SUSAN PAYNE: Thanks, everyone. Welcome to this call on the 9th of June, 2020, of the IRP-IOT. Thank you all for joining. We possibly have a few additional people just joining in as we speak. But we do look to have a pretty good turnout.

Before we start, I can see we have someone on the phone, on a number that ends in 354. Ah. Hi, Kristina. I think you for that. Okay. So, you are in Zoom Room as well, though, so that's great.

All right. So, just to start, first of all, quick review of the agenda. We'll touch briefly, again, on statements of interest. Then, I think we'll be moving on to introduce and then continue our discussion on joinder, consolidation, and amicus. Before we get to the end, we'll just agree when our next meeting should be. I have one item in AOB, which is just to circle quickly back to the translations. And then, we'll wrap up at that point.

So, without further delay, in terms of the second item on the agenda, I suppose it is, the statements of interest, I think I'm as bad as everyone else in terms of actually completing this. I don't know if anyone has completed the new form of SOI and forwarded it to Bernard. But I'm pretty sure that not everyone has.

Bernard, maybe, could I ask either you or, indeed, Brenda to recirculate the SOI form after this call and give people a deadline to submit it? I think that would be helpful. I know we have all had it but it would be, I think, helpful to get it back into the top of our inboxes and encourage everyone to complete.

And in the meantime, I will just ask whether anyone has any particular change to their statement of interest. I realize you haven't filled out the new form yet. But is there any particular change to your status that ought to be drawn to the attention of the group for the purposes of this call? Okay. I'm not hearing any.

And thanks. Bernard has confirmed that he will recirculate the SOI form and encourage us all to complete it. It is something that's important. I think we all should have done so. I include myself in that. It's important, for the purposes of these discussions, that as a group, we've got a record of any interest that the participants in this IOT have and that we keep those up-to-date. So, that would be good. Okay.

All right. Well, items three and four, I'm not quite sure what the difference is between introducing the topic of joinder, intervention, and amicus and the discussion on it. But let's just kick off. With thanks to Bernard, he has circulated round to everyone quite a lengthy document that captures all of the previous discussion and email on this topic in the previous situation of this group.

And then, because it is so very lengthy and I felt there was a danger that people would simply not have the time to wade through everything, Bernard also went through and highlighted—drew attention to particular discussions that seemed to him to be most pertinent so that if people didn't have time to read the whole document, they would hopefully have had time to at least read those highlights.

And I hope that most of you have been able to do that. And really, that just serves as a background, I think, so that people are aware of the

issues that were being discussed—of the way in which the rules developed over a period of time, leading to the final version of the rules, as in the interim draft rules that are what we're working with—not interim draft, interim rules—that we're working with.

And, so I don't know if … I don't see any hands. Obviously, if anyone has any questions they want to ask in relation to the document that Bernard pulled together, maybe this is a good opportunity to do that, or any requests for clarification on the nature of the work that was done previously. Perhaps this is a good time to just pause and see if anyone has any questions. Okay. Again, I'm not seeing any hands. And so, I think perhaps we can move on.

And I wonder if I could ask … I'm guessing it's probably you, Brenda. Would it be possible to pull up the discussion document that I circulated shortly before this call? Ah! Super. Thank you.

So, as you'll see, this is … I thought that it would probably be helpful for us to have something to be looking at as we're discussing. An also, as I was, myself, going through and just trying to prepare for a discussion on this, various questions, or issues, or concerns, I suppose you could say, that I noted with the rules came to my attention. And it seemed to me that the easiest way to, perhaps, flag them for the purposes of a discussion was to try and annotate just this rule seven, which is the rule that we're talking about, with some questions and comments.

And if that's okay with you, I would propose that we just start at the beginning and go through that. But I would also like to encourage anyone that, as we go through the paragraphs, that if there are any

other topics, or concerns, or issues that other people spotted and that I haven't highlighted, that you perhaps would just intervene and raise them as we go through. And then, I'll try to capture that because it's quite possible that there are other issues for discussion, as I say, that I haven't really thought …

SAM EISNER: Can others hear me now? I think I lost Susan.

BRENDA BREWER: Sam, I can hear you. I cannot hear Susan either.

SAM EISNER: Okay.

SCOTT AUSTIN: Agree.

BRENDA BREWER: Thank you, Scott.

BERNIE TURCOTTE: So, we've lost Susan. Let's see if we can find her.

BRENDA BREWER: Susan?

SUSAN PAYNE: Sorry about that. I think I got thrown out but I'm not quite sure when. Hopefully you can hear me again.

BERNIE TURCOTTE: Yes. You were just starting your presentation of the document when you fell off.

SUSAN PAYNE: Oh dear. Okay. So, it's possible, then, that I was chatting away to you for some time, which is unfortunate. Sorry about that. And I'm not quite sure. I hope it doesn't keep happening. Yes. What I was starting to say was I have a question, which is probably for Sam. And it may be that it's very clear to everyone else.

But it was in relation to this rule in particular. It was how this quite detailed rule seven interplays with the ICDR rules that also cover similar issues. And I ask this just because I do recognize that at the beginning of the supplementary rules, there is a reference to the fact that these are supplementing the ICDR rules and that where there's a conflict between the two that these rules would take precedence. But given that these are so detailed, it seemed to me that it wasn't entirely clear whether this whole rule—because there's a rule seven that deals with consolidation and intervention—whether that means that this displaces entirely anything that's in the ICDR rules.

