BRENDA BREWER: Good day, everyone. Welcome to the IRP-IOT call on 14 December 2021 at 19:00 UTC.

Today's call is recorded. Kindly state your name for the record when speaking. Have your phones and microphones on mute when that speaking. Attendance is taken from Zoom participation. With that, I will turn the call over to Susan. Thank you,

SUSAN PAYNE: Thanks very much, and thanks, everyone, for joining. This is our 14 December call. It's our last one before we take a couple of weeks off for the holiday. So without more delay, I will just get us going.

We'll do the usual agenda review and updates to SOI. Agenda item two is to review our action items and current status. Item three is the confirmation of our next meeting. And four and five, we'll have quick updates from the two subgroups that are underway, the one on consolidation and the one on initiation of the IRP. Agenda item six and seven are our follow up from a couple of the outstanding action items. So we'll come to them accordingly.

Okay. First off then, could I just pause and see if anyone has any updates to their Statement of Interest? All right, I'm not hearing anything so I will take that as no.

Then next agenda item then was the reviewing of the status of the action items. So we have a couple of action items that we've been carrying over for a couple of weeks. So the first one is Sam and Liz

wanted to comment more formally on Malcolm Hutty's proposal for the alternative to tolling of time periods for other accountability mechanisms. This is the proposal for Fixed Additional Time or the wonderful acronym FAT that we were using when Bernard put together the various timeline scenarios. I think I'm right in thinking we don't have that, or at least if we do, I think I've missed it. But I'll just pause and make sure I'm not incorrect and I haven't missed something.

SAM EISNER: Susan, that's right. We have a version that we think is close to final. We're just trying to get final sign off from it. But I don't think it'll be very controversial for the group.

SUSAN PAYNE: Okay. Super. All right. We'll include that discussion to try and make some progress on the proposal on tolling or the alternative on our next call then. Thanks, Sam.

Okay. And then the second action item was for some new language on the repose and safety valve. That is language that Liz circulated. I think it will have been yesterday for most of you or early hours of the morning for some of us. And so we will come to that as we come further down our agenda. Hopefully, most people have had at least some opportunity to have a quick look at that so that we can have at least some discussion on it and consider it on this call.

Okay. So that takes us to agenda item three, which is the confirmation of the next meeting. We are due to be meeting on the 11th of January.

As I mentioned, perhaps we're having a short break for the holiday period just to take into account the various public holidays and general kind of shutting up shop for some of us, probably not all of us, but in order to ensure that we have a decent turnout on our next call, we will be meeting on the 11th of Jan. in our 19:00 UTC time slot.

Okay. All right. So next we turn to an update. Agenda item four is the update from the Consolidation subgroup. I will give a quick update on that but I very much welcome anyone else who's in that subgroup to chip in, going to keep this sort of fairly high level, just to give you a quick sort of update on where we've got to. We had our call last week and we spent our time having further discussion on a couple of the items that arose from previous public comment input and previous discussions of the working group. So the one that we spent really quite a bit of time on was on who should hear the requests for consolidation or intervention or participation as an amicus.

Generally, I think there was good agreement on the call that we felt that there was merit in the idea of having those applications considered by the actual three-person panel, particularly taking into account that there's an expectation that the panel ought to be in place within one to two months, and that once we do have a standing panel in place that we could hope that that panel appointment could be quicker than that. So I've taken an action item to circulate some straw person amended language to Rule 7 to cover that since the current draft is drafted on the assumption that we would have some kind of a single arbitrator be that the procedures officer or an interim arbitrator making that decision. And so it does have various places in the current draft of Rule 7 that do need to be amended to reflect that.

We also discussed, again, what should be the role of the Supporting Organization whose policy is being challenged. Generally, again, within our subgroup, we felt that generally there's a feeling that the Supporting Organization should have full rights to participate as if they were a party. So there was a preference to keep them as a party rather than having them participate in the role of an amicus, although I do think it perhaps warrants some further consideration on what, if anything, wouldn't be addressed by them, what would they lack or what would they miss if they were participating as an amicus rather than a some form of a party.

But the bigger discussion was around whether they actually qualify as a claimant or not. In the current interim rules, it envisages the Supporting Organization joining as a claimant and states that that's the basis on which they join. But depending on how you interpret the definition of a claimant, some in our group feel that they simply don't qualify as a claimant because they've not been causally affected by the action or inaction. And others in our group felt that that definition could be interpreted in a way that did cover them. So I think we certainly didn't reach agreement on that interpretation, but we did at least agree that it's open to different readings and that perhaps if we do indeed want the Supporting Organization to be a party or to have the rights of a party, then we should look at how to make sure that the terminology is effective and does the trick and works to cover them. So rather than perhaps getting bogged down in whether or not they qualify, strictly speaking, as a claimant, we should look to find a way that enables them to have the rights of a party and to participate fully in the action.

So that's where we are. There's obviously still more for us to do but I'm happy to take any comments or questions and I'm also very happy to cede the floor to anyone else from the subgroup, if there's anything you all want to add. Okay. I'm not hearing anyone. So I think we probably can move straight on to the update from the initiation subgroup.

I don't see Mike Rodenbaugh on the call. I know he was probably only going to be able to join for a short while and it doesn't look as though he's with us. He did send me a very brief comment about the work of that subgroup. But I will just pause and see if there's anyone else from that subgroup who wants to give a quick update before I reflect on the comments that Mike sent, which are very brief. Malcolm, thank you.

MALCOLM HUTTY: Thank you, Susan. There isn't much to say at this time. We're very much in evidence gathering mode or information gathering mode. I'm afraid we've left an awful lot of requests with Liz to go away and ferret out information and discover what is available for us to do before we can really begin our work, undermine make any progress. Thanks very much to Liz for taking that on. And, really, we're waiting for that to come back before we can proceed. It may be that some of the information that we've asked for is not available because it doesn't exist. In which case, that will itself be information we can work with, the non-existence of it. But before we even know that, there's really not a lot of substantive work that we can begin with.

