SUSAN PAYNE: Thank you so much, everyone. Just for the purposes of the record, this is the IRP-IOT meeting of the 18th of August, 2020. Thank you so much to everyone who has joined. I'm Susan Payne.

Just for the usual housekeeping, please try, if you can, to remember to state your name when you're speaking just to help out with the recording and try to keep on mute when you're not speaking if possible, again, just to help with everyone else's audio and so on. Thanks very much to everyone for joining.

In terms of our agenda, there's quite a lot of things/documents to review and hopefully have some good discussion on during this call. A number of them were circulated by Liz Le during the course of the last couple of weeks. So hopefully you've all had the opportunity to review them. We will look at those and the suggestions and research that she's been doing for us that are various of the action items that came up in the last meeting.

In terms of our agenda, as I say, we've got an agenda item to review those action items. They're listed on the agenda. I think we probably don't need to spend too much time on them because we will actually—

SCOTT AUSTIN: Susan?

SUSAN PAYNE: Yeah?

SCOTT AUSTIN: Susan, hi. This is Scott Austin. I'm out of my office. I'm traveling. I just want to let you know I'm on the call through the 646 phone number. I don't know if it shows up in the thing or not.

SUSAN PAYNE: Oh, thanks, Scott. Actually, you're showing up as Scott, so we're good. We've got you.

SCOTT AUSTIN: Wonderful. Thank you very much.

SUSAN PAYNE: Thank you. That's a very good point. That reminds me to just anyone if there's anyone who's only on then audio. I don't think there is, but if there is, can you just make yourselves known?

Okay. That's good. We've got everyone. So then, having just quickly reminded ourselves of what the various action items were, we'll think about those documents that were circulated in more detail, including the timing considerations, the new draft of the translation documents, the options for the role of the procedures officer. We've got some strawperson text for Rule 7, which I think we'll probably just have time introduce but would expect that people will perhaps not have had too much time to consider that yet. Then we can just consider the date for our next meeting.

Just returning back to Agenda Item 1 and updates to statements of interest, is there anyone on the call who has any updates to their SOI that they feel they need to flag?

Okay. I'm not hearing anyone, so I'm going to assume that there are none in terms of our slate of IOT-specific statements of interest. We have all of them now. I think there are about three that it looks like we don't yet have. So, Bernard, if you wouldn't mind following up again with those people and hopefully encouraging them and giving them a deadline in which to submit their SOI, otherwise we may have to consider what we do about participants who haven't submitted an up-to-date SOI. Hopefully, it won't come to that. So, if you're one of the missing ones—actually, I think a couple of them are probably not on the call, actually … So, yeah, if you won't mind, Bernard, [chasing them] up again. I know you have tried once already. Hopefully, we can get those final ones in. Okay, thank you.

Moving on to Agenda Item 2, as I said, I don't think we really need to spend that much time reviewing these action items from the last meeting. Bernard has very kindly repeated them on the agenda so we can see what they were. They're all documents that I think we'll come on to talk about during the course of today's call. So I think we can note them as is and move on to actually get into the detail.

In terms of Agenda Item 3, I'm actually going to swap that over with #4: the translation document. The reason for that is just that, actually, when I looked again at the timing considerations research that Liz had very kindly done, it really largely related to Rule 7: the rule on consolidation, intervention, and participation as an amicus. So it seems

more appropriate for us to deal with it when we're talking about that section of the rules rather than in isolation. So, for our starting point, I think we need to circle back, hopefully near to the final time, on the rule on translations that we worked on to start with.

As I say, this is one of the action items that Sam and Liz had taken on. Liz has very kindly reviewed the draft of Section 5B and tidied it up and circulated it around the group a couple of weeks ago. So I hope that people have had a chance to review that, but I think probably we should spend some time just quickly going through it, again, as, I hope, close to a final time. There were just a couple of questions that Liz noted as comments against that document that we probably should consider and discuss. So I think we should spend just a little bit of time quickly doing that.

So, if possible, Brenda, are you able to call up the draft rule on translation, which, I hope, was attached—yes. Thank you. Perfect.

Again, just to reiterate, most of this language should be very familiar to everyone now. We've spent a fair bit of time on the translation rule. As I say, Liz has tidied it up. Probably, for the sake of good order, I should quickly go through it, I guess, but hopefully we can do that quite quickly. Obviously, if you have particular comments that occurred to you as you were doing your own review of it or occurred to you as I'm quickly going through it, then please do raise your hand or put something in the chat. As we go through, we'll get to Liz's questions as well.

Rule 5B on translation, Paragraph 1. We now have a number of paragraphs, which is very helpful. So, as required by the specified ICANN

bylaw there, “All IRP proceedings shall be administered in English as the primary working language with provision of translation services for claimants if needed. Translation may include both translation of submitted written statements, documents that have specific relevance to the subject matter of the dispute, transcripts, and panelists’ decisions, as well as interpretation of oral proceedings, ensuring that no party is unable to fairly participate in then proceedings due to language.”

Paragraph 2. “The claimants written statement of dispute must be submitted in English. No adverse inference as to the need for ICANN to provide translations services will be drawn from the fact that the written statement of dispute or request for translation services is in English.”

Paragraph 3. “A request for translation services (i) may accompany the written statement of dispute and must due so if the claimant is seeking reimbursement of the costs of translating the written statement of dispute into English or seeking translation of ICANN’s written statement in response from English into the language identified by the claimant as the claimant’s preferred language for the proceedings.” That’s been created as a new defined term: “claimant’s preferred language. “Where the request for translation services is made with the written statement of dispute. It does not count towards the page limit for the written statement of dispute, or (ii) may be made subsequently if a new need for translation services arises during the course of the proceedings.”

Paragraph 4. “Any request for translation services must identify the claimant’s preferred language,” which is now the new defined term,”

and include an explanation of why the claimant needs such services in order to be able to fairly participate in the proceedings. Each request for translation services shall be made on the designated form and shall not exceed five pages of text, double-spaced, using 12-point font."

