BRENDA BREWER: And good day, everyone. Welcome to the IRP-IOT Call on the 2nd of February, 2021 at 19:00 UTC. This meeting is recorded. Kindly state your name when speaking for the record and have your phones and microphones on mute when not speaking. Attendance is taken from the Zoom room and we do have apologies from Flip. Susan, I'll turn the call over to you now. Thank you.

SUSAN PAYNE: Thanks, Brenda. Yes, and welcome, everyone. Thanks for joining this week's call. We do have apologies for Flip although it looks as though he's actually managed to join us. So, they may be … The apologies may, in fact, have been overridden.

FLIP PETILLION: Hello. I'm here.

SUSAN PAYNE: Yeah. Thanks, Flip. I can see you're with us. I can also see we've actually had a few additional join us since you just started the recording, so that's great. We've got a fairly full house tonight.

Okay, so let's kick off. First up, we just need to quickly review the agenda and do our usual updates to SOIs. In terms of the agenda, the main thing we're going to be doing, we'll just quickly touch on the action items from the last time and have a brief update on the consolidation subgroup. But I think the bulk of our time is probably

again still going to be spent on the timing issue, the time for filing, and more specifically, the repose.

And then obviously, at the end, we'll have some time for any other business if anyone has anything they want to raise. And please feel free to signal that in the chat or speak up now if there's anything that you do want to put in the agenda for AOB. I'm not seeing anything at the moment.

Do we have any updates to Statements of Interest at all? Super. Again, not hearing anything, not seeing anything in the chat, so it looks like we're all good. Just the usual reminder. Obviously, if you do have any kind of change to your employment or affiliation or the like, please do update your SOI and just flag it to us as a group so that we're aware.

We've obviously taken the view that issues like being involved in an IRP or advising someone in an IRP doesn't preclude you from participating in this group. But we, obviously, it's something we obviously want to be bearing in mind when we're having these discussions.

Okay, so action items from the last meeting. We have an action item for Flip. He is going to circulate a sort of… He was going to sort of expand on his compromised proposal that he talked to us about on the last call. I think, Flip, you had indicated that we could expect that in sort of early to mid-February, so I think we'll probably just keep that on the agenda as an action item if that's okay.

FLIP PETILLION: Yes, please. Still possible for me.

SUSAN PAYNE: Okay, cool. And then an action item for myself, I had indicated that we had some useful discussion and a useful proposal and suggestion from Kavouss and I had indicated that I would be just revisiting the transcript and giving that some more thought. I think we'll come onto that, I think, as we move into our discussion on the possible compromises.

So, agenda item three is just a brief update from the Consolidation Sub-Group, and actually, certainly from my side, I will give the floor to anyone else in that subgroup who wants to speak. I don't particularly have an update from that group. We didn't meet last week, which is mostly down to me and being unable to find a time in our usual sort of time slot when I didn't have a conflict.

But in the meantime, the topic that we'd raised with this group and that we are due to be grappling with is the one about the concept of an amicus participation, as we currently have it referred to in the rules. And whether that terminology is the correct one for what it is that we're trying to achieve, or indeed, whether we need some kind of different terminology, or indeed, whether what we're trying to achieve is what would traditionally be considered to be the usual, the traditional amicus-type role as understood from litigation in jurisdictions such as the U.S.

Bernard has very kindly pulled together a sort of history document from the IOT in terms of how this concept of an amicus was discussed and the concept of the terminology came about in the previous discussions on this topic, which we can then share with the group.

Obviously, this is something that the Consolidation Sub-team are looking to take forward, but as we raised on the last call and raised by Helen Lee in her e-mail in advance, we were interested and keen to have the input from this wider group before that sub-group went down a particular path and ran the risk of bringing something back to the full group for adoption which the wider group disagreed with.

So, we can continue to progress that. I think we'll circulate the summary that Bernard has pulled together, and if anyone in this wider working group does have input or comments that they want to make, please do share them by e-mail. The Consolidation Sub-group will be meeting again next Tuesday, so on the alternating week for this call.

I'll just quickly pause and see if anyone else in the Consolidation Sub-team wants to add anything to that. Okay, I'm not seeing anything or hearing anyone. So, I think we can move on and discuss and try to progress further the discussion that we had on the last call on the time for filing, and more specifically, on the concept of the repose.

Just to briefly summarize for anyone who wasn't able to join our last call, we spent some time with a suggestion from Kavouss, hearing from Kavouss, his views on an area, which essentially might be the beginnings of a means of compromise.

As we've had with, I think, a number of the members of this IOT, there's a discomfort with the notion of dispensing altogether with any kind of outward time limit, sort of final outlying time limits, the kind of notion of this repose. There's a lot of discomfort with completely dispensing with any overarching time limit, albeit obviously that we do understand

that in the previous public comments and the discussions that this IOT group had in its previous situation, the version of the rules that went out for the second public comment had removed altogether the concept of a repose and sought the views of the community on a rule that removed that concept.

But obviously, Kavouss and a number of others in this group have a degree of discomfort about that. And the suggestion that we had from Kavouss was something that he drew on his experience in other areas for, and the notion that we should put in some kind of a time limit but that there should be some concept of prolongation or being able to extend that reposed time limit in circumstances where there's sort of evidence and a good justification and proof as to why the potential claimant hadn't been aware or hadn't been able to meet the deadline.

And so, we talked about that. That got, I think, some support from some of the members of this group who thought that that was a good starting point and an area for further discussion, also some comments that it actually, that it aligned with a sort of very similar concept to the compromised suggestion that Kurt Pritz had made for us a little while back that considered a similar sort of concept, not identical but the notion of having a time limit—but having some scope for making an application to waive it or to extend it where, for example, there might be undue hardship or something of that nature.

