BRENDA BREWER: Good day, everyone. Welcome to the IRP-IOT Meeting #78 on the 12th of October 2021 at 17:00 UTC.

Today's meeting is recorded. Kindly state your name before speaking and have your phones and microphones on mute when not speaking. Attendance is taken from Zoom participation. Apologies received from Flip Petillion and Mike Rodenbaugh.

With that, I will turn the meeting over to Susan. Thank you.

SUSAN PAYNE: Thank you, Brenda. Thanks, everyone, for joining. This is our regularly scheduled call on the 12th of October. As usual, we'll kick off by reviewing the agenda and seeing if anyone has any updates to Statements of Interest. In fact, I'll do that bit first, and pause and see if anyone does have any SOI update that they need to flag to the group. Okay, I'm not seeing any hands or hearing anyone, so I will take that as, no, we don't have any updates for this time.

Next up on the agenda we have a couple of action items from the last meeting. One was for me to finally get around to seeking volunteers for small groups to try to advance some of the outstanding matters, and in particular to focus on outstanding matters on the IRP rules as opposed to some of the other matters that are sitting in our inbox, if you like. So I have got that down as an agenda item to come back to. So we'll come on to that shortly.

The second item was an action item for Malcolm to suggest some draft language relating to tolling. And that arose out of our discussion on the last call about the timing of different accountability mechanisms and concerns that if we were tolling for one or more of those, that we could be, essentially, significantly extending the time before and IRP would be brought, potentially therefore undermining the concept of the IRP as a swift resolution of dispute.

Malcolm has circulated some draft language today in the form of a PowerPoint presentation. I'm hoping he will join us. If not, I perhaps we'll just quickly present it to everyone. And really, it's just as a sort of first look for people. Obviously, not everyone will have had time to review it and we don't have everyone on the call, so we certainly would look for us to engage on that further on the e-mail list and then come back to it.

So agenda Item 3 is, as I just mentioned, to talk about the subgroups. Then agenda Item 4—and this is our sort of substantive topic for the call list to come back to—the draft language for the safety valve for the repose. That was language that was circulated by ICANN Legal, and we've had it in the form of a Google Doc which has been open for people to insert comments for a couple of weeks now. And so I'm hoping that we can talk specifically about those comments and review them and reach a sort of path forward on that language.

So, very much encouraging people not to start raising new points that haven't been put in as comments in that Google document unless … Well, unless you feel that it's something that absolutely has to be

raised. But we're trying to move our work onwards by trying to work online rather outside of the meetings as much as we possibly can.

And then the final item on our agenda is just to flag the next meetings. And I'll quickly mention that now in case in case I mismanage the timing of the call again.

Bernard sent an e-mail suggesting that we might try and have calls on either side of the ICANN meeting in particular since we had a bit of momentum going. And we will lose a week for the ICANN meeting proper. We were proposing that, in addition to meeting this week, we would also have a meeting next Tuesday. And that was put out to the mailing list for any comments. The only comments we had, and I think it was just one comment, was favorable. Haven't seen any objections.

And so that's our intent, that we'll meet next week. And then we'll meet after the ICANN meeting on the 2nd of November as well so that we don't lose too much momentum and too much time. Especially as we're sort of coming into the holiday season, it would be beneficial for us to keep things moving as far as we can.

So I don't see Malcolm with us at the moment. I'll therefore turn to … Well, I think perhaps we'll hold fire on talking about his draft language on the tolling and see if he is able to join us.

So first up then, on agenda Item 3, is really just to flag for those who haven't had a chance to sort of looking and think about this yet that I have—or Bernard on my behalf—has circulated now my suggestion on how we might break up some of the tasks on the rules into subgroups to try to take the work forward. And I'm looking for volunteers for people

to join some of those efforts. I have had some volunteers already on the e-mail list which is great.

And so, hopefully, this is really just to flag to you all and hopefully encourage you all, again, to look at the list of items and the suggested breakdown of how we might structure it. And to sort of put your hands up for particular groups to work off outside of these main meetings and try and take it forward.

And essentially I think I'm currently proposing for work, four subgroups. We do have a group already on consolidation that did meet for a while. We lost a member, in that Helen changed roles and left the group. It's basically looking at consolidation, but it also covers a couple of the other items from our outstanding item list. So it's consolidation. It's about elimination of the procedures officer or use of a different terminology. And it also, I think, sort of …

There seems to me to be a reasonable sort of overlap with the interim measures and the practice for using an emergency panelist. And so I think that probably makes sense for those efforts to be combined.

The next one is that there were various sorts of questions around the selection of arbitrators that we had on our list of issues, including considering whether to better align the Article 3 language with the ICDR rules, particularly about the procedure [on] how to appoint a third panelist—where there's disagreement—potentially considering whether we feel that we need to have any kind of specification the nationality of arbitrators and whether there should be one or more from the same

nationality or, indeed, whether we need to address the nationality of the parties and the nationality of the arbitrators.

Again, I think this is something the group should think about. Obviously, when they're thinking about it, they will also have to have in mind the fact that we will be having a Standing Panel. And therefore, to some extent, the part of who to select from will be necessarily pretty small.

And then the other item in relation to selection of arbitrators related to thinking about having greater clarity on when the IRP panel is in place which would give clarity to when you might need an emergency arbitrator. That does sort of slightly over overlap with some of the consolidation work, but I'm hoping that it operates as a stand-alone. I didn't want to give that consolidation group all of that to look at. And so, at the moment, I'm proposing that it's two different groups. But we will have to see if it proves to be unworkable.

The next group was to be looking at the initiation of the IRP. And in particular, this is, firstly, around the fee to initiate the IRP where a question's been raised about whether the current procedure of having the complainant pay a fee is in line with what the bylaws say. And again, this not to prejudge that question by having it on the list. It's essentially to have a small group look at that and make a make a decision and, if necessary, make a proposal if they feel some change is needed to the procedure.

And it sort of ties in as well with a point on the time for filing around clarification on when the IRP is officially commenced. And particularly, that also ties in with failure to pay a fee. And so it clearly is relevant. If

were to have a proposal that there's a different procedure for dealing with the fee for the IRP, then those two things need to be lined up.