SUSAN PAYNE: Lovely. Thanks very much, Malcolm. That's helpful. So that, I would say, is a sort of slightly longer version of what Mike had said to me. So that aligns very closely. Again, I think both the Consolidation and the Initiation subgroups are also having a short sort of holiday period pause, and so both of those groups will be reconvening in the new year. And hopefully there will be some ability to make progress at that point, although obviously Liz herself is likely to be taking some time over the holiday period as well. So we will see where we get to, but thanks for everyone. Again, I think most people on this call are probably in one or even both of the subgroups, but if you aren't and you're enthusiastic, there's certainly sort of space and opportunity to still join either of those efforts if you want to.

Okay. All right. So our next agenda item would have been the review of ICANN Legal's comments on the proposal relating to fixed available time as against tolling of time periods. I think it makes sense, really, for us to just sort of park that one and we will come back to that, as I said, on our next call, and hopefully we can have a really substantive discussion and try to make some progress on that concept. So, at which points we've reached already agenda item seven, which is I think, obviously, the most substantive part of our call for today, to review the new draft of the Repose and Safety Valve documents and to hopefully have some sort of substantive discussion on that and see if that new draft is addressing concerns and reflecting the discussion we previously had and also is something that collectively we feel is now workable to provide that safety valve that we were talking about to go alongside the notion of having a repose.

So I think with that said, if you wouldn't mind, Brenda, pulling up the draft that Liz circulated yesterday. That would be super. I'm not sure to what extent people have been able to review it. I don't think we've got Liz with us. Sam, you have your hand up. I was wondering whether you wanted to take us through it.

SAM EISNER: Susan, I'd be happy to.

SUSAN PAYNE: Thank you.

SAM EISNER: Thanks, Susan. For the record, this is Sam Eisner from ICANN Legal. So this is a proposed update to the Rule 4: Time for Filing, including the safety valve. As you may recall, we presented some earlier language to the group and discussed it, and there'd been some revisions proposed. I believe along the way, we had also flagged that we might provide a little bit more information about making sure that we had timing for both action and inaction specified.

I know, Susan, there were three things that you had flagged on the agenda as the takeaways. There was a specific issue about timing, the time for filing from the discovery of the material effects. There was some duplicative language. There was some language about harm to third parties. Now, we did not present a redline here because there was some significance moving around of some of this and some addition of subparts, and so a lot of the context was missed that we can surely

generate a redline. But I wanted to specifically identify—we thought about and we worked through whether or not we thought it made sense to specify time of filing from the discovery of the material effects, as opposed to just from that act, which was something that had been proposed. If we look at A (i) here, it would have been on which the claimant became aware of, or reasonably should have become aware of, the material effect of the action being challenged in the dispute. There had been a request by the IOT to consider whether or not we could insert material effect there.

So when we looked at that, our thought was it created a lot less certainty, particularly when we had the safety valve and other mechanisms and it didn't necessarily tether to the discovery of the act, as opposed to the discovery of the effect, which hasn't ever been the test that's been provided in the Bylaws. So hopefully, the other things that we have in here help mitigate some of the concerns of not including the material effect as the initiation of it. It brings a lot more certainty to the IRPs without having to document when someone learned of the material effect as opposed to the act, though sometimes those will be one and the same, particularly as we got to the safety valve. But I think as we look at some of the intended purposes of the IRP to have efficiency and a bit more streamlining, it didn't seem to align with that. But again, we have other things in here that we have definitely taken into account some of the IOT's concerns.

There were some areas of duplicative language that you'll see have been removed from here. And then one of the biggest changes that you'll see is that we previously had provided along with the safety valve suggestion that the safety valve would not be properly used if there was

an impact on third parties for linked file, the IRP. We had a really meaningful discussion about that, I think, in the last IOT call, and we have removed that concept from here. As we discussed that internally after the call, we agreed with IOT that it really wasn't any different from any other filing of an IRP, and as the IRPs don't necessarily mandate action, it wasn't also appropriate to then tether the test for the safety valve on that. So that concept is gone.

So now I'll walk through what is here. I wanted to note one other thing. I had previously suggested on an IOT call that we might want to mirror the timing requirements or at least the triggering requirements that we have for the reconsideration and also maintain some level of timing of Board action from the posting of minutes. And we heard some significant concerns raised by the IOT about that and about making sure that people were tracking minutes and things like that. So we actually did not include that in here. We thought that it made sense to not make this more complex than it needed to be or add in that additional timing. So that's not in here, even though I mentioned that it might be.

So let's walk through now. So, we have A (i). This is the claimant shall file a written statement of dispute with ICDR within the following timeframes. This has the language for the 120 days. That was in the current version of the supplementary procedures. So, here you have it. You have action or inaction. One is about action. So it's when the claimant became aware of or recently should have become aware of the action. Or (ii) was about 120 days after a claimant could reasonably conclude or reasonably should have concluded that action would not be taken in a timely manner.

Then B is the statement of dispute may not be filed more than the length of this time to be determined by the IRP-IOT, currently 12 months from the date of such action or inaction being challenged in the dispute. So this A and B, it's really just a recasting of the familiar language. There's no other real substantive changes here. It's really just specifying it a little bit more.

So let's move to C. So this is when we start seeing—if you can scroll down a bit, Brenda, if you're driving. Great. Thank you. So C is where you see us reworking that safety valve. So here, an IRP panel may permit the claimant to file a written statement of dispute after the timeframe set forth in A or B above, under certain exceptional circumstances. So that takes care of either of those timeframes running. So the claimant may seek leave to file a written statement of dispute by demonstrating by clear and convincing evidence that—and this is the same standard that we had before in the safety valve language that was presented. So first, that the claimant satisfies the standing requirements set forth in the Bylaws. So we wanted to make sure that was without dispute that a claimant still needs to have standing in terms of being materially harmed by the action, etc., and either—and so here we have the two types of extraordinary circumstances that we discussed previously. So first is extraordinary circumstances not caused by the claimant that prevented the claimant from becoming aware of the action or inaction being challenged in the dispute within the timeframe set forth above, or extraordinary circumstances not caused by the claimant prevented the claimant from being able to file a written statement of dispute within the proper timeframe.

