-SUSAN PAYNE: Hi, everyone. This is the IRP-IOT meeting for the 22nd of September, 2020. Thank you very much, all of you for joining. The usual instructions: please try and stay on mute when you're not speaking, and try to remember to introduce yourself when you are speaking. As is usually the case, I'll probably be the one who fails on that more than anyone else, but we'll all try to do that.

Noting that Sam has just given us apologies. She has to leave after the hour. Thanks for that, Sam. Hopefully, we'll have dealt with probably the discussion on consolidation, I think, or the majority of it by that point. And as you say, Liz is still with us, so that's absolutely fine.

Okay, in terms of our review of the agenda and updates to SOI. Obviously, we have a few action items to just check back in on from last call. We will spend a small amount of time on translation, looking at what is hoped to be the final text as circulated by Liz a little over a week ago, I think it was now. We will effectively be having what I hope will be our first kind of formal reading of that.

We then will spend a bit of time returning to the section on consolidation, inventions, and participation as an amicus; and particularly reviewing some of the information that Liz and Sam have produced for us regarding other rule sets.

Then I'd like to try to wrap that discussion up with about 15-20 minutes to go of the call just so that we can briefly look at what I think should be our next topic of discussion, which is the time for filing.

Note: The following is the output resulting from transcribing an audio file into a word/text document. Although the transcription is largely accurate, in some cases may be incomplete or inaccurate due to inaudible passages and grammatical corrections. It is posted as an aid to the original audio file, but should not be treated as an authoritative record.

And then just a small amount of time for AOB and, as you see on the agenda, the next meeting is listed there. That's in two weeks' time in our earlier time slot.

So just circling back to updates to SOI, I will note that we now have the IRP-IOT specific version of the SOI from most of us. Thanks very much to everyone who has done that now. You'll be able to see all of those at the relevant tab on our workspace, so please do update them as required. And when you do update your SOI, please flag it to the group on the next call that we have.

So with that in mind, does anyone have any SOI updates that they need to flag on this call? Super. I'm not seeing any.

Robin has noted in the chat that she has updated hers, so that's the latest one that was uploaded to the section. Perhaps if people want to just check in on that, that would be helpful. Thanks for that, Robin.

As I say, as usual we'll just check on this at the beginning of every call.

Next agenda item: we have a few action items from our last meeting, and I think they've pretty much been covered off. The first one is one that was allocated to Liz to circulate the updated translation language, and we have that. We're going to look at that in a moment.

Sam had a couple of action items, and I think the document that Liz circulated earlier regarding consolidation and looking at some other rule sets in particular, I think, addresses those. Although, as we go through that, if we feel that we need more on that, then we can obviously come back to it.

Also, Flip had also volunteered to look at the IBA and EU rules in terms of seeing whether they might apply to consolidation. But in fact, I think what we have from Sam and Liz probably adequately covers that off as well, although, again, if Flip in particular thinks there's anything in relation to EU rules that it's worth still looking into further, then perhaps that's something that can be revisited.

Thanks, Flip, noting that you are in the car so you're on audio only and consequently won't be seeing anything in the chat and probably less able to speak up during the call. But thanks very much for being able to join us anyway.

Without further ado, I think we can move on to agenda item three, which is to look at the translation language, the new text that Liz circulated. I am hoping that you all have had a chance to look at this. I'm also hoping that Brenda has it to hand to put in the screen for those who are able to see in the Zoom. We'll start introducing it anyway. There it is; it's on its way.

As Bernard flagged when he circulated the agenda, we now have this, what I hope is the final language on this.

Brenda, we're looking for the 5B translation language to start with if you have it. I'm hoping you do. In any event, I'm hoping that people have taken the time to look at it already or will do on the next call. Yes, that's it. Thank you.

