ANDREA GLANDON: Good morning, good afternoon, and good evening. Welcome to the IRP-IOT Meeting #93 on Tuesday, the 28th of June 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 the Zoom participation. I will turn the call over to Susan Payne. Thank you.

SUSAN PAYNE: Lovely. Thank you very much, Andrea, and thank you to the group members who've been able to join the call. We do now have a quorum as we've been discussing, so I'm really pleased to be able to go ahead with this call. We will start with a review of the agenda and updates to Statements of Interest. Kavouss, I see your hand.

KAVOUSS ARASTEH: I'm sorry. I had a very urgent issue. I was not able to connect to listen to your statement. What was reply to my statement that normally, we need to have consensus, but we don't need consensus for discussion. But should we need to decide, we need certainly quorum. So I said that with the apology to David. And with his agreement, I disagree with him. Thank you.

SUSAN PAYNE: Thanks, Kavouss. I didn't realize that you had dropped off. We luckily did not need to make a decision for the purposes of this call on the basis that we had no quorum because we're lucky that Kristina has been able

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to join us. So we now do have a quorum for this call. Generally, I think we are trying to make sort of substantive decisions, perhaps not formal adoption of text, but we are trying to progress the text and use the call to actually reach agreement on things rather than just a discussion. So I think it does probably depend on what is on the agenda for the call. Certainly today I'm hoping we can reach some meeting of minds on the text for rule 4 so that we can then sort of have a formal reading of it in future week. But we don't have to worry about the quorum now because we do have quorum for this call. So thanks very much for that.

All right. So first up, we have to just, as usual, review our agenda and discuss the action items—sorry, on the updates of Statement of Interest. And then our second agenda item is to review and discuss the action items, which we'll do in a moment. Third on our agenda is to continue the discussion of rule 4 with the cleaned-up document that we do have some edits that have been proposed since our last call. Then we have on the agenda there the dates of the forthcoming meetings.

So if we can circle back to the first agenda item just in terms of the update of Statement of Interest, I will just pause briefly and see whether there are any updates that need to be flagged to the group. Okay. I'm not seeing any hands and I'm not hearing anyone. I've had to remove my headphones with a microphone for the moment. If the sound is okay, I will say like this. But if you could let me know if there's a problem with hearing me.

ANDREA GLANDON: You sound fine.

SUSAN PAYNE: Okay. If anyone feels that I'm not being heard, then please let me know and I will fix the headphone issue. Okay. So we have agenda item two then, which is to review the action items that we had from our last recent calls. First of those is one that is with me, which is to have a draft work plan. I have to give my apologies on this. Bernard has done some work on this and it is something that is sitting with me. Apologies with other commitments, including ICANN74 meeting, I haven't got to that yet. But it is very much on the radar, so I will be endeavoring to have something circulated to the group. I'm conscious that it is something that is outstanding.

Indeed, when we consider that work plan, it may well help inform the point that David McAuley just raised before we turned the recording on, which was whether we consider having a meeting of this group during ICANN75. Certainly I think it's unlikely our work will be finished. I think, if possible, it would be good if we have—and I think that the aim is to try and have our rules in a form where perhaps they're close to an agreed form within this group at least by that meeting. But that doesn't mean that there wouldn't be more work for us to do in terms of we're likely to have a public comment, and so there will be more work to do probably on the rules. But we also, as we know, have a number of other items once we do finish these IRP rules. I think there is certainly some benefit. And perhaps I can explore with Bernard after this call whether we can put in for a request for a meeting space in the hopes that there will be enough of us in Kuala Lumpur to meet in person. So that was the first action item. I can see a hand from Kavouss. So before I come on to the other action items, I'll turn to you, Kavouss.

KAVOUSS ARASTEH: No. I'm very sorry. I don't want to address the issue of—

SUSAN PAYNE: I'm not hearing you at the moment. I don't know if others are.

KAVOUSS ARASTEH: I said that I don't wish to address the issue of having or not having face-to-face meeting in ICANN75 for this group. But I'm addressing that, if you allow me and other people allow me, I could talk about myself. I, me, myself, have been trained to work with a work plan. If we don't have work plan, we cannot work. We need to act. Yes, it might be some reason that it is not prepared. But we need at least to know when that work plan is available. That is essential and fundamental. We cannot work without work plan. I'm sorry. Continuing the discussions without having a target to see what are the expected timelines to finish this work, and in particular, to put an end to the rule 4, which, I don't know, more than a year we are discussing. It may be difficult for some people, maybe not difficult for some others, but there's no qualification to see difficult, not difficult. This is an adjective. But we have to have a timeline to finish that. If you allow me, this is what I would like to submit. Thank you.

SUSAN PAYNE: Thanks, Kavouss. As I said, my apologies. I know that this is an action item for me and I am endeavoring to get that done so that it can be circulated. Indeed, I don't think anyone wants to be finished with this work more than I do. All right.

