BRENDA BREWER: Good day, everyone. Welcome to the IRP IOT call on the 16th of March, 2021, at 17:30 UTC. This call is recorded. Attendance will be taken from the Zoom room. May I please remind you to state your name before speaking for the record? Have your phones on microphones on mute when not speaking. With that, I'll turn it over to Susan. Thank you.

SUSAN PAYNE: Lovely. Thank you very much. Apologies to everyone for having to cut this meeting a little bit short. So, we only have time for an hour today. I'm seeing other people who are also finishing up on other meetings, so I guess it wasn't just me who had some conflicts. It turns out that the week before an ICANN meeting, which is meant to be a quiet week, is anything but—if one looks at my diary, certainly.

But anyway, we have an hour and I hope we can make a bit more progress on our discussion on the timing issue. And so, without further delay, first off, we always have a quick review of the agenda and updates to any SOIs, so I'll do the SOIs first. Does anyone have any update that they need to flag to the group?

Okay, I'm not hearing anything or seeing any hands, so that sounds fine. Obviously, just a general reminder to everyone to be sure to keep your SOI up to date and flag to the group if you do make any changes. In terms of reviewing the agenda, therefore, we'll come back and look at a couple of the action items from the last meeting.

We'll be continuing our discussion on the time for filing and then we have our next meeting scheduled on March 30th in the 19:00 UTC time slot. From memory, that's the week after the ICANN meeting. So, we hopefully … There shouldn't be too many. I think there is the odd meeting happening during that week that didn't happen during the ICANN meeting but very, very little in the way of ICANN activity. So, we shouldn't have too much of a conflict, there. Okay.

So, coming back to agenda item two, which is just looking at the action items from the last meeting, the first of these was … Well, they're both allocated to Sam, although I think they tend to be collectively Sam and Liz. And Sam and Liz were looking into how inaction has been pleaded in past IRPs, particularly considering the sort of musing that we had had about whether continuing inaction in some way created a sort of permanent right of … Meant that there was never any time limit, I suppose is the best way of putting it, because time was continuing.

And Liz, I think it is, who has just circulated something on that … I have personally only really quickly skimmed it and I suspect, if a number of other people were either in the DNS abuse session or in other meetings, you may be in the same position as me. So, I wonder if this would be a good opportunity, Liz, for me to ask you if you wouldn't mind just quickly giving us the highlights?

LIZ LE: Hi, Susan. Sure, I can do that. So, basically, in what we researched from past IRPs, there wasn't a particular challenge that was made on an inaction as it relates to an alleged continuing failure to do certain things.

They were tied to some kind of an affirmative action or event that took place.

So, there were two particular IRPs in general where we cited some examples where this might be relevant to the group's understanding or discussion of inaction itself, and that was in the IRP related to Islam and halal that was filed by [inaudible]—.islam/.halal, apologies. And also another IRP that was filed by Donuts relating to .sports and .rugby.

What's instructive, I think, is that, in both IRPs, the panel found that an inaction should be tied to the failure to take an action where there was some kind of an affirmative obligation to do so, that there was not …

And that failure is inconsistent with the duty to act that was whether that duty is formally established by ICANN's documents, generated by some other explicit or clearly implied undertaking by the board, or just by the circumstances in general that was not just a continuing ….

Inaction was not a continuing failure to do something that's not tied to a particular action. So, I think that … And we cited some language that was particularly instructive in the Donuts IRP that related to sports and rugby on this matter. So, hopefully that helps the group's consideration and discussion on inaction.

SUSAN PAYNE: Lovely. Yes. Thanks so much, Liz. That is helpful, I think. And I think it is worth us bearing in mind. It was, perhaps … I used the term "musing" before. It was perhaps a kind of view of a potentially technical inaction,

if you like, if you're viewing the board as every day they fail to do something or fail to correct something they are continuing an inaction.

And whilst I wouldn't put it past someone to argue that in an IRP, it is not, certainly based on your research, really how panels have viewed the concept of inaction. It has been viewed as there being a specific act that they ought to be taking.

So, for example, it would be that there should be a decision on something and a decision hasn't been made or there should be something published and it hasn't been published, I think is what it's getting at, or at least where we should be focusing our attentions. Okay. Thanks very much for that. If anyone else wants to comment on it now or after they've had an opportunity to ponder on the e-mail that Liz circulated earlier today, then we can obviously do so. Yes, Kavouss.

