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BRENDA BREWER: Good day, everyone. Welcome to the IRP IOT call on the 3rd of November 2020 at 19:00 UTC. This meeting is recorded. Kindly state your name when speaking for the record. Have your phones and microphones on mute when not speaking. Attendance will be taken via Zoom.

I would like to note we do have apologies from Flip, Becky, Kristina, and Sam. And I'll turn the call over to Susan. Thank you very much.

SUSAN PAYNE: Lovely. Thanks very much, Brenda. And thanks, everyone, for joining. Welcome to our call. It feels like a little while since we've met, just due to ICANN 69 and other things. So it's good to get back to this, I think, and try to make some decent progress, hopefully. Just first off, I need to review the agenda and see if there are any updates to SOIs. So why don't we do the SOIs first? Does anyone have any updates? Chris, for example.

CHRIS DISSPAIN: Do you want to make an example of me, Susan?

SUSAN PAYNE: I do indeed. Come on.

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CHRIS DISSPAIN: Well, I guess I do, don't I? Yes, I'm no longer on the ICANN Board. Yay. And so I'm attending—but I would like to continue to attend this as an observer and interfeerer. So here I am.

SUSAN PAYNE: I think that's absolutely wonderful, that you would like to continue, Chris.

CHRIS DISSPAIN: I'm passionate about judiciary. It's deep in my heart, Susan.

SUSAN PAYNE: And Chris, formally, are you an observer then? Were you not a formal member to the group?

CHRIS DISSPAIN: I think I was an observer previously. Bernie would know, but I'm fairly sure I was an observer. Bernie says yes.

SUSAN PAYNE: Bernie says yes.

CHRIS DISSPAIN: So I think I'm just continuing to observe.

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SUSAN PAYNE: Happy for you to stay observing. If you want to change your status—I'm not quite sure how we go about that.

CHRIS DISSPAIN: It would have to go through—the appointment is effectively by the Board, so if this continues and the Board decides it wants to revisit the appointments, then it can do so, but for now, I'm very happy just to chime in and observe, if that's all right with you. So, thank you, [inaudible].

SUSAN PAYNE: Absolutely. Very pleased you still want to do this during your evenings. Brilliant. Anyone else, any other updates for SOIs before we keep going? Okay, not seeing anyone else. Excellent. Thank you.

So next, just a quick review of the agenda. We'll just circle back on the action items we had from the last meeting. If possible, we'll try to do the final approval of the translation document. Well, we'd scheduled an agenda item to do an update on the consolidation subgroup meeting. That's going to be quite a quick update, and then we'll continue our discussions on the time for filing issue, and then AOB and next meetings as usual. If anyone has anything they want to put on the agenda now for AOB, then please speak up or put something in the chat, otherwise we'll just come back to that towards the end of the meeting just in case.

Okay, lovely. Thanks everyone. So in terms of agenda item two then was the action items from the last meeting, so Doodle poll for scheduling the consolidation subgroup call, that's happened, the Doodle has happened

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and we'll come to that group on item four. Sam was looking into the timing for the empowered community to use the IRP, and she has confirmed to us that the bylaws address that. So I think we can probably view ourselves as covered by the slightly separate timing in the bylaws for the IRP. Greg.

GREG SHATAN: Thank you, Susan. Sorry to be a little late. I just wanted to add, for item number one, updates to SOIs, that I have an update that as of the end of ICANN 69, I am now a member of the At-Large Advisory Committee through the NomCom's good graces. Thank you.

SUSAN PAYNE: Thanks, Greg, and congratulations on your appointment. Excellent.

GREG SHATAN: Thank you. I represent 7 billion people, so don't mess with me. Thank you.

SUSAN PAYNE: Absolutely.

CHRIS DISSPAIN: Can we have the names and addresses of them all, please, Greg, for the statement of interest so that we can be clear?

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GREG SHATAN: [Aaron A Aardvark is first.]

SUSAN PAYNE: Chris, GDPR, my man.

GREG SHATAN: And it'll be ending with [Ziziz P Ziziz] which his the last name in the New York City phonebook. Thank you.

CHRIS DISSPAIN: Brilliant.

SUSAN PAYNE: Deary me. That has got to be a made up name. Okay, back to item two, third bullet, just the other action item we had was Liz was sending us the link to the legal opinions regarding the repose, and I think we had them and I hope everyone had a chance to look at them now. Greg, I think that's an old hand so I'm just ignoring you, but please shout if it's not.

GREG SHATAN: It's an old hand, but I'll get used to being ignored as a member of ALAC. Thank you.

SUSAN PAYNE: Dear. Yeah. Now that you've defected from the IPC, I think that's right.

GREG SHATAN: Carry on the way [inaudible]. Thank you.

SUSAN PAYNE: Exactly. Okay, number three, final approval of the translation documents. So this, I think, is the first sort of substantive item on our agenda. The draft is the one that Liz circulated to us. I think I'm right in saying it was on the 5th of October now. So we've had it in our inboxes for a little while. We've circled back to it a couple of times in the runup to that and just made some really minor tweaks. So in the absence of anyone raising any concerns on the mailing list over the last few weeks now, I think we can view that as being final. Obviously subject to anyone raising any concerns here now.

Excellent, I'm hearing silence and I'm viewing that as golden. Obviously, at some point we will have all of our rules in one place, and I have no doubt we will want to read all of them together and make sure they all hang properly together and we haven't inadvertently built in some inconsistency. So I'm sure it's not the last time we'll be looking at that, but hopefully we have put that rule at least to bed for now.

Okay, next is agenda item four, just a quick update on the consolidation subgroup. Yeah, that one, just as a reminder, that's a sort of small subgroup of people who'd volunteered to try and take the consolidation text offline and work on it and come back to the full group with suggested improvements on that text.

Unfortunately, we did have a call scheduled for yesterday and a number of people were unfortunately sort of fairly last minute unable to make it for all sorts of reasons outside of their control. And so it did seem unwise—we could have gone ahead with a sort of less than complete set of us, but given that we'd been trying, by using a Doodle poll, to schedule a time that everyone could do and given the people we'd be missing, we postponed that, so that group is now going to meet next Monday, I think I'm right in saying. Bernard will correct me if I'm wrong. And so hopefully, we will be able to give a more substantive update for our next meeting.