We can move on to action item two, which I'll just note but we don't have Sam with us on the call. I believe she's on vacation. But that second action item was for Sam to review the language on the fixed additional time. If she still felt that it didn't adequately cover the same issue point, which is something that she raised a couple of calls ago, to propose language that reflected the amendments that she felt we needed to see in advance of this call. So we don't have any revision to that from Sam or Liz. At the moment, I'm taking that there is no amendment or proposed amendment from them forthcoming. Obviously, that doesn't preclude them from coming back on this if they feel that this is a matter of real importance. But I think we can remove this as an action item because we haven't seen any further text from them.

Then moving on to the third action item, which is one for Mike Rodenbaugh, who is the chair or the leader of FAT, of the initiation subgroup. Mike is not with us on this call. But we have been hoping to have a status report from the Initiation subgroup. Again, in advance of this call, the subgroup has had some difficulty in reaching agreement on the topics that they were discussing. Generally, I think there is agreement from that group that some of the matters for discussion need to be referred back to this plenary, and they didn't feel that it was appropriate for such a small group to be handling that. Ideally, we would have a sort of report from that group to frame the areas of

discussion and where the group has agreed or is proposing that has amongst themselves at least to have agreement on what they would recommend into the full plenary. But at the moment, we don't have that.

I have had some correspondence with Mike outside of this call. I think one of the things I'm suggesting to him and I think we will organize is perhaps a further meeting of that Initiation subgroup, which would be in a couple of weeks' time, we need to fix a time for it, which I will join, and to see whether we can reach a kind of understanding on what the report from that subgroup should be into this full plenary so that we can pick that discussion up here. So that is certainly the intent unless there's an agreement within that Initiation group to proceed in some other way. But the intent I think is for us to have a follow-up call with the Initiation subgroup, which I'll attend, and then we can probably have this as something that will be on the agenda for a forthcoming call for the plenary group to start talking about these initiation issues. Kavouss, I see your hand.

KAVOUSS ARASTEH: I'm sorry. I do not criticize anybody. My question was to you as a chair, but not to Sam. You are requested to kindly reply to my question but not staff of ICANN. If the staff of ICANN are helping you to work plan, that is internal issue. We need a work plan. If there was some difficulty, no problem. Next meeting or next, next meeting, but you need to have a work plan. That is essential and fundamental. I request kindly that you kindly and respectfully reply to that, but not ICANN staff. Thank you.

SUSAN PAYNE: Thanks. I think I have replied to that twice now. I don't think I referred it to ICANN staff at all. I said it was sitting with me and that I'm endeavoring to do something so that I can circulate it for the next call. I don't know how much clearer I can be. So thanks for raising that again. I think hopefully that now has addressed your question.

Okay. So we can now move on to agenda item three which is the main topic of discussion. We do have some cleaned-up text from rule 4. Andrea is going to pull up the Google Doc for us to look at. We had some extensive conversation or discussion rather about this draft text, which is close to agreement on our last call. Then there were some issues that came up on the call that were raised by a number of our members.

So in particular, we had some objections from Kavouss, who was on the call here, regarding the clause H which refers to a four-year outer limit. As I understood it, by the end of the call, after some explanation of the intent of that clause as being an absolute outer limit, I agreed that I would look at moving that text from clause H and moving it further up so it is clearer and follows on from clause C that it is an outer limit. So that one reads the clause of the text of clause C, and then when one has that absolute outer limit made it absolutely clear as immediately afterwards.

So I've indicated in this draft document that this is the intent to move that clause but I have not moved it yet. And the only reason I have not moved it is because we have some proposed edits from Malcolm into

that clause H, and I wanted us to discuss that first. I didn't want to lose Malcolm's proposed amendments. If you'll bear with me, Kavouss, I'll come to you in a moment.

We also had on our last call some comments in particular from David. Also Liz suggested that she may look at the text and have some suggestions to make. I think over the last few weeks, we have actually had a few small amendments to the text proposed by Kavouss and by Liz, and I have also gone in to attempt to address some of the comments that came up on the last call, and more particularly, one of the points that Kavouss made about the use of the word "may" in some in some parts of this rule.

So we have a relatively small number of amendments, but I think we should go to the top of the document and talk about them in turn. Then we will obviously shortly get to clause H, but I'm just flagging that we had talked about that on our previous call that amendment proposed by Malcolm but he wasn't with us on the last call. So we are coming back to that to discuss it when Malcolm has the opportunity to be here as well. Okay. Andrew has kindly scrolled up to the top. But before we start, I will turn to you, Kavouss. Thanks.

KAVOUSS ARASTEH: Thank you very much. I had two comments. One is a cap of four-year and the other is use of the terms and language which legally may give rise to some misinterpretation and I would say misuse. The word that we use for claimant sometimes it is an obligation. The obligatory statement normally is used "shall" but not "may". But if it is a request

that the claimant may request could remain “may” but could be added subject to verification, justification, and decision by the panel.

So we should be very careful to some extent, not totally. Some other member of the group agreed with me. And in reply to me, maybe to you as well, said that, “Yes, we need to look at that one.” So I had difficulty with the cap of four years, because we started with 120 days, and then 12 months, and then after the public comments, there was some three years. I may be mistaken. But I don’t recall the four years being supported by many public comment. The three years, yes, there were several inside and outside. But for years cap, I think that we need to look at that one to really see whether we need to put that cap. I’m sorry. I don’t want to repeat that. I have said two or three times and I don’t want to repeat that. I want some action.