Sorry, this (ii) here is really about the types of situations that Malcolm has been describing. What happens when they don't really find out about it until later? That's what's captured under (ii), and then what's captured under (iii) is the type of situations that Kavouss has discussed here that there could be such extenuating circumstances that really just kept someone from being able to focus on filing an IRP because of other issues that were happening around them. Again, these are both very similar to what you saw earlier. If you can keep going in the document.

So D is an attempt to make sure that we have some clear process involved here. So D, any request for leave to file a written statement of dispute under 4.C—so 4.C is really the safety valve specification—shall be accompanied by claimant's proposed statement of dispute must be filed within 30 calendar days of (i) or (ii). So these are both broken out based on the circumstances above. So this (i) is the claimant becoming aware of the action or inaction being challenged in dispute. If they're filing under that, I didn't know what happened portion above, or (ii) is the claimant becoming able to file a written statement of dispute if the late filing is requested under the romanette above, which is about "I wasn't able to timely file."

Then we included in here an E that says for the avoidance of doubt, ICANN shall have the right to respond to claimant's request for leave to file submitted pursuant to the safety valve and the procedure specified above it 4.C and D.

Then F is that item that we discussed earlier. This was in the prior version that under no circumstances may a claimant seek to file a statement of dispute more than four years after the date of the action

or inaction being challenged in the dispute. As we discussed earlier, we time this from the four-year statute of limitations that governs count California's breach of contract law. As we've discussed before, there does need to be some level of an outside limitation on when these are filed we thought that the time within which a contract action could be brought within California was a really reasonable timeframe to propose as our action. So in principle, today what that would do would be it would add three years of the ability to prove extenuating circumstances.

We also made sure to relax this language a bit. Because I know a prior version that you saw, it was that the claimant basically had to perfect its filing of the statement of disputes within four years. But here, this is really that they must seek to file their statement. So this is really about when they file for leave to file so that we don't build in an artificial timeframe constraint that they need to make sure that they're timing back from procedure in order to hit that four-year window in order to get approval from the IRP panel to file.

Then G is really about an overall statement. And I know that this is tethered to the initiation group so we might want to kind of leave this one aside. I know Mike has also stated a formal objection on the IOT mailing list about this one because it relates to the initiation work. But the statement here is, in order for an IRP to be deemed to have been timely filed, all fees must be paid to the ICDR within three business days (as measured by the ICDR) of the filing of the statement of dispute.

So however we come down on the initiation, this is still something that remains relevant. We do recommend that we would want to have some

language in here. This goes to all the filings, not just the safety valve that it's important to identify what it means to perfect the filing, and not just have a filing on record without the proper other steps of initiation. So that's the purpose of having that there.

So that's the full document that we have here. I know it might not have everything the IOT would have seen. Hopefully we've responded to some of the other concerns and we appreciate the conversation that happened earlier. Particularly on that third party harm issue, I think it makes us a lot clearer and also reduces some of the opportunities to have a lot of trading of briefings and a lot of substantive fights during just the leave to file portion to make this a more streamlined proceeding. So with that, I will turn it back over to you, Susan.

SUSAN PAYNE: Lovely. Thank you very much, Sam. Thank you. Particularly, thanks, as you say, for reflecting that discussion that we had about the third party impact and the concerns that were raised when we did discuss that. So that's much appreciated.

So I have Malcolm with his hand up. He's been very patiently waiting, but I know that he would have wanted you to finish your presentation first. Malcolm, over to you.

MALCOLM HUTTY: Thank you, Susan, and thank you, Sam, for that presentation of your proposal. Susan, as chair, it would be helpful if we could actually see the document that we as the group are working on, as well as Sam's

proposal, so that we can do a read across, especially Sam's removed all redline markings, so that we can see more clearly what Sam has agreed to and what she is dissenting from so we can analyze it more clearly. That would be helpful.

But turning to some of the substantive points that Sam raised, I think one of the most important is the one in the first section, in this section A, where Sam said that she proposed that we did not include material impact language. The reason that she gave was because that would lead to lack of clarity and uncertainty, and that basing it on the action is more certain.

My response to that is that that's a very ICANN staff-centered perspective here, rather than the claimant-centered perspective. The claimant may view the action as actually potentially a lot more complex and a lot harder to pin down. When we look at what the claimant actually has to show, they have to show that they were materially affected. That's a requirement to get into this process. So there has to be clarity about material impact that can be presented to the IRP in order to have standing. So that is not a thing that is uncertain or that could create lack of clarity. That is clear. However, from the claimant's perspective, they may not actually easily be able to state the action that gave rise to that harm. It could be a complex action, it could be a multi-part action. They might not actually know what the action was, only that it will lay within a particular domain, all of which is inconsistent with the Bylaws. That would be sufficient to plead a case. They may actually be uncertain as to between two potential actions that might have been taken by ICANN. Either one of which could have been the thing that led to the harm, and either of which they contend is inconsistent with the

Bylaws. So actually basing it on the action doesn't lead to greater certainty, it actually removes certainty and creates a problem here. Of course, the main problem with we're basing it on the action is that it's actually not consistent with the Bylaws requirements, and that goes back to my long-standing request that we base the time for filing on the language in the Bylaws rather than on something different. But I know that Sam has a different preference there.

So I think that we need to reject the proposals to base this on the action rather than on the impact, and really reject the argument that that is more certain, because from the claimant's perspective, it isn't going to be, whereas the effect is a matter of the pleading. So that'd be the first and possibly the most important of these new proposals there.

