BRENDA BREWER: Hello, everyone. This is Brenda speaking. Welcome to the IRP-IOT call on the 2nd of March, 2021, at 19:00 UTC. This call is recorded.

Attendance will be taken from Zoom. I'd like to remind you to please state your name before speaking and have your phones and microphones on mute when not speaking.

Susan, I'll turn the call over to you. Thank you.

SUSAN PAYNE: Thank you very much, Brenda. Hi, everyone. Welcome to the IRP-IOT meeting on the 2nd of March. I can't quite believe we're in March 2021 already. [inaudible].

So we'll just kick straight off. It will be reviewing the agenda and updates to SOI—oh, I'm so sorry. I'm hoping that it will rectify itself. [inaudible] cutting out?

BRENDA BREWER: Susan, this is Brenda. I'm happy to dial out to you if you want to private message your phone number.

SUSAN PAYNE: Sure.

BRENDA BREWER: Thank you.

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SUSAN PAYNE: Yes, if it was still cutting out, then I guess I better had. So apologies for this, everyone.

BRENDA BREWER: Thank you. Stand by, please.

KAVOUSS ARASTEH: [Brenda], I hear nothing. I don't know whether there is something going on or whether there is silence. Thank you.

BRENDA BREWER: We just dialed out to Susan. She should be able to unmute her line and speak. One moment.

SUSAN PAYNE: [inaudible]. Okay. How is that? Is that any better?

BRENDA BREWER: You sound a little far away.

SUSAN PAYNE: [Okay]. How about that? Is that any better?

BRENDA BREWER: I can hear you okay. Everyone else?

I think we can go ahead with that, Susan. Thank you.

SUSAN PAYNE: Okay. Sorry about this. I don't know what the problem is. I think it's because of the time of night. Everyone has turned on Netflix and Amazon Prime because, here in the U.K., it's the evening now. Okay, perfect. Right.

What I was going to do is just quickly review the agenda and so on. So we have the usual … Before I get onto that, let's just do the updates to SOIs first. Does anyone on the call have any updates to SOIs that they want to flag?

Okay. I'm not hearing anything or seeing anyone with their hands up—oh, okay. Kavouss?

KAVOUSS ARASTEH: Thank you very much, Susan. I apologize to you and to everybody. My nature is that I am a [say-it-]forward person. Very frank and I don't hide anything.

Point 1, we've been turning around ourselves for more than a year. This is not very efficient. It is not the fault of anyone but is a collective fault. We have to remedy that. We cannot continue this. I request of you as a convener or chair or pilot of this important meeting. Please kindly take necessary action so that we stop turning around ourselves.

SUSAN PAYNE: Thank you—

KAVOUSS ARASTEH: I'm sorry. I have not finished yet. I don't agree with Paragraph A: Expand on the compromise proposal. There was no compromise proposal. We did not agree to that compromise. We did not know the impact of that. We did not know whether it requires a change of the bylaw. It has nothing to do with my distinguished colleagues who proposed that. I am talking of the song but not of the singer. We can't continue to have compromise, compromise, and new solutions. It's quite clear: the start of the things, the repose period, extension/not extension. That's all. But I don't understand the situation. Please kindly take us to the correct way.

SUSAN PAYNE: Okay. Thank you. At the moment, I'm just reviewing the agenda. I will touch on the compromise proposal when I do that. But your comments are noted. Thank you, Kavouss.

We have a couple of action items. It says, from the last meeting, that the first one—letter A that Kavouss has just mentioned—was actually a holdover from a meeting possibly one or two meetings ago, where we had discussed the compromise or the suggestion that Flip had raised with us. A number of people on the call felt that it would be helpful to see something in writing so that they could better understand what it was that Flip was proposing or the path had suggested. You will have seen that Flip has now circulated that, and I hope that you have had an opportunity to look at it. When we come onto Item 4 and the

discussions on the time for filing, I think we will come back to this. But we already have noted Kavouss' concerns about that proposal and the, if you like, backwards step. But the reason for that is because this was something from a couple of meetings ago.

The second action item was one for Sam or possibly Sam and Liz to look at how inaction has been pleaded in past IRPs. I think perhaps this is something again that we will come to when we get to Item 4.

Does that sound okay, Sam?

SAM EISNER: Yes. We're almost complete with this. We don't have the substantive update, but it'll be coming within the next few days.

SUSAN PAYNE: Okay. Perfect. Thank you.

Our Agenda Item 3 will be an update from the subgroup that's working on consolidation. Then our main agenda item is to come back to the discussions on the time for filing.

I can sense your frustration, Kavouss, and indeed I think it's shared by many of us. We do all hope to be able to bring this to a conclusion soon, I think.

And then Agenda Item 5: just looking ahead to upcoming meetings. We have our next meeting on the 16th of March. That will fall handily into the week that is between the ICANN prep week that starts next week

and then the ICANN70 community forum, which will be the week after that. So we don't have a meeting during the community forum, obviously, but, in fact, our regular rotation of every two weeks will take us to having a call on the 16th of March.

Kavouss, is that a new hand or the old one from before?

KAVOUSS ARASTEH: This is a new hand. You know, Susan, I am much older than you. I'm much senior than you, but I'm not more knowledgeable than you. But please respect me. I was in the middle of my intervention. You interrupted me two times. Please kindly, respectfully, humbly, don't do that again. Thank you.

SUSAN PAYNE: I very much apologize. I'm sorry. Certainly, I realized that I had interrupted you one time. I hadn't realized I was doing so. There was a long pause, so I started to speak. But I certainly apologize. I didn't appreciate that I've done so twice, so if I cut you off and you have more you want to say, then please continue.

