DEVAN REED: Good day, all. Welcome to the IRP-IOT Call #84 on 11th January 2022 at 19:00 UTC. This call is recorded. Please state your name for the record when speaking and kindly have your phones and microphones on mute when not speaking. Attendance is taken from the Zoom participation.

Turning the meeting over to Susan Payne. Thank you.

SUSAN PAYNE: Lovely. Thanks very much, Devan. Hi, everyone. Happy new year to you all. Welcome back from the holidays for those who were sort of taking some time out. Hopefully you all had a bit of a break.

So we are, as Devan said, this is our IRP-IOT call. It's the call of the plenary group. We have a reasonable turnout, I think, but hopefully we may get a few additional joiners in the next couple of minutes. But in the meantime, I think we have enough on our call to let us kick off. So let’s do that.

So first up, as usual we need to do the review of the agenda and the updates to SOIs. I’ll circle back to the SOIs before we get on to Agenda Item 2. But just reviewing the agenda first, we’ll look at the status of our action item. We will spend, I think, a little bit of time on this call now reviewing and discussing the proposed update to the language on the repose and safety valve.

You will recall that we did have a preliminary review of the new draft that ICANN Legal had provided to us. And in response to some concerns that we were sort of losing the legislative history, if you like, we have a

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new version which Bernard has circulated with the agenda which is an attempt to put the old language and the new language side by side so that we can better compare and see what amendments have been changed or have been made, and also where there were comments and the extent to which those have been picked up.

So I think the majority of our call today will be spending time on that, obviously subject to the extent of the discussion that we have. We then, time permitting, will move on to circling back on the discussion on tolling for time or the proposal for perhaps using a notion of fixed additional time instead of tolling to allow for time for other accountability mechanisms. And then final, just noted on Agenda Item 5 is our next call which is in two weeks' time and on an earlier time slot.

So just reverting back to the top of the agenda and Statements of Interest. And pausing briefly just to say welcome to, I think probably David is a recent joiner before from the call. So welcome, David. Thanks for joining us.

Yes, so first up, just circling back to Statements of Interest in case anyone has any amendments to Statements of Interest that they need to flag to the group. I'm pausing. I'm not seeing any hands or hearing anyone, so that's a good sign. I'll just make the usual reminder for us all to please be sure to keep an eye on our SOIs and update them from time to time as required, and to do so and then flag any changes to the rest of the group just so that we can be sure we're all aware of where people may have interests or particular interests that impact on the work we're doing here.

Okay, so Agenda Item 2 is the review on the action items. We've got one action item which relates to that piece of work about the proposal on the possibility of using fixed additional time as an alternative to tolling. And that's to allow time for claimants to pursue other accountability mechanisms without becoming time barred from bringing their IRP.

We've got an action item sitting with ICANN Legal who were proposing to give us a more formal response on that proposal. We have had some preliminary thoughts on one of our calls.

So just looking to you, Sam, to see if there's an update on this. It is, time permitting, a topic we're hopefully going to come back to on this call. So just wondering whether we can anticipate getting anything more formal from you or whether we will just address any comments you have through the course of our discussion.

SAM EISNER: Just with the passage of the holidays and people in and out, we haven't finalized a written response to the group that we did provide some initial thoughts of where they were going. So we'd be happy to participate in the conversation later that, on that basis.

But I think it's still—and Liz, if you can jump in—I think it's still in the pipeline to get something written back to this group in short order to finalize that now that we're back from break. But assuming that's the case, we'll get something back. But we're also prepared to participate in the discussion today.

SUSAN PAYNE: Thanks, Sam. That's great. We can leave that one there for the moment and we'll come back to that as an agenda item for us in due course.

So next up, really, I think the probably substantive discussion that I'm hoping we're going to have today is to see if we can review again, particularly with the comparison document and reach kind of an agreement on the proposed repose safety valve language.

And so with that in mind, Devan, if you could put the first page of that document up on the Zoom screen, that would be super. Lovely, thank you. And that largely shows the comments. It is a bit challenging using these documents in the Zoom screen in terms of reviewing comments when they get to be too detailed. And so I'll do my best to flag what the comments are, but you all may find it helpful to have the document open in your own screens as well if you're able to do so.

As I said, we did spend some time looking at the proposed revised version of this draft language, but there were some concerns that we were sort of losing the history of our document, and particularly that we were not necessarily being able to see very clearly what amendments have been made and indeed perhaps what amendments hadn't been made.

And so Bernard and I have done our best to try to capture both versions of the document in a way that hopefully allows people to compare. And hopefully you've had at least a preliminary opportunity to have a look at that before you came onto the call. So really, I think probably it makes sense to go through the document clause by clause and just gather any more feedback or comments on the draft, bearing in mind that the

right-hand column is the later draft and so therefore is the proposed language that ICANN Legal came back to us with. But we'll want to read that in the context of, obviously, the other column as well to see whether it addresses all concerns or indeed whether we feel anything needs to still get picked up, or indeed whether there are any particular comments on text which is new text.

First up then I will just start. Obviously, please put your hands up as and when you want to feed in, although I will try and pause from time to time to wait for feedback as well. But first up we've got ...

Malcolm, is that a hand before I kick off or is that you just enthusiastically getting in the queue?

MALCOLM HUTTY: No, that was a hand.

SUSAN PAYNE: Okay, go for it.

MALCOLM HUTTY: Thank you. Just in terms of how these have been characterized, I do think the chair's paper is the working draft and that ICANN's proposal is ICANN's proposal. So I'm not really comfortable with the language as to whether or not ICANN has picked up certain things here. It's like ICANN is proposing to drop them. Yeah? The default position, Madam Chair, should be your chairman's draft.

And if ICANN is asking the group to agree to something else, then that's a request on the table but it's not really ICANN that makes the decision as to whether or not the things that you have put forward are acceptable. That's not really up to them. You're the chairman of the group.