Moving down, there are other things here which are problematic and some of which that have been essentially the working assumption of this group, such as the extraordinary circumstances that are brought into a sharpest perspective of the problems that they cause by the draft that Sam has now brought before us. So for example, in C (ii), extraordinary circumstances not placed and caused by the claimant prevented the claimant from becoming aware of the action or inaction being challenged. Well, what if those circumstances were actually perfectly ordinary circumstances, not caused by the claimant that prevented the claimant from being aware of the action or inaction being challenged? Should that not also be included? Should they not also be entitled to challenge those when it was ICANN's normal practice to keep the claimant unaware? So that comes out, I think, more sharply as a result of this language. And again, clause F just stands out as straightforwardly inconsistent with the Bylaws. But we've discussed that

many times. So I'll just reiterate that for the record, but I won't elaborate on it. I see that Sam has her hand up so I yield the floor.

SUSAN PAYNE: Thank you, Malcolm. Yes, I see Sam's hand. I did want to just flag that I put in the chat what the definition of a claimant is. I think this is useful language in the context of the comments you were making, Malcolm. And specifically, if you will bear with me, Sam, a claimant is any legal or natural person, group, or entity, including but not limited to the Empowered Community, a Supporting Organization, or an Advisory Committee that has been materially affected by a dispute. And then to be materially affected by a dispute, the claimant must suffer an injury or harm that's directly and causally connected to the alleged violation. So that's Bylaws 4.3 B (i). So I just wanted to flag that for people's consideration as we're discussing this, and then I will turn the mic over to you, Sam.

SAM EISNER: Thanks, Susan, and thanks, Malcolm. I'm not really sure where to go with what Malcolm said because the Bylaws are written about IRP being about people being impacted by an action or inaction. So if the Bylaws are not about people being just generally materially affected, the Bylaws specified that it should be about an action or inaction. The IOT was charged to identify a time for filing reasonably from the time that the claimant becomes aware or reasonably should have become aware of the action or inaction giving rise to the dispute. That is the language of the Bylaws, right? That's what we've been working towards. And so if

it's the view of the IOT that the IRPs are not actually about challenging actions or inactions that give rise to a Bylaws dispute, then I think we have something else to talk about. I think it's pretty clear to me, and maybe it is that ICANN view of it, but IRPs are about challenging an action or inaction and it's not just about the material effect of it. It's a full scope. People are supposed to come and say what it is that ICANN did that impacted them. So now that we also have the safety valve built in, if they're not clear—and I take Malcolm's point that sometimes people might not understand exactly which action, it could be a series of actions or something. But then of course, we've also discussed that if it's a series of actions that we would time things from the last action. The IRPs aren't something for someone just come to and go, "I don't like what happened. It impacted me and I think it violates the Bylaws." There's an obligation to at least identify what it is you think that ICANN did, and that is where the action or inaction comes from. So I think it's important to keep that in mind.

SUSAN PAYNE: Thanks, Sam. Malcolm?

MALCOLM HUTTY: Thank you. Thank you, Sam. I didn't mean to go where you seem to think I was going with that. I certainly do not wish and I do not believe that the IRP process in the Bylaws supports a generic cause of claim based merely on harm without having to challenge a particular action and its status is contrary to the Bylaws. So I'm completely actually with you on that, and then merely saying, "Oh well, something happened

that had a bad effect on me." It's not sufficient. There's no question of that.

However, what the claimant has to show is the actions that ICANN took caused it harm and that these actions were contrary to the Bylaws. But it doesn't actually have to show which of them. So for example, you mentioned the series, but what happens if it wasn't an actual series of actions, but actually one of a number of things that may have happened? If the claimant says, "Look, I don't know actually what happened here but one of these things must have happened, and any one of these things would have been contrary to the Bylaws," and they could have occurred on different dates. Which data to be said? Now, suppose it is, for example, the case that there were multiple things involved or maybe some of them didn't happen and some of them did, but nonetheless, some of them were contrary, how would you even know what was the relevant data at that point? Until you'd actually proven the case, you wouldn't actually know whether or not the date was such that you were entitled to bring the case, if you had a variety of actions and alternative pleadings. Pleadings in your alternative that may have taken place on different dates. You wouldn't even know what the date concerned was.

So, it seems to me that the thing that is certain is the data that they obtain standing because that has to be shown. Their standing has to be shown. And the facts giving rise to them having standing seem to me the basis that provide clarity, whereas the actual actions themselves are the substance of the dispute between the claimant and ICANN, and may not be known at the time of filing. They may come out during the course

of, I will say, litigation. It's not strictly litigation but you'll forgive me for the rather loose terminology there. I yield the floor.

SUSAN PAYNE: Thanks, Malcolm. Sam, I see you have your hand up. I'm thinking to reply. So over to you.

SAM EISNER: Thanks, Susan. I'm concerned that we're having a conversation that's not about holding ICANN accountable to its actions and is more focused on allowing people to show how they were—the fact that they were materially impacted by something means that something went wrong. The IRP has always been—and from my understanding through the CCWG—improvements to it remains a place for someone to identify where ICANN did something wrong that resulted in a violation of the articles or Bylaws and as a means to hold ICANN accountable to that. And so there could be situations and we haven't really seen this as a pleading in case, so I don't have an example to give for it. I don't know if you do, Malcolm, or if other people on the call do. There could be situations where there might be multiple things that ICANN could have done and each one individually could have been in violation of the Bylaws or the group of them together could have caused a violation of the Bylaws under a claimant's theory. I don't dispute that part. But it's really about identifying what ICANN did that someone says is against the Bylaws so that ICANN can be held accountable meaningfully and change its course of action, right? It never has been about just a potential series of things. I think there's the opportunity to point to—it

could have gone wrong here or could have gone wrong here or could have gone wrong here. Those are all opportunities to point to individual actions. And if we look at the full scope of what we do when we have a safety valve, whether it's a four-year or whether it's longer or shorter, but if we have the safety valve, then it gives some leeway to the claimant if they're not exactly sure which of the actions specifically and directly caused them harm because that Bylaws do have a tether to identifying that their material harm is directly caused by the action. That is language from the Bylaws. They could say, "My direct harm could have been caused directly by this action or that action or that action." There's no barrier to people filing an IRP in that way. But there is a requirement that it all gets tethered to an action because it's challenging the action about what holds ICANN accountable. The person doesn't have standing to challenge that action unless they've been materially harmed by the action. It's not just a citizen's right to come in and challenge it. They have to have some stake in it in order to be able to challenge it, but it's about challenging the actions—and this goes back to the relief—it's not about granting relief to the material effect. It's about writing the action of ICANN.