Okay. I'm not hearing from you, so I will continue. But you should please feel free to put your hand up at any time, Kavouss.

I think we can go straight into Agenda Item 3 in substance. We have a few of our participants in this meeting that are in the small group on consolidation who were looking at Rule … I want to say 7—I think it's 7—that's dealing with consolidation, intervention, and participation as an amicus. I confessed on our last IOT call, I had indicated that we felt

we were getting close to the end of our work and that we hoped to be able to have a substantive output and submit it to this group quite soon.

In fact, on our last call, a question about our scope came up. For those of you who've had the opportunity to read my e-mail from a little earlier today, you will have seen where I set out the question that we wanted to put to this group to get more guidance.

But in case some of you haven't had the opportunity, I will just quickly summarize it now, which is that, as we were looking at this, I think some of the group in particular felt that we perhaps we'd taken a slightly different approach on that Rule 7 to say that the in-depth review that we've been conducting on some of the other rules, including, in fact, the timing one … and felt that we really ought to be undertaking a more critical assessment; that we're looking into things like, what is the intent of the section, what is the problem that we're trying in this group to fix, if any, what input did we get in the public comment period, what have been the previous discussions on this topic, and, to the extent that we're proposing amendments to the language, is that fixing the problem that's perceived and is it doing so without causing any other issues, and in particular the aspects of Rule 7, where it was felt that perhaps a deeper dive is needed, related to both the nature of the role of an amicus participant and to the specific guidance that we might provide to a procedures officer or whatever we call that person, if we give them a different title; that role of the arbitrator who considers these applications.

Particularly, the point for referring this back to this group is that, within our sub-team, I think we were not clear on whether that exercise is

within the scope of the task that we've been asked to perform by this group. Certainly, some of our members, at a minimum, felt that they would unclear on whether they know it was in scope or not. So we felt that it was appropriate to come back and seek further guidance on whether either this group feels that that kind of deeper dive and potentially more wide-arranging amendments—the current straw person—was already anticipated and envisaged by this group or, if it wasn't anticipated, then nevertheless, is that something that this group wants to task us with? Or does this group feel that, actually, that discussion ought to happen in the full working group and that we should pause our work on that basis?

So, as I said in my e-mail, to my mind, I fell that the scope of the sub-team was intended to be as wide as needed, but I say that on the basis of perhaps what I had intended for that group, and that doesn't necessarily reflect what everyone else had appreciated. So I do agree that I think it's appropriate that we come back and seek some more guidance.

But, specifically, the reason why I personally feel that it's within scope, if you want it to be for the sub-team, is we have had some discussions on various aspects of those rules. We had a straw person that I circulated that had some amended text but also various comments and issues flagged in the margin about further considerations that were needed, including around things like clarifying the procedures officer's role, what considerations should be allowed for when considering an application for one of those interventions or consolidations, and whether the classes of persons identified as being able to participate as an amicus was the right list of persons. So whilst that doesn't necessarily directly

address some of the issues that the sub-team think we might also need to cover, I think, in itself, it flags a range of issues that we felt the sub-team was effectively being charged to look at.

I will stop talking there. I'm very happy to hear from anyone else in the sub-team, if they would like to expand or correct on what I've said, or indeed from anyone in this group with views on this. Really, we are keen to get the guidance from this group on whether we can continue with this task or whether the group as a whole thinks we should be moving it back into the full working group. So I am going to pause.

"Nothing to add," from Kristina. Okay.

Does anybody on this call have views on this topic?

Kavouss? Thank you.

KAVOUSS ARASTEH: Please correct me if I heard it wrongly. You want to establish a full working group under the IOT? Or I mistakenly heard something differently?

SUSAN PAYNE: Kavouss, we have a subgroup already of people who have volunteered to take the work that this group had already done, where we had had a number of discussions on Rule 7, which is the rule dealing with consolidation, intervention, and participation as an amicus. We've made some progress and felt that reached the point where a small group would be able to progress things further and come back to this group

with a recommendation of what they think Rule 7 should look like. So we have a group of volunteers from this group but a smaller group who have been meeting on the alternate weeks. So the consolidation group met last week.

So, yes, I'm not proposing a new group. I'm proposing a group that does exist already. But we are keen to be just getting guidance from this group on whether some of the work that we are doing is what this group had envisaged or not.

KAVOUSS ARASTEH: As long as there are clear terms of reference mandated for them, and as long as they are informal, as long as they bring the matter to our group, and as long as they help progress, I have no difficulty. But we have to have clear … And we don't want, again, to turn back and turn around ourselves. So they should follow certain instructions from the main group but not starting something from scratch again. So, follow-up action: instruction from this group. It's most welcome if they do something to facilitate our work because every 15 days is maybe not sufficient. I appreciate their volunteer-ness to do that, but provided that they do not take a different path—that they do not start a new path—or new solutions. Thank you.

SUSAN PAYNE: Thank you. Indeed, that was part of the reason for setting up that group: to try make progress on these rules more quickly.

I am not seeing any other hands. If there is anyone else who wants to share thoughts on this now, then that would be great. Otherwise, perhaps I could ask you all to look at my e-mail and share your views on our mailing list. I hesitate to say that, if we don't head to the contrary, we will continue with the path that we think is appropriate. But it would be preferrable if we could have some specific input from this IOT to confirm that you're happy with that.

Okay. I'm not seeing any more hands, so I think we should move on.

