
BRENDA BREWER: Good morning, good afternoon, good evening. This is Brenda speaking. Welcome to the IRP-IOT plenary call on the 26th of July, 2022.

Today's call is recorded. Kindly state your name before speaking and have your phones and microphones on mute when not speaking.

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

SUSAN PAYNE: Thanks very much, Brenda. And thanks, everyone, for joining so promptly. This is our plenary call. So as always, we'll start with a quick review of the agenda and updates to statements of interest. I'll come back to the SOIs just when we've gone through the agenda.

So Agenda Item 2 will be reviewing the action items. There are a couple of those there. We'll briefly have an update on the possibility of an in-person meeting at ICANN75. I'm hoping that David will be able to give us an update on the Standing Panel Selection Committee work. Then Agenda Item 5 and sort of 6, I think, go together, which is basically completing the discussion on Rule 4 and just the proposal for how to go forward with that. And there's confirmation of the next meetings. We got a Consolidation Subgroup meeting tomorrow. And our next plenary will be on the 23rd of August. And then I do have, time permitting, an AOB item, which is just to look at what we need to start working on next on the assumption that we are close to having completed our work on this Rule 4. And the two sub-teams that we have working at the

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moment are also both reasonably close to wrapping in their subgroups and bringing their work back to the main working group.

So with that, I'll just go back up to the updates of statements of interest in case there are any.

Oh, and David is mentioning he has also got an AOB item. Thanks, David. So I will make sure to leave some time.

And updates to statements of interest? Please speak now or forever hold your peace.

Perfect. Thank you very much.

And, David, just for time purposes, how much time do you think we need for your AOB item?

DAVID MCAULEY: Very little, Susan.

SUSAN PAYNE: Okay.

DAVID MCAULEY: Thanks.

SUSAN PAYNE: All right. Lovely. Thank you very much.

All right. Then let's move on to our agenda proper. So Agenda Item 2 is reviewing the action items. They're both really sitting with me. One is the draft workplan. With apologies, this is still a work in progress, but it my item of AOB does somewhat influence that. And also, I'm hoping, after our consolidation call tomorrow, I'll also have a better picture on the kind of timing on that piece of work, too. So apologies again that this is still outstanding, but we are working towards having a decent workplan that we can share with the group shortly.

The second agenda item was for me to arrange a meeting of the Consolidation Subgroup to finalize Rule 7. I'll just give a quick update from that consolidation group very briefly. We met last Tuesday, and then, as I say, we have this follow-up meeting tomorrow. We've got, I think, a close-to-final version of Rule 7. A couple of things did come up when we started our review of the close-to-final text that may require a bit more thinking about. But hopefully the call tomorrow or, at worst, perhaps a subsequent call to that, should see us being able to wrap that work up and report back in to the working group. Obviously, the whole of the work of that group and the recommendations coming from that sub-team is for the review of this full plenary working group, but we will have some specific items where, as a sub-team, we either didn't reach agreement or we felt it wasn't something we should reach agreement without the input of the wider plenary team. So there are some specific items we will be coming back and asking for the plenary group to focus on.

So I think that's all from my perspective as an update for now. I'll just pause and see ... I think David is probably the only sub-team member

who's—oh, David, sorry, and Liz, rather—so I'll just pause and see if either of you wanted to add anything.

DAVID MCAULEY:

Susan, hi. On the Consolidation Sub-Team, I think your summary is excellent. I think we're really close, and I'm looking forward to the meeting tomorrow. I think we can finish. And we will come back with several questions for this group. Thank you.

SUSAN PAYNE:

Lovely. Thanks, David. Yes, fingers crossed. Hopefully, we can power through the rest of that.

All right. And in terms of—it's not specifically on the agenda—the Initiation Subgroup, we will either be having a follow-up call or we will be endeavoring to finalize the report from that group. I think there's not much more progress that can be made in that sub-team, and so they definitely had, again, some questions or some issues that they will be bringing back to the full working group for consideration where it wasn't possible to reach agreement in the sub-team. So hopefully that is something that will be back on our agenda for perhaps our next plenary call.

Okay. So moving on to Agenda Item 3, this is regarding the possibility of an in-person plenary at ICANN75. And I'm going to defer to Bernard on this one.

BERNARD TURCOTTE:

Thank you, Susan. All right. I sent an e-mail asking people about a month ago if they would be available for such a meeting. I did not get a significant number of responses. After talking about it with Susan, we thought we would check here and see if people are A) going to ICANN75 in Kuala Lumpur in September and if they would be interested in meeting with that. And basically that decision should be taken today because the time for arranging these meetings and the rooms is quickly coming.

So thank you, Flip. So I have Flip.

Anybody else attending ICANN75 and interesting in participating with all reserves that, of course, we do not know at what time we can get a room? So, yes, that will be a factor.

“I will be attending and I’m interested in the meeting.” All right. Susan Payne. Excellent.

Anybody else?

DAVID MCAULEY:

Hey, Bernie, it’s David. I’m just having a little bit of trouble with the chat. I need to fix it because I want to put a chat in for you. But I plan to attend—that’s subject to changed based on conditions—and would be very interested in the meeting. I think you’ve heard me say that before. Thanks.

BERNARD TURCOTTE:

Yes. Very good. All right.

GREG SHATAN: This is Greg Shatan. I'll be there as well.

BERNARD TURCOTTE: Okay. Interested in attending?

GREG SHATAN: I'm saying I'm interested.

BERNARD TURCOTTE: Okay.

Kavouss, I see you have a hand.

KAVOUSS ARASTEH: I'm very sorry. I don't understand. How could I tell the IOT to send the link with the agenda 24 hours [earlier]? Why should I spend time going inside the terms of the e-mail I received to find the link? When you send the agenda, I respectfully request you to kindly also attach to that the link.

BERNARD TURCOTTE: Are you talking about the link to the document?

KAVOUSS ARASTEH: The link to this meeting—the virtual meeting.

BERNARD TURCOTTE: Ah, okay. I understand your point now.

KAVOUSS ARASTEH: This is not the first time I'm attending ICANN—at least from 2011—but recently, the last two years, not only you but also David McAuley always in the other one forgot to put the link. So I have to lose 10 minutes or 15 minutes into the terms of the e-mails to find the link. And sometimes people put the link for the next three months. How could I do that? Please kindly, respectfully—I plea to you, I request of you—if you accept me as a member of this team, please send the link. If no one wants the link, please send it to me. And I thank you very much.

