SUSAN PAYNE: Hi, everyone. Thank you very much for joining. Welcome to the IRP/IOT meeting for the 19th of January 2021. The usual rules apply. Please keep on mute when you're not speaking and please try to remember to state your name for the recording if you do speak. I think we all have to try to recall that one. I know I personally forget it frequently but we'll all do our best I think.

Just before we start, I wanted to first of all wish everyone a Happy New Year, and thanks to those who are putting those comments in the chat, and to apologize for having to cancel at short notice last week, or last time around. Unfortunately, I went down with what turned out to be quite a short-lived bug but quite virulent, if you like. I spent the day in bed, I'm afraid, but it was not COVID. My test came back negative and, as I said, it was quite short-lived. But apologies for having to cancel on short notice, I don't like to do that.

Okay. So, first off, our agenda is up in the screen. We have to review the agenda and do updates to statements of interest, so we'll come back and do that shortly. Just in terms of reviewing the agenda, obviously, we are keeping a note of our action items from the last meeting. We then will have a brief update from the small group that's working on the consolidation rule, trying to finalize something for the consideration of the whole working group.

And in that regard, I think one of the main things that's probably worth noting is the e-mail that Helen Lee sent around a little bit earlier today. And then, it's an opportunity for us to continue our discussion on the time

for filing. There has been, again, a bit of exchange of e-mails during the course of the last few hours, and Flip is on this call, I see.

So, he had sent an interesting suggestion in response to this topic that it's worth considering and discussing further. I think he raises an interesting perspective. It's not necessarily that easy to understand fully from the e-mail alone, and so having Flip on to talk us through that a bit more, I think, is helpful.

We do also have an obligation, I think, to review the public comment input which, if we have all done our homework properly, we don't necessarily need to spend time going through every comment line-by-line but we have a responsibility to have properly reviewed and taken on board the comments that were submitted by the public on the last public comment period. If time permits, and I think it probably won't, we could move onto talking about the prong one, which is the other aspect of the time for filing, but let's see where we get to.

And finally, if there is any other business that anyone wants to raise, that will be the opportunity to do so at the end of the call. But if anyone wants to signal that they have any AOB to put on the agenda, please do so now. Okay, I'm not hearing anything. All right. So, just circling back up then to updates of statements of interest if there are any. Okay. Again, I'm not hearing any. If you do have any changes to your employment, or role, or otherwise, obviously, please do be sure to update your SOI and to make us all aware of it.

All right. In terms of action items from the last meeting, as I mentioned when I was running through the agenda, we all took away a homework

to review the public comment input on the time for filing, and particularly on the topic of the repose, so that we could have a targeted discussion on those comments which members of this group think are noteworthy.

So, that's one of our action items. The second action item is listed as staff although, actually, I think it is now sitting in my inbox, I'm afraid, which is to have a scorecard to track our progress on topics against the list of items we need to cover off. Apologies for that. That is, I think, something that I know Bernard has done, so I need to review and get that out to everyone.

Okay. Agenda item three is just a brief update from the consolidation subgroup. I will just start. But then, if Helen is on—yes, she is—I may ask Helen if she's like to take over and just talk to her e-mail that she sent a little earlier.

But in terms of that consolidation group, we have been making good progress. We have had a lot of discussion about the role of the arbitrator who will be making these decisions on consolidation, and whilst we had originally started tending toward the notion of making the procedures officer and the emergency arbitrator role the same role, as we have been continuing our discussions we have reflected that, whilst consolidation applications are certainly important and need to be timely, they probably aren't as extremely time-sensitive as to require the activities of an emergency arbitrator.

And so, again, this is somewhat a question of what we call the role. But also, if we were adopting the name and the role of the emergency

arbitrator, that would impact on all sorts of aspects, such as the timing for dealing with requests, and how those requests got made, and so on.

And so, with further reflection, I think we have concluded that, whilst we want to change the name of this role and we want to think about issues such as timing for appointment and how that gets worked out, it's not appropriate for these applications for consolidation to be actually managed by the emergency arbitrator.

But we also have been talking about issues such as the timing for requests for consolidation and intervention and we did move on to start thinking about the role of what's currently in the interim rules called the "amicus participation." Hence, that triggered Helen's e-mail that I think … Helen, if you don't mind, I might turn the mic over to you.

HELEN LEE: Sure. Thank you, Susan. So, we had, in the consolidation subgroup, as I stated in my e-mail, started talking about these issues around amicus. I provided some context from my experience with the Afilias IRP and some concerns that kind of came up in that context.

One suggestion that our team has been thinking through this is thinking that the limited … Well, first, I think, the issue that I previewed, that the word choice of amicus has a built-in bias and may have created a concern where there is this bias toward only participating in the traditional amicus context, whereas it appears—and I know that, certainly, there are other folks on this call who have a lot more experience on this and some history with the concept than I do—that it may have not been intended to be so limited. My understanding was that, although the Afilias panel didn't

extend the amicus participation to that of an intervener, it kind of lay somewhere in the middle.

So, I had some suggestions about how we could change things but we wanted to bring it to this group both to have the benefit of the experience, knowledge, and background that you all bring, and also to discuss what people think might be the best way forward. It was probably good to get that kicked over here to begin with because, certainly, this is a topic that is going to invite a lot of, I think, opinions. So, that's my introduction and I'm happy to cede the floor to anybody who might have some thoughts on that.

SUSAN PAYNE: Thanks, Helen. Yeah, as Helen said, we're really looking, firstly, for a steer from those who were in this group previously, or indeed who were involved in the CCWG work, in terms of the concept of that kind of third party intervention that has been classified in the current version of the rules as an amicus participant.

So, as Helen said, we're firstly interested in if any recall why that terminology was adopted, whether that was deliberate in terms of the view of the nature of the role. And I think, just generally, as well, there certainly is, probably, some assistance in the CCWG work in terms of the views that were being expressed about who should be able to be engaged into an IRP, and it does seem as though it's a wider involvement than what might be traditionally considered an amicus participation as that concept exists in U.S. and other jurisdictions. I'll stop talking. Sam.