Our next action item is to revert back to the time for filing and the discussion on that. With some hesitation, bearing in mind the objections already raised to Flip's document, I think, nevertheless, Flip has taken an action item that we gave him and have now circulated the document that he was asked to circulate. So I think it is appropriate for us to at least have any comments or initial comments that anyone has on that that they would like to share now. Again, if not, there are always opportunities to respond on the e-mail list or, indeed, to ask to bring something back to an agenda for a future meeting.

I will say thank you, Flip. I think you're on the call. Thank you very much for doing that. It was what we asked of you. So it is appreciated. I certainly have found it very helpful in understanding the structure that you had been talking about in a previous meeting and found it a really interesting proposal.

I do share the reservations that Kavouss has expressed around the fact that this is—or at least I feel the reservations Kavouss was expressing—something that is very different to what we currently have under the

bylaws. So it does seem to me that it would require extensive bylaws changes because it is essentially really quite a different accountability structure to the one that has been adopted. So, in that sense, I think, for the purposes of our work, it seems to me currently to be quite challenging to achieve that kind of wide bylaw change and perhaps is not something that we should be seeking to do at this point.

But, again, I'm happy to get other people's thoughts and reactions to the proposal. Again, as I said, if people haven't had time to really fully consider and want to engage in a discussion by e-mail or on a later call, we can also do that.

Kavouss? Thank you.

KAVOUSS ARASTEH: Let me be quite clear. We are not doing anything for ourselves. We are a member of the IOT Oversight Team to help the claimant—the claimant that is or would be some sort of victim, not duly aware of the impact or consequence of action or inaction of ICANN on something. Anything that complicates the task of that is not appreciated. The path and procedure and process should be clear, precise, concise, and straightforward. This is apart from that. Anything else which may directly or indirectly have impact on the bylaw also is an issue that we don't agree on. So we have to look for something straightforward, clear, precise, and concise. If there is a straightforward line from A to Z, we don't need to go from A to A1, from A1 to A2 and A3, and come to B. We come directly from A to B because there might be some risk of an accident if you're driving from that path. Let's take the straightforward

way, which has been tested elsewhere many times—in ICANN, maybe for the first time or not really.

So I'm not offending anybody. I'm not disagreeing with anybody. I'm just saying clear, precise, concise, and helping those people who have not been in a position to duly react on something—action or inaction. I hope I was clear. Thank you.

SUSAN PAYNE: Yes. Thank you very much, Kavouss. David, a see a new hand as well.

DAVID MCAULEY: Thank you, Susan. I appreciate Kavouss' thoughts, but I did want to say that I've been on vacation leave—PTL or whatever you call it—since last Friday, and I just haven't had a chance to read what Flip has put there. I am extremely grateful, Flip, that you did that. I just pulled it up before the call. It looks like a lot of thought has gone into it.

But I put my hand up, Susan, to say yes when you said, "Maybe some of you would like a little more time." I'm one of them. I'd like to have a chance to give a close read to what Flip has put before us. We've got a couple of other compromises proposed. So I will commit to doing that before the next call, but I did want to say I want that opportunity. I would like to take a look. Thank you.

SUSAN PAYNE: Thanks, David. I think that's fine. As I said, I think we don't make a great deal of use of our mailing list. If people would like to and have thoughts

and want to share them via the mailing list, then certainly that would be a good way to make some progress. But we can, of course, also come back to this again on a subsequent meeting.

Flip?

FLIP PETILLION: Thank you, Susan. I just wanted to say that I think everybody knows in what context that this was prepared. This was actually more sharing intellectual views on a topic rather than trying to introduce any change or amendment, definitely, to bylaws. I think it's interesting to reflect on this. If it's not for now, it could be for the future. That's what I meant by that we know what the context is in which I prepared this. I'm happy to have discussions one-or-one or by e-mail on this topic. Thank you.

SUSAN PAYNE: Indeed, Flip. Again, thank you very much. Indeed, even if the three-tiered structure that you talked about and that we all found very interesting is not something that we feel we can fit into any compromise that we are trying to create, when people are reviewing your proposal, there may be elements of it that they feel could be adopted or could be incorporated, if you like, into something that we are doing. So it could help shake people's thoughts. Let me put it that way.

So, again, thank you very much. We don't need to belabor this, but, yes, to those who've said they haven't had the opportunity to do it yet and would like to do, please do. Please do think about using the mailing list.

Yes, we can also consider, if appropriate, if anyone would like to discuss it on the next call, we can do so.

I guess, perhaps, this is an opportunity or a good time to just come back to Sam on the second of those action items if that is okay.

SAM EISNER: Sure. Thanks, Susan. We agreed to do some work on how inaction how has been pled and what inaction has looked like as it relates to [IRP] proceedings in the past. We are very close to having a write-up complete for the group. You'll have it hopefully by the beginning of next week. It's something we can discuss in more detail if needed at our next IOT meeting. Of course, we'd welcome reactions on list as well, once we send it out.

SUSAN PAYNE: Thanks, Sam. That's great. I think this will be useful for us. I think it goes to the discussion of, what's the action that's being challenged? But more particularly there's been some discussion about, if there's an inaction from the Board, does inaction continue? And is inaction a continuing action, if you will, or a continuing inaction, thereby perpetually resetting the clock? I think that's the context of how this came up. So I think it will be a useful thing to discuss.

In the meantime, I'm conscious that we do want to make some progress. I don't want us to be having a wasted conversation.