So, we discussed both of those concepts and we also heard from Flip who had previously put something in writing and was expanding on that notion. And I think, again, was of some interest. Certainly, some people found it very interesting notion. Just very much to paraphrase, Flip was,

again, calling on experience in, I think, his particular jurisdiction and talked about three different scenarios, one being prior to the adoption of a particular rule or policy having some kind of panel which assesses the relevant policy in question and gives a view if it feels that it shouldn't go forward, then a second scenario where once that rule or policy has gone forward, there would be a short time period for anyone who has been affect to file a complaint to a different panel.

And then, finally, in this third scenario, it would be there's a much more individual challenge to the implementation of that rule or policy, where that would be where the affected party would bring an IRP. And Flip had commented that it might be that in that third scenario, that where it's a dispute that's sort of personal to a particular party, that scenario might be one way or it was okay not to have a repose.

We did have a bit of discussion from some others in the group who expressed a bit of concern about whether that sort of concept, whilst very interesting, really fits with what we're having to work with in terms of the bylaws framework. And certainly, a number of people expressing concern at the complexity and challenge, if we were to try and go down a path that required us to make a bylaws change. But Flip was going to ponder on this further and provide a bit of further clarification for us in due course.

So, that's where we got to last time. And what I tried to do, really for the purposes of sort of giving us something to discuss on this call, was I tried to pull out, I suppose, what I heard, if you like, from the last call on potential areas where we might be seeing the beginnings of something that could form a compromise. And so, whilst I did circulate just a

couple of slides so that people have them in their inbox, I was anticipating that I only circulated that just before this call and so probably, it's really for the purposes of us to discuss here on this call.

Obviously, I don't want to preclude anyone raising anything else, but as I say, I thought at least as a starting point, I wanted to try to capture where I felt that I heard us going last time around and to see whether that matches what you all feel was the direction of travel and whether you feel when it's captured in a sort of summary form, whether you think that this is workable or the beginnings of something that might prove to be workable.

So, Brenda, if you wouldn't mind, could you call up the first slide? Thank you. So, again, this is making the assumption that there is some repose of some sort. The duration of that repose being, obviously, something to be determined whether it's 12, 24, 36 months or whatever. But that, perhaps, if we were to have a concept of some kind of outlier time limit, that perhaps what we're trying to do is come up with a compromise that tries to address some of the concerns that have been raised by members of this group, and indeed, by members of the community so as not to build in an unfairness for potential claimants.

And so, firstly, this notion, therefore, that came up out of the compromises from Kavouss and from Kurt, some kind of concept for a prolongation of that time period, that repose period, or an exception/waiver to it. And I think we'd want to be thinking about what would be the possible circumstances where that might be appropriate. I heard from Kavouss the suggestion that it might be where a potential

claimant can bring a justifiable explanation of their lack of awareness within the relevant time period.

Kurt had come at it from a slightly different perspective, but something where to keep to that repose period would give rise to something that was clearly a demonstrable injustice. I think probably we'd want, if we were going down this kind of path, we'd want some kind of clear justification to be made by the claimant who is looking to bring an IRP out of time and some kind of evidence or proof that supports that justification.

And then we have a question about where would that decision get made. Kurt's proposal had suggested it might be a decision for the ICANN Board with us trusting to the Board to be acting in good faith. I know in response to that suggestion on e-mail, there was some concern about that. Certainly with the ICANN Board effectively being one of the parties to an IRP that perhaps puts the Board in something of a difficult position.

An alternative might be what I think I heard coming from Kavouss, was a suggestion that it's a decision for the panel themselves. And whilst we, at this stage in the proceedings, wouldn't have an IRP panel, it might be a circumstance where there would be one of these kind of interim panelists drawn down from the standing panel who would be making that kind of a determination on whether to allow the out-of-time IRP.

I'm seeing a hand. Oh, thanks. Yes. I'm seeing a hand. I was about to ask whether we want to pause and discuss that before we go on to look at the rest of what I've listed out or pulled out. But I'm seeing a couple of

hands now, so that's a good point at which to pause and I'll call on Kavouss. Thank you.

KAVOUSS ARASTEH: Thank you, Susan. Good evening to everybody, or a good time to everybody.

The option that I have suggested has been tested since 1979 in many, many, many conferences and it relates to retention or suppression of a multi-million dollar project that, according to the principal, must respect a deadline.

These conferences were of about 1,500 to 3,400 participants around the world, top-level CEO, technical, operational, administrative, legal, and so on and so forth. It has been tested. The only thing that they defer is the extension, whether the extension should be six months or should be one year. But the issue is that people have the time to submit something. If they failed, the submission cannot be given or they could not submit any claim unless they provide a justification. And justification, as I mentioned, one of the measures of that would be force majeure, would be not being able to be ever of any impact of action or inaction of the Board of the ICANN.

This is something which has been tested. This is very simple to the previous proposals which were on the table, having the 12 months. And in reply to the comment of the people that these 12 months may not be sufficient, we put some qualified additional time. Does not require any change to the bylaw at all and that does not require any action from any other entities than your team.

Let me make it clear. I am against, not in favor. I am against of anything that may require any modification of bylaw, number one. And number two, having various options, scenario one, scenario two, scenario three, which may complicate the works. This is not that I want to support my own suggestion. This is not my suggestion. This is something which has been tested.

Thirdly, Susan, unfortunately, I have gone through a medical surgery and I am not in a position to continue to look at the screen because I had some operation on my eyes, cataract, and I have to leave your meeting. But I'm sure that you and some other people are looking for a solution which is not complex, not complicated, not requires a change of the bylaw, and easily implementable, and has already been tested over many decades in cases much more difficult and complex and costly as the case that we may be.