SAM EISNER: Thanks, Susan. I'll just go back through and look a little more in-depth at that [and recall that] CCWG discussions, as well as our prior discussions. But just as a reflecting note, one of the things that I think we have always tried to watch out for during the IOT work is to respect the lines of work and to respect the role of the IRP as it relates to what the IRP is to challenge, and that the IRP itself might not be the place to bring full justice for someone who believes that they have been wronged or an entity that has been wronged, but it is a place to challenge acts of ICANN.

And so, if I recall, in our prior iteration of the IOT, as well as during the CCWG, we didn't really have discussions about whether there would be this line of parties that wouldn't … Not "parties," but there would be a line of entities that would be allowed participation that wouldn't necessarily be party status because they didn't fit party status, but it wouldn't be an amicus-level …

And we never talked about whether or not there was a deficiency in the amicus participation because the IRP panelists do have the ability and the discretion to determine how that amicus can participate, so I'm not sure that I understand the rule of bias that has been suggested about amicus. This is about bringing entities in that might have information about it but the IRP is not a place to make entities whole between and among themselves. It's about whether or not ICANN did something wrong.

So, I think we need to keep that in mind as we think about that idea of what it means. So, I'm not sure that you'll find anything in the CCWG or in the prior IOT about having broader amicus participation. I think we do have a structure that the roles that we're supposed to put in, as closely as possible, are to align with international arbitration rules.

And so, I think the more we try to create an interim party status or something, the further we're getting away from standard arbitration principles. So, I will go back and look more at it, but that's just my first reflection on the conversation. Thank you.

SUSAN PAYNE: Lovely. Thanks, Sam. Kavouss.

KAVOUSS ARASTEH: Yes, good morning, good afternoon, good evening. I fully agree with what was said. The scope of application or appropriateness otherwise of amicus in the IRP issue is quite different from the scope of amicus or appropriateness otherwise of amicus in the court. It's two different things.

We are not going to mobilize the entire community against ICANN that they have done some action incorrect or no inaction. I don't think we need to go to such a course of mobilization and so on and so forth. So, I have [issued] very carefully to it, the issue. This is a general statement that I would like to make.

Second, unless there is a concrete proposal about the consideration or amicus in IRP, or appropriateness or validity of that, I am not … I see difficulty to get into that discussion because, sufficiently, we have considerable difficulty now with respect to this timing that tonight you will hear from me that I have totally entire different views, which is something going in the wrong direction. So, let us not discuss amicus at this stage. Let us park on that and see, from the general point of view, do

we need to enter into the business of amicus in IRP/IOT, or we do not need to do that one at all? Thank you.

SUSAN PAYNE: Lovely. Thanks for that input. Helen has just commented in the chat, just to clarify that she wasn't trying to imply that there was—if that was how it had been interpreted—some kind of ICANN bias here, but more that her comment about the inherent bias of what's understood by the term "amicus" was what she was raising.

But unless others have thoughts on this and want to raise them now, we don't necessarily have to spend too much time discussing this now. As I said, within that small group, we did feel that we might benefit from the thoughts of the wider working group. So please do, if you have thoughts and want to share them, provide input in the e-mail in response to Helen's e-mail of earlier today and we will work with what we have.

Thank you for that. Other than that, did anyone have other questions about the consolidation subgroup at the moment? Okay. I'm not seeing anything, which is to be expected, I think. So, we can move onto our agenda item four, which is to continue our discussion on the time for filing.

So, I will just start off with a bit of an introduction or an explanation, I think, to why we are reviewing, or why I felt we need to review, the public comments. And this is just … I did respond to Chris's e-mail of earlier but I thought it was worth having this raised on the call, as well, and indeed for people to have the opportunity to discuss it or challenge it if they want to.

It's not necessarily the most exciting topic to go through, public comment input, and certainly on our last call I think it was widely felt that, for us to go comment-by-comment through all of the public input we had had on this timing issue was not going to be the best use of our time, and I fully appreciate that. Therefore, we all took an action item to review the comments so that our opportunity, now, when we get onto this is really to raise comments that we think are noteworthy in this context of what we do about the notion of repose.

But the reason I believe we have to review the comment input is twofold. The first is just simply that is part of our job. There was a public comment, it was actually some time ago now, on this timing rule. Because of what happened with the constitution of this working group at that time, that public comment input has never been reviewed by this group. The meeting started having fewer and fewer participants, and so the comments just simply weren't reviewed.

It is part of our role in seeking comments from the community that we then have to review that input and determine whether it changes our path or not. So, that's the first point, just simply that's our job. But secondly, we did have some discussion on one of the earlier calls on this timing issue where there was some suggestion—and I think it came from Malcolm—that, whilst he feels very strongly at one extreme on this topic, he was interested in seeing whether there was an appetite to try and explore a compromise that might be somewhere in a middle ground.

And whilst I think some in the group perhaps do think that's worth doing, I don't think that one could say that the group as a whole necessarily felt we were there yet. And I know that there were some comments,

including from you, Chris, that you felt that you were hearing from Malcolm as an almost alone voice, and what you really wanted to be persuaded was that he wasn't a lone voice and that there were others whose position was the same or similar to the position that Malcolm has expressed before you felt that seeking a compromise was necessary.

And I believe that the public comment input that we have had in two different public comments that have referred to the timing rule helps to inform that. I personally feel that it informs it sufficiently, that if we are able to explore a compromise that would be a good thing.

So, that's the other reason why we're doing that. I know you did raise an e-mail from Flip that he had circulated, and I think it would be really helpful to understand Flip's position or Flip's suggestion more clearly. And so I think, before we get onto looking at any comments people want to look at, we should turn to that. But I can see Kavouss has a hand up, so I will go to you first, Kavouss.

