SUSAN PAYNE: Thank you, everyone. Welcome to the call for the IRP-IOT on the 8th of September. Thanks for everyone who's been able to join. Appreciated. Greg has gone for a cup of coffee already. That's not a good sign. I'm looking forward to hopefully making some progress today. Oh, and thanks David for noting that Helen is planning to join us but might be a little bit late. That's perfect. Thank you so much.

As usual, please keep your mics on mute when you're not speaking, and please try to remember to introduce yourselves when you are speaking. I've, as usual, completely failed myself to do that, so apologies. This is Susan Payne speaking.

Let's start with a quick review of the agenda and updates for SOI. In terms of the agenda, we'll just look back at what our action items from the last meeting were and just check on progress. The majority of our time I think we'll spend on continuing our discussion of consolidation, intervention, and participation as amicus—so reviewing the strawperson text. In that regard, we have useful comments from Liz that she has circulated a little earlier today that hopefully we can use as something as a guide for our discussion. Then I did have on my agenda AOB, but I think it has just lost its line entry and number entry. In terms of AOB, I've got a couple of quick related items to raise, which we'll come to at the end, regarding the e-mail that Mike Rodenbaugh circulated towards the end of last week. If anyone else has anything they want to raise as AOB, let me know now if possible or put it in the chat. But they're also be a time to do so when we get to the end of the

call. Our next meeting is noted in the agenda—so two weeks' time on the alternative time slot, which is 1900 UTC.

What I didn't do was the updates to SOI, so if anyone has updates to SOIs that they need to draw to the attention of the group, now is your opportunity, please.

Great. Not hearing from anyone or seeing anything, I will keep going.

In terms of action items from the last meeting, we had a couple of particular ones. One was for Bernard, who was going to be chasing up the outstanding SOIs, which are just from a couple of our members now. I think we still have a couple outstanding. I'm hoping that we can have those now by the time of our next call. I think we are reaching the point where we would reluctantly have to move people into observer status if we don't have them. I'm very, very much hoping that's not necessary. I don't want to lose anyone from this group. But we do need to have everyone with an up-to-date SOI. So that was the first action item.

The second one is one for Liz, which is to circulate around an updated edit of the translation document to incorporate the comments from the last meeting. Liz is working on that. That's hopefully going to be available to us sometime towards the end of this week/early next week, if not this week. What I'm hoping is that we'll have a good seven days or more for people to spend time and review that outside of the meeting so that, when we come to our next meeting on the 22nd, hopefully, if anyone has any further substantive issues or concerns, that has already

been aired and we can spend the minimum time we need on the next call on that translation document.

Just pausing there in case anyone wants to add anything or ask anything.

David?

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

SUSAN PAYNE: Yes. Thank you.

DAVID MCAULEY: Thanks. Just a question on SOIs. For a long time, I thought my SOI had been entered. I found out that I was mistaken. So, about a month ago, I sent it in. So it's possible that it might happen twice. So my question to Bernie is, Bernie, are you contacting individually those folks whose SOI is absent? Thank you.

BERNIE TURCOTTE: Yes, I am.

SUSAN PAYNE: Yes.

DAVID MCAULEY: Thank you.

SUSAN PAYNE: It's certainly not our intent to lose anyone inadvertently, so we are following up. We definitely want everyone to stay a member of the group, and we don't want to lose them. So, yeah, we're trying to make sure that that doesn't happen. Thanks, David.

So those were our action items.

We did also have obviously a request to everyone in the group to review the strawperson text on Rule 7, which is the consolidation, intervention, and participation as amicus (the rule dealing with that), ideally to circulate comments and suggestions and questions or whatever. I haven't really seen any feedback on that strawperson so far, and I'd love to think that that's because I did such a perfect job that everyone was very happy with it. I'm confident that that's not the case. So I do hope that, for the purposes of this call, you've all come having given it some thought or in a position to put your thinking hats on on this call so we can actually make some good progress.

In that regard, thanks very much to Liz, who did circulate—hopefully people have had a chance to quickly read Liz's e-mail from earlier today—a series of principles, if you like, for us to consider in reviewing that document that hopefully are some of the key outstanding principles we need to try to make to reach agreement on in order to allow us to finalize that Rule 7.

In that regard, I think maybe it's helpful if we can have the Rule 7 text up on the screen. I'm hoping you all are in a position to have a look at Liz's e-mail in tandem with that whilst we've got the Rule 7 text up. What I'll try and do is flag up … Yes, I think that may not be what I was … Or maybe it's just not coming up as the markup. Is it possible to load it as the markup, Brenda? Yeah, there it is. Thank you. Cool. Unfortunately, what it doesn't really do is highlight all of the comments, but we can try and do that as we go through. What I will try to do is to flag up the questions or the points/the consideration that Liz has raised as we go through. I have no doubt that Liz will do likewise if I'm missing something. So really I think we start at the top and work our way through.

One of the first considerations that has been flagged has been what do we do about the procedures officer and the role of that procedures officer. This is something that Liz has flagged, too, as the first item in her e-mail, where she basically says the "Number one role of the procedures officer. Are we updating the role of the procedures officer, and, if so, how?"

Now, we did have some discussion about this on the last call. In particular, we previously had some suggestions from Liz in an earlier e-mail, particularly suggesting two possible options on how we deal with the procedures officer, bearing in mind the comments we've talked about previously about the kind of lack of understanding of the role, lack of clarity, and particularly the lack of appreciation of the procedures officer themselves in the dot-web case on what is role was and what his duties and responsibilities were and that that had caused some confusion. So Liz's two options that she previously suggested was

either, as Option 1, to use ICDR and to have them select an arbitrator for this purpose, or, as Option 2, to borrow the concept of the ICDR consolidation arbitrator. But obviously that would require some amendment to reflect that our procedure is not entirely the same as the ICDR rules, and what we're entirely to achieve is not entirely the same. So, as Liz was suggesting, it's borrowing the concept, but it would need tweaking to better reflect what it is we want to do.

