's go for it.

BERNARD TURCOTTE: All right, and we would try to organize a Doodle poll for the week of the 2nd of November for the small group.

SUSAN PAYNE: Yeah, I think that makes sense, and yes, let's try not to have it later than that. If it could be sooner, then great, but we do have the ICANN meeting and I'm conscious that I don't want to overburden everyone.

BERNARD TURCOTTE: Week of November 2nd. And we'll try to stick to our current UTC times for that meeting since that seems—we've gone through that whole discussion, that seems to be the best times for everyone. So I will work with Brenda to put up a Doodle poll to the group. If those members of the small group could respond to that so we can set that meeting, that would be great. Thank you very much.

SUSAN PAYNE: Thanks, Bernard. Okay, excellent. So moving on to our next agenda item, then we are going to begin our discussion on the issue of the time for filing, which hopefully you have now all had time to review the e-mail that Bernard sent around a couple of weeks ago, two, three weeks ago, and the attachments. They gave a sort of good flavor of what happened, what has happened on the timing rule to date, and included summary spreadsheets of the public comment on sort of how this has been treated. I think it's worth ... if people are okay for me to just do a really kind of brief headline summary of where I think this issue has got to, and in very high level, what the feedback from the community has been on the two versions of the timing rule that have been put out to public comment, and then I think we can, between us, identify what

kind areas of sort of agreement the community seemed to have coalesced around and where there seem to be open issues.

So if everyone's happy with me doing that, then I will do it. But I'd also obviously very much welcome inputs from anyone, either who was previously in the group and recalls their own previous discussions on the topic, or indeed anyone who's new into the group but recalls seeing further information on this from their own reading in. And then we can take it from there and hopefully try and progress that rule, because it is one that we knew coming into this reengaged group that we did need to review and think about.

So the issue is basically what time limit is given for a claimant to bring an IRP, and clearly, under previous rules, there was as time limit, clearly, there needs to be some kind of time limit by which one brings a claim rather than leaving it completely open ended.

In the first set of the rules that were put out for public comment as a whole in around November 2016, the proposal in relation to timing had been that an IRP could be brought no more than 45 days after the claimant becomes aware of the material effect of the action or inaction that was giving rise to the dispute, and then there was a second limitation which provided that in any event, any IRP may not be filed more than 12 months from the date of that action or inaction.

And whilst I don't think the term "repose" was used in the draft rules, when people have been talking about this topic and this issue, they've called that second timing of that 12-month period as a repose.

Effectively, it's a sort of effective cutoff date, or if you like, an absolute limitation period.

So that public comment elicited quite a lot of feedback. In total, in relation to the 45 days element, there were 11 comments, and they were all either opposed to the 45 days or proposed some changes that indicated they weren't entirely in agreement. And those comments ranged from people suggesting that—well, generally saying 45 days was too short. There were some suggestions of 90 days, 60 days, 120 days, 180 days, but a sort of range of suggestions. Indeed, the Registries Stakeholder Group I think suggested removing that 45 days altogether and just keeping the 12 months. But a range of concerns about 45 days being inadequate to allow for affected parties to bring a claim.

And in relation to the 12-month repose, there were a slightly higher number of comments in relation to that. It looks like there were 13 in total, of which 11 made comments that indicated they opposed or proposed some changes. And I'm taking from that that a couple were less concerned about that 12-month period.

And those comments, I think, generally felt—there were a number of commenters that essentially argued that that 12-month outer time limit or repose was contrary to the bylaws, and a number of those, or indeed some who didn't argued that, argued that the relevant time period should be based on the knowledge of the event, the action or inaction, and that if you had a time limit of however many days it was from when you became aware of the event in question, that that was adequate and that if that happened outside of the 12-month period, that shouldn't preclude you from bringing an IRP.

A couple of the comments were probably not in favor and just made statements to the effect that they felt more work needed to be done. Registries Stakeholder Group, as I say, was more supportive of that one-year period but was arguing that that should be the only limitation and that the 45 days wasn't needed.

So generally, there that issue obviously led to subsequent discussion where the group reviewed the comments that were received, and in 2018, there was a second public comment period that was just in relation to this timing issue. So Brenda, if you wanted to call up the public comment announcement, the public consultation announcement, I think that might be quite useful to have on the screen.

Thank you. So this, hopefully again, you all have read. It provided a good summary of where things had got to, at a very high level, anyway, in terms of this second public comment period. And Brenda, if you wanted to scroll down to the second page, we have initially a reiteration of what the first version of the timing rules said that was put out to the first public comment. And then further down, an explanation of what changes had been made.

In particular, the proposal was that the 45-day time for filing from when the claimant became aware of the action or inaction should be extended, and the group had come to the conclusion that 120 days seemed more reasonable and appropriate. So that was what was being put out to public comment.

