BRENDA BREWER: Hello, everyone, welcome to the IRP plenary call number 91 on Tuesday 10 May 2022 at 18:00 UTC. This meeting is recorded. Kindly have your phones on mute and state your name when speaking for the record. And I'll turn the call over to Susan. Thank you.

SUSAN PAYNE: Great. Thanks very much, Brenda, and thanks, everyone for joining. This is our plenary call, we've got an agenda as usual, which is up in the Zoom window now. So we'll just quickly do a review of that agenda and cover updates to SOIs. I'll circle back on that just in case we have any more joiners.

But in terms of our agenda, the second agenda item is to review our action items, which we'll come back to shortly. Then we'll move on and review the amended language on the 30-day fix additional time option. And fourth agenda item is to continue the discussion on the 24-month repose and safety valve language. And then you'll see in in the agenda, we've got our next meeting in two weeks' time confirmed there for the 18:00 UTC slot.

Okay, so first up, then, do we have any updates to Statements of Interest from anyone that we need to note? Okay, I'm not seeing any hands or hearing anyone. So hopefully not for this time.

All right, circling back then to agenda item two, and the review of the action items. So the first action item was to revise the summary of the agreement that has been reached on the fixed additional time proposal

specifically to take into account some of the comments that Kavouss expressed on our last call about sort of clarity and he'd felt some of the language perhaps used terminology that that wasn't familiar to everyone. So between us, Bernard and I have revised that. And to look at that in more detail is our next agenda item. So we'll come back to that then.

The action item B was for me to update the rule four document to produce a clean version. And that's with my apologies, it's still sitting with me, I'm afraid I haven't had the time to do that with having been at the INTA meeting and had some various bits of sort of follow-up to do from that. So that is with me, but I am going to endeavor to get that done this week so there's some time for people to review that before we have our next call.

And then the action item C is also sort of sitting with myself and Bernard, collectively to have a draft work plan, which was, again, something that Kavouss raised last time. And so I think we'll be aiming to try and have something circulated before our next call as a draft work plan.

So with that, I think we can move on to agenda item three, which is to look back again at that sort of summary of our agreement on the 30-day fixed additional time.

And whilst Brenda is pulling that up. Just as a reminder, really, that we have looked through this summary of where we'd reached agreement on a couple of calls already. And the differences between our last call and this one are really just to reflect, as I said, those comments that we

had from Kavouss about he felt some of the language was insufficiently clear or in some cases used kind of terminology that perhaps was too colloquial.

And so the document that has been circulated and we have up in the window now does not have any matters of substance changed over what we saw on our last call. But just those clarifications to the language in relation to a few points to reflect Kavouss's input.

So I think last time, we really did have agreement in principle, but for the sake of completeness, really, I did want to sort of run through it again, just to say that we have had one final read through. But I think before we come to that, perhaps we should touch on the query that Malcolm raised in his email earlier, which hopefully you all have had time to see but was sort of just an hour or so ago, some of you may not have had an opportunity to see it.

First up, Malcolm queried whether this was the sort of internal document. And if it wasn't, he felt the language could be crisper. I'd say, one, I think it is an internal document. This is intended, really just to ensure that we all are aware of what we've agreed. And then that agreement will have to be sort of reflected in text that goes into the draft rules.

Having said that, I agree it probably could be crisper. I don't think it warrants a redraft. Really. We've had this circulated—

MALCOLM HUTTY: Susan, I'm happy to withdraw that. As soon as you said it was internal, I had no problem.

SUSAN PAYNE: Okay, fine. Thank you. That's not to say it may not end up in some report of what we've done in some form. But really, it's just internal. But then you had a—

MALCOLM HUTTY: It was only if this was going to be final language for the rules of procedure that it was worth looking at.

SUSAN PAYNE: No, absolutely not.

MALCOLM HUTTY: If it's not final language, what you have written here and what I offered as a redraft mean the same thing. I'm entirely content with what you've written.

