BRENDA BREWER: Good morning, good afternoon, good evening. Welcome to the IRP IOT meeting on the 13th of April 2021 at 17:00 UTC. This meeting is recorded. Kindly state your name when speaking, for the record. And have your phones and microphones on mute when not speaking. Attendance will be taken from the Zoom participation.

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

SUSAN PAYNE: Thanks, Brenda. Hi, everyone. Thank you very much for joining. This is our IRP IOT call. It feels like a long time since we've met, what with one thing and the other. ICANN meetings are obviously important and a good thing, but with not having an IOT meeting during the ICANN meeting, it feels like we've sort of missed a couple of calls. But not to worry. We're back now. Hopefully, it has allowed us to give some more thought to all of this.

And I recognize the frustration of some that we were still talking about the time for filing, but I think we all know that this was really one of the most difficult topics that this group had to consider. And so, it's obviously important for us to get it right. And if we can, to come to a consensus position if we possibly can.

So, first off we need to review our agenda and do updates to SOIs. So, in terms of our agenda, action item 2 is to review the previous meeting's action items, of which there are none. We'll be reviewing the comments that Sam circulated on April the 7th as a follow up to the discussion

we've been having on the issue of what is the actionable event from which timing runs and how that impacts on a challenge to a policy or a decision, as opposed to that policy or decision as it's applied. And that will, I think, lead us seamlessly into our continued discussions on this time for filing issue.

In doing that, I think … As I just quickly circulated before this call, I think it will be helpful for us to think about this as applied concept in the context of the other case study or stress test that Malcolm prepared some time back. And we do also have some other issues around the timing, which I think we do need to take into consideration. So, that I hope is something that we will be able to move on to today.

And then, our next meeting will be in two weeks' time in the other time slot. We don't have on the agenda a slot for any other business, but I will just pause now and see if anyone has anything they want to add to the agenda for the end of the meeting. And if not, we can also revisit that towards the end.

So, I can see a symbol next to Kavouss's name. It might be intended as a hand. I'm not sure. I will come back to you just very shortly. Before I do so, I just would like to just get rid of agenda item 1 which is, are there any updates to Statement of Interest that anyone needs to bring to the attention of the group?

Okay. I'm not hearing anyone and not seeing anything in the chat, so I will ask Kavouss. I'm not sure what that symbol is. Are you intending to put your hand up?

KAVOUSS ARESTEH: Yes. Good morning, good afternoon, good evening. I'm sorry that I raised my hand at this very early part of the meeting. In fact, I am sincerely and really frustrated of this discussion. I don't find the discussion very helpful. I don't believe that one case or maximum two case could be generalized to cover the entire thing. Nevertheless, I understand at least you and a few others, they want to discuss this use case.

But you have to put a limit. Next meeting, we have to finish this case, this use case, and we should not go back and dig out more and more and bringing something which may not be covering the issue that we have. It may be related to the past under certain circumstances that may not prevail now. You have used this use case elsewhere. I am fully aware of that, but you had some limit.

So, could you kindly at least guesstimate how many more meetings you want to talk about this use case. Two? Because up to the end of this year, we have about 15 more sessions. I have not counted ICANN meeting. We may not have meetings, so let's say 12 to 15 sessions. So, please kindly guesstimate. I said guesstimate—a guess of estimate—how many more meetings you want to talk about this, and to come to the point that we had, really, 45 days, 120 days, 1 year. And not going to dig out this.

Are you following, everybody? I want to not to be difficult, but also there is some limits. And we are going far beyond what we have put [in] public comment. You bring new issues, new elements. We have to go again back to the public comment, and we may not be very constructive to do that.

After several months, as people may reopen what they have not been successful previously, and now we may be turning around ourselves. So, I leave it in your capable hands, but I sincerely ask you to kindly indicate how many more meetings we will discuss these use case. Thank you.

SUSAN PAYNE: Thank you, Kavouss. I don't want to respond on that now, but let's see where we get to on this call, and we'll endeavor to do so by the end of this call. But I am aware that we actually only have Sam with us for 20 minutes, so I think let's make the best use of her time. But thank you for your comments, and I note your frustration. I'm sure it's shared by others.

Okay. As I said already, we don't really have any action items from the last meeting to review. We did, in fact, have comments back from Sam which was in response to the discussion we did have on the last call, which was sort of a further clarification using the example of the first stress test or use case of the view that ICANN Legal has taken in terms of the impact of the implementation of an action and when time begins to run.

I found that very useful in helping to, I would say, allay some concerns that I might have had personally in my personal capacity as opposed to in my capacity as a chair. In terms of feeling that, at least in the case of the [inaudible] example, that potential claimants could still bring an action or we could envisage a situation where they could still bring an action without being time barred, provided that they are judicious in how they plead their case. As I say, I think I found that helpful.

And David raised some questions which Sam indeed has taken the time to just answer just before this call. So, I really want to sort of throw this open to the rest of the group, if that's okay, to see whether, in light of that clarification that Sam and Liz have given in the context of these last two calls, whether it's giving sufficient comfort ideally to all of us. But if not to all, at least to most of us that some form of repose doesn't end up being an absolute bar for a claimant in a manner that we think is inappropriate.

So first off, I want to throw it open to everyone, but also bearing in mind that we have Sam just for 20 minutes. If anyone has any specific questions they wanted to ask Sam, where they want clarification of what she circulated, or want to challenge anything on that, I think this is the opportunity to do it.

And Kavouss, I'm still seeing that strange blue symbol next to your name. I'm assuming you don't have your hand up, but obviously you must tell me if you do.

Okay. I'm not hearing from anyone. Malcolm. Thank you.

MALCOM HUTTY: Thank you, Susan, for inviting me to the floor. And can I begin by offering my thanks to Sam for the replies she's given and the work that she and her team have put into them, which are very helpful.

I think the time is probably getting close when we need to move on from scenario one, as having been fully answered, and onto scenario two

which potentially might pose some different issues, or might not. I don't know. And it would be good to hear Sam's view on that.