And the reason I was asking is just because there are some considerations covered in the ICDR rules around issues like what

happens to the arbitration panel—how that gets dealt with when there's an intervening party and the formalities of which proceedings get consolidated into which—that are dealt with in the ICDR rules and aren't covered here. And so, I guess it was a question for Sam. Are there still elements of the ICDR rules that are standing because they're not specifically dealt with in this rule seven?

I guess it's not a problem either way but it does, I think, to my mind, make it a bit more complex for a participant in proceedings, to be clear on what aspects of the ICDR rules are still applicable to them. But can I pause and just ask you, Sam, if you can shed light?

SAM EISNER: Sure. Thanks, Susan. So, the general rule would be that the ICDR rule stands unless there's a more specific provision that overtakes it. And so, I think that we would see, if there's an area that the supplementary procedures are silent on but there's text on it in the ICDR rule, that that ICDR rule text could still apply.

So, I think that it's actually a very good point that one of the things that we probably want to do as we're relooking at the section is identify the principles that we have, the principles that we want to uphold and that we want to make sure are not areas where we're silent. We could even put in language about how we expect this rule to be considered, along with the ICDR rule seven.

It was just before the call that I sent a note responding to a general concept that's within your annotation, which I thought was really helpful. But one of the things that we need to be concerned about, as

the IOT, is that general proceedings and general rules about who can intervene, or who could join or consolidate into your proceeding, might not be appropriate within the IRP positioning because of the very limited nature of the dispute within an IRP—that it's not about who's willing to submit their claims for arbitration but it really is about encouraging a determination as to whether or not ICANN violated its Bylaws or Articles in taking a certain action.

So, one thing that … And I can offer this up. We could go back, make sure that we're circulating appropriately to the group so everyone can see it, the ICDR rule seven and identifying where the current rule applies, and where it doesn't, and where we see some potential risk of expanding the purpose of the IRP, if we were to allow those portions of the current ICDR rule seven to apply to IRPs. That might be a helpful thing for the IOT to consider as we keep marching down the path on this rule.

SUSAN PAYNE: Yes. Thank you, Sam. Personally, I think that would be incredibly helpful. And I think it probably would make sense for future participants, for us to be sure that we're very clear on which parts of the ICDR rules are still standing, and if there's something that isn't appropriate, that we make sure to carve it out or to disapply it.

I definitely think that would be helpful because otherwise, I could envisage, as a party … I guess that probably applies to all of the rules but it just particularly struck me on this one. A party bringing an IRP may well be a little unclear about whether something still applies to them

and whether they're meant to be abiding by something that's in the ICDR rules because there is, in the supplementary proceedings, a quite detailed set of other obligations and requirements. So, yes. I think that would be incredibly helpful. If you would be able to do that for us, I think we'd find that really useful.

There is another overarching issue but perhaps we'll come down to that when we get to the consolidation section. I did just briefly see your email, Sam, that you sent round just before the call. But in the meantime, I think perhaps it is easier if we start at the top and work down. So perhaps, again, this would be easier with paragraph numbers but not to worry.

So, moving on to effectively the second point that I had highlighted when I was going through the rules is this paragraph that refers to, "In the event that requests for consolidation or intervention are granted, the restrictions on written statements set forth in section six shall apply to all claimants collectively, for a total of 25 pages, exclusive of evidence, and not individually unless otherwise modified by the IRP panel in its discretion, consistent with the purposes of the IRP."

And thanks to Liz for circulating a little earlier the results of some research that she had done on how other arbitration rules deal with page limits and restrictions on evidence, where there are these consolidation and intervention issues.

I do recall, from my reading through of the background document that was circulated, that this was something that was discussed. But I do still

feel that it's at least worth us reconsidering whether this 25 pages, collectively, restriction is appropriate.

And I can see Mike's hand up but I will just explain my thinking. My main thinking is probably, in the case of … We're talking here about consolidation and intervention. And so, in the case of consolidation, there are already two sets of proceedings and they will already have been … Both of them have been initiated with a written statement that meets this page limit requirement.

And so, it seems to me that if we are saying that the expectation is that there'll be a collective 25 pages, then are we actually saying that we are expecting these two or more consolidated claimants to work together and come up with a single statement that meets that page limit? And if that isn't what we're expecting, then perhaps it would be the exception that the 25 pages are collective. And the usual would be that each party's written statement that already exists in their own proceedings continues to stand.

And I also feel that the same kind of issues come up in intervention, although to a lesser extent. But I think in the case of intervention, you're saying to the party that intervenes and a later stage and becomes an additional claimant that they effectively … You're saying that unless the IRP panel says otherwise, they don't have any opportunity to put in their own written statement. They're effectively joining onto the existing claimant's statement. Or again, are we saying the parties have to agree between themselves to amend it?

I'm going to stop now but that was my thinking and that was what I thought it was helpful for us to consider. But I can see Mike's got his hand up so I'll go to Mike.

MIKE RODENBAUGH: Thanks, Susan. I had, really, some of the very same concerns that you just expressed. It seems to me this is a little backwards, especially with respect to intervention. I think with consolidation, as you suggested, it may not really matter. But with intervention, presumably these parties aren't really friendly or they would have joined together initially with the same lawyer. In IRP right now, I'm representing four different parties.

But in an intervention situation, I think normally the claimant that's there probably doesn't even want the new claimant involved. So, requiring them to work together and come up with any sort of collective statement, I don't this is proper. I don't think that's how it works in courts, here in America anyways. So, I think that this restriction should be removed as to interveners. Each claimant should have their own page limits. Thanks.