SUSAN PAYNE: If anything, the language gets longer every time we look at it, because there are concerns about it being too brief. But anyway, you raised a more substantive question about the cooperative engagement process. And the references to the CEP, where they've been included in the agreement reached, I think are ones that I had flagged on our last call. And you're right, you weren't on that.

But it is not intended and I don't believe it does apply the concept of fixed additional time to the cooperative engagement process at all. And indeed, at the end of our agreement, we know that the as a group, we did talk about whether we should do this and concluded that it was best to have that consideration when we look at the rules for the CEP.

But the reference there is really only intended to reflect the fact that if a claimant is out of time and is then planning to bring an IRP, the first thing they do might not be to actually commence an IRP, they under the rules are meant to or encouraged strongly to commence a cooperative engagement process.

And so it was only intended to reflect that, that under the current rules—and this is something we will come on to look at—when they commence a cooperative endeavor engagement process, time gets stopped at that point. And so it wasn't intended to do more than that,. just to reflect that the thing they do after they finished their request for reconsideration might not actually be to commence their IRP, it might be to enter into the CEP.

MALCOLM HUTTY: Oh, I see. Thank you for that clarification. I guess I misunderstood that. Maybe I was put off by the color. Thank you. That was a very helpful clarification.

SUSAN PAYNE: Okay, all right. Thanks, Malcolm. Sam.

SAM EISNER: Thanks. I have two items that I wanted to raise. One I think is pretty noncontroversial, which is I think that as we're confirming what the group has agreed upon, it would be helpful to identify that particularly when something is filed for the times that the IRP is filed, at a period of time after the original filing time for an independent review has expired, that it's very important that if a claimant is availing themselves of this extension, that that IRP has to be related to the same act.

I think it's presumed in this language, but it's not necessarily stated specifically. So I think that could be something that we just make explicit so that we make sure that it's appropriately reflected in the rules because we're not extending the time to file any IFR, we're extending time to file an IFR as it relates to the act that was also the subject of the reconsideration.

And then there's one other aspect that I thought there could be some benefit in having in here. I know we've previously talked about the importance of notifying people that there's an intent to use an accountability process. And that becomes particularly important when the timeframes or the typical timeframes to file are expired.

And so I wonder if there's a place for us to add in here particularly for those times when someone's initial time to file an independent review process has expired, but they're going to be able to take advantage of the fixed additional time that we have here for the request for reconsideration.

So we know that as things operate within ICANN, sometimes the pendency of an accountability mechanism via reconsideration or

independent review, sometimes makes ICANN pause on taking certain actions as the actions are under review.

And so there is a potential where someone has a request for reconsideration that goes to completion. But their time for an independent review has also expired, that ICANN could start taking actions based on the resolution of that request for reconsideration that it might not otherwise do.

And I think this also has to do even when there's not expiration, but ICANN doesn't just hold off on actions for the duration of the time that someone could file an IRP. So there is kind of an obligation of some level of notice if we want to make sure that ICANN's not taking action that would impair future actions or future relief for the claimants.

SUSAN PAYNE: Thanks, Sam. So if I'm understanding you correctly, are you suggesting that we should be including a requirement for the claimant to notify ICANN in here if they're intending to subsequently bring an IRP? Or, in fact, would it be more that this is something where a claimant would perhaps just be advised to do so if they want to ensure that ICANN doesn't proceed with taking certain steps?

SAM EISNER: I think particularly in situation—I think we should have, at minimum, some level of encouragement to a claimant particularly where the initial time to file an IRP has expired but can be revived because of the fixed additional time, that there be some obligation of notice, because these

are also issues that it doesn't just impact ICANN, right, there are other people or entities that might be relying upon the act of ICANN. And so there really has to be some level of transparency around it. So I think, at minimum, a strong encouragement, if not some level of notice. But I think it does make sense to at least make some sort of encouragement of that for transparency sake, because it's not just ICANN acting. It's others who might act also in reliance on ICANN's actions because they had previously understood that the time for challenge had expired.

SUSAN PAYNE: Thanks, Sam. I see David has his hand up. So perhaps I'll turn to David. I don't know if it's in response to that. And then we can circle back. David.