One of the areas that I think we talked about on the last call as being something that would be very fruitful for us to discuss and to try to

come to some agreement on was around, "What is the challenged action?" again, I think, to try to understand, when we're talking about limitations on timing, when that runs from. I'm not sure.

Again, I guess I'm looking to you a little bit, Sam. Do you think that's something we can reasonably discuss at this point, or do we really need to have that research you've been doing on inaction first?

SAM EISNER: I think that the conversation about what constitutes an act can be separated from, is there a continuing inaction that would be an alternative for timing? So I think that the two conversations, while related, can be uncoupled.

SUSAN PAYNE: Okay. Thank you. And in which case, again, if we're proceeding from the assumption that some kind of a compromised proposal would be including a repose period, it was felt that, if we had a better understanding within this group of what the action is that's being challenged during the IRP, it may be that it would flush out whether [there are] concerns or indeed flush out that there is less need for concern, that we are perhaps not as far as apart as we might seem on the surface to be.

So I'm very interested to get thoughts on this to the extent that anyone has been giving this further thought since our last call.

Kavouss, I see your hand.

KAVOUSS ARASTEH: First of all, we have to distinguish between inaction and failure. They are two different things. Second, unless it is explained further, what do we mean by continuous inaction? A case is before the Board and they consider that, examine that, and they found that or are convinced that no action is required? So what is the case of continuous no action or inaction? That the person in question brings back the situation for reconsideration? And how many times will that be? So I don't understand the meaning of "continuous inaction." Thank you.

SUSAN PAYNE: Sorry. I forgot to come off mute there. Thank you, Kavouss. I think that was my terminology, so I'll do my best. It's not a defined term in any way. What I was trying to allude to is exactly that question. Actions and inactions of the Board are something that can be challenged—Board and staff, rather—in an IRP. But it was exactly that: is an inaction a one-off event or does the fact that something hasn't been done effectively form an ongoing inaction with no specific date? I think that is—or at least I hope—at least in part something that the research that Sam is doing may shed some light on. But I was not suggesting it as something that we agreed on but more as something that we need to have in our mind when we're talking about when is an action challengeable and the timing.

But I'll stop talking, and I can see Sam's hand. So I'll turn it over to you, Sam.

SAM EISNER: Thanks, Susan. My hand was originally up on the more general question, but in terms of a response to Kavouss, that's part of the distinction we're looking at, Kavouss—the tension that you noted in your comment. A question that Susan raised on the last meeting was, would an alternate way to looking at inaction be that, as long as action hasn't been taken, every day that that action is not taken is basically a new violation? So I think that that's a framing of it that hadn't necessarily been anticipated—or that I was aware was anticipated—during the initial drafting on the inaction language, which has been there for years. It predates even my coming to ICANN. But we're trying to look at that and scope that out a little bit more as it relates specifically to the inaction part.

Susan, would now be a good time for me to respond to your more general action question?

SUSAN PAYNE: Yes.

SAM EISNER: Thanks. You might have heard [inaudible] discuss this at different points. I know we've raised this along the way. It's something that we had briefed out with a little bit more detail during the prior iteration of the IOT. I think we've shared some of those writings with this current iteration of the IOT. But I think it's really important that we understand as an IOT and we come to some level of agreement about what an act means.

Again, we'll separate out the inaction portion for now, but when there is an act, when there's something that can be timed from, that's the act that's being challenged. Does it all go back to an original act, or are there interim steps along the way that renew an entity's time or a person's time to raise an IRP if they were materially harmed by the new action that was taken? Because, in some ways, I think a lot of the conversation that we're having around repose is premised on the fact that, if you don't have the ability to challenge the initial action, then there's no reason to raise an action, that we have to be able to able to tether everything back.

But I think that, if we think about those ideas of what action means and also what it means to be accountable to the system and to bring challenges on a timely basis so that poor actions by ICANN—actions that are in violation of the bylaws or articles and those that are causing harm—are challenged quickly so that those items can be remedied and so that we can put ICANN's acts back on the right course so that we're not continually making that same mistake. That's part of the full accountability of the system, such that there are places where acts occur that they have multiple touchpoints. So we've talked about the approval of a policy. That's an act by the Board. That approval, if it causes the requisite harm, could be the subject of an IRP if it was alleged to be against the bylaws.

But then there will be affirmative steps by ICANN Org along the way. It could be the decision to implement. Or now we're having more formally document implementation steps put into place so that, when ICANN takes an act, there are many acts. Now it could be something that has to do with the new operational design phase that's being introduced, if

there's an act that's in there. We're taking actions beyond the limit of the bylaws and [inaudible] [policy] territory, right? That could be a new act. That could be when ICANN makes the directive to the contracted parties to implement a policy. That's a new act. There could be a new act in a compliance action from ICANN and how that act was done.

So those things can be years done from the original policy action, but then you're really getting to the heart of, what did ICANN do when? So we might not need to come to that question of, how long do we need to allow an action to linger and to be not final if we have the ability to discretely define an act and put some finality around each one of those acts and how the harm how might fall from that.

So I don't know if others on the call have had opportunities to think about it, but we wanted to see if we could continue to have that conversation to get some reactions from others in the IOT because it could be that there's actually a very, very, very limited set of circumstances that we're actually thinking of in terms of whether repose fits or not. Then we can make a much more informed decision as an IOT as to whether or not it makes sense to impair the finality of decisions across the ICANN ecosystem for that limited defined set.

So I want to make sure that we're all taking about the same thing when we're talking about the world of actions that can be challenged. So, with that, I'll turn it back to you, Susan.

SUSAN PAYNE: Thank you very much, Sam. Interesting food for thought. Hopefully, we can have a good discussion on this.