This is what I have to say. I apologize to you and to the team. It doesn't mean I don't want to collaborate, but I may not be able to continue to look at the screen because my eyes are fatigued. So, that is that. So, I kindly apologize and I am waiting for a few more minutes to get any reaction from you, as the Chair of this group, and collaboration from others. This does not mean that I object to any other thing, but I think we should look for the most simplest, most straight-forward, most practical, and something which I am very sensitive doesn't change the bylaw.

I have been working in the Work Stream 1, Work Stream 2. Some of you may have been witnessing that. I am familiar with the situation. I know how difficult the bylaw is, how difficult is the Empowering Community

to modification of the bylaw, how much it takes, and there are some other colleagues like you, and Chris and Becky and others, David MacAuley and others, Robert and everyone, that are more familiar than me that how difficult it is to modify the bylaw even if there is a likelihood to modify the bylaw.

Because whenever, and more importantly, if you go to something which is complex and then you have to go to the, I would say, community comments, public comments—I'm sorry—and public comments may bring another question, may more complicate, asking the issue, "What is it?" and may not achieve the objective that they are looking for unless you want to work with some other, I would say GNSO or ccNSO six years or ten years of discussion. It is up to you, and I thank you very much. Thanks.

SUSAN PAYNE: Thank you very much, Kavouss. Yes. Before I go to David, I will just quickly respond to you then. Firstly, I think I probably speak for all of us when I say that I'm very sorry to hear that you had to have an operation. I hope, obviously, that it went well and that, as a consequence, you make a speedy recovery. And I certainly think, I recognize fully that it's incredibly challenging, if you've had an operation on your eyes, to be asked to look at the screen. And so, thank you for joining us at all. And I think we would all be wishing a speedy recovery and I hope that your eyes improve rapidly and as soon as possible.

And again, thank you for your comments. I hope that I, in trying to capture and summarize for the purposes of the discussion, I hope that

I've done justice to what you had suggested last time and that it's formed at least the skeleton of a start to a path forward on something that keeps a repose but doesn't build in unfairness.

And I think we all, I certainly am very conscious of the complexity that would be involved in a bylaws change, and it's not a path I'm particularly keen to go down. And indeed, we, in the bylaws, have been given a task to do. And it seems to me that if we can, we should try to do it within those bylaws rather than trying to reopen them

So, thank you very much. If you would like to and you're able to stay on, in any event, I will do my best to read out what's in the slides so that you don't have to read them. But obviously, if you aren't able to join us, I completely understand and I'm sure the rest of the group do as well.

But now I'll go to David.

DAVID MCAULEY: Thank you, Susan. And I'll join you in wishing my friend, Kavouss, a speedy recovery from the cataract surgery. Best wishes, Kavouss.

So, Susan, I put my hand up just to make a statement for the record. And it's not going to surprise this group, I don't think. But the reason I wanted to say something is I certainly believe that your slide are a good capture of the discussion. But there was something I missed and that is this notion of justifiable lack of awareness as being a basis for granting a waiver to appear to repose.

So, it's my apology for not picking that up in the last time of our discussion. But now seeing that that's part of it, my statement is this. I

would support, as I have in the past, Kurt Pritz's idea as further developed on the calls.

And what I think would be a legitimate basis for a waiver to appear to repose—and that waiver to be granted by the IRP panel—would be something that would cause a manifest injustice if it didn't happen. And to me, these are exceptional cases, rare cases. They are not subjective. A justifiable lack of awareness to me would be a subjective inquiry of what one claimant may have known or thought which could help that claimant but would possibly work a disadvantage to a large community.

What I'm suggesting is that we should try with period of repose to protect the notions of certainty and predictability which I think are so important in an IRP decisional system that issues decisions of precedence. And so, that's where I'm coming from. And so, I just wanted to state—I think I have stated this before—but I want to make it clear in light of this justifiable lack of awareness basis that I'm pretty much for just one basis, manifest injustice if it didn't get a waiver and it would have to be rare with guardrails on it to make sure that it's not an open ticket to a routine exception. So, thanks very much, Susan.

SUSAN PAYNE: Thanks, David. And yeah, just to be clear for everyone, as I say, I was trying to capture where I thought the discussion was going. And I'm certainly not personally suggesting that we adopt both of them. I was trying to capture the two different proposals or suggestions that seem to be coming at this notion in a similar manner but weren't necessarily proposing the exact same test.

So, it was definitely something for discussion and consideration. And I think that would be … So, I'm certainly hearing you're sort of uncomfortable with the justifiable lack of awareness concept because of concerns about, I think, how extensive that might be and the fact that it could be fairly subjective and feel that manifest injustice is, perhaps, a safer path in creating a more narrow exception.

It may be that in terms of what Kavouss had been proposing, we heard him just now talking about a prime example of justifiable lack of awareness being something like force majeure. So, it may actually be that in terms of notion, he's not that far apart from the place where Kurt was coming from. And unfortunately, I don't think we've actually got Kurt on the call this time. But I think his suggestion was fairly clear in any event.

Any other thoughts from anyone, just in this particular point? I suppose whilst I'm just pausing to see if there are any hands. I suppose I did also hear David expressing support for the decision to be made by the IRP panel as opposed to the ICANN Board. Any other thoughts on that one? Or indeed, as previously said, on the kind of circumstances where we might be extending or giving a waiver to the repose? Malcolm.

MALCOLM HUTTY: Thank you, Susan. Good evening and good evening to everybody or whatever time of day it is. Greetings. And in particular, I would like to start by offering my concern and good wishes to our esteemed colleague, Kavouss. Very sorry to hear about your medical challenges, and I'm sure we are all very grateful that you are, and possibly a little

surprised really, that in such circumstances, that you would join this call. But I'm certainly immensely grateful that you can and please do not overtax yourself. Your health is the first consideration. But you have my very best wishes for a swift recovery.

