BRENDA BREWER: Good day, everyone. Welcome to the IRP-IOT plenary call—I got that wrong on the agenda. I'll fix that. Sorry—on February 8th, 2022 at 19:00 UTC. Today's meeting is recorded. Please state your name, when speaking, for the record and have your phones and microphones on mute when not speaking. And we will be taking attendance from Zoom participation. I'm happy to turn the call over to Susan. Thank you.

SUSAN PAYNE: Lovely. Thanks.

BERNARD TURCOTTE: Susan?

SUSAN PAYNE: Yes?

BERNARD TURCOTTE: I forgot. I counted Avri, who's not an official member, so we're short one.

SUSAN PAYNE: How about with Greg just joining us?

BERNARD TURCOTTE: Ah. With Greg, we're at the minimum. Yes.

SUSAN PAYNE: Superb.

BERNARD TURCOTTE: Okay. But it is break-even, as they say.

SUSAN PAYNE: Okay. Well, let's hope we get some more join us. Thanks anyway. Thanks, everyone. Thanks for joining. This is our IRP-IOT plenary call so this is the full working group on the 8th of February. Becky said Avri counts. And of course, Avri always counts. But I think, strictly speaking, Avri's not a member of this group, although I'm happy to be corrected.

Okay. So first up, we'll review the agenda and updates to statements of interest. In fact, let's do the statements of interest now, just to see if anyone has anything to update on them. I don't recall if I've mentioned it previously. I guess I have one, in the sense that I've now joined the Statement of Interest Task Force, which is looking at reviewing the statements of interest, as one of the alternates for the IPC. I can't remember if I've mentioned that previously. So just to be on the safe side, I'm mentioning it. Any others? I'm not seeing anyone so let's keep going.

So back to the agenda review, we'll just review the status of our action items. And they're listed on the agenda. We'll come to them in a minute. The bulk of our time, I hope, will be spent on the discussion on tolling against fixed additional time.

Then, we'll just circle back to introduce and explain the proposed language and suggestions that I circulated on the rule four repose and

safety valve language. And obviously, happy to take any immediate input but I think that subject—obviously, how long—timing. We may not have time for a really substantive discussion on that. But we will hopefully gather any particular feedback or suggestions that people have on that between this call and the next call.

And finally, confirmation of our next meeting. Actually, since we're going to lose David, I will move that up and we'll do that after we've reviewed the action items, if that's okay with everyone, just to cover off the date of the next meeting.

And I can see some chat going on about what statements of interest are declarable and what aren't. I don't think I have updated it. I will review it. I'm not sure that there was an obvious place for inclusion of that. But if I can see … I've certainly updated the GNSO one but I think I couldn't see anywhere where it particularly needed updating on the one that we have for this group but I will double check. But thanks for that.

All right. So in terms of reviewing the status of the action items, which is our agenda item two. We have three of those. The first up is any formal comments in writing that ICANN Legal were intending to submit with respect to the proposal on tolling or fixed additional time. I'll turn to you, Sam, just for an update but we are planning to try to substantively discuss that today.

So it may be that this is something that needs to come off the action items. And if you have any particular formal response you want to submit, then fine. But perhaps it's not wise to keep it on as an action

item. But I will just quickly say, if you have anything you want to add, Sam …

SAM EISNER: Thanks, Susan. I think it makes sense to move this into a discussion as opposed to action item. We can discuss some of the nuances that we've been thinking about internally, when we get to this, as a discussion point on the agenda.

SUSAN PAYNE: All right. That sounds good. Thanks. And then, action item b is one for me, which was to propose some language to replace the language—the reference to "material effect—" which we felt was fairly clunky. So that was circulated yesterday.

Likewise, I had a second action item, which was to propose text on who should be the decisionmaker for applications for leave to file out of time. Again, I circulated something yesterday. Hopefully you've had, at least, the opportunity to cast your eyes over it. It's not formal text, although I think some of it could relatively easily be made into text as appropriate. But as I was doing it, I felt it was perhaps more useful to have some agreement on principle before I started trying to reduce this to actual formal text for the rule. So we will come to that and look at that—at least a quick overview—when we come to agenda item four.

Which brings us to agenda item three, which is to return to the concept of tolling, or rather, the concept of a potential alternative to tolling,

which was the proposal that Malcolm put forward on fixed additional time.

If you wouldn't mind, Brenda, if you could call up that proposal, which was a PowerPoint presentation that Malcolm put together. I think I will try and work out which is the most appropriate page, if I can. Actually, I can't see page numbers but it's the page about halfway through—perhaps a little over halfway through—that's called "options." If you wouldn't mind scrolling down a bit. If you'd like to scroll and I'll shout when to stop. I think it's the next … That one. Yes.

That's really just up on the screen as reminder for people. But I think, or at least I certainly hope, that you recall what this proposal was. It's something that we did. It came around as Malcolm had kindly volunteered to put forward a possible alternative to tolling of the time periods to allow …

Essentially, we had been looking at feedback that came from various groups during the public comment period. Particularly, I think it was the Registries Stakeholder Group and IPC who had felt that there was a need to allow time for other accountability mechanisms to be pursued and to ensure that a potential claimant wasn't out of time because they had been attempting to resolve their differences, if you like through some other accountability process.