BERNARD TURCOTTE: Okay. We'll work on that. It's just usually that Brenda schedules those and sends the link separately, usually right after the call we're having for the next call. So I have not had a request for that, but we will be happy to do that in upcoming agendas.

However, I will go back to my original question. Will you be in Kuala Lumpur, and are you interested in a face-to-face meeting of this group at ICANN75?

KAVOUSS ARASTEH: Still we have not found out the face-to-face for the CRG. We are not planning another face-to-face. There are many things I just don't know. And I'm not God. I don't know. I planned to go to Kuala Lumpur. In fact,

I have asked the Fellowship from ICANN. They have not replied to me. And I'm waiting for the reply of Joseph/Jesus to reply. Whether this request is accepted or not, the GAC agreed with that, but ICANN has not yet applied, so I cannot say.

BERNARD TURCOTTE: All right.

KAVOUSS ARASTEH: And I also sent one of the copies of that request to Joseph. You know that. And it has not been answered. So I don't know. But if there is answer, I will come. If there is no answer, I will not. Thank you. And then I said that, if there is any meeting, it should not be at the same time as the communique of GAC because I am part of that. So we should avoid that. Thank you.

BERNARD TURCOTTE: All right. Thank you, Kavouss.

All right. Anybody else? Malcom? Scott? Anybody else?

No.

SCOTT AUSTIN: I will not be there.

BERNARD TURCOTTE: All right. Thank you, Scott.

MALCOLM HUTTY: I don't believe I'm going to be there, although it's possible that that could change.

BERNARD TURCOTTE: Okay. Great.
Becky, will you be in Kuala Lumpur?

BECKY BURR: I will indeed be in Kuala Lumpur.

BERNARD TURCOTTE: And if there's a meeting and it is possible for you to attend, would you attend?

BECKY BURR: I will indeed.

BERNARD TURCOTTE: All right.
Well, as a basic, we do have a confirmation that at least we would have a plenary.
And Mike has also said he plans to be there. All right. Great.

So we will proceed to look for a room and a time, and we will advise the group as soon as we have confirmation of this. Thank you very much.

And I'll return this to Susan now.

Kavouss, your hand is still up.

KAVOUSS ARASTEH: Yes. Please kindly ensure that your meeting should not be at the same time as the CRG as well. Thank you.

BERNARD TURCOTTE: All right. Thank you.

SUSAN PAYNE: Okay. Lovely. Thank you very much. All right. Agenda Item 4 then. We are—ah. I'm going to turn this one to David, who I hope can give us a quick update on the standing panel. Thanks, David.

DAVID MCAULEY: Thank you, Susan. Hi, everybody, again. And Susan has asked that I update the group on the work that the Community Representatives Group is doing to nominate members to an IRP standing panel, nominate those members to the ICANN Board. And so I'm happy to give an update.

And first I'm going to see if I've fixed what I'm trying to do in chat. And I'm trying to put in a link to our wiki. Oh, maybe it worked.

So let me just talk a little about this Community Representatives Group. We were constituted by nomination by the various communities. And I should mention the members of the group. Three of our members are here in this group. That is myself, Greg, and Kavouss. We are all members of the seven-member Community Representatives Group. In addition to us three, the other members of this group are Edowaye Makanjuola from the GAC, Cheryl Langdon-Orr from ALAC, Donna Austin from GNSO, and Heather Forrest from GNSO.

We were put together operationally at the end of February and, since that time, we've been meeting pretty regularly. And we've been doing organizational matters, administrative matters. We have terms of reference that were well-developed. We have an extraordinarily good support group from ICANN Org. Sam and Liz are in it, Mary Wong is in it, Julie Bisland, Lauren Hejazi, and Kathy Schnitt. We have really good support.

One of the first things that we did organizationally is we looked to hire a consultant to help us in our deliberations. This work is not dissimilar from what the NomCom does. And ICANN had come up with a short list that they had worked on and vetted and came over to us to look at these candidates to deliberate about it and to make us a selection, which we did. ICANN Org then went off and did contract work.

Sam and Liz, I'm going to close the consultant. I think this is public information now. It's Odgers Berndtson. They are an organization ... We're working with the lead partner, a gentleman by the name of David Webber, out of the Brussels office. This is an organization that has worked in NomCom work before. It's very good.

And so we've done other things, including ... We established what are the qualifications that we're looking for. They're all driven by the bylaw. If you go back to Section 4.3, you'll see what Section J says about what a panelist has to have. We're working with some flexibility on things like diversity to make sure that we have a diverse and adept panel. We have talked about how we're going to work. Amongst the terms of reference is an obvious strong term of ... I'm sorry. Rules of engagement is an obviously strong one on maintaining confidentiality with respect to candidates and distance with respect to candidates. So I'm not going to get into who the candidates are. We have 99 applications. I went mention who they are. I frankly don't know who they are yet. We are on the verge of finding out in the next meeting. In other words, our organizational and administrative work has taken us to this point where we've done a lot of putting things in order.

We will be having four working meetings. We meet every Monday typically. We will not meet next Monday while the Odgers team is doing a little bit more of their organizational work to present the candidates to us. And we will start the process on Monday, August the 8th. We have four meetings scheduled in August, which is an aggressive schedule. We're doing well in that respect. We're making good use of lists. We have a good group, a good staff support. I'm very optimistic that things will move in good shape, in good order.

So what I want to say now is we have some momentum and we're moving forward. And I am told that, amongst the 99 applications that came in, we have a good, rich group of talented people to select from. So I'm very happy to hear that. And I was asked to chair the group. The

chair is really just administrative. I am a working member of the group, too. And we're up and running.

That's about it, Susan, unless there's questions that I can answer.

SUSAN PAYNE:

Thanks, David. I don't see any hands at the moment, so I will just ask a quick question. I note that the bylaws talk of—or I think we've seen talk of—I think, six standing panel members. But it's something like at least six or similar.

DAVIC MCAULEY:

At least seven.

SUSAN PAYNE:

At least seven. Thank you. And is that what you're aiming at? Are you aiming for seven, or is their flexibility on that, do you think? Or do you not yet know? Does it somewhat come down to the review of the candidates?

DAVID MCAULEY:

In some respect, it'll come down to the review of the candidates. So obviously the floor is seven, but we're talking preliminary amongst ourselves—and remember we haven't seen the candidates yet—of a group that would range from seven to eleven. Something like that.

