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BRENDA BREWER:

Good morning, good afternoon, good evening. Welcome to the IRP-IOT Team Meeting on June 7<sup>th</sup> 2022 at 18:00 UTC. Today's call is recorded. Kindly have your phones and microphones on mute when not speaking. Attendance is taken from Zoom participation. We do have apologies from Malcolm Huty.

And with that, I will turn the meeting over to Susan Payne. Thank you.

SUSAN PAYNE:

Thanks very much, Brenda. And thanks, everyone. Welcome back to IOT plenary call. We haven't had one for a few weeks, so it's really good to be able to pick this back up.

First up we'll do our usual review of the agenda and updates to Statements of Interest. Agenda Item 2 is to review our action items, and we had quite a long list of action items this time.

Agenda Item 3 is the substantive part, I think, of the call which is to continue the discussion on Rule 4. And particularly, we now have a cleaned up document. So we can come on to that. And hopefully as you'll see from the document, we now are, hopefully, close to final format of what we've agreed on Rule 4.

And finally, an agenda Item 4 is just the confirmation of our next meetings. We obviously have the ICANN meeting next week, so we won't be meeting then or the week after the ICANN meeting. So we'll have a plenary call on the 28<sup>th</sup> of June. And the consolidation sub-team will have a call on the 5<sup>th</sup> of July.

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*Note: The following is the output resulting from transcribing an audio file into a word/text document. Although the transcription is largely accurate, in some cases may be incomplete or inaccurate due to inaudible passages and grammatical corrections. It is posted as an aid to the original audio file, but should not be treated as an authoritative record.*

So with that in mind, I should quickly do Statements of Interest in case there are any updates to SOIs that anyone needs to flag to the group. Thank you. I'm not hearing any, so we'll move on to Agenda Item 2.

Thank you, Brenda. Brenda has put up the agenda and the list of action items. So that's really helpful.

So Agenda Item 2 is our review of the action items that we had. First one was one for me, which was circulating the updated version, the clean version of Rule 4. And as I said, I did finally—and apologies for it taking so long—get to that and have circulated that around now. So we'll then come on to look at that when we get to Agenda Item 3.

The second relates to the preparation of a draft work plan and, particularly, timing for bringing this phase of this work on the rules to a conclusion. Bernard and I are working on this. I would say it's sitting with me at the moment. And I think we will look to have something, I hope, before the next call so that we have an opportunity for people to see that before we meet again.

The next action item we have relates to the Fixed Additional Time proposal and our language which we have which reflects the agreement that we've reached. And when we discussed this on our last call, Sam took an action item to circulate some proposed language on the question of the same issue. This is ensuring, effectively, that Fixed Additional Time, where it's applied, only applies in the context of a Request for Reconsideration which relates to the same issue as in dispute as is being dealt with in the IRP.

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I think Sam's on the call. I just wondered if there's an update on that, Sam, and when you've had time to reflect on the language, whether you think what we have is adequate or whether you still plan to circulate something.

SAM EISNER:

Thanks, Susan. Admittedly, it's been quite busy and I need to reconfirm with my team whether or not we need to produce anything. But if we do, we'll do that on list shortly and make sure that happens before the next meeting.

SUSAN PAYNE:

Lovely. Thank you. Great. All right. And then our next action item—as I said, we've got a bunch of them this time—was one for Bernard to begin our list of items that we've come up and, as we've been discussing them, have felt that they might be something which could be referred in the future for further consideration or further work when the Standing Panel's in place. And that work might include the Standing Panel working with the IOT.

And so we do now have a Google Doc that's referred to there in the agenda which has a sort of parking list, if you like, of items. So please do take the time to have a look at that. It's not a long list at the moment, but we'll add to this as and when we need to.

And if you have any comments on any of the items on there or if you think anything's been missed that we had previously talked about as

being suitable for perhaps further consideration by the Standing Panel, do please flag that.

And then I know, obviously, we have this Google Doc and it's referred to in the agenda, but I'm not sure if it's yet been added to the documents section our homepage of our workspace. But I'm going to ask Bernard. If it hasn't, could we have it on the homepage so that people can find it? Certainly speaking for myself, I find it quite hard to locate things back in previous agendas.

Thanks very much. I see your tick. So we can have that. We'll have that on our homepage so that you can find it readily in future weeks.

And then finally we have an action item for Mike Rodenbaugh—I'm assuming this is—to give us a status report on the Initiation Subgroup. I don't see Mike on the call at the moment. I do think I may have seen some apologies for him, but I don't now recall.

But I did have a quick side e-mail exchange with Mike because I wanted to see whether he was able to join us and what the status was on this, so I can say that the report from the Initiation Subgroup, there is a draft. Its pending finalization and/or comments from the group. And in particular, I understand that Malcolm may have wanted to make some comments on the document before it's finalized.

So I have asked Malcolm and Mike if they could try to bring this to a conclusion and have something circulated to our mailing list for the week before our next meeting so that we can have this as a topic on our agenda for the next call. I think, obviously wanting to give time for that

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subgroup to agree what their report is, but also conscious that that report has been in this sort of draft state for some weeks now.

And also, my understanding is that group essentially has been unable to reach agreement on one of the issues, or at least one of the issues that they were discussing. And so that issue is being referred back to this full IOT anyway for further discussion.

So whilst we obviously want an accurate report from that group, if necessary it may be a report that just reflects that even in the report itself, the group are not entirely in agreement as to what is a true summary of where they've reached. But knowing that we will, anyway, as a full IOT be needing to pick this up and take it forward, I'm hopeful that we, therefore, will be able to have this on our agenda for the next call.

Okay, so that is a quick canter through our action items. And I think, obviously, three or four of them, I guess, are staying on as action items. So the work plan, the same issue language, and the status report, I think, we should keep on us as action items. Although, in the case of that status report from the Initiation Subgroup, I think what we're really looking for is, before our next call, for the report from that subgroup to be circulated to the mailing list. So perhaps we could slightly amend the action item to reflect that.