So the proposal had been, or rather, the public comment feedback had been, suggested that time periods should toll to allow for that. And we did spend some time talking about tolling or have spent some time talking about tolling. But it was also felt that from some, including in

particular Kavouss, that … He expressed some concern that we were building complexity and lack of certainty into the process by repeatedly proposing to toll time periods.

So Malcolm came up with an alternative suggestion that he posed as something for consideration. This is a summary of it. But he then, as you'll recall from that presentation Malcolm produced, he then went on to consider the different accountability mechanisms against this suggestion. I'll pause because I can see Malcolm's hand. So, Malcolm.

MALCOLM HUTTY: Yes. You just went on to note what I was going to say. I was looking at this as a mechanism to be examined, rather than so much as a proposal. In my own view, this mechanism is a reasonable thing to do for some accountability mechanisms but I wouldn't really think it was preferably to tolling for others. So I'd just like that understood. I'm not proposing this instead of tolling, generally. It was just an alternative mechanism to be considered.

SUSAN PAYNE: Yes. Thanks very much, Malcolm. And thanks for that reminder. Yes. Absolutely. You'll all recall the slide deck that Malcolm put together and that he, as I say, went on to review this suggestion against the different mechanisms and made an assessment of what he suggested might be a useful place where this concept of fixed additional time might work in preference to tolling.

So we obviously had this proposal from Malcolm and did give it some … Certainly, we had this initial presentation. We also then spent a couple of weeks going through the scenarios that Bernard put together for us to help the group visualize the impacts on the timelines for both tolling and fixed additional time. And we spent quite a lot of time doing that.

I think it did help people to get their head around what it would mean in terms of timings and how, potentially, the mechanisms—multiple time periods might get tolled or put on hold and have a fixed additional time added to them, depending on which accountability mechanisms were being adopted.

I think we've also, in our previous discussions, had some preliminary comments from Liz and Sam, as ICANN Legal. And I think it's reasonable to say they were somewhat supportive of the concept of this fixed additional time option. But obviously, we definitely welcome any further input that they have.

But really, I think we're at the point we have this suggested option that's been on the table for a while and we haven't really circled back to consider it in detail. So I think that that is where we are. And really, it's time for us to decide whether there's support, generally, for fixed additional time as a concept for any or all of the accountability mechanisms, or indeed, whether people feel that tolling is preferable for some or all of them, or some alternative to that.

I think, really, we probably should consider this in the context of each of the mechanisms. Certainly, that's what Malcolm had done. So, Brenda, if you wouldn't mind scrolling a bit further on, we might circle back on

that one. But that was the … Actually, no. Let's pause briefly and look at that. Malcolm made an effort to identify the interests—the reason why we're looking at this—the rationale, if you like, for allowing this time, whether it be tolling or fixed additional time—for allowing a claimant this time and not finding themselves out of time to file their IRP. So he went through and tried to identify how fixed additional time would address that.

I think, generally, as you can see … I think there was probably agreement that, on most of these, it did provide benefits. It perhaps provides less benefit to a claimant, in terms of having to work on two processes at once, when compared to tolling, because obviously, if you toll the time period, you're stopping it in its tracks and then restarting the clock from the point that it had been stopped at. But other than that, I think, generally, that was the checklist that Malcolm had identified as potential rationales for doing this.

Then, if we keep scrolling on, Brenda, we … Yes. Again, Malcolm then took a view on where it might be appropriate to use this option. And in particular, his assessment was that it might not be fair to apply the fixed additional time. Or we might consider it less fair to do so in those two circumstances. So firstly, if the lack of foreknowledge of the outcome of the initial process—the other accountability mechanism—would be inhibiting the claimant in preparing their IRP claim in parallel or if conducting to processes in parallel would create an unfair burden on the claimant.

So with that in mind, I think the next one is where Malcolm had come out. Sorry. The next slide, Brenda, I think is the assessment, again, that

Malcolm had done. It's a possible assessment of looking at the different accountability mechanisms and where he had come out when he was reviewing this suggestion in the light of that.

Obviously, as we're all clear, this is the suggestion and the assessment that Malcolm had put together. Others may have different views. So this is really, I think, the meat of our discussion. And I think it does warrant considering the different accountability mechanisms in turn, rather than considering them collectively, because they are all different.

Of those, I think we perhaps—although, again, subject to anyone else's input and comments—we perhaps may put the ombuds process to one side, having had quite a good discussion with the ombuds who came and spoke with us and heard what we'd been discussing in relation to tolling of time periods, and really was not in favor of us tolling the time for bringing an IRP in order to allow for an ombuds complaint because of the nature of the complaint and including because of the very confidential nature of those complaints.

So I think, generally, we perhaps felt that that was an accountability mechanism too far, perhaps, for this notion of tolling and that we should leave that one to one side, although again, if I'm making assumptions for the group, I would welcome to be corrected.

But on the assumption that that's the case, I think we still, therefore, have to think about the cooperative engagement process, the request for reconsideration, and the DIDP, the Document Information Disclosure Procedure—I think that's the one it is—and whether we think fixed

additional time, as Malcolm had proposed it, might be a suitable alternative to tolling of the time period.

I guess I'm going to … Why don't we start with cooperative engagement? Perhaps I'll pause first and see if anyone has any general comments they want to make first. And if not, we can launch into the different mechanisms. Sam.