Second is the use of the terms and verb that I mentioned. We need to look at that one to see the legal consequence of those terms and verbs that we put in the text. I hope that you kindly take this suggestion seriously and not misinterpreted by somebody nor paraphrased by somebody. Merely, I just draw the attention of us to be cautious in selecting the terms which might have legal consequences or unintended legal consequences. Thank you.

SUSAN PAYNE: Thanks, Kavouss. Malcolm, is that in response to Kavouss’s comments? Or do you have your hand up in respect of something else?

MALCOLM HUTTY: Just a direct response to one particular thing that Kavouss mentioned.

SUSAN PAYNE: Okay. Please go ahead.

MALCOLM HUTTY: Kavouss said that he recalled that there was no support for four years as an outer limit in the public comment, but that there were several reports for support for three years as an outer limit in the public comment. I have no such recollection of those submissions in the public comment. To the best of my recollection, the only public comments in favor of an outer limit were those received from the Registry Group from Verisign, which I believe Dave had drafted, and from ICANN's legal department, and all the other public comment received was against any form of outer limit or oppose. Thank you.

SUSAN PAYNE: Thanks, Malcolm. I would prefer to have worked our way through this document. But I think we have to—

MALCOLM HUTTY: I'm happy to do that. Sorry. I was just simply replying to what has been raised.

SUSAN PAYNE: The difficulty is we have two different outer limits here. The four-year outer limit is the one referred to in H. This is not the repose, it is an

absolute outer limit. In clause C, which if we can scroll down, Andrea, to C, that would be helpful. Clause C, I think, as you all know, is the sort of exceptional circumstances provision, whereby the time limits that a claimant is allowed but we built in at the suggestion of Kavouss. Some leeway, if you like, some circumstance, some ability for a claimant who is otherwise out of time to be able to come to the IRP panel and explain that for circumstances entirely beyond their control. This might include things like force majeure events, some of the types of force majeure events that Kavouss suggested that we want to allow for a possibility to seek leave to file a claim late, and that is what C does. Clause H, which we will move in the document so that it follows immediately afterwards, is merely intended to say that even if you are seeking this permission to file your claim late, you cannot do so beyond four years. That is the intent of that clause. It's not meant to be changing the time limit. It's meant to be putting an outer limit on this exceptional circumstances exception. My understanding, when I was on the call last weekend and having reviewed the transcript again in detail, is that actually, Kavouss, you expressed agreement with that concept of there being an outer limit in that circumstance. Okay. I see a hand from Kavouss.

KAVOUSS ARASTEH: I'm sorry. I don't want to be misinterpreted. I never agreed on limit of four years. You refer to force majeure, but force majeure should be properly described, what are the conditions and circumstances for which force majeure may be applied going beyond three years. Without that, I am not in a position to say that that is right. Everyone could say under the force majeure. Maybe you know or maybe you are not well

aware. In the discussion of force majeure, sometimes there is an expression, self created force majeure. This force majeure is not accepted. If as a result of an individual, some kind of force majeure were resulted, this is not force majeure. Force Majeure is something which normally in a very simple language is beyond the control of an individual.

So if you want to apply force majeure above three years with the total definitive cap of four years, for that additional year force majeure, we need to define what are the conditions of force majeure? Without that, even that one additional year is not accepted. The issue is that maybe some of us just looking into the interests of claimant, but some others may be interested in the interest of the other side. That claimant may raise point against them. So those people's right also needs to be protected.

So, not always one side. Yes, I understand claimant may be not aware, maybe under so on and so forth of action, inactions by ICANN, ICANN staff, that's it, all of them. But we need to be very clear of the additional year if everybody agreed to put an additional year and just refer that after three years, an additional year of not more than 12 months may be considered under the force majeure. The condition of that is described below. We have to mention what is the conditional of that.

Again, I'm talking about myself. I have considerable experience on this force majeure during the decades, and we should avoid any misuse or eventual misuse or unintended misuse of the force majeure. So I hope I am clear. If everybody pushing for the additional one year, we should put the cap for three years but add something, however, under certain

circumstances of force majeure, which is described below, an additional year of 12 months may be admitted or authorized subject to justification, which one complies with the force majeure conditions and also approved or agreed by the panel but not automatic additional year. Thank you.

SUSAN PAYNE: Thanks, Kavouss. I probably misspoke by using the term force majeure. I've been reminded that the terminology we have been using in this group is safety valve. But this is what we have been proposing. What you're suggesting is effectively what we are proposing in this document. Clause C is the language that we have at the moment. It is on the screen at the moment and you can see it. It is a circumstance where the claimant has to ask for leave to be allowed to file their claim late. We have some text in here that we have had for some time. We also have some edits to the description of when those circumstances would be proposed by David between our last call and this one. So hopefully, you've had an opportunity to review this language, but I will read clause C out so that we can take some time to think about it now.