And so having dealt with all of that, we now reach agenda item five, which is the continuation of our discussion on the time for filing issue. And I want to thank all of you, really, but thank particularly David McAuley who very kindly had offered to look at—he'd mentioned the last time we talked about this that he'd been giving this some thought and we wanted to come back to the list with those thoughts and indeed he has now done so.

I certainly found it very helpful to have that as a sort of new restatement and an opportunity for me to remind myself of what it is we need to think about, and sort of one of the perspectives on this. And thank you also to Malcolm who I know has also sort of responded on that fairly quickly with some particular concerns that he wants to raise.

I think, as I said in my e-mail earlier, I wouldn't—it's clear I most certainly am not suggesting that I think everyone in this group is in agreement with the position that David's expressed, and indeed,

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Malcolm has a different perspective on it, but I felt it was really helpful to have the benefit of that thinking and that reminder of what the issue is, because it's been a few weeks since we've had a meeting.

So I'm going to pause because I've just seen David's hand, and in the meantime, I can see there's some chat, so I'm also going to have a quick look at that. David, please.

DAVID MCAULEY:

Thank you, Susan. I just wanted to mention that the reason I did what I did—and I had given this some thought—is back in the time when I was the chair of this group prior to reconstitution, I had spoken on this but I never really marshaled my thoughts. I was sort of trying to act more as chair, but I did put my personal hat on every once in a while. So I just took the time to do it.

[But what I'm also putting] my hand up was, as I think about what I did as chair, Kurt made a very interesting comment in chat just a moment ago about trying to keep a scorecard. Maybe staff could keep a scorecard on moving things like the translation document into a sort of informal "done" file. And I think that's an excellent idea, and as I think back to when I was chair, I'm sorry that I didn't think of it at the time or try and do something like that at the time.

And the other thing I'd say about translation, given the number of apologies today, is that when we do something like this, it might be a good idea to say we'll note this on list and give people a chance to reply on list, but I think it would be a great idea that Kurt came up with to keep track of these so that a year from now when we have the final

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rules in our hands and we want to talk about translation, we can at least inform ourselves that back in the first part of November of 2020, we did sort of put this to bed. So I just thought it was a great idea and I wanted to speak a little bit to it because I had an experience as chair where I wish I had done that myself. Thank you.

SUSAN PAYNE:

Thank you, David. And I agree, I was just acknowledging Kurt's suggestion in the chat while you started to speak, and I agree. I think it would help a lot. I think it would be useful then when we need to go back, if anyone asked us, did we actually agree on X, it would be helpful for us to be able to easily have a record of when we did it and which meeting it was at and so on.

And I suppose as we manage to tick things off, it will also make us feel like we're progressing, and hopefully indeed our progress will speed up a little bit so that we'll be ticking things off a bit more quickly. So yes, I totally agree. I think that would be really useful. And Bernie is acknowledging it and agreeing that we could do that. so that's really helpful.

And yeah, David, I completely understand why you circulated your thoughts. Indeed, they were, as I said, incredibly welcome. You had flagged on the last call that you'd been giving this some thought and you were wanting to put pen to paper, so thank you for that. I think it really helped me in the preparation for the meeting. So just, as I say, not everyone is going to necessarily agree with all the positions that you have expressed, but it's at least an airing of the issue if nothing else.

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And so it seems to me that we've got two prongs. As you said, one is the sort of, what is the time within which the claim must be filed after the claimant becomes aware or reasonably should have become aware of the relevant act that they're objecting to, and that's effectively the language that the bylaws tells us to address, so we know at a minimum the bylaws would like us to be addressing that, and the bylaws talk about our time period as being with reference to that.

So whilst it may not be perfect, and one can see some potential imperfections with exactly how it's expressed, I think that is the language we have from the bylaws, and it would be exceptional circumstances, I think, for us to feel that we needed to do something that was different to the bylaws, if we felt that the time from which the—that it shouldn't be the date of the Board action for example but it should be something else, I think that would require us amending the bylaws. So you would really need to feel, as a group, that we couldn't work within those bylaws to be suggesting that, and that obviously would not be ideal, because there's a whole process involved in changing the bylaws, and I think we have to assume that when the new bylaws were adopted, that all of these issues were discussed. So I think we sort of have to assume that we have the bylaws and that's what we have to try and work towards.

So that's the first head, and there are various elements that require discussion within that, but I suppose that first head or prong is probably the less controversial or less difficult one, if you like. And then we have the second potential prong which is whether there should be this overall cutoff date after which you can't bring a claim, and that would be the so-called repose. So essentially, that would mean, if there were a

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repose, be it 12 months, 24 months, 36 months or whatever, that at that point, if you were a potential claimant that at 36 months or whatever the time period is, you haven't yet suffered an injury or harm that's caused by the relevant act, then you don't qualify as a claimant under the bylaws and so you can't bring an IRP because you don't qualify as a claimant, because you haven't suffered a harm.

So you would be excluded from bringing a claim, and similarly, if you had been harmed somewhere within that 24 or 36, 12, whatever month period, but you had not become aware and you could not reasonably have become aware within that period, then again you would be time barred. So that obviously is—that's not something to be adopted lightly, because we are potentially excluding some people who otherwise might qualify at some point as claimants. But on the other hand, I think we've heard from Liz and Sam and the concerns that Org has. We also have a number of other people on this call—or rather, in this group, expressed on the last call their concerns about the uncertainty and lack of clarity for all the community of having all decisions of the Board open to challenge forever, albeit that it may be somewhat hypothetical in some cases.

And obviously, that's certainly the stance that David was expressing. So I think prong two is the more challenging one. I think it's the one where we have a bit more spread of views across the group. We have a spread of views expressed during the second public comment period. And so it is more challenging. That was where David focused most of his attention in his e-mail, and so I'm not sure that we can necessarily solve this second prong today, but perhaps that is where we should start our discussion and at least see what progress we make, and then we

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perhaps can circle back to the first prong which I think, as I said, hopefully, is slightly less contentious.

But I'd obviously be willing to be very interested to hear other views, to the extent to which others are sort of of a similar mind to the views expressed by David. I would say that going into this group, wearing my personal hat as opposed to trying to address this as a kind of more neutral chair, I've been troubled by the notion that someone might be excluded before they ever became eligible to be a claimant. So the notion of the repose, particularly when the repose was 12 months, has very much troubled me. But I can also very much see the arguments for there needing to be some cutoff points after which one could feel confident that a Board decision is fixed.