SAM EISNER: One of the things—because I know we've been looking at this internally and have been trying to get back to the IOT on this. One of the things that I think has been a bit challenging for us is that when we talk about fixed additional time in the way we're discussing it around the request for reconsideration is that what we're actually talking about is a mixture of two things. We're talking about tolling. We're talking about stopping the clock and then providing a fixed time period after the clock comes back on within which to file a claim. So it's kind of a mixture of both.

One of the things that we're still concerned about … And we hear the IOT's drive to using the less expensive, less resource-impactful, both on the claimant and on ICANN at large, because we do know the substantial costs that are incurred by an IRP to try to use the "less expensive" and hopefully more efficient ways to resolve a dispute.

But one of the things that we think still is really important is making sure that there is early and proper notice to ICANN and the ICANN community about the intent to take something to an IRP if a certain outcome isn't reached within the other process. So in CEP, that fully makes sense. So you're filing the CEP as a precursor to filing an IRP.

Everyone knows that the thing is likely to happen after a CEP is there's an IRP if you can't resolve it. But it's not necessarily the case with reconsideration. We've discussed that before.

One of the really important things is making sure that there's visibility into knowing when someone believes that they have an issue that falls into one or more of the accountability mechanisms and that they have an intent to avail themselves of those. So one of the things that we think doesn't serve the ICANN community well would be to allow for time for the reconsideration process to fully run, plus fixed additional time, with no prior indication that an IRP is also contemplated.

So I think that idea of notice and understanding where we can be transparent about that to the ICANN community is a really important part of this because there are gaming opportunities. We just had in that … There's a fairly public discussion about the impact of accountability mechanisms on things like applications and things. So those could stop the processing of applications. So people who are involved in applications might need to know that there's a further intent to use an accountability process to further stop an application from processing.

So those are just some examples of things that I think we still need to discuss and really look at the impact as we're looking at the concept of how long someone has to file an IRP. That's been some of the complexity we've been thinking about from the ICANN side.

SUSAN PAYNE: Thanks, Sam. Malcolm.

MALCOLM HUTTY: Thank you. Sam raised an interesting point so I wanted to inquire a bit further there. If the concern is about having no indication that an IRP might happen, would you feel more comfortable about this thing, Sam, if in order to avail themselves of whatever we land on in each case—tolling, fixed additional time, whatever—that in order to avail themselves of that, then at the time, they must give notice that they are contemplating a possible IRP? Would that help?

SAM EISNER: Thanks, Malcolm. Without wedding ourselves to a specific solution, I think that notice as early as possible within a process is something that makes sense. I think intending to use an ICANN accountability mechanism, since it's not just something for the claimant itself but it's also something about the general accountability for the community, notice that's available to the community is something that's important at as early a point in the process as we think is practical.

MALCOLM HUTTY: Great. This is a potentially helpful compromise. From my point of view, I'm concerned to make sure that people don't lose the opportunity to bring an IRP. But I don't think anyone's got any interest in having ICANN blindsided by these things, or for that matter, anyone gaming it out or anything like that. So if we can find those sorts of things that will mitigate any issues with the additional time, from your point of view, that can be achieved, I'd be very open to that. I think that'd be a great compromise.

SUSAN PAYNE: Thanks, Malcolm. Sam, is that a new hand?

SAM EISNER: Sorry. Prior hand.

SUSAN PAYNE: Okay. David, then.

DAVID MCAULEY: Thanks, Susan. That was an interesting discussion. So I agree. I think this shows promise. I think we will have to sharpen our pencil when we draft this. I have a question about CEP and I think Sam or Liz could help us on that. That is, the bylaws provide that CEP should be initiated prior to a claim being filed. Then, in a meeting some time back … I may have this confused but I think Mike Rodenbaugh said that he's been involved in CEP's that have taken six years. Possibly, I've got the context wrong.

My question would be how do CEPs work now? If someone initiates or asks to initiate a CEP prior to filing a claim and CEPs, let's say they could go on for six months—what does that do or what would it do under our rules? So to me, I see CEP as an integral part or a preliminary part of actually getting to IRP. I think we'd have to sharpen our pencils to draw this up.

The other thing is we'd have to be very careful. By the way, I'm speaking from the perspective of I agree with Sam. It's good to know as soon as

possible when something is being challenged and how it's being challenged. So I've always spoken on rule four from the context of, "Let's get this moving. Let's not have too much time pass to make these policies, or whatever it might be, firm."

So we would have to be careful in drafting it. We'd have to keep an eye towards what if the claim changes during this process or is the claim that's filed at IRP following an RFR—does it match the claim that was brought at RFR? Has it evolved over time? So we just have to be careful here. Then, in DIDP, I'm open but I'm trying to process that now so I'm not sure how that fits in. Anyway, those are my comments. I think there's promise here and I was very interested in the discussion that Sam and Malcolm had. Thank you.

SUSAN PAYNE: Thanks, David. Sam, that does look like a new hand. So Sam.

SAM EISNER: Thanks. One of David's points about does the claim change through the reconsideration process if something becomes different when it gets to an IRP, I think that's one of the issues that we've been concerned about. I know we've talked about that before from the ICANN side, that there really has to be …

I know the IOT itself has engaged in a good discussion about that and has confirmed that the intention of this is that this is for the action—that it has to be about the same action if this is going to apply—because we know that there are times when a claimant or a potential claimant in

an IRP might find something so egregious about how a reconsideration claim was handled that the action on the reconsideration is itself a new act, which sets off a new timeframe for filing of an IRP, versus the fact that there might be a lack of resolution of their initial concern over an act within a request for reconsideration, which would then continue on into an IRP.