I would say, on the last call, that, to the extent that people expressed views on this, there seemed to be more support for that second option. In particular, Malcolm, Helen, and myself, if I was taking my Chair hat off, I think all felt that that second option was probably the better one to spell about a bit more clearly what the officer does but use that kind of notion. We did also have some comments which I think came from Helen to the effect that there was support for the procedures officer being empowered to make decisions and having it clear that that was part of their role and responsibility and using language like "shall" in order to make that clear.

Now, I'm just quickly looking down on who's here at the moment. I think—ah, Helen has just joined us. I don't think Malcolm is with us this week. But, as I say, my feeling was that there was support from those people for that second option in terms of how we deal with the procedures officer role.

Really I'm just pausing here to see if there are any other thoughts on this and indeed whether Liz has any particular views, given that this is one of the questions that she asked us to focus our agreement and principle on. But, aside from the existing support for that second,

Option 2, that Liz suggested, are there any contrary views to that, or can I take silence on this we being that most people are comfortable with taking that approach.

Okay. I am not seeing any hands, so I am going to –yes, hi, Helen. Yes. David gave your apologies and said you might join a bit late. So thanks very much for joining us. Okay, I'm not seeing any objections. Robin in the chat is agreeing. So it looks as though there's at least some support for trying to approach it from that perspective.

Liz, does that give you enough, or do you feel you need more guidance?

LIZ LE: Thanks, Susan. Well, I think it's a good start for us to know which direction that the group is heading in. I think it would benefit us a little bit to discuss some of the concepts that we've highlighted in the e-mail that I circulated on August 10th from the ICDR rules because, as you said, we're going to have to adapt some of that into the role for Rule 7 itself because, in this instance, the ICDR rule that we're following from is for a consolidation arbitrator. It's not contemplating the situation of someone that will preside over a participation as an amicus or intervention—maybe those two further points that we raised in our e-mail, which is, is there a suggestion that we need additional procedures for the various other motions in addition to consolidation, such as intervention and participation as an amicus? So I think more guidance on that, and then that will allow us to be able to provide some suggested thoughts for the group's consideration.

SUSAN PAYNE: Just coming off mute. Thank you. So good start, but maybe we need to, if we move through the rest of the document and through the other questions that you were asking, maybe that will help shed light. If not, we may need to come back to this if it seems that we haven't sufficiently addressed what you need. That's kind of what I'm hearing from what you're saying, Liz, so I hope that's right.

LIZ LE: Yes. That's correct.

SUSAN PAYNE: Brilliant. So that's great. Thank you.

I'm just moving on. In terms of your second point, I think it's one we don't really need to come back to in terms of the page limit that is at least one issue. I think all of us were agreed. So I don't think we need to spend time on that one.

Your next question or matter of principle for us to think about was around the timing of any motion for consolidation, intervention, and participation as an amicus—in particular for us to agree as a matter of principle what the timeframe is for seeking to do that. But for consolidation and intervention, I think, from Liz's e-mail, there's some assumption that that timing for consolidation or intervention applications would be the same. But I think that is something we need to think about.

Then, is there a different timeframe for an application to be an amicus? To my mind, probably the answer to that is yes, but I think that's something we will think about as we go through the document.

But since we come to that, in the case of consolidation anyway, the next block of text in the redline is around what is the timing, first of all, for a consolidation application. Again, I'm looking for input from people. I had proposed 15 days on the basis that a consolidation action is where you've got two individual IRP disputes, and one or the other party is applying to have those two disputes consolidated into a single action. On that basis, it seemed to me therefore that you've got two actions that have already been commenced where there's a written statement of claim from both the claimants in both cases. So they already got their cases together if you like. On that basis, it seemed to me that we wanted that consolidation to happen in a timely manner. So I had suggested within 15 days of the later IRP action so that there's only a short period after the second IRP commences in which an application to consolidate could be made. But that was very much as a strawperson. I do think it would be helpful to get people's thoughts on this. In particular, I hadn't really given much thought or consideration to how appropriate that 15 days is if in fact the first IRP is by that point six months or one year underway. It may be that we need to address that timing as well. So I'm hoping that that's the case.

I've got a ton of hands, which is super, and I've got a question which I'll just come to now, which Mike has put in the chat, just saying, "What is publication, and who controls how and when it happens?"

To my mind, and based on that this was proposal, "publication" was "published on the ICANN website" and therefore that's to some extent controlled by ICANN. But I think—I'm sure Liz or Sam will correct me—there is a certain requirement for publication to happen in a timely manner. But it felt to me that, given that the outside world doesn't know that an IRP has happened until it gets published, we should be running out timings for that. But, again, it's for discussion.

I'm going to stop talking because I can now see a huge number of hands, so I'm going to start at the top with Flip, please.

FLIP PETILLION: Thank you, Susan. I actually thought that Kristina was before me.

SUSAN PAYNE: I'm very happy for you two to fight it out, but I'm sure Kristina can go first if she'd like to.

FLIP PETILLION: Kristina, you decide.

SUSAN PAYNE: Okay. Kristina is passing to you, Flip. It looks like you just beat her to it. So we'll do Flip, and then Kristina will go after you.