Paragraph 5. "Requests for translation services generally shall be determined by the IRP panel, unless ICANN has already agreed to the request. In exceptional circumstances, if a determination is required as a matter of urgency before the IRP panel is seated, the request may include an application for emergency determination of translation services. A to-be-determined number of days after receipt of such application, an emergency panelist selected from the standing panel (or, if no standing panel is in place, a panelist appointed by the ICDR pursuant to ICDR rules) shall be appointed, and a determination shall be made as a preliminary issue for the proceeding within"—again—"to-be-determined number of days after the date of such appointment."

I am going to pause before we carry on with Paragraph 6 because this Paragraph 5 is the one where Liz raised a couple of questions. The first of those was, to summarize, "Essentially, should we build in a time for a requirement to first approach ICANN to agree on the provision of translation services prior to submitting a formal request? And, indeed, should the parties try to reach stipulation about the scope of the translation, including some of the items we'll come on to in Paragraph 6?" So essentially it's the extent to which translation should be provided and what for.

I can see there are a couple of comments in the chat on this point, so I'll just quickly refer to them and then make a comment of my own. So, yes, that's the first one. Then we'll talk about the second question.

David McAuley has put in the chat that he thinks this idea from Liz of the claimant approaching ICANN first is a good one and, indeed, he also is supporting the second comment as well.

But we do have a comment from Kurt in response to that saying that he interprets approaching ICANN first as an extra process step, so it might slow things down. Perhaps it's better to have it as an option and not a requirement.

I think that point from Kurt is something that I thought it would be helpful for us to think about really because, as I understand it, we certainly have envisaged circumstances where the claimant might be seeking translation services or making this request for translation services to accompany their written statement of claim of dispute. As we already know, there is certain time period for bringing an IRP. So it did seem to me, as Kurt mentions, that potentially this could build in a kind of delay that perhaps is not ideal. Particularly if it was absolute requirement to go first to ICANN, it might leave some claimants in a difficult position as to their time limits. So I wondered if perhaps, for consideration, we think about either, as Kurt says, having it as an option but not a requirement, or indeed perhaps we build in some kind of a time for the claimant and ICANN to discuss and try to agree [on] request for translation services after the request has been submitted. So the claimant has to make the request formally, but, having done so, they and ICANN would be given a period of time, which could be seven, 14,

21 days or whatever to try to reach agreement, rather than it needing to be a determination by a panelist.

I'm just looking, again, in the chat. Some support for something optional, although David is keen to see some kind of encouragement to have that discussion, rather than just a [bare] option. And Kurt is expressing the concern about ICANN being on the critical path to a claimant for being able to make a filing of their … I'm assuming you mean their written statement of dispute, but indeed also their request for translation services, I'm assuming.

So what do you think? I'm asking this of everyone, but I guess David and Kurt in particular: does a time period that kicks in after the request has been made? So the claimant makes a formal request and then we build in a time period during which ICANN and the claimant can try to reach agreement, and we encourage them to reach agreement? But, if they can't reach agreement, obviously that goes to the panelist to make the determination.

David?

DAVID MCAULEY: Thanks, Susan. Can you hear me?

SUSAN PAYNE: I can, but I went on mute. Yes.

DAVID MCAULEY: Thank you. Well, Kurt and I are very close. The point I was really trying `to get across is I think we mentioned in this group once or twice that the translation issue has not been a big deal in the past, and it may be something that can be very informally agreed to between ICANN and a claimant. I understand Kurt's concern about putting ICANN on the critical path to filing a claim, but it just seems to me that, if there were explored for a day or two or something like that—at least parties touching base on this—it might save a lot of hassle.

So that's the only point I'm trying to get to. I don't feel all that concerned. I would really look to hear from ICANN what they think in that argument. That's the point I'm trying to get across: this might be able to be done just in a snap, frankly, and we should have some language that encourages folks to just check. Thank you.

SUSAN PAYNE: Thanks, David. Liz or Sam? Actually, I don't know if Sam is on the call, but, Liz, do you have any particular thoughts on this?

LIZ LE: Hi, Susan. Yes. I tend to agree that I don't know that it should be a requirement, but I think that, in terms of the concern that this step might take more time, I actually think that, to the extent that such a discussion could reach to a stipulation, it actually—

SUSAN PAYNE: Sorry, Liz. I think we lost you.

LIZ LE: Can you hear me? Hello? Can you hear me?

SUSAN PAYNE: Hi. Sorry. I lost you briefly but I think you might have just come back.

LIZ LE: Okay. Sorry about that.

SUSAN PAYNE: I think it might even be at my end, actually, sorry.

GREG SHATAN: I think it is your end.

LIZ LE: All right. So I will just summarize. I think that the step of approaching ICANN and trying to reach a stipulation might go a long way towards saving time in terms of having to then brief this issue and make a formal request. So that's one of the reasons that we had put this into the comment section for the IOT to consider because I don't know that it needs to be a requirement, but if we put a provision in there that puts parameters around encouraging claimants to do this pre-step with ICANN, it might save time in the IRP itself.

SUSAN PAYNE: Thank you. Yeah, I take your point. My suggestion of building in a time period after the submission of formal request does have a definite downside in that then the claimant has had to go to the trouble of putting that request together in a formalized manner which might not be necessary, as you say—so perhaps something that makes it, as others have been suggesting, an option but of "parties are strongly encouraged where time permits" or something of that nature. What we don't want, I think, is to disadvantage someone who really is coming up to the wire to make them feel in any way that they can't bring their IRP claim because they've failed to allow time for this kind of translation discussion.

Okay, I'm seeing some support from that from David. And Liz?

LIZ LE: I guess one other place we can consider where this could be appropriate is that, while not all IRPs start as a CEP, many, in our experience, IRPs begin with people invoking the cooperative engagement process to try and work out the dispute with ICANN. Maybe we can consider that at the conclusion of the CEP that doesn't successfully resolve the claims. Maybe that's something at that point where they can discuss it as part of the CEP. I don't know. Just a thought that I want to throw out there for the group to consider.