Turning to the question on the table, if we are to say that there is going to be some repose as an expectation, which as I say, I believe it's completely incompatible with both the bylaws or good policy. But if we were to say so and then wish to carve out where it's absolutely essential that there be a carve-out, and if we attempt to follow the principle that David said, of keeping it narrow and clearly defined and objective, and also—and I certainly think that this latter is a very strong point—what Kavouss said about keeping it simple and not overcomplicating matters that will lead us into more and more difficulty, challenge, complexity, and likelihood of making mistakes that we didn't intend. So let's keep it simple then, and to say that the exception should apply only where it is necessary in order to achieve the purposes of the IRP.

The community has already decided what the appropriate purposes are. And then the case should be heard if it's necessary to hear it in order to achieve the purposes. That way we don't get in to trying to pick and choose among which of those purposes we consider more important or crafting our own or anything like that. But stick to the existing bylaws, stick to the existing language, refer to that, and let the panel do its job in interpreting it. Thank you.

SUSAN PAYNE: Thanks, Malcolm. So, we've got a question in the chat or a comment in the chat from Chris who says he's not sure he understands what you mean. I assume by that, that Chris is meaning when you're saying, "We stick to the exception of applying where necessary to achieve the purposes of the IRP." I don't know if you want to expand on that. Do you?

MALCOLM HUTTY: I think it's straightforward, if you write that there shall be this time limit and then you say that the panel shall be entitled by exception to hear a case outside that time limit where they consider that it is necessary to do so, in order to achieve the purposes of the IRP. The purposes of the IRP are set out in the bylaws. It would be in very straightforward language, very simple, not trying to invent things anew as the previous speakers have just urged upon us.

SUSAN PAYNE: Yeah. Thank you, Malcolm. So, that was what I was thinking you meant. So, when you're talking about the purposes of the IRP, you're talking about the purposes of the IRP as set out in the bylaws as opposed to the purposes of the specific IRP in question. I don't think that was…

MALCOLM HUTTY: Yes. Yes.

SUSAN PAYNE: I don't think that was Chris's question, but just for the avoidance of doubt.

MALCOLM HUTTY: No, that's right. Yes, the purposes of the IRP are set out in the bylaws. The panel has a job to do. It has purposes that it's supposed to apply, principles that it's supposed to apply in how it conducts the IRP. And where it thinks it's necessary in order to achieve those purposes so that the case should be heard, then it can be heard.

SUSAN PAYNE: Okay. I welcome other reactions to that or agreement or disagreement with what Malcolm has suggested. I think that's a fruitful area of discussion. I'm just, as we're speaking or as I'm speaking, scrolling through the bylaws to remind myself of what the purposes of the IRP are and I'm not sure that I'm going to be able to find it in time. But it is something that is specified in the bylaws. I just, at the moment, whilst I'm also talking, I'm not sure I'm going to be able to find the relevant part. Oh, purposes of the IRP. Sorry, it's right in 4.3a and then items one to nine, by the look of it. I can run through them but first, I'll cede the mic to Chris and then David probably.

CHRIS DISSPAIN: Thanks. It's a different point. I just wanted to make a suggestion that I think we're pursuing a very interesting avenue. As a matter of principle, I don't have an issue with the decision on an exception to repose being made by a panel.

But I would suggest that for the point of view of logistics, cost savings and everything else, that that decision needs to be made in isolation. In other words, you wouldn't want to have to put together the full case and have a decision made at the beginning of a case that it was or wasn't to be brought, but rather, an application would be brought for the exception. And let's assume for the moment, it went to a panel. That decision would be made in isolation and then the process would continue, or the process would commence, rather, in respect to actually having an IRP itself.

I just have a concern about it being tacked onto the very beginning of a panel's sitting and ending up with a situation where, as I say, you have to effectively prepare for a full-blown case when you're actually arguing that there shouldn't be one in the first place. Just a logistical matter in passing.

SUSAN PAYNE: Thanks for that, Chris. And yes, I think certainly that would be what I would envisage as well. I didn't particularly take the suggestion from Kavouss that it's a decision of the IRP panel to be a suggestion that the first decision they make at the end of the full-blown proceedings but rather that it's an initial application.

CHRIS DISSPAIN: Preliminary. Preliminary decision.

SUSAN PAYNE: Exactly. That's the term I was struggling with, that it's a preliminary application for permission to bring an IRP.

CHRIS DISSPAIN: Correct.

SUSAN PAYNE: Yeah. That certainly would mirror what I would expect as well. David?

DAVID MACAULEY: Thank you, Susan. I do hope others will join in, in this discussion. And thanks to Malcolm for offering something like that. I agree with Malcolm and Kavouss that it would be wise that if we have this, the exception be based on a simple test. I do agree with that, and what Malcolm stated, I think would be simply stated but I think would be much broader in application. And I agree with what Chris just said. I think it could be an invitation to an IRP before an IRP, whereas the manifest injustice, I think would be also simply stated as a test and more simply applied by the panel—more discretely, more narrowly applied. And yes, so I do like the idea of narrowness.

With the test of being consistent with the purposes of the IRP, the purposes of the IRP, you could get into arguments, what does that mean? It's 4.3A as you said, one through nine or whatever it is, but then also, the rules of procedure allow us to address timing. I know we don't agree whether that allows us to put in a period of repose, but you could get into a recursive argument. Does that include purposes of the IRP with repose or not with repose? I just think it's a good… I agree and I'm

thankful to Malcolm for stating it, but I would not surprisingly urge that we adopt, if we did go this route, the manifest of justice test. Thank you.