FLIP PETILLION: Thank you. Thank you very much, Susan. I would like to just make the following observation. The later IRP requests … I would expect that this one would actually ask for a consolidation in the requests or very briefly after filing the request. I think that, in practice, 15 days may be too short. That's one observation.

Second, suppose the later IRP request does not ask for a consolidation but the older one actually finds, "Hmm. That's an interesting case, and actually it covers topics that we are covering in [our] IRP, which has been filed, in your example, Susan, six months ago. We [ask] for a consolidation. Again, I wonder whether 15 days is enough.

The last and third observation I would like to make I have the impression you covered in the last meeting. I apologize but I couldn't attend then. But of course we should be very careful about request for consolidations that are actually filed with an intent to slow down existing requests [of] existing IRPs. Thank you, Susan.

SUSAN PAYNE: Thanks, Flip. Before we go to Kristina, I'll just, for everyone's benefit, flag that Liz has commented in the chat that, once an IRP filing has been perfected, Org will publish the notice of the IRP and associated materials filed by the claimants on the ICANN website within 24 hours. So I think, by that account, there's not a great deal of difference in timing between when the IRP is filed and when it gets published, but obviously, when it's published on the website, that's when then world knows about it, rather than just the party that filed it.

Kristina?

KRISTINA ROSETTE: Thanks. Just picking up on a couple points that Flip made, I do think that we need to think about this from both the perspective as the first filer being the party requesting consolidation, as well as the later party being the one to request consolidation.

With regard to the "within 15 days of publication"/the later IRP, I do think that's too short in that scenario. I do think it should be at least 21 days. Probably 28 might be too long. The scenario that I'm thinking of, for example, is that it may be the case that an IRP claimant may time the filing of its notice of IRP to coincide with the start of an ICANN meeting. At some point, we will all be traveling again, and I assume at some point we will be returning to our meetings, so you're going to lose eight to ten days off the bat there. So I do think that should be longer.

I also think that there does need to be a date by which it frankly should be too late for a party to request a later-filed claimant to request consolidation, simply because I think, at a certain point, the proceeding gets too far along such that where there may have been an argument that consolidation would foster more just and sufficient resolution if it had been filed earlier, at that point that's no longer true. I think I'm not in a position, of the top of my head, to flag what state that would be. But I do think it's something that we need to identify to avoid a party using consolidation as essentially a request to delay. Thanks.

SUSAN PAYNE: Thanks, Kristina. Sam?

SAM EISNER: Thanks. Following on from both Flip and Kristina's comment, I particularly what Kristina was saying about, when is it too late?

Also I wanted to flag that there might be times when there's not just a claimants who are seeking consolidation but it could be ICANN, for example, that would see that items that are within the two proceedings are so related that maybe it would make sense to move. I don't read this language to preclude that at all, and I don't think that would be appropriate to preclude.

But I think, if we step back for a second and think about some of the things that were raised in Liz's e-mail, what are the things that we hope consolidation achieve? Because that might guide whether there's a time bar on it or not. Because we know that, out of IRT, they're becoming preclusive. They're becoming binding. So what's happening in one IRT will impact what happens after that IRP has concluded in terms of what constitutes a violation of ICANN's bylaws and what doesn't. At times, those could be very issue-specific things. At times, those could be very broad. But I think we might benefit by maybe trying to reflect in the procedures what it is that we're hoping to achieve consolidation, not just that they're happening out of the same nucleus facts, but maybe it's more that they're addressing the same issue or something arising at the same time. We always know that there's going to be that ability for preclusive [effect] in the future. So that's where I see Kristina's idea of, when does it become too late for someone to join? I think that that might something that helps the claimant and maybe gives more information to the panelists or consolidation arbitrator or whoever's

making the decision to think about when it's appropriate and when it's not because I think we're not really clear on what we hope to achieve out of consolidation or intervention here in the rules to guide how that should be considered in the future.

SUSAN PAYNE: Thanks for that, Sam. That's really helpful comments. David?

DAVID MCAULEY: Thank you, Susan. I tend to agree with the comments from Sam and the prior speakers. All I would like to do is just urge us to exercise some caution in how we draft this to take account of the fact that it's possible that the case will be repleaded after discovery or that the statement of the issue might change in some respect. If that would happen—I'm not a practitioner at IRP; never have been, so maybe this is impossible—as a result of pleading/responding/doing some discovery, if the shape of the thing changed a bit, I think we would want to make sure that there is an opportunity for people who want to intervene in some fashion—one of the fashions that we're talking about if things changes to their perspective. Anyway, just an idea. Thank you very much.

SUSAN PAYNE: Lovely. Thanks, David. I've got Scott now.

SCOTT AUSTIN: Thanks, Susan. Following up on what David just said—I appreciate his mention regarding practitioners—Mike is on the call, who has been a

practitioner, as I understand, in an IRP. I'm always interested in what is the timeline of a typical IRP, if there is such a thing, and is there a timeline of certain events that have occurred? Is there a discovery conference set at a particular point of time, or is it just fairly open to determination by the parties in an arbitration setting? There are certain things that typically occur within appointment of the panel and so forth.

But I guess my question would be, what are using as determinants or markers for how much or how little time we should have? Kristina has brought up a very good point that's unique to ICANN in the sense that there are ICANN meetings which could have an impact in terms of what ICANN announces at that meeting or that people are assembled that are needed for the IRP or that people have to make decisions for the IRP. At any rate, my question is, do we have any analogues or do we have any evidence from prior IRPs of what is the course of events within the first 30 days/within the first six months that we could rely upon to determine whether 15, 28, 21, or a longer period time is required? Thanks.