SUSAN PAYNE: Excellent. Thank you.

 And Kavouss?

KAVOUSS ARASTEH: If I'm not mistaken, David did not mention the name of Greg Shatan.

 Am I right, Greg?

 Yeah, you forgot to mention him. Thank you.

DAVID MCAULEY: Okay. Kavouss, thanks. I thought I did mention Greg, but I want to make sure that I mention everybody. So it's the four people I mentioned plus three of us from this group: Kavouss, Greg Shatan, and myself.

 By the way, Kavouss also mentioned in our discussion on the prior list item that the CRG will attempt to be meeting at ICANN75 in a face-to-face manner. We are trying to do that for two purposes. One is to move things forward substantively, and two is to enhance the group dynamic so the seven of us get more comfortable with us, etc., etc.—you know, the personal element of a face-to-face meeting, which I actually personally put a lot of stock in. So we are trying to do that. It's not confirmed.

 So that's all I really have to say right now, Susan, unless there's other questions.

 Kurt, please go ahead.

KURT PRITZ: Thanks, David. Thanks for doing this. Are the 99 candidates from the RFI that was published a couple of years ago, or was there a new solicitation for candidates that developed this crop of 99?

DAVID MCAULEY: It's this solicitation. I think it was in March of 2020.

So let's go to Flip next. Go ahead.

FLIP PETILLION: Thank you, David. First, Susan, I would like to stress that I'm raising my points here in my personal capacity and in my capacity as the representative of clients in IRPs. I hope that's clear.

I see several problems, David. One of these is that I see people in your list—and I've raised them before, by the way—who have absolutely not experience with IRPs. So I wonder how these people will actually gather the skills to intelligently participate in the discussion/selection process—whatever takes place (after all these years, by the way). That's one point.

Second point. Again, I'm not here raising this as a representative of a client—past, current, or future—but I am very honest with you and open. I would raise this if this is necessary. You are actually setting up a selection process where one of the parties who will definitely be part of an IRP is not only participating in this standing panel organization selection education but will be the party in an IRP. And any other parties

absolutely are not involved here. And the reps from different constituencies or groups will not remedy the lack of the representation and presence of these potential claimants, be they already active in the community or not. That's irrelevant.

And then, third point: there is a lack of transparency. It is typical in arbitration that parties to an arbitration exchange through their counsel, and sometimes indeed information sticks to the counsel and doesn't need to go the clients. But at least their representatives are involved in the selection process. Here that is absolutely lacking. So anybody who will want to initiate an IRP will actually have a very easy task to do. And this raises that point that only the other side, which is ICANN, has been involved and has not been transparent in the selection process of the standing panel.

I believe that there are constituencies who have raised at least some of my points in the past, many years ago, and despite that, I see that these have been unaddressed. And, again, if it's not me ... And as this information in this call is public and can be consulted by any lawyer who is willing to represent a claimant, they will be aware of these points. And if I am a future representative in an IRP, I will raise these points. I can't be more clear than that.

So my question, David, to the group is, how do you envisage to examine and address these issues? Because, frankly, when I'm initiating an IRP, I am interested in obtaining a binding, final, enforceable award. I'm not interested in an award where I will have some opportunities to invoke the nullity of the award because the selection process of the panel was inappropriate. I'm happy to address any question you would have on

this. I would perfectly understand that you need to digest this. But here is my honest, open opinion.

DAVID MCAULEY:

Thank you, Flip. So I will be brief in my reply just because it's Susan's meeting and not mine. And then I guess we should go to the queue if it's okay with Susan.

But let me just mention that, as a chair of this group—and I say this with great respect because I've worked with you, Flip, in a couple of groups, and I've seen in others, and I have a tremendous amount of respect for what you do in this community—I do disagree with you. The process that's in place has gone through two crucibles. One is the IANA transition, in which the bylaws was written. And the bylaw sort of directs this. And then the second is that the members in the CRG were picked by the community at the request of ICANN. And the community put forward these names. I was nominated, for instance, by the ccNSO. This will be scant comfort, but I can tell you that, in the working of the group, the people involved—the seven involved—are intelligent and appear to me to be objective. I know that's ... Take that for what it's worth.

But let's go to the queue. Flip, your hand is still up.

Becky, I think your hand is next. Why don't you go ahead?

BECKY BURR:

Thanks. And, David, I think that you said a lot of what I was going to say: this arrangement whereby the community selects a panel, a slate, of

standing panelists that is confirmed by the Board was part of the transition with the product of the work of the CCWG on Accountability. It was vetted over and over again in public comments. And the value of having a standing panel with true expertise on what ICANN is and how it works was conceded by the community or was embraced by the community as a way forward.

And my understanding is that Org providing Secretariat assistance but that the community group made the determination about what expert it wanted and, [if] running the calls with that expert[,] the calls for expressions of interest were widely published and apparently got a lot of responses. Notwithstanding the intervention of COVID between now and then, the level of interest remains very high.

Moreover, all of the provisions for the selection of the standing panel have been in the bylaws and in the draft of the bylaws since 2015 and finally adopted in the 2016 bylaws.

So I hear what you're saying, Flip, but I think the community has expressed its will and its preference for how this panel should be created.

DAVID MCAULEY:

Thank you, Becky.

Liz, you're next. Please go ahead.

LIZ LE:

Thanks, David. Just adding on to what Becky and David have already said, there are just a couple of things I want to note.

First of all, with respect to the call for expression of interest, that was put out for people to apply to be a standing panelist. That was something that we discussed with the IOT. It was something that the IOT was a group reviewed in terms of the requisite experience level and preferred skills. And we did that way before the call was published.

And I think the role, in addition to what Becky said with respect to how the community is involved in this and what the community has expressed in terms of how this should move forward, that ICANN Org plays as part of this process of composing the standing panel is actually something that is written into the bylaws. And it's a defined role that was agreed to in the CCWG in terms of that ICANN Org has a responsibility of assessing and providing to the CRG a set of qualified candidates from which they would then make their selection and nomination of the slate for the Board's approval.