So this is the point at which I now have two hands and I can stop talking and get the views of you, Chris, and then we'll come to Malcolm. Thank you.

CHRIS DISSPAIN:

Thank you, Susan. And I too have been troubled by this and I'm troubled by my trying to figure out why I'm so uncomfortable. So I want to say thank you to David for his notes. I've read that. I've read Malcolm's response which is also perfectly valid, and I've gone back and looked at the history of this to try and figure out what it is about this that makes me feel so difficult, because as a lawyer, I understand exactly the issues at hand and I've been trying to work out why I'm so uncomfortable.

And I've come to this conclusion. It's about the remedy. If we were having this conversation in the context of a court action where a

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remedy could be given in damages—which does exist and is open to any claimant to bring a court action against ICANN subject to them being in a contract with ICANN where they'd agreed not to, but even then, they can still claim that they have a right. That would be different.

But this is not the case here. What we're talking about is a set of circumstances where the remedies in essence for the Board to reconsider an action that it's taken and the consequences of overturning the action that it's taken, five years, six years, ten years down the line or even three years down the line [are what are] the challenge, and that's why I'm so uncomfortable. It's not that I don't think people should be entitled to a remedy. It's not that I don't think people should be entitled to say, "This is wrong and I've lost and I should therefore be able to claim damages." It's that the internal ICANN processes where an IRP can say to the Board, "Reconsider your decision or you've not taken something correctly into account," and then expecting the Board, after three years or four years have passed and businesses have been built based on that decision, etc., to change its mind makes no sense.

What makes perfect sense is if a claimant is able to say, "I have suffered a loss and therefore I should be compensated." Not a problem. Different point entirely. But that's not what we're discussing. We're discussing a set of internal mechanisms where the remedies are such that not restricting them in some kind of time basis makes the Board's position almost untenable from the point of view of the damage and the consequential damage to other parties that would occur if an individual person suffered harm, because the Board doesn't have the ability to

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say, “We will compensate you, claimant, by giving you a bunch of money.”

The only thing the Board can do is to change the thing it has done, which in essence is to change a policy or an operation that has a catalog of effects on a bunch of other parties, whereas in a court, damages does not have a catalog of effects on a bunch of other parties, it merely has an effect of the loser being required to compensate the winner financially. I hope I've made that clear. I'm happy to obviously discuss it further. Thanks.

SUSAN PAYNE:

Thanks, Chris. Yes, certainly clear to me. Malcolm.

MALCOLM HUTTY:

Thank you, Susan. You raised something when you spoke that certainly, I think, gave me an idea that there's a possibility that we're talking at least to some extent across purposes in this, in that we are imagining different kinds of disputes on either side of the argument here. And that leads us to different places. And I wondered if we could look into that in a bit more detail.

Before I go down that path, though, I'd just like to reply to Chris's point about the idea that unwinding or reversing some position that they've taken is somehow something that no Board could ever do. Actually, it's something that a Board could absolutely be faced to do regardless of what happens on this, because if it turns out that something that the ICANN has done is illegal, is unlawful, is contrary to some regulatory

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rule, then it's not good enough to simply offer one party that's complaining about it compensation.

If the company is acting unlawfully, it must stop acting in that fashion. It can't continue doing so merely because it's been doing so for a long time. And paying off one party that's harmed by that unlawful action would be no sufficient remedy. It must comply with the law. And if that involves unwinding something that it's been doing for a long time, then it will have to do so.

Now, of course, as Chris points out in the chat, that's different, that'd be a court decision, not an IRP one. Sure. But nonetheless, it goes to the heart of Chris's argument that unwinding something that's long established is an impossible thing to ask. And the answer is no, it's not, it's something that absolutely can be asked of the company, and will be asked of the company, should it ever be found to have acted in a way that is unlawful.

So now really, the only question is, on top of the duties that ICANN owes to the state—I don't mean American state, I mean in law, should it also apply the same standard to abiding by its own articles? And I would argue that it says in its own articles that it must.

Anyway, that's my answer to Chris's point, but I actually asked for the floor to react, Susan, to what you said about when you used the words, "To any Board decision." And it struck me that actually, there were very different kinds of decisions or actions by ICANN that could be complained about here, and it might be valid to treat them differently.

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There were some kinds of actions that are just a simple decision or an action that is taken that—and then when the complaint is, oh, look, the way that decision was taken was wrong, you should go back and do it again and the process wasn't followed, whatever it might be, and things that result in very sort of discrete actions being taken such as the award of a domain to a particular registry operator, that sort of thing.

But then there's another kind of action, and it's this other kind of action that the structure of the IRP was set up to defend, which is to ensure generally that ICANN operates within the framework that was set up at transition. And that in particular—there are several things here. Really, there's the whole set of commitments that are set out in the bylaws and various things, but I'm particularly minded by the mission limitation and the rule that ICANN must not seek to use control of the domain name system so as to be interfering with the content and operation of services and what's on services that use the domain name system.

And these kinds of decisions are very different. If the nature of the complaint were that I've been harmed by something that ICANN [has been done] in this area and ICANN shouldn't be acting in this area at all, it's completely ultra vires. If that's the allegation that is made, then it seems to me that there's no satisfaction in saying, oh, well, we've been doing it for a long time. It's like, no, if ICANN should not be doing it, it should never have been doing that, and must stop no matter how long it's been doing it. And it makes me just as uncomfortable as what Chris was saying makes him, to think that we could cast out the settlements that were so carefully constructed at the time of transition merely because the passage of time has allowed ICANN to carry on behaving in this fashion and it's no longer challengeable, let alone it was never

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challengeable in the first place because it managed to come about in a way which nobody ever had the right to challenge.

And that would do real damage, I think, not only to the confidence in ICANN and the IRP but to the very basis of the transition settlement that was made. The IRP is very explicitly set out to defend that settlement and to defend the nature of the bylaws as they were written and the compromises that were struck there. And we must find some way to do that.

So I wonder if we could try to have a discussion that would uncover the particular circumstances in which there might be real and legitimate concerns about [inaudible] reaching back too far in time and separate them from decisions that are essentially of the nature that I was just describing. And maybe even we could have a different rule that applied between the two circumstances.

I hope we could have that discussion. Thank you.