SUSAN PAYNE: Thanks, Mike. Helen?

HELEN LEE: Hi, everyone. So, I think your question, Susan, in the document was how do the page limit provisions work in practice. I think I have to agree with

Mike that it would be more helpful if each claimant got their own page limitations.

It has been my experience in the Afilias IRP that the contentious parties have to agree on the page limit and it isn't quite as … As Mike reflected, parties in this situation are not prone to agree on many things. And then, including something as seemingly minute as page limit becomes another point of contention. And so, I think if that as something that was articulated more clearly in our documents, I think that would be helpful for future parties.

SUSAN PAYNE: Okay. Thanks, Helen. That's helpful to get some input from existing proceedings as well, that are having to actually deal with this. And I did note … Again, thank you to Liz for circulating her document. I did quickly skim through what she had identified and it didn't seem to me that this idea of requiring the parties to agree and have one set of agreed documents was necessarily something that's particularly covered in other types of rules. So, this does seem to be somewhat unusual. Greg?

GREG SHATAN: Thanks. I would suggest that this highlighted paragraph be deleted entirely or it be flipped and made clear that each page limit is per party and not per side, so to speak. Not to mention that interveners … And I think Mike alluded to this. Interveners don't always have the same interests as the claimant. They may have orthogonal or a different interests. This also even creates the possibility of gaming—having an uninvited guest and then you have to share your page limit with them.

It's not highly likely but if we create the incentive and the rule that allows that to happen, one could easily imagine it happening. So, I don't see the value of this. I suppose if there were many parties, at some point the panel would get swamped. But I think, at that point, they might have some discretion.

But if the point of this is substantive justice, the ability to be heard is the most basic part of that. And getting to make a filing isn't worth much if you have only a fraction or if you show up during the course of a proceeding and you're told that, "Your side's page limits have already been used up. You can submit a picture," or something. I don't know. In any case, I'd like to hear why this is a good idea because I haven't heard anything yet. Thanks.

SUSAN PAYNE: Thanks, Greg. So, yeah. We do seem … I don't see any more hands. I don't see anyone speaking up in favor of keeping this page limit, or at least keeping this assumption in this form. You mentioned, Greg, that it might be flipped round. And I'm assuming here that one way one might flip this would be that there would be … The presumption would be that all the claimants have their own page limit and maybe we give the panel a discretion to rule otherwise. So, we're flipping the presumption. And I'm just looking in the chat and I don't see anyone disagreeing this this.

There is a question from Mike, asking where it came from in the first place. And Sam thinks that it was introduced by Sidley during prior drafting. But I'm not seeing anyone disagreeing with that. So, perhaps

one area that we can make the necessary change and I think seems to reasonably uncontentious for us all. So, thank you. Perfect.

I think, then, we can move on to the first section on consolidation. This wasn't particularly a comment on that paragraph per se. But it was a reminder to me because it's the first reference to the Procedures Officer.

And it was a reminder to me that one of the things that we talked about right at the outset, which Sam drew to our attention, was that in existing IRPs that have happened to date under these new rules—which I think is probably only the .web proceedings but there may be others—that this concept of the Procedures Officer has caused a certain amount of confusion and, indeed, delay in terms of the parties because the parties have not really understood the role of the Procedures Officer. Or, indeed, the Procedures Officer perhaps hasn't understood the role. So, something with is presumably included here, intended to streamline, has had, perhaps, the other effect.

Now, in the comment that I made, I think I just flagged that the ICDR rules have a similar sort of notion. They have, they use the term "a consolidation operator." And it does seem to serve a similar role as the Procedures Officer. And I think it's recognizing the fact that probably, at the time when these applications for this kind of intervention to the proceedings, you generally haven't got your IRP panel or your arbitration panel in place. And so, you potentially need it to be dealt with before that's the case and up front.

And so, I think one of my questions, which again may well be a question for Sam, probably … I'm assuming that this confusion and difficulty that people had was something more than simply a terminology issue. But if you can, is it possible to give us any more guidance on where the problems have come? Because as I said, the ICDR rules do have a very similar concept, albeit that it has a different name. Do you think a change in terminology would be adequate to help the parties understand better what the role of that person is or do you think it's more than that?

Actually, Helen's got her hand up. So, let's go to Helen first and then, maybe, if Sam wants to add anything, we can go to her after. Helen?

HELEN LEE: I can certainly … I'll let Sam answer the question but I thought it might be helpful to give some context in what has happened in the Afilias IRP, just because it's a real live situation that's unfolding, especially if it's the initial application of this Procedures Officer concept.

So, I don't know how closely everyone has been following but the Procedures Officer was appointed in the Afilias IRP to decide the issue of whether the Verisign and NDC should be allowed to participate as amicus. It took several rounds of briefing, specifically at the Procedures Officer's request. And it ended up being a delay of several months. And then, in the end, he punted the decision to the full panel. So, it seems like the Procedures Officer either wasn't fully aware of the boundaries of his authority or he acted in a way that wasn't in line with the rules. I'm not sure, really, what that is.

So, I think there are two concerns. One is what precedent does this set for the role of the Procedures Officer. If you were going to follow this example, then you would say the Procedures Officer doesn't have any authority. So, it would be difficult to cite to that. And then, I think another issue is maybe a different Procedures Officer would have acted differently here. If that's the case, then maybe there are concerns that we can address regarding the selection of the Procedures Officer.