I have Kavouss in the queue and then, after him, Malcolm. But I think it is a new hand, Kavouss, so I will return to you.

KAVOUSS ARASTEH: Yes. Thank you, Sam. You always have some [brilliant] idea and some good analysis of the situation.

However, I don't think that we have the task to define what is the action—policy action, non-policy action, ongoing action—and what is inaction and what is failure. I don't think that we have that task and I don't think that we have to spend any time on that. It will be directing us to a well that we will never get out of. The more you dig, the more problems we would have.

So our task is to implement the bylaw and the task given to us talking about repose time and reaction of the claimant who has difficultly being alerted directly or indirectly on time. So I don't think that we have to get in such a complex area. I'm not objecting to what you're saying. I admire your way of thinking, but I think that is not a mandate of the group to get into these sorts of discussions because we're digging more and we will be more involved in something that we may not find any way out of. Thank you.

SUSAN PAYNE: Thank you, Kavouss. Malcolm?

MALCOLM HUTTY: Thank you, Susan. Good evening, everyone. Thank you, Sam, for that intervention. It's an intriguing idea that we might have actually been arguing across purposes by misunderstanding the meaning of action and how that applies in relation to time and, if we understood that more clearly, we may end up with not quite the same problem that we think we have. Very intriguing and definitely worth investigating closer.

So I have a question or two for you to further explain how we should understand your view [on] action and time. I prepared an example for the consideration of the group some weeks ago now, and I wonder if I could refer to that and ask you to say you think action would relate in that context as an illustration to get a better understanding of the point you're trying to get across.

In the example, ICANN had instituted an educational program, and the claimant said their case was that that educational program was out with ICANN's mission and therefore was inconsistent with the bylaws. It was sometime before it was introduced into their own country and affected them directly, and they wished to make the case that the program was inconsistent with the bylaws, not merely that there have been some procedural mistakes between the decision to embark upon that program and its implementation but simply that the program was out with the bylaws.

So my question is, if that's the case the claimant wishes to make, and if the time since the decision to institute a program has exceeded the time bar, would the claimant nonetheless be able to say, "This program is outwith, ultra vires the mission, and therefore all actions in pursuit of this are ultra vires, and therefore, please declare that so?" Would they

able to bring that case without asserting any particular irregularity in how it has been done—merely that it has been done—or would they be time-barred because [for] the decision to institute the program, the time it already expired, and nothing other than proper and correct implementation of that policy had occurred since? Which way would it fall?

SAM EISNER: Thanks, Malcolm. I think it depends on, as with anything that's pled, the specificity of the circumstances. However, if there is a current ICANN act—let's define "current" as that we presume it's in a world with a repose and it's current as within the repose period and within the days … So, if they're pointing to an act, such as ICANN rolling out the program in their area and they're stating that ICANN rolling out that program in their area is an act that ICANN is taking against ICANN's bylaws, then it's very likely that the issue of timeliness of the IRP is not longer an issue because what repose does is it talks about the issue of timeliness. That's one of the gating factors to get the item before an IRP panel.

Then what the outcome of that IRP declaration is a separate issue. But it's always a separate issue under an IRP because, of the IRP panels, we know the declarations are now considered to be binding and set precedence on ICANN. So, if we then have an IRP panel saying, "You have brought this in a timely fashion. You pointed to an act within X number of days (X number of months or years—whatever that repose period is that's defined), so you have the right to have this heard within the IRP." That's repose is. It's about the right to hear the claim.

Then the extent of the backwards action that fall out of the IRP's declaration depends on what the declaration says and what they've challenged. So whether or not the claimant says that everything that ICANN did under this program was against ICANN's mission or if they've termed it as, "What ICANN did in this instance caused me harm, did something with my competitive interest, was against bylaws in that way," there still will be a declaration at the end about ICANN's acts.

Then ICANN, with its community will have to then consider what the lasting effects of that are. A panel can say that an act was against the bylaws or against the articles. That's what we're asking them to do. But they can't dictate what ICANN does with that in any of that. It's so—

MALCOLM HUTTY: I appreciate that, absolutely.

SAM EISNER: So I think, when we're trying to solve a problem to allow a panel the swath to cut out a year's worth of action, that's not necessarily what the panel would be empowered to do in any event. The panel would be expected to look at everything that's laid out. If the panel then comes with a declaration that says, "Hey, ICANN, you acted outside of your mission when you did this," because of the precedential nature of it because of the binding nature of it, ICANN needs to then step back and go, "Whoa. Were we wrong with this entire thing?" If ICANN doesn't take that step, no matter when that IRP is taken, that's a different accountability issue. That becomes the broader accountability issue between ICANN and its community—that ICANN has been acting in a

certain way—and ICANN and the community can point to the whole history of it to say, “Hey, did we do this wrong?” The—

MALCOLM HUTTY: Absolutely, Sam. I was trying to be narrow here in my question. I understand that. If there were a declaration that that program was completely ultra vires, clearly it would be up to the Board to decide what to do about it.

SAM EISNER: Right.

MALCOLM HUTTY: And that wouldn’t necessarily mean seeking to unwind everything that had ever been done. It might not be possible to unwind everything that had ever been down right from the get-go.

SAM EISNER: Right.

MALCOLM HUTTY: But nonetheless it would be significant that the whole program had been declared ultra vires as opposed to merely some misstep at the moment.