And I will make sure that, as I said ... Well, I've already indicated that to Mike and Malcolm. So hopefully, when they've seen the action items coming out of this call, we can look to have that.

All right, so we're now on to Agenda Item 3, which is the discussion on Rule 4 with the cleaned up text. And so that is in ...

Yes, thank you, Brenda. There it is. And we now have ...

As I said, people may have had some time to have a look at this. Very little of this is new. If you'll bear with me, I will very quickly run through what I've done because I want to really just highlight that most of this Rule 4 is not new text. It is text that we have had on the table since at least March, but in many cases much longer than that. And so, aside from a couple of areas which I'll highlight, as I say, this text is not new and we all should be very familiar with it.

But it looks slightly different and therefore, I think it would be helpful if I really quickly run through it just to highlight what has been done so that you can all feel confident that nothing has changed and nothing new has been snuck into the rule.

So if you wouldn't mind scrolling up to the top, Brenda, that would be super. Perfect.

Okay, I'll just quickly, as I say, run through from the top, just highlighting what's been done in this to bring us to this version and, as I say, setting everyone's—I hope—minds at rest that nothing of substance has been done to the majority of this document.

But I see your hand, Kavouss, so I will turn to you first.

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KAVOUSS ARASTEH:

Thank you, Susan. I think I'm not very comfortable with what we are doing. After four years, still someone could do something? Are we serious? After four years, 48 months, still the claimant should do something? Why?

I know. I don't want to name a particular person. I know who is behind this. I know who has taken us on hostage for two years. Modification, modification, and modification. And now after four years ... Susan, I totally disagree with that. I'm sorry. I disagree with that, categorically.

SUSAN PAYNE:

Sorry. Apologies, I was on mute there. I was just finding the closing question just to remind myself. You're referring, of course, to Clause H, Kavouss. We do have some amendment to that clause which is not an amendment to the four years part but is an amendment. So we will come on to talk about Clause H in more detail, but I hear what you say.

I would note that, subject to the amendment that Malcolm has proposed, that four-year language is something that has been in the draft of this document now since, well, at least since December, but I think longer than that. So I think for the whole time we have been talking about ... In fact, at least since September. For the whole time we've been talking about this draft, that language has been in there. So I note your comment. And, as I say, there is a proposed edit to that clause, so we will come on to it.

But I would just point that out and, as you know, we are trying to come to a compromise that people feel that they can live with, balancing the desire to have disputes dealt with in a timely manner against the

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reaction from the community when the last version of the rules went out that there should be no out of time limit at all subject, of course, to their being, still, always a time limit from when the claimant knew or had reason to be aware that they had a claim.

KAVOUSS ARASTEH:

I'm sorry, I'm sorry, I'm sorry. Excuse me. I apologize. Please consider, then, if you, instead of four years, you put up to 10 years [and then] the community said, "Very good. Thank you very much. You give us a gift." My position is clear. Categorically object to four years. That's all. I don't understand. I don't want to name a particular person. I always hesitate to talk about individuals, but the concept of four years is rejected by me. I can't agree with that. I'm sorry.

As I mentioned, if you put 20 years, still the community says, "Thank you very much. Very good thing. You give us 20 years of coming back again" may provide ... No, no. I [can't agree]. I'm sorry. And please kindly do not say you take note. You take into account. Please take into account, but not note. Note, in my view, has specific connotations. No actions. But take into account that I object to four years.

We have 120 days. We have 12 months. We said that the extended to 18 months, increasing. And now, come four years. And even after four years, you want to give a very big gift to some people to come. I don't know what is going on. I don't know what these people are going, with the entire people that are not following what you are doing.

Sorry. Maybe I am among the very minority people. I understand what is going on, but not other people. Or maybe the other people are the



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same group of people on the same language. They wish to have extension and extension and extension. Sorry, my point is clear. Crystal clear. Categorically object to that paragraph. Thank you.

SUSAN PAYNE:

Thanks, Kavouss. As I say, I am taking note. It's not for me to determine. This is the work of this group as a whole. But we will come to discuss that clause, in any event. And indeed, if there are others who equally categorically object, then we will be having further discussion about the four years. But that's, I think, all I can do for now.

But let me continue and run through very quickly so that you, as I said, so that we are all on the same page with this language and feel confident that nothing has changed significantly in the majority of the clauses. And then we can turn to discussing the relatively small number of, if you like, open items.

Okay, so Clause A. In the previous version, we had some redline text from March that reflected clear language about the terminology about being materially affected by the action or inaction in question. And so I've made no changes to A. I just have accepted that redline text now because, as I say, we've had it since March and discussed it at length.

KAVOUSS ARASTEH:

I'm sorry. I'm sorry. I suggest to you that we are 8 persons, or maybe 7 because 11 is not the entire group. Some of them are secretariat. These 8 persons should not decide for 3 billion people. I'm sorry. Put that sentence in a square bracket. A square bracket that means not agreed.

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Thank you very much. I don't want to prolong your discussion. You can do whatever you want, but that is my comment after many years of experience outside and inside the ICANN. Thank you. Go ahead.

SUSAN PAYNE:

Kavouss, can I clarify? Are you talking about Clause A or are you talking about the four years? I don't want to put the wrong language in square brackets.

KAVOUSS ARASTEH:

I am not very happy with all these changes that has been made. They put prolongation on everything. Safety guards on everything. Safety valves for everything, and so on and so forth. But this for years which the claimant may, after four years, do—this is one of the main issues that I object and I ask you put at least that one square brackets. I may come back to that. And please kindly note that I will come back to that with the detailed discussion and proposing changes for each item of what you have discussed. Thank you.