SUSAN PAYNE: Thanks, David. And I think Chris is agreeing with you in the chat. Other views on this? If not now, then obviously, there will be opportunity after this for further discussion on this. Would people find it helpful? I could quickly run through the purposes as they're set out in 4.3A. Obviously, they're in the bylaws so anyone can see them, but just as a reminder—and I'll paraphrase—so the purposes of the IRP are to ensure that ICANN doesn't exceed the scope of its mission, and rather, and otherwise complies with its articles of incorporation and bylaws. So, that is quite wide in itself, I think, even that first one.

Item two is empowering the global Internet community and claimants to enforce compliance through meaningful, affordable, and accessible expert review. Three is ensuring ICANN is accountable to the community and claimants. Four is addressing claims that ICANN has failed to enforce its rights under the IANA Naming Function contract. Five is a mechanism by which direct customers of IANA can seek resolution of PTI service complaints.

Six is reducing disputes by creating precedent to guide and inform the Board, etc. Seven is securing accessible, transparent, efficient, consistent, coherent, and just resolution of disputes. Eight is lead to binding final resolutions which are consistent with international arbitration norms and would be enforceable. And then nine is providing

a mechanism for resolution of disputes as an alternative to legal action in the courts, in the U.S. or elsewhere.

And I think we all are working within the knowledge that those are the purposes of the dispute, of the IRP. I guess I would question or would … To my mind, I can understand why, obviously, it would make sense to allow for an exception to the repose in order to meet the purposes of the IRP. But I must say I'm somewhat persuaded by David's comments that whilst this would be extremely simple to write, to set out the grounds, this seems to be giving quite a difficult decision to an IRP panel or panelists not least because even just item one is about ensuring ICANN doesn't exceed the scope of its mission or otherwise complies with its articles of incorporation and bylaws.

Every IRP is about that, whether they're in time or out of time. So, doesn't that effectively mean that every request to extend the proposal to set aside the repose would automatically be passed because it would automatically be meeting the purposes of the IRP? That's a question for consideration. I don't know. You may have given this more thought than me, Malcolm. So, you may have a reaction to that. But if not now, then I think, as I say, one for us to think about further. Okay, I'm not seeing any hands at the moment. Let's for now, keep going anyway, but recognizing that there is more to discuss on this.

So, in terms of other considerations and other things that I heard during the course of our last call was there was a suggestion that if we are allowing for this concept of repose and we are allowing for, albeit that it then has this concept of prolongation or waiver of the repose in certain circumstances, that there could be certain types of case where actually

the repose is just not appropriate at all, and that we should exclude them from the applicability of the repose. Thinking in particular, or the example in particular that was suggested was excluding from the application of the repose those who were simply not eligible to bring an IRP before now.

And when I was thinking about this in advance of the call, I went back to the bylaws. 4.3B1 is the explanation or is the definition section and includes the definition of a claimant as being someone who's been materially affected by the dispute, i.e. they have to have suffered injury or harm directly or causally connected to the relevant action.

And so, in order to be a claimant or be eligible to bring an IRP, you have to have suffered harm. Therefore, that seems to me to be a class of potential candidate for a claimant who simply wasn't eligible to bring a claim until a certain point because they didn't actually qualify as a claimant until they have suffered the necessary harm.

So, that was an area which seemed to me to be a potential scenario where such an exclusion that was suggested might be applicable. And I think it does also align quite well with quite a lot of the public comments in both the first and second … Well, actually, more in the first public comment period because by the second public comment period, there was no repose included.

But significant comment from various parts of the community expressing concern about a claimant being excluded from bringing claim before they're even eligible to bring one. But if this were the case, would that kind of scenario …? Would that be the sort of situation …? If

we were applying a clearly demonstrable injustice type test, would this fall squarely within it that they weren't eligible until now, and therefore, it would be a clear demonstrable injustice not to allow that type of claimant to bring their IRP because they're only now eligible to do so?

Sorry, Sam. I'll just get to the end of this little section and then I can see your hand is up. And then just a couple of other areas of thought about this. One is something that has been troubling me. If one had no repose, one of the areas that had troubled me was this idea that a party might not be eligible because, for example, they weren't a contracted party at the time in question. They then sign up to become a registry or a registrar, so they've now become a contracted party. But they signed up in full knowledge of the kind of policy and contractual framework that they were engaging in.

And so, is it right to then allow those people who have now made themselves eligible, if you'd like to bring an IRP? Is it right that they should be able to do so over something that they have brought themselves into conflict with, if you like? They've chosen to sign up to become a registrar. Should they then be able to attack a policy that they've just agreed to? It feels to me that that would be one where maybe one would want to carve out from the exception of those who were previously ineligible.

And then another area that came up during our discussion was about personal disputes, which is just a concept from Flip's proposal that perhaps is it appropriate, if we're having this eligibility carve-out, is it appropriate to limit that to specific types of dispute or not? Sorry, that took rather a long time. Sam?

SAMANTHA EISNER: Thanks, Susan. One of the things that strikes me when we're talking about that idea of times that have passed and someone later becoming harmed by an action from ICANN they didn't' have the ability to be harmed by it before … And I know this has been something that we see in the situations Malcolm's put forward.

And one of the things that I think we had flagged for further discussion, but haven't really gotten into is getting very clear on that idea of when an action from ICANN occurs. Which action are we talking about? Because ICANN has offered, in the past, an explanation that this isn't all just back to an original act. But there can be situations, and often are situations, for example, in how policy is implemented or we can chart out other paths if there are examples that people would like us to walk through, where there are multiple places where either the ICANN Board or the ICANN Org have taken action and it could be that action that serves as the genesis for the harm for a claimant.

And so, there might not be the need to have such a broad carve-out for someone who was impaired by an action because I think it's always important to tether to a recent action if that's appropriate because the further we get out, I think whether or not someone's aware, we come into those issues of finality and certainty and all of those things that we've discussed. And David reflected on those a bit earlier in one of his first interventions today.