But before we do, I'm just thinking about the status of what Sam has written, that is, as it stands, a statement of the interpretation ICANN legal [give] now and at the moment. I'm wondering what comfort could be offered or mechanism could be used to ensure that that won't change in a way that would reverse the position as far as such a claimant was concerned.

So, I guess I want to ask Sam. What do you think could be written into the Rules of Procedure, that we are drafting that would endorse or give effect to or crystallize the advice that you've just given?

SAM EISNER: Thanks, Malcolm. I think that one of the things that might be helpful to include into the supplementary procedures could be as simple as a line clarifying that each unique act of the ICANN [border] Org should be considered on its own. Something to that effect. Because that's really what we're trying to encapsulate here. Right? While some acts have continuing effect, this is about timing things from unique acts, and that there are different paths along the chain, and that we do see an act as a separate and defined time and a separate and defined point from which a time obligation.

So, I think if we were to include some sort of statement about the separate ability of each act, that might be a way to handle it.

SUSAN PAYNE: Thanks, Sam. I think that sounds sensible. I'm noting that Becky has also put in the chat that it's sort of the legislative history. And whilst I would agree with that, I do think, for anyone who's not been a member of this group and hasn't been following our work really closely, two or three years down the line it would be challenging for someone to find that single e-mail that gives this information. And so, it would be helpful to have something more than that.

And, yes, whether that's … I mean, I think it would be helpful to have, as you say, something that we can put into the rules. But perhaps it would also be helpful to have something slightly more than that, some form of guidance or something like that that could go alongside the rules. Does that seem like a workable option? Just to ensure that … As Becky's saying, there is a legislative history here, but I'm concerned that people will not know about it and won't know where to find it.

Sorry. Scott, you have your hand up. Sorry.

SCOTT AUSTIN: Thanks, Susan. I just wanted to quickly see if, in the e-mail that I sent back—and I don't know if Sam has had a chance to look at that—but if I was on the right track in terms of the question. Because the term "act," it seems to me, the adoption of the initial policy would be an act as well. And I thought that one of the distinctions made with regard to repose versus statutes of limitations had to do with a bar that started out with the occurrence of an event that was not necessarily based on harm or a determination by a claimant [of harm].

And that maybe that was the time of adoption, and that some of the things in Malcolm's stress test were more along the lines of acts that occurred with regard to how the policy as adopted was implemented.

Is that a meaningful distinction between the types of acts? I just wondered to what Sam's thoughts were on that.

SAM EISNER: Thanks, Scott. So, admittedly I haven't gotten into the details of some of the things that you shared, but one of the things that we've been discussing from the ICANN Org side is that there are different occurrences, there are different unique things that ICANN does in relationship to a policy. So as we said, we have the initial acceptance of it. Then we might have some acts that occur during the preparation for implementation. Then as we've seen in this example and we have in many other places, there's the point where ICANN announces implementation and readies implementation.

So, those are each different acts. We've provided a few different descriptions of those, so if it's helpful we can call back up the e-mails where we've laid out what we see, at a high level, what some of those different acts are along the policy acceptance or a project delivery type thing. But there are unique acts that you would refer to, if that helps.

SUSAN PAYNE: Thank you very much, Sam. Kavouss.

KAVOUSS ARESTEH: Sorry. Maybe I was not clear. Irrespective of what something's going to tell us, or as Becky asked to provide us for the next meeting, to what extent that particular case could be generalized to cover what we don't know would be in future? This is very important. Are we basing ourselves on customary law or on constitutional law? Use case is good to understand.

A proverb said, "If you want to talk about the future, you need to know about the past." Yes, very good. But to the extent that once we know about the past, then we have to establish, irrespective of what the past was, the future. But not transfer the past into the future. This is the problem that I face. Thank you.

SUSAN PAYNE: Thank you, Kavouss. Just a reaction to that. I think no one is … I'm certainly not suggesting that the stress test or the use cases that we have are anything more than a than that—just a couple of examples. But we're trying to use them to sense check or to work through issues and problems. We only have two because Malcolm was the only one in this group who put forward any suggested use cases that we could use to sense check. And so, those are the ones we're working from. But they are—I think we all acknowledge—tricky, difficult issues. And therefore, they surface some of the problems that we're all grappling with.

And I hope that they … I believe that they're doing their job quite well. But we're not developing a solution for those scenarios exactly. We're simply using them to try to stress test what's being proposed here.

Scott.

SCOTT AUSTIN: Susan, I'm sorry. I just wanted to note that in my e-mail that I sent around, that was one of the things that I tried to stress myself. How can you ever foresee some of the various impacts that will occur of these policies? And I think that that is a large part of what we are trying to do in some ways with the provisions that we're drafting—is to look out to the future, as Kavouss was saying, and determine are we thinking in terms of a constitutional approach where there's an evolution over time? And should this policy be able to meet things as they change—the various evolution of people, of faces, of the things that are confronting it; and respond to that, to have a flexibility that's built in?

Or are we supposed to be anticipating each and every, frankly unforeseeable, act that could happen down the road as a result of implementation? And is that what's harnessing us to the point that we feel reluctant to ever impose a time bar because we really can't anticipate all of those [inaudible] implementations of the policy—how the policy will be implemented?

But I think that's what I put in the e-mail. I think it's worth reading to at least consider whether that's what we are doing or if we basically just decided that a statute of repose shouldn't apply to the policies that are adopted.

SUSAN PAYNE: Thanks, Scott. So, I will give you my gut reaction to that, but I would … Again, I would welcome anyone else who wants to give their input as well. But, to my mind, I don't think we are at all arguing that a statute of

repose shouldn't apply. And quite the reverse. We are having this discussion because the last iteration of the draft rules that went out for public comment after work from this group in its former iteration had no repose.

And that was as a result of the first public comment where a number of members of the community, or groups within the community, expressed real concern about the imposition of a repose. And so, the draft version of the timing rule that went out in the last public comment had no repose and was general … The majority of comments supported that approach.