So if we do wind up going down a path of providing fixed additional time, it has to be something that's very clear that it's about the same act and that we're not guaranteeing standing within the IRP, just because it's about the same act but they still have to meet the standing requirements of an IRP independently. And it doesn't just flow that because they were a requestor within a request for reconsideration, that they then have an automatic path into an IRP. So I think that those are really important considerations. But I know the IOT itself has already started talking about those items.

SUSAN PAYNE: Thanks, Sam. I think it's important for us to keep bearing that in mind. But I think it's also … To my mind, it's a given that there are standing requirements to bring an IRP and that's the case whether we're talking about the time for filing, or the tolling of the time, or anything else. You don't suddenly become eligible, just because you've brought a request for reconsideration, if you're not otherwise eligible—if you don't otherwise meet the grounds for bringing an IRP. Malcolm?

MALCOLM HUTTY: Yes. Since Sam raised the standing, yes. We must remember that this clause of the Rules of Procedure on timing is really just one clause. It only deals with one thing—namely, the timing. It shouldn't really be intended in any way to affect standing, either to widen it or to narrow it. Standing is a separate issue.

I've been concerned that the fixed stop-clock, if you like—the proposed thing—actually is a backdoor way of changing the standing rule. Sam now raises the concern that, actually, the language that we write on tolling or fixed additional time could be a backdoor way of expanding the standing rule. Neither of those things should be our intent. Timing is timing. It's separate from standing.

Maybe we need to, for the sake of clarity, for everyone's benefit, say that nothing in this is intended to deprive anyone who has standing of a right to file a timely claim or to give someone who does not have standing a right to bring a claim that they would not otherwise have a right to bring. Just drafting off the top of my head there. But I think we're on the same page here. This text that we're writing there should not interfere with the standing rule in any way.

SUSAN PAYNE: Thanks, Malcolm. I think it does sound as though there's a good level of agreement on that which is beneficial. Indeed, I think we had a bit of a conversation about the impact of timing on standing, possibly on our last call, when we were looking at the rule four language. Again, we were all, I think, clear that rule four is just talking about the time when you bring your claim. It's not talking about your eligibility to bring the

claim. That is dealt with elsewhere, and indeed, is dealt with in the bylaws.

So it sounds like we've got … We've certainly got a degree of agreement on that. We do also seem to have some sort of shared understanding now of the concern about the need to make sure that people are aware that an IRP may be a possibility and that that awareness should be at an earlier stage, rather than a later one. I think that seems a reasonable outcome.

If that's the case, I assume here that we're talking about some sort of a base notification of the intent to bring an IRP as opposed to some requirement for a much more detailed setting out of one's claim. Otherwise, the purpose that we're trying to achieve here, of allowing the claimant the time to pursue another mechanism, is being eroded.

But again, I guess I'll just pause and see if anyone is seeing this differently. But it seems to me that perhaps what we're talking about is some kind of an extremely short notice that needs to be given if a claimant or potential claimant is viewing the case as one where they may bring an IRP if they don't get the resolution—the adequate resolution of their complaint via the request for reconsideration. I think it seems most appropriate through that process. Does that align with what you all are thinking? David.

DAVID MCAULEY: Thanks, Susan. That does. I just would like to ask … And I would ask first, someone please correct me if I'm wrong about what I heard from Mike Rodenbaugh that some CEP, or one CEP, is like Jarndyce versus

Jarndyce. It's a six-year … It's just going on and on. Maybe it's endless. Who knows? So I'd be interested, along the way, as we discuss this, hearing from maybe Sam or Liz. How do CEPs actually work? What do we envision? I think it would be helpful to know because when Mike said that, if I've got the context right, I was just stunned. Thank you.

SUSAN PAYNE: Thanks, David. It's a shame. I'm looking down and I don't think we have Mike with us. I do think that, from recollection, it … If it's taken six years, it's almost certainly a case under the previous bylaws, I think. But I will turn to Sam, who obviously has much more knowledge than I do.

SAM EISNER: Thanks. Liz, if you have more to add, please jump in. I have not been really on the practitioner side of IRPs or participating in CEPs for a long while now. So the CEPs, they have the potential of being longer. As Becky noted, there is the opportunity for either party to terminate after one meeting. So a CEP would only go on for an extended period of time if both parties were okay with that.

One of the things that we, from the ICANN side, do is we post status updates of the CEP on the IRP document webpage. And Liz put some links to that in the document. So at any time, any member of the ICANN community can go in and take a look and see what matters are in CEP. We, of course, don't list out the discussion status because CEPs are confidential in nature between the parties that are trying to get to a cooperative engagement. But we do try to provide some level of

transparency that there is an ongoing CEP. So it's not a hidden fact that there are some that have been going on for a while.

Liz also dropped that there are certain CEP procedures, of course. Updating the CEP is one of the tasks upcoming for the IOT as well. So each CEP is really unique in terms of the facts, and the intensiveness of the facts, and the potential involvement of other parties or other issues. So each CEP has the opportunity to follow its own course as necessary.