And then we don't' have to worry as much about creating carve-outs as well for people who might have entered the ICANN system with full

knowledge and then stepping back and seeing how they want to then challenge past actions. That's not how we want people to come to the system anyway. And so, if we can maybe explore that idea of what does an action by ICANN or the ICANN Board mean, and particularly in light of the 2016 bylaws that created that expansion of the IRP from just an ICANN Board action to also imputing into actions of the ICANN Org.

I think we have a lot of flexibility there in many places that weren't necessarily there under the earlier IRP regime. So, I'd say let's explore that and make sure we understand the implications of that before we build in exceptions to what we currently have.

SUSAN PAYNE: Thanks, Sam. That's a good point and I recall that that is something that you raised previously. I think that the challenge … And I won't speak for too long because I can see Greg has his hand up. The challenge that I can see is around whether what one challenging is the policy itself or the application of that policy once it's applied to the particular claimant or potential claimant in question.

And if the application of that policy to the claimant in question allows that claimant to also challenge the policy, then I completely agree with you that we don't need to be worrying about time periods because … Or we probably don't need to be worrying about time periods. We'd have to sense check this against scenarios. But it seems to me that that's not the case.

The application of the policy to the particular individual or party could be entirely appropriate—no improper process having taken place

because the policy has been applied absolutely as it should, as it was anticipated. But what the party is trying to challenge is the policy itself. And I'm not sure how that squares.

But I can see Greg and then you have your hand up. Greg, do you want Sam to respond to that or did you have thoughts on this anyway and you'd like to go first?

GREG SHATAN: My thoughts are very much along your lines.

SUSAN PAYNE: Carry on, then.

GREG SHATAN: I've being thinking about the whole issue of the way that this is framed with regard to covered actions, which is a holdover from IRP 1.0, which was very much a procedural challenge mechanism to Board actions. And now that it has become substantive and now that it has become broader than just Board actions, it really, to my mind, exposes that, fundamentally, it's really going after the substance of what was being decided and not the action of deciding it. So if a policy is put in place that is a violation of the bylaws but it's put in place anyway, is there a point in time when that policy no longer violates the bylaws, assuming the bylaws themselves haven't changed?

If the question is if this is only intended to cover actions and that we would need to further amend the bylaws to cover substance, that I

think is too narrow a reading because if this is challenged a week after the decision is made or six months, it's really going to be about the substance of the policy and not about the process by with it was decided, at least 99 times out of 100. Certainly, that's going to be the issue is that there's a policy that is outside ICANN's remit.

So to my mind, if that's really what this is, I start to question, frankly, the need for repose on something of that nature. I think that there are, and there may be … As you read through, there is a laundry list of things that are covered and some of those sound more like challenges to actions, which the further away you get from the action itself, the less appropriate it is to challenge the action because the facts and the people are changing.

But when it comes to challenging a decision to implement a policy that violates the bylaws, it's really not the action that is being challenged but the result that's being challenged. It could have been done perfectly according to every process point. But the result is wrong in the eyes of the complainant.

So I guess there's a question of if we are going to give repose to policy challenges, then where do those policy challenges go? And if we're not, is that really what we should be doing? I think, certainly, the intent when moving from a process to a substance model, was really to challenge the results because process is really only an issue in these cases where you don't like the result. And in fact, most cases, the past challenges were all proxies for challenges to the results in any case. So it was more of a Kabuki theater. This is more straightforward. But we're still not quite there yet.

Coming back to this after a little time away, I started thinking that the whole idea of repose, when it comes to results that are, in essence, continuing harms, if they are harms at all, is problematic. I don't know if we can distinguish results claims from truly action-based claims and only provide repose for the former. But it certainly points out that … We're a little bit in a tough spot because of the way that this mutated from 1.0. But I think we perhaps need to think more about the overall intent and less about the technical language. Thanks.

SUSAN PAYNE: Thanks, Greg.

GREG SHATAN: And thanks for letting me …

SUSAN PAYNE: Yeah. I might come back and ask you some questions. Sam?

SAM EISNER: Sorry. On mute. Thanks, Susan and Greg. I have a fundamental disagreement with Greg on this differentiation of IRP 1.0 at solely process-based and IRP 2.0 as not process-based. We see in the old bylaws that the standard was for independent third-party review board actions alleged by an affected party to be inconsistent with the articles of incorporation or bylaws. That's the same standard that we have here but we've added in ICANN Org there.

So I don't think that the history of the IRP bears out that process versus substance. I think the IRPs have always been a place for substance to be challenged. And one of the issues that the CCWG addressed was that it was hard to get to the substance when it was tethered only to a Board action. And that's why we brought in the Org actions as well, because people were jumping through hoops to get to the substance and impute the substance to the Board, as opposed to just looking at the action itself.

So I don't think that the record bears out that differentiation between process and substance. IRPs have always been there for substance. And we have the benefit of the IRP updates put in through the CCWG to allow clearer imputation of that to ICANN Org, which was a really big limitation before.

Along with that, I think we have to consider this idea of challenging policy. The notion that IRPs are the place to challenge policy … Clearly, if the ICANN Board approves a policy that is not within the ICANN bylaws, that's something that should be challenged. And as we've discussed before, there are many different places along the path to have raised an issue that a policy might not be aligned with the ICANN bylaws in many different places.

So one of the big risks in not having repose is that we could wind up looking at a policy decision that was taken 10 years ago and say, "Hey. As we understand and apply the bylaws today, that policy decision no longer fits with how we want to see things done." So instead of initiating a policy review and changing the policy, we're then inviting

people to come in and use the IRP to challenge the fact that the policy was even in place in the first place.