Nevertheless, there were comments from at least one commenter—possibly it was more than one—and also, of course, from Org expressing concern with having no end point at all for when an action might be brought. And, in particular, we obviously are faced with a situation where Org and, indeed ICANN Legal, have said they will not feel able to recommend to the Board that they would adopt something—these rules—with no end point at all, no cutoff date for bringing an action.

And so, that what we've been grappling with, essentially how to how to, if you like, get this group comfortable and find a path forward between having no repose and having something which we feel gives sufficient fairness for potential claimants, bearing in mind that the bylaws are drafted in such a way that you can't bring an IRP until you're damaged and impacted.

Now, I think the conversation that we've been having on the last couple of calls about the various act that take place and that therefore give rise to new time periods and new actionable acts has, in fact, certainly to my mind, been incredibly helpful in trying to find us a path forward through that. And I think it's also worth just all of us reminding ourselves that we also have a limitation period on bringing any action. So, we only get into the circumstance of the repose in a scenario where the claimant in question wasn't impacted earlier or didn't know or have reason to know of the act earlier because they have their own personal time period that runs from the time at which they ought to have known of the event that impacts them.

Sorry. That probably ended up being quite confused. But just, this repose period that we're spending so much time on is a kind of cut-off point after which someone who maybe hasn't been impacted yet and only is impacted by the decision of the Board some way down the line, despite the fact that they couldn't have brought an action earlier, may find themselves unable to bring an IRP.

David.

DAVID MCAULEY: Thank you, Susan. Can you hear me?

SUSAN PAYNE: Yes, thank you.

DAVID MCAULEY: Thanks. I thought I should offer to speak since you've asked for our thoughts on this. I did put questions to Sam on list. Thank you, Sam, for your answers. And I just wanted to give my overall impression of where we are because of what you said at the beginning of the call. We've been grappling with this issue. Those of us who are on the forum, the reconstituted team back to the beginning, we've been on this a long time. And a lot of the argument has been between binary points. There should be a repose; there should not be a repose.

It seems to me that in the last several weeks, or was it the last several meetings, we really are making progress, and we are close to the end. So, as I said, I want to thank Sam for the as-applied e-mail. It strikes me that we have before us three possible ways forward to solve this problem fairly quickly. One is the compromise that Kurt presented a little while back wherein, as I understand it, there would be a repose period, but it could be waived by the panel in exceptional cases. Meaning some manifest serious injustice would occur otherwise if the claimant applies to the panel for a waiver and the panel agrees.

The second suggestion was from Flip, and it was a well-considered, thoughtful thing that Flip on the list a month or so ago, talking about IRP panels dealing with pre-policy announcements, policy announcements, implementation and outputs, those kinds of things.

And then the third is this notion of as-applied that Sam is talking about.

I would simply like to say I'm very glad we're making progress. I think we're actually closing in on [an end]. I personally would support Kurt's idea. I think it would be the easiest to put in drafting. I think it would be

the simplest. There would be a repose period for those of us who want repose, and yet that could be waived by the panel in appropriate cases.

And I think everybody on this call will not be surprised when I say where I'm coming is where I've been coming from, and that is to protect the idea of precedents which is replete throughout Bylaw 4.3. In fact, it's one of the purposes of the IRP—to prevent future disputes by creating precedent.

So, of all of the good things that have been suggested over the last several weeks, I'm grateful and I support Kurt's approach, I think. And I would urge us to consider it. I think it's the best way forward. Thank you.

SUSAN PAYNE: Thank you, David. And just before I go to Kavouss—who I can see, you have your hand up—I apologize for just asking this quickly first. David, do you see option 1, or path forward 1 and path forward 3—so the Kurt compromise and the as-applied—as being exclusive, or mutually exclusive, should I say?

The reason I ask this is because it seemed to me that there is scope for them to coexist. It seems to me that the as-applied is something which exists. If an appropriate action arises which gives rise to a ground for someone to bring an IRP, then it gives … Then that's the case, irrespective of when the policy itself was decided. I think that was the point that Sam and Liz we're making, and was effectively why they were giving comfort that the feeling that people would be time barred should be less of a concern than perhaps the binary determination had given rise to.

DAVID MCAULEY: Susan, thanks. I do not see them as exclusive for the reasons that you just said. However, I do see them as different. And in the solution, as I understand it, that Kirk made … And it was discussed by others—myself, Mike Silber. I forget who all weighed in on it.

But in that solution, to me, when we got to drafting that would have to guard rails of saying [that] the exceptional case has to be a significant injustice that would be avoided, etc. It would have some guardrails on it. And the way I read Sam's e-mail, maybe I misread it, is that it would come down to the art of pleading, and someone—a claimant—could get whatever claim he wishes to be adjudicated based on how he or she pleads the case.

And so, I thought there was a difference. I thought they're not different in kind, but there is a degree of difference in there. And that's what struck me, and that's why I said what I did. I would like to pursue Kurt's suggestion with language that would be consistent with [that idea], at least as I understood it, rather than sort of open the doors to how the practice evolves and how you make your pleadings. Thanks.

SUSAN PAYNE: Thanks, David. Kavouss.

KAVOUSS ARESTEH: May we please ask either David or yourself to put in the chat a brief summary of the option that he proposed—concrete, concise, and precise.

Having said that, Susan, you referred that many people [however] are not in favor of repose. That is not correct. Not [that] you are not correct. You are correct, but that sort of idea is commercially motivated and results in total instability that after 10 years you could bring something and saying that, “I forgot. I was not aware …” and so on and so forth.

So, there should be some repose. What the people are worrying about, I think, is not general cases. Exceptional case or exceptional cases. Always there is possible to have something for exceptional cases. So, the idea not having any repose, for me, is totally outside the logic. There is no logic behind that.

But the time whether it should be one year or one and a half years or six months—that is another issue. But we have to separate the general cases of exceptional cases. And people saying that, “I was not aware or did not become aware …” they should give justification, but not simply in order to put the others in confusion and provide instability to the entire process saying, “I was not aware … “

So, what was the reason that that “was not aware” and if that reason is justifiable or not? So, once again I come back to the case that we need to separate exceptional from the general case.