DAVID MCAULEY: Thanks, Susan. I just wanted to say that I think the concept that Sam is floating make sense. The only thing I would say is not so much that the party is intending to bring an IRP but rather that they are considering bringing an IRP just so there's no notion that they're bound to bring one. But I think it makes sense, especially given what Sam says about staying ICANN's hand on taking action that they otherwise might take. Thanks.

SUSAN PAYNE: Thanks. So there's a question from Mike in the chat asking if you could crystallize your suggestion, and perhaps ideally in writing, but I think maybe that suggestion has been somewhat crystallized. But, Malcolm.

MALCOLM HUTTY: Thank you. I don't see any problem and having a non-mandatory recommendation added here. Because it would be good if a party were to—that were thinking about bringing an IRP were to make ICANN fully informed of that. I wouldn't want to set up a fixed rule, sort of inflexible rule that would mean that somebody could trip over by procedurally just failing to do that. And then suddenly, they can't bring their IRP. But as a recommendation, that this is in everybody's interest if everyone's kept well informed, that certainly seems good.

That said, Sam was characterizing this in terms of the time having expired and then being revived. And I don't think that's what's going on here. I think what we are saying is that in circumstances where the party goes into an RFR, then the time doesn't expire until 30 days after the end of the RFR. And so ICANN should be aware that if a party has called an RFR and they were within time to bring an IRP at the time when they called that IFR, then time has not expired for them. And that's best really something that it's within ICANN power to remain aware of through their own internal guidance to their own legal staff.

SUSAN PAYNE: Thanks, Malcolm. Yes, and that was a sort of point that I was going to somewhat reflect in just saying I think also that when we built this into the rules, then both ICANN and indeed the members of the community, provided they read the rules, would be aware that there is the potential for an additional 30-day period before the prospect of a request for an IRP is expired. But like you, I think there's much to be said from the

claimant's point of view for them to safeguard themselves should they choose to do so by giving that kind of notice. Sam.

SAM EISNER: Thanks. I just wanted to make sure, the language I was using today, it wasn't necessarily about what we believe to be the case inside of ICANN. We understand based on the agreement that's been reached here if this is put into the rules that if someone has a claim that's from an IRP that's from the same [inaudible] request for reconsideration, indeed, there is that additional time, right. But this is really about making sure that there's transparency to others who are relying on the action. So please don't make any assumptions based on the inartfulness of the terms that [inaudible] speaking today.

SUSAN PAYNE: Thanks, Sam. And then I should just circle back to your first point as well. I think that the first bullet that we have there where it says this agreement applies where a potential claimant to an IRP first brings a request for reconsideration relating to the same dispute, that was meant to capture that concept so that it's not about any request for reconsideration. It has to be essentially regarding the same issue. If you feel that doesn't adequately reflect, maybe that is one on which I would say, can you suggest an alternative if you think that that doesn't reflect what we intend?

SAM EISNER: Sure, yeah, I think it's just a matter of maybe using terms like action instead of dispute, because dispute relates to something more particularly within the IRP. But I think it's just a matter of updating this language of that, but we can come back with that.

SUSAN PAYNE: Okay. All right. Well, I mean, at which point, then, I mean, I had been planning to do what I'd hoped was a sort of final read through so that we could put this language to bed, but it sounds as though there will be some slight further tweaking. And so perhaps it's not a particularly good use for everyone's time to go through and do a kind of formal read through at this point since we will have to come back to it.

So perhaps what we should just do—Yeah, David, I would certainly hope we could settle the language on the list. I mean, I think officially—as I said, we've done at least a sort of couple of reads of the language. And certainly the last one, the amendments that have been made between last time and this time really are just two clarifications to address points that Kavouss raised and not matters of substance.

So I think with that in mind, I think we can finalize these final tweaks on what we've agreed on the list. And I will just pause here anyway, to just give everyone a sort of opportunity to raise any concerns about the amendments that were circulated that we've got here. As I say, just a few points to language clarification. But if anyone has any concerns about any of that that they want to flag on here, then this is a quick opportunity to do so. And then obviously, there'll be a follow up

opportunity on the list to do so before we've got this agreement kind of finalized.