But more particularly, from the claimant’s point of view, there’s a big difference between being entitled to say, “You have just done this to

introduce this program yesterday, but I'm not claiming that what you did yesterday would have been wrong if the program was legitimate. I don't have to identify some particular recent complaint here. The whole thing is ultra vires, and you're still doing it and it's still ultra vires," (if they are able to argue that and it's timely to present that argument to the IRP) and if they're told, "No. You have to find something that happened within the recent time. But saying that this program is fundamentally flawed is something you're out-of-time to argue. That argument can't be heard." Yeah?

SAM EISNER: I don't necessarily think the two are mutually exclusive, but I see that we also have a queue. So I'd like to turn to Susan to navigate this discussion.

SUSAN PAYNE: Thank you. Yes. I'm not certain, but I put myself in the queue, and I think I'm next. I hope Greg will forgive me if I'm not. I will be really quick. I wouldn't normally do this, but I felt I wanted to ask a question or express an understanding of what you said, and I wanted to have the opportunity to quickly do it.

So it seems to me from what you're saying and, indeed, from what Malcom is saying that, in that specific example of the language service rollout, that the claim, of course, is that operating these language services is outside of the bylaws. It's outside of ICANN's mission, so it's a breach of the bylaws and it's something that's open to an IRP. I had definitely been viewing this in the same way that Malcom has been viewing it in terms of the timing and taking the view that, then, when

you roll out into, I think, [Mauritania] or wherever the country is, three years down the line or however long this is, there is nothing intrinsically wrong with the rollout itself into a new territory because it's program that is being adopted, albeit that the program itself is, we would argue, wrong. Then, of the taking of that program on and rolling it out into different countries—the actual rollout—there's no improper act.

But what I'm hearing you say is that, actually, that may not be the case because, essentially, each time something rolls out, that's another act of implementing a program which is outside of the bylaws. In terms of [Mauritania], they are obviously challenging the rollout into that particular country—the claimant is—and the declaration would be in relation to that particular act. But, of course, it may be that, in the declaration, if the declaration is also saying, "Operating language services is outside of the mission and a breach of the bylaws," the Board could ignore that, obviously, but the Board probably ought to then take a look at their whole language program and think, "Do we need to reconsider this?"

But I'm hearing you say that you don't think that the claimant in this circumstance would be told, "I'm sorry. You're out of time because you didn't challenge the decision to adopt the language program three years ago." Am I understanding you correctly? I think I am.

I'll probably go to the rest of the queue because I expect lots of people have got some questions and comments on what you've said. So, if you don't mind, I'll probably go to Greg, who has his hand up, and then Scott, and then we'll circle back to you, Sam, if that's alright.

I am not hearing Greg. I don't know if anyone else is. Greg, I think you may be on the dreaded double-mute.

GREG SHATAN: Can you hear me now?

SUSAN PAYNE: Yes.

GREG SHATAN: Okay. I was on the dreaded wrong microphone, now that there's so many sophisticated possibilities in Zoom for selecting audio and video capabilities.

In any case, what I was trying to say was that, without presuming to get in the way of your authority, Susan, is that I would actually be interested in Sam's response to what you were saying because it may influence or eliminate my question or point or make it more pointed.

SUSAN PAYNE: Okay then. Alright. Well, if that's okay with Scott as well, then I will go to Sam, if that's alright.

SAM EISNER: I'm going to defer to Liz a bit. I dropped audio at the most unfortunate time and I've just come back to hear Greg's question to me. So I missed

a lot of what Susan has said. But Liz has been on the entire time, so I'm going to defer to her to answer, and then I'll comment as necessary.

LIZ LE: Thanks, Sam. Thanks, Susan. I think, in this scenario that we're looking at here, there's a challenge to the implementation of the program itself, and that challenge would be "timely" under the time limits in the IRP. The question is whether or not the claimant can also, in that challenge, make a challenge to the actual program itself which was adopted, say, by the Board, I think, three years ago or four years ago in Malcom's scenario. I think, in that situation, if you're challenging the actual program itself, there's another outer limit on the challenge of that program, which, right now, is twelve months. So it's an outer limit of when the program was implemented. So I think that time to challenge the adoption of the program has passed. So while the claimant may try and the claimant might make an argument to challenge the adoption of the program, there is a timeliness issue there.

I think what Sam was addressing in her scenario is, if, in the challenge of the implementation itself, the IRP panel comes back and finds there is a merit to what the claimant has challenged in implementation, and the IRP panel also reaches back to say that, in its opinion, there are issues with the adoption of the program, what I am hearing Sam say—I think it would be true—is that Board would look to the declaration itself and consider whether or not there was an issue with the program.

So it almost doesn't matter whether or not the claimant can assert a challenge to the policy itself. There's touchpoints along the way. There

are new touchpoints of when an action is taken—in this case, the implementation—that allows them to assert a timely challenge to the current conduct. As part of that, there is an evaluation of the current conduct as it relates to the program. I hope that addresses your questions.

SUSAN PAYNE: I think so. It raises some questions for me again, but I am going to go my queue. So Greg?

GREG SHATAN: Thanks. That was helpful. A couple of points. This is an extremely nuanced discussion. I'm sorry that my points might come in slightly orthogonally.

One, I think a big concern that we had generally is whether decisions of the panel will be retroactive or to what extent it would be retroactive. That may be something that we want to provide some guidance on when we're talking about past conduct, which is typically what you're talking about, even if the remedy is in the future. You expect things to be retroactive, unlike laws which are generally not retroactive. If you criminalize something on January 1st, having done it on December 31st doesn't make you a criminal.