Having said that, I’m waiting if either David or yourself put the suggestion that he made or third option, or whatever, in a chat to see in the language what this looks like. Thank you.

SUSAN PAYNE: Thank you, Kavouss. Your objection to having no repose is well noted. You are not alone in this group. We are not at the point where everyone is as comfortable as you, but I recognize your concerns. Again, I have to say [that] we have been grappling with the fact that the public comment input that we had, which was not just from commercial entities but from wide range of groups across the community, appears to feel differently. But I also, and I think most of us on this call, also are grappling with how to bring the necessary certainty and some kind of cut off.

Again, thank you to you and to everyone else for bearing with this discussion. I appreciate [that] it's really frustrating, and it feels like it's been going on for too long. It does, but we have been making really good progress, I think, in the last few calls. I really feel like we are close to a breakthrough, or have appeared to be close to a breakthrough. And I really appreciate everyone bearing with this process. I think we are getting there.

Malcolm.

MALCOM HUTTY: Thank you, Susan. And, yes, I do think we have made progress in the last couple of calls. I just wanted to say that I don't think that the stress tests that I drafted are necessary the be all and the end all of the conversation. But at the same time, I also don't think that they're entirely nugatory either. Neither of them are based on the notion of a claimant who was merely tardy. Neither of them are based on the notion of a claimant who says, “Oh, well I forgot so can you hear it anyway?” And both of them have clearly logical reasons why they

should be heard that are apparent on the face of the facts that are laid out in those cases.

In fact, in both cases, the reason why the claimant didn't act any earlier is because the claimant was not allowed to act any earlier, even if they could. They wouldn't have been eligible. So, they were offered … Because I think we need to understand what the impact would be in such clearly foreseeable circumstances that form a pattern, that is the precise circumstances laid out in those things will not occur.

But the broad patterns [this] described are very likely to occur. It's very likely that there will be someone who, in the future, one day finds that they are first affected by an ICANN program. And, at that point, wishes to challenge it. And it is very likely that at some point in the day, some future registrants will be affected by an ICANN policy that they believe ICANN was not entitled to adopt. And whether or not these are things that can be challenged before the IRP is a matter of utmost import.

So, I think we shouldn't just dismiss them as being, “Oh, well. You can't foresee all future possibilities.” No. But these ones we have been foreseeing, and we need to understand what the impact of what we do should be upon them.

As for any possible areas of compromise, as you know, I don't think that … I think that one of the main reasons why we shouldn't have a repose is because there's no concept of repose in the bylaws. But if we were to go in for something like this, then certainly, as a minimal requirement, would be that people should have a right to have the repose waived if

the reason that they didn't bring the case earlier was because they were not eligible to do so.

So, I would offer that as one element—not the only element, but one element—that should stand in any such test. Thank you.

SUSAN PAYNE: Thank you, Malcolm. So, I was going to say that your comments were really good segue into us just taking a look at the second stress test. And I would like us to be able to do that on this call because I really would like us to feel that we had looked at that before we get to the end of today's call. But, Kavouss, you have your hand up. So, I will turn to you, and then perhaps we can try to do that.

KAVOUSS ARESTEH: Yes. I apologize to Malcolm. I fail to understand what he said. He said that the claimant was not allowed. Who did not allow him?

MALCOM HUTTY: The rules.

KAVOUSS ARESTEH: Who?

MALCOLM HUTTY: The rules.

KAVOUSS ARESTEH: Which rules?

MALCOLM HUTTY: The eligibility criteria. The eligibility criteria state that a claimant cannot bring a case until they've been materially affected. Both my scenarios show circumstances in which the claimant brought the case as soon as they were materially affected. And therefore, they were eligible to [inaudible].

KAVOUSS ARESTEH: Okay. Remedy the rules to remove that. Then you said ICANN should have not taken or adopted the policy. How do you say that?

ICANN does not adopt a policy himself. Policies are either coming from recommendation of the GNSO or other, or from the advice, and so on and so forth. And they have to act in accordance to the bylaws. They have to state the public comment. [inaudible] putting in question the ability of the ICANN Board that they may take the policy which is not correct. Then empower the community to remove that Board totally or that member of the Board.

So, so we forget we have spent a lot of time, two years, to have an empowered community. So, bring a case, Malcolm, that ICANN did adopt a wrong policy. We cannot simply say this one. And you said [they] have the right. Yes, they have the right. But they have also responsibility. They have also obligation. Right always goes with obligation.

So, the only thing that we may consider … You said that rules do not allow. What rules? The repose rules does not allow? Put something in the repose rules in case of circumstances that this happened. There would be a possibility to extend that, subject to justification. So, we should not put everything in abeyance and say that ICANN policy is wrongly made. Rules did not allow these. And having open-ended and no repose, and so on and so forth. You bring a case 10 years or 20 years after, and so on. So we don't know whom we are protecting. We don't know exactly. Thank you.

SUSAN PAYNE: If I could. So, Kavouss, Malcolm was referring to the bylaws, the version of the bylaws that has been adopted as a result of the accountability work. And the way in which the bylaws are drafted, I believe that certainly some on this call would say that there's some interpretation in terms of whether a repose is permitted or not. But the fact remains that, in terms of the question of whether a claimant could bring a claim or not, I think that there is no dispute about that. That the way the grounds for bringing an IRP are drafted into the bylaws, you are not eligible to be a claimant until you have been materially impacted and damaged.

And so, this is Malcolm's point. And this is the point that he has been trying to bring out in the case studies, the stress tests, that there might be scenarios that you can envisage where someone couldn't … They were not being slow. They were not being unaware because they weren't paying attention. They literally did not have any grounds to bring an IRP until it was too late.

And that's what we're trying to work through and see whether there are ways to give some comfort over that or address it, and whether something like the notion of the as-applied—the different acts that give rise to a cause of action—is enough to give some comfort. Or, indeed, whether something like the waiver that David and Kurt have been talking about also helps to give security in the scenario where we have this claimant who might otherwise be excluded from bringing an IRP, and where some on this call are concerned about that.