SUSAN PAYNE: Thank you. Yes. This is where my recollection of the bylaws is going to let me down because I know that a CEP is definitely covered now. I'm just quickly looking at the bylaws as we're talking. The cooperative

engagement process, whilst it being something that is strongly encouraged for most of these cases, is still something that's voluntary. So it's certainly something that, if there's been a cooperative engagement process, that seems to be something that you'd like to think the parties would touch on, too. But we perhaps need to reference it here as well for those situations where there hasn't been a CEP for whatever reason.

Is that a new hand, Liz?

LIZ LE: No, sorry. I apologize. Old hand. But I do agree with what you're saying: because it's a volunteering process, we should consider referencing it in this set of rules as well.

SUSAN PAYNE: Okay. Thank you. Kurt has put another comment in. He says, "This is poorly worded"—I'm sure it isn't, Kurt—"but, for ease of use, parties can address requests for translation directly to ICANN for a stipulation that translation services will be provided."

Yeah, I think we can even have a "parties are encouraged to" … David is liking that, but would like a "parties are encouraged" type of language so that we don't want to force them but we'd like to encourage.

All right. I think we've got a path forward for that then. So thank you very much, everyone.

The second of Liz's very helpful comments is again on Paragraph 5. She just refers to a couple of specific questions. "How should the need for translation services be reflected for hearings before the panel—i.e., will there be a need for live interpretation?" Then the second one is, "Also, should there be some ongoing process for the parties to agree upon translations as the case proceeds, particularly as IRPs can be long processes?"

I'm obviously, again, looking to all of you for thoughts on this. I did have a few, so if you don't mind, I'll just keep talking whilst you ponder this. I think we do envisage that there might be circumstances where there's live translation for interpretation for hearings. I think that that's envisaged by Paragraph 1 of this Rule 5 or 5B—I can't remember what number the rule is—where Paragraph 1 does refer to various types of documents and so on, but it does also refer to the possibility of interpretation. So I think it's built in and is something that a party could be asking for. So I guess the question to everyone is whether they think that that is sufficient or whether we need something more than that reference in the first paragraph.

Regarding the second on—"Should there be some ongoing process for the parties to agree upon translations?"—again, my assumption had been that we have covered this off in Paragraph 3(ii) just above, if you won't mind terribly, Brenda, scrolling back up a tiny bit, where, in 3 (Paragraph 1), we're envisaging the request for translation services being made with the written statement of dispute. But, in Paragraph (ii) we do also say that such a request can be made subsequently if a new need for translation services arises during the course of the proceedings. I had envisaged that. My assumption and understanding of

that had been that that would be the kind of situation where a party might go back again either because a change of their own circumstances—for example, they hadn't ask for translation right from the outset, but later on they felt they were being disadvantaged so they went and made a request—or indeed if it became clear that there was going to be a hearing and they felt that they would need to have translation services … that that could be something that they hadn't previously asked for, so they could go back again and say, "Actually, we didn't ask for interpretation services for the hearing. We'd like to make a request for that now."

So, again, I had assumed from our draft that we were envisaging that and had covered that, so the question from you all from me, I guess, is, do you think I'm correct? And do you think that's adequate? Or do you think we need to be more precise than that to avoid any doubt?

David?

DAVID MCAULEY: Thanks, Susan. I went back, as you suggested, and looked at Paragraph 1 for the first point that you made, and I agree with you that that seems to take care of it. I think that's a nice catch.

With respect to then ongoing services, I think you make a good point about Paragraph 3 (ii), but it seems to me it might also make reference to instances where translation services are big provided but, for whatever reason, the claimant finds, during the proceedings, that they actually don't need it. So it might be an encouragement or a statement that counsel would recognize or a claimant would recognize. If you

don't need them and you're getting them, why not wind it up? The reason I say that is that oftentimes the claimant may not know how they'll work with counsel, how closely or how well. Counsel may be very good with English language or whatever the language this is being in. [That] may be working for them. They may not need translation services. So, if it makes sense, it might be a statement with respect to both needing them or no longer needing them. Thanks.

SUSAN PAYNE: Oops. Sorry. Coming off mute there. Thanks, David. That's a really good point. So perhaps we should be clarifying in 3(ii) that this could cover, as you say, both a new request and also a standing down of translation services if it becomes clear that the need doesn't continue.

All right. I think that covers that unless anyone else has any further thoughts. Hopefully, Liz's is good with that. Perhaps we'll be able to just make a few minor tweaks to reflect that.

We should just finish off the rest the rules from Paragraph 6 onwards just for completeness, so, if you wouldn't mind again, Brenda, scrolling up. Sorry. I'm going to be asking you this a lot today—oh, sorry. The other way: 6. Super.

Just to finish of the rest of the paragraph, Paragraph 6: "The IRP panel shall have discretion to determine, one, whether the claimant has a need for translation services, two, which documents or hearing that relate to the need, and, three, the language for which translation services will be provided."

I don't know if it's just me—it may just because I'm reading it out loud—but I'm finding 2 a bit awkward. But, as I said, it may just be me. If others feel it's fine, then I will just keep going.

Paragraph 7. "In exercising its discretion, the IRP panel should bear in mind the purposes of the IRP set out in specified bylaw section; in particular, Purpose vii, which should have regards to the following non-exhaustive considerations." These are, "One, the materiality of the particular document, hearing, or other matter or event requested to be translated, including the need to ensure that all material portions of the record of proceedings are available in English. Two, the claimant's ability to fairly participate in the proceedings to the level of understanding of spoken and written English by an officer, director, principal (or equivalent) with responsibility for the dispute, and, to the extent that the claimant is represented in the proceedings by an attorney or other agent, that representative's level of understanding of spoken and written English. Three, the level of understanding as above in another official language of the United Nations (i.e., Arabic, Chinese, French, Russian, or Spanish), where a claimant or a representative has a suitable level of understanding to commit fair participation in more than one language of which one is a U.N. language. Then translation services will be limited to that U.N. language where possible."