So I think, here, it seems like there's maybe an artificial line being drawn, and it may be very hard for a plaintiff or complainant to assert that an action is outside the Board's remit or outside the bylaws.

Maybe in some cases you'll have a policy which itself is within the bylaws, but in the implementation or in a particular implementation, it's outside the bylaws. There may also be a situation where the whole program—root and branch—is ultra vires. It seems to me that there should be the ability to assert both of those things on the complainant's part, and then the panel would have the discretion, in reviewing it, to consider that. I think it puts too much on the panel to expect them to get to the larger issues [inaudible] and not allow the complainant to raise that issue. In some sense, in terms of the question of repose, I think that gets to the issue of how far back retroactivity goes, especially when there have been earlier actions.

That's where I think we may, somewhat counter to what I said before, provide guidance that we're not necessarily requiring the panel to unwind all prior actions. We don't want to make this a dirty cop scenario, where a cop will use manufactured evidence/false evidence. You go back and reopen all those cases and relitigate them. If there's something that has been in place for a number of years saying it needs to be unwound, I think it would be unwise and impossible there. I don't know if there's any way to come up with a bright line for that. It really depends so much on the facts and how long the underlying policy has been in place. That, in a sense, is the problem with trying to come up with some bright line/bright rules on repose, as opposed to giving the panel discretion to decide what the scope of their decision is, both with regard to the claim, the action or inaction, and with the potential remedy that it ends up recommending. Thanks.

SUSAN PAYNE: Thank you, Greg. Scott?

SCOTT AUSTIN: Thanks, Susan. I always seem to follow Greg because either he says one of the things I was thinking and then I can't remember which one he said and, undoubtedly, I might duplicate it.

This hypothetical that Malcolm has brought up I really like because it takes me back to my days teaching trademark law and drafting final exams. It seems to me that there's some items in here that he's trying to get at specifically to poke holes or to expand certain aspects of what we're trying to do to see where the edges are.

I'm going to go back to something I've threatened to provide to this group and still have yet to do—I'll try to find the PDF that I had—and that is an analysis of statutes of repose versus statutes of limitation because I think that what I'm straining to deal with—I sensed it a bit in what Greg was saying, and I think it is also what Liz was getting at in her discussion, but here's my shot at it—is that we don't want to undo the origination because, as Malcolm has carefully crafted in the facts here, there's been tremendous benefit from this program for its first four years. It was only after it ran into its fifth year and expanded—key word is "expanded"—into Ruritania] that it ran into a conflict. So we've been grasping at this concept of, how can we undo/unscramble the egg—however you want to put it—of the good that's been done just because [Edutania], a for-profit training skills provider, thinks that it's wrong for ICANN to have done this?

I guess my thinking on that, going back to my original comment about statutes of limitations versus statutes of repose, is that it seems to me it's more in the "What triggers the ability to file a claim?" In other words, we have the origination of this [entire] program and whether that is ultra vires and whether that is beyond ICANN's remit and its bylaws. But then we have "the next act occurs," which is the expansion. It also speaks to—Malcolm gives us some very detailed facts here—that it was targeted, that there was something in the plan. I don't know if that was original. I don't know if that was done on a year-by-year basis, and I don't know if that's something that could be the basis for a claim--any one of those acts along this timeline.

But my suggestion is that perhaps there should be a second basis for claims within a multi-year program like this that is like a statute of limitations where, when this subsequent act occurs, such as expansion, then there is not an opportunity to undue the entire program—undue all the good that has been done over the previous four years—but in fact there would be a carve-out, essentially, for those who would be affected in each year of expansion, such as [Edutania or] Ruritania, to come forward with their claim as to how the implementation in Year 5 has occurred and [if] that has either violated whatever is within the original program as created, as passed, as approved by ICANN and its Board or something that is more limited in terms of both recovery and when it can occur.

So I'm not getting as much to the end—"The 120 days—how terrible! We've now left those people, five years down the road, stranded"; no—but we should try to create a new beginning, a commencement

date, that's relative to the subsequent action in implementation that has taken place.

SUSAN PAYNE: Thanks, Scott. I think—others will correct me—that's where the discussion about that retroactivity was coming in. So I think you are on the same page, I think, with some others, particularly with Sam's comment about that decisions can't have retroactive effect.

SCOTT AUSTIN: Susan, I'm sorry. If you wouldn't mind, I've got to interrupt you because, no, I'm not looking backward. I'm just saying that there should be something put in place so that, as each new year, if you will, or each new expansion, occurs, there would be an opportunity—a new 120-day period or some period—for people to react, not that it would undo/look backward and retroactively affect the undoing the entire program. I'm just saying it should be in fact be forward-looking, but it would only commence with the triggering of the next expansion.

SUSAN PAYNE: This is a really interesting way of looking at this, so I think it's proving to be a really useful discussion.

Anyway, I have two more hands. Malcolm?

MALCOM HUTTY: Thank you. Thank you, Scott, as well. But I want to go back to the concerns that Greg was raising about retroactively. I think, Greg, a lot of those worries evaporate when you consider the very limited nature of the IRP and the very limited remedy that it can offer.

Suppose that [Edutania] was allowed to have its case heard, and suppose its only case was that this program is completely ultra vires the bylaws and that there's really no way around that; there's no correction or cure that you can do; it just shouldn't be done. And suppose that that argument was upheld by the IRP panel. The only thing the IRP panel can do is to say, "This is ultra vires by the bylaw. This is inconsistent with the bylaws." There's no question of retroactivity of application of that, or indeed, any kind of application of that, because the IRP has no power to decide how that should be applied or when or to reaching back or any of that. All it says is that this is inconsistent with the bylaws.