The second aspect was that the proposal was to remove that 12-month repose and just have the 120 days. Perfect, thank you. And if you want

to keep scrolling, I think we actually have the new version of the rule. Thanks, Brenda. And the other change that was made was in relation to the 120 days. There was a slight amendment to that in that it was 120 days after the claimant becomes aware, or the new language is reasonably to have become aware of the material effect of the action or inaction that was giving rise to the dispute.

And I think that language was intended to pick up provisions in the bylaws which do talk about particularly bylaw 4.3 (n)(A) which talks about the role of this IRP IOT in coming up with rules, and talks about one of our obligations being to consider rules about the time within which a claim may be filed after a claimant becomes aware or reasonably should have become aware of an action or inaction giving rise to the dispute. So that is where that additional language, I think, came from.

So this new version was put our for the second public comment period and again got a reasonable, quite a large number of commenters, mostly from the various different constituencies and stakeholder groups, a few other organizations, and indeed ICANN Org itself. And I would say, in relation to the 120 days, there was pretty widespread support from the commenters. In some cases, various of the groups did flag particular issues which they thought might need to extend that 120 days, but in essence, I think the general feeling from the public comments as I've read them is that there's quite a lot of support for the 120 days, and particularly support for having it be extended in the way that it was over the original proposal.

In terms of the removal of the 12-month repose, again, a lot of support—it wasn't universal, but we had—I think if I accurately reflect it, I think there was support from the BC, the IPC, the Noncommercial Stakeholder Group, the Registrar Stakeholder Group, International Trademark Association, and the ISPs. It wasn't universal support.

So the Registries Stakeholder Group in their comment argued that they felt that some kind of overall cap was needed, and suggested a couple of options, one of which was 36 months, so three years, taking into account certain accountability mechanisms, and one was a slightly shorter period of 24 months. But essentially, feeling that something longer than 12 months was needed but feeling that there should be some kind of limit.

Verisign also put in a comment I think along similar lines, and there were comments from ICANN Org itself, particularly—and obviously, ICANN's legal team can speak for themselves on this, but arguing again that they were concerned at having no repose whatsoever, and as ICANN Legal, they didn't feel that if the IOT made a recommendation to that effect, they would not feel that they could—they would feel that they should be raising their own concerns with the board when the recommendations went to the board. So there's a strong indication from ICANN Legal that they feel there needs to be some kind of backstop.

In terms of some of the other comments that were made, there were a fair number of comments, including from the BC, the IPC, and the registries that expressed some concerns about how the timing limits fit with other accountability mechanisms. And I do think this is probably

something we do need to explore further and give some serious consideration to, because a number of commenters did raise concerns about things like how does this tie in with the cooperative engagement process, which parties are encouraged to engage in, but obviously, if you enter into a cooperative engagement process, you could run down your timeclock.

Similarly, should the time for bringing an IRP be told for something like some other accountability process like a request for reconsideration, perhaps a complaint made to the ombudsman, perhaps a document disclosure request. So I think that is something that we also need to consider, whether we're talking about the 120 days or we're talking about if there should be a repose.

There were also, I think, a couple of comments about asking for sort of ensuring that we have clarity on when the timing starts, and a comment from I think it was the IPC that suggested to ensure that parties are aware of decisions and aren't having to, for example, keep an eye out on board minutes and so on, that those who are particularly engaged in the dispute should be notified when a decision has been made. That's probably not something that can happen in all circumstances, but there might be circumstances where it's clear that there's a particular individual or group of entities who have a very obvious interest in the decision or the action or inaction that is going to occur.

So I think that's where we are. I'm quite sure that members of the group have views on this. It seems to me—and obviously, again, looking for other people's thoughts on this—that subject to a discussion on what we do with other accountability mechanisms, that there's a reasonably

good level of support for the 120 days. But the question we have to, I think, resolve, is whether there should be this repose and if so, if there were a repose, then what kind of time limit would there be for that.

I can see a couple of comments in the chat so I'm just going to have a quick look at that Scott's comment, I think, is in relation to the spelling of affect versus effect. I have no idea, Scott. I had rather assumed this was some kind of American versus English thing and that everyone else spelled it a different way to me. So I will leave that for others to opine. And then Kurt has asked what discussion has there been for a tolling approach as opposed to a cap. He says he's afraid that this question demonstrates his ignorance. I don't think that's the case at all, Kurt, but if you're in a position to speak on the mic, it might be helpful if you explain that in a bit more detail just so that I'm sure I understand you and everyone else is sure that they understand your question.

KURT PRITZ: I'm physically able to talk, but I don't know if I'm intellectually prepared. But if claims have to be if a claimant shall file a statement of dispute no more than 120 days after a claimant becomes aware of the action or inaction, is that timing told by the cooperative engagement process or some other activity that's going on while the parties are in good faith trying to find some sort of resolution, or is it told by some factfinding to ensure that the action or inaction has actually occurred or something like that?