And then the final one was around the procedure if ICANN elects not to respond to the IRP. I think we all probably think this is relatively unlikely to occur, but the bylaws certainly allow for that. And we don't really have anything in the rules that's covering it off. And so it would be, I think, useful for a group to think about that as well, and see whether we need to be proposing some additional rules to cover that scenario.

And then on our action list or our list of outstanding issues, specifically about the rules rather than about some of the other matters on our list, we also have appeals. A question of whether we need fuller rules for appeals. And if we do, do we have a separate set of rules or do we feel that this should be dealt within these specifical IRP rules about non-binding IRPs in precedent, and whether it's within our remit or not and whether there's an ambiguity about the Standing Panel's ability to adjudicate a stay or to recommend a stay. And this was something that David McCauley raised in an e-mail a little while back.

I haven't allocated them to subgroups because I think that we need, as a group, to be considering how best to handle—and, indeed, whether they're within our scope—before we start looking for volunteers to work on any of those.

So that was what I was proposing. I hope it makes sense. If anyone has any suggestions, and particularly if anyone suggests a better way to do this, then I'm certainly all ears. But otherwise, I'm keen to just get some

volunteers and hopefully get some work going so that we can try to crack through this now.

David.

DAVID MCAULEY: Hello, everyone. I have been away the last several working days with my grandchildren, which is the good news for me. But what it means is that I'm just catching up on list now. So apologies for not answering some of these things.

But what I'd like to say is that I think your suggestion looks good and I would like to volunteer for a number of the groups. Not consolidation because you already have that in hand, but maybe the others. And I have a question about it, too.

So do you expect that the subgroups will meet every other week? And when you say … I mean, I think it's a fair comment to reserve some things for full group discussion, but I don't think that means … And I'm asking you. I don't think that means that the work that subgroups produce won't come back to the full group for a final blessing or something like that.

But I think it's a good approach. I think it'll help us move more quickly. And I'm happy to volunteer for as much as I can. Thanks.

SUSAN PAYNE: Thanks so much, David. Yeah, absolutely. I certainly am not anticipating that subgroups will be making final decisions. I'm very much hoping

that, rather in the way that we've used subgroups in some of the PDPs and other work efforts, that a group can take a really sort of decent first pass and explore the issues and come back with a recommendation.

But that it would be for the full group's blessing or, indeed, rejection; that it would be perfectly possible for the full group to reject. Ideally, not based on a consideration which had been fully explored. But ultimately, it's the role of this group as a full group to be making these recommendations. And so we can't delegate that responsibility.

In terms of how frequently we meet. Yeah, we might look at having a couple of … It may, to some extent, depend on how many people are across multiple groups. We might sort of kick off with a couple of these groups and then move on to another couple once some of that work is wrapped up. It may not be possible to have four groups going in parallel, I think.

But, yes, I'm sort of envisaging maybe they could meet during the off week of the full group meeting or something like that. Not necessarily on a Tuesday, but hopefully we could get at least two subgroups going at it at a time, subject, as I say, to how much overlap there is between members.

David, I think that's a new hand.

DAVID MCAULEY: It is. Thanks, Susan. And your answers makes sense to me. I think it's a good suggestion.

But I raised my hand again because you mentioned something that I forgot to speak to, and that is this idea of non-binding IRPs and precedent and all. I did mention that in an e-mail, and Mike Rodenbaugh asked a question about it in his e-mail earlier today or yesterday. I forget what it was.

So I thought I'd make just a little bit of an explanation of what I was getting at, if you don't mind. I'll just take a second to sort of explain that. But what I was doing was I was flagging an issue that I thought this group should look at. I don't have in front of me, but one of the bylaws says that appeals are subject to limitations that may be developed. And I posed a question. Should we develop a limitation that non-binding IRPs are not appealable? There is a potential to have a non-binding IRP.

So I said, "Why don't we look at the question, should they be appealable? And then I was asking a related question. If they're not appealable, would a non-binding IRP be considered precedential? Should we, you know …

And I was also making the point that if we find that something like that is beyond our remit, should we, when we conclude our work, make a report to ICANN that says, "Here's our work. And, oh, by the way we saw a number of issues along the way that we thought should at least be considered by the community"?

And the reason I say that is that very few folks in the community are going to know Bylaw 4.3 the way that we do. And it struck me that—this is just me speaking personally now—that a non-binding IRP decision, as far as being precedent, I was scratching my head, you know. Will it be

subject to the same kind of all-in litigation that you want for a precedential question and a precedential decision to have, for the panel to have at hand all of the contested information that they might get?

And so, anyway, that was the basis of the backdrop. And so I wasn't trying to suggest that is within our remit. I was asking is this in our remit? If we decide that a non-binding IRP is not appealable—and we can decide that, I think—should we look at the question of precedence or should we pass it on to the community through the Board? Thank you.

SUSAN PAYNE: Thanks, David. And I certainly had understood that to be your intent. Sam.

SAM EISNER: Thanks, Susan. David, I don't know if you're prepared to talk about this now, or maybe you could circulate some information to the list. I'm having trouble understanding what we mean by a "non-binding IRP." So if you could provide some more information about that. I just don't understand how that fits into the bylaws right now.

DAVID MCAULEY: Thank you, Sam. Apologies. I'm having a real problem there with the mute button. It's Bylaw 4.3(x). An in 4.3(x), Section (iv) says, "By submitting a claim to the IRP Panel, a claimant thereby agrees that the IRP decision is intended to be a final, binding arbitration … Any claimant that does not consent to an IRP being a final, binding arbitration may

initiate a non-binding IRP if ICANN agrees; provided that such a non-binding IRP is not intended to be and shall not be enforceable."

And so the potential exists, you know. Maybe ICANN would adopt the position, "We're not going to do that." I don't know. But it strikes me that the potential is certainly there for a non-binding IRP.

SUSAN PAYNE: David, you're going in and out of audio a little. Sometimes you're easy to hear and sometimes you're quite faint.

DAVID MCAULEY: I need to hold the mic in front of me. I'm sorry about that. But I was pointing to 4.3(x), subsection (iv). I think that's a provision where there, at least, is the potential for a non-binding IRP.