KAVOUSS ARASTEH: Yes, good morning, good afternoon, good evening to everybody. I think Sam referred to some use-case or cases which have been in the past. The first time in the activities of the ICANN, first and the last, we take seriously into account the use-case was ePDP Phase 2. At that meeting, it was mentioned that the number of the cases should be sufficiently enough to make any conclusion on that, that these should be more or less, I would say, representative.

I do not understand that we follow a particular case, or a single case, or a specific case, and generalize that if they do not give good results. We have no problem to look at what has happened but we should be

mindful that we should have sufficient representation and sufficient argument that it could represent in future cases.

So, I don't think that we should have too much emphasis on the past case, which may be different from other cases, because not all the cases are identical and even they are not similar. They will be different, widely or less widely than each other. So, we could not make any conclusion on that. But I have no problem to consider that but not to take that into account—to consider that—whether it could lead us to somewhere.

I don't think that we should spend too much time on this and work on theory. Currently, this group is working on a theoretical concept. It has been that, in the past, some cases, people work on theory and never progress. Some other people, they put something that they had some confidence in that and didn't correct that—trial and error—at a later stage.

This would not be the end of the IOT and end of IRP and they would be continued in future. If I am not mistaken, this IOT will not be disbanded immediately and the panel is not the same panel as it was in the past. They are different. The way that would be selected is different, and the experience of the people may be different, and cases may be different. I had to make this intervention to be that we should not continue, and continue, on working on theory and some cases that very less probably could happen or would happen. Thank you.

SUSAN PAYNE: Thank you, Kavouss. And yeah, thank you for your reflection that, clearly, as you're pointing out, there are only a couple of cases that Liz

was able to identify, and so we shouldn't be drawing too much conclusion from them. But that is what we have and it was an action item that we had given staff in this group to do.

And so, they have done it. We are somewhat hampered by, when we're looking for examples of past experience that we can use to inform our activities or our decision-making, the fact that there aren't that many IRPs. But yes, thank you for your word of caution. It's well-noted. Hopefully, others will take that to heart, as well. Thank you. Okay.

So, we have our second action item, related to what we spent a lot of our time talking about last time, on the various different touchpoints that occur and which might give rise to a new cause of action, effectively.

We, I think, made really promising progress on our last call as we started to consider that there are various times along the process of the development of a policy or the making of a decision, and then its roll out or implementation, and that various different touchpoints arise, and that where they arise they may give rise, effectively, to a new time period to bringing an action for a complainant.

And so, we did make really good progress, I think, or at least we had a really helpful discussion on that on our last call. And Sam and Liz had taken an action item away to look at this in the context of one of the stress tests that Malcolm had prepared for us some time ago.

And so, Liz, I think it was, again, has circulated something to us last week where they had looked at the Edutania example. And so, again, I think, probably that was circulated longer ago. So hopefully, you all have had

an opportunity to look at it. But perhaps it would be helpful for people to, again, put Liz on the spot and suggest you to quickly run through that, if you wouldn't mind.

LIZ LE: Sure, Susan. The example that we put in writing is the one that … We had discussed this with the group on our last call and, in that example, using Edutania with an outer limit on the time for filing. In this instance, the claimant who would bring the challenge is somebody that was affected by the implementation of the policy in the [five by five] program in [Ruritania].

And in that case, there wouldn't be an issue on terms of timeliness for that claimant to bring an action because it would be considered timely within the outer limit. So, as long as it was filed within 120 days after the claimant became aware of the impact of the decision of the action and not more than 12 months from the date that the action, which is the introduction of the program into [Ruritania].

So, we recognize the course in terms of move forward. The claimant has standing. The claimant has to meet the other procedural requirements in order to move forward. But assuming that's the case, as it relates to the timeliness of the filing, the claimant will be able to challenge the program and the implementation of the program as it's applied to [Ruritania].

So, the claimant will not be allowed to challenge the initial adoption of the program by the board five years ago, or potentially how the program

was implemented in the five years following that adoption into the other areas.

But if there were to be a declaration from the panel in the claimant's favor, finding that ICANN did in fact violate the bylaws or the articles of incorporation in implementing the program in [Ruritania], the ICANN Board, in considering that declaration, would also likely evaluate how that declaration impacts the implementation of the program in the prior years, as well as the adoption of the program as a whole.

So, this is to say that there are touch-points along the way where an action that may be taken by the ICANN Board or Org prior, outside the outer limit, will still be considered in part of the review as a result of a claimant's timely challenge in implementation further on down the line.