I understand there's probably discomfort in not having an absolute cap, but it seems like in other areas of law, calendared actions are tolled in

order to take care of other business or undertake some study or something like that. And maybe it's a combination of the two, maybe the repose is a very long period but—well, anyway, strike that last sentence. I'm getting out of my debt. Thanks.

SUSAN PAYNE: Thanks, Kurt. I think that is one of the questions that we need to discuss. I'm not sure that this group had a great deal, if indeed any, discussion of the public comment input from that second public comment period because of the timing of when it came in and the sort of participation status that the group had reached, and the fact that the decision was made to sort of fast track some interim rules. So I don't think really any of the comments got a huge amount of review, but certainly, there were a number of comments that did propose that there needed to be some kind of tolling for these other activities. So I do think that is something we have to consider, and what would be most appropriate?

I will say that I think I'm correct in saying that whilst the IRP rules don't refer to tolling of timing of the cooperative engagement process, there are some cooperative engagement process rules which are out of date because they predate the bylaws change, and they do, I think, have to be updated, and I think that's one of our tasks. So within those rules, I think you can find something in there that says that if you enter into a cooperative engagement, that it tolls the timing for you to bring your IRP.

But I personally feel that that's a slightly strange place to hide this information, and also, I believe that given that those cooperative engagement process rules are out of date, that it's not ideal to be relying on them and that if we think there should be a tolling of the timing for an IRP, it to my mind makes sense for us to specify that really clearly in the IRP rules.

Brilliant, I've got two hands. Kristina.

KRISTINA ROSETTE: Just picking up on the point that Kurt had raised, I remember having very energetic discussions within the Registries Stakeholder Group on this very point, and I think the view that we came to as a Registries Stakeholder Group, although there was some variation within the group as to which was more acceptable, is really that you need to have a combination of both, that you need to have tolling so that the potential claimant has the opportunity to pursue the various accountability mechanisms, many of which frankly, once the potential claimant submits its request for reconsideration or request under the document disclosure information policy, the timing of what happens with those is completely out of the potential claimant's hands.

So there is a need to toll the time for that. However, there was also some view that in order to have some certainty that you did in fact need to have a final limitation period, a final cap, and just [looking back] for example at what the Registries Stakeholder Group proposed, is you could either do 36 months excluding one set of circumstances or 24 months excluding a different one. I don't want to get into which one is

better at this point, but I do think we actually will need to have both, if only of the basic additional reason that even after a potential claimant has exhausted all of the other accountability mechanisms, they are not going to be in a position for example on the day after they've received the last decision in all of those mechanisms to be able to say, okay, we now have a week to file our IRP.

So I do think there's a practical matter, there's going to have to be some time afforded, and I think that's where having the tolling and the cap combination is really critical. So I am strongly in favor of that, and my view is that we'll just need to work out the details, how much, what's the ultimate limitation, and what tolls—I do think we probably also need to have somewhat of an escape valve in the event that the potential claimant is running up against whatever that final limitation is through no fault of its own, namely if for example there are delays on ICANN's side. But that's just my overall view at this point. Thanks.

SUSAN PAYNE: Thanks, Kristina. That's really helpful. Before we go to David who's also kindly got his hand up, maybe, Brenda, it would be helpful if we had the spreadsheet of the public comments from the second comment period up, just in case we want to look at any of the particular comments that were raised. And indeed, we could have that sort of display what the Registries Stakeholder Group comment said, which I think is line 15.

Yeah, I think that's about right. Just having that there, and we can scroll back and forth through this spreadsheet as we need to, but David, you've been very patiently waiting.

DAVID MCAULEY: Thanks, Susan. Hello everybody. I just want to make three quick points. First, I wanted to respond to your call, Susan, to speak up. What I want to do in my response is create a placeholder. And I beg the indulgence of this group for doing it. But I wanted to prepare to comment on this because those who were engaged in the pre-reconstitution of the IOT will know that I spoke on this a lot before, and I committed that I would go back and look it all over with an open mind. I haven't finished that yet. I've had some high demands on my time, including on the personal front, and so I'm just not prepared. I'd like to create a placeholder to speak to this at the next meeting, or if a miracle happens and we resolve it at this meeting, I'd like to come on the list after this meeting and comment, but I'm just not prepared to now. That's the first thing I wanted to say.

The second thing is as I used to say when I was chairing this group and commenting, I would take off my chair hat and comment personally, I wanted to make it clear that anything I say on this will be my personal capacity, and I wanted to make that clear just because there was reference earlier on to the fact that Verisign had made a comment in the public comments. So when I speak up in this group, it'll just be personal, and I'm not speaking for Verisign.