SUSAN PAYNE:

Thank you, Kavouss. We will put it in square brackets. But again, I would flag that it has been in this document since September. And I believe you are the only person that I'm aware of who has objected to that language. Undoubtedly, if others feel similarity, we'll have a spirited discussion about it. But, thank you. I don't think it will show for the purposes of this call because we already have the document in the Zoom window, but we will put that in square brackets. Thanks.

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Okay, now we can move down to Clause B please, Brenda. Previously, in Clause B we had ... Sorry, I'm just ... I will start talking, but hopefully Brenda can move the document down to B.

Previously, we had a time period in this Clause B that was marked as "to be determined." And on our last two calls, we have discussed what is a reasonable time period to have in that Clause B. And my understanding was that the overall sense of the group from those two calls was that we should include a time period of 24 months. And so that change has been made to the document, but I have underlined it since that is a change, albeit it is one that we discussed at some length on our previous two calls.

Sorry, Brenda. Could you scroll down to Clause B? That's the one. And indeed, we can now, I think, move straight on to that one—yes, thank you—to look at C.

So, in Clause C, this is quite a long clause. And we did have a fair amount of redline text in our previous version of this document. So we had redline text to reflect that the request couldn't be made to an IRP Panel, which is what the previous version originally had said since the panel is not in place. So there was some redline text reflecting amendments to the rule to reflect that.

We also had some redline text at the end of bullet point C(ii), the text talking about the time period within which the claimant could be eligible which is, I think, meant to be text from March. Sorry. I'm looking at the wrong clause. It is C(1) because, obviously, we deleted a bullet. So apologies for that. I couldn't find the language and I was thinking I had missed something.

So that text at the end of that paragraph C(i) refers to being eligible under the Bylaws as a claimant within the time frame. That was redlines in our previous version, the text having been inserted in March. So again, that is text that I have accepted into this new, clean document.

And then we also had a redline text to reflect that we were deleting what had been bullet one where there had been reference to it being a condition that the claimant had to satisfy the standing requirements under the Bylaws as being an actual condition of bringing a late request to bring an IRP.

And as we discussed again, I think, in March and agreed, we felt that this wasn't appropriate to make this a condition but that it was appropriate that the claimant should be aware that just as every claimant has to meet the standing requirements, that the claimant seeking to file late would need to meet the standing requirements. And so we should include some texts that just makes that clear to them. So just points out to them that there's an expectation that they will explain ... In the application for leave to file out of time, they will explain how they meet the standing requirements.

Again, that text was redlined in March and I have accepted it. So all of that text in C that I've just been talking about is not new. The document has just been cleaned up. But there is one area where there is some new language, and that's highlighted at the beginning of paragraph C. And then there is various text that I've underlined. And this new text.

And just as a reminder of what this is, on our last call we considered the wording referring to both "exceptional" and "extraordinary" circumstances. At different places within this rule, we had both of those

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terms being used. And David raised, firstly, a concern about the potential inconsistency between those two terms. And then we had quite a detailed discussion about whether either of those terms was really appropriate, given that in certain legal jurisdictions it may be a term of particular definition that may not be what we were intending.

And so we didn't reach a conclusion on what the appropriate language would be on our last call, but I took an action to propose something when I circulated this draft. So that is what I've done, and I think this is one of the areas in the document that we will want to come back to. I'm certainly not committed to the suggestion that I've drafted, but I'm hopeful that it's a starting point and that either people will feel that that adequately reflect what we want or may have some suggestions on that.

But I think, if you don't mind, we'll just quickly cantor through to the rest of the rules so that we can then hone in our attention on the bits that we need to come back to. And I note your comment in the chat there, David.

So if you could scroll down again, Brenda, please, to D. Perfect. That's lovely.

So in D we had some similar redlines to Clause A. So reflecting the language about being material affected by the dispute. And so again, that language has been in our draft for some time and I have just cleaned it up by accepting the redline.

And we also had, from March, the redline text at the end of Clause D which talks about nothing in Rule 4 being intended to preclude a

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claimant if they believe they're filing in time but it turns out that they are out of time for some technical reason.

Again, I haven't made any amendment here. It's some texts that was redlined in our draft from around about March. So again, in order to clean the document up, I just accepted that.

Then scrolling down further to Clause A. And I think that's probably going to go over the page, but that's not too ... This whole Clause A was new redline text from March reflecting our discussions in the previous weeks and months. And it was the suggestion of how we deal with the fact that there isn't an IRP Panel to hear these requests for leave to file a late IRP. And so it was the proposal on how we deal with this using a single panelist.

And so again, there is no change here. This whole text was a redline in a previous iteration of this document. And so it's just been accepted.

And I will note that the Google document that we have for items to refer to the Standing Panel, this is one of the topics that we potentially might pick up at a future date with the Standing Panel when we have that.

Okay, and we are close to the end of the document now. So again, if we could scroll up, please, Brenda. Clause F again was redline text from March reflecting a language proposal from Malcolm that the panel, when considering these applications for leave to file late, should have regard to the purposes of the IRP. That was a proposal that Malcolm had made some time ago. And when we had the last iteration of this document redlined, it was included in that document there. So again,

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this isn't new text in F. This is simply an acceptance of the previous redline text that we have had on the table for some time and I think are all comfortable with.

Clause G. No change at all there. We had that text already and it was not any kind of a redline.

Then we come to Clause H. And this is the clause that we've just been talking about, about the absolute out of time limit for bringing a dispute. And here we have a proposed amendment that came in from Malcolm after our last call.

His proposal was that instead of this clause saying "Under no circumstances may a claimant seek to file a statement of dispute more than four years after the date of the action or inaction being challenged in the dispute," he has proposed an amendment that it should be no more than four years from becoming eligible to file a dispute.

I haven't made that change because, as I say, this was some suggested amendment that came in after our last call. So it is new and it is not something that we have talked about. But I have flagged it in the document so that we can see that this is an area for us to come back to to discuss. And again, as I say, there were only a couple of areas which are new, and so we will come back to talk about this as well, I hope.