Paragraph 8. "All translation services ordered by the IRP panel shall be coordinated through ICANN's language services providers and shall be considered an administrative cost of the IRP paid for by ICANN unless the IRP panel later orders otherwise pursuant to ICANN bylaws-[name] section."

Paragraph 9. “A claimant determined by the IRP panel not to have a need for translation services must submit all materials in English.”

Paragraph 10.” If the claimant arranges for its own translation, either because translation services or not requested or denied, such translations shall be considered part of the claimant’s legal costs and so borne by the claimant pursuant to that named section in the bylaws and not an administrative cost to be borne by ICANN unless otherwise ordered by the IRP panel.”

Paragraph 11. “Where the claimant seeks to rely in the IRP proceedings on its own translation, this must be a certified translation from a qualified independent service provider.”

12. “The IRP panel may order that the deadlines for submission of document, etc., and for the timing of any appeal be amended to take into account reasonable delays generated by the translation of documents, transcripts, or panelist decisions.”

Kurt is helping me out there on that paragraph, 6.2, which I was stumbling over: “which documents or portions of the hearing relate to that need.” Yeah, I think that does help, Kurt. I think that is better. Thank you. So we’ve got a minor tweak to that 6.2 to make it read a little more clearly.

I think, subject to those few tweaks that we’ve just been talking about today to reflect in particular the questions that Liz raises, I think we are good with this, unless I hear anything from anyone else.

I'm not seeing any hands, so I think we can move on. Yes, bon voyage. Thank you very much for Liz for tidying that document up for us.

We can now move on—ah, thank you. There's our agenda. We can now move on to circling back to Section 7 on consolidation intervention and participation as an amicus, which is the live section that we're working on at the moment. In looking at this, we have a few documents to think about. We have the timing considerations research that Liz kindly did for us and circulated. So I think we'll look at that first. Then we have—again, Liz has been incredibly active for us—also her summary of options for the role of the procedures officer. Finally, we hopefully will have time for me to just at least introduce the strawperson that I circulated earlier today. I am just quickly checking. I'm now sure—ah, Malcolm is on. Great.

Just to set the scene for anyone who may have forgotten why we were asking about this, when we did our initial review of Section 7 on consolidation intervention and joining as an amicus, some questions came up just about the timing and whether the supplemental interim rules have the timings for bringing these requests for these various consolidations, to use as shorthand. [They] tend to have a deadline of 15 days for the relevant request to be made. So we just had a question about whether that timing was realistic and reasonable. So Liz very kindly agreed that she would look at what the situation is under other rules in case that could give us any particular guidance. I will let Liz chip in as appropriate, but really just to quickly skip through that. Obviously, the names of sections … The term "intervention" is something we adopted in our IRP rules, and it's not a term necessarily used in other rules, including the ICDR rules, but similar concepts exist.

Just to briefly go through this, essentially, under the ICDR rules, on the notion of joinder, of additional parties into the proceedings, there's no particular time limit expressed, but there is a provision that parties shouldn't join after the appointment of the arbitrator unless there's consent of all the parties to that. The point at which an arbitrator has been appointed would almost certainly be longer than a 15-day time limit. In terms of consolidation under the ICDR rules, that's Rule 8 or Article 8. Again, Liz has confirmed that they don't have a specific time limit. But, again, in the case of consolidation, there are some factors taken into account under the ICDR rules as to whether you allow for consolidation of proceedings, and they include things such as whether there are arbitrators already appointed in the respective proceedings and the general progress that's been made in the arbitrations. Neither of those absolutely rule out consolidation, but really they're just factors that get taken into consideration. So, certainly under the ICDR rules, which are the rules to which IRPs are subject, in addition, obviously, or rather as amended by any supplemental rules that we have agreed, there's no specific deadlines.

Under the ICC rules, just by way of alternative, again it's very similar to the ICDR. So, for joinder, again, it's mostly by reference to whether the arbitrators have already been appointed or not. Again, on consolidation against similar sorts of principles, there's no specific time limit but takes into account the circumstances. That might include how far one or both of then actions have got, including things like whether arbitrators have already been appointed.

If we scroll down a little further, Liz also looked at the federal rules of civil procedure—thank you—so here we have a concept of intervention.

There's no strict time limit here for an application for intervention, but there is a reference to a timeliness, effectively—timeliness having various factors that should be taken into consideration, including how much time has elapsed and so on. In the case of consolidation, those rules, again, have no specific time limit for such an application.

I'm just having a quick look at Rule 14. Okay. I think Rule 14 does have a 14-day limit, which seems to be for, if I'm understanding that correctly, joining an unwilling party[,] serving notice on an unwilling party. So that's not entirely analogue to what we have.

Just to summarize really, whilst this is all helpful, certainly it's helpful in reminding us that, if anything, our interim supplementary procedures are more strict. And, under a number of these other rule sets, it's really left largely, I think, to the discretion of the panelist rather than imposing strict deadlines.

Liz has made just a few comments at the end of things for us to consider and comments in particular that, if we're thinking about this, we might want to take into account that there is an overall timeframe target for the completion of an IRP, which is six months. So, when we're thinking about how much time we give to third parties for applications to consolidate or applications to intervene, we might want to have that six-month target timeframe in mind and, I suppose, not allow so much time for these applications that we would throw that timeframe out. I think that's a good point, although it is noticeable that, if one looks at the three IRPs that are currently underway and, I think, are now all on the new IRP procedure under the new bylaws, none are anywhere close to being resolved in six months. So whilst that might be a target and an

aspiration, it seems incredibly optimistic and it doesn't appear to be something that is very easy to meet in practice. The .web case, for example, whilst it is complex and did have intervening parties, has been more than a year-and-a-half since it commenced. So it's very far from six months. I think we should bear in mind that there is desire under the bylaws to try to have these cases decided in a prompt and timely manner, but I think we have to also recognize that perhaps there's a balance here to be struck if we're limiting parties to making these kinds of requests to just two weeks in an action which actually is going to run on for 18 months or more. That perhaps is too constraining. But really this is something for us to consider as we go through Section 7.