And then, of course, there will come a time or there may come a time where one or both of the parties agree that there isn't really any further purpose to continuing the CEP. Then they would agree on a timeframe to file an IRP—because we already do practice tolling within the CEP—and then come up with a reasonable time after to file the IRP. Liz, I don't know if you have any more particular details about CEP you'd like to share.

LIZ LE: Thanks, Sam. Yeah. Just to add on to what Sam had said, the purpose of the CEP is for the parties to be able to work out their issues before it goes to an IRP. So the way that the CEPs currently operate is that either party can … At any point in time either or both party feel that it's no longer beneficial or serving the purposes for which they entered into the CEP, then the parties can end the CEP at that point in time.

What you can see in the documents themselves … There is a process when a CEP is initiated. And you can see this in the document. There are certain number of days by which ICANN will designate a representative and a number of days in which the parties should conduct their first

meeting. So you'll see that in the documents that I provided the link to. But I think what you'll also see is during the time that the CEP is ongoing, the clock stops for the time to file an IRP, so that at the end of the CEP itself, you add back the days that the CEP was conducted onto that timing.

So I hope that helps. Of course, these rules are pretty outdated. They were enacted in 2013. And that's one of the scope of work for the IOT, is to review the rules for the CEP and develop new rules as needed.

SUSAN PAYNE: Thanks, Liz, and indeed, Sam. So yes. In terms of timing, I think yes. There have been some. I think the six years—the one that Mike was involved in—is something of an outlier. But certainly, we can see from the records that there have been some quite long CEPs, cooperative engagement discussions. But we do have some changes that have been brought in that enable that process to be brough to an end if either party feels it's not working. So hopefully this issue with them running on for extensive periods of time is a think of the past.

I think we also, given the nature of the cooperative engagement process, it is a precursor to an IRP, very clearly, as set out in the bylaws. Obviously, there's the potential that the parties might resolve their differences or resolve the areas of dispute sufficiently that an IRP ended up not being brought. But I think that's probably an unusual circumstance. So I think we can view the CEP as giving adequate notice that an IRP is likely to be filed, if you all agree. So it would really be a

question of addressing that issue for other accountability mechanisms like the request for reconsideration.

Okay. I will bring this particular part of the discussion to an end, or at least we'll pause it when we get to about five minutes before the top of the hour because, having said I would talk about our next call, I then forgot to do so. And I know we're going to lose David. But we still have 10 minutes or so.

Do people have any strong thoughts about which mechanisms might be more appropriate for tolling or for fixed additional time? Or indeed, are you persuaded by the assessment that Malcolm had made? So really, just looking for more input on that if anyone has any thoughts.

Okay. I'm not seeing anything, in which case can I …? I think, for the purposes of this call at least, is it safe for me to assume that there's a degree of agreement that perhaps the fixed additional time concept is one that we think would be a reasonable one to adopt for a request for reconsideration but not so appropriate for other accountability mechanisms?

I'm going to, I think, take silence or lack of hands as being assent, at least for the present purposes, in which case, perhaps it's worth us thinking about, in the last few minutes before we lose David, what kind of time period might seem appropriate.

And if we can scroll back to Malcolm's proposal again, which was the one, I think, called "option …" A bit further, Brenda, please. Sorry. That one. In Malcolm's suggestion, he suggested 60 days as being potentially a time that one would assume. So as suggested in this proposal, when

our request for reconsideration process wraps up, the claimant has either the balance of time that they would have had for bringing an IRP or they have 60 days, whichever is the longer, on the basis that if a request for reconsideration generally runs for 135 days, the claimant would be out of time.

But obviously, it's possible that a request for reconsideration could wrap up sooner than that. And if that were the case, it is at least conceivable—and we saw that from Bernard's various timing scenarios—that it's possible that there would be more time left to run on the normal IRP clock, in which case that time would simply continue.

But absent that, the suggestion or proposal had been that we think about giving the potential claimant 60 more days. I think there was some feeling that perhaps 60 days was too long. I feel like someone raised the possibility of perhaps 30 was more appropriate. So I think that is something for us to consider. David.

DAVID MCAULEY: Thanks, Susan. Real quick, I think I was the one that suggested 30. I do believe I mentioned that before. I think 30 would be appropriate or the remaining time of what they have on the clock. I can't help but think that during a process like we're talking here, of going through an RFR or whatever it might be, that a complainant's thinking may have crystalized, been honed somehow. 30 seems adequate to me. I'll resurrect a phrase from CCWG on accountability. It's not something to die in the ditch for. But it strikes me that 30 would be ample. Thanks. That's my view. Thank you.

SUSAN PAYNE: Thanks, David. Sam.

SAM EISNER: Thanks. In my own personal opinion, I lean towards the shorter timeframe as well because I also think that one thing that we haven't looked at is what does it mean to file the IRP. So if someone is coming out of a reconsideration, are they abandoning the opportunity to go to CEP? Because, like we've discussed before, IRP is different from reconsideration and we know that the bylaws have a preference for going through CEP and participating in that in good faith.

So really, is that the window to really initiate CEP, which then stops the clock amongst itself? So if someone's not being asked to perfect an IRP filing but to move into CEP in good faith, then I definitely think that a shorter timeframe is appropriate. Then we have to think about what the ultimate timeframes are coming out of CEP as well to make sure that there's enough time to file a proper claim but not too much time to allow the accountability issues to be heard as efficiently as possible.