And then Clause I. Just to complete this off, Clause I. There are no changes here, although in previous iterations of our draft rule, we have noted that it's possible that we may need to look back at this or make some changes to this, subject to whatever the outcomes of the discussion about initiation of the IRP are that has been happening in the

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Initiation Subgroup. And that will be coming back to the full working group. [inaudible].

KAVOUSS ARASTEH: I raised my hand many, many, many minutes ago. Could you kindly give me the floor once you're finished? I'm sorry.

SUSAN PAYNE: Absolutely. Sorry, I don't see a hand at all.

KAVOUSS ARASTEH: Yeah. Because—I'm sorry—you are very good chairman but you're talking and talking and talking. That's all.

SUSAN PAYNE: Apologies. Yeah, I—

KAVOUSS ARASTEH: No, no, no. Please, you are conducting a meeting. We respect you wholeheartedly. But please allow the other people to talk. Madam, I don't have problem with H. But only problem with four years. This four years, I have problem. But not with the H itself. The language in H, apart from four years, is okay. But I have problem with four years.

But I request you, first of all, please kindly don't put me at the corner. Please, kindly. I am not Galileo, but when Galileo said that the earth turns around the sun, the people attack him saying, "You are in the minority. Everybody thinks that the sun is turning around the earth."



Please read Galileo history. I am not Galileo. I'm a simple person. Simple, humble person. I would like that you kindly describe where this four years compose—no, not that—from where these four years composed of. 120 days plus 12 months? Plus what? Plus what? Plus what? Plus what?

But put four years in a square bracket. Number one, this is the first objection. The second objection. From the very beginning, I was against one single panel. I was against. Human being is human being. Is subject to mistake whether intended mistake or unintended mistake. I was against that one single person decides on important issues. I don't know who that person ...

Whoever it would be, is subject to mistake. Is subject. All of us are human beings. We can make a mistake. We can be emotional. We can be sentimental. We can be influenced. We can be biased. And so on and so forth.

Once again, I am not referring to any individual because I don't know who would be that panelist. But I was against from the very beginning of the one single panelist. Put that as an objection. If everybody agreed with one single panelist, I don't agree. If everybody agrees with four years, I don't agree. [That's all].

I don't want to argue with you because apparently you don't agree with me. Apparently, I am [putting under the corner] that you are—that means I am—the only person. So, that I am the only person who is conscious—I'm sorry—who is smart and who knows what he's talking about.

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I don't agree with the four years. This is the stability of the whole process. You allow someone to come after four years and object to everything, whether for action or inaction of ICANN Board and [whether] for any other decision. Too long. Very sorry. Too long.

I don't want to get problem with anybody. I know who has proposed that, I want to be totally neutral. So these are the main two objections, but I'll come back to any other paragraph that you have meant. Sometimes I was not available because of one or other reason, but I know what I'm talking about. I have 50 years of experience in international operations. I am not biased. And I'm neutral. I'm acting professional. And I have legal background and [engineering] background. Both of them help me to say something. I respect all of you wholeheartedly. [And I respect] yourself. Please, kindly, don't interpret it differently. Thank you.

SUSAN PAYNE:

Thanks, Kavouss. Well, we needed to circle back to a couple of clauses, one of which was Clause C, and the other one was this Clause H anyway— both with respect to the proposed amended language that Malcolm has proposed, and also as now raised by Kavouss, the question of the four years absolute outer limit.

And I would like to hear from others on this call. I understand Kavouss's this position very clearly. My understanding from our previous reviews of the rule is that there was comfort with the four years from most, or indeed, the majority of the members of the IOT. But I would like to hear from others on both of these aspects of Clause H.

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Kristina first, and then I see Sam. So, Kristina first.

KRISTINA ROSETTE: Yeah. Can everyone hear me?

SUSAN PAYNE: I can, yes.

KRISTINA ROSETTE: Okay, excellent. I'm actually going to raise a point of order. If I heard correctly, during his last intervention Kavouss stated that he is the only one on the call who is conscious and smart. And it is inconceivable to me that that statement is consistent with and in accordance with the ICANN Expected Standards of Behavior. I'm not really quite sure what we do about that. But I, for one, find that insulting and offensive, quite frankly. Thank you.

KAVOUSS ARASTEH: Sorry. I'm sorry. I did not say I'm the only one. I said I am not stupid. Smart. I didn't talk about others. Others are more smart or smarter than me. I never talk [inaudible]. Did a talk like everyone else is not as smart? I said I am smart. I can talk about myself. I didn't talk about anybody else. You may be much more smarter than me. [That's all]. Please, don't put anything in my mouth. I'm sorry, I didn't say that.

This is a record. I said that I am smart. That's all. I did not say others, they are not this smart. [inaudible] they would be more smarter and more intelligent than me. I never said that. Please, kindly, don't

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paraphrase what I said. I'm very sorry. I also respect you. Be fair, kindly.  
Thank you.

SUSAN PAYNE:

Thanks very much. So I think, accepting what you say, Kavouss, it sounds as though perhaps there was an understanding of what you were meaning, which perhaps was not, or indeed, as you say, was not what was intended. And so I am hopeful that we can leave that aspect here and talk about the substance, if that's okay. I hope that everyone feels comfortable that no slight or slur was intended in what you were saying to the group, Kavouss. Thank you.

Sam.

SAM EISNER:

Thanks, Susan. I wanted to talk a little bit about H and just confirm, as part of the earlier part of the discussion, there's no secret that as ICANN Org has been participating in this discussion, one of the things that we've been highlighting is the need for stability and surety in the decisions. And we've talked about that in many ways as we've looked at this time for filing and the outer limits and all.