I'm happy to take any comments now but equally happy for us to just bear this in mind as we're going through.

I can see a couple of comments. Oh, blimey! Helen has commented that she thinks it might still be helpful to encourage timely at the very least.

Scott has a question about at what point during the web proceeding did the parties intervene.

I'm not sure I can answer that one without doing more research, I'm afraid, Scott, although it's possible that someone else on the call might know the answer to that.

Kurt has raised more of a point of principle and just commented that, "As a starting point, do we agree with the general principle that IRPs should prioritize prompt and timely settlement of the claimant's case as opposed to creating a global precedent or assembling all parties to an issue?"

That's a really good question—again, one for us to consider. I think we might also need to, in considering that, reflect back on the bylaws. Again, I don't have the bylaws sufficiently clear in my head without going and rechecking, but I think we have something in the bylaws which references something to the effect of prompt resolution. It might see if I can find that whilst we're discussing.

I can see Scott has his hand up, so, Scott?

SCOTT AUSTIN: Thank you, Susan. The only reason I asked the question was that we've had some really nice research done and shared with us, but the thing that seems to be missing is that some of the key words—for example, "timeliness," timely application," and some other facts—would be useful if there's been a precedent set, whether that's under the FRCP or other proceedings, including our own, where there has been a factual determination on what is considered timely.

Was anyone in the interest of justice, for example, allowed to intervene post-14 days, or can we find maybe some court precedent that has allowed that? As I said in one of my earlier questions, where there times when there was a denial of a motion to intervene as untimely? And, if so, what was the period of time that has elapsed? This almost sounds like something like [latches] that's very fact-specific and fact-driven.

I just wondered if that would help us if we're going to do something other than what we have before us (14 days, for example); if we had some other precedent that has put the meat on the bones of what untimely or timely means.

SUSAN PAYNE: Sorry, Scott. Thanks. I'm hoping Liz has her hand up to help me out with the answer to that. Liz?

LIZ LE: [Thanks], Susan. Again, I think Scott is raising a good point, but I think those are very fact-specific scenarios and it's not something we came across in terms of our research as to just a global rule. If you would like, we can go back and see if we can find some more information on it, but, again, I'm pretty doubtful because it's very fact-specific situations.

SUSAN PAYNE: Thanks, Liz. Scott, is that a new hand?

SCOTT AUSTIN: Yes, it is.

SUSAN PAYNE: Fine. Scott, please?

SCOTT AUSTIN: Just to clarify, all I'm trying to say is maybe I need to understand better what it is we're trying to do—if we're trying to actually insert a proposed time limit, a cutoff, or a permission that extends to a later date at which time parties intervene—and, if so, I was just trying to look at, if it was a yes, it probably is a very fact-specific precedent. But, if

some of that fact-specific precedent gave a particular timeframe, it'd be something for us to look at to see if perhaps the facts would be similar to the type of case that we're dealing with generally in an IRP context or if it would be applicable. It just seems to me that, for us to be left with these different versions of how the FRCP or the ICDR or ICC deal with intervention, I don't think we're there yet in terms of having enough information to determine if we should just leave it as determined based on all the circumstances or if we need to put some kind of a guideline so there's actually a cutoff point.

SUSAN PAYNE: Thanks, Scott. I have some thoughts on this, so I will make some comments in a minute. But Helen has her hand up so I will quickly go to Helen first.

HELEN LEE: Hi, Susan. Can you hear me?

SUSAN PAYNE: Yes. Thanks, Helen.

HELEN LEE: Sure. I think that the global decision of whether we should encourage time limits or whether there should be a time limit might be slightly putting the cart before the horse right now. I think the way that the IRPs operate currently or have operated in the past might be different than how they might operate in the future, given the rules that we are

considering. I think that, in the .web situation in particular, as I mentioned, there was that procedures officer decision, and he had put off making the decision until amici had filed in December 2018, and I don't think the panel made a decision on allowing participation until February 2020.

That being said, that's a past situation, and I think we are trying to remedy some of these bylaws so that we're not in a similar situation in the future. Also, we're considering a standing panel, which I think may allow some inherent timeliness versus the way that the panel had to be assembled in the .web case.

So I think, given some of these measures that we're already considering, it might help to consider them first while we are thinking globally about whether we want to encourage a time limit or whether we want to philosophically want to encourage timeliness or whether we even want to give a specific timeframe.

SUSAN PAYNE: Yeah. Thanks, Helen. I think that's a good suggestion and a good encourage for us to move on and look at some of these other documents. I was going to make a similar sort of point.

I think what we have at the moment, to come back to what Scott was asking, is we have the interim supplemental rules which do put some time limits. Generally, where they do so for these types of consolidation-type applications, what they've put in is 14 days. You'll see that they're not an absolute, so already-built-in is scoped for a discretion from the proceedings officer to allow for a late application

where they feel it's appropriate. So the 14 days that we do have is not an absolute. But really I think it's just useful to have in mind what other rules say on the topic. I think our fallback would be … Unless we agree that we think we need to change what we've got, then I think the presumption would be that we keep what we have, which is the 14 days but with a discretionary opportunity for that to be extended.

But really I thought it was helpful for people to have the results of this research in mind as we start looking at the rules and just also, I think, to have in mind, when you're thinking about it, who is it who's going to making the application. If it's an application for an intervention, for example, who might be a party who would be wanting to intervene? And, if they're not a party who've been involved, as indeed they wouldn't be in something like the cooperative engagement process between the claimant and ICANN for a period of time, then they're not necessarily directly aware of when the IRP in question that they want to intervene on is going to be started. So are we being unfair to them to spring an IRP on them, and then they only have 14 days? But it may be that, overall, we think that that is good enough, particularly when there's this discretion from the panelists. So I just felt it was helpful for us to be reminded of the information that Liz had dug out. Then we can keep that in mind as people start looking at Rule 7 in more detail.