Okay, I'm not seeing any hands, so with that in mind, then I think we can move on to our next agenda item, which is agenda item four, continuing the discussion on the 24-month repose and safety valve language.

Again, with apologies that I haven't had time to circulate the kind of clean version of the rule four language. But in the meantime, I think there are a couple of things that we can cover off. And perhaps first up is on our last call, David had mentioned that he had got a small comment on the draft wording for part of the rule four text. And he has actually added that to the Google doc now. So I think this is a good opportunity for us to quickly look at that and see if we can agree on what the appropriate terminology is. So wondering, Brenda, if you could pull up the rule four and then we're in paragraph C on the right-hand side.

To paraphrase David's comment, he's highlighted in that introductory text to subparagraph C that we talked there about the claimant being permitted to file their written statement of dispute late, under certain exceptional circumstances. And the term used there is exceptional circumstances.

And as Malcolm has noted and pointed out, when we then move down into sub-paragraph two and sub paragraph three, what is being referred to as extraordinary circumstances, and these are not the same thing. And indeed, David has very helpfully gone on further to point out, and I'm just going to quickly—I don't think that the comments are showing

up, but I will just quickly confirm that his point is that if you look at a dictionary definition, then certainly one dictionary defines extraordinary as being exceptional to a very marked extent. And so his suggestion is that actually, we should be using the term extraordinary circumstances in all of the places in this rule, rather than in the introductory paragraph referring to exceptional circumstances, which is a sort of slightly lesser test.

And so this, I think, is one for us just to sort of discuss and consider but first of all, David, I'll let you speak, because I've probably mangled your point.

DAVID MCAULEY: Thank you, Susan. So thank you, Susan, for summarizing what I put in there, but I just wanted to state the reason I put that language in there. And that is something I've stated before, but I believe that this exception or safety valve or whatever we want to call this should be available. It should be real, but it should not become routine. And any language, I think, that would allow the panel to say, “Oh, well here's another one, let's just go ahead and hear it,” I think would be a mistake, because we're talking about a claimant that is out of time here being able to file late because of something extraordinary. So I just think it's important to state my rationale is this should not become a routinely applied exception, is what I'm getting at. At least that's my opinion. Thank you.

SUSAN PAYNE: Thanks, David. Greg.

GREG SHATAN: Thanks. My only remark on this—and may cut both ways. I think exceptional circumstances is a term that's used relatively often in US law and regulation and legislation. So it has kind of a familiar ring to it. I don't believe extraordinary circumstances has the same kind of legal use history.

But then again, I don't know if we want to conjure up exceptional circumstances as a level test. For instance, in a trademark infringement case, the prevailing party can get awarded the attorney's fees. But only if it's an exceptional case. There's no extraordinary case beyond the exceptional case.

So we may just be talking about semantics here, but I did want to weigh in that exceptional circumstances is kind of a legal term of art to an extent, and obviously signifies something that is beyond the ordinary.

So I don't know if we want to use both extraordinary circumstances and exceptional circumstances, if we want to get that nuanced, and have different levels of circumstances beyond the ordinary. At some point, it becomes probably too pedantic to even consider like angels dancing on the head of a pen, but I'll leave it there. Thanks.

SUSAN PAYNE: Thanks, Greg. Malcolm.

MALCOLM HUTTY: Thank you. And thank you to both the previous speakers. Firstly, to David, I thought that David summarized what we're intending here quite well here. What we are intending here is something that should be real, it should be not a nugatory or pretended exception, it should be possible to do this in the right circumstances.

But at the same time, it should not be routine, it should not be the ordinary way of things. I hope that's not controversial. I certainly think that I share that idea.

So the question is, what language best get us there? I'm not sure that what we've got at the moment avoids the ambiguity in either direction. Thank you, Greg, for saying that this is a term of art in the American system. I'm afraid for me, that actually is suggesting that maybe we should avoid it rather than use it, because we're not necessarily all clear on what we are meaning. We might be meaning something very precise without intending it. That's the problem with using terms of art that are particular to one system.