So, I just give that kind of information as a framework for our discussion and what's enfolding in real life.

SUSAN PAYNE: Thanks, Helen. That's really helpful. There is a comment in the chat but I'm just scrolling up. There's a few comments in the chat. So, Mike is asking whether the Procedures Officer was appointed by ICDR. I don't know if you can answer that, Helen. I think my assumption was yes. But I don't know if you can recall.

HELEN LEE: I can't recall off the top of my head but I think that's the case. I'll just double check and write it in the chat, if I can find it. I think that was the case.

SUSAN PAYNE: Thank you. And then, Kurt is saying, "Assuming there are efficiencies to be gained by lumping all procedures issues under one role and related to the suggestion earlier, could we compare the ICDR's Arbitration Arbitrator with our Procedures Officer and then perhaps include a

better explanation of the relationship between the two in our document?" Thanks, Kurt. Yes.

Maybe I'll just, in the meantime … Sam, is there anything else you wanted to add, in terms of the challenges from the Procedures Officer and whether you think it's … do you think it's an issue that it's not clear enough that they have authority to make this kind of decision? Or, indeed, that we need more guidance for them?

SAM EISNER: Thanks, Susan. I hear how Helen was explaining her more direct involvement with the IRP. And we're also trying to check here and see how the Procedures Officer was appointed in that case. But I think what we've learned from the experience of using it in this instance, that whatever we call it, there's not enough guidance. And whatever we call it, there's not enough information to tie into the expectations of the role and into standard practice.

And so, I think that we would benefit, considering Kurt's suggestion, to better tie it into an existing role within the ICDR practice or explaining how we see it fitting in with the standing panel, or the work to form that, which is currently underway—if those are alternatives that need to exist. But I think what we've learned from the extent of motion practice that happened just over the role of the Procedures Officer, that ended with a Procedures Officer that said he wasn't quite clear that he had to power to do what he's being asked to do, that we have to get this cleared up.

And so, if we want to tie it back to a role that currently exists within the ICDR rules, we can do that. If we want to create a different role for it, we can do that. We just have to put in clearer expectation and bounds for what that role is supposed to serve.

SUSAN PAYNE: Lovely. Thanks, Sam. Mike? Not hearing you, Mike. Are you on double mute?

MIKE RODENBAUGH: Sorry about that. So, my understanding of Procedures Officer was that it was basically going to be a rotating position amongst the standing panel. So, one month or one quarter … Each quarter, that would rotate, much like would happen in US courts with this sort of thing. And then, I do agree the role should be more defined. These rules should be more defined. Clearly, if there's some practical experience around it, we should understand what's happened. That was all news to me so thank you, Helen for sharing.

So anyway, I don't think that the Procedures Officer is one person that's appointed to be the Procedures Officer. I just think that that's supposed to be a rotating role. Do people have that same impression or think differently? Thanks.

SUSAN PAYNE: Thanks, Mike. I'm not actually sure. In terms of the definitions, I'm just reading this out as I'm reading it. So, apologies if I stumble. So, it says in the definitions, in the supplementary rules, it says, "The Procedures

Officer refers to a single member of the standing panel designated to adjudicate requests for consolidation, intervention, and/or participation as an amicus. Or, if a standing panel is not in place at the time, that the relevant IRP is initiated, it shall refer to a panelist appointed by the ICDR, pursuant to its international arbitration rules relating to the appointment of panelists for consolidation."

So, I guess my sense from that is that it's an interim arbitrator that's appointed when you haven't agreed your formal IRP panel yet. And it could, indeed, be rotating. But my assumption would be that once you're given your Procedures Officer for your particular set of proceedings, then if the Procedures Officer was rotated off because their time was up that they wouldn't rotate off making a decision on … You wouldn't have to change your Procedures Officer halfway through while he's still considering it. I would assume that once you get allocated your Procedures Officer that he would stick with you whilst he's still needed. I don't know if anyone would agree with that or disagree.

But yeah. I think you're right, that that could be a rotating thing. And perhaps this would be … Once we have a standing panel, one would hope that the standing panelists would better understand their own roles and responsibilities. And so, perhaps the challenge could go away a little bit. But I think still, if this Procedures Officer that has been appointed to date was looking at our supplementary procedures and didn't really feel that he was sure that he had the power to make a decision on whether parties could participate as an amicus then it does seem like there's a gap there.

And perhaps that would also be worth getting people's thoughts on. But my assumption would be if we've gone to the trouble of saying that there's a Procedures Officer who is going to hearing these type of requests, then presumably, we're expecting him to have the authority to make a decision. Mike, you've got your hand up. I'm not sure if that's an old one. Yeah. It's an old one.

Okay. So, maybe what we need to do is … Obviously, we're all hoping that once there's a standing panel in place that this will somewhat get resolved. But nonetheless, as Sam and Helen have been saying, there clearly, at the moment, is a bit of a lack of clarity over what the role is. So, perhaps that's something that we can look at further. We can look at what the ICDR rules say about the consolidation arbitrator and whether there's any assistance in the provisions that deal with that, that would help us and that we perhaps could import across to make it a bit clearer for our Procedures Officer.

So, I think, unless anyone wants to discuss this particular issue further, perhaps we should park that for the time being and spend a bit of time looking into it. And then, we can come back to it.