SUSAN PAYNE: Thank, Scott. Flip has his hand up. Just before I turn back to Flip, I'll just refer to what's been happening in the chat, which is just a couple of people answering at least in part what Scott was querying. Just to remind us, the bylaws say that there's a desire to conclude IRPs in six months, but also a number of people are then commenting from their actual real-life exercise that they run significantly longer than that and that six months, whilst that might be an aim, is one that doesn't appear to be realistic in practice.

Turning to Flip.

FLIP PETILLION: Thanks, Susan. Just wanted to give an answer to Scott. Scott, I've handled something like seven or eight, now, of IRPs, and they are all different. In the 30 first days, nothing really happens. I think I mentioned in one of the previous calls one of the first preoccupations for parties to install a panel. That usually is done in the following way. Each of the parties is trying to find a panelist. Then, once they are cleared and nominated and appointed, they will seek for a chair. That can take quite some time. It has in the past. Some parties, even ICANN, have had to ask for prolongations—more time—to find a chair. So it can take quite some time.

What I want to stress is that—I think it's good, and I think it should be kept that way—every case is different. Every case's timing will depend upon the parties, parties 'involvement, their counsel, the issues that are in stake, and the number of parties that are involved.

Also, we should make a difference between a normal IRP and an expedited one. There has been an expedited one very recently, and actually that was handled in less than a month's time.

So you should really, really look at the case and the very peculiar aspects of each case that is at stake. Thank you.

SUSAN PAYNE: Thanks, Flip. Sam has given the very sensible reminder that of course six months in the bylaws may be aspirational, but that is what the bylaws

say, and we as this group can't really change the bylaws. So we should at least have in mind what the aspiration in the bylaws is when we're trying to come up with timing or at least have in mind that, if we were to suggest that one had six months for consolidation, then that really isn't something that's meeting the bylaws' expectations. So we do need to, whilst we recognize that a lot of these IRPs don't run to the six-month aspiration, at least be having in mind that there is this desire for them to be as quickly resolved as possible when we're trying to come up with our timing. So I think we need to be realistic.

As people were talking, I had a couple of questions or things that this brought to my mind. One was that it hadn't really occurred to me, although there's absolutely no reason why not … But I had tended to be approaching this from the perspective of one or the other of the claimants wanting to consolidate rather than ICANN. But I think it was Sam who pointed it out that it might be ICANN itself who are wanting to consolidate, and I think that's excluded at all. But it is certainly something we need to bear in mind.

One thing that I had somewhat assumed was that, where there's a later dispute or a later IRP commenced, if there's an earlier one on essentially the same facts, that potential claimant could seek to intervene and therefore they don't necessarily have to apply to consolidate the action because they also have this potential to intervene directly as a claimant in the already-existing IRP. So I had been tending to assume that this process of consolidation would be more likely to occur where the earlier filer of the IRP was seeking to consolidate a later action. But it may be that that's not always going to be the case. Possibly some of you can think of good reasons why it wouldn't be the case. That had been my

thinking and consequently why I had been focused on the publication of the later IRP. But, as I say, it's certainly open to either of them.

Other than that, I was struck by David's comment about being sure we ensure that, if things change—if there's, for example, a change in the claim that suddenly brings a slightly different circumstance—we haven't ruled out the ability to intervene or consolidate in that scenario. I think that, to my mind, perhaps that's addressed by having this discretion for the procedures officer to accept a late application outside of whatever the time limit is if it would further the purposes of the IRP.

Does that seem to provide sufficient safeguard? That seems like the kind of scenario where a late filing might be appropriate because circumstances have changed, if you like. I don't know, David, if you've got any thoughts on that. Does that seem adequate?

Okay. Thank you. David is saying it sounds as though it probably would be a way to address that concern.

Perhaps, as Sam was suggesting, we also need to be thinking of some of these other issues before we can maybe pin down our timing. But, yes, I think we need to note for ourselves that there's certainly some concern from a couple of you that 15 days would be too short and maybe 21 days is more reasonable as a general principle but also that we need to think of some kind of backstop for a point at which—yeah; Kristina is making a suggestion; this is perfect—of maybe 21 days of the late IRP or a backstop of something which might be 60 days, she's suggesting, of the publication of the earlier one (whichever is the earlier). So 60 days would be two months, effectively, and that does seem reasonable to me

in the context of a potential six-month timeline from start to finish for an IRP. So we could perhaps that as a strawperson suggestion pending further discussion and further review as we come to the end of the rules overall, if that makes sense to people.

I think we'll probably have to revisit the question of timing when we think about intervention as well, but it may be that we can think about the same timing for intervention.

As Liz noted, we'll also need to think about, when we get to it, whether we do something different in the case of participation as an amicus.

I am going to park that now, I think. Not seeing any more hands. So I think we're certainly at least aware of the concern and the issues we want to address, or at least the facts that we want to take into consideration on this.

Let's keep going. I think this takes us mostly onto further down that same block of text and to Liz's next point, which is Point 4. But I've just seen David's hand, so I will pause. David?

DAVID MCAULEY: Thank you, Susan. As we wrap this up, I just wanted to mention that we're obviously going to have to come back to it. It's a very difficult area, in my estimation. One reason is, if you have an IRP between ICANN and the other party, and the decision comes out in such a manner that it would affect a third party so that, when ICANN goes to put in place a remedy in accordance with the first IRP decision, the third party that was not present brings an IRP against ICANN for that action.

That has its own very difficult questions, such as, does the first case act as a precedent, barring the second case? So this whole area, in my view—I'm consistent with what you're saying—I think needs a lot more thought and reflection. Anyway, thank you very much.