SUSAN PAYNE: Thanks, Liz. So, I will paraphrase but I would also really … I can see David has his hand up already. I would really appreciate others' thoughts on this. Just to paraphrase, as I read your e-mail, how it spoke to me was that the adoption of the program, the [five-by-five] program, by the board initially is out of time, and we all accept that, in the context of Malcolm's example.

But the rollout to [Ruritania] is a new act by the board making a decision to roll out, or by staff. There is a new act. And so, a new 120-day time period starts running from that new act. Essentially, Edutania, when they're bringing their claim, are arguing that this is a new, ultra vires act, that, by rolling out a program that's ultra vires into their country, that is a new actionable act by the board or by staff.

And that's even though the only actual act that has happened now, today, is the decision to select [Ruritania] for a program that already exists but that … And so, effectively, Edutania are challenging the program but only in so far as it applies to them and in their country. That's kind of how I hear or how I understand what you're saying. I'm just interested to see if others agree and this gives them comfort, therefore, in relation to the timing for bringing an IRP. So, I'm going to turn the mic to David.

DAVID MCAULEY: Thank you, Susan. Can you hear me? I'm using a different headset.

SUSAN PAYNE: I can hear you. You have a bit of a whine going on but it's not overly problematic.

DAVID MCAULEY: Well, thank you. What I have is a question, really, Liz. Thank you for what you provided. I did read it over. My reaction is largely like Susan's but my questions are around the concept of precedence, especially in instances where the implementation is in a new country but the implementation is largely following implementation that has already happened.

And so, my questions would get to the notion of ultra vires: does precedent apply in rendering a decision by the panel? Are there limitations on the panel to consider only implementation in country X? How does it work? Does it create new precedent?

So, I'm getting at the thing that I have stated before that I find very important about a rule for having timely filing of cases, and that is the creation of precedent on which the community can rely and look for predictability. So, that's what I'm getting at. Where does precedent fit in in this scenario? Thank you very much.

SUSAN PAYNE: Thanks, David. I'm not seeing any other hands. I don't know … Liz, would you like to respond to that now or would you like an opportunity to think on that?

LIZ LE: Sure, Susan. I think I would need further clarification, David, in terms of what you mean by "precedent." Are you referring to bringing the examples of how it was applied in the other jurisdictions into the IRP itself or are you thinking of something else? Because I think, as it relates to …

If you're intending to mean the former, I think those are all specific, factual circumstances that, certainly, the claimant, either that or ICANN, can bring into the briefing stage, and then it's up to the panel to consider. But they are very fact-specific instances that are up to the discretion of the panel to weigh on its ultimate decision.

DAVID MCAULEY: Thanks, Liz. I guess I sort of need time to think on this, too. But what I'm talking about is I agree that implementations could be fact-specific on a

country-by-country basis but they may not be on a material … On conditions of materiality, they may be largely the same.

And so, I'm wondering … It seems to me that, if we have a body of cases that create precedent, that the IRP panel will abide by precedent until such time in the future where a timely case raises and issue and they say, "Well, it's time to rethink this," that may be appropriate. But if an instance like this, where a case comes along that's timely for the factual implementation but largely the same as an already-decided issue, does it become a case in which precedent is overturned on a more routine basis?

In other words, I'm trying to protect the notion of precedent. I've made that clear. And I'm wondering, in a case like this, will the panel be considering already existing precedent if this particular policy has already been attacked?

And will this decision create a new precedent if the claimant is only timely because they're limiting their claim to how this is implemented in the country X? What does that do when that decision comes out? What kind of a precedent does it make? I'm getting at those. It's sort of a rough notion. I need to think it through myself a little bit more, but that is my response. Thank you.

SUSAN PAYNE: Thanks, David. Liz, I think that's a new hand.

LIZ LE: Hi, Susan. Thanks. So, I think if the question or the issue you're addressing is, what kind of precedent does it set overall in terms of time for filing and how it impacts other IRPs or may impact other IRPs in the future, in this instance, if the claimant is within the time to file the IRP, I think that's consistent with what the rules would say and I think that would be consistent with any IRPs, the standing requirements of any IRPs, that might be invoked in the future. So, I guess I'm just not understanding exactly your concern, here.