Okay. I'm going to keep moving down. Yeah. Actually, my next comment is related to the Procedures Officer. And it was just that I think some of the language in there is a bit vague about whether you're referring these things to the IRP panel. Actually, it's further down. But there was a comment that I flagged, where I felt that perhaps that was part of the problem, was that the rules there talk about the panel making these decisions or things being referred to the panel, when clearly we know that the IRP panel isn't in place yet.

Thanks, Brenda. And sorry for jumping around. Would you mind scrolling back up to … That one, just at the bottom of page one. So, this is the comment that I had, that Sam circulated an email on just before the call. And the paragraph in question says, "In addition …" this is talking about intervention. So, it says, "In addition, the supporting organization which developed a consensus policy involved when a dispute …"

Sorry. Let me try that again. I can't read. "In addition, the supporting organization, which developed a consensus policy involved when a dispute challenges a material provision of an existing consensus policy, in whole or in part, shall have the right to intervene as a claimant to the extent of such challenge. Support organization rights in this respect shall be exercisable through the chair of the supporting organization"

My comment/question was that when I was reading this, it was slightly not making sense to me because it felt like how could the SO be claimant? If one assumes that the supporting organization is maintaining and defending their consensus policy, then surely, they're not standing shoulder-by-shoulder with the claimant in question. And so, how is it that they're being joined as a claimant?

And that is something that Sam commented on in her email shortly before the call and clarified. And I think that certainly did help me get my head around it a bit better, which is not that they're necessarily standing shoulder-by-shoulder with the original claimant. They do have a different perspective and point of view. But it's just that we don't, as it currently stands, have an alternative terminology because the respondent is ICANN. And so, you can't really have someone intervene

as the respondent because that would put the SO in the same position as ICANN is in this dispute, which is clearly not the case.

So, I think, perhaps … My comment there is perhaps that we've dealt … We don't need to deal with this. It's just one for me to get my head around, I suppose, and for all of us, unless we think it's useful to have some different terminology for an intervening party who is not taking the same stance and position as the original claimant. Greg?

GREG SHATAN: This might be a radical suggestion but I'm going to suggestion but I'm going to suggest "intervener."

SUSAN PAYNE: I was just going to respond but I can see Sam has her hand up. So, I'm going to go to Sam instead.

SAM EISNER: Thanks. I think that there's probably value in agreeing on a term. But I think we also want to make sure that the term is limited enough that it expresses only those areas. And I don't think that we need to only say that the areas that are reflected in this version of the rules are those that we think are appropriate for this type of intervention. But it needs to be limited only to those areas where we think that intervention, as opposed to amicus, is appropriate.

So, one of the things … And I see Mike has a question in the chat that says, "How would a dispute challenge a provision of a consensus

policy?" What we were talking about previously was … Let's say that some comes and says that the Board's adoption of the GNSO's recommendation eight out of x—name your PDP—was in violation of ICANN's mission because it went to [contest].

So, that would be a way that there is a consensus policy … So, assuming you had all the right thresholds in the GNSO process and Board did correct processing considering it, and someone later comes back and challenges that the Board's very adoption of that consensus policy itself was a violation of the consensus policy. Or possibly, it could be something about how the consensus policy is being implemented. That's probably a little bit further from this.

So, if we focus more on the challenges going to the Board's adoption of the consensus policy, in that situation, what we've previously discussed among the IOT was that there was value because of the multistakeholder model of how ICANN works and all of the work that went before that to get to the consensus policy, and all the work that the SO needs to do in order to even raise a consensus policy, that they would be in a unique position to join into that proceeding, to make sure that the policy that they got through their process, that they could stand up and defend it in some way.

They're still not on the hook the same way that ICANN would be because it's ICANN and ICANN alone that can violate the Bylaws or articles through the actions. And that's what's challenged in the IRP.

But what this also means is that the IOT, in our previous work, did not want to make … We didn't want to open up the possibility of

intervention wherever anyone thought that they had an interest, such that they would automatically be afforded the right to participate in full briefing, etc. There are other tests that we put in.

And so, I think we have to be careful about the types of terminology we use and the rights that we afford different people or entities for different purposes to come into the IRP, while making sure that we're still upholding the purpose of the IRP and not doing it to further interparty conflict or resolution of disputes between parties that are in ICANN.

SUSAN PAYNE: Thanks, Sam. Yes. And whilst you were speaking, I did look back at the definition of a claimant, just to be sure. And as one would anticipate, it is what you'd think of as a claimant. So, it's "a legal or natural person, group, or entity, including but not limited to the empowered community." But then, it also says, "a supporting organization or an advisory committee that has been materially affected by a dispute." And to be materially affected but a dispute, "the claimant must suffer an injury or harm that is directly and causally connected to the alleged violation."

And so, I think in that context, an SO might be a claimant, where they consider that there's been a harm brought on them by a decision from the ICANN Board specifically. And this notion of the SO as an intervener because it's their consensus policy that's the subject of discussion …

I agree with … I've come back round again to the point that Mike was making in the chat and that was my original feeling, which was it's fine

for them to be an intervener, if that's what we've all decided is appropriate. But they're not a claimant because they are not suffering an injury here as a result of ICANN's decision. In this context, they're intervening to uphold the consensus policy that's under challenge, unless I'm misunderstanding.

And so, it does seem to me, as some have said, that it would be appropriate for us to try and come up with some other term for the SO when they're intervening in that context. And I think in other contexts, other interveners, the first paragraph says that they have to be qualified as a claimant to be intervening, apart from in this particular circumstance. So, everyone else can be called a claimant.