The third point I wanted to make addresses the point that you raised about the cooperative engagement process. Just a little bit of history, this'll be very quick. Coming out of CCWG Accountability Work Stream 1, into Work Stream 2, there were nine subgroups. One of them was actually on the cooperative engagement process, but that

group was small and eventually disbanded and they came to us and asked us if we would take on, we would sort of volunteer to work on rules for the cooperative engagement process, and I discussed this with the team at that time and we agreed—there didn't seem to be any alternative, really—and we said we would do our best. So I think that is in our agenda unless we wish to refer that back to the group that convened CCWG on Accountability. I think that is on our agenda, and so when we think of these things, if we want to think of them in tandem, that would be up to us, I would think. So I just wanted to make that clear. It's a little bit of history, and those are my comments. Thanks, Susan.

SUSAN PAYNE: Thanks, David. And I'm sure your placeholder is noted. I'd love to think we'd wrap this up by the end of this call, but I think it's probably unlikely. So we almost certainly will be discussing this again on the next call. Scott.

SCOTT AUSTIN: Thanks, Susan. I wanted to speak to the statute of limitations versus tolling or versus [extension of] repose, and I think it does represent kind of a ying-yang that is necessary or would certainly be useful. To me—and I think I mentioned on one of my prior calls, my exposure to this was working with a [rewrite of states LLC actor] in Florida with the Florida legislature, and specifically dealing with dissolution of an entity when claims could be brought by creditors of that entity and/or its owners. But in simple terms, it seems to me the statute of limitations is

really all about the person who's injured, and the timeliness and sort of an impetus for them to bring an action, but by the same token, also usually gives them the ability to toll that deadline based on factors that may be beyond their controls, such as the person who injured them concealing what has happened and for them to be able to obtain evidence about the various facts. And I'm not sure about the use of the term "aware." Usually it's along the lines of discovered or reasonably should have discovered the events that led to their injury or what has harmed them, damaged them.

And the repose side is really much more to protect the, I guess for lack of a better term, party doing the injury, but to give some finality. And in this case, if that's ICANN, finality that something has been a completed—past a certain point, it should be left alone, oftentimes based on the fact that people's memories or the material evidence that would be necessary for the claim to actually be meaningful can no longer be considered credible. Those kinds of things. So that was my experience from a prior exposure to developing statute of limitation and the difference between statute of limitation and statute of repose. Just thought I'd add that.

SUSAN PAYNE: Thanks, Scott. Chris.

CHRIS DISSPAIN: Hi. Thank you very much. Hello everybody. I'm going to speak entirely personally, although obviously, I am looking at this to a degree from the perspective of a board member, although I won't be a board member

after the next couple of weeks. So I will then be able to speak entirely personally without having to say that. But I just wanted to make a couple of points.

First of all, it seems to me that certainty for everyone, as much certainty as possible, is important. In respect to actions that are brought, ICANN could be a loser, but so could community members. And I don't just mean the person who brings the action could lose, I mean the results of an action could mean that parts of the community lose a registry or a registrar, or someone could end up losing because of an action that's brought.

I think the board itself—and I think this is key, really—is going to have to take into account that it's not just ICANN that'll be involved in all of this but the members of the community, and that input, just by definition, from everyone, from ICANN, from its Org, from its lawyers, from members of the community, from everyone on this call is, of necessity, in some way skewed by their opinion, by the fact that they're lawyers who represent members of the community, or they are members of the community who are looking at what might happen if they're involved in some sort of an action, etc.

So I just think it's important to understand that the board's role will be to make a decision that is in the best interest of ICANN, not as the organization as such, but ICANN generally. It may very well be—and this is just something that I'm saying, this is not being discussed at all, it's straight off the top of my head, may very well be that at some point, it's going to be necessary for completely independent legal advice to be

provided about what is a reasonable position to take, because it's clear that everyone is carrying some baggage in this discussion. Thanks.

SUSAN PAYNE: Thanks, Chris. I will have some questions about that independent legal advice, but let's go to Sam first.

SAM EISNER: Thanks, Susan. I just wanted to flag on the conversation of tolling versus statute of limitation or repose issue. I think that they're both really important things to discuss. I think that the tolling issues are a little bit different, and clearly, we need to have more stringent rules around that or a better understanding of common practice around that.

But the significant difference when you're in a tolling situation is that ICANN has already been put on notice that there is an issue with the challenge, or there's a potential challenge to a decision or an issue that's being thought to be challenged through the community. And that creates a much different situation than the ultimate time to file, which is really about when you're putting ICANN on notice that there's an issue, and so I just want to make sure that we're appropriately separating those issues and identifying which parts go to which discussion, because it might be that we want to handle some of the [CEP] rules as we're looking at the time to file. Probably not the whole thing, but we might want to consider how we address some of our expectations of how the two interplay as we're addressing the time to file issue, but that we don't try to put all of the concepts regarding tolling everything into the time to file. Thank you.

SUSAN PAYNE: Thanks, Sam. I might look to you to expand on that as well, but let's go to Malcolm.