It might be better to spell this out. I mean, I can certainly think that while the vast majority of cases and the vast majority of types of cases might be ones in which this safeguard was not applicable and not usable, if we are to have in any way a sort of precedent here, and I think David has spoken many times that we are actually hoping to establish a body of precedent, then it would actually be when a like case was met, if one case deserved this exception, then when a like case was met, that case ordinarily would be allowed this exception too. Like cases should get like results.

So we need to be a little careful here. And I think we may need to spell this out more clearly. I think the use of exceptional adjectives, or superlative adjectives may be unhelpful. We may actually need to write out what we mean. Thank you.

SUSAN PAYNE: Thanks, Malcolm. Scott.

SCOTT AUSTIN: Thank you, Susan. Contrary to my learned colleague Mr. Shatan's comment about it being US, I think that exceptional circumstances, I've been able to find some examples in a few other countries as well. So don't hold it against the US as being the reason not to use it.

But I think that some examples that I've seen, including Australia, including some other countries, but I don't think that's really the key. I think the key is exceptional in one of the more broad based definitions anyway deals with things like unavoidable circumstances, the inability to—the inaccessibility to a facility, inaccessibility to documentation or data, un5availability of information regarding certain regulatory obligations. There is a fairly significant list in this one example that I'm looking at, that I think could be modified to be used in the context that we're discussing. And I think that would be helpful, because I agree with Malcolm's original point, or maybe it's David's, that there is a difference between extraordinary and exceptional. And yet we're using it basically within the same relatively proximate passages.

SUSAN PAYNE: Thanks. I can see Greg also has his hand up. And then perhaps I'll come to what David has put in the chat as well. But, Greg, I think this is a new hand.

GREG SHATAN: Yes, yes, it is. I've confirmed now that extraordinary circumstances also has a legal meaning in US law, and perhaps in other systems as well. I think a lot of it goes back to what is stated in different regulations and different cases. And so there's kind of a lot of freight on both of them. I just pulled up an article called the continuing debate about Brown versus Brown, what constitutes extraordinary circumstances. That seems to be an ongoing debate in the New Jersey divorce law about what constitutes extraordinary circumstances.

So I think to echo Malcolm and David's contributions, we should define what we mean, because if we just use the term without definition, it'll be left to the imaginations of those or the preconceptions of those who are dealing with it, which could leave us all over the lot. So I think this is something that I really think we should say what we mean, rather than just try to depend on the words to convey what we mean. Thanks.

SUSAN PAYNE: Thanks, Greg. I think I'm coming to agree with you. Since we I think, probably collectively, are not sure that either of those terms, if they have legal meanings, we're not necessarily sure that either of those are specifically what we mean. And so perhaps we should avoid. There's a bit more in the chat about, I think, what might be considered

exceptional circumstances. But I think perhaps this does need some attempt to express what it is we mean. Scott.

SCOTT AUSTIN: Yes, I did put that entire mess into the chat. But I thought it was useful only because there may be analogues that we could use if we do go to the extent of a definition. The point I'm making now is if you look at the very end of the example I put in the chat, it notes that costs—and in this case, deals with something with the generators and things like this, the repair cost alone shall not be an exceptional circumstance. And I throw out to the group whether we should say something about whether the cost to prepare the IRP or something like that should or should not be—if we should make mention of that as grounds for an exceptional circumstance, the inability to be able to pay for it.

SUSAN PAYNE: Oh, there's lots of reaction to that there, to that controversial notion there, Scott. Sam.

SAM EISNER: I might have some reaction to that. But my hand was not up for that purpose. So if there was somebody who had a more direct reaction to what Scott just said, let's let them go first. I saw David's hand go up at the same time too.

DAVID MCAULEY: Thanks. I do have a reaction to that. I think Scott's suggestion would normally be reasonable. But in this case, I guess I prefer a clear statement to the standing panel that this safety valve or whatever it is, is not a matter that is or is to become routine. But as Malcolm and I have both mentioned, it is to be real, it can be applied in some very exceptional circumstances.