With that in mind, let's move on and look at the other piece of research that Liz did, which is in relation to the procedures officer role. Again, it's more for the purposes of "let's keep this in mind then when we look at Rule 7" rather than necessarily "can we fix everything as we go through this suggestion from Liz?" Again, we've had various discussions, various comments, in the past both from Sam and Liz and also from Helen from

experiences in cases where there has been a procedures officer. Obviously, the number of cases have been very limited because IRPs don't happen all the time. But, based on experiences, particularly in the .web scenario, there was some uncertainty, if you like, about exactly what the role of the procedures officer was, what their responsibilities were. Helen pointed out to us that in fact the procedures officer in question in the web case didn't appear to be feel terribly comfortable, that they were empowered to make decisions and felt that those decisions should be something the panel made. So we've had some feedback that the role of the procedures officer at the moment has seemed to perhaps … Instead of what I think the intent probably has been is to make complex things more straightforward and to have a simple process for these applications actually seemed in practice to have made them more complex because of a lack of understanding.

So Liz very kindly looked back at this and again circulated a note and reminded us that the concept of the procedures officer isn't something that is contained in the ICDR rules. It is something that was adopted for our process specifically. And she has suggested two different alternatives. One would be that we might consider using the ICDR process whereby the ICDR who are managing the proceedings give them the opportunity to select an arbitrator for the specific purpose of adjudicating requests for consolidation intervention and participation as an amicus and keep it fairly light-touch. Or she suggests that we borrow the concept of what's called, under the ICDR rules, the consolidation arbitrator. That consolidation arbitrator, under the ICDR rules, is dealt with under Article 8, and there's quite a fairly detailed set of rules in

relation to what that particular role is. So those are two possible options.

Malcolm very helpfully had taken the opportunity to respond with some thoughts on this. I don't know, Malcolm, if you're on and if you wanted to raise them on the call or if you want me to paraphrase. So I'll just pause and see if you want to speak up.

MALCOLM HUTTY: I spoke to more than one thing on this. Which did you have in mind?

SUSAN PAYNE: If you'd like to, feel free to touch on all of it. We have the concept of how we deal with the kind of procedures officer role or what we use as a role if it's not that, but there is also the subsequent question of, where do we find that person, if you like, or does that person come from the standing panel or do they come from some other source?

MALCOLM HUTTY: Okay. Well, if you'd like me to address both the points that I made there, firstly there was really one quite narrow point, which was in looking at the previous models. One of the things that has been said for a consolidation arbitrator was setting out a set of criteria when they could consolidate claims. And one of them was that it would be sufficient for consolidation if all the claims were made under the same arbitration agreement. I may misunderstand that, but if I correctly understand this, from the ICDR's point of view, the entire IRP system is considered a single arbitration agreement, which would mean that, if

we adopted that as a rule, then it would be acceptable to consolidate any IRP case with any other for no better reason than that it was an IRP case, which seemed to me to be, not to put sufficiency of guidelines as to when it's appropriate to do so.

So, while I think the idea of actually having that consolidation arbitrator that was specifically empowered to consider the issue of consolidation strikes me as a very helpful suggestion. I think we need some more precise guidelines than that.

More generally, moving on to the more general point, it struck me that there were two balancing things here. One the one hand, when ICANN does something that is controversial or rather unpopular and there's a lot of challenge to it, it can have a tendency to spawn a very large number of complaints against it, all of which, if they were brought in as IRPs separately, very often would be very sensible and then everybody's interested. They all got consolidated into a single claim. Well, at least I can very much imagine scenarios where that would be the case and where multiplying the claims against ICANN would be in nobody's interest at all. Actually, being able to clearly and accurately identify where really actually this is just the same case being brought, maybe being put differently and from different perspectives, but fundamentally the same issue … It would be very helpful to be able to be quite aggressive in consolidation.

On the other hand, if you come at this with maybe a naïve approach, excess consolidation could be quite unhelpful, both to claimants and indeed to ICANN, by wrapping together really quite separate issues into a case that really makes a single case that could be quite simply overly

complex because it involved, through consolidation, too many different factors that are not really at all related. If you think about, say, something like the challenges to how a new TLD application round had been applied under the rulebook, to an outsider that wasn't familiar with this, it might seem, "Oh, well, it's a challenge to the application of the rulebook. Well, that's all really a very similar set of facts, isn't it?" But actually I think those of us who have been more intimately aware understand that real complexity of that and would realize that being too aggressive about consolidating things which were different complaints in relation to that would really make a case much more complex than it needed to be. So there's this balance to be struck.

It just occurred to me that the community itself probably has a much deeper understanding of when things really are truly the same sort of issue, even though they might not appear to an outsider. Even when actually it may have appeared to an outsider to be the same thing, fundamentally they're about a different point that needs to be litigated. There was a wealth of really deep understanding of that in the community. The problem is, of course, preserving independence because there's a risk that sort of thing could be misused.

So I just wondered whether you could look to community leaders to appoint a consolidation arbitrator who, on that particular occasion, would be truly disinterested but would have the depth of knowledge of the issue to be able to fairly aggressively but not excessively consolidate cases to maximize efficiency without achieving unto complexity. So I thought, well, maybe if the Chairs of the GNSO, the [ccNSO], and the ASO acted together, they could say, "This person really knows it, and we all know that this person is not involved in this controversy but they

really do understand what's going on here and they would be able to pick out whether it was appropriate to consolidate cases. And I wondered, "Maybe that's an idea but maybe that's asking too much of the community. Maybe it's too much for those Chairs." I can already anticipate many objections to that as an idea, but maybe they're resolvable.