SUSAN PAYNE: Yes. Thanks, David. I completely agree, which is why I was being a little facetious at the beginning when I was saying I was hoping that no-comment meant that everything I suggested was perfect. I absolutely don't think it is. I think that's why we have this group here with the range of experience that we have to try to think about the scenarios that we need to try and address. I guess, since we'll never think about every scenario, we do need occasional discretion built in as well to enable a procedures officer or an arbitration panel to deal with things that we just haven't thought of.

Since we've got the Rule 7—the marked-up rule—up, I'll just read out Liz's comment from her e-mail on additional procedure because I think that's probably the easiest way to do it. Point 4 that she made, if you have her e-mail in front of you, was, "Do we need additional procedure? Do we need to have additional procedural steps detailed? If so, what procedural steps are missing?" Then a couple of bullets: "Do we need to detail out (as I had suggested) the required elements of the request? And should be clearer in this Rule 7 about the types of consideration that important for upholding the purposes of the IRP? And are there specific purposes of the IRP that we should specifically call out? For example, because IRP proceedings are binding, there's a possibility of conflicting rulings or [an erased] ruling that might render a separate

pending IRP moot. Could that be a factor that would tend towards consolidation? And are there factors that might go against consolidation, or are there other items that might support consolidation? And do we want to call any of them out?"

I think this goes to this section, whether that's dealt with in the "what does the application for consolidation need to say" or whether it's more generally considered as part of the subsequent part of the text, where I tried to suggest some circumstances that the procedures officer would have in mind when they're deciding whether to allow the consolidation or not.

Just as a reminder, those that I had suggested were somewhat influenced or informed, if you like, by some of the considerations that the ICDR rules reflect. But obviously, we've got a different procedure and a different process to ICDR. It's not identical. So not all of the considerations in the ICDR rule seem to be so relevant. So I selected some, but by no means all of them. Again, they were a starting point, part of this straw suggestion, but very much for further discussion and consideration.

Flip, I'm going to turn the mic to you.

FLIP PETILLION: Thank you, Susan. I think I need to share one topic. I think a justification for a consolidation is actually the fear that the decision might be not consistent with another decision. So a party who's asking for a consolidation may have concerns about consistency and may be fearing

that a decision in one case may actually conflict with a decision in another one. That's one level.

A second fear could be that the execution of a decision in one case could actually be impossible, if compared with the execution of a decision in another case.

So consistency, I think, is a major point.

Second, what I would see as an important criteria for accepting a consolidation is that the filing of such a request should be also in the interest of more than the parties of the community because, as we already said, there is that precedential and binding value of a decision. Thank you.

SUSAN PAYNE: Thanks, Flip. Becky?

BECKY BURR: Thanks, Flip. I was actually thinking about those two things, and I think they do raise hard questions.

The one thing I just wanted to urge some caution on, because I think we do sometimes forget this, is that the bylaws essentially give the IRP panel the ability to say whether an action or inaction violated the bylaws or not. I think it's certainly ICANN's view and consistent with my understanding from the beginning of time: the resolution of a case—something like awarding damaged or something like that—goes back to ICANN but the authority of the panel is in deciding whether an action or

inaction violated the bylaws. So you wouldn't want to set up something where an IRP panel was actually—well, I don't know; maybe you would—being asked to chose between two particular contending parties or something like that. So just a caution that we need to keep in mind the authority of the panel here, which is a little bit different than other cases.

SUSAN PAYNE: Thank you, Becky. So a question for you all then. Since the parties in question are claimants, who are therefore bringing an action in relation to an objection of some form in relation to the action or inaction of ICANN, are we going to see a scenario where they would be opposing, where you would both be claimants objecting to the action but you're asking the panel to chose between one and the other of them? I'm asking that and perhaps it's impossible to answer whether that scenario could happen. But is that scenario one that we don't want to happen? So that would be a factor that would tend to suggest that there shouldn't be consolidation or there shouldn't be intervention.

Flip?

FLIP PETILLION: Thank you, Susan. Yes, that is perfectly possible. I will give you two examples—for example, a case about confusing similarity that ultimately ends up between a request for consideration and that lands into an IRP. One party may have been granted the extension, and the other party actually opposes the granting of the delegation of that extension to the other party. So these parties have an opposing interest

on the same question. The same could be on a public interest. The same could be about the community evaluation process where the outcome is in favor of one and not for the other. One starts a request for reconsideration with the ICANN Board and ultimately has to initiate an IRP. Another party may actually have similar issues on the same question but opposing interests to the other party. So it's perfectly possible.

SUSAN PAYNE: Thanks, Flip. In which case, is it the case then—let's think about this; we may need to think about it more—that would be something that would perhaps suggest that the cases shouldn't be consolidated? Or in fact would that be worse? Is it in fact better, if there are two potential disputes relating to the same factual nexus and decision and action or inaction, to actually have it dealt with in one IRP and thereby avoid the possibility of conflicting decisions or erased decisions? I think that may circle us back to where we came in with Liz's e-mail and what she was suggesting. So I'm floating that. I'm not sure I have the answer, but I can see two hands, so maybe you guys do. David?

DAVID MCAULEY: Thank you, Susan. I'm following up on the point I made earlier. I think we need the wisdom of Solomon here. It's going to be very difficult.

First, I agree completely with Becky that the panel's role is to make a declaration. That's what they do. They declare something was or was not violative. ICANN, in my personal thinking, would fashion the remedy. But, if we preclude consolidation, as you suggest might be an

avenue of approach, then ICANN, in fashioning a remedy to satisfy the first party, may actually undertake an action that a second party then walks in and says, "That remedy harms me. I'm bringing another IRP" about. Then we face the complicated question of, can ICANN argue in that second IRP that the precedent was set in the first IRP, where that second party had no voice? So this is extremely fraught, and we're not going to solve it here in this meeting. But I'm of the view that flexibility and trying to get all of the claims aired in one proceeding by one panel subject to one appeal is probably the better approach. Thank you.