MALCOLM HUTTY: Thank you, Susan. And thank you for your introduction. I don't want to make your job even more difficult, but when you said that there seemed to be a general—overall large degree of support for the 120 days, and although there's a lot of controversy over this concept of repose, now, we've had some discussion now about the idea of tolling that might effectively extend that 120 days for certain circumstances.

I'm afraid I want to put another example on the table where that 120 days may not be satisfactory. Now, usually, we think of the IRP as being the individual's recourse against ICANN rather than the community collective recourse. But we should also remember that the empowered community is permitted to be a litigant in the IRP process. And I do wonder, given all the steps that the empowered community has to go through procedurally in order to form itself into the empowered community and agree upon a course of action, whether actually 120 days would, in practical terms, be a possible timeframe within which the empowered community would be capable of acting. So that's really a separate issue there. I think we need to think about the 120 days and the empowered community.

As for this notion of repose that was introduced after these bylaws were adopted, after the CCWG and the transition process and the bylaws were adopted, and then really, ICANN's staff council came up with this

idea of repose, it was my understanding it was the council that came up with this as a means of providing additional certainty to ICANN.

Now, before we all start forming to fixed views on whether or not it would be helpful to have a repose and what are the benefits and disbenefits, I think it's important that we remember we do not have a free hand here. It is not up to us to decide entirely in the abstract whether we think repose might be a good idea. We must obey the mandate that we've been given. We must act consistently with the bylaws.

Now, the bylaws specifically state that one of our duties is to determine the time within which ha claim must be filed after a claimant becomes aware or should reasonably have become aware of the action or inaction giving rise to the dispute.

So it seems to me beyond question that it is not within our power, however wise we might think it to be, to set a date, a number of days, that could expire before a claimant became aware or reasonably should have become aware of the action or inaction giving rise to dispute. It is just simply [inaudible] this group's powers.

I would also point out the CCWG, when it created these proposals for this new IRP process, wrote how wit believed that this would do. You can find this in the final supplemental proposals of Work Stream 1, proposal annex 7. Under the section labeled "standing," it says that any person, group or entity materially affected by an ICANN action or inaction in violation of ICANN's articles of incorporation and/or bylaws

shall have the right to bring a complaint under the IRP and seek redress. Paragraph.

They must do so within a certain number of days (to be determined by the IRP subgroup—that's us—) after becoming aware of the alleged violation and how it allegedly affects them. So it's really not within our power to say that ICANN needs the certainty that it would have for closing the window before the claimant becomes aware of the alleged violation and how it allegedly affects them.

Now, it is important to remember the standing issue. In order to bring a case in the IRP, you must have been materially affected. Essentially, you've got to show harm. And the concept of repose attempts to set a deadline that would expire not only before the person became aware but potentially before they were affected at all by the action. And therefore—and this would be completely inconsistent with really any normal standard of law, whether that be administrative or constitutional or statute, or anything, that a claimant is expected to bring a case before they've been affected by the matter that they're complaining of, before they've suffered harm.

So it seems—I'm sure we will have an extensive discussion about this. But to me, it seems really beyond question that this is outside our powers and completely inconsistent with any normal process. Maybe this has been a bit theoretical, so maybe I'll draw on an American analogy here as to why a repose would be inconsistent with the approach being taken.

The IRP is supposed to provide accountability to ICANN to make sure that it stays true to its articles and its bylaws. Now, in the American system, it is possible to bring in court to say that a law is unconstitutional. When you do so, you still have to do so within a timely fashion for when you were affected by that law, but you do not have to do so within a fixed time of when that law is passed.

As a possibly amusing example, there's been quite a lot of discussion in the United States recently about the Logan Act, which is a United States federal law that criminalizes negotiation by unauthorized American citizens with foreign governments.

Now, I think that most learned opinion considers that the Logan Act is utterly unconstitutional and could never be enforced against somebody who was doing this. This hasn't yet been tested in court, but this [inaudible] a very widely held opinion amongst serious constitutional experts. And it is very much their expectation that if somebody were to be prosecuted under this, that this law would be overturned.

Now, it's worth pointing out that this law was passed on January the 30th, 1799, and yet it is still not ... US government doesn't have the repose of acting unconstitutionally. This law is still open to be tested for its constitutionality.

Now, by the same token, anything that ICANN does can be tested for the constitutionality of it, of its compatibility with the bylaws. ICANN must always act within the bylaws. [inaudible] when you believe that you have been materially affected by an action outside the bylaws that you consider to be outside the bylaws, it is right that you should bring

your action promptly, and that is what the mandate that we have been given. But in no way is there some notion that ICANN, by the passage of time, is immunized from ever being challenged and should be allowed to continue to act in a way that is contrary to its bylaws creating new harms to new people who simply do not have the ability to hold ICANN to account to its bylaws. This is not consistent with anything in the bylaws as written or in the CCWG and the purpose of the IRP. Thank you.