So, I think … Look, if we could, could we consider this concept, at least in the context of the second stress test? And well, perhaps Brenda, if you wouldn't mind, if you could call up that use case document and we can look at the second of those tests. I will just look at the chat because there are some very long messages in the chat that I haven't been able to look at.

So, Kurt has, I think … Going back to the comments that David was making, Kurt has suggested a solution [that] we establish a repose but the ICANN Board or the standing panel could waive the repose in order to avoid an injustice or something similar. And this might work with the presumptions that, firstly, the circumstances clearly demonstrate the potential injustice or that the IRP is the preferred forum for both parties, and (2) that the Board or standing panel—whoever is making that decision—will operate in good faith to come to an appropriate conclusion.

And I'll go on to Kurt's rationale before I scroll back. And the rationale is that, as Kurt says, he thinks the former can be determined in a straightforward matter. And if the latter is not true, then we're all sunk,

as he puts it. Requests for an extra repose IRP would be rare, and the solution would provide a backstop in the event a certain set of circumstances did come to pass.

And so, I'm not reading it all but I'm sort of slightly paraphrasing. And then to scroll back to David who, I think, was saying something similar. David was saying in some, he personally likes the way forward where there would be a repose period, say, of two years. But on application by a claimant, the IRP panel could waive the time bar to avoid a significant injustice. And we will describe that, but the panel will implement it.

And I think David has then gone on to say the panel, that is, would decide whether something is exceptional or not.

Okay. There's too much in the chat for me to look at all of it, but I think this does seem to me to be where we are heading. It seems like a workable solution, if you like. So, perhaps bear this in mind when we look at the second case study. Can I suggest that? I would like us to get forward.

I'm sorry, Brenda. I wasn't being clear. So, in my e-mail just before this call. So, 15 minutes before this call started, I recirculated … It's called IRP IOT Stress Tests, and it's a document that Malcolm originally sent to us.

Okay. And while you're doing that, I can see Scott is supportive of some kind of safety valve to the statute of repose. Yeah. Kurt is saying, "Maybe to Malcolm's statement: one of the standards for the standing panel waiving the repose could be that the claimant was barred from asserting her/his right earlier."

So, this is a good set of suggestions, I think, that we're getting towards a potential solution here. Or, at least it seems to me that we are. I hope we are.

Scott.

SCOTT AUSTIN: Just two points. I just wanted to make sure, as a shorthand, that the second stress test we're talking about is the [get baked] stress test, as I recall.

SUSAN PAYNE: Indeed, it is. Yes.

SCOTT AUSTIN: Okay. And the second point was just that I think Malcolm hit on something when he mentioned eligibility. And perhaps eligibility criteria, I think was the term, would be something to draft around in terms of what this waiver or safety valve or what would constitute eligibility criteria for such a waiver as a next action step.

SUSAN PAYNE: Thanks, Scott. Okay. So, Brenda, could we go to scenario 2? Which is, I think, about three or so pages in. That's right. There it is. And I hope that you all have looked at this stress test multiple times before. It's not new. We have had it for some time, and we have thought about it previously.

So, hopefully all that's really needed is just a kind of reminder if you haven't recently reminded yourself of it.

But to summarize, if you like, very high level, this second scenario relates to a new policy having been developed on abusive use of the DNS in the ICANN community process. And the way in which this is being addressed is … Or rather, this abuse in particular that it's considering is using the DNS to promote medical information that is false and dangerous. That's the notion.

And the way in which it is proposed in the policy to be dealt with is, essentially, by something which Malcolm has called the UDRP-Max which is an expansion of the existing UDRP to provide this adjudication process for this new kind of scenario. In this scenario in question, implementation has taken some time. So, it's taken about three years to get the relevant panel in place and to change the rules and whatever else needed to be done to actually implement the Board's decision to adopt this new policy.

So, basically, the Board's decision was made. Three years have passed. So, in this scenario where we have a repose of two years or one year or whatever it is, that time has passed. And then a registrant in a particular scenario has lost their domain because of the content on their site which has been argued by the French government, I think it is, to be sort of damaging to health. And rather than—

MALCOLM HUTTY: My apologies to the French. I should have said Ruritanian, of course, [inaudible] the use of fictional countries in these scenarios.

SUSAN PAYNE: Indeed. Ruritania would be better.

MALCOM HUTTY: My apologies to anyone from France or within the [DEU] for mentioning them by name.

SUSAN PAYNE: And the idea is that, rather than appealing that you UDRP-Max decision, the registrant instead has chosen to want to bring a challenge to the policy itself via an IRP action because they're saying this policy that ICANN adopted or the ICANN Board approved and adopted three years ago is contrary to the bylaws because it's about regulation of content. I wouldn't cite the bylaws provision specifically, but it's outside of ICANN's mission and remit. And so, therefore they're seeking to challenge the loss of their domain name because they're challenging that the policy exists in the first place. And as we know, we're already out of time.

So, I think we need to sense … The point of this example is to stress test whether that registrant can bring and IRP. I think it's for us to consider whether they can. And if they can't, if we feel that that's a problem or, in fact, whether we're comfortable that this is a scenario where that individual doesn't necessarily get to challenge the ICANN policy.

I'll just start with my own thoughts on this. One is that it seems to me that if the UDRP-Max is like the current UDRP, then it's happening outside of ICANN because it's an independent adjudication body that's making the decisions. And so, when a decision of that panel happens, it's not a decision of ICANN. The decision of ICANN happened three years ago and was the adoption of the policy.

But it does seem to me that there's an argument that the time to challenge that policy was when it got adopted. And that is what the empowered community is there for. That is why we have given various community groups, or interest groups you have, who are involved in ICANN … If they felt that ICANN was regulating content in an inappropriate way, could be expected to have challenged this by an IRP themselves. And if they haven't because it was a multistakeholder developed policy the community has adopted, then perhaps, yes, there is an edge case where an individual registrant and has lost their domain and are not happy about it.