SUSAN PAYNE: Okay. Thanks, Malcolm. I'm noting your comments. I'm happy to address this with that in mind. I think, let's just—

MALCOLM HUTTY: I think it's important that we understand that we don't need ICANN's permission for anything that we decide in this group here. Yeah? And the Board will ultimately decide whether or not to accept this group's report. But this isn't ... But ICANN can't just sit there and say, "Oh well, no. We've decided that we don't agree with this and so it's not happening." That's not in their gift.

SUSAN PAYNE: Agreed, Malcolm. And thanks for that. David, I'll come to you in a minute. I think all I would say is that we had some discussions. We, I think, didn't necessarily collectively all agree on everything that had been put in as comments in the 21st of September draft. But we obviously had a certain degree of agreement and we therefore asked ICANN Legal ... Well, I asked ICANN Legal to do a redraft. And so I'm viewing it with that in mind.

But absolutely agree that if there are areas where, as a group, we felt—or indeed we feel—that some text is important and needs to be in there then, yes, that's absolutely what the outcome should be. [inaudible] if that puts us closer to being on the same page.

David, thank you.

DAVID MCAULEY: Thank you. Thanks, Susan. I think Malcolm makes an important point, but it's also one that he's made before and I think we understand it. And so what I would ask is that we be able to speak colloquially. I mean, this group has not changed recently and it's an important point. I don't dispute that. We don't need ICANN's permission for what we say or what we do, but I think we need to be able to speak colloquially.

I didn't even pick up, Susan, on what you said as being an issue when you said it. And it's just because we're not speaking as if we're writing right now. So anyway, it's just a minor point. Thank you.

SUSAN PAYNE: Thanks, David. I think I probably am being a bit colloquial. I'm very happy to be picked up on that, but it's always important, I think, if someone feels that there's perhaps a potential misunderstanding about what our task is or what the status for a document is. I think it's better to air it rather than not, but I appreciate the comments from both of you.

Malcolm, is that a new hand?

MALCOLM HUTTY: No, sorry. I'm on a device that ... I hope that has taken it down. Sorry.

SUSAN PAYNE: It's taken one of them. I've got two of you which is a real joy for us. So I'm not sure what to do about that, but I'll kind of ignore the hand that's up at the moment, but please ... Oh, there you go. One of you has vanished. But please do, if I looks like I'm ignoring your hand then you know I'm not going to stand on ceremony here, so please do just butt in, obviously. Thanks very much.

Okay. So turning to the document, we have Paragraph A, the new suggestion—let's put it that way—the new proposal for the language is longer than in the 21st of September draft. That is, I think, one would agree when one looks at it, largely due to the suggestion of dividing out into Subparagraph (i) and Subparagraph (ii), the idea of an action or an inaction. And certainly, that to my mind does seem to make a certain amount of sense and does I think, if anything, does make the clause a little easier to read and understand.

So subjects to thoughts on that. I think that certainly, to my mind, that's a positive amendment that has been made. I think what we need to focus on really is on this—the language we're referring to that's highlighted in the 21st of September draft with a comment, this language about the reference to the material effect of the action or inaction. That language, that reference to the material effect is in the current interim rules.

So they were rules that were that were being dealt with by this IOT group in its previous incarnation. And whilst there was a great deal of discussion on, indeed, the timing rule in particular was one where the group was not ... There was still work to be done and there was a public comment to be reviewed by the group, and so on. Nevertheless, there was a version of the rules that did go forward and the Board adopted as an interim measure which has that material effect language in there.

And so with that in mind, certainly that was at least one of the reasons why I had been or I think I was one of the people who had proposed that I felt that this language didn't need to be in there. And what I would say is that I think if that language isn't to be in there and we're to be agreeing as a group to delete that language from any new version of the IRP rules, we need to have a clear understanding of why we're doing so and a clear agreement on doing so.

When we had our previous call to discuss this—the new draft language, proposed to draft language—there was some concern from ... Some members of our group expressed that material effect language not being in the draft. And Malcolm in particular was one of those who talked about concerns that basing the timing on the action, as opposed to on the effect of the action for the claimant, created less certainty for the complainant and in his view wasn't consistent with the bylaws language.

I would say I don't think Greg is ... Oh, Greg has just joined us as well. Hello, Greg. I would say Greg also did speak largely supporting a similar perspective to the one that Malcolm had expressed. We did obviously ... During our discussion, Sam expressed a contrary view referring us back

to the bylaws and to the bylaws which tasks us with coming up with the rules and talks about the timing of bringing an IRP by reference to when a claimant is aware or should have been aware of the action as opposed to the harm.

But of course added to that, there is this provision also in the bylaws that makes it not possible to bring an IRP until you have a material effect and it's caused you damage as a claimant. And so that is, I think, the issue that we've been circling around.

Now we did have, just to completely cover things off, Flip did raise on our last call the possibility that in fact a claimant might not need to have already suffered harm in order to be eligible to be a claimant. But he did also say that this was a subject that is actually part of a life dispute at the moment. And so I think the fact that it's part of a live dispute would suggest that, at a minimum, it's not a universally accepted interpretation. Or at least it's not one that it seems wise to be basing our rules on if it's currently a live issue before and IRP.

So I think I just want to sort of pause here and get any further views that anyone else in the group wants to express. As Malcolm has rightly pointed out, the ICANN Legal Team are a one of the participants in this working group and therefore their language is not the default. Let's put it that way. It is for us to decide, and certainly we've got a good couple of members of our group who've expressed very strongly that they feel that material effect language should be in the draft, rather in the rule.

So really I'm just looking to see whether there are any other inputs anyone wants to make before we move on.

Greg.

GREG SHATAN: Thanks. Another way I've been thinking about this—and I'm not sure if this is the concern between those who want material harm and those who don't, so to speak—is to make sure that this is a live case or controversy as opposed to a hypothetical advisory opinion being sought. Which is a different dividing line, but maybe more relevant in a way to what we're discussing. Because I would agree we don't want people bringing matters where there is no possibility of harm occurring to them as a result of the this.