But if we cannot agree this language on this call or at least agree some language that we are all comfortable with, then I would invite you, just as I've invited you on previous occasions, to suggest alternative language that you think better reflects what our intent is. Because otherwise, we simply keep coming back on calls and you yourself have expressed frustration about how long we are spending on this rule. But then every time we come back for a further discussion, there are further

objections to the language and no one is proposing alternatives. So, clause C, I am going to read and then I will turn to you.

It says—and this is after the time limits that the claimant has been given. So, 120 days of knowing or being should reasonably have become aware of being impacted by the action or inaction and the outer limit or repose of 24 months, so two years. We as a group discussed and agreed two years. And then we have this clause C which is the safety valve for exceptional circumstances. It says that the claimant may be permitted—David McAuley has proposed the text by the IRP panel to file its written statement of dispute after the timeframe set forth that I just mentioned. Under certain limited circumstances, such a claimant shall seek leave to file a late written statement of dispute by demonstrating by clear and convincing evidence that either. And then, the first alternative is one unusual to a marked extent circumstances not caused by the claimant and out of the claimants control prevented the claimant from becoming aware of the action or inaction being challenged in the dispute within the timeframes set forth in 4.A or 4.B, or being eligible under the Bylaws as a claimant within those timeframes. Or—and then I will go on to paragraph two. I just need to go back on my headphones. Okay. Hopefully this is still working.

Paragraph two is that there are unusual to a marked extent circumstances not caused by the claimant and out of the claimants control preventing the claimant from being able to file a written statement of dispute within 24 months of the date of the action or inaction being challenged in the dispute within the timeframe set forth in 4.A and 4.B. And then in both of those circumstances, the application for leave to file late a written statement of dispute shall include an

explanation of how the claimant satisfies the standing requirements set forth in the Bylaws.

When we move on to clause D, there is further explanation of exactly what is required of the claimant so that we have all seen that text for many weeks. If you would scroll back up to C, Andrea. I now can see I have a queue of people. So we have this text in clause C. We have some edits that have been proposed by David between the last call and this one. I hope that that reflects the concept that we have been trying to cover in the rule that there should be the safety valve for exceptional and limited circumstances which are out of the claimant's control. Kavouss?

KAVOUSS ARASTEH: I'm sorry, I may not be clear. Let me seek one by one. In C, limited circumstances. What is limited circumstance? It was before exceptional which is much better than limited. But even exceptional—what are those exceptional circumstances or limited circumstances? I don't know why I have to repeat this.

Then I don't understand marked extent. What does it mean marked extent? Unusual to a marked extent. What does it mean marked extent? It has been used two times instead of unavoidable, which was much better than marked extent.

The third problem is that shall seek leave. What does it mean by shall seek leave? If seek is equivalent to request or your mean something else by seek and then leave? What is the combination of seek leave? So,

these are the difficulties that I have. I explained several times, but people propose something that's worse than what it was.

So, if I understand you, 120 days plus 24 months, and after that this C1 and 2 and so on, so forth. But provided that the language should be clear, I don't understand limited circumstances. What are those circumstances which are limited? Or exceptional circumstances? If we don't define them, we have difficulty. And I see that there is some pressure from some other distinguished colleagues to make it more vague than it was. I'm sorry for that. Thank you.

SUSAN PAYNE: Thanks, Kavouss. Liz?

LIZ LE: Thanks, Susan. I apologize for joining late. I did advise Bernie that I had a conflict at the beginning of the call on another meeting. Again, my apologies for joining late.

I do want to touch on the language that is under C subsection i and ii. I think this is something that we discussed the last meeting which is the new change or proposed change from extraordinary unusual and unavoidable circumstances to this unusual to a marked extent. I do agree with Kavouss. I don't understand what "to a marked extent" means. And additionally, one of the things that the concerns that we expressed or expressed on the last call is this language seems to make it the standard for filing the safety valve or exercising the safety valve to be more of a normal process that people can invoke rather than what

was intended when this group talked about the safety valve, which is an extraordinary, unusual, and unavoidable circumstance. So I think there's just a concern of the new language taking away the effect, and essentially then it creates kind of a runaround the current statute of limitations that we're discussing. Thanks.

SUSAN PAYNE: Thanks, Liz. I'll just react to you and Kavouss briefly before we turn to Malcolm and just say I'm sort of slightly at a loss. I would love someone to propose some language. David has done that. He's done that in reaction to a discussion that we had two calls ago, where there was a lot of objection to the terminology "extraordinary" and "exceptional" as feeling that both of those had specific meanings onto the law. I think we all know what we want to achieve. I just I think David has done his best to propose some language that is trying to meet the standard we're trying to describe. But if it doesn't do so, then feel free to suggest something else because I'm at a loss. David?

DAVID MCAULEY: Thanks, Susan. I just have a couple of comments. One is on the last point that you made, you're correct. I was the one that made a comment a couple of meetings ago that in one of the paragraphs we used the word "exceptional" and then the other paragraph we used the word "extraordinary". They're not the same, and so I was looking for some kind of alternative. I think what we're looking for—and this is I think the way I expressed it—is that we get the message across to the Standing Panel or to the panel that's involved to the panel, that this

safety valve should not ever become a matter of routine. Whatever language works to get that point across, I think would be welcomed.