DAVID MCAULEY: Okay. Thanks. I need, then, time to think it through and state it more clearly or more crisply on the list. And to answer Becky's question in the chat, I'm of the view that the panel would consider existing precedent. But it depends on how the claimant brings their claim. It seems to me that if they bring the claim, and go back to square one, and attack the policy as created at the data creation and adoption, irrespective of intervening precedent, is that what we're talking about? I guess I'm just trying to get my arms around what it means to bring a case like this. Thank you.

LIZ LE: Susan, may I address that?

SUSAN PAYNE: Yes, yes.

LIZ LE: I think in the example we have provided the claimant would be time-barred from challenging the initial adoption of the policy itself, that where the claimant is timely on is challenging the implementation of the program into [Ruritania] but not going back to the initial action itself. So, I want to clarify that because I think what I heard you say is, what kind of precedent would it set if the claimant were to challenge the initial policy adoption? And that would be a time-barred claim. Thanks.

SUSAN PAYNE: Thank you, So, I have Kavouss in the queue. I'm trying to find my hand to react, as well, to that but I'll hand the mic to Kavouss first of all.

KAVOUSS ARASTEH: Yes, if you want to go ahead, I have no problem, but I have difficulty to understand the present precedent. Precedent is precedent. It does not have a time. Past precedent. Future precedent. Existing precedent. Present precedent. Precedent is the precedent. Usually, it's associated with the past but there is no existing … Existing precedence is the past precedence. So, I don't understand why we put the term "existing precedent." Precedence is precedence and I think in the bylaw, the panel is allowed to look into the precedence to facilitate the treatment of the case.

So, now I come to another point that someone says, or Liz says, that there are difficulties not with the initial action but the action taken with respect to [Ruritania]. I don't know. We are complicating the thing. We were usually taking some claimant taking some actions or some

processes against the action but I don't know why we have said the initial action, and subsequent action, intermediate action.

It is complicating this case. Could you clarify, please? Thank you. Or maybe there is someone at this meeting, and that is Becky, who was heading or chairing the group when we discussed this part of the bylaw, and we discussed the precedence, we discussed all of these things. And maybe, if he wants, he could also comment on all of these issues. Thank you.

SUSAN PAYNE: So, David, if you will, I will just leap in briefly and make a couple of points. I wanted to just react to your question, Kavouss, about why we are complicating this. I accept that it may seem to be complicating it to be thinking about lots of different action points which might trigger a claim.

All I would say is that the reason we have gone down this path is because, as you know, whilst there are a number of group members who are comfortable with the notion of repose, there are also group members who are very uncomfortable with the notion of having a repose.

So, this is the 12 months—outright 12 months—for bringing a claim, and members of the community who are very uncomfortable with it. And we have had quite significant argument and discussion about whether to have such a thing is permitted under the bylaws or whether building-in a repose would actually be contrary.

And as we were starting to think about what compromises we could reach, we realized that we may have been talking at cross-purposes about the notion of when the actionable action is, and that, perhaps, in some of these examples, like the example of the Edutania case that Malcolm so kindly developed and circulated for us, possibly, we had been viewing Edutania as being time-barred when, in fact, they might not be. And this in itself would give a great deal of comfort to those who are concerned about imposing a repose. That's a very long-winded answer.

And then, maybe, if you would bear with me, just in relation to David and your concern about the precedent, I think what I'm hearing from you is a concern that, if Edutania is, effectively, bringing an action against a new act because they're bringing their action against just the rollout in [Ruritania], then, to the extent that there had been previous IRPs about the policy itself or a rollout into one of the other countries, because they would be in relation to a different act, does that mean that we are not taking on board whatever the outcomes of those cases were as part of the precedent here?

I would say—and I think it has been echoed by some others in the chat—no. Nothing about precedent is ever going to prevent Edutania bringing their action. But I would say, if an entirely identical scenario had been challenged in another country previously then Edutania would be well-advised to take a good, hard look at what the outcome of that case was before they decided whether it was even appropriate to bring their IRP.

But no one can ever prevent them from bringing their IRP. They may just be doomed to failure or, indeed, doomed to success, depending on what has happened previously. That would be how I would view this. But I can see Malcolm has his hand up so I will stop talking.

MALCOLM HUTTY: Thank you, Susan. Yeah, I must say I think some of this stuff on precedence and on challenging previous things … Like Kavouss, I have been slightly confused by some of this talk. The point that David raises in the chat, I think I'd like to explore because it confuses me, as well.