But I really do think we do want something where if somebody sees harm coming down the pike, they can stop it before they're crushed under the wheels so to speak. But I think probably have more agreement. At least I'll speak for myself, that I would agree that we do at least want something that is an actual controversy as opposed to just somebody deciding to slap a hypothetical up there to get an advisory opinion. There needs to be a live matter.

But whether harm needs to have already occurred as opposed to whether there is harm that will occur if the decision isn't reviewed and reversed or revised, it seems to me that this is one of these things where you don't have to wait for somebody to be killed at the crosswalk before you put up the light. Thanks.

SUSAN PAYNE: Thanks, Greg. So I think that sort of provisional harm or, you know, there's the expectation of harm is perhaps the point that Flip was raising and that is sort of the subject of a dispute, if you like. But I'm not sure that we need to be ultimately concerning ourselves about that.

I guess what I would say to you is, given that this here is about timing as opposed to being eligible, if the timing is no later than a certain time after you become aware of the material effect, then does it matter if actually you were talking about a time before the material effect comes into play? That's sort of, if you like, is an earlier date rather than a later one. And therefore it wouldn't time by you.

I don't think I explained that at all well, but does that make sense? Is that something you think makes sense?

GREG SHATAN: I'm not sure I quite made sense of it. But I think that the point is ... It might occur earlier but it might also ... The question is, it might occur earlier in the arc of a particular circumstance, but it might still be occurring later in the time that has elapsed since the decision was initially made. In a sense this maybe has more to do with—I'll call it a case—whether a case can be brought at all because the harm while impending has not yet been experienced. The jaws have not yet shut, but you're in the mouth or inevitably swimming toward it. Not to keep metaphorizing this, but it's still not ...

If we're talking about any kind of absolutely time bars, the fact that you know that you're going to have a problem or that you're reasonably likely to have a problem because the thing that you want to do and the

thing that the Board has put in place are at odds with each other and you believe that it was an improper decision and you want to challenge it, you should be able to do that before you're, say, rejected or before ...

Because the reality is that, looking at this from the business side, awful hard to have some project or new gTLD or whatever it is going without any idea, without being able to somewhat clear up whether in fact you will be successful if it appears that there's an issue that might wrongly, you think, stop you from moving forward. You should be able to resolve that along the way rather than waiting for a new decision to be made based on the prior decision. Because it's really not the new decision that you're challenging. It's the initial adoption of a policy or the like that is what is being challenged in any case. Thanks. I hope that made sense.

SUSAN PAYNE: Thanks, Greg. Yes, I suppose what I was trying to get at was that we're not really ... Certainly for the purposes of this part of the rules, it's not our job to be making a decision about whether a claimant is eligible to bring a claim. Indeed, that's something that's sort of set out in the bylaws. There's a definition of who's a claimant, and it talks about there being an action or inaction and there being harm that they have suffered.

And noting again that obviously there does appear to be a live case about whether potential harm is something that you can rely on. I think, still, for the purposes of when you're out of time, a person who brought an action before they were even harmed is bringing an action earlier than, you know, more than 120 days after they were harmed, if you

know what I mean. So they're never going to be time barred if someone was actually trying to bring their action based on a potential harm rather than a harm that's actually happened, assuming we've got this material effect language in there. I think that's what I was trying to say, but I probably wasn't doing so very clearly.

I do want to note that the Becky's made a suggestion in the chat that shouldn't we be referring to the material harm arising from the action or inaction rather than the effect of the action or inaction. And Sam expressed some support for that. I think that's potentially correct, or at least that to my mind is perhaps slightly clearer language but still is language that is reflective of what the bylaws are saying to us. But again, I think people may want to give some thought to that and see whether they feel comfortable with that suggestion as an alternative.

And there’s quite a bit in the chat that I will have a quick look at while I tend to Malcolm.

MALCOLM HUTTY: Thank you, Susan. I was wondering. I think, actually, maybe my point has been—or my suggestion—has been maybe obsoleted by Becky's. I mean, I was wondering whether we could get around this by just saying that they must file within 120 days of becoming aware that they were eligible to bring a case under these rules. But looking at Becky’s suggestion, if everyone else is agreed with that—being aware of the material harm arising from the action or inaction—then, yeah, that would work, too. I’d be happy with that.

SUSAN PAYNE: Thanks, Malcolm. And certainly off the cuff I think that's making sense to me and it does look like it's getting some support. Greg, I've got your hand up. Is that an old one?

GREG SHATAN: Very old.

SUSAN PAYNE: Not that old, but thank you. Okay, all right. So just briefly pausing in case anyone else wants to weigh in on that. But I think Becky's suggestion does seem to perhaps add a degree of clarity and certainly addresses the issue that I was a little concerned about and that I think was being reflected by Malcolm, at least.

I think then, in the absence of seeing any other hands, we could perhaps move on to the next clause. And I'm just going to at ... Where are we? So in the new draft it's now Clause B, just to ... Oh, no. Sorry. Devan, could you scroll back just a tiny bit? Perfect, thank you.

I don't think we need to discuss this. It was Clause A, or it was a part of Clause A but is now being divided out as Clause B. Again, I think there's nothing substantive in that, particularly, assuming that no one has seen anything that causes them any particular concerns. I think it's essentially the same. This is just the reference, obviously, to that repose time period. And so we have the actual length of time in square brackets at the moment because it's currently 12 months. But the timing we've been talking about generally has been longer than that.

So, then I think we can go on to look at the newly numbered Clause C—what was previously B in the old draft. I think the first thing to flag is something that was flagged on the previous draft. I'm not that it was an issue that, as a group, we had a concern with. It was that had been flagged as a comment on the draft, so I just want to close it off, really.