There does look like there's a fair bit in the chat so I'm just going scroll back up and see if I'm missing anything. Okay. Mike has made a few comments about how that intervention by the SO would take place, in terms of the references to "through the chair" that we'll also need to, I think, think about. And Mike has commented that he thinks that perhaps it sounds more appropriate for the SO to be an amicus rather than and intervener because they're not—they don't satisfy the definition of what a claimant is.

And Kurt is saying, "This is confusing to me. First, the SO makes consensus policy recommendations." Oops. Sorry. I've just lost this. "It is not consensus policy until the Board says it is. Would it not make the Board the intervener? That makes no sense. Second, if not an amicus, it seems like the SO would be a witness and not an intervener but I'm clearly missing something."

Sam's comment is, "This was an issue that was primary in our prior IOT conversations. And I agree. The terminology's not right here. Helen's also agreeing that the terminology isn't right. Yeah.

Okay. If we were to think of some terminology along the lines of "the intervener," which was Greg's suggestion, perhaps that would work, unless there are strong feelings that the SO, in these circumstances, shouldn't be anything more than an amicus. Sam?

SAM EISNER: This is not to support or reject any positions the IOT might take about where the supporting organization could or should be on this. I think we do need to make sure that any suggestion of intervention is tied to specific rights that we want to uphold through the ICANN system. People or entities need to be there for full adjudication of the dispute. Or they might have a due process right involved in the action, as it relates to whether or not ICANN violated the Bylaws.

But I think this is, again, an area where we might benefit from talking about principles first before defining the term so that we know that we're supporting what we want to support. And from the ICANN Org side, we're very agnostic as to whether or not there's a special carve-out for SOs or anything. We're not here to defend that but I think we do have some of the history of it that we can help bring to the conversation.

SUSAN PAYNE: Thanks, Sam. And so, when you're talking about the principles, it seemed to me that there was quite a lot of discussion about whether it was appropriate to allow parties to intervene who wouldn't qualify as a claimant. And it seemed to me that the previous conclusion was that if you qualify as a claimant, then you can intervene.

But other parties that are impacted by the decision, or at least would be impacted by an overturning of the decision … So, for example, if you had previously … If you were effectively positively affected by the Board's decision but if it were overturned, you would then be negatively impacted, that you don't have the status of a claimant. And therefore, your role of intervening is as an amicus.

I'm not hearing anyone suggesting that that is the wrong balance to have reached. But perhaps that's something that we I should at least pause on and see if anyone does feel that that's the wrong balance. And in the meantime, I can see a long comment from Scott so I'll just quickly look at that.

So, Scott is asking if "the rules provide for the ability for either party to implead someone they determine may be responsible for or contributing to the violation, assuming this could be done by someone other than ICANN. Also, is there a possibly for interpleader to force a third party to enter the dispute that may be necessary to administration of justice, as it relates to compliance with the policy?"

I'm not sure of the answer to that, Scott. It might be helpful if you could … If you can think of a particular scenario, it might be helpful if you could suggest it. But as Sam is pointing out, "The IRP is focused entirely

on a violation, or at least an allegation of a violation, of the Bylaws or Articles by ICANN." And so, there may not be circumstances of the kind that you're envisaging.

I did see someone have their hand up but it does seem to have gone down. Oh, Scott.

SCOTT AUSTIN: Just to explain myself just a little bit … And again, still learning all the ins and outs of the policy. I thought it would be good to, perhaps, add the rest of the checklist from civil procedure, in terms of ways that people could be brought into a proceeding.

As an impleader, I guess the question is if a claimant comes in and says ICANN has violated a Bylaw, there may be a need for another party … In other words, the violation may have to do with favoritism or that there was unfair treatment of one particular gTLD versus this particular claimant that represents another gTLD, if I'm getting the context correct. And therefore, there may be a need for the parties already involved in the dispute to bring someone in—to reach outside the proceeding to bring in another party, whether they be considered a claimant or, essentially, a defendant, as typically a third-part impleader would be. So, that's one instance.

The other is whether there is someone that may not necessarily have had wrongdoing but that it's necessary for them to be a party to the dispute for all of the rights that are involved in this Bylaw violation to be dealt with. I don't know whether that means that they would be some kind of a downstream distributor or someone that's related in some

way to the way that the claimant has been damaged by this violation of the policy, or by the breach, or the violation of the bylaws by ICANN.

I just wondered if the policy should provide for that—has considered providing for those two instances, where either you need to bring someone in who has, perhaps, done something wrong with ICANN or is implicated in the violation of the Bylaw.

SUSAN PAYNE: Thanks, Scott. I'm not sure I know the answer to that. And indeed, it might be that one would need to look at the Bylaws, even, to see if that's a possibility because it seems to me that … The Bylaws set out the role of the IRP. And yeah. Sam is saying, "Can we think of some examples where that might happen?" Maybe this is one for us to think about between this call and the next one.

Mike is saying, "Could it be useful as to ICANN contractors, such as the EUI, at least to require them to provide relevant documents and witnesses? I guess that's a possibility. Would that be the only way in which you could get that? Yeah. Becky is saying, "You don't need to bring someone into the proceedings as a party in order to get documents."

Perhaps that's something that we can think about between this call and the next. Because at the moment, I'm slightly struggling to know how you can force someone in, even if you feel that they're tied up with ICANN's activity, when the Bylaws are a fairly specific set of obligations which exist for the Board. This seems to me like if something's … In

those kind of circumstances, it feels like you might need to be looking to the court for assistance. But I don't want to say that that's the answer.