SUSAN PAYNE: Thanks very much, David. I'm coming around to feeling similarly. Flip?

FLIP PETILLION: Thank you, Susan. And thank you very much, David. You actually put that very well. I couldn't say it better. What's important is that a panel has to decide/render a declaration in each case or after consolidation in one case so that it is actually deciding in accordance with values and with commitments, and it will be up to the ICANN Board to implement the decision in such a way that the implementation is in accordance with these principles, even if that would mean that one party wins and the other party fails. Thank you.

SUSAN PAYNE: Thanks, Flip. Greg?

GREG SHATAN: Thanks. I think it's important to allow for consolidation but also recognize it's not going to be appropriate for each case and even be counterproductive, depending upon the relationship of the cases to each other. There are some fairly well-settled principles for consolidation and the like, which hopefully we can important and not have to make up. But it certainly shouldn't be mandatory, and it shouldn't be prohibited. I think it should be discretionary and at the discretion of the panel ultimately. In some cases, it may be a no-brainer. In other cases, there may be some reasons why one of the three parties involved may not want it. And they may be credible reasons. Of course, it creates another layer of complexity, but then again, it's still less burdensome, I think, than having two cases as a matter of course. Thanks.

SUSAN PAYNE: Yeah. Lovely. Thanks, Greg. I think it sounds to me that we're agreed that we perhaps would like to beef up that section about the considerations for the procedures officer and some of the things for them to bear in mind. And I think that's what Sam is saying in the chat, actually: "Can we give guidance in Rule 7 about when it would or wouldn't be appropriate?" That's my sense from the views that people have been expressing so far. I think they probably feel it would be helpful.

Now, whether people have thoughts on that they want to air now, that might be an option. Alternatively, I think it might be one that we could come back to. It would be good to see people perhaps expressing some suggestions. Perhaps we could circulate and try to agree on some

suggestions by e-mail rather than trying to do all of this on the hoof on the calls. That, I think, would be really helpful.

I was going to say Greg's hand is up, but, Greg, is that a new hand now?

GREG SHATAN: Yeah, it's a new hand. That's why I took it down for a nanosecond and put it back up again.

SUSAN PAYNE: I was just looking at and about to say that was an old hand.

GREG SHATAN: Very sophisticated. Yes, you saw both the old hand and the absence of a hand and a new hand all in one second.

SUSAN PAYNE: Super. Then I will hand over to you. Thank you.

GREG SHATAN: Must have made your day. In any case, I think this is place where we are strongly advised to be better scavengers than inventors or better scavengers than scriveners, to be alliterative. There's definitely stuff out there that I can even almost hear the language out there, although it might be the language of making a class in a class-action case. In any case, it's the same sort of thing out there. If there is something in the arbitration world we can grab, that'd be great. If not, then I think

there's something we can grab out of the U.S. or U.K. system. This I wouldn't quite call black-letter, but these kinds of balancing tests are fairly well built out since there are so many times when cases don't just neatly involve two parties or two parties that are in complete alignment with each other and are approaching the case together from day zero.

So I just think that I would not put a premium on inventiveness here but rather on what we need to do to fix existing things so that they fit our peculiar circumstances when our circumstances, as Sam, notes—I'll paraphrase, obviously—are peculiar and unique. Anything else will be a jumping-off point. But I think we'll have a much better jumping-off point from a pre-existing set of rules than we will going at whole cloth from something else.

SUSAN PAYNE: Thanks, Greg. I'm noting, as you did, that Sam's comment in the chat was that obviously things like class actions are not wholly on foot with this because this is different type of proceeding. But, nonetheless, Malcolm is giving you a +1 in terms of if it's worth looking elsewhere for guidance on this.

David, I'll come to you.

DAVID MCAULEY: Thanks, Susan. I'll be brief. I largely agree with Greg and Malcom that we should try and be scavengers, but when we do it here, we do have to exercise one more form of care. That is, in this arbitration … Well, let me put it this way. There are some court systems—I know in the United

States—that like arbitration and will give effect to an arbitration ruling to the exclusion of litigation if the parties had an arbitration agreement, etc. In this case, however, we have to be careful about excluding parties in an IRP because those parties who were excluded in an IRP in my personal opinion may not be subject to such standards in courts because they could easily say to the court, "Well, I wasn't there when this was argued."

So I like the idea of scavenging, and I think there are things we can get from court systems if we need to, rather than arbitration systems, if they don't provide the answers. But we just need to be a little bit cautious here and make sure that there's a chance for people to be heard at the IRT arbitration. Thank you.

SUSAN PAYNE: Thanks, David. Understood. I will throw back at you or indeed everyone, given that, in the case of consolidation or in intervention, these are still claimants—we're not talking about the amicus here, who doesn't have a claim; all of these parties have a claim of their own that they could bring against ICANN—are we denying them justice if we're just saying they can't join this particular case but we're not preventing them or they're not prevented from bringing their own action? Because in order to participate in this process themselves as an intervener or for their action to be consolidated, they already have to have a cause of action. Again, I don't know this answer to this. I'm just querying it.

I've got Flip. I think Greg's is an old hand, so I'm going to ignore Greg for the moment. He can go after Flip if indeed it isn't an old one.