SUSAN PAYNE: Thanks, David. Okay, Kavouss. Kavouss, I am not hearing you.

KAVOUSS ARASTEH: Yes, yes—

SUSAN PAYNE: Perfect.

KAVOUSS ARESTEH: —because you have not properly pronounced my name [inaudible]. Now, okay. You're pronouncing my name.

I'm sorry. I don't need any explanation for a non-binding IRP. I'm opposed to that. Clearly, bluntly, and openly. It is against the objective of the very objective IRP. I don't understand non-binding. Why we do all of these things for non-binding? And if we don't discuss "non-binding" we don't need to discuss whether it's contestable or non-contestable. So I oppose the non-binding IRP. I don't know where it comes from. Thank you.

SUSAN PAYNE: So Kavouss, I think the point is that there is a reference to it in the bylaws. But certainly, what we are doing here is … Well, the expectation is that the IRPs would be binding in the majority of cases, and that's what we are working towards. But David rightly flagged that there is this provision in the bylaws and we have it on our list to talk about in the future. I hope that makes sense.

Okay. I'm not seeing any other … Oh, Kurt. Sorry, I missed you.

KURT PRITZ: Oh, no. That's all right. I just re-raised my hand because I wanted to make sure the previous discussion was exhausted, which I think it is.

Anyway, my advice that might not be worth much is—and you might have already anticipated all of this—and through my own painful experience is that one way subgroups fail is that the issues are re-

litigated when they come to the big groups. And there are two ways to address this. Like I said, you've probably already thought of this.

But one is, as subgroups develop their thinking, to report up the direction in which they are heading as they do work so that the final product is not a surprise to anyone, and feedback is garnered along the way so that when the final product is done, there's a high chance of acceptance by the whole group.

And then secondly, in a representative group where each stakeholder group or constituency is represented, you'd want to have a critical mass of people—so we're stretched a little thin here—but somebody from each constituency or stakeholder group to make sure all viewpoints are taken into account even at the subgroup level. We don't have that luxury here. We're more of a mishmash, but we do have, after a long time of working together, some identification of who argues on what side of what issues.

So when the subgroups are formed, I think we'd want to try to take care that there's a diversity of thinking in every subgroup so that, again, when the final product is delivered it's not antithetical to some other's thinking. So that's my big advice. Thanks.

SUSAN PAYNE: Thanks, Kurt. That's really helpful. I think those are really good points, and we'll take them on board. It may be that I may be needing to encourage some people to join a particular subgroup or, indeed, it might even be that if it doesn't look as though we can get kind of a representative group on a particular topic, we might need to just

reserve that one to the full working group if we need to. But, yes, thank you very much for those good suggestions.

Okay, I don't really want to spend any longer on this. And I'm not seeing any further hands, so I think we can wrap this discussion up. But just urging people to have a look at the groups and think about putting your hand up for one or more of them. And hopefully we can get that work underway. Probably not before ICANN72, since it's coming up fairly promptly, but we can hopefully get that going soon thereafter.

So circling back now, it's not specifically agendaed except as part of one of the action items held over which is the document that Malcolm circulated with his suggestion about how we might introduce a level of reasonableness and fairness into the idea of allowing time for other accountability mechanisms without putting the claimant in an IRP out of time for filing.

Malcolm, I think you've joined us. I hope you're still here. Yes, there you are. Sorry, you were off my screen. I wonder, would you be willing to just very quickly introduce your document and sort of explain your thinking? And we will perhaps see if anyone has any immediate reaction. But I don't want us to spend the whole call discussing it. I think it warrants people having time to think about it and provide some feedback on the list. And we can perhaps have that on the agenda for next week. So if you wouldn't mind a very kind of whistle-stop tour.

But just before you start, Kavouss, you have your hand up. Is that a new hand? So, Kavouss, do you wish to have the microphone?

KAVOUSS ARASTEH: Yes, Susan. I said that I don't want you to discuss something and leave it as it is. We should have some sort of at least conclusion on that. I remember that this non-binding IRP [inaudible] discuss it in the work stream, and so on and so forth. But it's a very rare exceptional case. If that happened, no doubt it would be uncontestable because when it is not binding, we cannot contest something which is not binding. So it is a waste of time.

But I would like that either you or Becky who was dealing with this issue many years ago, or David, provide information where and how one circumstance—not now, I mean next meeting—for this non-binding IRP [inaudible]. We should not generalize that at all. Thank you.

SUSAN PAYNE: Thanks, Kavouss. Well, perhaps, why don't I just circulate after this call—well, not today but before the next call—the bylaws section in question. It's not for us to discuss now. I was just simply flagging that it is on our list of outstanding items and has been on that list now for about a month. And it is not something that we are putting into one of the subgroups, but it is something for us to consider whether it's within scope for us to spend some time looking at it.

So I hear your comments and I'm sure you'll be wishing to make those comments again when we, as a group, consider whether that's something that we should and indeed could spend time looking at or not. So thanks for that. Your comment is noted.

Malcolm, over to you.

MALCOLM HUTTY: Thank you, Susan. And my apologies for being late to join this meeting. I'm afraid other business prevented me arriving on time. No disrespect was intended to my colleagues here.

So this presentation I put together attempts to somewhat summarize and then build upon the discussion that we were having in our last call about whether it really could be possible to get the benefits that we get from tolling time without necessarily having some of the downsides that Sam was identifying. But tolling time could extend the duration, the elapsed time—the [elapsed] calendar time—between an event that was challenged and the ultimate outcome of the IRP more than desirable, and possibly more than necessary with an alternative solution.

So here [inaudible] I've attempted to sort of examine those points and look at the solution that was discussed last time and give that a sort of evaluation. So if you can flick through the slides because I don't have control of the slides on the screen.

The first slide, I've just given a definition of what tolling means. But basically, just don't count the days for processes tolled. Next slide, please.

Then we identify the purposes. The first purpose of tolling, then, is simply to make sure that the time doesn't run out for the claimant. They're not unable to bring an IRP claim simply because they're engaged in another process instead. And we should remember that our job here is actually to create rules that help claimants to bring their IRP claims in a timely fashion so that we can get these disputes resolved. And if we

don't put in place things that enable that to happen, then we're really falling in our duty. So that's one of the reasons for tolling. Next slide.