KAVOUSS ARASTEH: Thank you, Susan. For your information, and the information of others, it is about the decades that I am dealing with timing, which we call them "deadlines," deadlines that provide a sort of stability to the process. If any timing does not end to be comprehensive, to be valid, and to serve its purposes, it would have no value at all.

I am of the opinion, reading the comments many times, still, there is a degree of misunderstanding of some of the people commenting on this timing. The issue was that there was two timings. One is a 45-days, now become four months, and the other is 12 months.

I don't care about the first one. I care about the second one, to get the sort of stability to the process that you cannot file something, a claim, ten years after something has happened in ICANN. You cannot do that. That is why we want to have some timing.

So, we should clearly understand the first timing is not very important because it is truly flexible, vague, and unclear. Why? Because the starting of that 120 days is [fluke]. It says, "From the time that the person or claimant becomes aware."

This is a subjective, optional, and arbitrary issue. I could say that I became aware five years after something. Another guy could say two years after and another ten months after, so it is optional/arbitrary. I don't mind if you put something encouraging, and that is encouragement. That does not have any, I would say, legal or regulatory application.

The most important is the end of the process, that beyond that the claim or submission of claim should not be accepted. I understand the situation for some people, that they may say that this one year is too short or they want to totally delete that.

But if that is the case, I have a solution that I have applied for many, many years elsewhere. So please, I would like to come back to the issue that, at this stage, I am not prepared to accept at all to delete the one-year and put it totally [fluke] without nothing. And 45 days, or 120 days, or whatever days to start with has no meaning because the counting of the clock is arbitrary/is unclear.

I cannot forget my 49 years of experience and say accept everything that, the other people, they say. They may not face with such an application,

i.e. whilst faced with that application for something much, much more complex than issue of ICANN—much more complex: a multi-million dollars of project that the timing has an important element that you accept the claim or you reject the claim.

People are talking about their rights to submit the claim, but they should also talk about their responsibilities and obligations. So, these go together. I don't go beyond that, now. I leave it to you. But I have serious concerns and difficulty to delete the 12 months, whereas I have no problem as an indication and encouragement to put four months or any months to submit the claim, but there should be a date beyond which the claim is not accepted at all.

But I have a proposal for particular circumstances that somebody, by situation, might not be aware of the difficulties occurred to it, or to him, or to her within that one year. I have a suggestion for that but I don't put it now. But please be aware that … I'm very sorry.

You may believe that I would be in minority but I push my finger to this minority, which is legally important, that systems should have a stability. Systems should work without any arbitrary decisions and without any optional statements, and the stability is much more important. I leave it to you, distinguished, there, Susan, to deal with the matter, and I come back later. Thank you.

SUSAN PAYNE: Thank you, Kavouss. Thanks for your input. We definitely have been dealing with that 12 months, or whatever period it is. Our discussion at the moment is really focused on that 12-month … The concept of the

repose, and that is correct. I think we do have to, just for completeness, close off the other issue about what, on the agenda, is called the “prong one.”

So, the four months that it now is, or whatever. We do have to close that off but I think that is the less controversial topic, certainly as things presently look. I think a number of us would take issue with you about it being less important or arbitrary but I believe that probably depends upon the nature of the dispute.

In a number of cases, when an IRP is being brought, it’s very clear what your date of knowing or reasonably being aware of the decision that you need to challenge … I’m thinking, in particular, where you’re a contracted party or an applicant and the decision is being made that is directly in relation to you.

I mean, there is a very clear date from which your time runs and that time, that 45 days, or 120 days, or whatever it is, is the only time that matters in that context because you will never have the one year, or 24 months, or 36 months, or whatever it is. It will never be applicable to you in many, many cases.

But I understand your point that there may be some cases where it is much less clear-cut when your time starts from. But yes, we are talking about prong two, about the repose, and I think that is what we have been focusing our time on because we all recognize that it’s very important and it is, sadly, the aspect of this that is proving to be the most difficult to reach an agreement on. Malcolm.

MALCOLM HUTTY: Thank you, Susan. I'd like to thank Kavouss for his intervention, as well. New year greetings to everyone as my first intervention. That last point, Susan, that you were addressing from Kavouss's intervention about the potential for a lack of certainty as to when time runs.

I would like us to spend some more time considering and addressing objections and concerns, such as that point that Kavouss just raised and that you responded to in that our discussions last year really got to a point where it was starting to look like there was no willingness to work together, where it was starting to look like, "Well, I think that this should be like this and I don't care what anybody else has to say. I don't care what has been written in the public comments. My mind can't be changed. This is my position, and there it is."

But Kavouss's point there about the potential, in some cases, for there to be uncertainty is a real point. And while I would agree with you, Susan, that in many cases it will be very apparent when time starts running, and it will start running, essentially, immediately, as you say. And so, the concept of repose really won't be an issue. There will be other cases when it doesn't.

And so, this strikes me as a good thing that we should look at from the point of view of seeing whether we can actually work constructively to address the issue that Kavouss has raised, and other such issues like it, as well.

For example, it doesn't necessarily have to fall down to, "Oh, well, there is no repose and that's an end to it. There is nothing else, no other protections that are created." On the contrary, we could look at the

circumstances in which it might not be clear when time had started to run, and address them, and put protections in so as to avoid any other potential for downsides that Kavouss is pointing to and, therefore, address the legitimate concerns that are raised by some members of this group about the potential downsides of not having repose.

But repose is not necessarily the only means of solving those problems and, if we identify those problems and consider them one-by-one, we may be able to address them and ensure that the negative consequences of not having repose are never encountered. So, I hope we'll have the opportunity to do that. Thank you.

SUSAN PAYNE: Thank you, Malcolm. I thought I saw a couple of hands up beside yours but it may have been mis-seeing things. But I do see Kavouss, so I will go back to you, Kavouss.