SUSAN PAYNE:

Thanks, Malcolm. Yeah, there's a queue of hands so I'm not going to opine on that or comment on that yet, but thank you for those thoughts. That's very thought provoking. Nigel.

NIGEL ROBERTS:

Okay. This is going back about five minutes to something Malcolm was saying. I'm a bit confused about this because if ICANN is doing something illegal or unlawful, it's got to stop doing that and doesn't matter how long it's been doing it, and we'll have to take the

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consequences. That's a no brainer. So I kind of don't see how that fits in. I don't see the analogy. The law is the law, we've got to follow the law.

SUSAN PAYNE:

Thanks. Chris.

CHRIS DISSPAIN:

Thank you. So I think Malcolm raises an excellent point and I'm going to just shorthand it, and if Malcolm, you have a problem with this, say so. I'm going to just call it mission creep by basis of shorthand. Take the example that you've used. And I think you're right. I think that clearly, there's a circumstance where the ICANN or the Board or whatever would have acted outside of its mission, that that needs to be corrected. My point is simply that the IRP is not the right place to do that. The IRP can't correct a mission creep. It doesn't have the power to say, "You, the Board, are acting outside of your mission, you must operate in a different way." All it can do is ask the Board to reconsider.

The empowered community could make a finding through its processes that it believes the Board has acted in a certain way and there are consequences that flow from that. And a court can make a finding that the Board has done that. But the IRP can't. And that's why I find the use of—or the lack of a repose in the circumstances of using that particular remedy to be so challenging. It's not the right remedy to fix the problem that you've raised, because it can't fix the problem that you've raised.

And if we were sitting here talking about that we should never allow anyone to bring a legal action against ICANN after two years or

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whatever, notwithstanding that we can't do that anyway, I'd be arguing in the same way as you, Malcolm. But that's not what we're discussing. We're discussing what an IRP can do. And in the context of the example you've used, I just don't think it works because you can't use the IRP to fix the problem that you've raised. Thank you very much.

SUSAN PAYNE: Perfect. Malcolm, I imagine you want to respond to that, so over to you.

MALCOLM HUTTY: I must say I'm very surprised by that argument from Chris. If somebody has been harmed by an ICANN action and they feel that that action is inconsistent with the rule in the bylaws that limits the mission to a particular area because it's completely outside that area in their allegation, it's absolutely their prerogative to argue that before the IRP that that action should be declared as inconsistent with the bylaws and sent back to the Board so that they can reverse it.

I'm amazed to hear Chris. Maybe I misunderstood what Chris was saying, because that seems to me absolutely within the realms of what IRP is set up to do.

CHRIS DISSPAIN: Can I respond to that, Susan, if it's all right with you?

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SUSAN PAYNE: Assuming it's all right with Greg—and I'm going to just assume it is—then yes.

CHRIS DISSPAIN: Yeah. So people can bring whatever IRP that they like. I'm not suggesting that. What I'm suggesting is that the panel cannot require the Board to—the panel doesn't have the power to find that the Board is in breach of its mission. What the panel can say is the Board hasn't followed its process properly and it should reconsider. But what it can't do is to make a finding in fact that the Board has done that. It doesn't have the power. That's not the job of the panel. It's not within the panel's remit.

MALCOLM HUTTY: But it is [though.]

CHRIS DISSPAIN: No, it isn't.

GREG SHATAN: Chris, since I'm next, I'll just talk. This is what was changed during the accountability process. You're referring to the former IRP, which was a process IRP. What we now have is a substance IRP that deals directly with bylaw violations.

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CHRIS DISSPAIN: Yes, I'm not disputing that, Greg. And Susan, I apologize, I don't want us to get out of hand so I'm happy to take this [up on the list.] But the panel cannot order the Board to redo an action. It does not have the power to do that. A court can, the panel cannot.

MALCOLM HUTTY: But it can do that.

GREG SHATAN: Yes, no, that's also changed. This is a binding IRP.

CHRIS DISSPAIN: That's my point. Thank you. That's what I'm trying to say. It cannot fix—

[GREG SHATAN:] It does have the—

MALCOLM HUTTY: It can declare that this area is ultra vires the powers awarded to ICANN under the bylaws. It can declare that when it did such a thing—whatever it was—that was inconsistent with the stated and enumerated objects of ICANN and the particular clause that says that it shall not act outside that bylaws. It can give a declaration, and that declaration is a remedy.

CHRIS DISSPAIN: I'll rejoin the queue in a minute.

SUSAN PAYNE: So, can I—and apologies for chipping in here. Perhaps it would be helpful if we have the bylaws up. Is that possible, Brenda? Specifically the bylaws Article 4. I'm going to just copy into the chat, because I've got it open. And maybe we could look at what the actions are that it covered. I don't know if it'll help, but it just occurred to me, as there was this difference of opinion, that maybe it would. And whilst that's happening, I think—Greg, was that what your hand was up for, or was there something else you wanted to say?

GREG SHATAN: No, that was largely my point, that I think that—clearly, we need to clarify, because my understanding is very much like Malcolm's here, that this is indeed what the IRP 2.0 is intended to deal with, which was one of the major shortcomings of IRP 1.0, which was that everything was dealt with as if it was a process problem and that [we now have to deal with line drawing] on what is within and without the bylaws. It specifically talks to violations of the bylaws substantively.

SUSAN PAYNE: Thanks. So David has his hand up, and in the meantime, yes, Brenda, you're scrolling down very helpfully to 4.3. And it may be that we need to go a little bit further, but David, why don't I turn the mic over to you?

DAVID MCAULEY: Yeah, I was just asking if Brenda could go down to 4.3.1, and I see that she has. The things I wanted to mention or say is, one, I don't think we

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should forget that the ICANN community, the SOs, ACs and etc. are also to be considered under the purposes of the IRP. We shouldn't lose sight of that. And then secondly, I think there may be some promise in Malcolm's idea. I thank him for the idea of looking at this perhaps a little bit differently.

The only thing I would say, though, is when we talk about whether things are or are not clearly outside the mission is let's recognize that certain decisions and certain actions or even inactions may not necessarily be clear. The claimant will think they were outside the mission, ICANN will think they were inside the mission, and if you asked 1000 people, you'd get 1000 different opinions. And the IRP panel's decision won't be any different. They may have a different view. Theirs will be important because they are the IRP panel.