And I wanted to confirm that while I see from both sides a concern, with some thinking that four years might not be enough and others being concerned that four years is too much. And I have my own personal views on that, but that isn't necessarily what's here. I want to confirm that ICANN Org and its participation in the IOT has also confirmed its comfort with, given the safety valve, that the four years under the extraordinary circumstances, or whatever term we wind up using, was

something that ICANN Org was willing to proceed along with as part of the consensus of the group.

So I recognize some of the concerns about a lack of stability within the system, but as we're moving forward it seemed to be part of where the group was converging. When we do start talking about the proposals from Malcolm, I have a concern with putting in a phrase such as "timing from eligibility" because I'm not sure exactly what that means. I'm not sure exactly what that would always be timed from. And if we can't point at that, once these rules go into operation any sort of vagueness or a lack of clarity in those terms would be considered against ICANN.

And so I think it's not a good practice to build in vagueness into our rules where we can avoid it anyway. And I think it's really important to not build in a term that even those participating in this group for as long as many of us have been wouldn't know what it means. So I respectfully reject Malcolm's amendment for when we get to more substantive discussion on that.

KAVOUSS ARASTEH: Excuse me, Susan.

SUSAN PAYNE: Thank, Sam. I have David in the queue now.

DAVID MCAULEY: Thank you, Susan. I'm happy to talk about H. I understand where Kavouss is coming from on the four years. When this IOT started, I was

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happy with 12 months and then two years as an overall cap. But I think as we close in on a compromise on a very difficult rule, just like Sam said, I can live with for years as an overall, under-no-circumstances, cap. I can understand that. I think it's long, but ...

And for the same reason that Sam mentioned, I think ... As I've said many times before, I think it is important, especially with binding decisions, that there be predictability, finality, things like that.

With respect to the amendment that Malcolm is suggesting, I again feel as Sam does. I think it is unclear language, but I can think of one example that might illustrate some of my concern. Let us say that somebody has a concern with and ICANN policy from the point of view of a domain name registrant, but they don't get their first domain name until 10 years from now.

In other words, in 2032 they buy their very first domain name, and for the first time become a registrant and then look at the ICANN policies and say, "Well, I don't like this policy as it impacts registrants." Under the terms of the proposed amendment, that may be their first date of eligibility, meaning that a policy that maybe was created this year could be disputed 14 years from now. I just find that ... I just don't ...

I think, as Sam said, we need clarity. I think we need to be very precise with the language we use in the time for filing rule because I think it's going to be an area that could be fought over, and I think we need to be very clear in our instructions to the panelist to what we're discussing and what we mean when we come up with a final compromise. And so that's my thoughts on paragraph H. Thank you.

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SUSAN PAYNE:

Thanks, David. And before I turn to Greg—I see your hand, Greg—I will just point out that I've realized, of course, that Malcolm is not on the call, and so out of respect to him ... I mean, obviously, he will have the opportunity to hear the recording. But out of respect to him, I think we will have to circle back to this.

So we'll hear from Greg on this. And again, particularly if people have thoughts on the four-year aspect, certainly that is something that is worth us trying to seek some clarity on the feeling of the group as a whole. But we will need to, I think, come back to this draft text that Malcolm was suggesting when he's with us because I ... Or at least allow him the opportunity to come back over e-mail because I've realized that he's not with us.

Greg.

KAVOUSS ARASTEH:

Can I speak, please?

GREG SHATAN:

Thanks. It's Greg Shatan for the record. I have the floor. I think that we've been through a long set of discussions. I think the four years is a reasonable compromise between the various positions and how we got here, and that it's a final hard stop after which no action can be taken.

I don't support Malcolm's proposed amendment. That is a completely different type of deadline. We're talking here about a deadline from a

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point certain, which is the date of the action which typically would then the ICANN Board or staff action that is being challenged. That happened on X date, and we know what date that is. And then four years after that, we have complete finality.

Eligibility or standing, or whatever it is to count something from that point, that's really a question of when an action could have been started or when the plaintiff knew or should have known that they had rights that were being potentially infringed while there is ...

I don't want to add yet another deadline in here. I think we actually may even have a deadline that really answers that type of thing. But that is just ... It's a completely different character of deadline. This is start to finish, once an action is taken, when do you know you have complete repose? And that's what we've always been talking about, complete repose.

Repose that is dependent on when a plaintiff can start their action is a completely different type of thing. That would not be, to my mind, a four year question. I think we may have something in there. But again, this one—four years here—is really tied to the idea that it starts on the date that the action is taken and not on some later date.

I believe four years is appropriate, given the time clock of actions that ICANN, for better or worse ... A typical PDP takes four years. Launching a new round can take a decade. If everything else was shorter, the four years should be shorter and would be shorter. But unfortunately, we're on the calendar we're on and driven by the circumstances. Thanks very much. I'm done now.



SUSAN PAYNE:

Thanks very much, Greg. And Kavouss, I heard you asking for the floor. So I will come to you now. And again, apologies, but your hand is not showing for some reason. I'm not overlooking you deliberately, but I didn't see a hand from you. I don't have a hand from you. But anyway, Kavouss, the microphone is yours.

KAVOUSS ARASTEH:

Thank you, Susan. Let me explain myself. You said that, about the smartness, it was not intended. No, it was a clear description that I am not stupid. I didn't talk about anyone else at all. When I said I'm not stupid, that means, on the contrary, I am also smart. I didn't talk about anybody else's [inaudible]. I never allowed myself to judge anyone else's smartness. Number one.

Number two. The text proposed here in H may be okay, provided that there is another text before that, that under certain circumstances with justification, a claimant could find blah, blah, blah up to four years. And then after four years, no more statement at all. So we have to capture that under certain circumstances, with justification to be agreed by the panel, a claimant could file a statement up to four years. And then the H. After four years, no more statement at all. So that is what I'm saying.