KAVOUSS ARASTEH: Thank you, Susan. I'm sorry to come again. In even the one-year is [fluke] and ambiguous. Until the time that we don't know when the clock starts to count, any timing has no meaning. You cannot put timing on from the time that claimant is aware of the material effects on interests. This would change from case to case, and is arbitrary, and is difficult to justify.

One claimant may say that "I was aware two years after." It is difficult to say yes or no, and so on and so forth. And so, we have to have clear understanding of the start of the clock. There is a solution for that.

And also, there is a solution to address the point raised by my distinguished colleague, Malcolm, for some particular cases or some unforeseen consequences that, during the repose time, people may not be properly alerted to raise the issue and, after the one year, their right will be totally forgotten. I have a proposal for that, as well, because I have faced with that elsewhere.

There has been a case and some of this, I would say, the more severe that would be, a case of force majeure that somebody brings something [there's a] court. IRP is like a court—not exactly, but alike. A force majeure. I was not able to identify and discover the effect and the condition of the force majeure, so I have a proposal for that. So, I have two concerns: one, the start of the clock, and second, address the issue that Malcolm raised. Thank you.

SUSAN PAYNE: Thank you, Kavouss. I mean, I think I don't want to cut this discussion off if it's a fruitful discussion for us to be having now, since it has come up. What I'm hearing Malcolm say is that he agrees with me that, in many cases, when the clock starts is very clear, and probably is the moment the decision gets made and published.

We actually are running, I think, our timing from when the decision gets published on ICANN's website, since that's an obvious date. And for those who are impacted directly or by a decision that relates to their own application or something, their timing very clearly has a very clear start date, and the 120 days, or whatever time we fix on, very clearly runs from that.

But I heard Malcolm—and I think I heard Kavouss—expressing views that would support trying to find some solutions to this. There are cases, as we know, where it might be less clear-cut. If we could work out what those were and perhaps even agree some times by which, at a certain point, one could be expected, your knowing or reasonably to have known about some particular action … If we could determine or fix some cut-offs for when that might be that we're all comfortable with, then perhaps, as Malcolm says, if there were no repose it would leave people with less concern.

I'm not saying we have decided there is no repose but, if there was no repose, there may be less need for a repose because we have built-in certainties of timings in some other way. And I got the impression from what Kavouss was saying that perhaps that would be something he thinks is worth exploring. But also, Kavouss, you say you have some solutions. If you'd like to share them now then I think this is as good a time as any. Okay. Malcolm first, and then Kavouss.

MALCOLM HUTTY: I would yield to Kavouss. I heard him offer a solution there that I thought was a helpful contribution. Please, allow Kavouss to explain it in his own …

SUSAN PAYNE: Lovely. Then we'll go to you first, please, Kavouss, if you would.

KAVOUSS ARASTEH: Thank you, Malcolm. Thank you, Susan. Yes. I am not speaking from the sky, just implementing … Not "implementing." Transferring my background knowledge on an exactly identical issue. It is not an ICANN issue but is a subject of a claim, and the time of the claim; a deadline for that claim beyond which a claim would not be accepted in order to provide this ability.

However, now, this is the English [inaudible], however. [inaudible] the cases that the claimants are beat, the claim beyond that X-months, let us say beyond 12 months, indicating that he did not become aware of the material effect of the action or inaction of ICANN, which gave or gives rise to the dispute, giving justification for that.

Then, there should be prolongation, and we have that. I have that in other organizations. There should be prolongations but not unlimited. We could say the 12 months could be prolonged up to 24 months, or any time that you want, but it is subject to submission of justification and proof that he was not aware for certain reasons: reasons of communication, reasons of access to [inaudible] or force majeure, and so on and so forth.

That time could be prolonged up to X-months. I would say up to another 12 months, which is more or less along the lines of some of the comments that were made implicitly/indirectly about the extension of the 12 months.

With respect to the start of the clock you implicitly mentioned, I want to put it in a more formal manner. From the formal publication of the decision of ICANN, if it is not known we should make it known that anything on which a claim potentially could be raised must be published

with the date available to public, everyone, in the sort of publications, in a sort of circular, in the sort of section, special sections, or whatever.

There is a way to do that. That is what I have done for many years. There is a publication. In that publication, announce the decision made by the people making decisions—here, it is ICANN—and there is the X-months to comment. Within that X-months to comment, if the comment has not come, it is conceded that there is no more claim. That means tacit non-claim.

However, if after the four months the request comes that I was not aware for this and this reason, there is a close in the rule number four, or whatever number you give, that, subject to submission of, I would say, a strong justification to the IRP panel, that time could be extended up to X-months—I would say 12 months—provided that these two timings should be clear-cut mentioned in the rules.

The start of that publication by ICANN available for entire community in a very clear manner, and then 12 months. After 12 months, no comment means tacit no claim or no dispute, unless there is a submission that I was not aware, and please prolong that. Who will decide on that? The panel. The same panel that decides on the subject itself, which also decides on the prolongation.

That is quite a valid approach. The entity that deals with the issue also deals with the prolongation. That should be a strong justification for that, and there are many. I said the most severe of that is a force majeure: "There was a war in my country. There was an earthquake. There was this, there was that, there were so many other things. There was

unavailability of communication for me because I was not given the opportunity to have access to this, and this, and this." So, if this argument is agreed by IRP panel, then prolongation will be given but that also has a maximum 12 months. Thank you.

SUSAN PAYNE: Thank you, Kavouss. Malcolm, I imagine you are wanting to respond to that. I also did have Flip teed up to talk about his e-mail of earlier on in December. Let's see where this discussion gets to. I'll cut it off at the top of the hour if it hasn't naturally come to a conclusion before then and we'll move onto Flip. Malcolm.

MALCOLM HUTTY: Thank you, Susan. I'll keep it very brief so that we can move quickly to Flip. I thought that was a very helpful contribution and, fundamentally, I think that the idea that the claims should be filed promptly within the short time limit is clear and supported.