I understand the points that you've raised about the ability for the parties to an IRP to choose their arbitrators or their panelists, but I think that's conflating the two issues of what happens with an IRP and what is the work that's being done here to establish that standing panel. That standing panel's work does not in any way supplant the ability of claimants and ICANN to select the arbitrators or the panelists that would preside over a particular arbitration matter. This is actually set out in the bylaws itself in that, once there's a standing panel in place, the panelist to each matter would be chosen (one by ICANN, one by the claimant), and then those two panelists would then choose the chair. So

I think you still have the ability to do that, definitely. The work right now doesn't obviate that ability.

And then, finally, I do want to speak in terms of your point regarding transparency. We have, as the CRG (and also as ICANN has) been transparent as possible with respect to the work that has been undertaken to compose the IRP standing panel, respecting that there is a confidentiality component that is involved that we must preserve as the process is undergoing.

So I encourage you to, if you're not already doing so, follow the work of the CRG on the community wiki that David, I think, put the link for into the site. And the meetings are recorded. So where there's not a confidential discussion that's ongoing, the transcripts are posted, and you can follow the work of the group on the wiki. Thank you.

DAVID MCAULEY:

Thank you, Liz.

And I'll just mention to everybody that I've been managing the queue, probably appropriately—it's not my meeting. I was going to draw a line under Kavouss after I went to Kavouss. But Kavouss and Flip, could you please be brief in your replies? I'll go to Kavouss first. And then let's put an end to this because the IOT ... Flip raises an issue. It's one I don't agree with, but he raises an issue. I don't think the IOT is going to solve this, and it's not my meeting. So Kavouss, over to you, and then to Flip.

KAVOUSS ARASTEH:

Yes, David. I don't understand what Flip is talking about. Does he have any doubt about these seven members? At least five of them are the heavyweight, long-term, outstanding, and top experts: Cheryl, Greg, David, Heather, and Donna. Then the sixth one is myself: ICG, CCWG, CWG, and many others.

So, Flip, if you have doubts about me, I can resign and give my place to you. And I tell the GAC that someone objects to the representative designated by GAC, and he replaced me then. Kindly apply to GAC [inaudible] I can't talk about the other member of the GAC, but I can talk about myself. So I don't know whom you are talking about who doesn't have sufficient experience in the IRP. Maybe you are the only one having sufficient experience in the IRP. I don't know which panels you have participated in. I don't know which cases you have treated. I don't know which vote you have given. I don't know which actions. But if you have doubts about these six people, I said my views about the five. They are all heavyweight, longstanding, experienced, outstanding people known by the entire community. And I've talked about myself since 2011 up to now. I have been in all these groups.

So still if you have doubts about somebody, please be clear. Or if you want to be added, there is no problem. There is no limit on the seven. It could be nine. It could be eleven. Just ask ICANN. ICANN could include you as a representative of ICANN or your community. There is nothing. We would be very happy to have more people. I have listened to you. You have sometimes (or many/most of the time) very useful, I would say, comments, very useful ideas, and they're much appreciated.

So please kindly be clear without accusing or asking somebody that is not qualified in your view. So please kindly be clear or apologize for what you said.

DAVID MCAULEY:

Thank you, Kavouss.

We're now going to Flip and then back to Susan. So, Flip, over to you.

FLIP PETILLION:

Thank you, David. I would only ask two things. First, as I said, my interventions are from an operational/intellectual point of view. I am interested in a system that works. Past, current, and future clients want to call upon the IRP process when they believe in it, when they believe that they can get a useful outcome. So the criticism is constructive. It's meant to be constructive.

Second, I offer to be available to discuss these delicate, important points. So if you want me to assist to some or more or all of your meetings, let me know, and I will make myself available. Thank you, David.

DAVID MCAULEY:

Thank you, Flip.

Susan, back to you.

SUSAN PAYNE:

Thank you. All right. Thanks very much.

And, Flip, thanks for raising that. I think, as we understand, your concern is not about any specific person. And certainly the suggestion from Kavouss—that he is offering to stand down—I didn't hear being what you are seeking at all. But I think it's good for us to have aired this. It wasn't really what we were intending to discuss on this call. And indeed this group is not the one handling the selection. But there is overlap between the group, the work of the standing panel when appointed. And so this is the reason we have these updates. But it's as well to have this aired and to have had this discussion. And you've heard the reactions back. And I think we can leave that here. But thanks again for that sort of spirited discussion on the appointment of the standing panel.

And speaking for myself, certainly I'm pleased to hear that the work is progressing and trust that we will have a standing panel soon, since that is something that has been required under the bylaws for, really, some years now.

All right. So we can move on, I think, to our next agenda item, which is Rule 4—so just basically to finalize our discussions on Rule 4. And indeed Agenda Item 6 is really the process for next steps on Rule 4. And I think, to some extent, these are overlapping items.

So, Brenda, if you could pull up the clean version of Rule 4 that was the Google Doc I circulated ... Thank you so much.

All right. And I can see two hands, one from Kavouss and one from Flip. I am assuming that they are old hands, but I will just pause in case—

KAVOUSS ARASTEH: No, it's a new hand. It's not an old hand.

SUSAN PAYNE: All right.

KAVOUSS ARASTEH: I am addressing David McAuley, the Chair of the group. He is responsible to reply. To whom Flip pointed his views that there are inexperienced people in the CRG, whom he was aiming at, he should be very clear. He should answer this question. If you want to be added to the team, this is not my duty. But if he has some doubts about somebody, he should clearly mention whom he was aiming at. Allow that person to defend as appropriate. So I don't want to listen or hear some of these things where somebody is putting in doubt the qualification of others. So I am not very much convinced of this sort of statement.

So, David, please kindly clarify the matter. How would you resolve the issue before we attend your next meeting? Thank you.

SUSAN PAYNE: Thanks, Kavouss. I do think this is a matter to be taken offline to some extent. Certainly my reaction to what Flip said was that he was talking about experience in the sense of being a practitioner who has participated as a practitioner, as a legal representative of a party in the IRP. And I don't think that his comment meant anything more than that.

But, David, I see your hand.

DAVID MCAULEY:

Thanks, Susan. Just because Kavouss asked me directly, what I want to say is I agree with Susan, Kavouss, that we should take this offline.

But, two, I also agree with Susan in that the context in which I heard Flip was that a personal criticism was not being leveled but rather a constructive criticism of an overall nature.

So I think it's best if we take it offline and not further complicate this meeting. And give me time to think about it. Thank you.

SUSAN PAYNE:

Lovely. Thanks, David.