There are, however, some subsidiary benefits here that you get from it. By taking away the negative incentive—that is, the fear that time might run out during the process—you actually encourage using the non-IRP processes that exist which might otherwise be avoided by claimants. And that could result in us saving time, saving money by actually either resolving the dispute without needing an IRP or at least narrowing the scope of what's needs to go to an IRP.

And one thing that came up in particular is that if you can actually agree a set of facts so that the IRP is only on the rules but not the facts, that can dramatically reduce the area under contention and the difficulty of what's done. You know, you don' have to worry …

All the stuff about whether or not you would have witnesses, whether the old issues have problems that need to be, you know, people's minds have faded and all that stuff. None of that appears if you've actually agreed a facts. So that's an important benefit there as well.

There's also the issue that if a claimant actually starts another process and then abandons it prematurely, says, "Actually, you know what? We're going to stop this before it's resolved it's outcome just because I've got to go and fight an IRP now," then that would create a lot of wasted work. So tolling would reduce that from happening.

And finally, another benefit that tolling gives to the claimant is that they don't have to actually engage in multiple processes in parallel, which could be a lot of work for them. Okay, next slide, please.

Now there are downsides, however, to tolling. And the first one is simply that it extends the duration. And the aim of the IRP is to get things done as quickly as possible, so that in itself can be considered a downside.

Secondly, there was a fear that was expressed that a party could—going into processes knowing that they're tolled—just use that to game the system to spin things out, even if the process that's being initiated is unnecessary, futile, there's really no point to it. The only thing it's doing is to create a delay. That was certainly a fear that was mentioned in the last meeting by Sam. One might think that if the other party could collapse a process that's being gamed in that way, that might mitigate it. But nonetheless, that fear was raised.

And finally, if you do tolling, the flip side of not actually forcing the claimant to engage in two things in parallel is that, actually, there's no incentive for the claimant to engage in multiple processes in parallel. Which means that there's no incentive to save the elapsed time that could be done by working a little harder in parallel. So that's the downsides of tolling. Next slide, please.

So that raises the question, is it possible that there's some alternative to tolling that would exist that would deliver the benefits that we've listed of tolling but avoid the downsides that we've listed? Next slide, please.

So the alternative idea that came up was the idea of a supplement for time. So under that, you wouldn't toll the time in a process, but you would guarantee to the claimant a fixed period at the end of the

process in which to file the IRP so that they wouldn't have their time expired during that sort of process.

And by example here, what I've set out, supposed that a claimant wishes to find an IRP. The clock starts at day zero. If, after 60 days, for example, they were to file a reconsideration request, for example, and that took the full 135 days to complete, they would then be out of time if there was no tolling.

But we could say, "Actually, we'll give you 60 days after the Request for Consideration to file the IRP as part of the rules, as an alternative deadline for filing. And that would give them the 60 days so they would be able to do the RFR before doing an IRP, but they wouldn't get a 135 days that the RFR took, which is what we'd be giving them if we decided to toll the RFR. So there would be a compromise there.

And that compromise could potentially satisfy the benefits and potentially significantly mitigate the downsides of tolling. So that was the idea of why that would be a compromise. Next slide, please.

So this is just looking back at those lists of benefits and problems we're tolling and seeing which ones are satisfied. And actually, all of these seem to be satisfied by this except for the issue that it would be forcing the claimant to work on two processes at once which could be a burden to the claimant in some circumstances. Next slide, please.

So when would it be appropriate? It seems that this alternative option might well be considered fair if we believe the claimant ought to be preparing their IRP claim for filing in parallel with conducting another accountability process.

On the other hand, it might not be considered fair, the flip side of that. If we believe either of two things. If we believe that lack of foreknowledge of the outcome of that other process prevents or significantly inhibits the claimant from preparing their claim in parallel—i.e., if they've got to know the outcome of the other process in order to be able to file their IRP properly—then this option might not be fair.

And also, if conducting two processes in parallel is seen as placing an undue burden on the claimants, then you might also consider it not fair. And final slide, please. The next slide and the final slide.

Then looking at the processes that we have, here's a possible assessment of how you would come out by applying those considerations.

For the RFR. Well firstly, we note that the RFR process doesn't really have any opportunity for the claimant to engage in an RFR process once they've filed it. So there's not an ongoing set of work being done, which means there's not really a burden on the claimant of having the two processes going in parallel. So the idea that this might be an undue burden on the claimant really doesn't apply for the RFR.

And secondly for the RFR, the outcome is pretty predictable. Now I may be mistaken about this, but my understanding is that it tends towards the binary. It's either that your request is accepted and they go off and do it again, or it's rejected. In which case, you've lost and then really your only option then is to do it via an IRP. And that's very predictable, very clear.

And you're not really going to be using anything that came out of the RFR in order to file your IRP because you're just being told no. So that makes it look like, for the RFR, the compromise option would really work. And we could say that won't toll for the RFR and instead have some supplementary time option as an alternative to tolling. And that could be a good compromise.

For the Ombudsman, the outcome, there's not really an outcome in that sense. So it's not at all clear. There is some active engagement needed by the claimant like talking to the Ombudsman, but is that really onerous? Would that really meet the standard of it being unreasonable to expect them to do [inaudible]? You take a view on that. My own view is actually that it sounds reasonable to me. But maybe others would have a different view.

For the DIDP, the Document Disclosure Policy. There, the issue is whether to file an IRP and the contents of what you actually writing your IRP claim may well depend entirely on the contents of the documents that come out of that process, that only come out at the end of it. And therefore, as a result, you may not really be able to do that work in parallel because you haven't seen the documents that come out of that process yet.

And so, for that we may … Well, it might be reasonable to assess that as, this compromise wouldn't work for that process for that reason. In which case the implication would be that tolling is required for DIDP.

And then for CEP, the Cooperative Engagement Process. That's a very active process of negotiation between the claimant and ICANN. And so

that's potentially as time consuming or as effortful as actually putting your case before the IRP would be. And so you might well consider then that expecting to do that at the same time as the building your IRP case is potentially an undue burden.