SUSAN PAYNE: I'm speaking on mute. Sorry. I was going to say I don't think we're suggesting that we assume that they're abandoning the CEP. But obviously, the CEP isn't obligatory. There are very good reasons, including cost reasons, why it's extremely advisable to bring a CEP but no one is required to.

But yes. There could well be a circumstance where what we're really saying is that they would then go into their CEP. The CEP stops the clock again but it impacts how much time they have left at the end of the CEP. So it is obviously still relevant to a claimant in terms of knowing what their time period is. Malcolm.

MALCOLM HUTTY: Thank you. Come off mute. Thank you. I think Sam raises a good point that someone is likely to go into CEP after this. That, actually, has some fairly significant implications because the CEP may well significantly change the nature of the claim. The purpose of the CEP is to provide clarity on the issues in dispute, hopefully to narrow the issues in dispute and to ensure that what goes before the IRP is no broader than it has to be.

I think we're all agreed that those are very worthy objectives that we would like to see taken advantage of to the fullest so that we don't rely on the IRP for any more than we have to. It is, after all, a time-consuming and expensive process. But the implication of that is that the claimant doesn't know, when they do into the CEP, how they would wish to file their statement of claim before the IRP. That's a necessary implication of accepting that the purpose of CEP is actually to refine and to change what the claimant currently has in mind.

For that reason, I think it would be necessary to ensure that the claimant really does have a reasonable opportunity to draft an IRP claim after the CEP process has concluded—that they can't really be expected to have done so before or during the CEP if they're actually going to be

participating in good faith in a way that will potentially change the nature of their claim and potentially narrow the nature of their claim during the CEP. So I think that we need to bear that in mind. Therefore, if the claimant is going to act in that fashion, in good faith, so to as adjust it in the CEP process, they are going to need a fair amount of time at the end to draft that claim.

Now, we have agreed, I think, that generally speaking, a claimant needs 120 days to file an IRP. And I think we might think, "Well, how is that time broken down?" How much time is that expected to be in terms of drafting the claim and how much of it is in preliminary decision-making, internally within the claimant, to actually do so—to discuss the process and so forth. And how much time is actually expected—out of that 120 days is expected to be spent drafting the claim? I would think the majority of it.

SUSAN PAYNE: Thanks, Malcolm. Sam, I do want to spend just a couple of minutes talking about our next meeting. But I'll give you the floor, if you'd like to, beforehand.

SAM EISNER: No worries. I think we can continue this discussion at another meeting. Thanks, Susan.

SUSAN PAYNE: All right. Thank you. Or indeed, I'd be delighted if this discussion could keep going, to some extent, over the e-mail. I think that would be really

helpful. Okay. Thanks very much. All right. And sorry to shut this short when we are having a very good discussion. But we will not be quorate. Not that we're making decisions but when David, unfortunately, has to leave us, we won't be quorate.

But in the meantime, I did just want to talk about the next call and get feedback from you all, to the extent that you have thoughts on this. At the moment, we're scheduled to have our next call on the 22nd of February. So that's in two weeks' time at 18:00 UTC. That is prep week. And at 18:30 UTC, it is the GNSO's policy update session.

So really, I'm just looking for feedback from as many of you who can give it, as to whether you would be intending to attend that policy update and therefore would, in the ordinary course of events, be missing this IOT, or indeed, whether it's something that you wouldn't ordinarily intend, and therefore, we'll have a perfectly good turnout and we can just continue as scheduled.

The alternative might be to push our meeting to the following week, which would be the 1st of March, and so would be the meeting between the prep week few days and the ICANN meeting. I'm not sure. If anyone wants to speak up on preference, that would be good. Or alternatively, perhaps if you want to just put a tick on whether you would prefer to reschedule to the 1st of March. That would be helpful. And I will assume, if you haven't ticked, that you're happy to stick with the 22nd of Feb. Would that work? I think the tick is in reactions. Okay. I'm not seeing any ticks so this is a good sign.

MALCOLM HUTTY: Sorry. Could you say again what you're asking.

SUSAN PAYNE: I'm suggesting if you'd prefer us to reschedule and move our meeting to the 1st of March, could you put a tick in the Zoom box, or indeed, speak up? Okay. I'm not seeing any. So it looks like we're all happy to sick with the 22nd and I will assume that's the case. So speak now if that's not the case. Otherwise, we'll just continue with our scheduled meeting on the 22nd. Perfect. Okay. And David said in the chat he would stick with the IOT. Okay. Well, that's excellent then. So we can confirm that. David, thanks for your input and participation. We will see you on the next call when you have to drop off.

All right. As I said, we still have a reasonable turnout here. We are down on numbers in terms of what counts to a quorum for the group now. So I think it's probably best if we don't go back to the discussion on the tolling and fixed additional time. We've reached a reasonable point to stop. And I think with David having had to leave us, I think that's fair enough.

I do think, even in the absence of David, I think we could spend just a few minutes on the agenda item number four, since I'm not anticipating it's going to be a really substantive discussion. But I did want to just introduce the suggestions that I had circulated by e-mail and give an opportunity for if there are any questions or if any immediate feedback strikes someone that they feel it would be helpful to discuss immediately. Failing that, we'll obviously look to try and get additional feedback by e-mail between now and our next call.

So if you wouldn't mind, Brenda, I would … Could you pull up the e-mail? I'll just briefly introduce it or introduce my thinking.