GREG SHATAN: This is Greg. I can't put my hand up but I'd like to be on queue please.

SUSAN PAYNE: Then you are the queue, Greg. After you is David. Greg first.

GREG SHATAN: Thanks. I think that we are talking about actions here. The big change to the IRP was to get it away from being focused purely on process on the action itself breaking some rule and to focus more on substance or results. So the issue isn't whether ICANN didn't follow a process or procedure to get to a result, although it could be. The question is whether the result itself violates the Bylaws. So the substance of the policy is what's being looked at, not at the method by which the policy was concocted. We're still very much talking about action but it's not—and obviously we're talking about harm as well. It requires that there be an action or inaction, but the action of ICANN would be adopting a policy that violates the Bylaws. Even if they did it following every procedural rule absolutely correctly, the result is the problem. Thanks.

SUSAN PAYNE: Thanks, Greg. David?

DAVID MCAULEY: Thank you, Susan. I just wanted to give a general reaction to this draft. I need more time think about it because I was just able to read it shortly prior to the call. But one of the issue that really has hung up the IOT in its former iteration, and I suppose currently, is the issue that's voiced in paragraph that Malcolm made reference to where he does not agree that's consistent with the Bylaws. Sam obviously does because Sam and Liz wrote this and put it down, and I happen to agree with them. I think that this is consistent with the Bylaws but we'll discuss that. I do want to thank ICANN, Sam and Liz for putting on the table what I think is a reasonable attempt to try and get us moving forward on this. And as I

said, I think I need more time on the bit that Malcolm and Sam have just been discussing. But I'm grateful that maybe there's a way forward here. That we could come to grips with the issue that's represented in paragraph F.

With respect to G, I recognize Sam's caution that the initiation group was working on this. I just wanted to give a general reaction to Mike's e-mail saying three business days, maybe that is an issue. He's a practitioner and he knows the practical barriers people meet. It should be a short timeframe, but maybe three is too short. But I also want to note, when the group comes back, I was a bit alarmed, I guess, by the notion that there would be no filing fees at all. So I'd look forward to that discussion from that group when it comes back to the full group. Thanks, Susan.

SUSAN PAYNE: Thanks, David. Sam?

SAM EISNER: Thanks. I wanted to react to Greg's statement. The changes that are reflected in the Bylaws about the IRP really focused—there's not a change in there that says that we focus on substances as opposed to process. The largest change that's reflected in the Bylaws on the IRP is that we expanded the IRP from just covering Board actions to also covering staff actions. So in some ways, what Greg said bears out. Because one of the challenges that we saw from the pre-transition IRP is that claimants were using the IRP in ways to challenge staff action but they had to do that through challenging Board action. So in expanding it

also allow independent reviews of staff action, we took away the need to go through that procedural torture that claimants had to go through in order to try to get IRP relief about those actions. In some ways, what Greg said bears out, that we tried to make this less about the procedure and more about the substance so that people could actually go to the actions themselves. But what I don't think bears out, if I understood what Greg said, is that the Bylaws don't now say, "We don't look at the process, we don't care about the action, we look about the substantive effect." Because the Bylaws still say that it's about Board or staff action. It's about actions. And we haven't changed that action component of it or the need for the effect to be directly caused by action. So I just wanted to make sure that we remain clear on that point.

SUSAN PAYNE: Thanks, Sam.

GREG SHATAN: Can I get back in the queue to briefly reply?

SUSAN PAYNE: Yes. Malcolm is ahead of you. But then I'll—

MALCOLM HUTTY: This is Greg's original so I'll let Greg go ahead me, please.

SUSAN PAYNE: Thank you, then, Malcolm. Greg, over to you.

GREG SHATAN: Thanks. I would say we have not gotten rid of the requirement that there be an action. Clearly, the action of adopting a policy is the action that's at the heart of this. But it's not a requirement that there be something faulty about how the action was taken, but rather that the result of that action is what's being challenged. I think it's hard to say that that's not what we're after here. I was involved in writing this, and it's pretty clear that what we're intending to do is to elevate this from a procedural dispute mechanism to something that goes after the heart of problematic policies and not the way problematic policies were adopted. So I think that's sufficient to state my point. Thanks.

SUSAN PAYNE: Thanks, Greg. Malcolm, come back to you.

MALCOLM HUTTY: Thank you. I must say I agree with Greg here. I appreciate what Sam is saying. And indeed, to some extent, I agree with it in the side. There's no intent here that a stand-alone harm without some form of action on cause of ICANN that is said to violate the Bylaws constitutes a valid claim. There has to be actions that are being adjudicated. But what do we mean by actions here? They do not necessarily mean, as Greg was saying, some specific procedural misstep. What ICANN has committed to is to comply with its Bylaws in all their elements. And any claim that ICANN has acted inconsistently with its Bylaws stand in any particular case, stands as the basis of an arguable cause of action, an arguable

complaint dispute site. Get the jargon right, please. I've been doing this long enough.

For example, Sam, if I can point you to Section 1.2, the commitments and core values. Item 5 in here states that it's a commitment of ICANN that it will make its decisions by applying documented policies consistently, neutrally, objectively and fairly without singling any particular party for disciplinary treatments. Then there's something that continues in parentheses. The substance of a dispute with ICANN can be an allegation that when you did this, you were not acting neutrally, objectively, and fairly. Then how is that shown? Well, that can be shown through the course of evidence. But the particular things that were done that amounted to applying things inconsistently or unneutrally or unobjectively and unfairly could actually be a complex array of things. Some of which may be proven, some of which may not be proven, not all of which are necessarily have to be proven to substantiate or to bear out the claim and its substance. Some of which may well be further back in time, some of which closer in time. At what point would you need to be pointing at here if you were doing it on the basis of all the things that might be referenced to evidence that ICANN was not acting objectively in a particular case? Whereas if instead you say that the real thing that is being complained about here is, "What happened as a result of that was the harm that was done to me," that happened at this point of time. That can be fixed in time. It has to be fixed in time because you have to show the harm. And then the rest is evidence that will come up later in the process, not right at the beginning of it.