And it also gets the claimant into the wrong mindset. On the one hand, the CEP are supposed to be negotiating and reaching a solution. Whereas the IRP, when you're filing, you're trying to build your strongest claim. So they might actually be mutually antagonistic processes, really.

So for that reason, you might say that, again, this compromise option might not be considered appropriate for the CEP process. And the implication of that would be that tolling is required for the CEP.

And so I would ask you to go away, consider the issues that were raised there, and consider how you would conduct such an assessment. But certainly as a first pass, I think it's possible that this compromise option could provide a workable and reasonable solution certainly for the RFR, and quite possibly for the Ombudsman as well—i.e., to say that neither those processes need to be tolled if there was, instead, a promise of sufficient time to file at the end of it.

But the DIDP and the CEP probably do require tolling. This process would not be sufficient to meet the requirements there.

So that would be my suggestion and submission here as to how we could go, though. It would potentially bring us forward, and I think that actually, if we got the RFR out of tolling and into the supplementary

time, might well mitigate significantly the concerns that Sam was raising in the last meeting. So I'd be very interested in ICANN Legal's reaction.

SUSAN PAYNE: Lovely. Thank you so much, Malcolm. And thank your thoughtful assessment. I thought was incredibly useful. I found it really useful as well. It's been really handy to have the kind of thinking of why we're calling and what the pros and cons are set out in that way. Really appreciate it.

I don't want to cut discussion off unduly, but at the same time I do want us to have time to go back to the safety valve on the repose. And I am also conscious that not everyone's here, not everyone will have had time to really consider what you're proposing. And so it does merit people taking some time to think about this. And I would like us to have a really substantive discussion the next call.

But I do have a couple of hands. Particularly if anyone's got any questions for Malcolm where something isn't making sense to them or they want to clarify something in order to consider it, that would be really super helpful. But otherwise, I'm going to try and cut this off at the top of the hour if people don't mind.

And with that, I will turn to Liz.

LIZ LE: Thanks, Susan. And thank you, Malcolm for the thoughtful work that you put into this and trying to come talk to address the concerns that we raised and trying to come towards some kind of an agreement that

we can all live with. Clearly, you put in a lot of time and we really appreciate it.

I think, from an ICANN Legal standpoint, obviously we'll need to take this back and consider it some more and spend a little bit more time on it. And we'll come back and respond in a more substantive manner.

But I think a couple things, just off the top of my head as you were going through this, is that it's still not clear to us how the tolling after a Request for Consideration really does end up providing some benefit to the IRP because they are …

A Request for Consideration, as you know, is an entirely different process that evaluates going under a different standard than an IRP. So a Request for Consideration looks at whether or not an ICANN Board or staff action or inaction in terms of process itself violated the bylaws or the Articles of Incorporation. It does not look at the merits of the larger issue at hand that may be challenged, but just whether or not there was a failure in the process in reaching that decision.

Whereas an IRP does look at the substantive merits of a decision. So a lot of times, what we saw in the last couple years as it related to the new gTLD round—I think that this may be going to where you said that the results of an RFR is predictable—is that we had a lot of new gTLD applicants that tried to challenge the merits of a decision that was made during [any] of the objection processes—whether it's legal rights, whether it's a community priority evaluation—by bringing it through the reconsideration process.

And in all those instances, because the reconsideration process does not look at the merits of that decision but only whether or not the panelists, in making the objection determination fail to follow process. And in fact, then what happens is, you saw that most of the people who then ended up getting their reconsideration denied because they were seeking a different remedy, a different standard using the wrong accountability mechanism, then went to really file an IRP because that's what they should have done all along if they were challenging the merits.

So I don't think in this, you really gain anything. I don't think a claimant gains anything by having an additional 60 days after the reconsideration request has ended in order to file the IRP because there's nothing coming out of the reconsideration request that would benefit the claimant in the IRP. Certainly, there's no merits decision being made on that end in the reconsideration process.

Now the other thing is, you had mentioned that you want to be able to have additional time so that the claimants can agree on a set of facts that can go into an IRP which, of course, would cut down the time of an IRP and would be beneficial to both parties. But that's …

The only way that an agreement on facts that are being litigated in an IRP can carry through into the IRP is through the CEP. Which goes back to our initial suggestion which [is that] tolling in the CEP addresses the concerns that you've highlighted. Tolling at the end of an RFR does not address these concerns.

And I think the other thing is, well, we did not raise gaining … We did raise gaining issues in our discussion so far, and that's not really the

focus of our concerns here. What we're trying to do is move towards an appropriate and efficient resolution for the issues that we're discussing, but it's just not clear to us that by adding on additional time through the reconsideration process—or even the DIDP process which is seeking disclosure of documents—would somehow [alleviate] any prejudice that may come to a claimant who chose to pursue a different accountability mechanism rather than through an IRP. Thank you.

SUSAN PAYNE: Thanks, Liz. So that was quite detailed. Obviously, it's some points that we've heard made previously. I think we will explore this all further, but I'm conscious … We've spent a lot of time talking about tolling of time limits. Generally, my feeling is that the group will largely agree collectively that some time needed to be allowed so that a claimant could pursue other accountability mechanisms and not be time barred.

And we, as I say, we've been talking about that for a very long time, so I'm hearing what you say. You've said you want to think about this further, so perhaps you could do that and come back on the list if you possibly can. And then we will have a much more substantive discussion on this next time around, if that's okay.

Kavouss, I see your hand and so I will come to you. But please bear in mind that we will have a substantive discussion on this next week.

KAVOUSS ARASTEH: I'm very sorry. You don't allow me to raise a question?

SUSAN PAYNE: No, I do allow you to raise a question. Please do.

KAVOUSS ARESTEH: Yeah, but Liz made a very comprehensive comment which was not necessary at this stage. Let [us limit] to point of clarification. That's all. We don't discuss it. That means we don't discuss it. And then this is us. Who is us?

SUSAN PAYNE: Please do. Do you have a question?

KAVOUSS ARASTEH: Wait, wait, wait. Please. Even yourself, kindly allow a question for clarification. Malcolm, is it only 60 days or this goes more than that? Yes or no?

MALCOLM HUTTY: I think it's open to this group to set whatever period that it thinks would be appropriate.