FLIP PETILLION: Thank you, Susan. Just to address David's point, we actually have to be sure that we give an opportunity to third parties to an IRP to ask for a consolidation so that they can be heard. That means we will have to be very transparent and informative about the fact that an IRP has been initiated and about the content of the claim so that there is an opportunity for interested parties to intervene or to ask for a consolidation. Once the timing has lapsed, I don't see where that party could [inaudible] elsewhere intervene in court and actually ask for ignoring the declaration that was just issued between ICANN and the other party of parties involved in the IRP.

I see Sam has a question. "Flip, is a third party to intervene to be heard, or is amicus status enough?" Sorry. I have to think about that, Sam. Sorry.

SUSAN PAYNE: That's not a problem. That was obviously a new hand from Greg, so, Greg?

GREG SHATAN: Thanks. I think a lot of this is dealt with by making this discretionary and having a time period that … I think that, regardless, the third party will have a case of is own, or it doesn't have a case. It shouldn't be intervening if it doesn't have a case.

I think we should also encourage—maybe this is a little bit different—that the two parties' plaintiffs or complainants really should work this

out among themselves if possible rather than just intervening as a sticking-your-nose-in sort of thing. We'll need to consider what the rights of the respondent are, but I think those are considered in looking at whether there's a core nexus of issues of fact and law that outweighs any differences or whatever similar criteria there may be.

But I think the clearer the rules are, the less likely it is that people will mess about. I mean, people always mess about. It's just the way of things. But there'll be less for them … I like that from Scott Austin: intermeddling versus intervening. Yeah, so we need to avoid the intermeddling and we also need to avoid the post-meddling. But, again, I don't see a scenario where someone should go to court to try to get into an arbitration proceeding of this nature. But, again, the vaguer we leave things, the more likely it is that someone will try something and that somebody might find that we haven't adequately dealt with the concern here. So we can see how this all looks. I think the next thing to do is see how this looks and then test it against some of these scenarios. Thanks.

SUSAN PAYNE: Thanks, Greg. I think that certainly sounds sensible.

Bearing in mind the suggestions about not trying to reinvent the wheel and to look into other proceedings where we can and where we think it can help inform us, I guess firstly that there's a question for you all: whether any of you can suggest places that either they would be willing to volunteer to look or indeed places where we could ask our ICANN Legal colleagues to look in terms of some then principles that already

exist elsewhere that we might be able to use as a jumping-off point to avoid out reinventing of the wheel.

Greg, you have your hand up again. I don't know if that's a new one.

Sam?

SAM EISNER: From the ICANN side, we'll do whatever thinking we can do to offer, but also I know Greg had mentioned the class action rules. We'll get some input back to this group on what those are and some comparison notes to think about. So we can take that as a starting point on this.

SUSAN PAYNE: Thanks, Sam. In the chat, Flip has suggested the ABA rules and the IBA rules as possibly being helpful.

Greg may have another suggestion here.

GREG SHATAN: This is Greg again, hopefully for the last time. I think the class-action rules are probably of limited value—not no value, but limited value—and I probably should never have necessarily mentioned them because they go the other way in that they talk about how you can bring in defendants together in a sense. Or you can bring plaintiffs together but for a class, which is rather somewhat different than an- individual-intervening rule, which I think might be more apposite. There are times, it think, where you can intervene as a right, but I don't know if we need

to ever have that. We're not recreating any country's judicial system, thankfully. So I think there's definitely something to be learned from class action, but it's a different posture than a single party seeking to have itself added.

Now, there may be cases where there may be a class. Maybe we want to think about what if there are 30 potential plaintiffs that all want to join together ab initio rather than looking at a question of joinder. But we're looking at a question of having essentially a class. That might be slightly different than if Party A starts a case and Party B says, "I should be in that case, too, rather than starting my own case." I think those are two different scenarios, and I think we probably need to deal with both. Thanks.

SUSAN PAYNE: Okay. Thanks, Greg. I'm looking at the time. We've got a handful of more points of Liz's that we still need to get through. I'm not sure if we will get through all of them in detail on this call. We may run out of time.

I did say at the beginning that I had some AOB. The main point that I was going to raise was the e-mail from Mike, which he sent last week, about administrative costs and fees and so on. But actually Mike has messaged us and said that he had to drop early. He could only make the first hour of the call. So I think I'm going to park that. I will make a note that we can come back to that on the next call when hopefully Mike will be [on]. But in the meantime, you hopefully have all seen Mike's e-mail,

so give it some thought. If people want to respond to that on the list as well, that would also be useful.

Why don't we just keep going for a few more minutes and see how much further we can get through this, at least in terms of maybe the next one or two points that Liz flagged to us?

Point 5 relates to the IRP panel re-composition. Brenda, if you wouldn't mind scrolling down a bit further in the document—I think that's fine; that flags it up—this is Liz's comment and questions about the paragraph that you can see towards the middle of the screen now where I tried to give some thought as to what do we do if there's already an IRP panel is place when we're consolidating actions and what happens to that panel? Does it continue or does it get replaced? Certainly, my suggestion had been that, generally speaking, it would continue unless there's a decision by the procedures officer to do otherwise, generally speaking.

So Liz's comments from her e-mail regarding this are particular to think about the language that I had suggested regarding the possibility of changing the IRP panel as a result of consolidation or intervention. She comments that, outside of conflict-of-interest concerns adding a new party to the proceedings might add, are there other scenarios where the IOT believe it's appropriate to consider replacing an existing panel?

From ICANN Org's view, the more time that's allowed to pass between the initiation of the IRP and the filing for the consolidation or intervention, the more important it becomes to have defined expectations and limitations on seeking to appoint any panel. So, again,

from Org's side, they would recommend a narrow set of circumstances likely to be only in conflict-of-interest-related circumstances for replacing a panel.