Perhaps it would be easiest if I just set out how I understand what Liz has advised us and then invite her to correct me. As I understand it, what we've got to do with the situation is that Edutania wishes to challenge the rollout of this program. It's this come to Ruritania and they want to challenge that.

And they say, "This shouldn't happen." Why should it not happen? They must have a reason. You can't just challenge it bare. You have to have a reason why something is contrary to the bylaws. There are arguments as to why it's contrary to the bylaws. It's because it's ultra vires. ICANN should not be doing this at all. That's their claim, which may or may not be well-founded.

So that raises the question, given that this course of action of doing these kinds of things happened more than a year ago, is it time-barred? Are they prevented from raising that argument merely because ICANN has been doing this for a long time or are they allowed to do it because

there is a new and approximate action that happened just yesterday but it was introduced into Ruritania?

Then, if we were advised that Edutania can bring that challenge and make that argument, it will proceed to judgment and the IRP will decide whether or not this particular course of action is ultra vires. And if they decide in favor of the claimant, they make a declaration to that effect and say, “This is ultra vires.”

And the panel’s role ends there. They just give that declaration. It is then for the board to consider what they do about that. There are obviously certain expectations on the board but the board must decide what to do about that because the decision that it is ultra vires is not fixed in time. It’s fixed according to the bylaws.

If a kind of action is ultra vires to bylaws then that same kind of action is ultra vires to the bylaws at any point in time. Now, whether it is possible to go back and undo that, whether it’s practical, whether it is required by its responsibilities as the board, is for the board to decide. And how far back and what might be done, if anything at all, is in the board’s hands.

But nonetheless, that decision exists, and is binding, and exists, essentially, for all time and forms precedent. Now, if there had been a previous challenge on exactly the same basis—and in my scenario, there had not been, but if there had been—and the board and the panel had ruled “this is not ultra vires,” then it would still not be ultra vires and Edutania’s case would be struck out at the first opportunity as already decided or doomed to fail.

But assuming that it hasn't been, and there has been no previous one, then this case will form precedent for the future and, therefore, the board will have to have regard to it in the future when deciding what future programs it may institute.

But really, the question that we put to Liz is, can Edutania raise the argument that this is ultra vires or is that argument to be struck out on the grounds that it should have been made five years ago if it was to be made at all? And if I understand her advice correctly, because the specific action that is complained of is one that is proximate, is within time, then there is no reason why that argument gets struck out.

They can make whatever argument they'd like in respect of an action that is within time to be challenged, and so the case can go ahead. Am I reading that correctly or have I erred? And if so, I would be very interested to hear how. Thank you.

SUSAN PAYNE: Thanks, Malcolm. Yes, I would agree with your summing up. I think that is the crux of it. Liz?

LIZ LE: Thanks, Susan. So, in the summary that Malcolm just provided and the question he posed, the Edutania case, that challenge can be brought as it relates to the implementation. The action, here, that is timely is the implementation of the program in Ruritania. That can be challenged to be ultra vires as it is applied to Ruritania.

What is not timely is the challenge of the initial board adoption of the program over five years ago. This is, as we said and highlighted in our written example, the panel has the authority to make the finding on whether or not the implementation of the program in Ruritania is ultra vires.

And perhaps, if any of the other implementation and the other jurisdictions gets brought into the claim and it is within the time period allotted to file a claim, the panel can make a finding on that. So, as long as the claimant meets all the other standing requirements in order to bring a challenge; quorum, etc.

So, once the panel makes a declaration on that then it becomes back to the board to take a look at. And in this instance, the board would take a look at it and I think the board would likely … If the panel found that the program as applied to Ruritania is ultra vires then the board would likely look back at the prior adoption and implementation of the program itself. But I think, also, in terms of the actual adoption of program five years ago, that's beyond the time frame.

But I think one thing that I want to note that's really important here is that we have said many times before that, where there is a clear violation of the bylaws in existence from the start—which, in this case, would be the board's adoption of the program—and that program or policy somehow got through the whole process without the [community] challenge then I think there is more of a fundamental issue with ICANN and not about the timeliness of an IRP.

There are a number of minimum touchpoints along the way that would be as part of our multi-stakeholder, bottom-up process. You would expect that such a policy like that would … And if it really is ultra vires, there would be touchpoints that would address that. So, that would become less of a timeliness issue, here. I hope that answers your question, Malcolm.

SUSAN PAYNE: Thank you, Liz. Kavouss.