And then when it comes to defining or giving examples of what an exceptional circumstance might be, I think that may not be that wise here. I think we should trust the panel, just because we will forget an example that may be important or they'll look at it as a list, if it doesn't include something then it's not part of it.

I just think we would be better off to explain the concept and to make it very clear that this is a real safety valve but it is not to become a matter of routine. Anyway, that's my comment. Thank you, Scott. And thank you, Susan.

SUSAN PAYNE: Thanks, David. Okay, Sam.

SAM EISNER: Thanks. So I really appreciate that suggestion that David made, that there should be—maybe there's some way that we can provide some sort of practitioner note or something to inform the panel about what was intended, because I think that that really comes to the heart of it. We all seem to be converging on what we think are things that could be exceptional circumstances, and we're all converging that this is

something that should be something that is used sparingly and only under the appropriate circumstances. So I'd support some level of explanation or practitioner note to share.

Also, going back to Scott's suggestion about cost, I think there are many other aspects where costs also impact things other ways, right, cost to go back through and review the action. And depending on how many years it's been, etc. So I think cost considerations can cut multiple ways. So I'm not sure that that's necessarily the basis that we'd want to lay out. And I think it's also another reason why David's suggestion that maybe we veer away from examples but state our intention could be very helpful so that we're not just tying ourselves into a couple of use cases.

I also wanted to just throw out the idea that we have a group and there are a couple of people on this group who are participating in that community representatives group to start seeing the IRP panel, and one of the activities that's expected to happen when that standing panel is convened—and you know, we still have some time before it's convened, it's not going to happen tomorrow, but it is every day coming closer and closer to reality.

But one of the items that that IRP panel is supposed to do is to work with the IOT to identify if there are places where the rules could be clearer or to make sure that they're workable for practitioners. So some level of description around this might be something that's worth us flagging for an item that we discuss with the standing panel once it's convened, because I think that there could be some benefit from having a group of hopefully diverse and international or global composition of

arbitrators that could give a little bit more assistance to really expressing this group's intentions into actionable words that can be used by future panels. So we might want to also take advantage of that.

SUSAN PAYNE: Thanks, Sam. That's a good suggestion. I'm going to take the opportunity to ask Bernard if you could capture that. I'm not sure now if we've already got some other points for the standing panel that we've been capturing before. But it's probably worth, if we don't already, having that kind of a document in case other similar sorts of issues come up. All right, come back to Scott, who I think may well be the last word on this. Scott.

SCOTT AUSTIN: My final comment is please don't kill the messengers because I put up an example. I mean, I think this forum, I thought, was so that we could put things up and look at them and knock them around. And certainly, I don't think that I just say that cost is something that is done as an analog. Okay, in this particular instance, as I said, it looks like some kind of industry regulatory context, but I know in motions to show cause, and even in things that are done for the trademark trial and appeal board, for example, in the USPTO, there are specific guidelines or requirements and examples that are given so that there is some guidance given to practitioners in terms of what they would want to see.

The other thing I look at is the UDRP itself has, for example, in certain of the elements of what they considered nonexhaustive examples, and my

last comment is that it's not in the rule itself or it's not like out in a particular section here, then perhaps [it could be like the] Uniform Commercial Code where it's literally a comment or a footnote and some examples are given.

SUSAN PAYNE: Thanks for that. Yeah, I'll take a note of that, too. And we can revisit. But I think generally I am hearing that there's a feeling that we need a bit more clarity in in terms of what it is we intent rather than just relying on some wording that may have a specific legal meaning and could end up opening this particular rule up to sort of perhaps a judicial interpretation, for want of a better word, that wasn't necessarily what we were intending.

I confess whilst we're all talking, I'm struggling to think of some language that would be a useful replacement for this, although it's never a good idea to try and draft on the hoof. But if anyone after this call gives it some further thought and has any suggestions of a way to better describe what it is we're seeking to achieve here, and wants to put a suggestion around, I certainly would be very happy with that. But otherwise, I will also give it some thought as well when I'm trying to come up with a clean version of this rule and include a suggestion.