But is there any difference to an individual registrant losing their domain as a result of the UDRP which also, arguably, is at least related to the content, in many cases, that's carried on a site as to whether you actually make out your UDRP or not? So, is it any different? And no one would suggest that someone who lost a UDRP now should be able to bring an IRP challenging that the UDRP exists.

So, this is me just floating thoughts out, almost as devil's advocate. I've got a set of hands up, so this is super. So, I have Scott first.

SCOTT AUSTIN: Sorry. That's an old hand. I'm still considering it.

SUSAN PAYNE: Okay, then. Thanks. So then, I have Kavouss.

KAVOUSS ARESTEH: Thank you, Susan. What you're saying, you put in question all policies of ICANN that it might be ultra vires or beyond their mission. You put in question the competence of ICANN Board. They adopt a policy which is beyond their vision. You put in question the way that the policy is developed. Never there is a policy developed in ICANN which has full consensus. There are always some people that don't give agreement to that, but at the end we have different types of consensus. Normal consensus. Consensus with strong opposition. And with significant support. That means it is not full consensus. But that is the way the policy is made.

So, you put in question the entire bylaws. They have to change the way that policy is made. You have to change the way that ICANN adopts the policy. [inaudible] ICANN makes something or a policy which is wrong, beyond their missions. And I said that now you have a mechanism to stop that.

Please raise a motion and, in the community that you have, in the constituency, approve that. Bring it to other constituencies. Reach the level of the adoption. And once adopted, remove the Board.

I don't understand that you put everything because 1 or 2 or 10 registrants are not happy. There is no full consensus on anything at all

except the GAC advice if there's full consensus—at least as far as GAC is concerned. But it may not be the same thing as the community. Many of the GAC advice full consensus was subject to comment by GNSO and others and may have not been adopted by the ICANN Board.

So, I think you put the whole thing in question. It's a dangerous game that you're playing. It is beyond our duty and it is beyond our mandate to put in question everything and express doubt and skepticism on everything. This is a new era. It is a new idea. And it is a new [front] that this oversight team now starts to begin with putting everything on doubt and questions. So, we should be very careful. Thank you.

SUSAN PAYNE: Thank you, Kavouss. Malcolm.

MALCOM HUTTY: Thank you. There were two things that you raised in your comments, Susan. And one was, why hasn't this been challenged anyway? And isn't the appropriate place to bring such a challenge through the community processes? And I think my esteemed colleague Kavouss's comments just now explained why that might not happen.

It might be that there is no sufficient consensus amongst the community to oppose this policy—I mean, in order for a community process to stand in its way or to seek to reverse it. But nonetheless, they could well be aggrieved parties.

But then that raises the other question. Why should such a thing be entertained at all? They're always going to be people, as Kavouss, I

think, was suggesting, that … There are always going to be people that disagree with something. It doesn't mean that their view should prevail or that they should be able to have another go at changing the decision and to be able to do so indefinitely. That would be quite wrong. I quite agree.

But that brings us to the thing that distinguishes this because it's not sufficient. You can't bring a case simply to say, “I disagree with this policy. Please reverse it.” That's not good enough. You have no grounds to bring an IRP to do that. And if that's how you plead your case, it will be struck out at the first opportunity as not showing a case to answer.

In order to bring an IRP case, you don't just say that this policy is wrong or unreasonable or unfair or treats me badly or any such thing. You have to say something very precise. You have to say that this policy is not permitted by the bylaws; that the bylaws preclude this from happening. That's what you have to allege, and that's what you have to demonstrate in order to prevail.

Now, Susan, you asked why would this be any different to the UDRP that we have at the moment that has been working for many years. And the answer to that is clear. The UDRP that we have at the moment and that has been working for many years is not prohibited by the bylaws. It's not precluded. It’s explicitly supported.

And with regard to the specific elements that were pled in aid of this hypothetical case, not only the mission limitation but the specific prohibition on interfering with content under 1.1(c), this was foreseen at the time that the bylaws were written. And the UDRP was grandfathered

in by specific language to ensure that it could not be challenged under that section, under that clause.

So, that would be what this claimant would have to do. They would have to show that this policy was contrary to the bylaws and show that it was not grandfathered in or otherwise authorized by the bylaws as written, as the current UDRP case is. And that's what provides the protection against the circumstance that I think Kavouss so eloquently sketched out as a chaotic one, and so correctly sketched out as a chaotic—in my view.

Certainly, I agree, is what I mean to say. I agree with Kavouss that that scenario that he described where it became a freefall would, indeed, be chaotic and could not be an effectual way of working. But the protection that we have against that is the very limited grounds on which you can bring such a case, and specifically that it has to be that it is contrary to the bylaws; that there has been an infringement of the bylaws. And that provides the protection against those circumstances because, by the end of the day, ICANN is always supposed to be acting within the bylaws.

It's not only the IRP and the IRP panelists and the IRP interpretations that constrain ICANN to act within the bylaws. The ICANN is legally obliged to act within the bylaws. It is a legal duty to do so; and duties that are potentially, in some circumstances, enforceable through the [ordinary course of law]. But that's another matter.

But the fact is that the Board has an obligation to conform to the bylaws, and the IRP is just a mechanism for correcting the Board when it is judged to have failed to do so. Nothing more than that. But the basic duty is there as things stand. And that's the only basis on which such a

challenge to the bylaws can be brought. Not on the basis of wild or fanciful ideas that I think things should be different.

I hope that provides some comfort that we're not getting into the scenario that Kavouss outlined, but actually we are simply honoring the intent that the bylaws should have meaning and should be enforced, and to ensure that they are. Thank you.

SUSAN PAYNE: Thank you, Malcolm. That was very helpful and very clear to me. And thank you for that thoughtful response to, as I said, my kind of devil's advocate scenario or explanation of your scenario. I think it's helpful for us.

Before I say anything else, I can see Liz and Scott have hands up. So, Liz first and then Scott.

LIZ LE: Thanks, Susan. This is Liz Le with ICANN Org, for the record. So, just a couple of points from ICANN Legal on this second scenario that Malcolm has posed. I think, as we said before, where there is a clear bylaws violation in existence from the start—which is where this scenario is couched in—and that policy somehow got through the whole process without any community challenge, then really we're not talking about an issue of timeliness to bring in an IRP. But it's more of a fundamental issue with ICANN.