KAVOUSS ARASTEH: I think when the claimant brings a challenge it should indicate whether the challenge is relating to the initial decision or action or whether it relates to the implementation of that initial action. Then, what I fail to understand, the people refer to "beyond the power," or ultra vires. What is beyond the power? Beyond the power for the implementation? What do you mean by beyond the power or ultra vires? Because of non-feasibility to do anything? That was taken as a pragmatic course.

So, I have two questions, here. Once is the challenge made by claimant should clearly indicate whether it relates to the initial action or it relates to implementation. Then, we have to explain what they mean by ultra vires, here, with respect to this challenge, whether the challenge is for the initial action or whether the challenge is relating to the implementation one. Thank you.

SUSAN PAYNE: Thanks, Kavouss. David, you have your hand up. I'm not sure if you're responding to Kavouss but, in any event, over to you.

DAVID MCAULEY: Thank you, Susan. I thought I should comment, since I started this discussion. There have been two interventions, Malcolm's and Liz's most recent one, and I think Malcolm well-stated the question, so thank you for that. And I have to say that I, in concept, agree with what Liz just said.

It seems to me that this might be a workable idea if the original policy is not challenged but the implementation in a certain country is. It strikes me that it might be hard to write a rule like that and it might be hard to tell a panel how to write a decision like that, but if a policy is made and the period of repose goes by … If there is a period of repose.

Let's say, for the purposes of example, it's two years. Two years go by and there is no challenge. Let's assume now that there is no challenge to it within two years. The idea of certainty, that this case is now closed and this policy is now certain and predictable, something on which people can rely, that's important to protect. A challenge in Ruritania should not be able to take that away, in my view. But allowing it to be challenged in its implementation in that country would be fine, assuming we can tailor the rule to it to address the practical difficulty that might ensue. Thank you.

SUSAN PAYNE: Thank you, David. Yeah. So, I'm struggling a bit to understand how you can distinguish … I'm finding it difficult to put this in words. In terms of the roll out to Ruritania, effectively, if I'm understanding it correctly, what you're challenging is that a program, which is something that ICANN should not be doing because it's allegedly in contravention of the bylaws, is now being rolled out into Ruritania.

So yes, they are challenging the roll out into Ruritania, but when the panel makes a decision they will have to say either, "Yes, you rolled out an improper program," or, "no, the program was fine and, therefore, the roll out was fine." Now, if the decision that they make is, "Yes, this was an improper program," obviously, that is a decision about Ruritania.

But the board are going to then have that decision from a panel saying, "Actually, you're running an improper program," and I think this is Malcolm's point. And I think, as Malcolm … I'm not entirely clear whether what Liz has said is in agreement with that or whether we're forming a distinction literally between the manner of implementation—which, let's face it, you could implement an improper program in an entirely appropriate manner in the sense of everything you did in order to implement it was done properly.

But that may be splitting hairs. That was the path that we were originally going down and we seemed to be finding a solution by looking at it in the concept of touchpoints. But I don't see that the outcome of a panel decision might never cause the board to then look at its program altogether and say, "Hm. We've now had a problem with this program. We need to do something," and what that something is would be for the board to decide.

But it might be, “We can’t do any more,” or, “we can’t roll out any further. We have to disband this program.” Depending on the nature of the case, it might be something more about, “We need to backtrack on some things we’ve already done.” And I would welcome understanding whether that outcome is what Liz envisages, too, but I can see, Scott, you have your hand and have been very patient. So, I will pass it to you.

SCOTT AUSTIN: Well, I had arrived late, unfortunately. I was involved in a [inaudible] and apologize for that. The thing that comes to my mind when I listen to this—and I have been on enough of these calls going through this—is it’s almost like one lies and the other swears to it, but the idea being that you could have a policy that has inherent in it some kind of nascent problem but it can’t be expressed, or seen, or realized until a particular form of implementation occurs.

And as you just said, the implementation could be absolutely to a T in accordance with the procedures that were enunciated in the policy. So, in other words, the lie is the policy but the swearing to it is the procedure that follows it. And yet, something has to be done.

So, it seems to me that we need to concern ourselves with the second event, which is the implementation, and how you do that, but use that as the trigger because that’s what is expressed or allowed to be expressed, the damage that maybe was hidden within that policy that no one ever could have foreseen until the number of years have gone by or the number of recitations of the use of that policy.