Then with respect to Kavouss's comment about defining limited circumstances, I think I agree with what Becky put in the chat, and that would be to say to my friend with respect, Kavouss, we don't want to define that. The circumstances probably could be infinite. The point I think we want to get across is whatever they are, they have to be exacting. They have to be unusual, exceptional, whatever we come up with, whatever the description is. But at the end of the day, we're putting in place rules that we trust will be applied in good faith and as intended to the best that they can discern by the Standing Panel. We have to trust the Standing Panel. At the end of the day, as Becky said, you have to ask the panel's permission. They're the ones that will decide whether the circumstances described by a claimant are limited, together with whatever term we come up with to say it's exceptional.

Then I'd like to make one other point, just to refer to something Malcolm said earlier about the comments from Verisign and the Registry Stakeholder Group, it is a fair comment that he made that I had a leading role in crafting both of those comments but it was not exclusive. In other words, I had a leading hand in drafting both Verisign's and the Registry Stakeholder Group's comments, but whatever I came up with was well and truly tweaked, believe me. But it's a fair point. I just wanted to make that nuance clear. And that's it for me. Thank you, Susan.

SUSAN PAYNE: Thanks, David. Malcolm?

MALCOLM HUTTY: Thank you, Becky. Okay. So on the issue of—before I do, David, I didn't mean to in any way deny that those were legitimately on behalf of the organizations written or suggest that it would be personal comments on your behalf, only to note that there was a commonality of thinking there. So if you took it in any way to denigrate the inputs of either of those two organizations, please understand that that was not my intent.

Now, as for the substantive matter, Kavouss asked what unusual to a marked extent means. My understanding reading that would be very unusual is what it would mean, and we might say very unusual if he prefers it. As one might similarly ask what extraordinary means, I believe that was the problem before. My interpretation of extraordinary would be not ordinary, out of the ordinary. So to my reading of this unusual to a marked extent actually narrows the cases as compared with the previous language.

I would also ask if we were thinking of reverting what unavoidable means, I don't understand what unavoidable means. It also begs the question of unavoidable by whom? Unavoidable by the claimants? Unavoidable by ICANN? Unavoidable by some third party? It seems unusual. It seems difficult to pass. I think the panel will have difficulty in applying it. But the suggestion that David has put forward seems to accord with what the majority of this group seem hell bent on doing, so why don't we just get on with it so that we can get on with appealing it?

SUSAN PAYNE: Thanks, Malcolm. Liz?

LIZ LE: Thanks, Susan. I do want to come back to your comment about suggesting proposed language or the one who had proposed this language initially to begin with, the extraordinary, unusual, and unavoidable circumstances. We are definitely comfortable with that. But if extraordinary is something that the group is not comfortable with, I would suggest that we could use exceptional in place of extraordinary, I think. If I recall correctly, this conversation started because in some places we use extraordinary. Like in C, we use exceptional, and then in i we use extraordinary. If there is a comfort level of using exceptional throughout, then that would be something that's a position that Org would also support.

I still have concern with at the unusual to a marked extent because that still is not the same bar as exceptional circumstances. If you would prefer that we go back and put the exceptional into the document as proposed language, that's something we can definitely do if you prefer to discuss it here. We will follow your lead on how you want to approach the discussion. Thank you.

SUSAN PAYNE: Thanks, Liz. Kavouss?

KAVOUSS ARASTEH: Susan, you ask me frequently what is my position, what is my suggestion? Am I right? If you ask me my suggestion, in general, I agree

with David, I agree with Malcolm. We cannot define what is exceptional, we cannot define what is unavoidable, and we cannot define what is extraordinary.

English language, like many other languages, is a rich language. If you open anywhere of the synonym for one word, you'll find between 2 or 10 or 15 synonyms. So these are synonyms of each other. So we don't need to define them. But we could add the qualifiers to that. You can use any of them, in my view. The last speaker, Liz, mentioned about exceptional, which is much more often used by other organizations. But whatever you add under exceptional circumstances, the important thing to add is supported by valid justification an argument to be considered by the panel and accepted. That's all. Those who are more involved in this matter could take this general idea and develop that instead of all of these things. Under exceptional circumstances, if supported by valid justification and argument that you put claimant could so and so, and then that's subject to consideration and agreement or approval by the panel. Thank you. I did my best.

SUSAN PAYNE: Thanks, Kavouss. In terms of the supporting requirements, they are captured in the following clause, I believe it is. They certainly are captured. There's a requirement for the claimant to be explaining how they qualify or how they should qualify to be given permission to be late. So I hope you can feel comfortable that we have that already in here.