And this is this notion that the way one would proceed with one of these applications for an IRP out of time is that the approach that's being proposed is that it should be an application for leave. So if you've missed the deadlines that a set out in A and B and you want to bring an IRP, then you need to be seeking leave to bring your IRP late. And that's in contrast to the, perhaps, alternative way that one might handle this which would be effectively that a claimant would just file late and it would arguably be sort of up to someone—whether that be the panel or whether that be ICANN—take a point on the timing.

As I said, it was something that was flagged on the previous draft as a point for discussion. I don't recall there being strong objection to addressing this in that way by putting the onus on the complainant to seek leave to file late. But again, I just want to try to close that one off and just make sure that there are no strong objections before we move on.

So I'm going to pause briefly. And I think there is some chat going on, but I think it's on a separate issue so I will, at any point, if anyone feels that needs to get raised on the mic then do shout. But I think that may be slightly unrelated to this. So I'm not seeing any hands expressing anyone arguing strongly against the idea that we make this a proactive obligation on the claimant to seek leave.

So I think, yes, absent hearing from anyone on that, I think we can move on. Malcolm.

MALCOLM HUTTY: Could I just ask if it could be ... And maybe I'm being a little slow here, but I just wanted to know what exactly is being expected here, then? Are we expecting that a preliminary hearing to be established for this, then, or a preliminary decision point rather than the claimant just setting out their claim and including within that their reasons why it's appropriate that they should be heard, now? They need to go through a separate decision process?

Because if so that seems to raise practical questions as to how this is established and whether there is actually a mechanism to conduct such a thing. So perhaps someone who has experience with actually participating in these things can explain that to me. I mean maybe Sam, for example. I don't know. Or someone from the other side. Maybe Mike.

SUSAN PAYNE: Thanks, Malcolm. And just to leap in, but hoping that one of our practitioners who are more familiar with these processes will have some thoughts on this. That certainly is how I'm reading it, that there's a preliminary consideration on whether you're out of time request is going to be allowed or not within which, when you make that preliminary request, you are filing what you're statement of claim would be, or statement of dispute would be. But you, strictly speaking, haven't actually filed your IRP because you're needing permission first.

MALCOLM HUTTY: [inaudible]. So if you haven't foiled your IRP yet, does that mean the clock's still running on time? While you're waiting for a decision on whether or not you get leave to file it, time's running out. Is that how it would work?

SUSAN PAYNE: I'm going to let Sam and Liz answer this one, but my gut reaction would be no. I mean, you're sort of stopping the clock by saying you want to file. That's how I would expect the procedure to run. But we've got Sam and Liz and then Flip, and I'm sure all of them are far more experience on this than I am.

Sam.

SAM EISNER: Thanks, Susan. And thanks, Malcolm, for the question. To you second question about whether the clock is still running or you stop the clock, I believe we tried to insert some language to indicate that it was seeking leave to file, that that was when you needed to seek leave to file, not to actually perfect it so that we didn't have to worry about the time it might take for the panel to hear and decide whether or not the filing should be perfected, that you wouldn't lose your right in that.

And so that was something that we had thought about as we are drafting, and so it really is about the time within which you would seek leave to file to put ICANN and the community on notice intending to do this. So I encourage everyone on the IOT to look at that language and

make sure that, as part of the grouping of it, make sure that you're comfortable if this how the group goes, that we've expressed that correctly. Because indeed it shouldn't ... Once you've made that the leave application, if that's how we proceed, you shouldn't then have to worry about how long the process might take to decide on it to then possibly cut you out of the system. We tried to think about that.

In terms of the process itself, as were thinking about it we were trying to balance the concept of encouraging a panel to get involved in the substance of a claim if the claim is not timely versus allowing the smaller view as to whether or not the claim is timely before we're then using the resources and the panel time. And that's all paid by the hour, all paid out of ICANN resources.

And we also have the legal fees on each side that we're thinking about, too. It's a narrower set of briefing at the first instance which is about the timing itself. And then if the claimant is then given leave to move forward, then we'd have the panel moved to the substantive issues that are presented within the IRP. We borrowed a bit from litigation concepts where the concept to seek leave to file a certain type of motion or a certain type of complaint or a certain filing is a normal practice within, at least the American litigation systems.

We borrowed a bit from that in developing the process to try to streamline a non-substantive evaluation of the claim but focusing on the timing aspect first to then allow the substantive process to proceed only on those that are authorized to move forward.

SUSAN PAYNE: Thanks, Sam. Flip.

FLIP PETILLION: Thanks, Susan. I'm not going to repeat what Sam just said because she actually gave the answer. So I'm not going to steal any more seconds and give the mic back to you.

SUSAN PAYNE: Okay. But I guess, if you don't mind me putting you on the spot, as a practitioner I haven't heard you expressing particular concerns about how this would work in practice. Is that correct?

FLIP PETILLION: It has already worked in practice. And actually, what Sam just summarized is how it actually works in practice. And even if we hadn't any system in place that we got inspired from other systems, counsel to one of the parties—and in this case that would be counsel to ICANN—would file a motion and the panel would accept to have parties file a brief on the topic. And that panel will consider the topic and decide. And in practice, panels do—generally speaking—hold the matter. They actually have the possibility to hold the decision on the matter until the end of the case which, of course, gives an indication of what the first views of the panel are on the topic.

Sometimes can be uncomfortable for a party because they don't really know what the final ruling is, but once a panel allows parties to further debate on the substance pending a final ruling on a topic that is rather of a procedural nature, it is an indication that the panel has already

made its mind up because the panel is quite well aware of what the timing and cost implications are if it were to come back on the point and it's wrong.

SUSAN PAYNE: Lovely. Thanks, Flip. As you've been speaking, something's occurred to me, but I will raise that after we hear from Malcolm.