SUSAN PAYNE: Thank you, Malcolm, for your really thoughtful comments. I certainly found them to give a great deal of food for thought as we're considering this. I know there were some comments in the chat, and I'm going to go back and start looking at them and seeing if there's anything to flag. Nigel.

NIGEL ROBERTS: Thank you. I'll be very brief. I'm just going to disagree with Malcolm's view. I think we're comparing apples and oranges here. The judicial review of the constitutionality of an act of congress, something that's under Marbury v Madison, is a completely different kettle of fish to a civil claim.

In the UK for example, Limitation Act 1918 bars all civil claims after six years, which I was quite surprised to find out is actually somewhat longer than many states in the US. Possibly, that's why the concept of tolling appears to be much more prominent in US jurisprudence than it is in British jurisprudence. The only argument I've heard about tolling—

and it wasn't called that, that's what it was—relates to a thing that happened in a personal injury when someone was a miner.

So I'm going to disagree with this slightly. More than slightly. We have to have some kind of finality here. The accountability mechanisms that we're designing or providing are arbitrary in nature. They're kind of ... It doesn't take away the ability for anybody to sue ICANN for anything anytime, and those claims would be under the normal limitation, presumably in California, and depending on what kind of claim it was, it might be anything from three years to six or thereabouts. I'm not entirely sure of the different limitations in California, but I think they're slightly shorter than in the UK.

So I'm actually going to disagree with Malcolm on that one. Thanks.

SUSAN PAYNE: Thanks, Nigel. I'm just looking back through the chat. Sam has suggested that in response to Malcolm's comments about the empowered community timeframes, as already set out, that perhaps it might be possible to review those.

I think it's clearly an important issue and we definitely don't want to forget it, so perhaps—although it's a bit out of order given what we've been moving onto discussion, but I think that probably would be helpful. It may be that wherever we come out in some of the rest of this, I think we will need to sense check that against the timings for the empowered community to take action, given that we know the IRP is now providers of a really important accountability mechanism for the empowered community.

So perhaps that is something that Sam, either you or Liz would be able to take on and provide a sort of summary of those timeframes for as and when we need them. I don't think it's a matter of extreme urgency. I think we have bigger things to discuss anyway. But we will not want to forget this, let's put it that way.

There's quite a long comment from Sam about the history of the issue and that historically, under the old bylaws, the filing of an IRP was tethered to publication of the minutes of the meeting where the action was taken and that it was therefore far shorter than 12 months. And indeed, the bylaws now allow for a much wider range of actions to be challenged.

We've also got comment from Chris, again in response to Malcolm's views as expressed in terms of the repose. Chris's comment is, Malcolm, you may be right, but if you are, then it will fall to the board to do so, and I'm assuming it is to make a decision on this. And it may be better for the group to at least make a considered recommendation to the board in relation to a repose rather than to leave it up to the board.

Lots of comment in the chat. Malcolm's commenting in response to Nigel on civil disputes and constitutionality, agreeing that they're different, but pointing to the bylaws and what it says specifically about the IRP and the role of the bylaws or the role of this process in holding ICANN to account and enforcing the bylaws.

So we have a bit of a disagreement. I think we do have, among different members of the group, a disagreement about whether the concept of a

repose at all is outside of the bylaws, whether it's simply therefore outside of our remit to do this or not.

I do know that there was previous legal advice on this. Indeed, I think there were two sets of legal advice. I'm not sure that—I think one set was from Sidley Austin, and one from Jones Day. It may be that others are aware of other advice that came during the accountability work itself rather than within this IOT, in which case it would be great if you could flag that as well, but it does seem that we've got two sets of legal advice that doesn't necessarily agree on this point, and it may be that what Chris was referring to about that we may need to have some truly independent legal advice because we all are potentially coming to this discussion colored by our own either experience or by our own perception of ourselves as a potential future party in some form or another. And it may be that that's the case.

So I guess I have a question. I can see Malcolm's got his hand up, so I'll just float this because I don't even know if we have the scope to seek further legal advice. Perhaps we probably should review as a group the existing previous legal advice in any event before we could actually take the view that we need more, but I'll turn back to Malcolm first of all.

MALCOLM HUTTY: Just on where the legal advice came from, the Sidley Austin legal advice was not provided to the previous incarnation of this group, it was provided to the CCWG, and it was provided before the CCWG's final report. So Sidley Austin was acting as an entirely independent advisor to the community because they were doing so in the context of, well, this

would be the effect of what you wrote if this is what you end up concluding. And it was before it the CCWG had lost all opportunity to amend its report.

The other advice was from Jones Day who are ICANN's counsel and were essentially providing a position to support the position of the ICANN staff lawyers. I think it would be worth reviewing the Sidley Austin text as independent advice. We can of course read the Jones Day, although we should understand that that Jones Day advice is essentially the ICANN staff legal position.