In terms of where we go in terms of whether we use the term exceptional, extraordinary, or unusual to a marked extent, I'm hearing support for many of those things. I think I will need to review the transcript or listen again to the recording to see whether anything has been captured because I'm not sure whether there's a meeting of minds from people. I think there's a meeting of minds on the intent. I'm not sure we have a meeting of minds on how we capture that. But I will go back and review the recording and see if I can make a suggestion. I think maybe this is probably time to move on from this. I'm not sure we can draft it on the hoof. Kavouss?

KAVOUSS ARASTEH: Susan, we don't need one and two at all. We could embed everything in C under exceptional circumstances if accompanied by valid justification argument to be considered by the panel and agreed upon. And then you don't need to say in one that is about unusual because exceptional circumstances cover unusual. You don't need to talk about your unusual circumstances because we put everything. So you don't need one and two at all. The devil is in the details. If you put everything in C in a more general without going what is exceptional, what is unavoidable, and what is extraordinary, and what is unusual, select one of them. I suggested the exceptional and put in that accompanied by valid argument and justification for consideration by the panel to agree upon. Then you will say that how long time it would use. So we don't need one or two. Because one and two repetitions in what is in the [inaudible] of C. I submit that for your consideration. Thank you.

SUSAN PAYNE: Thanks, Kavouss. So the challenge we have there is that one and two are slightly different. I understand your point regarding the reference to the exceptional circumstances part that maybe we do not need to reproduce that. But one and two are different circumstances or are different scenarios, one being that there is something which prevented the claimant from becoming aware of the action or inaction within the necessary timeframe. And the other one, in two, is that the circumstances prevented the claimant from being able to file their written statement of dispute within that time period as a result of these exceptional or unusual or unusual to a marked extent or extraordinary circumstances, whatever the terminology is. So they are not the same, one and two, so we do still need them. But I take your point about trying to minimize the use of this term exceptional or unusual or extraordinary. Malcolm?

MALCOLM HUTTY: Thank you, Susan. I don't know. I don't know about this. We're going so far round on rounds. We have very few, the usual participants on this call. Each time we meet, it's to cover the same ground with new objections to the wording. Sometimes the same people objecting to wording that was created out of their own objections the last time. How are we ever going to bring this to a conclusion?

Clearly, there would need to be, since there was not an agreement on this, there's never going to be an agreement on this. There will need to be opportunity for the actually capturing and recording properly what the majority opinion and reasoning is and dissenting opinions and reasoning. But further negotiation on this seems fruitless. Surely, we

just need to accept where we stand and report out. I don't know. What do you think, formally, Madam Chair?

SUSAN PAYNE: I think it's already apparent, Malcolm, that I'm at a complete loss because I agree with you. We're going round and round in circles. And I agree with you that—

MALCOLM HUTTY: Well, that's not satisfactory, is it?

SUSAN PAYNE: Well, no. It's not, is it? I think what we need to do, as you say, is I will review the comments on the last few calls and propose some language and see if people will accept it as reflecting something that the majority can live with. But I don't think on this call we have a majority agreeing one way or the other on any of these terms. But I think we are probably wasting our time to talk about it further on this call, and we have other things that we can waste our time on instead. So I think it's probably timely for us to move on and talk about the other main clause where there is an amendment, which I think is H, although we will need to just scroll down. But before we do that, I can see David has his hand up. So I will give David the luxury of speaking before we carry on.

DAVID MCAULEY: Thank you, Susan. I would like to revisit the thing I said before we started recording the call, and that's because Liz, Becky, Kristina, they

weren't here, if I'm correct. I floated the idea that maybe we should at least consider getting together face to face at ICANN75 for a four-hour meeting or whatever, if it's feasible. I'm not suggesting it just to suggest it and create a trip for everybody. It may be too expensive for some. It's just something we ought to visit on list, should we do this. And the reason I say it is the very thing that you and Malcolm were just talking about, and I can sense it in our voices, in our body language that we really can't see on this call. We're struggling with a difficult issue. But this group has never really come together in person. I think it would help us.

So if we were to do that, because ICANN75 is so close upon us more so than in a normal year, we should start doing things like Doodle poll with the question "Do you plan to go to ICANN75?" Maybe no one's going to go, who knows. But if there's anything we can do to help us come together as a group and sort of cohere. By the way, the group is much bigger too, and there's very talented folks out there that show up periodically, if they're going to be at ICANN75. So it's just an idea for us to consider. But if we wanted to consider it, we'd have to start taking steps now to find out who's going to be there, etc., because I know the logistics are not easy. Anyway, it's an idea I floated. I don't want to have a meeting face to face just to have it, that wouldn't make any sense. But this group, in my opinion, is struggling as I think you and Malcolm just mentioned, and we're so close to solving this issue that if we can find a way to do it, we ought to do it. Thank you.

SUSAN PAYNE: Thanks, David. Yes. I think that is one of the things that I will pursue with Bernard after this call. The other is actually that I think we also need to—and this may also require a Doodle poll—revisit the call times. I did manage to run into a couple of our members during The Hague meeting who do not join the calls. Certainly, in the case of at least one of them, it was largely down to the time that has been selected which is not friendly to them in their time zone. So I think we do need to revisit the time of our calls. So we can also do that.