BRENDA BREWER: Yes. It's coming. One second.

SUSAN PAYNE: Thank you.

BRENDA BREWER: I had it ready. I don't know where it went. Sorry.

SUSAN PAYNE: Okay. That's all right. While you're doing that, I think I can start anyway. There were two items. And these relate to the rule four—the repose and safety valve draft language that we've been talking about over the last two or three calls. And we'd had a couple of discussions about the terminology, where the current interim rules talk about the material effect of an action. We felt that this was quite clunky language.

When we went back and looked at the bylaws, it was an attempt to reflect the bylaws language. So it's possible to see where that terminology of becoming aware of the material effect of an action or inaction giving rights to the dispute. But I think we did all feel that it wasn't the clearest language in the world.

So as I circulated … And in won't read it all out. I think you all have this in your inboxes, and indeed, its up there in the screen. But I thought it

was helpful to pull up into one place what the bylaws language is. It's covered, essentially, across three areas of the definition. So one needs to look at what the definition of a claimant is, and what a covered action is, and what a dispute is. These are all elements of relevance to when you're bringing your IRP.

But it does talk about … In the definition of a claimant, it talks about being materially affected by a dispute. So with that in mind—and also having in mind the suggestion that Scott had made in the chat on our last call—he suggested why don't we instead refer to "becoming aware of being materially affected by the action or inaction." I think that really fairly minor tweak on the language still reflects what the bylaws are intending and perhaps makes the language just a little bit easier—a bit more user-friendly.

So if you scroll down, Brenda, this … Yeah, a little bit further. Keep going. Yeah. In clauses a and d, this is how I therefore envisaged that we could, as I say, just marginally amend the language to try and reflect what the bylaws test and the bylaws definitions are but make it a little bit more user-friendly.

So I'm hoping that makes sense to everyone. I'm hoping that when you have an opportunity to review it and think about it, that you'll either be supportive of that, or indeed, if people have concerns, or comments, or suggestions, that you'll obviously see fit to share them. Malcolm.

MALCOLM HUTTY: Actually, you know what? Now that you've proposed this, I think the best thing we can do is go away and study it and come back to you. Thank you. I withdraw my comment.

SUSAN PAYNE: Sorry. I keep talking on mute today. I don't know how it is that after all these years, I still can't work a Zoom room. But thanks for that. Yes. I think, obviously, if anyone's got immediate questions or concerns, do flag. But otherwise, I'm hoping that people will take the time to just review and see if you can support the language, or indeed, if you have any alternative suggestions.

Then the second area where I had taken an action item to come back to you all was on the question of who should hear and decide the application for leave to file the IRP out of time. And as we discussed—I think it was on the last call—the draft proposed language, currently, was envisaging that the potential claimant who's out of time would bring their IRP—who want to make an application to bring their IRP out of time—they would make that application to the three-person IRP panel.

But of course, the IRP panel appointment is something that happens after an IRP is commenced, with the claimant and ICANN each selecting one panelist and then the two panelists selecting the third. Ideally, they would be selecting from the standing panel but there is also a process in place for where the standing panel isn't yet appointed. So obviously, we have this scenario where you're seeking to bring an IRP and you can't bring it to the IRP panel because we don't have one yet.

My suggestion was that we consider having these applications, rather than being made to the three-person IRP panel, which isn't yet in place, that we accept that such an application would be heard by a single panelist.

So effectively, you'd make your application to the IRP provider. The provider would then call on a single panelist from the standing panel, assuming we have one. And if the standing panel isn't yet in place, then the IRP provider would appoint a single panelist using the process that they have under the ICDR rules for appointing panels. That's the process set out in ICDR rule 13.6, which I'll come back to in a minute. So we would have this decision made by a single panelist, who's basically appointed for this purpose—to decide whether the leave is going to be granted or not.

Then, given that I think it is important that these decisions are final, I think it would be very unsatisfactory to have a single panelist make this decision but then for it to be overturned, as a matter of course, once we have the three-person panel in place. That doesn't seem satisfactory either to ICANN or to the claimant but particularly not to the claimant.

So, drawing on a concept that we'd been talking about in relation to the consolidation work that that sub-team has been doing, my suggestion is that we should have it as, essentially, a final decision and that it should only be open for reconsideration if there was a sort of materially fraudulent misleading of that single panelist, so not simply that the later panelists would have made a different decision.

Then finally, just for convenience, I reproduced what ICDR rule 13.6 says. It really deals with the scenario where, if there's an arbitration and the parties haven't agreed a process for appointing the panel to hear the arbitration, there is a provision in that rule as to how the ICDR provider would go about getting a panel in place instead.

So it's not that 13.6 is really about putting a full panel in place, or at least a full panel which, in that concept, might be one panelist, or might be three, or whatever, but to hear to full case. But I don't see any particular reason why it couldn't work for the appointment of a temporary panelist that you need just to hear this question of leave.

But again, as I said, I'm very open to other people's thoughts or input on this. And certainly, in particular, if there are practitioners who can give us some insight on happens in other arbitrations, that might be really helpful.

But it seemed to me that this would be a workable way forward. It doesn't seem to me to be very satisfactory for us to be deferring this decision to a three-person panel because that would essentially require the potential claimant, or the person who wishes to be a claimant, to go through all of the process of panel selection and empanelment of the three-person panel, which in itself is a time-consuming process, before they even know whether they've got leave.