KAVOUSS ARASTEH: Yes. Thank you very much. If it is more than 60 days, I don't discuss it. But 60 days, I'm not in favor of what Liz said, that it makes it unproductive. 60 days does not make a big [thing] for [inaudible]. Let us discuss it next week or [inaudible]. So you said that it may be anytime—six months or one year. Thank you.

SUSAN PAYNE: Thanks very much. Okay. So, yes, thanks for everyone. Please do, if you possibly can, it would be very good to share your thoughts by e-mail so that we're coming into the next week call with views and perspectives on this flushed out somewhat for us to then discuss further. Thanks very much. And again, thank you very much to Malcolm for this work.

Okay, next up we have on our agenda to come back to the safety valve language on the repose. Brenda, we have that in a Google Doc and we have some comments from various people that have been made, and suggestions for edits. And so I'd like us to specifically look at those if we can and see if we can find a path forward on that language.

So is it possible to pull up the Google Doc, Brenda?

BRENDA BREWER: Yes. One moment, please. Is this the right one?

SUSAN PAYNE: Yes, thank you. Okay, so you all have had a couple of weeks now with this language from Liz, I think it was, that was circulated before our previous call. And we've had some comments. Indeed, I think all of these comments were made before our previous call. So we have looked at this document once, but not discussed in detail.

And so what I'd really like to do is, if we could go through just paragraph by paragraph and see whether the proposed amendments makes sense and the comments makes sense. And perhaps whether that gives us a

form of language that we can move forward with or, indeed, we maybe need to ask Liz to kind of address some of these comments and come back with a further draft.

But to start off, the first comment is one that I made. It was proposing the return of the language material effect of the action or inaction. And we don't have this [as] the redline from the current rule, but I believe that this is in the current interim rules and was being proposed to be deleted.

But it would be helpful to understand what the thinking was in that proposed deletion, Liz or Sam, because it seems to me that it changes the standard that is set in the bylaws where, in order to be a claimant you have to not only be aware, but you also have to be actually material affected. And so if we remove the “material effect” bit, you could be a claimant who knows about the action or inaction, but you aren't an eligible claimant yet.

And so my suggestion would be to keep that language in, but I guess since ICANN Legal proposed to delete it, I guess, I was looking for some clarity on why that deletion was proposed. Alternatively, perhaps we're comfortable keeping it.

Sam.

SAM EISNER: Yeah. Thanks, Susan. I don't think we have a big concern to keep it in. We'll go back and confirm with the other members of our team that we worked on these. These edits weren’t just from me and Liz. We’ll

confirm if there was any larger justification, but I don't see a reason to change it. So we should be fine keeping “material effect” in.

SUSAN PAYNE: Sorry. I’m talking away on mute. Sorry. Thank you for that. That’s very helpful.

And then in the next paragraph, we have a proposed deletion of some language that you had included about the “under exceptional circumstances.” And I think this is … Yes, it's a comment that Flip had made, that he felt that it duplicated because there's a reference to the “extraordinary circumstances” a bit further down.

And so I did … But my feeling was, in reaction to Flip, I agree that there's some repetition but I did wonder if perhaps you’re including this first sentence to make it clear that the kind of intent of this is that there has to be an application to seek leave to file late, and that that is sort of the point that is being made in that first sentence.

So again, I guess this is kind of a question for Sam and Liz, but for anyone else who has views on this to share as well. I’m not seeing any hands.

Oh, Malcolm.

MALCOLM HUTTY: Well, if the intent is to create another procedural step, then I think I would suggest that we avoid multiplying the procedural steps that need to happen as, with the deletion in place, the IRP Panel may permit the

claimant to file its thing if the requirements that we set out are met. That could potentially be when the claimant …

They submit their claim and demonstrate it. And it's for the panel to decide whether that standard has been met. No additional steps needed. If you're asking there to be a sort of preliminary hearing or something on a separate issue of whether you should be allowed to file in the first place, a) that's going to potentially conflict with the actual dispute provider's provisions that require you to file in the first place, and b) it's also just multiplying the procedural elements and adding costs. Let's not do that.

SUSAN PAYNE: Thanks, Malcolm. Kavouss, I'm seeing your hand, but I think it's an old one that's been up for a while. So I'm going to go to Sam, but if it's not an old hand, then please let me know. Sam, we'll go to you first.

SAM EISNER: Thanks, Susan. So we did intentionally have in here a step of process to say, "We want to file, but we acknowledge that it's after time." And then that can be decided and then the claim can be perfected. Right? And we can do some work to reduce the duplicative nature of some of the wording in there.

But I think that it's really important—and this one of the things that we've learned through the process of doing the IRP over the past couple of years under the new bylaws and with the interim rules—that there are places where there is a lack of clarity of process where …

I understand Malcolm's concern that we don't want to add in process for process's sake. But I also think that there is a place where having an additional process in the right place actually can help streamline things. And so if we have the panel identify just the issue of timeliness without going to a full examination of the merits, that actually creates that first process as a much narrower process. And it could potentially reduce the full amount of time and effort that's needed for the IRP itself.

And once the panel then says, "Proceed with your application," that you go to the merits. And you don't find claimants and ICANN. And if we step back and remember, these are all … A lot of these costs for the panel time and everything, ICANN is responsible for paying those. Those are that ICANN community's money that's going to that. And you have the claimants who are then using their own attorneys in that, too. When you have more limited filings on targeted issues, it allow some of the [gating] questions to be handled.

So we do think it's appropriate to take the opportunity to use some clarity of process when it's available. Not for processing, but to really streamline it because if the panel then says that the claimant is not able to file its IRP at the later date and you've used time to then consider the merits as well, there's been a lot of wasted time and effort from all sides on considering that. So that's why we present this in this way.

SUSAN PAYNE: Thanks, Sam. Okay, not seeing any further hands on this point. It sounds to me like there are merits to both. Maybe we don't have firm

agreement on this, but we will, I think … Let's park that one for now, but it's something for us to circle back to.

Kavouss, your hand is still up. Do you wish to speak? Okay, I'm not hearing from you so I will keep going down the document.

And the next comment is, whoops. Sorry. Oh, I think we're … Back up just a little bit. Yes.