All right, I think we're all agreed, though, on what we're trying to achieve here and the intent, and so we hopefully can find a way to reflect that intent in a manner that doesn't build in some new uncertainty or lack of clarity.

Okay. So the final sort of really open point in relation to this rule four language is something that we did discuss on our last call, which was regarding the duration of the repose.

As you'll all recall, the current interim rules have a 12-month period of repose, which is essentially the outside period of time for bringing the IRP. We've continued while we've been working on this rule four to have that 12-month time period, although in square brackets with a sort of indication that it was something that we needed to discuss further and agree.

And in advance of our last call, Bernard circulated some of the public comment feedback in relation to what a suitable time period was. And essentially, to the extent that comment was sent in relation to this, it was somewhat split between proposing that the time period was more appropriate to be 24 months, or potentially 36 months.

And so on our last call, we covered this relatively briefly, but certainly, David spoke up supporting that this repose period should be 24 months as being something which is fair, especially when it's combined with the safety valve language.

And in particular, what we're trying to achieve here is that we're balancing the need to allow people to find out about a decision and about its impact on them in order to bring an IRP against the need for the IRP process itself not to be dragged out unduly, and for there to be certainty for ICANN and for the community over whether decisions might be challenged or not. So that's the kind of balance we're trying to achieve.

And as I say, on our last call, the input certainly from David was that he supported 24 months and as he's noting in the chat, although his initial favor had been for 12, he's supporting 24. And there were no objections on the last call to that.

So where we ended up, I think, was a feeling from the last call that probably our recommendation was going to be 24 months, which is based on this notion of providing the necessary balance and taking into account the input that we did receive from the community.

So really, I know not everyone was on the last call and I wanted to give people who had views on this an opportunity to it express their views if they have them. And so, as I say, our feeling coming out of the last call was that we seem to be coalescing around 24 months. But this is the opportunity for further discussion if anyone has anything they want to say. Malcolm.

MALCOLM HUTTY: Thank you, Susan. Well, if I'm going to be in the minority and this group is determined to go ahead with a repose and isn't even going to be willing to allow the high-level test of this safeguard to allow to safeguard against long duration, but nonetheless is going to fit an absolute outer limit for which no justification will be allowed to challenge ICANN's unlawful behavior, then that's the group's decision. But please, it must be understood that this is not a without objection thing. When it comes to finally reporting, there will need to be a dissent noted that I've consistently maintained that repose is wrong in policy and contrary to the bylaws in my reading of it.

SUSAN PAYNE: Thanks, Malcolm. I do want to just clarify, and perhaps the use of the term repose in this context is no longer the correct one. But our concept of the two time periods, the first being the 120 days from when the claimant knows or should have known, and then the second concept of the proposal having 24 months from the date of the action or inaction, but both of those are subject to this safety valve. And in terms of an outer outer limit—

MALCOLM HUTTY: Is that right?

SUSAN PAYNE: That's certainly the intent.

MALCOLM HUTTY: If that's the case, then how'd you get from the 120 days to this two-year period? I thought it was this safety valve that allows you to get into this beyond 120 days, so the two-year period, and two years was intended to be an absolute bar.

SUSAN PAYNE: I think perhaps we should scroll up, Brenda, if that's all right.

MALCOLM HUTTY: It would be useful, actually, if this text, we could [all see rather than just] have the—can we have the link to this document? Brenda, could you put the link to the document in chat? Thank you.

SUSAN PAYNE: But Malcolm, if we go back to paragraph A and B, so first up, the claimant has a period of 120 days from becoming aware of or when they reasonably should have become aware of being materially affected by the dispute by the action or by the inaction. And then we have in B, if you wouldn't mind scrolling down to B now, Brenda? Sorry. It's not b, it's now C. No, sorry, it is B.

MALCOLM HUTTY: Which side are we reading, Susan?

SUSAN PAYNE: The right-hand side.

MALCOLM HUTTY: I'm sorry. I mean, if I got confused about this, then I apologize. But it is hard to follow.