MALCOLM HUTTY: Thank you. And I thank Sam for the assurances to her intention, and we will of course go back over the language to see that the text gives effect to that intention. I mean, we were just looking at language that said that a claimant must file. And if it's now being said that the filing doesn't actually happen until after they've been given leave to file, then that language that we've just looked at would needs to be qualified in the manner that Sam just discussed.

So I think we probably have some technical work to do on this. Assuming that this goes forward like this, I must say I'm reassured by the assurances that this is not problematic in practice and that we have the structures in in place for this. I do wonder what would happen if a claimant were of the view that they were within time and that were disputed.

Would that then be something that would then just simply be decided at the time that the claimant made their case and then ICANN say, "No, hold on a second. You shouldn't be here at all because you're out of time"? And the claimant is when allowed to respond to that and then

the panel makes its decision. Would that work that way or would there be any particular effect to the fact that they hadn't gone through the preliminary leave matter? Or would it just be decided at the time in that case?

I don't know whether this is significant in practice, but it seems like it opens up some complications that we're glossing crossing past. Maybe they are not a problem. I don't know.

SUSAN PAYNE: Thanks, Malcolm. Sam.

SAM EISNER: Thanks. So in general if a claimant files and IRP, one of the things that ICANN does is look through to make sure that it meets all of the standing timing requirements in ICANN's assessment. And ICANN would raise a defense or a challenge if it believed that there was a timeliness issue with the filing. So that would be kind of an automatic thing that ICANN would raise within the IRP in its response to the filing of an IRP if it believed that timeliness was an issue and not something that ICANN has done before.

What this leave process does is it gives the ability for those who believe that they've passed the initial time frame but have reason to have passed it to say, both to the IRP Panel and to ICANN, "Hey, we know we passed it, but here's the reason why. And you should let us still file."

And so it really presents a matter in a different way to tee up the actual issue of the propriety of not being able to meet the initial deadline but

taking advantage of the safety valve. So if the person just went or the claimant went ahead and just filed it without use of the process here, ICANN would, of course in the first instance, say, "Oh, you shouldn't even hear this because it's time barred" as opposed to then engaging into the sufficiency of the use of the safety valve.

MALCOLM HUTTY: Would that mean under those circumstances ... Sorry to butt in, but if I may ask a follow-up question then, would that then ... If that were to happen, if the claimant believed that they were in time, ICANN believed that they were not, ICANN automatically objects—or routinely objects, we'll say—because you haven't sought leave to appeal, does that then mean that the claimant is no longer allowed to argue in the alternative, even if were time barred we should still be able to use the safety valve, would they be deprived of that argument at that point?

SAM EISNER: I don't know that we've thought about that.

MALCOLM HUTTY: Okay. I would feel more comfortable. I think if we said that that would not deprive them of that, then I don't think there's any harm done by this. But if it were actually that the claimant had believed that they were within time and then lost the opportunity to argue in the alternative because of a procedural technicality, that would seem to be inappropriate. That's allowing ourselves to get tied up in procedure

rather than getting on with the substance of the matter. Susan, I think we want to avoid that.

SUSAN PAYNE: Thanks, Malcolm. I think that's one of the reasons why I think we need to go through the language in the kind of details that we're doing. I think you've raised a very good point, at least a potential concern. So if that's not the aim, and I don't think we would want that to be the aim, we may want to just comfort ourselves that the language is sufficiently clear that that's not the outcome.

Flip.

FLIP PETILLION: Thanks, Susan. I guess the question is, if the only argument is an argument based on time bar, on timing, then I think it's perfectly imaginable that ICANN's successful in having the panel examine that very question before proceeding with the rest of the procedures. Because, let's face it, if somebody is really too late, there is no reason why that part should be allowed to have a discussion on the merits. If it's really too late, if it's really time barred. And then the question is, what is a [inaudible] case? But from the moment there is any other element at stake, or maybe one of it, then that's not going to be that easy. And I don't see any panel in an IRP or outside in a commercial arbitration to simply decide on the timing only because timing only because that may be a very delicate thing to do as a panel.

SUSAN PAYNE: Okay. Thanks, Flip. So I think what I'm hearing from you is that you feel—certainly, if we're about arbitration generally—that panelists are well able to balance these kinds of nuances. If I'm understanding you correctly. But we may—

FLIP PETILLION: I think so, yes. And of course it depends on how ICANN is presenting its arguments to the panel because, in this case, it's always going to be ICANN who pulls the trigger and who raises the point of discussion. If I'm not wrong. Sam, I don't think there is a precedent actually where this very situation has occurred, but I'm not sure for 100%.

SAM EISNER: I can't think of one off the top of my head either.

FLIP PETILLION: No.

SUSAN PAYNE: Okay. Thank you. Yean, as with many of these discussions about accountability mechanisms, it's really helpful to know what's happened to date and to know what kind of positions to get taken. But obviously we do have to remember that we are—ones hopes—trying to craft some rules that will stand the test of time and that all of the individuals now that we maybe know and trust, if you like, may be no longer in the picture. So we have to be crafting something that stands up even when we've got new personalities and new interests at play, if you like.

So I think we don't want to get bogged down, but at the same time we want to be comfortable that we haven't inadvertently built in an ambiguity or something worse than that. So I think it's a really useful exercise for us to sense-check what we're proposing and make sure it works.

When Flip was talking, it flagged something to me and we don't need to fix it now, but we could perhaps have a discussion about it if anyone has any immediate reactions. But what it did flag to me is that we're talking here about the IRP Panel. The IRP Panel can permit a claimant to file late. You put in a leave for requests to the panel. But of course we don't have an IRP Panel yet because we don't have an IRP.

So I think we need to address somewhere. And it may be in this rule or it may be somewhere in the rules. We need to actually work out who, in fact, we are expecting to make this decision. And I'm saying this because, as a member of the consolidation group, we've been spending a lot of time agonizing about where should decisions get made. Should a single panelist be appointed to make certain decisions or should we be holding those decisions of. In that case it was about consolidation until there's a panel put in place.