The next comment is that highlighted section just in the middle regarding … These are extraordinary circumstances and, as drafted, it's caused by the claimant to prevent the claimant from becoming aware of the action being challenged in the dispute or from being able to file a written statement of dispute within whatever the time period is.

And I flagged this one just to see whether, as a group, people feel comfortable that this language as it's drafted would adequately cover a claimant where they might have been aware but they were unable to file a claim in time because they were not yet material effected and therefore we're not eligible. So they're not eligible to be a claimant.

Do we feel that this language covers that scenario? And if not, do we feel that that scenario is one that we are wanting to cover in this safety valve language? Or are people comfortable with this as drafted? So again, just a question for the wider group if anyone has strong feelings on this. If there are no strong feelings, then I guess we will stick with the language that ICANN Legal has proposed.

Okay. All right. Then we can move on to the next. And for some reason, I'm struggling to see some of the comments in the chat. But I think the

next comment is this proposed deletion. And I think there were various group members who had expressed some concerns about this.

As drafted, there were proposed to be two prongs to bring one within eligibility for this late filing. The first being these extraordinary circumstances, and the second being that any relief requested, including request for interim measures of protection by the claimant, if they were awarded or recommended by the panel, would not adversely affect any third party.

Someone—off the top of my head, I think Flip, maybe—had proposed to delete that second prong. I had some concerns about it in terms of whether the impact of that language would be effectively to rule out every IRP since in many or indeed most IRPs, if the claimant is successful, then someone else is disadvantaged as a consequence.

And I think Malcolm had also expressed some reservations about that language. I'm sorry that, in the Zoom room, we can't see all of the comments. But hopefully you have all read them prior to this call.

David.

DAVID MCAULEY: Thank you, Susan. I had trouble inserting comments in this document, so I mentioned on list that I had a concern with number two. Not so much a concern, but a question. How does a panel know whether someone's going to be adversely affected?

I actually thought the second prong was fairly stated. It was a fair concern because one of the things the IRP is intended to do and one of the things that the IRP I think was drawn up to do was to help in this towards the notion of finality and certainty.

And so if someone is timed out, you know, they're given a time within which to make a claim. We haven't settled on what that might be, but if they if they timed out, then that's it. Certainty and finality set in. And so, if there's going to be an exception to that, I don't think it's an unfair inquiry to say, “Well, wait a minute. Who's going to be harmed by this?”

My question was, and I wasn't able to put it in the document. For some reason I’m still having problems seeing things to the document. I don't know what the problem is. It’s probably in my computer. But in any event, my concern was, you know, shouldn’t we hand over to the consolidation group to think about how would a panel know. I mean, how do you flesh this out or how do you raise the issue of unfairness to someone else? I think it's fair answer. Thank you.

SUSAN PAYNE: Malcolm.

MALCOLM HUTTY: Thank you. I support the deletion of this clause. The reason is that it proceeds on a mistaken understanding of the nature of the relief available. In order for this clause to be triggered, you must assume that a relief that could be given would harm a third party. If relief is not

available that would harm a third party, then this clause is just completely not necessary.

However, the only relief that is available under the IRP is a declaration that's something that ICANN has done is inconsistent with the bylaws. There is no other form of relief available, and there is no direct effect to the panel's rulings. It is for the Board to decide, having had a ruling that something is inconsistent with the bylaws, how it should proceed on the basis of that.

It is therefore also for the Board to decide how it should balance the necessary and proper and potentially urgent need to come back into consistency with the bylaws, and with the legitimate interest of any third parties that may apply.

It is therefore not for the panel to consider the interests of third parties. It is for the Board, as the Board is the one that is deciding what to do about a finding of incompatibility. So this clause is misplaced, for that reason, and should be removed. Thank you.

SUSAN PAYNE: Thanks, Malcolm. Again, I'm not seeing any other hands. What you say certainly has some resonance with me. And as I say, I can't see all of the comments in this particular format. But I do think that we had quite a number of comments expressing concern about this provision. I wonder if, perhaps, we could ask, Sam, if you and your colleagues could look at this again. I mean, it may be that you were trying to … That you were trying to build in an element of fairness having regard to what the impact would be on a late-claim IRP.

But it seems to me that it currently effectively impacts the … It's drafted currently very broadly, and so the relief being requested, for example ... Taking Malcolm's point, but nevertheless the claimant is asking for the reversal of a decision. And so whilst the IRP outcome can't reverse the decision, this is based on the relief being claimed. And that does have a potential, direct knock-on effect to whoever was the beneficiary of that previous decision.

MALCOLM HUTTY: Instead of asking for a reversal of the decision to the IRP Panel, their claim is miswritten.

SUSAN PAYNE: Well, I mean effectively that is what you're asking is. Isn't it?

MALCOLM HUTTY: No, no, no. Effectively, it's not the same thing. It may well be the case in many cases that a finding of incompatibility leaves the Board with an incredibly powerful and almost answerable case for withdrawing the decision and starting again. But nonetheless, it is in the Board's hands for that. And there may be circumstances where that's not the case and where they don't, and the circumstances that are envisaged in this clause or exactly the sorts of times when the Board might have to do it.

Anyway, the point being is that it's not for the panel to decide that. It's for the Board to decide that. I would have thought that ICANN Legal would be very protective of the Board's preserved authority in this area.

And maybe if I yield the floor to Sam now, she will have thought again about the merits of this clause.

SUSAN PAYNE: Yeah, let's do that. Thank you. Sam.

SAM EISNER: Thanks, Malcolm. And also thanks to David for the point that you raised. This is this part of the heart of the issue, I think. One of the things that we see, even an IRPs that are file today, are people asking for relief beyond the bounds of what Malcolm expressed as what he's heard us say many times what's in the bylaws—what the limitations in the IRP are—which is a declaration as to whether or not ICANN violated its violence bylaws or not. And then he's correct. Malcolm is correct. Right? Then it's up to the Board to decide how to proceed with that decision and how to give effect to that decision.

But really, often what we see—and I think that this is part of what some of my colleagues were reacting to in drafting this language—we still see it … And you can go look at IRP filings that say, "Part of the relief we want this panel to do is to make ICANN reverse its decision, and put this contract into effect, and take away that contract."