Sidley Austin also wrote a reply to Jones Day's letter which was even more clear in disagreeing with Jones Day's interpretation.

SUSAN PAYNE: Thanks, Malcolm. I would imagine that all of that advice is probably on our IOT page, but perhaps it would be helpful for all of us to ensure we can find it if someone was able to help us. and it may well be that that's probably Sam or Liz [are most aware,] although maybe Bernard also is. It would be super helpful, I think, if you could flag those various legal advices for people so that they can be sure to locate them. If you don't mind, that would be great.

Chris.

CHRIS DISSPAIN: Thanks, Susan. I think Malcolm's just effectively encapsulated precisely my point, which is that whilst I disagree with his characterization of Jones Day's advice being advice in support of ICANN legal staff, which it

demonstrably isn't, it is nonetheless advice to ICANN and advice that was commissioned by ICANN.

Equally, the advice from Sidley is advice to the community commissioned by the community. And my point is simply that there is a serious issue and a tension between all of the parties involved in here, because everybody could possibly be a party. And it's precisely because of that that I think we have a real problem here. and ultimately, and it's why I made the comment I made about repose in the chat, ultimately the board, whether one likes it or not, is responsible for the decisions made and for acting in the best interests of ICANN in accordance with the bylaws, its mission and its public interest commitments and so on.

So I'm not sure that it is particularly helpful to say we have a bunch of advice to ICANN from ICANN's lawyers and we have a bunch of advice to the community from the community's lawyers. I don't have a solution to this. This is a very complicated and difficult scenario for precisely the reasons that I've set out, but I think it's important that we don't hold currently one piece of advice up to a different standard to others, because they were both provided in a set of circumstances and for a client. Thanks.

SUSAN PAYNE: Thanks, Chris. Not to put you and the other board members on the spot, but perhaps I will.

CHRIS DISSPAIN: You can put me on the spot, Susan, because I'm not going to be on the spot for much longer. I'm happy to be put on the spot.

SUSAN PAYNE: But thinking about what you've just been saying and the fact that tis going to be ultimately the board's responsibility here, I understand that and I appreciate that, but one might even feel that there's some potential inherent conflict of interest there in the sense that the purpose of this IRP process is to hold ICANN to account.

CHRIS DISSPAIN: Yep.

SUSAN PAYNE: The Organization. And the role of the board, the board members have a fiduciary duty to safeguard ICANN, if you like.

CHRIS DISSPAIN: [Correct.]

SUSAN PAYNE: And so having the board be the ones who make a decision on this has some conflict.

CHRIS DISSPAIN: It does, you're right.

SUSAN PAYNE: And presumably, that's why so much time and effort was expended on the CCWG with that cross-community group, of which members of the community and members of the board all worked together to try to come up with solutions on thorny issues. And in that sense, isn't our best course of action to try to follow the path that the CCWG set out for us, if you like, in terms of whatever it is that they had in their report and things like the bylaws that came out of that?

I'm just raising this. I'm not purporting to answer it.

CHRIS DISSPAIN: I understand completely. And much of what you say is correct. The board is—and as I said in the chat in response to Flip, my fear is the board will end up in a [inaudible] position. On the one hand, it has to operate on the basis of its fiduciary duty, which is a broad term, but we all know effectively what we're talking about. On the other hand, it has an obligation to act in accordance with this mission and so on.

So you're right. It's a very difficult situation. Seems to me that one possible way through—it's only a possible way through—is the board needs to be able to say, I think, that it has acted reasonably in all of the circumstances. And I suspect the only way that the board may be able to satisfy itself that it's acting reasonably in all the circumstances is to gather a bunch of examples or a bunch of equivalents across similar—[not across that] that there are any desperately similar organizations, but across organizations in similar environments, that it can say, yes, all right—and I'm making this up, right? One organization has a 120-day

time limitation, another organization has a 60-day time limitation, therefore 90 days seems reasonable.

But I'm only just using that as an example. But it seems to me that in essence, at the end of the day, the board is going to have to listen to the legal advice that it gets, it has to listen to what the community, this working group, proposes, but it itself cannot just, given that this is a matter that could lead to significant financial loss, it cannot make its decision based purely on, “Oh, well, that’s what this working group says.” It’s got to make its decision based on at least in part independent legal advice, otherwise it won't work.

But I stress I am just trying to throw some seeds on the ground here and I'm not talking on behalf of the board, I'm really just speaking in the moment for myself. But I can see this is a really tough nut, and I just, at this stage, don’t know how to crack it. The easiest way of cracking it is, everyone says, “do it my way, it'll be fine.” Well, I'm not sure that anyone’s way is particularly helpful at the moment.

SUSAN PAYNE: Thank you. Malcolm.