But I think we do need to think about how, in practice, it's going to work here. We haven't got an IRP Panel convened because we haven't got an IRP. So is this a case where we actually are going to be looking for a single panelist to be appointed from what we hope will be the Standing Panel that hopefully will be in place in order to be actually making this determination?

And if that’s not the case, then perhaps what we are actually looking at is going back to a process whereby the claimant does file an IRP. They file their statement of dispute. They and ICANN go through the process of appointing the panelists. And then at that point when that process has gone through, then the panel have to decide as a first decision whether to take the case any further. Because it may or may not be time barred.

And again, I don’t have an answer here. I’d love to hear, again, the views of practitioners on practicing, even if this scenarios hasn’t occurred in practice before, whether there are comparable scenarios and how it gets dealt with. My feeling is that it tends to get dealt with by a single panelist being appointed to make some procedural decisions, but this is a fairly substantial or substantive decision to be making about whether a claimant gets allowed to take their case forward or not.

And obviously, if there were any immediate reactions, then they're very welcome. But if there aren't, we can move on and I can leave that one festering with people. I am not, I think, seeing any hands. So I think, let’s cogitate on that and move on.

So next up we have the actual provisions of the new Paragraph C where, again, I think—and hopefully others probably will agree—that there is some merit to dividing out the subparagraphs to address the slightly different circumstances. I think it aids in readability compared to what we had in the previous Clause B. But I think that if we just look at those in turn, the suggestion has been that we have sort of ...

Subparagraph (i) is something that each claimant, when they're seeking the leave to file late, needs to establish. And then they either establish the grounds set out in (ii) or the grounds set out in (iii). Just briefly, if we look at (i), the first thing that they must demonstrate is that they've got standing. Or that's the proposal.

I don't think that's controversial in the sense that, clearly, in order to bring a claim, the claimant has to have standing. But by very virtue of the fact that I'm saying "clearly," that's the case for every claimant. Every claimant has to have standing. And so I wonder is it necessary for them to demonstrate that in this case, in addition to also explaining why they're late? That seems to me to go to some extent into the merits of the case.

So, question for everyone. And I'm seeing Sam's hand up, so I'm hoping to hear from her on what the advantage of that is, I guess.

SAM EISNER: Thanks, Susan. This was something that we put in, and I just want to give you a little bit of view into what our thoughts were in putting it in. We wanted to make sure that we had an assertion that standing was still a requirement. That standing is still something that needs to be satisfied to some degree even if you're trying to take advantage of the safety valve provisions that are laid out. Because there were some concerns expressed by some of our internal reviewers that there could be a suggestion that this was only about timing and that we were not reinforcing the standing requirements enough.

And so it was really just trying to remind filers that if you're trying to do it, you have to say that you meet everything else, too. And it's not necessarily that the time to litigate or to have motion practice against all other parts of standing, but that you at least need to make the minimum showing in the filing that if the panel were to agree with your late filing, that you've at least attempted to show that you've met all the other parts.

So we were concerned that we were leaving a hole to focus solely on timing and not on the other parts of the standing. But our intention wasn't that the full amount of standing had to be litigated at the same time, but that there had to be at least that preliminary sufficient statement of standing to show that this is someone who didn’t just come in on time but also might be there for all the right reasons.

So if there are other ideas from the group about how to make sure that we just maintain that expression because, indeed, it's a requirement of every filing within the IRP that the claimant should demonstrate that they have standing to be there. So we're really just trying to assert that as a requirement here, too.

SUSAN PAYNE: Thanks, Sam. Malcolm.

MALCOLM HUTTY: Thank you. And thank you, Sam, for that explanation. If that is the purpose, then I think this language possibly reaches a little further than the purpose that Sam has just set out for us. She said that it wasn't the

intent to actually litigate the details of the standing at this stage. If that's the case, then they don't need to demonstrate by clear and convincing evidence. In other words, that's the standard of proof there that they satisfy the standing requirements.

I think what Sam was describing would be more effectively served by saying that when the claimant seeks leave to appeal, they should set out the basis for them having standing which would show that [they] indeed still need to show that. But it doesn't arise to the level of actually proving it by reaching a final and determinative outcome on that because Sam said that will come at a later stage.

So this "clear and convincing evidence" language which is a standard of proof implies that would be litigated fully at this stage. So I'd take that out and instead say that when the claimant seeks leave to appeal, they should set out the basis for them having standing and just leave it at that.

SUSAN PAYNE: Thanks, Malcolm. That sounds like quite a sensible suggestion to my mind. I'd be interested to hear what others think on that.

Greg, you have your hand up which may be to comment on that or, indeed, maybe to make some other point. Greg, your turn.

GREG SHATAN: Thanks. Can you hear me? I changed headsets.

SUSAN PAYNE: Yes, we can hear you very well.

GREG SHATAN: Good. I agree with Malcolm. I do think that the concern that Sam raised in her statement just now is an appropriate concern. It goes kind of back to my “case or controversy” comment earlier. But I do agree with Malcolm that this goes a good deal further than it needs to. I think we could have the party not merely state their claim, but maybe affirm the facts of their claim. But proof requires adjudication, and proof by clear and convincing evidence is a higher standard under U.S. law.

We debated this in—what was it—the [TMP-PRM]? One of the newish accountability mechanisms has a Clear and Convincing Evidence Standard. We've spent quite a bit of time discussing it there. But the point is that that's an enhanced standard. The standard for civil litigation is “a preponderance of the evidence” and the standard for criminal litigation is “beyond a reasonable doubt.”

And “clear and convincing” kind of sits somewhere in there, but it definitely puts the assumption against the person or entity that is trying to prove something.