That's one of the outcomes I think that we should try to avoid. We have other places to challenge that sort of outcome. We have other places to change and impact it through the multistakeholder system instead of saying, "Hey. Based on what I understand today, that was wrong."

So I just encourage the group to think about it from that rubric, that the IRP is the place to say, "ICANN, you did something substantively wrong under the articles or bylaws." That's always been what it was supposed to be. But where else does it fit in, that we have the accountability in the system and the use of the other parts of the system to also make the system work effectively on all fours? Back to you, Susan.

SUSAN PAYNE: Thank you, Sam. Yeah. And thanks for that. That was certainly food for thought for me. And I know David has commented that he feels that's a good observation. Chris?

CHRIS DISSPAIN: Thank you, Susan. Let me just pick up on what Sam has just talked about and use a real-life example. The SubPro working group in the GNSO has put a final report in. And in amongst a whole raft of recommendations, they talk about the continuing of PICs and whether or not—and using those public interest commitments in new gTLDs moving into the future.

And the Board wrote to the SubPro working group before it finished and said, “We’re asking you whether actually think the new bylaws—ICANN’s new bylaws—enable the Board to actually make PICs going forward, given the change in the bylaws.” And the response from the SubPro working group was to say, “We think that’s a matter for the community to decide. We understand the decision needs to be made because clearly, in the event that the next round of gTLDs I going to be built around the use of PICs in certain circumstances, that needs to be in accordance with the bylaws.”

Now if we assume, for the sake of discussion, that the community goes through that process and makes the decision that it is sensible and it does fit within the bylaws to use PICs in new gTLDS and goes ahead and does that, it surely cannot be right. But if five years’ time or six years’ time, a new gTLD applicant or a new owner of a new gTLD who’s purchased it from another party, etc. can bring into question that very question about whether PICs are, in fact, within the mandate of the Board.

I’m not suggesting that there shouldn’t be a mechanism for that being challenged. But the use of an IRP in those circumstances can’t be what was intended. And that, I think, is a specific example, unless I misunderstood, of what Sam was talking about, as to when you use the mechanism and what mechanisms you use in order to challenge the stuff that happens in policy.

The other point being, just to finish off, to say, of course, at the end of the day, it’s a community decision. The Board follows the community’s decision and the staff implements it.

SUSAN PAYNE: Thanks, Chris. Malcolm?

MALCOLM HUTTY: Thank you. Chris just said that he's okay with the idea that that decision could be challenged. He just doesn't think that the IRP's the way to do it. But it seems to me that any harm that might be thought to result from a challenge being brought in the IRP would still be brought if an alternate mechanism, other than the IRP, were to hear that challenge and support it. It doesn't seem to me that the outcome is any different, however, it's arrived at.

So I don't' really understand why the great concern about letting the IRP decide this, since it is the IRP's job to actually interpret the bylaws and to decide whether or not something is consistent with the bylaws. It's then the Board's job to decide what to do about an adverse finding. But it's the IRP's job to interpret them.

And if Chris is happy to have somebody else hear that challenge, I don't understand why he thinks that somebody else that … Actually, I don't know who where he got it. I don't know whether Chris has got an idea of what other process he has in mind. But why that would be better than the institution that has been established under the bylaws to make those decisions?

CHRIS DISSPAIN: Susan, I'm happy to briefly respond if it will help.

SUSAN PAYNE: Yes. Why don't you? Thank you.

CHRIS DISSPAIN: Thank you. Two things. One, as David has said in the chat, I was talking about a timely challenge. I'm more than happy to accept that once the policy is decided, if members of the community want to bring an IRP to challenge that decision, that's fine. But as I've said all along … And I seem to recall the last—it was either on the last call or the call before—I went into what I considered to be excruciating detail. It's always open to parties to go to court and it's always open for there to be legal proceedings. And there is a significant difference between a court's decision and an IRP finding.

I've made the distinction all along that I think that the IRP is there for a specific purpose. Malcolm and I disagree about what the purpose is and that's fine. But the answer to it is—

MALCOLM HUTTY: It's purpose is avoiding going to court, Chris.

CHRIS DISSPAIN: Exactly. And my point is that you shouldn't be able to do that forever. At the end of the day, there are significant benefits to be gained by reaching a point where you say, "We've been doing this for so long now that it's necessary for you to go to formal court proceedings in court of

competent jurisdiction, rather than using a panel of people gathered by ICANN itself."

And I would argue, actually, that there are consequences on both sides for not using an IRP that is effectively nominated by ICANN and the ICANN community. But that's a detailed discussion for another time. The point I want to make in this comment is simply to say, yes, I am saying that I think an IRP is a perfectly logical place to challenge it at the beginning. But at a later stage, it isn't and it should be a court challenge, which I think is what I've been saying all along. And I appreciate completely that Malcolm, for perfectly sensible reasons, doesn't agree with me.

SUSAN PAYNE: Thanks for that. I think we need to think about this more. Because now, what I'm hearing you say, then, is not a complete objection to using an IRP process to challenge a policy, more concern that some way down the line, a policy gets challenged by someone—

CHRIS DISSPAIN: That's the whole point about repose. I'm not saying you're banned from using the IRP. I'm saying the IRP has a useful time limit. And post that, it's a matter which shouldn't be within the remit of an IRP. It should be a matter that your only recourse is to go to court. That has been my point all along.

The same way as I've said Malcolm's examples … Just use the education one as a specific. He says in his example, quite rightly, that there is no

problem with his complainant bringing a specific IRP five years down the line, to say that they are now being impacted by the implementation of this charitable philanthropic policy in their country and it affects them, and therefore that should be a matter for an IRP. That's absolutely right.

The issue is will they say, "And we want to challenge the whole basis of the policy?" And my point is that is something that, five years down the line, when you weren't involved at the time, should be a matter for a court to decide, not an IRP.