And also, I think that what Kavouss has said now is that, as a suggestion now, there should be an obligation upon the claimant if he hasn't filed in a timely fashion to demonstrate why he did and to justify why he didn't, and those reasons should be sufficient to justify the delay that has occurred, and the delay that is permissible may vary according to what the nature of that justification is.

I think that those are all … As principles, we'll look at the wording to implement that. But as principles, I think those are very helpful ideas that I think I would be quite willing to support. I would say there is one reason

that I think could never be limited in time, and that is that "the reason I didn't file any earlier than this is because the rules did not let me. I am filing as soon as the rules permitted me to do so."

I don't think that any claim that that is too late should ever succeed and that should always be permitted. But in other cases, I think, much as Kavouss has described, we will look at the precise timings and the wording, but I think this is a very fruitful area for this group to look at so I thank him for that contribution. And I must say, I am heartened that we are having so much more constructive of a discussion today. Now, I yield the floor so that you can move onto Flip.

SUSAN PAYNE: Thank you, Malcolm. Yes, and I too thought it was helpful. In fact, I want to ponder on this some more. Like you, I feel there is an area where this isn't possible, if you like, because of the way the bylaws express who can be a claimant. You have to be impacted. But I think, yes, this is a helpful thing to discuss further. But let's move on.

It may be that we have more light shed on potential areas of compromise from what Flip's suggestion had been, or Flip's expression of views and how things work in his country, I think is perhaps the best way to describe it. But I think it's better if I turn this over to Flip so that he can explain his e-mail and the point he was getting at himself, rather than me trying to paraphrase. So, Flip, if you'd like?

FLIP PETILLION: Thank you, Susan. Happy New Year to all. I'm so happy to hear, Susan, that everything is okay with you. Yes, the e-mail is too short, too succinct, and out of context to understand everything, I think.

The idea that I had in mind is, indeed, inspired by [quite some] legislations on the continent, and here is the broad structure: I see three possible scenarios. I try to distinct the scenarios because I think they will help us become more efficient and assure more legal certainty and stability.

The first scenario is, at the moment, where we are prior to the adoption of a rule or a policy. There, I would actually find it appropriate that, either part of the PDP or part of the board's considerations, the organization calls upon the views of a panel, a standing panel, a small group of people who are absolutely unrelated to any of the constituency's groups, whoever that actually is a part of the community.

Prior to adopting a rule or a policy, that standing panel would be asked to give its view on the proposed new rule or policy. That would be with a view to taking into account the comments by the panel or to ignore them, with all risks.

But probably, the wisest thing to do is to follow the advice by that panel. If the panel is negative on a proposed policy or rule, then it's wise to actually not adopt it and to go back to the drawing table. So, whatever that panel would share as an opinion, as a view, as an advice, that would of course be erga omnes, inherently, implicitly.

The second scenario I have in mind is post-adoption of a rule or a policy. There, within a very short timeframe—and I'm really thinking of a couple of months but I don't want to focus on that at this time, but I would keep

it short—anybody who thinks to be affected by a new rule or policy could call upon the decision by a similar standing panel with separate other members but composed of people of the same caliber, let's say.

This panel could actually—but again, erga omnes, so it would work for everybody—decide to annul a rule or a policy. Both standing panels would, of course, refer to whatever higher value we are talking about. That could be the bylaws, the articles of association, commitments, international law, or whatever.

The third scenario is quite different and the third scenario is a scenario where you are talking about the implementation, the application, of a rule or a policy. There, we would need to adopt a rule which says that, within X days following an event or the discovery of a situation, an affected party may start an IRP.

That IRP would be brought before a panel that is either composed on an ad hoc basis or with the help of the standing panel, either way. And whatever that panel decides is inter partes, only working for ICANN and the party who initiated the proceedings. That could be with a view to question the implementation in a particular case, avoid some consequences like harm that is suffered, and maybe even damages that are demonstrated.

The big distinction is that the IRP panel in the third scenario is completely separate from the standing panel for scenario one and the standing panel for scenario two. You could actually say that people with experience in the panel for scenario two could, at some stage, become members of the panel for scenario one.

But the reverse I would never think of because that would mean that people who have had an opportunity to criticize a draft rule or policy would actually become a member of a panel that could decide in a particular case but, again, with erga omnes effects. I wouldn't do that.

Interesting is that the three panels I have been talking about would always refer to the higher values: bylaws, articles of associations, commitments, whatever. The whole system would contribute to a balance that installs and promotes legal stability, certainty, predictability.

For scenario three, of course, we could—we should, I think—think of the precedential value of the decisions and the biding force of the decisions. Important is that, in scenario one, the ICANN Organization, its board, is free to actually adopt a policy, a rule, with the risks included if it has actually sought for the opinion/the advice of the standing panel in scenario one.

In scenario two, the board will be free to decide what to do if a rule or a policy is annulled by the panel. In scenario three, the ICANN Board will always be free to say, "Hm, that was an interesting case. Okay. It only has effects inter partes but such an important issue was raised in that case that it actually affects the community and we should rethink a rule or a policy."

This is, in some, the distinctions that I had in mind inspired by systems in some continental legal systems. I think with this in the abstract it may help us fill in the gaps and provide for the more details for every scenario—define timing.

Of course, for scenario one, there is no timing because every single rule or policy would be submitted for advice to the standing panel. In the second scenario, there would be a short time that we would need to define within which an affected party could raise an issue and ask for an annulment of the rule or policy.

And in the third, we have a whole discussion about, until when can people come raise an issue and initiate an IRP? So, some details would need to be filled in, here. But this is in the abstract. The system I had in mind, that's what I tried to explain with some of you at earlier stages. I am, of course, open to any question.

SUSAN PAYNE: Thanks, Flip. I have a few questions but I can also see some hands going up. And so, perhaps I'll turn the mic first to David.