And now, you've suddenly reached one that has, for whatever purposes—and again, I applaud Malcolm for the details that he put into this—down the road, you have finally reached a version of it that impacts someone in an adverse way. And I'm in agreement that it seems to me there should be something that allows a timeframe for implementation when someone has finally recognized they're damaged by the policy as opposed to trying to relate back to the very beginning, if that's helpful. Thanks.

SUSAN PAYNE: Thanks, Scott. And Liz has put it in the chat and indicated that, as they've said previously, the view of ICANN Legal is that the board will receive a panel decision and will evaluate how that impacts the specific implementation of the program, as well as the program as a whole. Kavouss, I will pass to you. I think, probably, this may be the last word for this call. One hour is not very long to have a discussion. So, Kavouss.

KAVOUSS ARASTEH: Yes. what I understand from this discussion is the following. People are trying to associate the timing of a challenge, not only to the action or inaction taken by the board. But saying that, they may not have any challenge to that but the challenge is the implementation of that because there is a lapsing time between the two from the time that the action is published and from the time that it is implemented. Is that the case that people want to argue and use this argument in order to conclude on the timing, on the repose and on the timing? Is that the

case, the people are trying, indirectly, to bring all of these things to conclude something on that, or not? Thank you.

SUSAN PAYNE: Thank you. I think that's what we are discussing, yes. And we're discussing it in the context, as I said, of when there has been concern about the notion of a repose, that perhaps we had been speaking at cross-purposes because a party who might fall foul of the repose in relation to the original policy, because they weren't eligible to bring an action at the time of the policy, nevertheless has a later action by ICANN Org or the Board that brings them back into time, effectively. And that is what we are discussing.

I don't see any more hands. I'm not sure that we have made a huge amount of progress. I think this has been a useful discussion. It really would be helpful, if people have strong thoughts, if we could try to keep the discussion going on the mailing list. I really do think it would be helpful, rather than waiting two weeks and then coming back to it again.

And perhaps, if you would all see my e-mail, I had hoped we might find the time to then look at Malcolm's other example, and we haven't done on this call. But again, perhaps we could find the time to consider his other example in this context as to whether the unhappy party in that circumstance still could bring an IRP, or possibly they can't.

And if they can't, that may not be an issue. We may feel that that's appropriate. But I think it would be useful for us to, as we're using these as a stress test, apply this interpretation to the second one, as well.

Kavouss. Oh, sorry. I saw your hand, Kavouss, but perhaps it was an old one.

KAVOUSS ARASTEH: Yes. No, it's a new one. I am saying that, why don't we discuss or explore whether we should have two timings? Timing one relating to the initial decision together with this repose, and then timing two, which relates to the implementation and is associated with reposing time. Would it be something that we could explore? Thank you.

SUSAN PAYNE: Thank you, Kavouss. I think that is what we are doing but Malcolm may correct me or have thoughts on this.

MALCOLM HUTTY: Susan, thank you. I wanted to just support you when you said that, actually, if we decide that, in the other case, this ought to be out of time, that's a legitimate view on time, as well. The purpose of these scenarios is to help us understand the impact of the words that we write would have.

They are written so that we can … I mean, whether or not this claimant should be considered within time or out of time, one might have different views on. But we should all be able to have a common understanding as to whether or not this claimant would be allowed to bring their case or not under a particular set of rules.

I.e., we should know whether the rule that we have written would allow them to bring the case or not, and that should be something on which we should all have a clear understanding and understand why it is that they are allowed or that they're not allowed to bring it as a result of this rule.

If we can't reach that, then we actually have failed to understand what we're recommending, ourselves. And it was to avoid that outcome and to ensure that we knew the impact of that which we do that these tests were written, and I hope they are useful to the team in achieving that. Thank you.

SUSAN PAYNE: Yes. Thank you, Malcolm. I agree. Again, apologies that we could only have an hour's call this time around. I think it does demonstrate why an hour-and-a-half is so much more useful. Apologies that we are now literally at the bottom of the hour, and so we are at the end of our time.

Can I, yes, please, just again urge everyone to … Let's try to keep discussing this on the e-mail if we possibly can, to hear from some more people, to feel confident that we are, as Malcolm says, in agreement on what the implication of what we're trying to draft would be. So, thanks, everyone. And again, sorry for a short call but thanks for everyone's engagement. Okay. Brenda, we can stop the recording.

BRENDA BREWER: Thank you. Thank you all for joining.

SUSAN PAYNE: Thanks, all.

[END OF TRANSCRIPT]