Please, correct me if I'm wrong. Please correct me if I don't understand. And please correct me if I am totally stupid. I'm not talking about anyone else. About myself. So I think this sentence may be proper/good, provided that before that you say that, "under certain circumstances with valid justification to be approved by the panel, a

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claimant could file a statement within four years, up to four years. Beyond that, no more statement at all. This is something that we expect. Please prove that I am wrong.

SUSAN PAYNE: Okay, if—

KAVOUSS ARASTEH: I am sorry. I appreciate David and I appreciate Greg. To some extent, they tried to clarify. But this is my suggestion. Thank you.

SUSAN PAYNE: Thanks, Kavouss. And I appreciate your clarification on your position here. That does greatly help. But I believe, and I think that others are of similar agreement to me, I believe that that is what we have here in this overall Clause 4.

And I'll ask Brenda to scroll back up to the top. So first of all, we are setting, in Clause A, the time limit. Once the claimant has a claim and they are aware or they should be aware of it, they only have 120 days. And that is Clause A. And then in Clause B, we have a cutoff of 24 months.

So that 120 days can be no more than 24 months after the date of the action or inaction. But that doesn't mean that the claimant has 24 months when they have or a reasonably aware of a claim. It means they only have 120 days. But they have an out of time limit of 24 months.

And then what we have been talking about in Clause C, and for some time, is what we've been calling the safety valve. And I think, indeed, the safety valve was a concept that was developed after a call where you raised this concern, in particular, that there might be circumstances where a claimant is just unable to file for some reason. And so we built in what we were calling a safety valve which is that the claimant or the potential claimant may go to the panel ...

In this case we have this proposal that it be a single panelist because we don't have an IRP Panel because we don't have an IRP. I am appreciating that you have expressed concern about the single panelist. But leaving that aside for the moment, we then have this extraordinary or unusual circumstance outside of the control of the claimant which are preventing them, for some reason, from being eligible or being able to file. And this is something where they can ask for leave to be late and the panel must decide, having regards to the nature of the IRP and previous IRP decisions, and so on.

And then even taking that into consideration, we have then said that that safety valve should not be open-ended. You shouldn't be able to come back to the panel or the panelists, the IP Standing Panel, many, many years down the line and say, "I know I'm late, but I want leave to file an IRP." And so that is what Clause H is saying, that even if you are seeking leave to file late, it has to be no more than four years after the action or inaction. So that is the absolute drop-dead date for being permitted to file out of time, which isn't, in itself, an exceptional circumstance where you have to persuade the panel that it's appropriate to give you leave.

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So I believe that we have here in this rule, and particularly in Clauses C and H, exactly what it is that you are seeking. And I note in the chat that David is making that same point. So I your hand, so I will come back to you. But perhaps this is one maybe where it would be ...

Perhaps after this call, you can reflect on this further and see whether, when you are able to read through this rule as a whole outside of this call, whether you are comfortable that it does indeed do what you are seeking.

Kavouss.

KAVOUSS ARASTEH:

Yes, madam. Let me explain myself. Maybe I was not clear. 120 days, okay. Two years, okay. Between two years and four years, any statement filed should be accompanied by valid justification approved by the panel, up to four years. After four years, no more statement no matter what is it. And doesn't require any further consideration.

So, H should be preceded by something between the two years and four years as follows: "Under certain circumstances, providing valid justification to be approved by the panel, the claimant could file a statement up to four years." And then take H. These are the two complementing or complimentary texts to each other.

I'm sorry if I was not clear. I'm now clear now. Thank you.

SUSAN PAYNE:

Thanks, Kavouss. And again, that is what I understood you to be saying. I believe, and I think others in this group believe that is what we have;

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that that is what we have when we read Clause C which is all about the need to seek leave to be filing after one is out of time. And that is whether you are out of time on the 120 days or out of time on the 24 months. You have to submit an explanation of what your justification is for being late and seek the panel's consent before you can go forward. And then if it's four years, that is the cutoff.

I'm confident that that is what we have. I will ask if you can perhaps review the text after the call. And if you remain concerned, maybe you could propose some amendment to the wording of C that you think better reflects what you think is missing because I feel that we have what you are asking for in this rule.

Kavouss.

KAVOUSS ARASTEH:

Can I suggest you something? A, 120 days. B, 24 months. C, up to four years. And then after that, immediately the text of the H comes under D. So we should have the sequence of actions: 120 days, 24 months, up to four years with valid justification to be approved by the panel, and then H, nothing after four years. If it comes in sequence, one after the other, everybody understands that. It may be a matter of presentation, maybe. Thank you.

SUSAN PAYNE:

Thanks for that. I will review the text, and perhaps we can reorder it, in case that will help to address your concern. But again, just as a reminder that this is not ... Well, I think it may be intended to be the final text of

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the rule, but certainly I think we are in agreement on the concept. So we maybe just have to work on the execution of how this is drafted to reflect what your concern is.

David.

DAVID MCAULEY:

Thanks, Susan. So I take it this is a time to talk about Clause C. And if that in fact is the case, I'd like to go through it, suggest some changes, and say why I'm thinking them. And I'd also like to just begin these comments by responding to a comment Kavouss made earlier about not liking the idea of having a single panelist decide these kinds of questions that we're talking about now, [a delay].

I tend to agree with Kavouss that anytime you have a single person making such a decision, the probability or the chance of mistake goes up. On the other hand, we're talking about alternative dispute resolution process that is meant to be rather to the point and express in some sort. And so in these circumstances, I would say that with the drawbacks that are inherent in something like that, I would still support a single panelist underscored, making these kinds of decisions,

So if you don't mind, I'm just going to take a minute or two to read through Clause C and sort of insert things here and say why I would insert them. And I would be happy to take a drafting pen to this afterwards to help, Susan, because you've done a really good job of drafting, and send it to you just to remind you of what I'm suggesting.