I think I let my frustration show but I think maybe the solution on this clause C, I said I would go back and listen to or review the transcript and see whether I feel there is a meeting of minds on any of the particular forms of wording. But if there isn't, perhaps what we do need to do, given that we know we will probably have to do a public comment on this anyway, we've already spoken about this, maybe we have the alternative forms of language and we have to seek the input of the wider community to try to get a sense of what is perceived to be the best terminology to reflect our intent. I would like to move on to clause H but I see your hand, Kavouss, so I will go to you briefly, please.

KAVOUSS ARASTEH: Yeah, briefly, allow me. I cannot accept that the people considering or categorizing the suggestion as wasting the time. I can't agree with that. I also cannot agree you go to the transcript. We should take the result as they developed. Now we have got clearer idea and better understanding at this meeting, and so on, so forth. So going to the transcript doesn't make any sense. So I am very sorry. Lastly, more importantly, if effort is that to put one or two person in minority and go

ahead in the term on the name of majority and ignore the views of other people, I don't believe that that is correct. Thank you.

SUSAN PAYNE: Thanks. Okay. I think we've got as far as we can on this call on this language. Hopefully, we will be able between now and our next call to have something that we can form a consensus around. Andrew, if we could sort of scroll gently down the document just to see whether there are any other clauses before we get to H that we need to discuss. I think there are not, so hopefully we can. Okay, no. All right. So let's pause here.

The other clause which had a substantive amendment that was proposed to the text was clause H. As I said early on in this call, the intent is to move this clause up so it is more clearly visible as an outer time limit to the safety valve that we've just been talking about at length in clause C. But we had a proposal to this language. So this is the absolute outer time limit, even if there are exceptional or extraordinary circumstances or whatever we call them. That, as originally proposed that the claimant has no more than four years after the date of the action or inaction that they are challenging. That this proposal for an amendment comes from Malcolm and his proposal is that the terminology should instead be no more than four years after the date of becoming eligible to bring the dispute.

As I said, we talked about this a little on our last call and there were comments from Sam, from David, I believe, and from Greg, who were not in support of this amendment. But on that call, we didn't have

Malcolm who made this proposal, and so I'm In order to give Malcolm the opportunity to participate and maybe explain his thinking behind his language, I said that we would come back to this. So this is our opportunity now to talk about this proposed amendment to clause H again.

Before we come to you, Kavouss, if you don't mind, I will just pause and see if Malcolm wants to speak in relation to this because this is the language that he has proposed. But other after that, I'll come to you. So Malcolm, is there anything you want to say? You may not. You may feel that the suggestion you've made stands on its merits, but I want to give you the opportunity to if you'd like to.

MALCOLM HUTTY: Thank you. Well, the wording that I put down was intended as a compromise that would clarify that there is not an intention to ensure that people can never bring a dispute, that they are shut out under all circumstances. And there we are, but if the group is not satisfied with this language, I would be content to revert to the language of the Bylaws and the language that is stated in the Bylaws itself. Let me get it, I'll read it to you. After the claimant becomes aware or reasonably should become aware of the action or inaction giving rise to the dispute. If we cannot agree on alternative language then clearly reverting to the Bylaws language is the proper thing to do. Thank you.

SUSAN PAYNE: Thank you, Malcolm. Just so that I understand you correctly, you're suggesting if the group is not comfortable with the term—

MALCOLM HUTTY: My suggestion isn't agreeable then we should revert to the Bylaws language.

SUSAN PAYNE: So you’re suggesting that instead that it should say no more than four years after—

MALCOLM HUTTY: The claimant becomes aware or reasonably should have become aware of the action or inaction giving rise to the dispute. I’ll give you the reference if you’d like. It’s under N.4.A which is the first element of the grant of authority to [inaudible].

SUSAN PAYNE: Thanks, Malcolm. I’m struggling to understand how that would tie in with—I think it’s clause B where we already have two years from them becoming aware or reasonably ought to become aware.

MALCOLM HUTTY: It ties in with the Bylaws.

SUSAN PAYNE: I understand that. I’m just—

MALCOLM HUTTY: Just to make sure that the rest of it ties in with the Bylaws, too.

SUSAN PAYNE: I'm struggling to understand how these four years could ever be relevant. I'm sorry, I'm advocating. Well, I'm not advocating but I'm sort of questioning because I think we already have two years as a limit in clause B. So I don't understand how both two years and four years could apply on the same test.

But I said that I had Kavouss's hand so we'll come to him, then we also have David and Liz. We probably will run out of time. Kavouss?

KAVOUSS ARASTEH: Thank you, Malcolm. It is not the matter you bring the language of Bylaws. In what context that language of Bylaw? We have two years. Then we have additional year on the unusual, unavoidable, or I would say whatever type of circumstances, and so on, etc., circumstances. But you bring another year that may have negatively impacted the two years and three years. If you want to do H, put not more than two years, bring anything, I agree with that. But not add another year which negates the two year period and negate the exceptional circumstances, and so on, so forth. So, under which circumstances this additional year, which on the negative direction or reverse direction, you say not more than four years, that means between three years and four years, still someone could bring something. But under what situation? Exceptional circumstances, we discussed that in C. Two years, we discussed that in A and B. So, why we need this? But I have no problem if you change the four years to three years. No more than under no circumstances more

than two years, anyone could bring anything. That is acceptable. That means put an end to it, but not create another year, which is not attributable to the condition of unusual or exceptional sequences, nor to the condition of two years.