DAVID MCAULEY: Thanks, Susan. Like Malcolm, I welcome this recent suggestion of compromised positions. Flip, thank you very much for your ideas. With respect to Flip's, I would simply say it sounds to me that it may be a little bit complicated, two, that it may go beyond what the bylaws provide for and what the CCWG accountability was looking for, and, to me, scenario three would definitely have to address the question of precedent by not being precedential. But the problem is disputes inter partes can have, as you mentioned, Flip, issues that would in a precedential system potentially have broader impact.

The other compromise that Kavouss was talking about sounds to me a bit like an extension of what Kurt Pritz suggested a could of meetings ago, and that was a compromise that I think may be a little bit more workable, and that was a compromise where there would be a repose period but there would be a stated ability to seek an exemption with serious guardrails, a serious guardrail being it wouldn't become a routine extension—it's not something that would happen simply because somebody asked but would be to avoid a serious injustice.

In my view, that would have been a decision that would have been to the standing panel, not to the ICANN Board. So, there are a couple of floated ideas of compromise which I find very welcoming. Hopefully, we could work on this. As Flip just mentioned, his ideas would require more work filling in some of the things.

So, my thanks to Kurt, Kavouss, Malcolm, and Flip for putting these on the table, discussing them. There may be some promise there. As between the two that have been floated, I think I personally would say we might want to focus on Kurt's idea. So, thanks very much, Susan.

SUSAN PAYNE: Thanks, David. Kavouss.

KAVOUSS ARASTEH: Yes, thank you very much. Thank you, Flip, for your very kind, I would say, investigations and thought. I have two comments on that. The first comment, you are dealing with three different panels with three different types of members, and so on and so forth.

Administratively, even, we have difficulty with the selection of the members of the panel today that, now, ICANN will start very soon with the SO and AC having an organization to select the members of that selection panel for the selecting of the members of the IRP panel.

So, that is the difficulty here but it is not the main difficulty. The main difficulty is what David mentioned. And I have another difficulty that separation of power, separation of authorities … We, at least, from the CCWG, are the legislative entity to have the rules. Members of the panel are judicial ones, to judge and to apply the rules as it must be. You take this from us, you want to give it all of them to the panel and to decide.

In my view, the idea may be good but implementation would not be free of complications. I'm not defending what I said but I'm saying that what I said has gone to the test for years and years. It is workable, very simple to implement without any doubt, without any difficulty, and it has already been done elsewhere, the concept.

So, I'm not defending my own suggestion but I think that your requires more work and may face some implementation difficulty and some complication in the implementation among the various parts of the panel, panel one dealing with this one, panel two dealing with that one, panel three dealing with the other one. In the first two, ICANN is free totally. The third, ICANN is half-free.

Okay. It is a lot of assumption, a lot of hypothesis, that should be worked out. They may take more time, the rules itself, not having the rules at all, and leaving it to the panel to decide rather than this one. So, it may not

properly help. Thank you. You will forgive me if I make very straightforward comments. Thank you.

SUSAN PAYNE: Thank you, Kavouss. So, in not seeing any other hands, I was going to ask just a couple of quick questions, as well, Flip, if that's okay. I think this is an interesting concept. When you and I had talked about it, you had made a distinction in the context of timing between some of those actions, and I think you did say this but I perhaps missed it when you were explaining this just now.

But if I understood correctly, your concept here was that decisions or policies that are being challenged as ultra vires, or contrary to the mission, or whatever, which have, if you like, an impact on everyone are ones where, in this kind of concept, you would view them as being ones where there needs to be some time limitation, so, effectively, where a repose would seem appropriate.

And when decisions or challenges are of a more personal, inter partes nature, perhaps one could draw a distinction between the need for a repose in that scenario and simply have a certain time period from when you know, or become impacted by the decision, or whatever.

Did I understand that correctly? Have I expressed that correctly? I think that was an area where it gave, again, this notion of not viewing all types of challenge to decision-making in the same way when we're talking about the repose. So, I guess I just wanted to double-check that I understood you correctly and whether that is thought to be fruitful at all.

FLIP PETILLION: You did, Susan, and you did summarize it very well. In scenario three, the rule or policy survives the IRP. There is only a decision, a declaration, as we call it, that needs implementation by the board, but that does not touch the rule or the policy.

Of course, the board will be free to say, "Actually, this was quite interesting. We need to reconsider this or that." It will all depend on what the consequences are of the particular declaration in that particular case, and maybe there will be absolutely no reason to review a policy or a rule.

The difference is, indeed, scenario three is inter partes, scenario one and two is erga omnes. It's actually an opportunity to have, let's say … I've heard Kavouss but I also have experience with these systems really working. It's really calling upon a third party, extremely independent, scholars, highly regarded people who are asked to do a last check before adoption or a check very, very shortly after the adoption of a rule or a policy, and it's really meant to focus on certainty, predictability, and stability.

SUSAN PAYNE: Thank you, Flip. Yes, I did want to just double-check that I had understood. And so I think, in a way, in the context of what we're doing … Because like David, I do have some … In my mind, I would need to think about this more in terms of how this fits with what the bylaws tell us our scope for an IRP is, but I do hear, at a minimum, your suggestion being one about, when we're struggling with this repose concept, perhaps we need to be not treating all types of claim in the same way, and perhaps

there is a distinction to be made in the context of some of them and in terms of whether a repose is appropriate or not. There are some comments in the chat that I'm going to read but, Sam, I'll turn the mic to you.

SAM EISNER: Thanks. I appreciate the distinction and thought that has gone into this, Flip. There is a sense that has been coming up through the conversation—and I know that Chris Disspain has pointed this out a couple of times in some of the other repose conversations—that the due tension of … Is the IRP about holding ICANN accountable to broader issues? Is the IRP a place to undo policies that might be ultra vires, or is the IRP a place for individual entities to have relief from the impact of a decision from ICANN?