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Anyway, so I'm going to start reading Clause C. "The claimant may be permitted ...". This is the first place where I would insert language, and I would say "by the IRP Panel." And I think that's important. And I've said this before. I think the statute of limitations should be waivable by ICANN. I think we really need to be very clear here. There's just one entity that can do this that we're talking about here, and that entity is the panel.

So, "may be permitted to file its written statement of a dispute after the timeframes set forth in (A) and (B) above under limited circumstances." That's good.

"A claimant may seek leave to file a written statement by demonstrating clear and convincing evidence that either:" Subparagraph i, "unusual and unavoidable circumstances not caused by the claimant and out of the claimant's control."

I think "unavoidable" on the one hand and "out of the claimant's control" on the other are largely redundant. And so I would delete the words "and unavoidable" and leave the words "out of the claimant's control." I think that's a better phrasing for what we're looking for here.

But I want to mention my concern with the word "unusual." We were talking "extraordinary, exceptional." We did see that we were using different terms. And in the last meeting, I mentioned I liked ... There is a definition for "extraordinary" meaning "unusual to a marked extent."

I guess the point I'm getting at is that anything we can do—at least this is in my opinion—anything that we can do to say to the IRP Panel that when we drafted this rule, we meant this was not to become routine.

This was truly extraordinary. Any formulation we could come up with that would do that, I would be happy with. I'm not necessarily sure I need to think about it that the word "unusual" is good enough.

I don't need to read the rest of i. I think I'd make the same comments in ii. And I think that is the extent of my comments on Clause C. Thanks, Susan.

SUSAN PAYNE:

Thanks, David. I very much appreciate those comments. I think they're very helpful. And I also appreciate your offer to propose that in the text. I think we've got a Google Doc and I think it should be open to allow for suggestion mode which would mean it would come up as a redline. So I will happily take you up on that, I think.

But, obviously, if anyone would like to react to David's proposal or suggestions there now, then please do so. But that certainly sounds good from my perspective.

And I'm not seeing any hands on that, I don't think. But I do see Kavouss's hand up, which has been up for a little while. So I'll go to Kavouss. Thanks.

KAVOUSS ARASTEH:

Thank you very much to giving me the floor. Let me ask you one question, please. Where this four years come from? I understand 120 days. I understand 24 months [is] coming from the 12 months. I have no problem to increase that to 24. But where are there four years come from? Why not three years? First point.

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Second point, under “exceptional circumstances,” does this exceptional circumstances mean a force majeure? If that is the case, that is another legal issue we have to discuss. This force majeure, this special circumstances, should be understood that is not created, or I would say self-created. There should be a reason for this special circumstances. Is it a force majeure? Or it is not a force majeure?

In any case, the panel should describe what are the special circumstances or what are the force majeure. In all aspects, it should not be self-created. Somebody could not say that, “Because of my fault, I need to add four years.” No. It should be really specific or special circumstances beyond his or her control. And we have to describe what are the circumstances which could be at least tabled which are beyond the control of the claimant. Otherwise, everybody uses this four years, and so on and so forth. Distinguish.

Susan, you remember from the very beginning I was in favor of stability of the situation. And not to put something we destabilize the situation. A decision made four years after someone challenged that decision without any valid reasons or with the reason self-created. We want to avoid that. Self-creation, even force majeure, is not accepted. Please kindly accept that I have at least I’m talking about myself.

Kristina, please don't interpret it differently. I have sufficient experience about this special circumstance [inaudible] in an issue much more delicate and critical than this IRP, much more billions of dollars. So we have to be very, very clear what we mean by “special circumstances.” And what are those special circumstances. And we have to at least table that in order to avoid any self-created special circumstances.

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I'm sorry. This is what I have the experience. You accept it or not, that is up to you. Thank you.

SUSAN PAYNE:

Thanks, Kavouss. Indeed, I do accept it, which is why in the draft it says, "out of the claimant's control."

But David has offered to propose some edits to the language. I invite you to do the same. Perhaps you may want to do so after David has proposed, but I think you were proposing on a slightly different issue. So feel free. It's a Google Doc. You can edit it, or rather you can suggest amendments to this text. It was the first draft to try to reflect what we were seeking to achieve. And so all suggested revisions for greater clarity are extremely welcome and, indeed, are encouraged. So thanks for that.

Liz.

LIZ LE:

Thanks, Susan. I raised my hand to react to the suggestions that David made with respect to Section C, and specifically the point that he raised about the proposed language of "unusual and unavoidable circumstances."

We agree with David's analysis on this that the unusual standard is definitely a ... It's a different standard than extraordinary. It's a lower, less-heightened standard. And when the safety valve was discussed, it was intended to carve out a mechanism for really extraordinary circumstances, not something that would be a routine filing where if a

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claimant met these criteria, then they would be allowed to file an IRP after the deadline to file an IRP has expired.

So we agree with David's analysis and proposal on this. "Unusual" just makes it more likely a routine mechanism that someone would demonstrate. But I think it is going to, then, basically render the safety valve rule ineffective in the way that we intended it for the safety valve to be in place. Thanks.

SUSAN PAYNE:

Thanks, Liz. Same invitation to you. I was trying to avoid both the terms "exceptional" and "extraordinary" because after our discussion last time, it seemed both had kind of legal meanings. But I was trying to suggest an alternative. As I say, not wedded to it. Would very much welcome improvements to that to reflect our intent.

Sam.

SAM EISNER:

Thanks, Susan. I wanted to respond to one of the questions that Kavouss raised. Not to prolong the four year issue, but I wanted to confirm to him the basis for ... I believe it was ICANN that brought forth the four years as we were discussing what a reasonable outer limit might be. And that was because four years aligns with the four-year statute of limitations within California to bring contractual claims. So many of the actions, to the extent that they result in challenges to ICANN activity, may actually impact some of ICANN's contractual obligations.

So we thought that there was a reasonableness in a proposal in bringing that forward to say why it shouldn't be longer than that time frame, because then it helps keep ICANN kind of out of this morass of what happens if a contract is challenged after there's actually a legal ability to challenge a contract under California law. And so that was where the four years ...