SUSAN PAYNE: On the right-hand side, so then we have in B the statement of dispute may not be filed more than ... and there it says length to be determined, but we're now talking about probably 24 months from the date of the action or inaction.

And so that takes into account the fact that you have 120 days from when you're aware or should reasonably have become aware. But that your awareness may not happen on day one. And so you have a total period of 24 months before you're out of time, provided that you're still complying with the 120 days from becoming aware. And then paragraph C is an exception to both of those, not just to the first one.

MALCOLM HUTTY: Okay. I know it's H [inaudible] the absolute bar.

SUSAN PAYNE: Yes, I was going to come on to that. And that is a longer period of time.

MALCOLM HUTTY: Okay, so the comments that I just made do stand but apply to a different paragraph than the one that you were dealing with at the time. I apologize.

SUSAN PAYNE: Yes. Thank you. And I think, again, obviously subject to anyone else speaking up, I think you are in the minority in objecting to that outer outer time limit at paragraph H. It has been sort of flagged on previous calls and views or objections requested. And I believe that you are, I'm afraid, in the minority, but certainly, your objection should be noted when we're coming up with our final recommendations.

MALCOLM HUTTY: Thank you.

SUSAN PAYNE: Thanks, Malcolm. But in terms of the 24 months, particularly when taken together with this safety valve for exceptional circumstances, or whatever we're due to call them in the future, I'm not as yet hearing any strong objection to us fixing on 24 months. I'm very happy to talk about this further. But my sense from silence is that there's a general feeling of if not happiness, at least sort of comfort that 24 months coupled with the safety valve language that we've been talking about is striking the right level of balance.

And with that said, I think that is probably as far as we can take this discussion on this call. But when we look at this again, we will have a clean document with only one version of the text and all of the redlines tidied up to reflect where we've come out in our discussions.

Okay, all right, I think then we are at the end of our agenda. Reminding everyone that we have a call coming up. The only thing I wanted to put on the agenda was one piece of AOB related to the subgroups. But Scott, I saw your hand. So I just want to come back to you.

SCOTT AUSTIN: Okay, I'll just say it real quick. Considering that what I put up before was extremely detailed, I found another definition. And I wholly agree with your idea of not drafting on the hoof. But I'd just like to submit it in the chat so [at least it can be considered,] and it'd be easier than sending on the list later.

SUSAN PAYNE: Thanks, Scott. Yes, please do. And then we've got the chat record that can be looked at. Okay. All right. And then I just did have, it's not on the agenda. But just one quick item of AOB, which is we didn't have an update from the subteams on this call.

From the perspective of the consolidation subteam, we haven't had a call of that group since our last call, because we missed a call whilst I was away. So we're meeting next week.

With regard to the initiation subgroup, we heard on our last call that there is a draft report from that group but that it's still being finalized and awaiting input from team members before it can be finalized and referred back to this group.

So I'd really just like to encourage that initiation subteam to sort of set a deadline for themselves for finalizing their report and reporting into this group assuming that you have reached the conclusion that you're at the end of your deliberations and that there's no further that you can take this and that the matter needs to come back to the main working group.

So I'd really like to sort of encourage you as a group to set a deadline. I think we talked last time about perhaps hoping to have a report in from you by our next call, which would be on the 24th of May. Not wanting to be unreasonable or put undue pressure on you, but if that subteam feels that you've reached the end of your deliberations, it would be good to have that report into the full working group now.

So just want to flag that. Hopefully between you, you can agree and perhaps just let me know if you think that this is something we can agenda for next time or if indeed when might be a suitable time for us to put that back into the main plenary agenda.

And that's all I wanted to say. So I'll just pause and see if anyone has anything else they want to raise before we wrap up. And I'm not seeing any hands or hearing anyone, so I am letting you have a bit of time back on your day, which I hope is appreciated.

Thanks again, everyone, for all of your input. I think we're getting there on this timing rule. And hopefully we can have a sort of form of language that we're all sort of coalescing around pretty soon. All right, Brenda, we can stop the recording, I think.

[END OF TRANSCRIPTION]