So while I think there's some promise in doing what Malcom says, I think we have to be careful if we do that. And the only other thing I would say is I still think—and I probably will always think—that the idea—where the language says at a minimum, I think that gives us a hand to do what we're talking about and where we talk about certainty or the bylaws talk about precedent, I fully subscribe to what Chris said in the last call about certainty, and I hope we don't lose sight of those things and they will be the things that sort of inform me as I go ahead if we go down the path that Malcolm suggests. So thanks very much.

SUSAN PAYNE:

Thanks, David. Yeah, I thought O is quite helpful. I also—a little bit further up—and I'm trying to find what the section number is.

MALCOLM HUTTY: 4.3(b)(iii) defines disputes. The very first type of dispute that is defined is a claim that Covered Actions constituted an action or inaction that violated the Articles of Incorporation or Bylaws, including but not limited to any action or inaction that, one, exceeded the scope of the mission. The very first type of dispute that is mentioned is a dispute based on an allegation that ICANN is exceeding the scope of the mission. It seems impossible to argue in the face of that very clear language that you can't bring a case to the IRP against what has been done with the argument that this is wrong because it's outside the scope of the mission. It's as plain language as I can imagine being written.

SUSAN PAYNE: Thanks, Malcolm. Yeah, and I don't understand Chris to be disputing that. I think there's, as much as anything, a dispute about what the impact of that is.

MALCOLM HUTTY: Oh, well that's another matter. Yes indeed.

SUSAN PAYNE: But I'm not trying to put words into his mouth. In fact, he has his hand up, so—



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MALCOLM HUTTY: There's absolutely no dispute about the fact that the remedies that the IRP can give are limited. But nonetheless, this is a valid matter to bring. And it's something that in its very nature is something that could be brought up after an extended time.

SUSAN PAYNE: Okay. Chris, and then Liz.

CHRIS DISSPAIN: Let Liz go first.

SUSAN PAYNE: Okay. Thanks.

LIZ LE: Thanks, Susan. Thanks, Chris. So I want to add to what Chris is saying on this point. I think while the panel has the ability to make a finding that an action is in violation of the bylaws, the articles of incorporation, I think, to what Malcolm's saying, he's right, but the IRP is limited in remedy in that the IRP panel cannot force the ICANN Board to undo an action or redo an action. I think what it will do, the IRP panel can have the Board go back and see and review the action and see if it would redo the action. But I think if you look down at section x(iii)(A) it discusses what the Board would do in terms of a decision taken by an IRP panel.

And I think one of the things that would be critical for us to look at in light of this is what is the benefit for us to look at something where it is, say, ten years down the line and we focus what's the impact on ICANN's resources to litigate IRPs on something that happened so long ago? Realistically, where are the resources [when we spend] in terms of documents, witnesses and whatnot to go back years and years on something that is limited in remedy nature when there are other things that the resources can focus on something more current. And I think there's a lack of certainty that creates and having no outer limit as part of this discussion. Thank you.

SUSAN PAYNE:

Thanks, Liz. Chris, do you want me to come back to you now?

CHRIS DISSPAIN:

Yeah, only just to say that I think Liz has kind of covered it, really. And as Greg has said in the chat, if you go to x—Roman ten—that deals with what the Board is entitled to do or not entitled to do. And I'm trying to come at this from a practical point of view. And as I said on the last call we had when we discussed this, as a, experienced director of companies, a circumstance where you cannot be expected to be obligated as a director or as a fiduciary responsibility not just to your organization but to the parties that are affected by it to act in a way that is detrimental to the organization, and to what in ICANN's case is effectively the community or from a contractual point of view, the contracted parties.

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And for all of those reasons—if a court makes an order, that is a different thing. But this is a panel, and whilst the panel’s decision is binding, the panel’s decision—if the panel makes a decision that the Board has acted outside of its mission, that is not a court finding, it’s a panel finding, and it’s binding. But what the Board does because of that is covered by article—the one that’s up there now. And I’m just unclear what people think the end goal is here, because quite clearly, the Board cannot find itself in a position where it’s going to overturn a decision it made ten years ago, absent a court finding.

And to be crystal clear, a court is—and anyone on this call who’s a lawyer, I know is going to agree with this—what I would argue in court in circumstances where someone has brought a claim five or six years down the line is if I lose this and I turn out to be wrong, the remedy is in damages. The remedy is not to put the parties back into the positions they were in prior to the decision being made. But the remedy that sits under the IRP is precisely, in effect, that. It’s to put the parties back in the position they would have been in if the Board hadn’t made the decision. And therein lies the challenge of trying to settle a dispute of that nature by a return to the status quo ante rather than a claim in damages which cannot be made in an IRP. Thanks.

SUSAN PAYNE:

Thanks, Chris. Greg.

GREG SHATAN:

Thank you. Chris, I think you’re speaking of the IRP as you wish it was, not as it is. It has been bumped up in class. At the very beginning of x,

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that makes it clear this is a final binding arbitration process. It is intended to be a process that ICANN has agreed to be bound by the decisions of. Furthermore, the EC has the power to enforce this decision. That is, it's not dealt with ab initio or rehashed from the beginning. It is an enforced decision. This is x I'm talking about, Chris.

So if you look at x—

CHRIS DISSPAIN: What about A?

GREG SHATAN: Well, x(A), the Board can—this is where there can be, the Board can say that for some reason, they cannot—they can reject compliance with the decision. They're allowed to do that.

CHRIS DISSPAIN: Thank you.

GREG SHATAN: But then if you go back down to C, there is a remedy for that, which is that the claimant or the EC may seek enforcement—again, enforcement—in a court of competent jurisdiction.

CHRIS DISSPAIN: But that's a court.

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GREG SHATAN:

Yes, that is a court for enforcement. When you enforce a decision, it's the decision that was made in the initial forum that is at issue. It is not a de novo review, it is an enforcement proceeding. In other words, the court looks at—this now goes under the arbitration act which deals with how arbitration decisions—which are binding decisions which virtually have much the same power as the courts, but they don't have the power necessarily to call in the marshals and the like. So you go to court to enforce the decision, just as you might go to a foreign country's court to enforce a decision that was made in the first country's court. So it is an enforcement [procedure.] The actual substantive matter is dealt with by the IRP. It is quite a powerful body in that sense.