I don't think we even need the preponderance of the evidence. I think we just need a statement of the standing, as Malcolm put it, and some at least affirmation that it's true just so that it's not, again, some sort of theory. And there needs to be some weight. If somebody comes to us with something that's frivolous and they just put together a fairy tale in order to get in, potentially there would be some teeth for that. But that's highly unlikely that somebody is going to do that under these

circumstances. But we certainly don't need to have something that essentially would generate a hearing at all, much less a hearing under a Clear and Convincing Evidence Standard.

So hopefully we can find a middle ground on this so that we are talking about real stuff but not requiring that to be proven out at this early stage. Thanks.

SUSAN PAYNE: Thanks, Greg. And again, thanks to Malcolm on this. David is also commenting in the chat that he's expressing some support for that as well. Obviously supporting Sam’s point about making some minimum showing of standard. But I think we’ve got sort of fairly good agreement here that ...

Perhaps we’re in agreement that the concept that's being expressed in that Subparagraph (i) perhaps needs to be captured in a slightly different way or moved up as part of the “request for leave” so that it's more of, as Malcolm and Greg have been expressing, an explanation of standing, if you like, or a minimum information to establish that they have a reasonable right to be bringing this claim as opposed to getting into what could potentially, in some IRPs, be a really substantive issue turning wholly on the merits; and therefore a very significant part of the actual dispute.

Okay. Thanks for that, everyone. I think that’s really helpful. We then have the two scenarios which, again, were carried over from the previous version but just broken out now. So for, I think, more clarity we've got in Subparagraph (ii) the claimant is either showing

extraordinary circumstances not caused by them that prevented them from being aware of the action or inaction that's being challenged; or in (iii), extraordinary circumstances not caused by the claimant prevented them from being able to file a written statement of dispute within the necessary time frame.

Again, I think this is largely sort of similar language to what we had before. I certainly don't have any objection to it being split out in that way. I think it does read better. We had a previous comment and, again, it’s one that I’m not sure to what extent we had reached a firm agreement. But I think it’s one to explore.

Effectively, when we went into this and when we were having ICANN Legal propose some text for a safety valve, one of the things that I understood that we were trying to provide some safety for a potential claimant for was this idea of them being time barred on either of the heads of time before they ever became eligible to be a claimant because they didn't satisfy what it says in the bylaws about having been both impacted by the action or inaction and harmed by it.

My understanding is that we were trying to get to ... At least part of the reason for having the safety valve language was to try to provide a safety valve for exactly that sort of scenario where someone isn't able to file a claim because they don't yet qualify, if you like, as a claimant. And by the time they do qualify as a claimant, they’re already out of time. And that was meant to be trying to give some comfort to that scenario, bearing in mind some of the concerns expressed within this group and, indeed, obviously concerns expressed by the wider community in the [two] public comments.

And so it's a question. I'm not sure of the answer, and hence asking the group collectively to think about this. Does Subparagraph (iii) do that? Are we comfortable that the language being used there in (iii) about the claimant being prevented from being able to file a written statement of dispute adequately and clearly enough covers a scenario where they haven't been able to bring a claim because they're not yet in time, they're not yet a claimant?

I don't know the answer. I guess I want first to establish whether the group are agreed with me that that was an area of concern that we were trying to cover off. And assuming yes, are we are we doing it or do we think we need something else here?

Malcolm.

MALCOLM HUTTY: Thank you, Susan. I think the fact that you're asking the question as to whether this is clear enough to cover that circumstance really does rather point to the answer that maybe it's not as clear as it could be and maybe we've got more work to do to maybe write in more simple language that that's what we intend to do. That we don't want somebody to be prevented from filing a claim because of time having run out when they never had the opportunity to bring the claim.

The purpose is set out very clearly here. It's to try and resolve these things through the IRP and not force people to go off the court of law. One thing I think we can all agree on is that we're all united in the idea that we would rather that these disputes get settled within the IRP process and not sending people off to courts of law and tying ICANN up

in civil litigation in honoring courts, if that can be avoided. And clearly, this doesn't provide a mechanism for someone, any opportunity for them at all to have their dispute resolved, then they will have no choice but to go to courts of law. And that's to be avoided.

So maybe we need to look for slightly simpler, clearer language here that says that the claimant should not be prevented from bringing their claim merely by ... Nothing in this is intended to prevent the claimant from having the possibility of being able to bring their claim, provided that they do so in a timely fashion. Yeah?

The whole idea here is to stop payments from sitting on their claim, not bringing it, and then harassing ICANN with it at a later date. We can all get behind that as an idea, but it shouldn't be about preventing claims from being heard in this process at all. It shouldn't be a backdoor way of changing the eligibility requirements of the standing requirements because it’s not in ICANN’s interest either that that happened because it will only force these things in the courts.

So if we can have some simpler language that more clearly expresses that this is not a means to shut people out from being heard altogether, only to make them bring their claims in a timely fashion, then that would really help this, I think. And the fact that you're even asking “does this really resolve that question” shows that it's not sufficiently clear and that we need to do more work. Thank you.

SUSAN PAYNE: Thanks, Malcolm. Sam.

SAM EISNER: Thank you. So, going back to Susan's original question. I think Malcolm is right that we probably need to get clearer language in here because it's really (ii) here that would be the place for when someone wasn't harmed within the time frame and then was later harmed and then brings it within an appropriate timeframe after that, or seeks leave to file an IRP within appropriate time after that. That's really where we intend to capture that one.

(iii) here is really what we call, internally, the "Kavouss solve." He was concerned about the situation where someone actually was harmed and knew about harm in a timely fashion but was in a position that it was fully impractical for them to put their energies towards an IRP. He used examples of civil unrest or wartime or things like that where ... It was one of those things where challenging ICANN's conduct in an IRP while all this other stuff was happening really was the last thing, even though they knew about the harm in a timely fashion.