All right. Let's move on to our agenda item, which is, as I say, the review of the Rule 4 text. Before this call, I circulated a cleaned-up version. I was not circulating that with ... It was very recent. I wasn't necessarily anticipating that you would all have time to look at it. And so what I want to do is just quickly introduce this text.

But I would just caveat that by saying that none of this really now is new. This is the text we've been talking about. I have just taken the opportunity to go in and create a fresh Google Doc so that we are starting from a clean base and to tidy up some of the text where there was redlines so that we now have it accepted.

And so this is what I hope reflects the discussion we had over some weeks but most particularly on our last two calls and where I believe, to the extent that there was disagreement, as close as possible reflect what I think most of the group were in agreement with. And so that is what I've done. And so there are not substantial changes over the previous version that you've seen.

Kavouss, I see your hand, but let me just explain what I have done first, and then I will come to you. So I will not ignore you. Don't worry.

So if we could scroll down, please, Brenda, to the next section or couple of sections ... Sorry, I ... Yes. On B. That is not new text, but we had had a comment from Kavouss expressing concern about the use of the term "may," but there was some discussion on that on the list and, I think, on one of our calls, and a feeling that, in the context of the use of the term "may not," that is appropriate language. It is not unclear in that context. Clause B is saying that you may not file more than 24 months from the date. And that term "may" is acceptable in that context.

Clause C is where we had quite a lot of our discussion. And we had sought to have alternative language to the use of the term "exceptional" or the use of the term "extraordinary." And on our previous call, David had suggested an alternative, which was, I think "unusual to a marked degree" or something like that. That also was not really seen by the group as being ideal. There was, again, a lot of discussion about whether this was precise enough or indeed whether it had changed the nature of the test.

And so my proposal, based on my understanding of the discussion from the group and where people supportive, was that, whilst in the introductory language we've moved to the reference the limited circumstance in Subclause 1 and Subclause 2, we refer back to "exceptional circumstances" as being, I think, something that people felt comfortable with or at least more comfortable with. And so at least for the purposes of taking this out to the community when we have a public comment, my proposal is that we should stick with "exceptional" and take it from there.

And I think the only other thing I wanted to flag, if you wouldn't mind just scrolling down to the next clause, is D. This is not new text, but I have moved it up. It was the clause that was H at the bottom. But I know, when we talked about this provision, Kavouss had expressed a desire to see this caveat or, rather, this time limit be more clearly visible when talking about the safety valve. And so I've moved it up so that it's directly under Clause C, as I said that I would. And subsequently subsequent clauses have been reamended.

And we have reverted back to that time period of "proposed to be four years," being from the date or inaction being challenged in the dispute.

We did discuss extensively Malcolm's alternative proposal. And really there was not support from the group for the change that Malcom had proposed, although that change is, I think, still captured in comments to this document so you can remind yourselves.

In terms of the four years, obviously Kavouss has objected to four years and feels that that is too long. Again, as I said I would, and as he

requested, the reference to four has therefore been put in square brackets, as he asked. And, again, I think, within the group as a whole, there was support for four years and a feeling that this was a balance between those who feel there shouldn't be a time limit at all and those who may feel that it's too long and, again, that this is something that we can seek/express views on from the community on when we go out to the community.

And then finally, it's not a change but you'll see that I highlighted the reference to a single panelist. It's not a change. We have had this concept of this being dealt with by a single panelist for some time, again, to flag that certainly Kavouss was uncomfortable with important decisions being determined by a single person. And I appreciate that, and I think others in the group appreciate it, too.

But overall, I think certainly my sense from the call was that, overall, there was support for retaining this as a decision of a single panelist, specifically this request for "a late"—for being able to file a late IRP—on the basis that we don't have a full panel in place because obviously there is no IRP and that it would be a very complex mechanism to put three panelists in place to be making this decision when leave hasn't even been granted yet. And indeed also this is something that I think we put on our list so that, when we have the standing panel, it may be an item that the standing panel, when we have them in place, could look at back at and review the proposal and perhaps suggest an alternative.

So those are the things I wanted to flag. I notice that there are a couple of other comments that have been added to the document, I think, by

David. And thanks for that, David, in the runup to this call. So we hopefully will come to them, too.

But I will now to turn to you, Kavouss, who has had his hand up for some time. So thank you, Kavouss, for your patience. I turn to you.

KAVOUSS ARASTEH:

No problem. May I request you kindly open the e-mail that I sent you? In that e-mail, I reviewed many, many times this Rule 4. I tried to digest what you mentioned. In some parts, I have agreement with you, [like] in the first “may,” because at the beginning, it says, “Subject to Paragraph C.” So in that case, “may” is not inappropriate. It could work because you put it as a condition under the Subject D, Paragraph C. But I have sent you an e-mail. Please kindly reply to that.

Most of that element in the e-mail is seeking clarification of something and comments. The first thing I want to clarify is mentioning “seek,” or “leave to file.” I don’t understand what you mean by “leave to file.” Several times you refer to that “leave to file.” I want to know what you mean by that. Or “shall seek leave.” I don’t know we say “shall seek leave.” What do you mean by “leave”? What does “leave” mean here? It may be, for some American-spoken people, a very valid sentence, but I don’t understand what you mean by “shall seek leave” or “leave to file.”

And then in two other places you referred to “eligible under the bylaw.” I mentioned, “Please refer to the specific clause of the bylaw,” because you cannot say, “Under the bylaw.” Which clause of the bylaw? You have to mention that.

But something that I have difficulty with is under D when you go the last paragraph after Roman II. The text is no very clear, noting in this Rule 4D, “is intending to preclude a claimant who has initiated an IRP in the belief that they claim.” First of all, for “claimant,” it should not be “their claim.” It is “his” or “her” or “its” claim. So I don’t understand this new Australian way in that they want to get rid of the “he” and “she” and put “their.” I don’t agree with that because it is not universally agreed. I think it should say “its claim” or “her” or “his claim” but not “their claim” because it is a singular claimant.

And then with the following text I have difficulty: “but where that timeliness is successfully challenged.” I don’t understand that. “From then”? What do you mean by “from then”? What does “then” refer to? “Seeking leave.” Again, the words “seeking leave”: “From then seeking leave to pursue that IRP out of time in response.” This sentence is not clear. It requires refinement and rewording.