Let's park that one as something to think about and come back to it, if that's okay. And indeed, if anyone can think of scenarios where this might be appropriate, that would help us. I think some suggested scenarios would definitely be helpful to try and get our heads around whether that's something that could or should be done. Okay. Yeah. Thanks. I agree. I think let's think about that. I'm not dispensing with it. I'm thinking about let's revert to it. Let's put it that way. And in terms of …

Yeah. Okay. Let's keep going, shall we? And I think the next section to scroll down to … And this will hopefully get us to the end of this document for the purposes of this call. And obviously, there'll be some things that we'll want to revisit and talk about further.

Yes. That comment is the one that I mentioned before when we were talking about the Procedures Officer. So, if we could scroll down, please, to the amicus section. Thank you. And so, I highlighted these three examples of scenarios where persons would qualify as participating as amicus. Or amici? And it seemed to me … My comment was that these seemed quite specific, particularly item two, where it talks specifically about contention set sort of scenarios from the new gTLD program. And whilst it is definitely … It's listed as an non-exhaustive list, I think. Yes, it is expressed to be without limitation.

But nonetheless, these did seem to me to be a bit specific. And I wondered if others agreed and, perhaps, whether there's a way to

address what the intent is without being quite so restrictive, if you like, as … Why are we particularly calling out someone who's been in a contention set? Is there a more general term that we could use that would be more appropriate to cover people who are materially impacted by the outcome because they've been party to the same process or decision? Sam?

SAM EISNER: Thanks, Susan. Just for a bit of history on this, I think that one of the reasons we got so specific in this list is because we understand that, through looking at the history of both reconsideration and IRPs, that for the most part, they are used when people are not successful in one of our application rounds. That's been the predominant use of the IRP proceeding.

And then, some of the situations that we've had—contention sets, or people who were part of the same panel proceeding, or others—those were specific use cases that were raised, that people considered might be easier so that we're not having so much motion practice. I just want to give that as some background—not to defend whether or not that level of specificity needs to be in here. But it really is trying to be reflective of the fact that the usage history of IRPs has almost 100% been around those who have not prevailed in application in various rounds of gTLD launches.

SUSAN PAYNE: Thanks for that, Sam. That's a really good point, which is something I knew but hadn't occurred to me for the purposes of looking at this.

You're absolutely correct. Let's hope, with all of the work that's going on in SubPro, that for any future round, that that's less the case. But nonetheless, yes, you were right that that's the case.

It still occurred to me that I think … I certainly agree that if you're tied up in a contention set then the outcome in the favor of one party clearly has an impact on anyone else in the contention set. So, I certainly wouldn't be suggesting language that rules them out, necessarily. But it also occurred to me that there might be scenarios—from the last round, the scenario, for example, of string contention, where principles that were used to decide one type of string contention between two applicants might have a knock-on impact to others. If there was a determination, for example—this didn't happen—but a determination that singulars and plurals can never go forward together, that would have had an impact on everyone else who was a singular and plural.

And so, I was thinking about is there a way of us just being slightly less specific in the listed examples? But Kristina? I'm not hearing you, Kristina. Kristina, it looks like your phone is muted.

KRISTINA ROSETTE: Oh. Thank you, whoever—magic phone person. And I have not fully gamed this out yet and so the question is directed more to the folks who participated in the original group. Was there any consideration of limiting the subcategory one to only apply to a person, group, or entity that participated in an underlying proceeding, blah, blah, blah, in which the IRT claimant was a party—that qualifying language.

I don't know if you all discussed that or not. And if so, and remember why that language wasn't included here, that would be helpful. Because otherwise, I'll be drawing out big gaming scenarios for the various objection types at some point. Thanks.

SUSAN PAYNE: Thanks, Kristina. I'm not seeing … Oh. No. I was about to say I'm not seeing any hands. And I thought I saw one but it was yours. No one is recalling. Sam?

SAM EISNER: So, I need to go back and look more at the specific language. But I do recall that one of the things we did not do was go back and compare the language to different objection sets or anything. So, it would be helpful if you could drop back in that language that you read so I can look more specifically at that. But I don't think that we were undertaking comparison to specific portions of the Applicant Guidebook or other rule sets as we were doing this.

SUSAN PAYNE: Okay. Thanks, Sam. So, is that something that you would be able to look into after the call? Thank you.

SAM EISNER: Yeah. I would just like to see the language that Kristina was reading.

SUSAN PAYNE: Yeah. Thank you. Okay. Helen?

HELEN LEE: So, not to make this all about the Afilias IRP but since these issues were relevant in a real-life example, I think I would agree with you, Susan, that some of these provisions seem a little bit specific. In the Afilias IRP, Afilias argued that Verisign did not have any material interest in the subject of the IRP. Perhaps reasonable minds could disagree on that point. We didn't feel that that was a reasonable argument. So, I think this language to could interpreted to be quite remitting. So, I would support looking at this provision in all scenarios to see if it would make sense to revise.

SUSAN PAYNE: Thanks, Helen. Yes. And to be clear, I'm not particularly proposing that we extensively widen the scope of who might be able to intervene. But obviously, open to discussion on that. If people feel that this is too narrow, then we can discuss and look at that. But to my mind, I just wondered why we were particularly calling out contention sets, when there may be other comparable scenarios.

Okay. I'm assuming that's an old hand, Helen. Yes. Thank you. Okay. And I think I'm close to the end of my comments. If we could just finally scroll down a little bit further. It gets towards the end. Yes. Sorry. Up just a tiny bit. Thank you. Thank you so much. That's it.