MALCOLM HUTTY: Thank you, Susan. I just wanted to pick up on the point that Chris was making about the practical consequences here. When this method of accountability was constructed, there was considerable attention given to the risk that an IRP case could cause serious financial loss or be massively disruptive in the way that Chris discussed, and provided for

numerous [other] protections to avoid that. In particular, the IRP dos not have the power to do anything other than to declare that what ICANN has done is not consistent with its articles or bylaws, and it is then remitted back to the board to decide how to address that and how to correct that and what should be done in consequence of that.

So in the circumstances that Chris was deciding, the board would still be very much in the hot seat and in control of the process, even after losing an IRP case. Now, of course, the board really is under a duty to obey its bylaws, and so if it did lose such a case, it would have to think very seriously about how best to bring itself into compliance. But that restriction is there, and it's there as an important protection for the board's ability to protect the organization.

Nonetheless, the community and members of the community do have the right to have that declaration when ICANN has stepped outside it and not to say, "Oh, well, the results of this might be expensive if the board acts in one way or another as a result of it, and therefore you can't even find out." That's not the way that it works.

So it's also worth, therefore, emphasizing that there is no power in the IRP to award damages. There is no power to order specific performance of any particular outcome or to direct a particular outcome. It is only to declare whether ICANN has acted incompatibly with its bylaws or not.

SUSAN PAYNE: Thanks, Malcolm. I did see, Chris, you had your hand up but it's gone down, so perhaps you've changed your mind.

CHRIS DISSPAIN: I was only going to respond—Malcolm makes a very fair point, but I think my response would be—and we're running out of time, we're obviously not going to solve this, but my response would be, yes, that's correct, but of course, a finding of a panel is now binding, and it's entirely possible that a finding of a panel could lead us to a situation where a whole series of events wouldn't need to be untied as the only way in which the board is able to meet the finding of the panel.

Now, that's a possibly expensive and difficult, even if you do it in the first year of something, but if you're looking at a situation where you've taken an action to, I don't know—again, the problem here is examples can always be responded to, but you delegated a gTLD and you end up in a situation where in five years' time, there's a finding that that delegation in itself is a breach of the bylaws.

It's a little difficult to see how that can be really in anyone's best interest in those circumstances. And the costs of that and the difficulties of untying it are extremely challenging. And it means there is a lack of certainty. What it means is that every time something is done—it's enough as it is that every time something is done—and I know because I've set up the BAMC and I sat as chair of the BAMC and before that, the BGC.

It's complicated enough dealing with a situation where you make a decision, something happens, and then there is a process—I'm not saying there's anything wrong with the process, but there is a process in place that involves reconsideration requests and [a whole heap of]

other things. And reconsiderations can come in various different forms, then you can get a reconsideration request on top of a reconsideration request, and so on.

The lack of certainty that that leads to and creates in the community and in the commercial world that most of the contracted parties work in—and I'm not speaking for them, I'm just using them as an example—is horrendously difficult to deal with.

And whilst I'm completely in favor of all of the mechanisms that exist in order to give people some sort of redress and the ability to have things reconsidered, a key point is that at the end of the day, there has to be a level of certainty, you have to be able to say at the end of that period of time, at least we know that we're not going to get attacked. It just seems to me to be inequitable to have it any other way. But that doesn't talk to [length,] just to the general principle.

SUSAN PAYNE: Okay. Lovely. Thank you, Chris. And by default, you have the last word on this because we have two minutes to go.

CHRIS DISSPAIN: That of course was my cunning plan all along.

SUSAN PAYNE: Excellent. Well, and I promised everyone that I wouldn't keep overrunning on time, so I think this is the perfect time to call this discussion to an end for today. We undoubtedly aren't finished with

this. As I mentioned earlier, if it would be possible—I know Liz was posting into the chat. If you wouldn't mind, Liz, posting the links to the various advices into an e-mail, maybe, and sending it around to the group, I think that would be super helpful just for people to be able to find them and for anyone who wasn't on the call or had to drop off, that would be really helpful. Thank you.

And I think we all should take an action to read those legal advices, bearing in mind everything that's been said about who they were provided for and so on. But I think we should at least get ourselves up to speed on the advice that has previously been given. And we'll need to circle back on this. I think we all need to do some pondering. I certainly need to do some pondering on what's the best path forward, and perhaps we may need to break this up into some bite-sized chunks and think about things that we can address whilst taking a bit longer to maybe deal with the more difficult bits.

We've already dealt with the next meeting. No one raised their hand to say they have any AOB, but if there is any, I think we're just at the end of our time, but do please speak up quickly.

Not seeing anyone, in which case, thank you, everyone, for your time. Thanks for a really super engaged discussion and let's keep talking about this and trying to find a path forward. So we can stop the recording, Brenda. Thank you so much.

**[END OF TRANSCRIPTION]**