I think that was one of the places where the four years came from. Of course, the IOT is able to discuss [inaudible] [as lower], but that was why we had come forth with the recommendation for that as the outer limit.

SUSAN PAYNE:

Thanks very much, Sam. I appreciate your reminder of that. I'm sure we have probably discussed that at some point in the past, but it's extremely helpful to have your memory on that.

Okay, it is 18 minutes after the hour so we have just about 10 minutes left on our scheduled time for the call. But I don't see any further hands. Oh, I do see a hand. Kavouss.

KAVOUSS ARASTEH:

Yes, Susan. Thank you very much, Sam, for the explanation. May we kindly ask you, Sam, to propose an asterisk for the four years at the end of the page or somewhere? You introduce that asterisk and mention the reasons or justifications or analogy with the four years, that the people know where these four years come from. You said about the contractual obligation, or maybe something else, but we need when we have four

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years. But does four years in H preceded by another one saying that “under certain circumstances,” C, and so on and so forth, “it should be agreed by the panel,” and so on and so forth.

But this “four years” and introduce an asterisk and mention where that four years comes from and what is the analogy to propose that.

You said something? I was not aware. I’m sorry. But please, kindly introduced that everyone knows that this four years is not out of the blue. That four years is coming from somewhere, and that somewhere is a practice or experience or precedence, and so on and so forth. Is it possible, Sam?

SAM EISNER:

We'd be happy to work with the group for something for our public comment filing or anything. I don't think we'd want to have that level of asterisk within our supplementary procedures, but if it's helpful for when we got to public comment, we would definitely be happy to work with the group on that for a public comment posting.

SUSAN PAYNE:

Thanks, Sam. I think I might put that one on our ... Or ask Bernard, rather, to put that on our parking lot document as well so we don't forget that for when we come to putting this out to public comment. I think that's a really helpful suggestion. Okay, thank you, everyone.

Our final agenda item, we already really covered, which was the timings for the next calls. So I think we have reached the end of the items that we were due to cover on today's call.

David has noted in the chat that he has an item of AOB. So I will turn to David now, please, for that.

DAVID MCAULEY:

Thanks, Susan. I just wanted to mention that the Community Representatives Group that's choosing a Standing Panel has begun its work. And it's going to take some time. There's no eminent Standing Panel. But it's something that this group, the IOT, should track somewhat. I mean, there's three of us on this call that are in that group—Greg Shatan, Kavouss, myself. It's a group of seven reps.

There are things that the IOT can and/or should do once a Standing Panel was in place, or before. We should consider whether there should be additional conflict of interest standards for the Standing Panel. We should consider whether there's additional training that would be good for them. And since, within our group, we have practitioners like Mike and Flip, that's probably something we might have some insight on.

Anyway, I just wanted to say that work has begun. And at some point within the next year, I mean after the reps pick the panel, then it goes to the Board for their approval. So as I said, it's not imminent. But at some point in the next year, we would want to probably look at those things. I just wanted to float that as an idea. Thank you.

SUSAN PAYNE:

Thanks, David. Do you think this is something where it would be beneficial for us to have an agenda item for a check-in every month or couple of months?

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DAVID MCAULEY: Maybe every quarter.

SUSAN PAYNE: Every quarter.

DAVID MCAULEY: Yeah.

SUSAN PAYNE: Okay, that's super. We can also do that and just get an update on how the work is progressing.

DAVID MCAULEY: Okay, thanks.

SUSAN PAYNE: Thank you very much for that. Kavouss.

KAVOUSS ARASTEH: I'm sorry. I fully endorse what David mentioned. This small group of seven led by a competent person, David McAuley, really has some connection with your group in one way or other. So there will be some sort of liaison between the group in order that we are working together. Because the end result, what we're doing in that group, has connection

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with your group, and so on and so forth. So I fully endorse what he said.  
Thank you.

SUSAN PAYNE: Thanks very much, Kavouss. Yes, that's extremely helpful. Thanks to both of you for that input. Okay, then I ... Oh, sorry. David.

DAVID MCAULEY: I had another idea, Susan. Thank you. Maybe what I should do is just indicate which Bylaw sections apply in that manner in the Google Doc that Bernie created for Standing Panel stuff. It's just an idea that might be helpful.

SUSAN PAYNE: Thanks, David. I think that would be helpful. So, yes, if and when you have time to do so, thank you. That would be appreciated. All right.

Okay, I'm not seeing any further hands and we have just a few minutes before the bottom of the hour. But I don't want to keep you all unnecessarily. So thank you, everyone, for your input today. We will look forward to some suggestions, particularly to the language on Clause C.

And apologies. I see, Kavouss, you have your hand up again.

KAVOUSS ARASTEH: I'm sorry. Just, I want to say that, like David McAuley's group, which are seven, here we are very few people. Let us work together—friendly,



kindly—and not misinterpret each other. We belong to a small family. And this is a small family within the big family of ICANN community should help. We have to share our views. We have to share our knowledge, our understanding, and so on and so forth, in order to produce something which would be useful for the community. Thank you.

SUSAN PAYNE:

Thanks, Kavouss. And on that note of good wishes and seeking to work well together, I think we can wrap the call up for this week. We will have a couple of weeks off because of the ICANN meeting and, as noted in the agenda, we are back in three weeks' time. So, looking forward to catching up with you all then. But keep an eye on the mailing list, as there hopefully will be some e-mails going around. Or, indeed, keep an eye on the Google Doc as well, which there will be some suggested amendments to the text in there.

Thanks very much, everyone. And for those of you traveling, have safe travels. And hopefully we'll see some of you at least in The Hague, and many of you virtually, undoubtedly.

Thanks, Brenda. We can wrap up the call now. Thank you.

**[END OF TRANSCRIPTION]**