SUSAN PAYNE: Thanks, Chris. And I can see Malcolm's hand. I will go to Malcolm. But I suppose I do have a question, which is … I'm not disagreeing with you. I'm just wondering if we can explore further why it's better to go to court. What is the problem? And again, I'm not suggesting that this should be the case. I'm taking devil's advocate. What's the problem with it being an IRP as opposed to a court action?

CHRIS DISSPAIN: I'd like to acknowledge Kavouss for referring to me in the chat. But thank you, Kavouss. It's not that, Susan. It's that it's always open to you to go to court. In other words, what I'm saying is there is a remedy that is always available to you.

I am saying for us to put in place what amounts to a voluntary system that ICANN agrees to be bound by—to subscribe to that—that allows for strangers, for want of a better way of putting it, and it has a particular meaning in certain circumstances, to come in and overturn

and challenge a policy that has been agreed to by the community … I get the fine legal point that it may end up being decided to be against the bylaws. I am saying that is for a court to decide. That is always open to anybody, 20 years down the line, if they want to bring that claim.

I'm not seeking to say people should abandon that right. I am saying it is, in my view, not appropriate that our voluntary mechanism should be used for that purpose. And Kavouss, I apologize. I will do my best to speak more slowly for you. I hope I've made my distinction clear, Susan.

SUSAN PAYNE: Yes. Thank you. Thank you very much. Yes, indeed. Very helpful. Greg?

GREG SHATAN: Thanks. I think with repose being based on time, I don't think it is the right method for distinguishing between the type of claim that is appropriate for and IRP and a type of claim that's appropriate for court. If a claim shouldn't be brought in an IRP, it shouldn't be brought a year after the action was taken. That would be just as inappropriate as 10 years later.

So I'm hard pressed to see why it would be appropriate to use an IRP for a certain period of time to do all these things and then not appropriate thereafter. If we think that the IRP is a less reliable or less appropriate forum, then we have a problem with the forum, I think, overall, that again, time isn't really the issue.

But to my mind, if a decision is made and if that decision is one that results in something that is outside ICANN's mission being adopted, the

question of who can challenge that and when … I think those are two different questions. But right now, we're saying that anybody who's aggrieved can challenge it for a period of time. And then, after that, they can go to court. But it doesn't seem to me that just the passage of time makes it inappropriate to have the IRP available for that, since it's really just the same type of claim.

So I personally keep coming back to the idea that repose, if we are aiming this … And I think we are still really aiming it at the results of the decisions and not at the fact that a decision was made at a particular point in time. As long as it remains a relevant question, then it should be open to the IRP.

And I'm just as concerned with taking something to court, which is also a strange forum and maybe a stranger forum to ICANN than the IRP, in terms of being concerned about strangers making decisions about our stuff. Maybe some of the issues that we're dealing with should be dealt with in terms of considering what the remedies and further actions by the Board or whomever might be as a result of a decision.

But I'm still not finding the idea that the passage of time makes a problem that's an ongoing harm no longer the appropriate subject of a claim. If it's over and done with and the harm, whatever it was, occurred at the time the decision was made, then I think that's a different can of worms entirely. I'm not even sure that a court would be available for that, for the same reasons, in terms of statutes and limitations, and laches and the like. But if the issue is an ongoing issue, then it seems to me that the claim is always ripe. Thanks.

SUSAN PAYNE: Thanks, Greg. So, Kavouss, I see your hand. You will have the final word and then I will quickly wrap up. Thank you. We are not hearing you. I think you're on mute.

KAVOUSS ARASTEH: Unmute myself. I'm sorry. I think we should be very careful not to extend the authority, mandate, and remit of the IRP beyond what we were talking about since several times in the Work Stream 1 and 2. I think we should distinguish that it would be very difficult to start giving more authority to the IRP than it was necessary or foreseen.

However, if after some time, we believe that by a rule, we could extend that authority to the area that we thought that might be reasonable to extend, we do it. But at the very beginning, I think we should be cautious and take a more conservative approach. Thank you.

SUSAN PAYNE: Okay. Lovely. Thank you. Kavouss, that was an old hand, I think. Thanks very much. And thanks, everyone. This has been at least the beginnings, I think, of a good debate on the topic. We certainly have many open questions still to discuss, even on those two bullets so far. I will just make a note for the recording and for the record that I had a couple of pages of slides but we've only actually touched, so far, on the first two bullets. I'm only making that note just so that if anyone ever were to go back and look at this, there's a record that we hadn't discussed the remaining items on these two slides.

I think to the extent that we've touched on some of these areas so far about if we were to have this concept of repose and we were to have a concept of prolongation, then what might be the appropriate circumstances for such an application being granted. If there are further thoughts on that, that people would like to share by email, that I think would be very useful. Further thoughts generally, disagreements or agreements with what we've been talking about in terms of is this a healthy path to go down would also, I think, be useful.

I think it would probably be helpful for us to circle back to the point that Sam made about what is the action that's being challenged and to try to drill down on that a bit more. And I think perhaps Malcom's … I want to call them case studies but that's not right term. Stress test examples, I suppose, is probably the closest term. They perhaps touch on some of that concept of what's the right action. So I think maybe, certainly by email, if you'd like to explore this further by email than that would be excellent. But otherwise, it's perhaps something that we'll be coming back to on the next call.

And yes. I should finally just call for if anyone has any other business that's occurred to them during the course of the discussion, then please raise it now. Otherwise, I'll ask Brenda to stop the recording.

BRENDA BREWER: Thank you very much.

SUSAN PAYNE: All right. So I'm not seeing anything. Thanks, Brenda. We can stop. And thanks, everyone, for your time and for your thoughtful discussion. And let's try to move this along on the email, if we can.

[END OF TRANSCRIPTION]