That's really one of the reasons why I think it is not only a mistake to do this, but it's certainly the argument that you're putting forward, Sam,

that the action is a narrow and defined and well-known and discrete point. But that the harm is vague and indeterminate and not easy to fix in time. That arguments I don't think holds water. I think it's very much the other way around when you start applying these to at least some types of real world types of claim.

Before I yield back the floor—I see Liz's hand up, though—I do want to briefly get on record that there was one other objection on another matter here since item G on Sam's proposal has been raised. I don't think that it's appropriate to name the ICDR within the rules of procedure, when the ICDR as the administrator, that may well go out to tender, the ICDR may not even be selected as the successful tender as a result of that tender process. We don't know. There's certainly must be open that others could potentially tender for it and might potentially be successful. So neither the ICDR nor its particular business rules should be directly cited within the rules of procedure. I don't think that's proper. We might instead say that the rules of the administrator relevant to the initiation of the case must be maintained. But I don't think we can be more specific than that. We don't know that there will be any fees that have to be paid to the ICDR or to any administrator and we don't know that it will be the ICDR. So I don't think we can make any of those sorts of references. Thank you.

SUSAN PAYNE: Thanks for that, Malcolm. I will just note that point about the ICDR. I think it's a fair one or it seems to me to be a fair one. I know that David McAuley is agreeing that he also thinks it's a fair one. I would note that our current interim rules do reference ICDR. It's a defined term and

talks about the ICDR itself as having been designated and appointed as the IRP provider, and also references the ICDR rules. I think, consequently, there are a number of places in these rules, not just in this time for filing rule but throughout the current version of the interim rules where we are referencing specifically the ICDR rather than the provider. I do think that is one that needs to be subject, obviously, to agreement from others. But I think that is something that may need to be addressed. Because I take your point, the Bylaws talk about an IRP provider and that could, in theory, change and we don't want to have to change the rules just because the provider changes. I was going to make a couple of other points for people to think about when they're reflecting on this current draft from Sam, but I see Sam has her hand up. So I will turn to you first, Sam.

SAM EISNER: Thanks, Susan. This is just on the ICDR point. Our current provider is the ICDR and a number of the rules have been written in alignment with ICDR rules. I think that we can't make the presumption that if we were to identify new provider, that we'd be able to port over the full level of supplementary procedures without consideration of how those impacts and how those differ from the general rules within that provider. I take Malcolm's point and we can see if it makes sense to generalize it within here, but these really are supplementary procedures that are drafted in view of being used by the ICDR. So if we were to change providers, we would have to relook at this set of procedures to make sure that they were aligned with the other rules coming out of them or the other rules associated with a different provider. So it might not be an exercise worth with the difference, because I think that there probably are

places where we're referring back to some specific emergency procedures or things like that that already exist within there. So we probably can't generalize the supplementary procedures to that point, though I would agree that we would never want to update the Bylaws to a place where we take in a single provider.

SUSAN PAYNE: Thanks for that, Sam, also very good points. You may well be correct, then. Certainly, as I said, there were a number of places throughout the supplementary procedures where we are referring to ICDR. Indeed, we fall back on their processes in a number of places where, in the absence of things like agreement or in the absence of a standing panel, we currently anyway fall back on the ICDR process. It's always envisaged that these would have to be revised if ICANN change provider. One for us to reflect on a bit further, I think.

MALCOLM HUTTY: May I ask a completely open question?

SUSAN PAYNE: Sure.

MALCOLM HUTTY: This just simply displays my ignorance but something would be useful to me. Can somebody show me where it is written that the underlying rules of procedure of the ICDR apply to an IRP case? As in not the

supplementary rules of procedure, but the underlying sort of what you just called the fallback. Where is that written?

SUSAN PAYNE: I am going to—thanks. Yes?

SAM EISNER: From a practitioner standpoint, when you file using a certain provider, so the ICDR here is the international arm of the American Arbitration Association. So any arbitration that's initiated under the ICDR is expected to follow. That's part of their process, that it follows the ICDR rules, and then they've agreed to supplement or modify those general procedures by adopting the supplementary procedures for anything that's filed using the IRP filing form. So that's just a general practitioner place. Whatever arbitral forum you might file in, the parties are expected to follow the rules of procedure about arbitral forum.

MALCOLM HUTTY: This comes from the fact that when somebody says they want to bring an IRP case, ICANN says, "We have selected ICDR as the administrator." That's what that hinges on then?

SAM EISNER: Yes. The IRP filing form is through the ICDR. So people file that with the ICDR. That's where the expectation to use the generalized [inaudible] comes from.

MALCOLM HUTTY: Sure. I get that when you go to the ICDR and fill out an ICDR form, it says that you have to obey ICDR rules. But that's an ICDR rule, not an ICANN rule. How does that become an ICANN rule?

SUSAN PAYNE: If I could, I mean, it becomes an ICANN rule in the supplementary procedures, the current version of them anyway.

MALCOLM HUTTY: Because we identify the ICDR in the rules of procedure?

SUSAN PAYNE: Yes. Because it says scope, ICDR will apply these interim supplementary procedures in addition to the ICDR rules.

MALCOLM HUTTY: Right. So if that's the only way in which the ICDR rules have authority, then actually maybe my intervention on this point was actually wrong. That we must refer rather than that we must not refer to the ICDR, because otherwise, those rules may not have any legitimacy. I see Flips's hands up.