To the extent that re-empanelment—that's a good term—is required, from Org's perspective they'd recommend following Rule 3 and not trying to create a new appointment path but would agree with the exclusion of the procedures officer from being one of the IRP panel members, which I think is something that looks as though it's new in this markup but actually was picked up from the current interim rules.

She also flags a couple of other considerations to think about. One would be, what would happen with issues that had already been decided by the prior IRP panel? Who's responsible for the cost of bringing a second panel up to speed? And how are the parties impacted in their legal spend if there has to be a change of panel? All of which I think are factors that one would want to be bearing in mind when we're thinking about, do we need to replace the panel?

So, again, for discussion, I will just flag that, in terms of whether [there] needs to be a new panel, I wasn't trying to create a new process, but I was looking at Rule 3 and feeling it didn't entirely cover the scenario. So the reality may be that we need to circle back to Rule 3 and address it there because Rule 3 as it's currently drafted very much assumes that there's only two parties—there's the claimant and there's ICANN—and there's no one else involved and is more challenging when you've got extra parties coming into the mix.

Flip?

FLIP PETILLION: Thank you, Susan. Wow, that is unprecedented. I never read that before, but it's a nice challenge. So the paragraph starting with "Where an IRP panelist is already appointed," and so on really needs a lot of consideration.

There are a couple of rules we should not forget, and that is that, also in ICDR cases, and particular in the IRP cases, each party is allowed to select or at least nominate its own panelist, which is then cleared and then appointed by ICDR.

You're right. Everything has been written in view of two potential parties in an IRP. It has the claimant on one side and ICANN on the other side and not more, expect, of course, like we have had in the past, six parties who have the same interest and start the same IRP against ICANN.

A solution I see is you always need an uneven number of panelists to make the panel—so one, three, or more. What I see as a solution is maybe five as maybe a solution so you keep the three initial ones installed, and the new claimant or claimants can select a fourth one and maybe even a fifth. Or we could debate on how the fifth could be nominated or appointed. Maybe that could be with the agreement of ICANN and the agreement of the initial IRP claimant. Maybe that's a solution.

But taking away that right of a party who has already initiated a case, who has already, with ICANN, installed a panel, taking away that

panelist or the panel members I don't see happening in practice. Sorry for being so long. Thank you, Susan.

SUSAN PAYNE: Not at all, Flip. I put my hand up to just make a couple of comments somewhat in response and to explain how this text came about, and that is that I did look at the ICDR rules. Obviously, the proceedings aren't entirely identical, but there certainly is, under the ICDR rules, this expectation that, if you've got two cases consolidating into each other, there would be an expectation that the later one consolidated into the earlier one. So I was trying not to suggest something completely out of whack of what the ICDR rules would also propose because it seemed to me that that's a perfectly reasonable path forward.

Sam is commenting in the chat that obviously the more panelists we start getting involved, the more we end up getting close to using the whole standing panel, which, to my mind, then brings us issues in relation to if there were ever an appeal because we already have the expectation that appeals would go to the whole standing panel. So, if we end up using five of them for hearing the first case/first action, we've only got two left potentially for our full standing panel for any appeal that might happen and also costs and efficiency concerns.

Certainly, when I was drafting this, I think this is something to bear in mind or something to consider. To my mind, it seems to me that one has a choice, if you like, whether to be consolidated or whether to intervene. So, if the later action or the later claimant doesn't want to be consolidated in—that might be because they don't like the panel and

they don't like having lost the opportunity to choose their own panelists—then maybe that's a factor that they would be arguing in terms of the decision to consolidate at all because they would have the right to, if they were an unwilling recipient of an application to consolidate by the earlier IRP, challenge that or to object to it. I think—yeah, Sam is saying we could come back to what the ICDR rules currently say so we all have the same baseline understanding. Thank you. That would be helpful. But I certainly didn't intend to be drafting something that was completely out of whack with that, so I hope I didn't manage to do so inadvertently.

We're at 26 minutes past. That's probably as far as we're going to get now, subject to any more thoughts on this immediately whilst we're talking about it. I think otherwise we need to pick this up from here. I very much welcome people reviewing the strawperson and reviewing the remaining question that Liz flagged in her e-mail. To the extent that we can try and make some progress by discussing this further on the e-mail list, I think that would be really helpful so that we perhaps come into our next call with having been thinking about it over the next two weeks and perhaps progressing by discussing by e-mail. That would certainly, I think, be helpful.

I'm going to just pause and see if anyone had anything they felt they strongly wanted to say about this replacement of the panel issue on this current call. Otherwise, we can pick this up. Perhaps, as Sam is offering, we can have a baseline from the ICDR so that we all know what those rules say. Super.

Yes, as I said, originally I was planning to raise Mike's e-mail as Any Other Business. I'm going to hold that off until next time when he hopefully will be on with us. But, again, if people have thoughts on his e-mail and whether that's a topic we should be adding to our list of items to consider, then feel free to share those and respond to Mike's e-mail on our e-mail list as well in the next couple of weeks.

Other than that, I will just pause and see if anyone has anything else they want to raise as AOB before we wrap up. Oh, I've got my hand up. That's not right. Anyone else apart from myself with a hand?

No. I'm not seeing any, in which case I think we can wrap up. We have our next call in two weeks at the later time, as mentioned in our agenda.

Yes, please do. Insofar as you're able to, it would be super if we can keep addressing this by e-mail in the next two weeks.

Thanks very much, everyone. Thanks for the really useful and engaged input. I think it's been a really useful discussion. All right. We can stop the recording and wrap up the call. Thank you.

[END OF TRANSCRIPTION]