So I'm sorry, I cannot agree with the four. I could agree with the three. So whether people wants to put me under minority, that is their choice. But I do not agree. That legally is wrong. It put a negative point on what we have done before. If we slightly change the language of David or some other people are going to do that in C, one and two—if you keep one and two or just keep C and put some impact on previous one which is B. So I don't want to have this additional, which is misinterpretation and misuse and negatively impacting B and C. Thank you.

SUSAN PAYNE: Thanks, Kavouss. Just to reiterate, this is meant to be an outer limit on C. If we don't have an outer limit on C then there is no limit on it and it could it could apply for any number of years. There are some, I think, who feel that that is the correct outcome. But this is not extending time. This is putting an outer limit on the term.

KAVOUSS ARASTEH: Excuse me. You're misinterpreting me. I said that put three years, but not four years. I agree with you if you put three years, but not four years. I'm sorry.

SUSAN PAYNE: Okay. All right. David?

DAVID MCAULEY: Thank you, Susan. You're correct at the last meeting, and I recognized Malcolm wasn't there. I was one who spoke up in favor of the original language in H, that is more than four years after the date of the action or inaction being alleged in the dispute. I was concerned with language suggested of becoming eligible to bring because I thought it was imprecise. I mentioned, as I've done this before, that in a system where decisions are binding and create precedent, the concept of fairness requires, in my opinion, at least some element of certainty for the community, and that this would undermine that. So becoming eligible, for instance, if you put it in the context of a registrant who six years after the action first registered a domain name and is unhappy with how a policy affects the registrant, would they be eligible to bring an IRP? That would open the doors to endless disputes with no time cap on it.

I also remember—and I recognize Malcolm's point, I mean, he's being very consistent—but I remember making arguments, including on list as well as verbally here in meetings, that in my opinion the Bylaws do support an overall cap, and there's notions of fundamental fairness stated in the Bylaws. I made the case, I'm pretty sure, an e-mail a year or two ago, but the long and the short of it is I just think that the language as originally drafted after the date of the action or inaction being challenged is the appropriate language, and that's what I support. Thank you.

SUSAN PAYNE: Thanks, David. Liz?

LIZ LE:

Thanks, Susan. I think that the summary that you provided in terms of the intent of what H is provides is perfectly put. Really, it is intended to be an outer limit, it's intended to provide certainty to IRP claims. So I think to measure it from a conditional point of when a claimant becomes aware or should have become aware of a dispute does not create that certainty that is intended by this section. Which is why when we proposed this language, we drafted it so that there is a point from which you can measure what the outer limit is, and that is from the date of the action or inaction of the dispute itself.

Then I do want to just address the point that Kavouss said about the four years. I think this was something that we addressed at the last call. The four years is the statute of limitation in California for contract claims. That is where the four-year comes from. I think this group previously discussed different iterations being two years or three years, and there was not a comfort level of either one of those periods, and this is where the four years language arose. Thank you.

SUSAN PAYNE:

Thanks, Liz. As I recall, there was also an offer after a request from Kavouss that this should be something that was explained in the covering explanation or the covering record of our work. I believe you and Sam had agreed to that.

Okay. I can see Kristina. Kristina, you will have the last word, and then we will need to wrap this call up. Thanks.

KRISTINA ROSETTE: Thank you. I certainly agree with the point that David has made about certainty. I think what would be helpful to me, though—and in the interest of time we may need to do it on the list—is it would be helpful for me if Malcolm could share the rationale for the change, namely, the problem that he's seeking to solve with this proposed change. Because that's really what I'm struggling to identify, and without having a better sense of what the problem is we're trying to solve, I keep coming back to, in my view, the greater certainty provided under the original language. Thank you.

SUSAN PAYNE: Okay. Thanks, Kristina. All right. I don't think we do have time for that now, but I will invite Malcolm if you would like to share that on the list. But absent which, I think we certainly appear not to have a great deal of support for changing the language as Malcolm has been proposing. But open to you, Malcolm, to continue this discussion and share your rationale on the mailing list.

Okay. All right. We are really at a time now. Just a reminder that our next call, it will actually be in three weeks time, and that is partly to reflect the fact that I am not available next week and that we will then, therefore, in two weeks time have tried to organize the consolidation and the initiation subgroups to have follow-up calls. And then we will reconvene on the 19th of July. But again, there is a document which is open for editing if people have suggestions on edits to the language, but

we really are trying to bring this rule 4 to a conclusion so that we can move on with other work.

Thanks very much, everyone, for your participation and time on the call this week. So we can stop the recording. Thanks, Andrea.

ANDREA GLANDON: Thank you, everyone. Have a lovely rest of your day.

[END OF TRANSCRIPTION]