I think that in terms of the temporality issue, there's a distinction I think we need to make between parties that have slept on their rights and parties whose rights did not even exist at the time that the initial decision was made. I agree that a party cannot have an infinite amount of time to raise an issue that they knew or should have known was an issue, and I don't think that is what we in fact are discussing. And if that needs to be clarified, it should be. We're dealing rather with the issue of later affected parties affected by a decision that in fact would be found or could be found to be a violation of law.

And there is no principle that equitable remedies somehow evaporate before damages remedies. You can make equitable remedies at any point in time if they're the proper remedy to be taken. So putting things back to the status quo is entirely appropriate if that in fact is the appropriate decision. Otherwise, we wouldn't be dealing with things such as restitution of artwork from the Second World War. You get the

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art, not the money. So here again, the equitable remedy is entirely within the ambit of the IRP. Thank you.

SUSAN PAYNE:

Thanks for that, Greg. Malcolm has his hand up. And then, without wanting to cut off discussion—because I certainly don't want to do that. This is, I think a very fruitful discussion. But let's see where we are after Malcolm. And we may see if we can come up with a path forward. And if not, well, lets see where we get to. Malcolm.

MALCOLM HUTTY:

Thank you. I don't want to go too far down the rabbit hole of what the remedies are and how effective they might be and what the consequences would be, because that will work itself out. The issue that I raised—we were supposed to be talking about timing here. And I said that while for certain sorts of issue, there might be a case that actually limiting it in a fixed point in time would be justifiable. There were also things for which that really isn't the case. And I gave us an example, the issue of somebody saying they've been harmed by an action of ICANN and that action wasn't just wrong, it was completely ultra vires and they should be able to bring that claim and get a declaration.

And it shouldn't be defeated by saying, "But we've been doing that for years." No. If it's ultra vires the bylaws, the mere fact that that was based on a decision that is many years ancient is irrelevant. It is still ultra vires the bylaws, and that person is entitled to the remedies that are available, whatever they may be.

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Now, I think, actually, the remedy that is available is a declaration that it is indeed ultra vires the bylaws, and then it will be up to the Board to decide what to do about it, which hopefully will be to stop acting in that area, but it may include all kinds of other things that it comes up with. That will be a matter for the Board. And whether or not what the Board has come up with is adequate to deal with that will then be dealt with by whatever further procedures then follow on from that.

But that's neither here nor there for the matter on the table right now. The matter on the table right now is the timing issue. And the timing issue is whether or not the person who wishes to make that case should be barred from it merely because acting in that fashion is directly consequent from a decision that is ancient and that that therefore places it outside—time barred, or whether they're able to say, "No, I have just recently been harmed by this and I wish to say that this is ultra vires, and please give me the remedy that I seek, namely, a declaration that indeed, it is ultra vires, that I'm right in that." That is what I'm seeking, I'm entitled to it, and I'm entitled to it because I brought my claim promptly from the time when I was actually able to bring such a claim because I was—[promptly on] essentially suffering the harm. And that is the case.

And then I think really, the rest of this discussion is really just a rejoinder to Chris's objection that, oh no, the IRP can't get into this mission stuff, it can't do anything, it can't do that. I don't want to put words in Chris's mouth. Every time I try to recount what Chris says, I get it slightly wrong and he corrects me.

But nonetheless, Chris's was making an objection to my case, and I think my case stands because it is clear that you are able to go to the IRP panel and allege that something is ultra vires, and that is within the scope of the things that the IRP panel can consider, and some form of remedy is available. These things are clear. And given that that's clear, the question then is, should I be time barred from doing that merely by virtue of the fact that the misbehavior that I'm talking about began many years ago, or should I be able to bring that case and say that's irrelevant? I was affected now and the way that you're acting is ultra vires. And the fact that it was a decision that was taken many years ago in no way bars me bringing that case. I think that sets out clearly the nature of the disagreement between us.

Now, as for the points that Liz brought up earlier about looking back into factual matters and so forth, I think there may be a possibility of finding some way of compromising there. The sorts of things that I'm imagining are not really factual questions at all. They don't mean [witnesses. They're essentially matters—facial invalidity.]

But if you're persuaded of my basic argument there, then I'm very open to discussing how we might shroud that with protections against problems that it might cause in other kinds of circumstances. But first, we must decide whether or not in a case like this, the mere fact that ICANN has been acting ultra vires for many years is sufficient to prevent someone coming in and complaining about them doing it now.



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SUSAN PAYNE:

Thank you. I see lots of hands. I think my hand is next, although it's actually impossible for me to tell. But I'm going to [inaudible] prerogative. And I put it up because—I think I'm personally quite persuaded by your idea, Malcolm, of let's see if we can try and make a distinction between different types of decisions or different types of scenarios.

Having said which, I've been trying to think, just as you've been talking, about a scenario, and one that keeps coming to me is if something—is one that I don't know if it's helpful or not, but I've been thinking about in terms of the timing, if there were a scenario where some sort of consensus policy were adopted—and let's say it was, I don't know, a new version of the UDRP that is entirely content-based—and so there may be a question, at least to consider about whether that's within the bylaws or not, within ICANN's mission.

And no one challenges it for whatever reason until five years down the line someone who wasn't previously a registrar signs a registrar accreditation agreement and so now they are a registrar and now they say they're damaged by it. Arguably, if you're right and this is outside of the mission, this is something that ICANN should never have been doing, but at the same time, is it reasonable that a party that signed a contract with ICANN knowing that this was in place because it was consensus policy and everyone's been operating under it, five or ten years down the line, it gets [unpicked] by someone who has only just been damaged, I don't know the answer to that but I think maybe this is the sort of discussion that one could fruitfully have in trying to identify what sort of cases we think fall within the scenario that you were envisaging, Malcolm, and where you shouldn't be time barred.

It seems to me—again, not speaking as the chair but just speaking personally, it seems to me that that's worth trying to explore at least. And I hate it when people do this, taking their hat on and off, but I have just done it. But anyway, I'm just now going to go to the next person in the queue. It was Liz, but you put your hand down. So I have Kurt and then Chris at the moment.