SUSAN PAYNE: Flip, over to you. Flip, I think maybe you'll double muted. I don't hear you. Does anyone else hear Flip?

MALCOLM HUTTY: No.

SUSAN PAYNE: Okay. That's a shame because I was rather hoping that Flip was going to—

MALCOLM HUTTY: Shed some light.

SUSAN PAYNE: Yes.

GREG SHATAN: The French are famous for their minds, I guess.

SUSAN PAYNE: Well, hopefully Flip will be able to join us. It may be too long. You may be able to put it in the chat, Flip, if it isn't too long. Otherwise, I am not sure what to suggest beyond the fact that it may be that you have muted in two places somehow. Perhaps in the meantime, I'm noting that we are 10 minutes after, this has been quite a very interesting and sort of robust discussion so far. We had a noise there. I don't suppose that to you, Flip, is it?

MALCOLM HUTTY: That was my computer beeping at me I'm afraid.

SUSAN PAYNE: Oh, okay. Not to worry. I feel that certainly David, in particular, had commented specifically that he wanted more time to think about this. And I think, indeed, that I'm sure having only received this new draft quite recently that most people would also feel that they would like to reflect on it and give it more thought. I wanted to just flag a couple of things for consideration when you're doing so. One is just to flag as a reminder, if you like, what our current interim rules say. And forgive me I don't have them to hand in a way where I can copy the language into the chat at the moment. Oh, it sounds like Flip is with us now. I'll come back to you shortly in a minute, Flip. Thank you. But the current version of Rule 4: Time for Filing, which is very short, does talk about the claimant filing their written statement of dispute within 120 days after the claimant becomes aware of the material effect of the action or inaction giving rise to the dispute. So, that material effect language that we have been spending a lot of time talking about is in the current version of the supplementary procedures. So those interim rules that were adopted by the Board back at the Barcelona ICANN meeting does have that material effect language. So one of the things I wanted to flag for everyone is that this new draft from ICANN Legal is removing that reference to material effects. In our previous review of the draft rule, we're asking for something new to be put in but more that we were highlighting that something had been removed from the version of the rules that currently exists and which, obviously, for many reasons the IOT group generally were not in agreement on that Rule 4. There were many aspects of Rule 4 that were not agreed, but that is the version

that was put forward to the Board. And so the current version has that reference to the material effect.

Then the other thing I did just want to flag is just to circle back to this definition of a claimant and to ask you all to reflect on that definition of a claimant, whereby in order to be a claimant, and therefore to have standing to bring a case, you have to have been materially affected. So it's not enough to know about the action or inaction. It also has to have bitten on you.

And then with that in mind, I wonder if we could scroll back up to A on the previous page, Brenda. When you review these rules, would you do so and reflect on that when you're reviewing paragraph A? I don't know the answer. My initial reaction was that if timing is running from when the claimant is aware or reasonably should have been aware of the action, then their time is running potentially before they are eligible to be a claimant, because it may be running before they have actually been impacted or materially affected to use the language that we've been using. However, whilst this discussion has been going on, I have been looking at this again and wondering if, in fact, given how a claimant is defined, the very fact that Rule 4 talks about a claimant means that that material effect is actually implied into this by virtue of the fact that in order to be a claimant, they have to have already been materially affected. When you're reviewing this rule, do you all feel that that need for an impact is already built in and that the timing runs accordingly taking that into consideration? I don't know the answer to that. But I'm just putting it sort of on the table for people to think about when they're reviewing the draft rule. And now I will stop talking and we'll

hopefully turn back to Flip. Then I think likely we will be close to wrapping up. Flip?

FLIP PETILLION: Hello, Susan. Do you hear me?

SUSAN PAYNE: I do. Welcome. Thank you.

FLIP PETILLION: Thank you so much. Sorry to everybody. I don't know what happened. Actually, the best way to handle was to simply call in again. I just heard you saying something about claimants that must be harmed. Actually, there is case law and there is a current debate on that point where a claimant can actually not yet been harmed but may be harmed in the future, which is enough for standing. But that was not a topic why actually wanted to step in. And what I'm going to say is going to be so trivial and far away from the discussion that was going on 10 minutes ago that it may not be so interesting anymore, but let me say it anyhow.

Actually, what's the situation? The situation where you have a problem with ICANN, the normal way to actually handle a disagreement, which becomes a dispute, is to go to court. ICANN and the community have been thinking of alternatives to seek a resolution out of court. And the ultimate approach is the IRP. It is ICANN the community who approved the idea that if we opt for that IRP, we will have it handled by an institution, and that institution happens to be the ICDR, New York. So ICDR has its rules, but there are special rules if you [watch], and these

special rules have been thought of to be pickable in these particular cases. And if these particular rules don't handle the issue, well, then you go back and you use the fallback position which are the ICDR rules. I think this is the hierarchy of the rules that apply in these cases. Thank you, Susan.

SUSAN PAYNE: Thank you, Flip. For useful intervention, I certainly follow what you're saying there. But I did actually want to circle back to your comment about the claimant point and your comment about the potential to be a claimant who might be harmed in future that that future harm, as opposed to having already been harmed, can grant standing to a claimant and that there is a current case on that. I'm understanding you to be talking specifically here about in this context, within the context of the IRP. And if that's the case, I wonder if when you have a moment, you wouldn't mind sharing that with us on the mailing list, perhaps pointing us to the case in question, because it may be that that this may certainly give some of us anyway some comfort about reservations on whether one becomes time barred before one even has standing to bring a claim.

FLIP PETILLION: Yeah, sure. But in all fairness, taking into account that has been a debate in a current case, it would be fair to have an equal standing by somebody from or representing ICANN on that topic so you hear both sides, although in my humble opinion, the panel in that very case has actually already expressed its views on that question. But just for the

debate, for the sake of this discussion in this particular group which is having intellectually open discussions, I assume, it will be fair that both positions will be heard. So I'm happy to prepare that as long as it's balanced.