And I think this is exactly the point that Kavouss was touching upon. If the whole process is somehow broken because there are so many touch

points up until the adoption of the policy and then again into doing the implementation period where there is no challenge of that policy by the community, then there is something else that is broken. And it's not about an IRP [time].

When Malcolm said it needs to have community consensus for the community to be able to challenge the policy, I don't think that's true because during the Policy Development Process, there are a number of touch points that allows up the community the opportunity to challenge and raise concerns about the policy that is being drafted and being adopted. And those are, for example, the community consultation periods of the work of any policy development working group and all the concerns that the community would raise through such processes would then be considered by the Board as consideration of whether or not to adopt the policy.

And again, after the Board adopts the policy, if there are concerns that any community member would have as to the legitimacy of that policy and whether it's consistent with the bylaws, then there are opportunities for a community member to challenge that through accountability mechanisms after the adoption. And similarly, there are such processes that exist during the three-year implementation period that was being developed in order to implement this policy.

So, I don't think that we're dealing with a scenario where it's somehow about a timeliness of an IRP or there should be no statute of limitations to allow somebody to bring the claims, such as in this situation. Because the policy itself, if it is in contradiction of the bylaws, then this whole process—multistakeholder process that is the very existence of how

ICANN is built and that what's in the bylaws—would flag that, and that would be caught as part of this process. Otherwise, then that's what we need to re-evaluate is how the multistakeholder process is built. Thank you.

SUSAN PAYNE: Thank you, Liz. Scott.

SCOTT AUSTIN: Thank you, Susan. Just, I guess, as a point of clarification, and I appreciate what Lisa has said about the adoption, the policy. But from Malcolm's standpoint since he was the author, I guess I'm still asking for clarification where he comes out on the availability of the statute of limitation or statute of repose—however you want to call it there.

Was the point here that, because inherently in the bylaws at 1.1(c) and 1.1(b) we have a prohibition against this kind of activity, that this policy should still be struck down years later, like a constitution, that inherent prohibition and limitation travels with it even in spite of the fact that we have a statute of limitation? Or is the idea that the statute of limitation itself should be up-ended, that it should not be available when you have this kind of context?

Because I see an intervening third party, in a sense, that really never could have been foreseen in the adoption of public health laws and a number of intervening factors that occurred way after all of the things that Liz talked about in terms of the analysis that's done for the original adoption of the UDRP-Max policy and things surrounding it.

So, just a question of clarification. Where, given all of the things that Malcolm just mentioned, does he come out on the availability of the statute of limitation in this scenario?

SUSAN PAYNE: Thanks, Scott. And so, if I understand you correctly, just to make sure I do. I think what you're saying is, is Malcolm—since this is his scenario—is he arguing that because of this kind of situation potentially arising, we shouldn't have a statue of repose at all. Or is he arguing that we might have a statute of repose, but it shouldn't apply in this kind of scenario where there's something fundamentally in breach of the bylaws.

It may be that, in practice, those are not actually that dissimilar. I suppose, though, that the question I would add to that is, can we feel comfortable that something like the waiver of the repose that Kurt and David have been talking about ... Can we feel comfortable that if we have such a really unprecedented edge case like this one, that that's there as the backstop safeguard that perhaps is what we need?

Kavouss, I see your hand, and I suspect you may be one of the last words on this for this week.

KAVOUSS ARESTEH: Thank you, Susan. I put, in a simple language, between white and black, there are many colors. It may be seen as a ridiculous expression, but it is maybe also seen as a philosophical expression. What we have to do, we must be mindful. As a responsible people, we are called an oversight

team. Apart from me, which is totally stupid, all of you are experts. So, we should not put our expertise together and undermine the process of the ICANN to say that the policy is wrong. Everybody could come from here and there and say that this is [ultra vires] or beyond the mission, and so on and so forth.

So, if we try to do something that, on one hand, maintains the stability of the policymaking which is based on a very detailed constructive way, for the policy you have to have the report. No, you have to take the subject. You have to have a report. You have to start to have the PDP. You have to put the [PDP] with the first public comment. You have to review that, Put the second public comment. You have to approve that and then send it to the ICANN Board. And ICANN looks into the bylaw and its mission, and so on and so forth. If there are questions, send it back to the policy maker or policy proposers, and so on and so forth.

If we maintain the stability of that on one side. On the other side, describe or raise weak points that may put in danger the interests of individual or community or sub-community, and so on and so forth, and try to find a middle ground on that, not to propose total [disability] that, no repose, no policy. Or you can put every policy in question, saying that, “This is wrong. It’s beyond the mission. “

We have to try something that maintains a balance between all that’s said: what is said by Malcolm, which may be black or may be white, and what was said by me, which may be black or may be white. But provide something that addresses the entire issue. Not one against the other in a very, I would say, smart way. Not going in too much detail, not going to the last miles, not [drilling into the poppy,] and not envisaging all cases

that may one day happen. To the best of our knowledge and best of our ability and our responsibility, all of us responsible to see what we can do.

I expect that either Malcolm or David or you or someone propose a concrete suggestion under the condition that they have mentioned. Not undermining or underestimating or weakening the process, and not forgetting the very right that Malcolm mentioned of a registrant, individual, or sub-community, or constituency, and so on and so forth. I that is our objective within the time limit of two or three sessions, I have no problem. Thank you.

SUSAN PAYNE: Thank you, Kavouss. Malcolm.

MALCOM HUTTY: Thank you. When I wrote these scenarios, I was responding really to the concern that had been expressed that our discussions were too abstract and did not have the specificity that could actually give us, really, the tools to even understand what each other were saying, let alone to maybe arrive at a possible compromise or even a change of opinion because it was just too abstract of a discussion.