So I just thought I'd throw it on the table and see whether people were interested in developing that as an idea and the necessarily fixes that would need to be in put in place to make it actually workable.

SUSAN PAYNE: Lovely. Thank you, Malcom. That sounds like something we can bear in mind, I think, when we're thinking about this role. As a reminder to everyone, I suppose, once there is a standing panel in place from which the panelists for IRPs would be drawn down, it's envisaged, or certainly it was envisaged under the current interim rules that we have, that one member of the standing panel would be selected to be the procedures officer. Then, because they'd have been the procedures officers, they wouldn't then be a panelists appointed to be part of the actual IRP panel, presumably because it's felt then that they've been too involved in some of these other discussions about consolidation.

So my assumption—I say this having not been a member of this group when those interim rules were put together—has been that perhaps the thinking behind identifying a standing panelist and using one of those standing panelists for this task is to try to get to some of your concern about having people who are not outsiders—so trying to get someone

who has got a bit more of an understanding of ICANN and the background to the dispute and just a general clearer understanding of the nature of the ICANN community and whether there is the necessary nexus between the factual situations. So that had been my understanding: that's why there was this suggestion that we use someone from the standing panel to be this procedures officer. Really, I'm happy to be corrected if others who were actually involved in that earlier decision have a recollection that disabuses me of that notion.

MALCOLM HUTTY: Susan, actually, I quite agree. I think that was what everybody, including myself, had assumed. Really I think I may be just going off on a bit of a flight of fancy here. So, if there's no interest in this as an alternative idea, I'd be very happy to see it dropped forthwith. It just occurred to me that that would be one other option that might get some real [depth] of knowledge. If people say, "Hey, that's a really good idea," then we could go with it. But otherwise, let's just drop it.

SUSAN PAYNE: Okay. Thanks, Malcolm. Why don't we park it? We'll not necessarily drop it. We can circle back to it. I certainly don't want to, particularly when you only circulated your e-mail today, completely shut off further discussion on this if indeed there's a degree of support expressed on our e-mail list in the next few days and weeks.

For the present purposes, let's just think more about the nature of this procedures officer's role and whether we want to go extremely light-touch and just have ICDR or someone pick a person and just give them a

great deal of leeway or whether we think that it's preferable to do something a bit more akin to Option 2 with a bit more guidance in the rules for the procedure officers about what their job is, what their roles and responsibilities are, and what their powers are, albeit that I absolutely take onboard Malcom's comment that the ICDR rules, where they talk about what cases are appropriate to be joined or consolidated, are not reflecting the same test as we have in the IRP for bringing an action. So we can't simply rely on the ICDR rules because it doesn't reflect the same situation that we find ourselves in in terms of qualification to bring an IRP.

Do people have strong preferences? Certainly, I think I've heard a preference from Malcolm to be something more akin to Option 2. I think Liz is certainly looking to get a bit of guidance on this. I think probably my preference, I would say personally, speaking just as another participant in the group, is probably similar. I probably feel like Option 2 ought to hopefully give that procedures officer or whatever name they know get given, whether they're stilled called that or whether they're called something else, gives them a bit more comfort about what their job is and what they're supposed to be doing. So I feel that that would be helpful.

Helen?

HELEN LEE: I agree that Option 2 is probably preferable for the reasons that I laid out in the .web matter, but I think it may require a little bit more thinking, at least on my part, about how the guidance may go in both

the way that it was been laid out in here in Liz's e-mail and also the strawman/the Rule 7 [markup] that you had. So I think it might require some more thought and several rounds of revision as we think and streamline and narrow down exactly what we might want to say.

SUSAN PAYNE: Yeah. Thanks, Helen. I don't envisage us making a final decision here. I completely agree that it's something we need to keep in mind. Perhaps this is the perfect segue to that Rule 7 markup document that I circulated because, if we keep in mind what we're trying to achieve, what we'll then need to do is check whether the draft is actually doing that and whether it works or whether we need a bit more thinking to be done. I'm pretty sure we do need some more thinking to be done because I specifically hadn't really tried to address the situation with the procedures officer and how we treat that role. I Was trying to start the ball rolling. Certainly, I flagged that we'd been discussing what the role of the procedures officer was and how it worked, but I hadn't necessarily fixed all of the problems yet. So I think hopefully we can try and build on Option 2 whilst we're going through and see if this works for us.

I'm conscious that obviously I didn't circulate this with a great deal of notice, and most of you haven't had that much time to think about this yet. So, really, for the present purposes, I just wanted to introduce this document and explain what I was doing and then hopefully give people an opportunity then to raise any immediate comments that they have if there's time but also just give people the opportunity to go away and actually review the document. Perhaps, if possible, we can have a bit of

a discussion by e-mail and then certainly come back to this on our next call.

As I say, I think I've taken an action item to try and just mark up Section 7 as a starting point, a strawperson, because we'd done a general review and I felt we were going to make a bit more progress. We had some suggested changes that we could also think about.

Now, as you're going through, you'll see that I haven't changed things like timings yet. Obviously, we've had a bit of a talk about the timing of when one of these applications is made. So I've just flagged that with a comment that this is something we need to think about. I haven't specifically addressed the procedures officer point, except to say that, as I was going through, there were certain points in the interim rules as they currently stand where it says something like, "An application must be made to the IRP panel." In the same sentence, it would say, "An application must be made to the IRP panel within 15 days of the commencement of the IRP." It seemed to me that that clearly makes no sense. There's no prospect, even on the most optimistic timeframe, of there being an IRP panel in place after 15 days.

So I've tried to fix things like that, and I've put in as a suggestion that the application is made to the IRP provider because I think, in practice, that's probably where it would be made. I've made an assumption that the IRP provider would then be finding a procedures officer or whatever we now call this person. So I've still, for the purposes of this, made the assumption that that procedures officer is coming from the standing panel, but we can review as we go through.