So that's where Kavouss was suggesting he would support some level of a leave for time. So that's what (iii) is. (iii) is, "I knew it was harm, but I couldn't come to the IRP. There was all this other stuff happening." So (ii) is really where we want to more clearly express the, "I didn't know about the harm yet because I wasn't harmed yet, and I didn't get harmed until after my time expired. So now I'm coming to ICANN to bring my claim, and I'm coming to ICANN within the time that you allowed for the safety valve."

So I want to make sure that we at least provide to this group the intended difference between those two, and then we can refine the language between that. I don't know if this group wants to maintain both of those scenarios or not, or really just focus on the issue of someone not harmed until after their time to bring an IRP has expired. And if that's really the main thrust that we want to do, then maybe we don't need both (ii) and (iii).

SUSAN PAYNE: Thanks, Sam. We don't have Kavouss with us, but thank you for the reminder. And it certainly was an issue of concern to him, and I think it was a concern that others in the group felt was a very valid one. And I guess we could think like, as you say, civil unrest. Or if there were an earthquake or a typhoon and everything has collapsed in the country, then bringing your IRP is the last thing on your mind.

So I think, certainly to my mind it, it does seem beneficial to have both (ii) and (iii). And perhaps we address the issue within (ii) by tweaking that language to again having the reference to the harm in there as well as to being aware of the action or inaction. And maybe it's as simple as that. Although I think it probably needs a bit of thinking about.

David.

DAVID MCAULEY: Thanks, Susan. I just wanted to comment because I may have misunderstood the comments of Malcolm and Sam. And so I wanted to

state what I think about this, and that is that what we want to build as a fair system which this leave to file late, I think, helps in a great way.

But I did want to address a point that Malcolm made that people that were not harmed before a certain time expires can bring a case. I'm not sure I agree with that. I think that there should be a point ... And I think in this document it's Paragraph F. There should be a point at which a case can no longer be brought, irrespective of whether someone had been harmed until after that point passes. And this is in the interest of certainty that I've spoken about before.

I know Malcolm and I see this differently, but I just wanted to say since some points were made. I may have misunderstood them, but I just wanted to say that I'm of the view that there are cases where a time comes and goes and someone may not have felt a harm before that time, but they won't be able to bring a claim after that time. And I don't know that they'll always be able to go off to court because courts will close their doors on a time basis as well. Thanks.

SUSAN PAYNE: Thanks, David.

SUSAN PAYNE: You rightly point out, I think, that there is that Paragraph F which I think is addressing that element that you've just spoken of, the ultimate time bar. Obviously that's one that we will need to come on and discuss as well. I do think that, yes, courts do have time limits. There are limitations on bringing claims, but they do ... Certainly where they stem

from aware, for example, or being damaged, time doesn't start running at the time of the action even in court, I would say. But I guess I'm advocating here and I shouldn't be doing that.

Malcolm.

MALCOLM HUTTY: I'll happily pick up the advocacy for you, Susan. Simply to point out to David that in the ordinary cases such as a contractual dispute or a claim [in tort], if somebody says they've been harmed by someone else, then the time in which they have to bring that dates from the time that they suffered the harm that gives rise to the cause of action. Not from some earlier data which the alleged perpetrator had set in course a train of action which ultimately gave rise to that harm.

In an ordinary, in a case [in torts], you don't get to line up a row of dominoes that will land on the poor claimants at some time after the deadline for filing would normally have run out and say, "Ha-ha, I escaped it because I set up a long enough line of dominoes that you can't come after me." That's not the way it works.

And so the interests of the claimant here are preferred by the court. So I'm afraid, I think that ... I mean, David may be right that in certain cases when the state itself is the party, it may provide itself with certain extraordinary privileges in some particular cases. But there's not many ordinary cases in ordinary law that it works like that. And the ordinary case is that anyone who suffers a hard has a right to seek justice. And that's what's happening here.

Someone who has suffered a harm by ICANN failing to abide by its own rules—let that be said—has a right to at least have the panel say, "Yes, ICANN was not abiding by its own rules." It's not much to ask. Yeah? Remember, there is an extraordinarily limited remedy available here, and to shut the claimant out for having even that much really isn't justified by any claim of certainty. [inaudible] the opposite of certainty because it appears to bless behavior which is not consistent with the rules. So, no.

I think we need to make sure that the claimant does indeed have the right. That nothing in this ... Maybe that's what we should do. Maybe we should have some overarching statement here that nothing in this deadline for filing seeks to exclude a claimant who acts in a timely fashion, when they have standing to bring a claim, from being able to do so. Thank you.

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SUSAN PAYNE: all right. Thanks much, Malcolm. Noting Sam's comment in the chat—just to close this off—expressing the perception that it's about ICANN and whether ICANN has violated its bylaws, and that's what the IRP is going to be testing, as opposed to bringing individual justice to individual claimants.

Noted. Although, of course, in many cases those do somewhat go hand in hand. There's not a remedy per se, but the upshot of a determination that ICANN hasn't abided by its bylaws can ultimately lead to a reconsideration, if you like, of something which has impacted an individual claimant.

Apologies, Bernard's been flagging that we're running out of time and that I should be wrapping up. And I have not been doing so.

Thanks for everyone. This has been a really useful discussion. We haven't got as far through the rules as I thought we would, but that is because we have been really fleshing out some really quite important

issues. We will keep going. I think it's important for us to keep going on our next call. Obviously, if anyone is minded to continue the discussion by e-mail, that would certainly be superb.

I will endeavor to send just a short summary. Not of the whole call, but just of the points that I think we reached agreement on, and indeed the points where issues came up that we've agreed we need to circle back to and perhaps reconsider the language on.

Our next call is going to be on the 25th at 17:00 UTC. So apologies for running over by a couple minutes, but thanks very much everyone for your time and for your engagement.

Devan, we can stop the recording. Thanks, everyone.

DEVAN REED: Thank you all for joining.

SUSAN PAYNE: Bye.

[END OF TRANSCRIRPTION]