KURT PRITZ:

Thanks, Susan, and thanks, everybody. I'm afraid I'm going to butcher this, but I understand Malcolm's point about the possibility or likelihood that some years down the line, there would be a valid complaint that ICANN is operating outside its mission. But I think in the ways to address that, there needs to be some balancing. So to me, the likelihood of such a valid claim goes down as time goes by, and the likelihood that ICANN is acting way outside its mission or remit that only affects one person is even less likely, and on the other side of that, there's some likelihood that parties can use IRP to be filed in less than good faith. And so that is why I think that laws are written and independent review or arbitration rules are written to provide for some—what I would call statute of limitations.

Additionally, I think that putting in some length of repose does not bar someone from seeking relief if in fact ICANN is acting outside its mission. There are many community processes by which items could be brought to the attention of the ICANN Board and if ICANN is acting outside its mission, I think there'll be more than one party interested in pursuing that, and then if the ICANN Board were to refuse to consider

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that in a valid community process, then the clock would start over again and that would be the grounds for an IRP.

So I think yes, there is a likelihood that there might be some good faith filing that ICANN's acting outside its mission, but I think that likelihood needs to be balanced with the costs and the availability of other remedies or other paths to other remedies. So I think that to me, putting in some time limit would not result in any undue harm. Thank you.

SUSAN PAYNE:

Thanks, Kurt. Chris.

CHRIS DISSPAIN:

Thanks, Susan. First of all, I just want to speak in support of what you just said before when you—whichever hat you were wearing, non-chair hat, and also to what Kurt just said. And I wanted to take an example and run it through. And I acknowledge up front that this is kind of off the top of my head, so I'm not sure where it's going to go, but let's run with it and see what happens.

It seems to me that one of the challenges here is that we've been having a conversation about ICANN acting outside its mission. So one of the questions that arises is, well, who decides what is inside ICANN's mission and what is outside of ICANN's mission?

So you take domain abuse as an example. There are many arguments in the ICANN community about which bits of what is loosely referred to as domain abuse are matters that are something ICANN should be dealt

with and matters that ICANN should not be dealt with. And there is a lack of agreement among the various different parties in the gTLD world about what is within the remit and what is not.

So how would that be decided? Well, that would probably be decided by some form of policy development process, and that policy development process, let us just say, would decide that it was ICANN's job to—and I'm just going to make something up—deal with spam. Not suggesting that's very likely, let's just follow it through.

So that happens, and the community, the policy development process, there'll be some disagreement but consensus is reached in the GNSO that that is the correct way forward and that's what happens.

And then five years down the line, to take your example, Susan, I think it was you who said a new registrar comes along or a new TLD operator comes along, buys .widget from another registry and decides that "I've been harmed because of ICANN's stance in respect to spam and that is outside of ICANN's mission." Then what?

So then there's an IRP, and the IRP says, yes, actually, it turns out we think—we, not the community, this IRP panel thinks that that is in fact outside of ICANN's mission.

Now, the argument that I would use if I was running the argument that says that should all be allowed to happen is that at the end of the day, the ICANN Board can say, "Well, sorry, panel, we don't agree," and the empowered community can ignore x(C) and simply say, "Yes, it's all just been a bit of an aberration, the community have decided this was okay,

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and even though there's been this IRP and this finding, we're not going to pursue the Board for not following it."

The challenge with that is that it takes—to go back to Liz's point made earlier, the cost, the inconvenience, the time constraint, all of the stuff that ICANN is put to, the money that ICANN has to spend in order to run that process through to pay for it, and then at the end of the day, decide that it's not going to do anything simply is not in the best interest of ICANN.

And it's not a bad faith claim. These people genuinely believe what they believe. So it's not about bad faith. So I'm at a loss to understand why we think it must be okay for someone to turn up in five years' time and say, "I don't like that. I think it's outside of the mission," even in a case where the community has decided that it is, because there's nothing to stop an IRP from happening in those circumstances, and there's nothing that says the IRP panel is bound by what the community has decided. Thanks.

SUSAN PAYNE:

Thank you, Chris. There's a lot going on in the chat as well and I'm not keeping on top of that. I think I—I suspect like others—will probably need to read some of the chat afterwards. In the meantime, Greg and then Malcolm, and I'm noting the time as well so we may need to bring this discussion to a conclusion.

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GREG SHATAN:

I think that in fact, everything that Chris wished wasn't possible is in fact possible under the IRP as written and that trying to resolve all of this through repose, I think, is really an attempt to undercut the IRP as it stands. And I think there are a number of checks and balances, and I recommend we all read all of this section 4.3 before our next meeting in total. Among other things, you'd know that x is actually letter x and not Roman ten.

So for instance in section (i)(iii), it discusses the fact that the IRP is limited in how it reviews Board decisions. It says for claims arising out of the Board's exercise of its fiduciary duties, the IRP Panel shall not replace the Board's reasonable judgment with its own so long as the Board's action or inaction is within the realm of reasonable business judgment.

And there are other checks and balances that are written in here as well, but ultimately, it is the IRP panel that is in fact making a judgment as to whether the board acted within its powers.

I think that in terms of the new registrar turning up five years later, whether they're turning up on an existing or a new new gTLD—and there may be some point, if we really want to get into the weeds, to deal with that, but that is in fact within the power of the ambit, we may have an issue to discuss about retroactive application. In other words, if that decision—if that was ultra vires, does that mean that it was void ab initio and that all decisions—the way that the board acted in those interim five years now has to all be unwound like convictions based on a dirty cop testimony?

That's, I think, where I might draw the line. Essentially, that the board was acting in good faith during that time and the decisions they made up to that point—or the effect of that decision up to that point can't all be unwound. But if in fact something is a violation, then it falls within the four corners of this IRP. This was intended to be radical accountability. Remember back where we actually were. This is not intended to be a polite evolutionary change from the previous IRP. So if people are uncomfortable with that, then that perhaps indicates we did a good job a few years ago. Thanks.

SUSAN PAYNE:

Thanks, Greg. Malcolm.

MALCOLM HUTTY:

Thank you. I always like to take the opportunity to agree with Chris whenever I can. So I would like to latch on to his scenario in which the board was not acting in a way that we so often seem to paint it in these discussions, as a valiant embattled community rebelling against the tyrannical oppression of the board. No, I'm very concerned about the time when the board is only acting at the behest and demand of the community and is being positively—more than egged on, but he community is loudly crying out for the board to act in a way which is inconsistent with the bylaws. And the individual—maybe the individual claimant, it might be a company or organization or whoever they are—are oppressed by that and wish to say they've been harmed by this, and this is not something that the community and ICANN and its whole structure has any right to do, it is completely outside the ambit and I

wish you, as the independent arbiter, to uphold my claim and to give me the remedy that I seek, which is a declaration that yes, I am right. And even though I'm only one and everyone else is saying, "No, ICANN should do this," I'm right and it is not within what was agreed, it is outside what was agreed. Please give me that remedy.