Then what I really tried to do was just to firstly divide out the application for a consolidation from the application for intervention because, although in the interim rules that we have they are divided out, when you actually look at the text, there are a number of cases where, under either the consolidation or the intervention section, it actually talks about both those proceedings together in a particular task that needs to be done or a timing for something. I felt that wasn't helpful. So, for present purposes, I've divided them out completely, which does actually mean that there's a certain amount of duplication. But I think that brings some benefit in that it means that, if you're applying for consolidation, you know that all of the rules you need to read about are in the consolidation section and you don't need to go elsewhere in this Rule 7 to find text that's somewhat hidden. But, ultimately, once we've got our principles, if people think there's too much duplication, we can probably find a way to rationalize the headings to remove some of that duplication. But, for now, that's what I've done. So you'll see that there is, as I say, a certain amount of repetition.

Then I tried to just be a bit more specific about what it is that an application for either consolidation or for intervention needs to contain, what it is that a procedures officer or whoever it is should be taken into consideration when they're considering it, just to provide a little more clarity. That, I guess, is with a view of trying to address some of these previously expressed concerns about the consolidation officer or the procedures officer not having a sufficiently good understanding of his role. So I was trying to give a bit more, I guess, guidance for that procedures officer so that he does understand—he or she—that

actually their job is to make these decisions. We've delegated them this task. They've got certain factors they should take into consideration. There are a couple of grounds that the requester has to explain how they meet in order for that application to be successful. So that was really what I was trying to do here: just give a bit more guidance to that procedures officer about what we're expecting of them. So, to some extent, I guess that does somewhat build on Liz's suggestion about Option 2, although there may be other elements from the ICDR rules that I didn't pick up and that we feel would be helpful.

So I think that's the main comments I wanted to make. I didn't propose any particular changes to who has standing or the nature of when you're entitled to intervene and the like. I very much stuck with what we had in the interim rules, but that in itself is something that we perhaps need to circle back on, particularly noting that Malcolm circulated some very thoughtful comments about the intervention aspect and concerns about whether we're excluding certain parties from the opportunity to intervene.

So that's a very longwinded way to say really that what I was trying to achieve … As I say, this is really just a strawperson. I'm most certainly not expecting this to be the final version or acceptable to everyone. It's to try to direct the discussion and flush out issues that people may be missing.

Helen?

Helen, I think you might be double-muted.

HELEN LEE: I'm so sorry. Can you hear me?

SUSAN PAYNE: I can, yeah.

HELEN LEE: Okay. Sorry about that. I had a question about what you and the committee may think about the procedures officer. If a procedures officer is appointed, is the idea that they must make a decision about consolidation or intervention? Or is it that they can or they may make a decision? Because that might affect the edits that I would suggest.

SUSAN PAYNE: Thanks, Helen. Well, I think that in itself is one for us to discuss. To my mind, it seems—this is, again, purely personally; I'm not speaking as the Chair here—nuts to have this whole role for someone who's supposed to be responsible for these decisions about consolidation and intervention and then for them not to make a decision. But I think we'd all benefit from your input on that because you're one of the few people who's been responsible for one of these actions.

I've got a couple of people with hands up. Really quickly, and then I think we'll almost certainly have to come back to this. So maybe if you could just quickly tee up, and then I need to wrap our call up, I'm afraid.

Sorry. Helen first and then Malcolm.

HELEN LEE: Sure. Yeah, I would say that, if the parties are going to agree to have a procedures officer appointed, then it would make sense that, barring any exigent circumstances, that procedures officer should make the decision. Then, in that case, you would say consolidation of disputes shall be appropriate and use language like that and that the procedure officers shall in its discretion [inaudible] etc. etc. So those the kinds of things that I was thinking, and it was really not a very large point. But thank you.

SUSAN PAYNE: Super. Thanks, Helen. Malcolm.

MALCOLM HUTTY: Sorry. On mute. I was just going to say that, if somebody makes an application, then to fail to make a decision on that application is to effectively take a decision against the application. So you really have to take a decision when an application is made.

The question then becomes more, should the procedures officer or consolidation arbitrator take decisions on their own motion, or should they only do so on application?

SUSAN PAYNE: Thanks, Malcolm. That's a good question, too, and I think another one we should certainly thinking about more when we have our next call.

Sorry that this became a bit rushed at the end. We just need to talk quickly about our next call. Thanks, everyone, for your input so far. I'd

just like to encourage everyone to read the strawperson on this Rule 7 with my intent to flush out issues in mind. If you can, do share thoughts on the mailing list, as Malcolm very kindly already has, which is fantastic. Then we can come back to this on our next call.

With that in mind, I want to just seek your views really. Our next meeting would ordinarily be in two weeks' time on the first of September. I will be on vacation then for the whole week. So I really want to seek any strong objection to us shifting by a week and having the call on the eight of September instead, which does change our call rotations. On the other hand, if people have other calls that they have been scheduling around, knowing when our call rotations are, then I don't want to throw everyone else's schedule out, but it would mean it would be four weeks before we could have another call. I wanted to try and avoid that if I could. So perhaps can I see if I can ask whether anyone has strong concerns about shifting the call so that we have it outside of our usual time rotation?

A couple of people are helpfully saying in the chat that they're okay with it. Malcolm, your hand is up, but I'm not sure if that's an old one.

MALCOLM HUTTY: My apologies.

SUSAN PAYNE: Oh, cool. It's an old one. Okay.

All right. I'm seeing lots of people saying that seems fine to shift to them. So, absent strong objection, I think, if that's okay, then we will

have our next call on the 8th of September in order that we don't have another very long delay between calls. But, obviously, in the meantime, we've got now three weeks when we can hopefully share some thoughts before that and have advanced some of our thinking on this rule before then.

All right. Thanks very much, everyone. Really good to get your input. I'll see all again on the 8th of September.

We can stop the recording, please, Brenda. Thank you very much for your help today.

[END OF TRANSCRIPTION]