Instead, to come up with something that was concrete, as Kavouss has just said, that gave a clear and concrete example of where a problem could lie so that we could at least understand what we were talking about. That was the aim. But maybe I've gone too far in the other direction. Maybe when I wrote these, I added in too much detail and

maybe a little whimsy that has provided a distraction. If so, I apologize for that. I did what I could.

But then, nonetheless, it's a real question here. In a scenario such as this, is the IRP available or not? And Liz has spoken in response, saying [that] if we had a scenario like this, it wouldn't be just the IRP that's the thing. We'd have the whole ICANN system and the viability of the multistakeholder model, or at least [as supplied within ICANN], would all be brought into question and we'd have all sorts of other things that we needed to look at. Which is all very well, but it's an entirely by the by.

The question for us. We are not looking at the viability of the multistakeholder model, or whether ICANN's other processes need broader reform, or the structures of the mechanisms used to arrive at those decisions, or any of that. They're entirely outside our mandate.

What's in our mandate is to write the Rules of Procedure for bringing an IRP case. And the question on the table right now is the time deadline for that. And I'm simply asking: in the scenario described, would the time deadline as its proposed to be—as some of us propose it to be written—preclude this case from being heard? And I think we need an answer to that. We need to know the answer to that.

Scott has put this much more succinctly and more clearly, but I wanted to really support that question. Now, if ICANN Legal needs more time to think about that, then perhaps they might, especially since we're coming to the end of this call, perhaps they might come back before our next meeting with an answer.

The last two paragraphs, or the penultimate paragraph, fictionalizes a response from ICANN Legal that might not be their view. If it's not, then I would like to know that. If actually ICANN Legal says. “No. We wouldn't say that. We’d say something very differently. We’d say this instead,” that would be a really useful step forward in understanding how this works.

And if it is what ICANN Legal would say, then would this case then be time barred? And if so, what would the consequences … And then we’d go on to consider the consequences of that. But first, I think we need to have a view from ICANN Legal whether what's written here is accurate or whether it's not a correct interpretation, that we can therefore potentially move in the same way we have on the first scenario through clarification rather than decision.

So, I’ll leave it at that. Please, could we have … I’d be grateful if ICANN Legal would accept an action to review this and provide an answer. Thank you.

SUSAN PAYNE: All right. Thank you, Malcolm. I think it’s probably putting Liz on the spot to expect her to answer this now.

MALCOLM HUTTY: I understand that, yeah.

SUSAN PAYNE: But perhaps she and Sam could circle back on the e-mail on this. I guess my gut reaction, or perhaps I don't need to give a gut reaction on what I think their answer will be. But let's put it this way. If the answer is that it is indeed time barred, then perhaps we can explore whether we think the path forward that has been coming out on this call, particularly from Kurt and David in the chat, of having some kind of a scope for application for a waiver from the panel where there's a sort of fundamental injustice—was the sort of scenario being considered. But perhaps that's something that can be explored further.

If we have the type of scenario that's being envisaged here where, for whatever reason, the multistakeholder process has adopted policy that is fundamentally wrong and has and has arguably led to a fundamental injustice for that registrant, that they should at least be allowed to have their case heard. I mean, we're not prejudging the outcome of that case, but they should at least … Perhaps that opportunity to apply for a waiver gives them their opportunity to be heard.

And I think that possible path forward that David and Kurt have been encouraging us towards may—or I hope it will—be something that gives us all sufficient comfort that it may not be what we would prefer, but perhaps it's a path forward.

I would like us to also think about, if that's the case, if there are any other safeguards that we think we also need. Some things that have come up on previous calls were about, given that there is a need to know or have reason to know about a particular decision but also this possibility that time is running when you don't know, do we feel that

there's something that needs to be done about publication of decisions by ICANN, perhaps publication outside of ICANN itself?

Which is probably not an issue with the rules themselves, but perhaps is a recommendation we might think we should make in order to be ensuring that anyone who could be impacted by a decision is not in ignorance of it.

And the other point that we haven't got onto but I really would like us to explore. And perhaps it's teed up on the slides that I circulated and we circulated before this call. But other actions that, if we are putting in time limits for bringing an action, are there other things that need to be factored in?

So, it's a point that came up in the public comments that there are other accountability mechanisms. And certainly, there was quite a reasonable amount of public comment supporting the idea that if we are having these time limits or periods of repose, that they ought to get told in order to take into account the fact that some of these other accountability mechanisms take a very long time to run. And you might be time barred because you're pursuing another avenue which the bylaws give you.

And I think many feel that it seems inappropriate to be running out of time on your IRP because you're going to the ombudsman or you're doing a request for reconsideration or—I'm losing track of another scenario—a cooperative engagement process which is a sort of process that has to happen or ought to happen before and IRP is actually brought.

So, I would like us to think about that as well, in the context of when we're thinking about whether a waiver process or an opportunity for seeking a waiver is going to take us forward, whether there are other safeguards as well that we really ought to be building into. And I welcome people sharing their thoughts on that on the list between this call and the next one.

I can see that we have just one minute to go. And, Kavouss, you have your hand up. So, you have the floor for the final word.

KAVOUSS ARESTEH: Yes. For the final words. I like very much what you said—to see whether there are other mechanisms to address the issue. The importance is not only to raise the problem. The importance is [to] suggest solutions. That solution might be already in the bylaws. There are many. Many of us have worked two years very actively in a painful time, sometimes 3:00 in the morning. And there are solutions in the bylaws for that. There are reconsiderations. There are many things.

So, what I suggest [that was once] put in the chat, that we fully understand the problems, but we are lacking the concrete solutions, a solution which is not looking for the radical changes, but looking for using some of the possibilities which exists already. If not, we add something. Thank you.

SUSAN PAYNE: Super. Thank you very much, Kavouss. And thank you to everyone for your engagement. And I really do … I know it's painful, but I do think we

are progressing towards a solution which may not be perfect, but I think, I hope we will feel we can live with. I hope.

Okay. So, we're at time. I apologize for running over by a minute. Thank you very much, and see you all again in two weeks' time. Thanks.

MALCOM HUTTY: Thank you, everyone. Good-bye.

[END OF TRANSCRIPT]