Just a final thought that I had as I was looking at this amicus section. It was this final sentence and the footnote. The final sentence in this

section talks about, “The IRP panel shall determine, in its discretion, what materials related to the dispute to make available to a person participating as an amicus.” And then, there’s a footnote that is a footnote to the previous sentence but talks about, “The IRP panel leaning in favor allowing broad participation of an amicus.”

And so, this is one that seemed to me to be related to the extent to which the amicus, who’s not a claimant in the proceedings but has intervened as a third-party participant—the extent to which they’re getting access to all of the documents and all of the participation in the proceedings. And I think most people’s understanding of an amicus and their role is that their participation is less than a party. But that footnote implies quite a broad, ranging participation by the amicus.

And that language did lead to some debate in the Afilias .web case, where it seemed to me that the IRP panel were favoring narrowing down that role of the amicus somewhat. Again, so this is one that I wanted to flag, of whether that seems to people that … Whether they think that there’s an issue here that we need to look at.

Mike is commenting in the chat that he feels that the amicus should broadly be allowed but should only get public documents. I’m assuming by that you mean nothing that the parties have identified as confidential. But you can correct me if I’ve misunderstood you. And

Helen has said, “We should consider what would occur if the amicus were not broadly allowed. Would there be implications where the IRP decision could be attacked in litigation?” Good question. Happy to get any other thoughts on this. Otherwise, we could go onto our other

agenda items. And we've got a few items for looking into in between this call and the next. And we can pick this up on the next call. And I will perhaps try and, to some extent, make some suggestions on some changes that we should be considering.

Kristina is commenting that she thinks it would be helpful to give more specific guidance—so, to refine that note four. Yeah. It's left, to some extent, to the discretion of the panel. But indeed, just off of the top of my head, it occurs to me that other people who are parties are given page limits, both the claimant and an intervener, and ICANN as the respondent. And yet, the amicus … There's no specific guidance on page limits, which seems to be a bit odd to me. But perhaps that's because it's felt that it's most appropriate for the panel to make their own determination on what's appropriate.

And perhaps it's envisaged it won't happen very often. But the way this is drafted seems to envisage that it could happen pretty frequently. And therefore, it seems to me bizarre that you might end up with, for example, different page limits—a bigger page limit for an amicus that you got for an actual party. But perhaps that would never happen.

Yes. So, I think there's a few things for Sam to look into and hopefully come back to us on. There's a few things for me to think about. And as I said, I will do my best to come up with some suggestions, at least on areas where we have reached some kind of meeting of the minds so we could have some kind of strawperson language. More to discuss, I think, on some of these more thorny topics for the next time around.

So, if you wouldn't mind, we can go back to the agenda and just finish off the last couple of items. Thanks, Brenda. Okay. So, yes. Next meeting. As Bernard has noted here in the agenda, if we were to go on our usual two-weekly rotation, the next meeting would be on the 23rd of June. And that's during the ICANN meeting. And as someone who may have to try and do the ICANN meeting on Kuala Lumpur time, even though I'm sitting in London, it fills me with horror, the idea of also then doing an IRP call at 5:00 PM in my local time as well. So, I would certainly … I'm definitely supportive of the notion that we revise that and do it afterwards.

I guess the only question would be do we do it on July … July the 7th would be two weeks after. Or should we look to convene during the week after the ICANN meeting? I don't know if that causes problems for staff. I know there's usually a gap after an ICANN meeting but that's quite often because of traveling and the like. Bernard?

BERNIE TURCOTTE: Thank you. It's not a staff issue. I just want to make that clear. But usually participants, after an ICANN meeting, are, a, a little exhausted and, b, trying to catch up on real life. So, experience has shown that the week immediately following an ICANN meeting is usually not great to have these kinds of meetings because, a, attendance is low, b, people are not prepared. Now, this is under the guise of the usual meetings. Will it actually carry over here? I don't know but I would assume so. Thank you.

SUSAN PAYNE: Thanks, Bernard. That's a good point, actually. And again, I guess to those of us who are going to try and do the ICANN 68 meeting in real time, we're all going to be completely out of our time zone. So, yes. Thanks for flagging that as an issue. That hadn't really occurred to me. Okay. Unless anyone disagrees, then, and feels we should push for the earlier week, let's keep the July the 7th. And we'll be able to come into the next meeting very fresh after the ICANN meeting.

In terms of AOB, I had one thing to mention which was that I know I had an outstanding item on translations. I was meant to be circulating revised language. And as I was sitting down and finalizing prep for this call, I realized that I hadn't circulated that. So, I will do that. And perhaps, that's something that with luck, we can have any debate on over email between this downtime between the two meetings so that we can go into the next call and perhaps really having agreed that language by email or have narrowed down any areas where we still need to discuss.

So, that was the only AOB that I had, which was just to remind you that I had forgotten but have no longer forgotten that I need to circulate something on—proposed final language on translations. And that's all I had. Did anyone else have anything they wanted to raise as AOB? I am not seeing any hands.

So, we are a few minutes early but I think this is a good time to wrap up because we've pretty much reached the edge of our agenda for present purposes. Okay. All right. Thanks, everyone, very much for your input and participation. And yes. We will hopefully have some engagement by

email. And then, we'll reconvene on 7th of July. Thanks very much. We can stop the recording, please.

**[END OF TRANSCRIPTION]**