To which Chris replies, "Oh, why do that? Why go through all the difficulty and expense and hard work and all the rest of it to do that when at the end of it, it may turn out that the board just turns around and says, 'Well, the IRP panel can say what it likes but we're going to carry on anyway and the community has got our back so we're all happy?' What's the point of doing it if only that?"

And the answer to that is because the bylaws say so. And it's only because the bylaws say so and the bylaws say what they say that ICANN was ever given the ability to be free of the other form of accountability that it previously had to the US administration. Instead, it is accountable to the IRP for the interpretation of the bylaws. And when I say, "Give me the remedy that the bylaws promised me," it is of right that I ask for that ruling, and it is in no way a legitimate argument to say, "Oh, well, why go through all that expense when we can just ignore it?" Thank you.

SUSAN PAYNE:

Thanks, Malcolm. So we have David and Liz, and looking at the time, I think we'll probably be wrapping up after that. David please, and then Liz, and then let's gather our thoughts.



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DAVID MCAULEY:

Thank you, Susan. I just wanted to make a point at the end. It's been an interesting discussion. I think we have a lot more discussion in front of us. I remain of the point of view that I had in the e-mail. But I did want to note one of the things I said in the e-mail—or at least I meant to, in light of our discussion repose and statute of limitations, etc.

What I think would be a good rule would be a statute of repose, that is, an end to the ability to bring claims at a certain point, not a statute of limitations that would act as a defense that ICANN could either raise or not raise at its option. In other words, I'm talking about something that ends the claims irrespective of ICANN's action to invoke it as a statute of limitations. Thanks.

SUSAN PAYNE:

Thanks, David. Liz.

LIZ LE:

Thanks, Susan. Just I want to add to and agree with David and what he's saying, because the statute of limitations is something that's necessary to create certainty to the IRP process and to all parties involved. And when I say parties, it's not just ICANN and the claimant but also to the ICANN system and those in the ICANN system, ICANN community as a whole to provide certainty to decisions and actions that are taken.

I think one of the things that we said time and time again when it comes to this is there hasn't been a real example that we've heard of where there would be a situation where there would be no statute where a claimant would be harmed by a statute of limitations in that way. To

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date, I don't think we've heard of a real-life example that's been provided I think by Malcolm in terms of any claims that were barred because of the statute of limitations.

And I think that's one of the things where Malcolm had previously said there are certain cases that he's thinking of. Well, that would be good, I think, if we could hear what these cases are and get real-life examples of what these cases are so that we can stress test this and see if indeed there's something to a claimant—a claimant is being prejudiced because there is [no] statute of limitations, because there hasn't been a real-life example of that we've heard of. Thank you.

SUSAN PAYNE:

Thank you, Liz. And that seems like perhaps that is a path forward. I think Greg has given us all some homework, which is for all of us to reread section 4.3 which is the bit of the bylaws that deals with the IRP. I'm sure we all feel like we read it all the time, but that certainly doesn't mean it doesn't warrant a bit more reading. It's very easy to forget some elements of it, so I think we probably all need to do that as Greg tasked us with.

I think perhaps I would find it helpful—and I probably will try and take the time to look back at the discussion on this that actually happened during the accountability work that took place, just for my own edification. I'm not suggesting anyone else needs or wants to do that.

But perhaps we can start trying to kind of come up with some examples, the sort of concept of stress testing. Perhaps we can try and, by e-mail at least if possible, or in time for the next call, see if we can come up

with some examples of scenarios where we perhaps do feel that a repose might be completely reasonable, and those perhaps where it wouldn't be, or indeed real-life examples as Liz was saying where it's clear that we can't have this repose because in particular scenarios, it's inequitable and inappropriate.

I'm not sure I'm making a great deal of sense, and I certainly feel like I need to reread all of the chat, because I haven't kept on top of the sort of debate that's been going on in there as well. But yeah, we clearly need to discuss this further. We didn't come on to talk about prong one yet. That's not surprising. This prong two is the challenge, or at least I think once we—if we put this to bed, I think we will turn to prong one with a certain amount of sigh of relief probably, but it's important for us to try and get this right and to try and reflect what was intended, and to ensure that there's the adequate safeguards for the whole of the community, which includes ICANN as well.

So it's not easy. We have some more work to do, I think, all of us, but let's see if we can share some examples at a minimum over e-mail. And happy for other suggestions too for how we keep going forward with this. Yeah. Thank you.

Okay, so we have three minutes to go. Did anyone have anything they wanted to raise as AOB? No, I'm not seeing anything, in which case then I would assume that we will have our usual call on the usual call rotation, which is two weeks' time, so it would be on the 17th of November. If that is a public holiday somewhere like Thanksgiving or something—I think that's a bit before Thanksgiving, isn't it? Can

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someone just tell me? But otherwise, I'm assuming we'll have our next call on the 17th and it would be at the earlier time slot.

BERNARD TURCOTTE: 17:00 UTC and no, there are no public holidays on that date that I'm aware of.

SUSAN PAYNE: Super. Perfect. So 17:00 UTC on the 17th. Thank you very much. All right, everyone. Thank you very much. Thank you to everyone who joined, thanks for all of the engagement. It's been a really—obviously, people feel really strongly about this, but it's a really important discussion. So it's right for us to [inaudible] all of this and hopefully ultimately come to the right solution. Bernard.

BERNARD TURCOTTE: Yes. Maybe just to remind everyone who wishes to participate on the consolidation call that that group will be meeting on Monday next week.

SUSAN PAYNE: Brilliant. Thank you very much. That's excellent. All right, so time to wrap up. And yes, I know I have some homework to do. I think we all need to give this some thought, and hopefully we can circle back on the next call and hopefully make some breakthrough. But I think examples would be good.

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Oh, National Homemade Bread Day. Okay, then everyone should bring a loaf of their choice and we'll virtually eat them. All right. Thanks, everyone. I think we can stop the recording, Brenda.

**[END OF TRANSCRIPTION]**