SUSAN PAYNE: All right. Okay. Thank you. Yes, I guess to some extent it may depend on whether this is a settled point or not. If indeed it is a settled point, then I think it is helpful. As I'm hearing you, it may be a point which is still to be confirmed. You're correct. There are sort of two sides to the argument. But Sam is saying she would be happy to prepare a response when she sees what you submit, but that they don't concur that it's a fully settled point.

FLIP PETILLION: I think it's a discussion I wanted too.

SUSAN PAYNE: Yeah. In which case, then I wonder if it is helpful to or indeed whether it's something of a waste of your time to be asking you to do that. If this is not a settled point coming out of an IRP decision, then it's clearly not something that this group can determine. And it may be simply asking you to make work for both yourself and ICANN Legal. I see David's hand. David?

DAVID MCAULEY: Thanks, Susan. I was just going to urge that Flip and Sam actually do that because I can see the confusion comes from a claimant is clearly defined as someone who suffered harm, and yet later on in the Bylaws it says a claimant can petition for interlocutory relief, including injunctive relief, which normally happens before harm occurs. So I can see the cause. I didn't know an IRP panel had let its impressions be known. So I'm very interested in it. Thanks.

SUSAN PAYNE: Okay. Over to you, Flip, I think, then. If you're willing to do this and it won't take you a significant amount of time—and Sam has indicated that she's happy to respond to it—then it may be of interest and relevance for us. I must say, I'm wondering whether it will just simply leave us with two conflicting points of view on whether you can be a prospective claimant, if you like.

FLIP PETILLION: I'm happy to do it, Susan. In any event, the information that both parties have exchanged on the topic is or should be available on the ICANN's website already. But I think our job can be limited to pointing to the right documents or paragraphs.

SUSAN PAYNE: That would be perfect. Yes. I don't want to make work for you.

FLIP PETILLION: No problem. And it's not the purpose to have the case handled here in this group, of course.

SUSAN PAYNE: Indeed, indeed. Thank you. And thank you for letting us know about that. It's definitely an interesting point. In absence of a settled position on that, this is certainly an area that seems to be very relevant to this discussion that we've been having. It's a slightly different way of looking at the point that Malcolm and indeed Greg have been making, but I think it's another way of considering some of the same concerns.

Okay. I think we probably have got as far as we can do here, in the absence of seeing any other hands now. Again, thank you very much to Sam and Liz and others in the ICANN Legal team who've spent time on this new draft. I think this is really good progress. Some of us may have some reservations in this group on some aspects of this, but we are making good progress on a revised version that we hopefully will be able to all get comfortable with. So, can I ask everyone, as an action point for all of us, to spend the time to sort of properly review the draft language? And perhaps we could do what we did previously, Bernard, and have it in a Google Doc so that members of this group can annotate with comment. I would suggest that we do that as suggestion mode or as comments, rather than direct editing of this document because that obviously is less beneficial.

I'm also conscious of Malcolm's request to be able to see the two versions side by side. Rather than that being a redline, because actually I do agree with Sam that perhaps a redline isn't necessarily as helpful as

it might be because of the changes that have been made, but I wonder, again, if it's possible to ask—and I'm not quite sure who I'm asking of this, whether it whether it would be Sam and Liz or indeed whether it's something that Bernard could take on—but to produce a version of this Rule 4 with the kind of last version of the language on one side and the new version on the other, clause by clause. Obviously, where the language has been broken down or broken down across a couple of clauses where it previously was in one, it requires a bit of mapping. But I think it's not too difficult a task to do. I hope it wouldn't take too long. Can I just pause and see whether that's something that can be done?

SAM EISNER: Susan, we can take that back to go and help and show a little bit more what the old language is versus the new. It could be as simple as just putting them both in the same document so that they're both easily accessible.

SUSAN PAYNE: Thank you. Ideally sort of lined up with each other so that we can see the old version of clause A and the new version, if you know what I mean. But that would be super helpful. Thank you. Malcolm?

MALCOLM HUTTY: Thank you, Susan. What I'm about to say may come across as critical. So please, I say this with very great respect for you and your work as chair here. But I really am concerned that too much deference is being shown here to ICANN's proposal as though this is the new version. We have

produced a document that had involvement from all members of the group that included a number of submissions to have that simply swept aside so that this is now considered the new version. And things go into a document that is based on what Sam has proposed simply because this is ICANN Legal's position, and then things either go into it or not go in to it according to whether ICANN Legal accepted in, that's not an appropriate working procedure for this group. We need to maintain our own documents. And Sam brings ICANN Org's proposal. I mean, they have very properly and correctly titled this document. This is ICANN's proposed revisions—I mean, setting aside this notion of Org—but then the ICANN Legal staff's proposed revisions to this rule. It's not the IOT document. The IOT needs to maintain a document so that we can see all the input that we've received from members of this group. And I respectfully ask that that is maintained and published and circulated. Thank you.

SUSAN PAYNE: Thanks, Malcolm. Perhaps I haven't expressed myself very well but I think that's what I was hoping to achieve by having our previous document and this new proposal put side by side. But let's take this, Bernard, and I will take this offline and work out how best to achieve that. Thank you. Flip?

FLIP PETILLION: Thank you, Susan. I actually want to concur with what Malcolm just said. And it's a general remark I want to make for the entire work that is done in this group. That is something we need to keep in mind because,

otherwise, I think the balance is not there. But I think Malcolm has expressed the point extremely well. I just want to stress my support for it. Thank you.

SUSAN PAYNE: Lovely. Thanks for that. Your comments are noted and appreciated, both of you. Malcolm, is that a new hand or is that an old one? Okay. I'm going to assume it's an old one.

All right. We're just a minute over. Thanks, everyone, for your time. We should wrap up now. I look forward to continuing our review in the sort of downtime between this call and the next one and to having any other perspectives on this repose and safety valve language that people want to present. Thank you. As I said, we will work out a way to produce a document that addresses the concerns that Malcolm has raised and circulate a link. Thank you.

All right, we can stop the recording now. Thanks all for your time.

[END OF TRANSCRIPTION]