So this is totally unclear. This is one point that I cannot agree with. The second point is the “four-year.” So there are two or three areas I asked clarification on, like the one mentioned, saying, “What do you mean by “shall seek leave”? What do you mean by “shall seek leave”?” And the other is the mention of the bylaw provisions instead of just saying “bylaws.” But two areas I see as difficulty. One is the paragraph after the Roman II under Paragraph D, and the other is the four years proposed by Malcolm. I disagree with the four year. Either don’t mention that at all or, if you want to mention it, the cap would be three years. And I have sent you a written e-mail, and I want that my e-mail to be properly discussed and properly replied to. And I don’t agree with people referring to majority and minority. This is a legal issue, and I

have to have convincing. Where do the four years come from? So once again, either totally delete “four years,” or, if you want to put something, put “three years.” And then the text that I mentioned is not clear. And two other clarifications.

These are my points. And with that, I leave it to you to kindly address the points I raised formally in my e-mail. Thank you.

SUSAN PAYNE:

Thanks, Kavouss. Yes, I can respond to the points that you raised in your e-mail, certainly. I’m assuming when you say “formally,” you’d like me to do that by e-mail in response, so I will do that.

Malcolm?

MALCOLM HUTTY:

Thank you, Susan. Firstly, I would like to thank Kavouss for his suggestion that we might delete “more than four years” clause altogether and leave [inaudible] on that matter. I would like to support that suggestion.

However, in the anticipation that that might possibly receive some opposition from within the group, I’m afraid I have a picky and pedantic point to make about procedure here, Susan. And I apologize for the comments I’m about to make. But when you introduced this and you mentioned those square brackets around that “four years,” you said that it was there because we hadn’t achieved full consensus on the four-years number and therefore square brackets would be put on that so that that could be consulted to the community. Well, if the standard

is that, if there is not full consensus then there should be square brackets around it, then there are other matters which are being decided here by something less than full consensus. I don't know what standard decision-making being applied is, but it's not full consensus. I would wish to have saved the square brackets and, more particularly, to ensure that these new changes are being put to the community and their view is being sought upon them.

Most particularly, the entirety of Paragraph D, which—not to be a dead horse, but you know—I continue to maintain my opposition to [as well as] the final paragraph as well, concerning the payments of fees to ICDR, which, in my view, should be considered administrative fees.

Now, I don't think there's any need now to discuss the merits of these opinions. We've done them many times already, and I support your efforts to drive through to a conclusion, but I would seek from you, Susan, your clarification that it wasn't just the four years that is being put to the community for comments but that all these changes would be, including with a comment that the view that is being presented on behalf of the group is challenged by a portion of the group and the reasons for it and it is actually your intention that that should go out in the report that we made and not only that square brackets/four years. And I'm pretty sure I know the answer to that, but given the way you presented that, I'd just like that on the record, please, so that we can refer to it later.

SUSAN PAYNE:

Thanks, Malcolm. I will respond if you don't mind, Liz, just briefly. I don't recall saying "consensus." If I did, I apologize. I wasn't trying to suggest that we've got a consensus of the group on this point and that "four years" was the only issue that was outstanding. So I say, I haven't intended to be talking about consensus at all, really. I think what I was trying to say that my sense was, to the extent that people are supportive of there being this time limit, there was support for four years.

But, no, you are absolutely correct that the anticipation is that all of our work will go out to public comment and that, yes, there will clearly, in addition to something like the period of time which is in square brackets here in Clause D ... The fact that the group are not agreed on this point, and indeed the fact that this does deviate from the version of the rules that was previously put out for public comment, is something that we will have to draw to the attention to the community. It's only right that we should do so with an explanation off how we have got from there to here.

So I hope that assures you.

MALCOLM HUTTY:

Thank you very much.

DAVID MCAULEY:

Thanks, Malcolm.

All right, Liz.

LIZ LE:

Thanks, Susan. I wanted to touch on address Kavouss' point on the four years as well as Malcom's point with respect to the entirety of Section D. The four years was something that ICANN proposed because, in terms of having an outer limit for filing an IRP claim, the four years comes from the statute of limitations in California for a breach-of-contract claim. So I think that, prior to us proposing this language, there were a number of different periods that were being discussed amongst the group, whether it was two years, whether it was three years, or whether it was four years. So we had put that out there because that is a definitive marker in terms of statutory law in California

So with respect to—and as you said, Susan, this will go out to public comment—Section D itself and the suggestion Malcolm has in terms of completely deleting that section, as ICANN Org has indicated, that is something that we would not be comfortable with accepting. And definitely [not] having any kind of outer limit claim on an IRP claim is something that we could not in good faith recommend to the Board to adopt as part of the final set of supplementary procedures. Thank you.

SUSAN PAYNE:

Thanks, Liz.

Kavouss?

KAVOUSS ARASTEH:

Susan, I have a suggestion, if Flip does not put my quality in question. I have decades of experience. Decades. I suggest that, whenever you

refer to “four,” don’t put a square bracket. Before “four,” put “three (slash or oblique stroke) four” and add the note: “These two periods were discussed, and no agreement was reached on either of those.” And put it to the community. If the community says four years, yeah, I agree with the four years. If the community says three years, we are giving it three years. But I won’t be able to understand why people disagree with the logic. To have four years is too long. It gives a lot of instability to the process. Even if ICANN Org now gives some reason that four years in accordance with a contract agreement, still I am not convinced. It results in instability that, after four years, somebody comes and tries to put in question many, many things, either action or inaction, and so on and so forth.

So put “three” and “four,” both of them, together with an oblique stroke or slash, and put a note: “These are the two caps which have been proposed. Agreement was not reached on either of the two.” Or delete this paragraph because we cannot put something in square brackets and send it to the community. We should explain the reason for a square bracket. If Malcolm insists to put in the square bracket, give the reason, saying what was also proposed was three years, but these two periods were not agreed on. So this is something.

And then, for the paragraph below that, after the Roman II, I said that I have difficulty with the language used. Nothing in this rule ... so on so forth. This language should be defined. It’s not clear. It’s mixed up and it is not clear what we’re really talking about. When we say “from then,” from what? Then from what? Is it time or is it what? “From then”?

“Seeking leave.” Still I don’t understand what we mean by “seeking leave”? What do you mean by “seeking leave”? Can you please tell me what you mean by “seeking leave”? To pursue the IRP out of time? What do you mean “out of time”? Beyond 24 months? Beyond 120 days? Beyond three years? Beyond four years? What do you mean by “out of time”? “In response.” What do you mean by “in response” at the end?