It then falls to the Board. Now, the Board have a legal duty to act consistently with the bylaws. As Sam said earlier, if they had such a ruling and said, "Oh, well, we wash our hands of that. We're just going to completely ignore it," then there'd be a much more fundamental governance issue there. But on the assumption that we don't face that, that the Board's pays a proper regard to such rulings, in which I still have confidence, it then falls to the Board to decide—what do we do about that?

It may well be that the Board says, "Well, for things that have happened in the past, there's nothing reasonably that we can do with it. We made these commitments. We've done these things. We've paid these things out. We can't unwind that. That's [the past]. What we can do with this is

make sure that we don't continue in error. So, henceforth, this program stops." That would be a decision the Board can make following such a ruling.

I would argue that, if there were to be what the Board decided to do in that, [Edutania], as a claimant, would find themselves entirely satisfied. Everyone would have cause to say that the accountability mechanisms to ensure that they were protected had absolutely discharged and had a very powerful effect protecting [Edutania] from this corporate goliath coming in and that they had everything they could have wanted to do without doing anything in the [inaudible] retroactive about other things that have been done in the past, just simply saying, "We're not going to do it now."

So I think that remedy is very limited, but it is, I think, very powerful and very valuable. That's why I'm spending so much time and effort seeking to protect it as I see it.

But it does raise the question of whether or not [Edutania] is able to go before the panel and make that argument and potentially to have it upheld or whether they would be told, "No, this has been going on for years. There is nothing new that you have identified, so you're out of time."

I'm afraid then I'm still confused as to the advice from ICANN Legal because I wasn't entirely clear on what Sam was saying, which is why I asked a follow-up question, but it sounded to me like she was edging towards actually that [Edutania] would then be able to bring that case and have it heard.

Then, when I heard Liz speak afterwards, that sounded, again, to me, more like, "No, they would not. They would have to identify something that had been done wrong anew that was separate from the mere fact from that program, which was now blessed by the passage of time," if I understood correctly.

And I wasn't entirely clear that I understood either Sam or Liz fully on that, but what I thought I understood from Sam I thought I understood the opposite from Liz. So I'm still confused and still seek further guidance. Thank you.

SUSAN PAYNE: Thanks, Malcolm. We have Sam's hand up, so hopefully we can get a bit more clarity on that from her. Then I am going to shut the queue. Its 22 minutes after the hour, so we're close to the end of the meeting, but I'm obviously not shutting it before Sam. But, yes, Sam will have the last word, I think.

SAM EISNER: Thanks, Susan. And thanks, Malcolm and everyone, for the thoughtful conversation on this today.

Malcolm, where I stand on this is, if there is an action by ICANN, and that action would be the introduction of the program into [Edigtania], and that is a new action from which the [Edutanian] claimant alleges harm and alleges that ICANN taking that act is against the bylaws, ICANN, because of the proximity in time of that action—because it would fall into that timeframe—would not really have a time-barred

claim to raise. The claimant from [Edutania] could satisfy their timing aspect of it to then have the IRP handle the substance of whether or not what ICANN did was against its bylaws or not. I really appreciated the way that you phrased the retroactivity discussion as well—that it's not a matter of retroactivity but that it's about the fact that the panel would make a determination as to whether that act is against the bylaws or not, and then there has to be the ICANN Board's ability to then decide how they're going to act on that declaration. I think you expressed that very well. I fully agreed with how you expressed how that could come out.

So the benefit of tethering things to specific acts of ICANN in each affirmative implementation act, such as rolling that out, is that it gives rise to a new period of action, like Scott was saying. We don't have to actually create different types of actions. When ICANN does something new, that is a new act. A time clock starts anew from which a harm can be claimed and an IRP can be given rise to if it something that is alleged to be against the bylaws.

So hopefully that's a clear statement, Malcolm, of the answer you were looking for.

MALCOLM HUTTY: Thank you, Sam.

SUSAN PAYNE: Thank you, Sam. And thank you, everyone. This, I think, has been incredibly fruitful. I'm quite sure that a number of us will want to ponder

on this more. But I think that, actually, as Sam is saying, if we come to a position where we all do feel that these new activities provide a new act that is IRP-able and therefore the time clock starts again, that significantly impacts or reduces a concern about the notion of a repose, I believe.

It's 26 minutes after, so we really are at the end of our call time. I hesitate to say perhaps we can try this further on the list, but perhaps we can give some thought to some other examples. Malcolm had a few scenarios that he circulated for stress testing. Maybe we can apply this same concept to them to start with. But we perhaps could also try to consider a couple of others. If we're able to, between this call and the next one. But, if not, we can circle back to this on the next call because I think, if we can feel some comfort that, in different scenarios, this same situation would apply, this is real help, or at least that's certainly how it seems to me. And I'm hearing from others on the call that they are also taking some comfort from this.

As I say, we have a call in two weeks. It might be helpful, Sam or Liz, if you could share this with us in writing, just so that we all are confident that we have understood what you've been saying and also, of course, for the benefit of those who haven't been on the call, if you don't mind me giving you another action item. I think it would be extremely helpful for us just to ensure that we are not talking at cross-purposes.

Other than that, again, thank you very much, everyone, for what I think was a really useful discussion. Let's keep pursuing this chain of inquiry.

Just pausing briefly in case anyone has anything as AOB that they want to raise.

I'm not seeing anything, so we can stop the recording. Again, thank you, everyone, very much.

**[END OF TRANSCRIPT]**