And so we do have issues where people are actively seeking relief that is not appropriate under the bylaws, but also is directly targeted to third parties. So it's a bit of a dance. Right? [inaudible].

MALCOLM HUTTY: Surely, Sam, the proper place for refuting such ill-drafted claims and such ill-directed claims is in your defense and not in the Rules of Procedure.

SAM EISNER: Well, you know, in hearing this conversation, we'll definitely take this back and look at it again in light of what we've discussed here because I … Malcolm, I really do appreciate the point that you've raised and how you framed it. I think you've expressed it an extremely compelling way, but we also have … There are other concerns, but I think the other question that you're saying is, aren't there other places to raise those concerns? And there might be so.

So that, and David's question of who's responsible for being the voice of the third parties if this comes up, I think, is also a very interesting question and definitely tied to the issue of consolidation and notice to others. So I think we have some really meaty points to take back and think about to provide some further reflection back to the IOT.

SUSAN PAYNE: Thanks very much for that, Sam. David. did you did you want to comment on this or was it on another topic?

DAVID MCAULEY: It was on this. I just wanted to say something real quick. I'll be quick.

SUSAN PAYNE: Please do.

DAVID MCAULEY: I'm glad Sam is going to take it back. Malcolm made a good case, and I think it's worthwhile to take it back. I don't agree with Malcolm. I do think that the standard for an IRP is whether the Board took an action or inaction that violated the articles or bylaws. But when they take an action, it's actually a human action expressed in words, usually. And it can be close. It can be a close decision.

They may say, for instance, that X is in the public interest. And an IRP Panel may disagree and say, "No, X is not in the public interest." When ICANN says X is in the public interest and no one presents a claim in a timely manner, then the community says, "Okay, X is in the public interest. We can rely on that." That's what I'm getting at.

There are close calls as to whether something violated the articles or bylaws, and so I do think this possible that third parties could be inappropriately effected. Thank you.

SUSAN PAYNE: Thanks, David. So for present purposes, will leave this with Sam, Liz, and their colleagues.

I think there's one other proposed … We've got four minutes left, but let's just quickly look at the one and Paragraph C. Paragraph C itself, I believe, is just wear Flip had suggested that that sat better as an independent paragraph rather than being at the end of Paragraph B. So the text in blue is not really the new text.

But I think the addition of the term at the end, “affecting the claimant,” is something that is more substantive since that does sort of impact the duration or how long that four-year term might be. I think, as proposed by ICANN Legal, it was an absolute cut-off of four years from the date of the disputed action or inaction. And as proposed to amend it, would be four years from when that disputed action or inaction has impacted the particular claimant in question.

Again, any particular views on this or anyone wanting to talk to it? And David, I don't know if … Is that a new hand?

DAVID MCAULEY: It is a new hand, I apologize. I have not been able to see the comments in the document for some reason. But this language that appears to me in purple, the language at the end that says “affecting the claimant,” I don't think that has any effect on that sentence. I think it's meaningless because what the sentence seems to me to be talking about is after the date of the disputed action or inaction. Not the effect, but the date of the action. That's the way I read that sentence, and I think that's proper. Thanks.

SUSAN PAYNE: Sam.

SAM EISNER: Thanks, Susan. So this four-year date was placed in recognition of the fact that there is a four-year breach of contract statute of limitations in

California. And that's the jurisdiction that most of our agreements are subject to, or contracted party agreements.

And we thought that it was important to really tether the outer limit of this to a breach of contract claim because if ICANN wound up being told that its actions were in violation of the Articles of Incorporation or bylaws and therefore, in acting on it, needed to undo certain actions that could trigger a breach of contract claim from other parties. And so we wanted to really tether it to that date to make sure that were preserving remedies kind of in a broader sense as well. So this would be timed from the act itself, as opposed to any measurement of impact. That's what we're proposing.

SUSAN PAYNE: Okay, thanks for that clarification. Malcolm.

MALCOLM HUTTY: Sorry, I don't follow that at all. That seemed … I just don't understand the reasoning there. What has this got to do with a contractual dispute? What we're talking about here is an internal governance matter. We're asking for a ruling on whether something was or was not consistent with the bylaws. Nothing more, nothing less.

It's not tethered to a contract. The subject matter might relate to a decision in the contract. Who know? It may or may not. But even if it did, firstly, you still come back to the issue that we mentioned and agreed on a moment ago. It's for the Board to decide what to do about that. And even so, what is the relationship of the …

Even if ICANN felt that it needed to do something as a result of this that would place it in breach of contract with a contract that is signed and felt compelled, in order to be become consistent but those bylaws, to break a contract and then to come to some arrangement with a third party as a result of that, I still don't see how that position would be in any way improved or in any way relates to the statute of limitations on that. It's just an entirely separate issue.

And to be honest, I don't see that this clause relates to that at all. This is actually about when the start date for the clock is, and is another example of ICANN Legal's attempt to tether the start date to the action rather than to the impact on the claimant and the claimant's knowledge as set out in the bylaws.

SUSAN PAYNE: Okay. Thanks, Malcolm. Your point is heard.

We're out of time. We will obviously be coming back to this. Sam's already taken an action item to look at this language again and circulate a new draft.

Sam, if at all possible, if we could have something before the next call which is next week, that would be extremely helpful as it would allow people to come into the next call ready to discuss the new draft. We will then spend our time next week … We will come back to Malcolm's tolling proposal and have a more substantive discussion on that. And we will be, I hope, able to look at this repose language.

Sam.

SAM EISNER: With Prep Week being this week, and many members of our legal team are already kind of fully booked, I really don't know that I could commit to delivering this in advance of next week. I apologize. Realistically, we are not going to be able to internally have the time needed to get this done by next week.

SUSAN PAYNE: Okay. Thanks, Sam. In which case, we will spend our time on the next call talking about the tolling. And we may wrap up slightly earlier if we don't need the full 90 minutes.

Thanks very much, everyone. Apologies for running over time. But thanks again for everyone's engagement. And I think we are making progress here, or at least I hope we are.

So we can stop the recording now and, yeah, we can hopefully … Please do share views on tolling by e-mail on our list so that we can go into next week's call having sort of flushed out the issues.

Okay. Thanks very much.

[END OF TRANSCRIPTION]