So I suggest to kindly review this element under D, the last portion of after Roman II, to be very clear. What do you mean by “seek leave”? What do you mean by “from then”? What do you mean by “out of time”? And what do you mean by “in response”? It’s bad drafting to put “in response” at the end. In response to what? So we need to redraft that. There may be something here, but it is not clear. It may be clear for the author of that, but it is not clear for the others, unless we’re writing for ourselves or we’re writing for a specific group behind this. But I am not behind this paragraph. I don’t object to that, but I ask to please kindly redraft this paragraph and clearly mention the three things I have mentioned. What do you mean by “from then”? What do you mean by “seeking leave”? And what do you mean by “out of time”? And what do you mean by “in response”? They’re four areas where I have doubts about this paragraph. It’s not clear. Thank you.

SUSAN PAYNE:

Thank you, Kavouss. Greg, if you’ll permit me, whilst I don’t want to engage in a back-and-forth with you, Kavouss, I will say, in respect to the four years, Liz has just explained to us where this comes from. It was proposed to ICANN Legal, and there is a justification for the four years in

that it matches the California statutes of limitation. So there is a reason for selecting four years. I hear that you do not like four years and you think it should be a shorter period. The reason it's in square brackets is because you requested that we put it in square brackets. Malcolm didn't request it. You did. So that is what I did.

But I don't hear anyone else on this call asking for three years. And so unless someone else—unless a number of people on this call support me adding “three/four,” I am proposing to keep it as four because that is what we have discussed for some period of time. There is a justification from ICANN Legal as to why it is four years suggested. We are putting this out to the community anyway for their input. And so if the community comes back and says they think this is too long, then we can review it then. Thank you very much.

In respect of the rest of your comments, you already made those comments. Obviously, I couldn't revise the text while we're on this call. We previously discussed “seeking leave” on a previous call. And Becky, I believe, explained that it is a legal term and it means seeking permission. But I think I can probably change it to “seeking permission,” if that will make you happier.

Greg?

GREG SHATAN:

Thank you, Susan. You said much of what I would have said. Just I felt that we were in danger of moving backwards here. I feel that we have thrashed around the time period at great length over a number of calls, where we ended up with “four years.” I personally would prefer to see it

without the square brackets because I don't think it's any more in question than any other part of this that's being put out, understanding that we do have a member who questions it. But there are, I think, a number of things here that, if we were start picking this part, people could start objecting to. So there is a point at which we need to be equally dissatisfied with what we're seeing or equally satisfied with what we're seeing.

As for the "seeking leave" and all that, that's kind of standard of legal English, understanding that the rules perhaps should be written so that they're understood by non-lawyers. Maybe we should give this a little bit of a plain-English read to try to avoid legal terms of art, but there are times when legal terms of art are the most accurate and will rely on people to look for ways of defining things such as by Google and understanding that we have rules that will have legal effect for a binding arbitration.

So this is a particular context. We are writing arbitral rules, and therefore they should be written using well-known and well-understood legal terms. And certainly "seeking leave" is an extremely well-known/understood term for any English-speaking lawyer, understanding that it's not necessarily understood by others unless they watch a lot of lawyer shows on TV. Thank you.

SUSAN PAYNE:

Thanks, Greg.

Kurt?

KURT PRITZ:

Thanks. Well, lawyer shows on TV confuse me. But to build on what Greg said, and looking at Kavouss' comment in the best light, I agree that these are legal terms of art and belong here. Maybe when we're all done, someone can go through and provide a glossary for those who are not used to English legal terms or terms of art to put those terms in some sort of plain language in some sort of glossary or explanatory note or something like that so the document is easily readable by those globally that aren't familiar with it. But maybe leave all these questions to the end and then go through and provide some sort of Rosetta Stone for those who might need it. Thanks.

SUSAN PAYNE:

Thanks, Kurt. I like that suggestion a lot.

All right. I was going to move on to next steps, but I see you've put your hand back up, Kavouss. So I will turn to you, and then we do need to move on to next steps and indeed the rest of our agenda. Thanks, Kavouss.

KAVOUSS ARASTEH:

Yes, I agree with Kurt that we could put whatever term that is not clear in a glossary and say, "This is understood to mean that." That would help. That would help the people to understand the meaning if people are too legal here and chose others that they don't understand. But put it in the glossary and what we mean by "seeking leave" and what we mean by a combination of ... Still I have difficulty with this language

used. Nothing in this rule, and so on so forth ... Starting that [inaudible] claim is within time and starting, but where that time limit is successfully challenged. We would like to refine this section. Those who are thinking that there are too legal people, please redraft these steps. Put it in a way that's understood by everybody but not by yourself unless you want that no one understands this text except those people who believe that or claim that there are legal people and others are not legal.

So the second line, from "but" to the end, needs to be redrafted. You want to put "four years"? Put, "This was suggested by the ICANN Board, by the ICANN Legal Department." I have no problem. Put a "four." Put an asterisk: "This period was suggested by the ICANN Legal unit." I have no problem. So that means our viewpoint is not counted. Only the ICANN Legal group is deciding for us. So they don't care about us. Never has it been like this. They are supporting. They are not imposing their views. I object to the ICANN Legal views of "four years," unless they give the reasons, saying, "The four years proposed here are because ____." Mention that for everybody to understand.

So I don't want to repeat again, but that is the situation. But I agree with Kurt to put some glossary and explain all of those things that I have mentioned. Thank you.

SUSAN PAYNE:

Thanks for that.

Sam, I'm assuming you want to respond.

SAM EISNER:

Thank you, Susan. And thanks, Kavouss. And I appreciate that dialogue that we're having on this. I want to confirm. When ICANN Legal put that forward, we provided our rationale for why we suggested it. It's not that we don't take into account the remainder of the group's concerns. As Susan has suggested, there is other movement from the group to change that to a lower number. We wouldn't stand in the way. We would still continue to voice our position if the group was to suggest that it would be appropriate to have it for an undetermined timeframe because there are some practical realities, and we would continue to engage in a conversation with the IOT if that was the case. But we do see that there's others of the IOT that have concurred with the four years.

But I want to make sure that this isn't ... The four years was not laid down as a dictate from the ICANN Legal team—that it had to be that way. These are matters that we brought to the table. Rationales were provided for the conversation with the group. So I'm sorry if you saw it as a dictate from us, but it was not.