And theoretically, they would have to put in a much more detailed statement of their case so that ICANN was in a position to understand what attributes might be necessary for that three-person panel. It just seems very unsatisfactory to be trying to defer this to the three-person

panel. But again, really welcome any immediate reactions or questions. Certainly, I'm very much looking forward to people sharing their thoughts and feedback between now and the next call. Malcolm.

MALCOLM HUTTY: Thank you, Susan, for what's clearly a very thoughtful and well-considered proposal. You've obviously put a lot of thought into this. I would give one quick reaction though—one area that I have … I don't want to say "concern." I take what you're saying about the final nature of the panelist's decision. And I think yeah. I think both sides have an interest in that being the case.

But what occurs to me is that one of the real values of the IRP is that we're trying to build up a body of precedence so that we don't have to do all these things over again. I don't think we'd want the situation where the panelist that is deciding these cases, which may be a different panelist from time to time, is doing so in a manner which is inconsistent and may be a bit arbitrary. And especially given that the standard that we're apply is really not very clear, in my opinion, I'd be a bit worried about that.

So I'm wondering if it could be … Maybe if we go with what you're saying—and I think my initial reaction is, "Okay. This sounds like a very serious proposal—" maybe it could be supplemented with a duty on the panelist that's making those decisions to have regard to any relevant jurisprudence of the IRP on the purposes of the IRP and other relevant matters that are relevant to that decision so that it can be …

Then maybe that would relive the concern that this unreviewable decision might be inconsistent and … I don't want to say unreasonable. But it would bolster those decisions if they were expected to look at what the IRP had said about how they expected those things to be decided. Does that make sense? Am I making sense in that suggestion?

SUSAN PAYNE: You are making sense to me, Malcolm. Yes. I think that's really helpful feedback. Perhaps that's something I should—

MALCOLM HUTTY: It'd be a drafting question but I'm thinking about "have regard …" Sorry.

SUSAN PAYNE: Sorry. I'm talking over you.

MALCOLM HUTTY: Sorry. I didn't mean to talk over the top of you. I was just thinking that it was … It would be a drafting. But I was thinking something along the lines of "have regard to all relevant" type language—that sort of thing. I see Sam's got her hand up.

SUSAN PAYNE: Thanks. And Sam.

SAM EISNER: Thanks, Susan. I guess I'm not fully clear on what you're suggesting, Malcolm, when you ask that any decision on leave should be, of course, in regards to things that have come before. If there's been other precedent on leave, of course that would make sense. But were you suggesting that there's also a substantive evaluation that should be part of that, too?

MALCOLM HUTTY: That wasn't my intent. My intent was that in applying this safety valve rule, they should have regard to any relevant jurisprudence as to how that should be interpreted—jurisprudence of the IRP panel—full panel, I mean.

SAM EISNER: So other precedent and how other requests for leave to file using the safety valve have been considered?

MALCOLM HUTTY: I was actually thinking of the three panel, which considers things in more detail, because there might be statements that the … There may or may not. I don't know that this would be the case. But if it were to come about that there were times when the three panel said, "Look. Clearly, the purpose of the IRP is to do this and not that here," then that would potentially be interpretive of what the safety valve is intended to achieve. And I'm hoping that they would have regard to that kind of interpretive judgment.

SAM EISNER: So it's really if there's relevant precedent within the IRPs on the issue presented with leave, the panelist is expected to follow relevant precedent within the IRPs.

MALCOLM HUTTY: Yes. Because the safety valve thing here is not intended to be a way round—to do things that you're not allowed to do otherwise. And it is intended to ensure that, overall, the purpose of the IRP is fulfilled and not to do it in a way that changes that. Interpretive precedent may well develop as to those matters and they may provide important interpretation for how the safety valve is expected to be applied. I'm thinking that the single panelist ought to have regard to that.

SUSAN PAYNE: Thanks, Malcolm. That makes a lot of sense to me. I'm very conscious that with us losing David, we aren't really quorate. I don't think we're making decisions here. But I think that feedback is really beneficial. I think, if you wouldn't mind, would you be willing to just drop that into an e-mail as a quick reaction to the one that I circulated? It doesn't need to be detailed but just to flag it so that it's on the radar for those who haven't been able to join the call. Malcolm, I apologize for giving you work but I think it would be really helpful and it might help spur other reactions to the drafting as well.

MALCOLM HUTTY: Certainly. I can't see a message from you with this text. Are you yet to send that?

SUSAN PAYNE: No. I was sent yesterday.

MALCOLM HUTTY: I'm afraid I missed it.

SUSAN PAYNE: I can resend it if you'd like.

BERNARD TURCOTTE: I'll resend it to him now.

SUSAN PAYNE: Perfect. Thank you.

MALCOLM HUTTY: Thank you. Then I can reply to that and that will make it easier.

SUSAN PAYNE: Excellent. That would be great. All right. I'm not seeing any other hands. So I think unless there is anyone else who has any questions or other initial reactions, then time to speak is now. Otherwise, I think let's call this a day for this week and we'll reconvene on the 22nd. But again, urging you all to continue both of these discussions on the e-mail list if at all possible so that we can make some progress on this. All right. Thanks very much, everyone. I think we've made some good progress

on this call so thanks very much for the engaged discussion and look forward to seeing you in two weeks.

[END OF TRANSCRIPTION]