And one of the tensions that I see here is that, sitting in this from the ICANN role, my inherent belief is that any time ICANN is actually acting against its bylaws it's doing something that does impact the entire community. The community has the right to expect ICANN to always act within its bylaws and, any time that it is called on doing something outside of its bylaws, that is a serious issue.

So, I don't know how to necessarily divorce the individual party impact from the broader community impact, and I think that, with that, there is always the ability for a party to claim that broader impact, as well.

So, I don't know how we create that distinction and I'm not sure that our bylaws currently have this dual tier of requiring some sort of repeal of a policy because that's not actually one of the allowable outcomes from an

IRP as it exists today. We get a declaration as to whether or not an action of ICANN was in line with the bylaws but there is not required outcome. ICANN should be expected to act in line with that declaration but there might be places to test how far that goes, I don't know.

But I think we have to make sure that what we're trying to set up here still remains in line with the bylaws and in line with the spirit, which I know you're doing, of what the IRP itself has set out to do. So, I'm having trouble drawing that line as cleanly as I see it might be drawn within your scenarios. Thanks.

SUSAN PAYNE: Thanks, Sam. Kavouss.

KAVOUSS ARASTEH: Thank you very much, Flip. First of all, please allow me to say I have no intention to put in question your expertise and qualification. This is not my job. I am no judge and I should not judge anybody's views, I just could give my own view. But I think that there are a lot of complications in the concept that, maybe, principally, could work, but difficult to implement, maybe. I don't know, very difficult or difficult.

However, if you take that, first of all, we have to have a clear description of the three scenarios that you have mentioned, that is full-fledged modifications of the rules that we have to put it to the public comment. If not, two, at least one, but maybe two, because you may receive more comments and more questions about that.

But what I suggest is the existing rules. What we do: we just clarify the start of the clock; we maintain 12 months; we mention that, beyond that, normally there is no claim accepted unless the claim provided justifications of missing the deadline. [May not requires] any public comment because it's not major changes. It's existing rules but clarification.

What you suggest is [inaudible] that also, in my humble view, may go, as David mentioned, beyond what is in the bylaw. It's a new idea. So, we may re-establish the group under [battery] and start to do it, section 43, differently. Once again, I fully agree with your thought but I have difficulty with implementation, I have difficulty with the timing.

And believe me, I may be a stupid person. I didn't understand your different three concepts because it's not on the paper. I have to analyze. I have at least some degree of knowledge to analyze the things very quickly but I am not sure distinguishing about that and complications.

And even, I don't know whether it's a more complicated task of ICANN or not and whether it has resolved the issue that it may require two public comments, and clear-cut description and distinction, and time among ourselves. At least, we should clarify before we're putting something to the public comments, but that is the situation. Thank you very much, again, for your valuable thoughts.

SUSAN PAYNE: Thank you, Kavouss. Flip, I think you may be the last word on this for now.

FLIP PETILLION: Thank you, Susan. I also read some comments in the chat, especially by Chris. If there is an interest by our group, I'm happy to put that on paper, and to work it out a bit more in detail, and share it with the group, and see where we go from there, but only if there is a real interest by the members of this group. Then, I'm happy to do that.

SUSAN PAYNE: Thanks, Flip. That's a kind offer. I'm not sure who that comment is. Oh, that's Chris. Yeah, I was going to say … And Chris has been putting comments in the chat that I think he, certainly, would find that of great interest. I think, without wanting to give you lots of work, I would, too, but I think in doing that it would be worth having an eye to what the bylaws say in order to be clear of what was … To the extent that something is being proposed, whether that fits within the bylaws as they currently stand, or to what extent it would require changes to the bylaws.

But I think, to the extent that you are, if you like, making proposals as to different types of natures of dispute that might be treated differently, that is a useful starting point for a discussion on compromise.

I'm not necessarily saying it's the only starting point but I think what I have heard on this call—and perhaps this is as a reflection of where everyone has come to as a result of having spent the time reviewing the public comments—there does seem to be a greater willingness to try to find a middle ground here and not an all-or-nothing on whether there should be a repose, yes/no.

So, I think we have got some suggestions, here, that may be able to be … One or more of which might be worked up and taken forward. I'm seeing

a bit of agreement on that in the chat. Flip, your hand is still up. I think it might be an old one.

FLIP PETILLION: It's not. I just wanted to add—

SUSAN PAYNE: Okay then, I'll turn to you.

FLIP PETILLION: Thank you. I just wanted to add, and I forgot two minutes ago, that, of course, I would take into account the comment by Sam and by Chris, and maybe others, regarding the [possible] impact on the bylaws and the potential need to suggest an amendment. But I would, indeed, take that into account. I'm sorry I forgot to mention that.

SUSAN PAYNE: Then thank you. I think there is certainly some interest in the group in at least understanding and discussing further, even if, ultimately, some people are a bit uncertain on how this could fit. But there is, certainly, a willingness to look at this and view it as potentially worth further discussion. So, thank you for the suggestion. Kavouss.

KAVOUSS ARASTEH: Thank you, Susan. I suggest the following. First of all, as I said, I have not well understood nor analyzed the proposal of Flip. I request him to kindly put it in a more clear-cut, understandable language, all three scenarios,

with advantage and disadvantage of each of which, and then inter-relation of these three different scenarios, and giving example of the cases that may simply go to scenario one, and scenario two, and scenario three.

Once it is provided, either we discuss it here or you kindly start with a small, little group, maybe yourself, Chris, Malcolm, David, and maybe one or more, two, to see the workability of that and the implementation difficulty of that. And that group needs to identify whether or not we need to change the bylaw. If it gives rise to change the bylaw, I will not be comfortable to accept that.

Among us, not limited to one person, Chris has considerable experience on changing of the bylaw, that we have done on a small team some time ago. And I'm not in favor of changing the bylaw. I see the consequence and difficulty of that in some SO/ACs and so on and so forth, and the very tedious formalities and procedure for that, because I was working on that in the Work Stream 1 and so on.