SUSAN PAYNE:

Thanks for that, Sam. And indeed I think on a previous call we had talked about the possibility of something like a footnote or an explanation in the explanatory text when we're explaining the rules. And you were very amenable to that.

So I think, perhaps if, Bernard, you can make a note of that so that we do remember to do that, that would be very helpful.

Okay. I think we just have twelve minutes left. And so I wanted to just talk through next steps. There is a little bit of just tidying up as a result of this call that we probably need to do. I will for example see if I can take the benefit of some of the suggestions that Becky was putting in the chat for an alternative form of wording that is equally understandable rather than using the term “seek leave” and that kind of thing.

But essentially this is now our draft of the rule. And what my proposal is is that, once I have done that tidying, I will circulate it again on our mailing list, and we’ll be basically seeking the support from the group to go forward with this language and have that as our proposed final text, with, of course, the understanding that not everyone in this group does support some parts of this rule and that that is understood. But you obviously feel free to note that for the record. But I would like to be able to get a sense from the group over e-mail that we are sufficiently with this draft of Rule 4 that we can go forward with it, at least for the purposes of going into a public comment period. And so that is my request.

And, yes, it will need to go to a public comment. And as I say, there will be some kind of legal cleanup, checking that the terminology is consistent—that kind of thing. The rule does go through a final legal review as well before anything gets finalized and fully adopted. But it’s that we essentially have reached the point that this group is comfortable with the text—or the majority of this group is comfortable with the text. Let’s put it that way.

All right. So keep an eye on your e-mail. And we can hopefully wrap this Rule 4 up.

Our next agenda item is the next calls. And I think I covered that when I was reviewing the agenda. Our next plenary call will be—actually, I'm not sure how many weeks it is—on the 23rd of August. And that is because I'm going to be away for a couple of weeks, so we will be not taking a long break but taking a short break before we reconvene, which will give lots of time for engagement over e-mail on Rule 4.

All right. Then I had one matter of AOB. And I know that David did as well. So I will turn to David's first because I don't want to run out of time and be disrespectful to him. So, David, if I could for you for your item of Any Other Business.

DAVID MCAULEY:

Thank you, Susan. That's very kind. What I wanted to suggest is ... You heard me say that one of the things that would be a benefit of getting together face-to-face in ICANN75 would be group dynamics, etc., etc. I think another thing that would help in that respect is that we should consider the times of our calls and sharing the inconvenience. In other words, maybe we could come up with two times lots, instead of just one, or three to rotate around and seek the engagement of some who may have difficulties meeting at this time. That's all it was: to maybe put it on our list of things to consider. Thank you.

SUSAN PAYNE:

Thanks, David. Yes, I would support us doing that as well. I do think we have some participants for whom this is not ... I'm thinking particularly of our participants in the southern hemisphere—so Australia and so on—where this really is not a good time. And perhaps we can find some times which would allow someone like Bruce to join us from time to time. So thanks for that.

Kavouss?

KAVOUSS ARASTEH:

Susan, I think we need to respect everybody. I don't want to be misinterpreted, which I was by some people that no longer are in the community but are on the other side of the table. We should respect the views of everybody. And we should not put the people in the corner, saying, "You are a minority." I know the entire Internet on ICANN is private-sector-rooted. That means they don't agree with anyone else but themselves only. But we are part of the game. Our views need to be respected. And I request you as the Chair of this group to respect my views and redraft that paragraph under D when I mentioned that it is not clear, badly written, and should not be put in a way that [needs legal knowledge] to know. Legally, it is incorrect and inappropriate. We should put in a language which is understood unless some of us claim that we are the top legal minds in the world. No. Please write for everybody who is interested. So please respect the people.

I have no problem with a single panel because of the reasons you have mentioned. Once the panel is not in place, you can have a single

panelist. I have no problem. I reviewed and removed many of my objections, but my two objections is “four years” and this paragraph under Roman ii in D. Plus some of these terms that Kurt has mentioned very nicely we put in the glossary saying what we mean by that.

So this we need to respect. We should not discourage the people by participating. Some of you were not in the CCWG at all when I was two years, day and night, working to sometimes 3:00 in the morning and so on and so forth. So I need to be respected by the people but not discouraged from commenting and saying, “Okay, go to hell. Your views is the minority,” and the majority accepts that. No, there is no majority or minority. There is logic that prevails. There is no logic for the four years. And ICANN Legal said that it’s just a suggestion for conversation. There is no rationale but a suggestion. Thanks for the suggestion. We don’t agree with four years. Thank you.

SUSAN PAYNE:

Thank you, Kavouss. You asked to be respected. I’d ask you to respect me. I believe I already said I would look at that clause that you have asked to be looked at and said that I will look at it again in response to your request. So kindly respect that I’ll do what I’ve said I’ll do, and don’t keep bringing it up. We had a few minutes to cover something on Any Other Business, and the clock has now run down because we have to hear you say the same things multiple times. And this happens on every call. And then we hear you complain that this is taking so long. I do respect your input. Your input is very welcome, but you don’t need to tell me something five times on a call. I am capable of understanding you the first time, as are we all.

But I also would say that just because you raised something, if you are the only one, then that does not go forward. The work of this group is something that has to be done as a consensus, and effectively there are majority and minority views. And that is just how things work. Not everybody is going to agree on everything. We are not here to come to full agreement from everyone on everything. If we were, we will never have some rules because one member of our group disagrees altogether with the idea of any outside time limits. So we are all compromising here, and we are putting this out to the community to get their input as well. So there will be ample opportunities for people to express the view that this time period is too long or too short. And that is really all I can say on this. I think this is enough. We've talked about this enough.

So thank you for raising it yet again, but at the moment, of this group, you are the only one who thinks this should be less than four years. If, when I send this language around, there is support from the group from your position, then we will change it. Otherwise, we will stay with four years.

I think now we have two more minutes, and really there is no time to go to the other item. I circulated something on the e-mail. I will cover it over e-mail and explain my thinking. And we will talk about it on a future call.

So thanks very much. I am going to wrap up at this point because I think there is not enough time to think about this further. Thank you, all, for your time and for your input. Please keep an eye on the e-mail. Something will be coming around. And as I said, hopefully we can sign

off on this Rule 4 as being something that majority of us can get behind, even if we do not support all of it. So thanks.

Brenda, we can stop the recording now. And I will give you back a minute of your time. Thank you.

[END OF TRANSCRIPTION]