So, if it is going to end to change the bylaw, I am not comfortable to that. I am more for a simple, clear-cut suggestion, unless somebody provides the disadvantage of what I propose—the difficulty. What is the difficulty?

So, you could not reject somebody because what I suggest does not require any change of the bylaw, does not require any public comment, does not require any additional work by a small team that I mentioned—I apologize if I nominate some distinguished colleagues without their permission, without their consultation.

There is a clear-cut way that you could work out, establishing a starting point similar to what someone says, yourself and some others from the publication, and one year, and then a paragraph. Beyond that, no more claim is acceptable unless providing sufficient justification, which may provide up to another 12 months. Simple, clear-cut, no change in the bylaw, and it is, in fact, a supplement to what we have already done.

So, we have to compare the cases to see which case requires more work and [inaudible]. We should not convert this group to a research group because time is very limited for us. Ideas are welcome, ideas are respected, but we need also to treat them based on their complexity of implementation, and difficulty of public comments, and so on and so forth. I'm sure that, if you put all these scenarios, you'll receive many, many comments. Before, you had 19. You may receive more than 19 questions and so on and so forth. Do we have that time? I don't know. Thank you.

SUSAN PAYNE: Thanks very much. So, I'm conscious that we're coming close to the end of our time. Apologies in the sense that I haven't done a very good job in keeping us to what had originally been proposed as the agenda in the sense that we haven't done, really, a discussion of public comments that people think are meaningful.

But I do think that this has been a useful discussion, a perhaps more positive and less polarized discussion than some of our previous ones have been. And so, I think it has been very valuable. Perhaps what I

should just ask first before I wrap up is … Not that I'm going to ask you to actually do this now. I think I haven't allowed time for it.

But did anyone identify comments from the public comment that they felt they really wanted to discuss and bring to the attention of the group, or do I get the sense that, in most cases, you saw in the comments what you were expecting to see and you have seen the range of opinions, and all that simply has done has been to help people feel that there is a need to try to find a path forward and that a sort of binary answer is not the ideal answer based on the input from the community?

I think I'm trying to get the sense of where we go on the next call in terms of whether you think it's valuable for us to try to do that quick review of comment input or whether you feel that, having reviewed it in your own time, there is nothing you feel that needs to be called out because there is nothing that's unexpected in there? Kavouss.

KAVOUSS ARASTEH: Yes, sorry for the last two minutes. Is it possible that I request Sam or others to provide the implementation or potential implementation of these three different scenarios? Sam because of the ICANN implementation of that, because everything is relayed to them, whether they [face] something, whether, instead of simplifying their work, they may complicate that, they may create another thing to the panel, so we need to have panel and inside the panel, and watching, the watchers, and so on and so forth.

So I request, if possible. If it is not possible, I don't insist. But I request whether Sam could provide some indication of potential difficulty if we have various scenarios to implement. Thank you.

SUSAN PAYNE: Thank you, Kavouss. So, I've got a whole series of hands now in the last minute or so. So, Nigel, David, and Malcolm, if you don't mind, very quickly.

NIGEL ROBERTS: Very quickly, I was hoping to just make an intervention regarding the predication of any changes on bylaw changes. That's just not practical. The procedure to introduce a bylaw change would be tantamount to kicking things into the long grass and we don't want to do that. Thanks.

SUSAN PAYNE: Thanks, Nigel. David.

DAVID MCAULEY: Thank you, Susan. On reading the comments, I think it would be worthwhile for everyone to read through them if they haven't yet. I have gone through them. I just wanted to mention to Bernie, on the August 2018 comments that were specifically on rule four, there were two links that didn't work for me.

One was from Verisign. I'm well aware of that comment. The other was from ISPCP. That link didn't work and I'm well aware of that comment,

but in case people go back you might just want to check it. Maybe it just didn't work for me but the links didn't work on those. And so, I think it's useful but I don't know that we need to discuss them. Thank you, Susan.

SUSAN PAYNE: Okay, thank you. And Malcolm, finally.

MALCOLM HUTTY: Thank you, Susan. My own view is that I think it's part of our duty. I agree with your opening remarks. I think it's part of our duty to review these comments and it's disrespectful to the community not to do so, but I have no particular view on whether that should be at the next meeting or whether we should carry on with some other work now and we should come back to them at a later time. I'd only say that, merely, if we don't go through them at the next meeting then that shouldn't preclude us from coming back to them later.

SUSAN PAYNE: Okay. Sorry, I think I was speaking on mute there. Yeah, sorry. Thanks for that. Noted. Then, I will bear that in mind and give some thought to when we do do this exercise. Perhaps it's something we can do at the start of the next call in order to have done it without wanting to preclude possible progress on some of these other thoughts. Bernard, you've got your hand up.

BERNARD TURCOTTE: Just the suggestion, what some other groups do when they start getting near a proposed solution to a thorny issue like this, they actually run through the comments at that point, sort of as a stress test of the proposed solution, and that may be useful in this case.

SUSAN PAYNE: Yeah, thank you. I think that might work well, particularly given that, hopefully, everyone has reviewed the comments. And so, we are not acting blindly without having read them at this point. All right.

Our next meeting, as it says on the agenda, is in two weeks' time in the 19:00 time slot. I think we will look forward to Flip's work, and perhaps I will try to take some time to re-review Kavouss's suggestion, perhaps in the context of what Kurt had previously circulated, and see if there is a combination of those two suggestions that might work—or, alternatively, to recirculate in any event so that we all have to mind those compromises, or starts of compromises, that people have been suggesting.

Okay. But please, to the extent that you would like to continue this discussion by e-mail on our list, that would be very welcome. All right. Thanks, everyone, and sorry for running over by a couple of minutes. I will stop the recording and we can wrap up, now.

[END OF TRANSCRIPTION]