There were relatively few updates that needed to be made, and as you see, Liz has not inserted a new Paragraph 5 that specifically encourages claimants to approach ICANN directly to try to agree on a stipulation for

translation services so that if it's not necessary for this to be contentious, then ICANN and the claimant in question can reach agreement. The last time we discussed this, we talked about actually covering that off in the rules to make it clear.

You'll also see that there is now a new Rule 11 addressing the situation where a claimant perhaps might feel that they don't need translation services and wants to discontinue them. Again, it's something that we felt was worth positively drawing to the attention of claimants so that they're aware that they can and, ideally, should do that if they don't need those services to be provided anymore.

I am going to pause because I see David's hand. David?

DAVID MCAULEY: Thank you, Susan. It has to do with paragraph 11, and it may be a minor point because this is all under the control of the party that requested—the claimant—requesting translation services. But if they do identify that they don't need it, shouldn't the word "may" actually be made "ought to" or "should" or something like that? It just strikes me it would be more consistent with the idea of trying to maintain economy of IRP.

SUSAN PAYNE: Thanks, David. Yeah, I think that makes sense. It makes sense to me. I'm happy to hear other views on this if people have a different opinion, but I think you make a good point that we should try to encourage claimants not to run up costs if they've determined that they don't need them.

Scott.

SCOTT AUSTIN: It may be just a grammatical point, but I would think that if you do that, then I guess the question is whether it's "shall" or "must" instead of "may." But it would seem to me that the prepositional phrase "at any point during the course of proceedings" should probably be inserted right after "claimant" so that it ends with the clause, "The claimant must (or shall) request the discontinuation of translation services." Seems to me that would be more appropriate. So right now, I can change it to "must" [inaudible].

SUSAN PAYNE: Yes. Kristina's suggesting "should," which was what David had suggested. I think, in ICANN parlance, "should" is not quite as definitive as something like "must" or "shall" where there's perceived to be slightly more discretion.

I can see Malcolm's hand as well, so I'll go to Malcolm.

MALCOLM HUTTY: Thank you. I'm wondering here [about] this complication introducing a new standard. It raises the question, well if they should do this; if they must do this—what happens if they don't? Does that become then a grounds for saying, "Well, you ought to have said this, and IRP case is now that you've defaulted on the terms." It might make more trouble than actually the benefit from the existing language.

SUSAN PAYNE: So if I understand you correctly, you would favor keeping “may,” I’m assuming, on that basis.

MALCOLM HUTTY: Well, if we don’t think that this is something that we should get into an argument about losing the case over, then it’s probably better not to risk creating a bunch of litigation on what’s really a very subsidiary point. So, I would prefer leaving it at “may.” I don’t feel very strongly about that, but I think that “must” would be potentially unwise.

SUSAN PAYNE: Okay. Thanks for that. David is saying, “I doubt we can address that, Malcom.” I’m not quite sure what—

David, yes. It’s best that you speak for yourself.

DAVID MCAULEY: Sorry, Susan. I thought Malcolm was going to suggest some kind of penalty, but he didn’t so that makes no sense. I just don’t think—

MALCOLM HUTTY: No, I was afraid the opposite. I was afraid that there would be suggested that there was an implicit penalty when, actually, that wasn’t our intention.

DAVID MCAULEY: Right, and so it seems to me that if we used "should" and not "must," this would probably be acceptable. But I agree with Malcolm. I don't think we should make too much of this. Thanks.

SUSAN PAYNE: Okay. Malcolm, your hand's up but I think it's an old one unless you wanted to come back on this.

MALCOLM HUTTY: No, it's saying "raised hand" in my [inaudible]. I was trying to find out how to lower it.

SUSAN PAYNE: Oh, okay. There you go.

I don't feel terribly strongly. I am quite persuaded by Malcolm's point. I think we probably don't want to start opening up avenues of challenge over whether someone really needed the transition services to continue or not. But perhaps "should"—I think, there's quite a bit of support for "should"; that we're encouraging something a bit more active than just a discretion on the claimant that they would at least be encouraged to consider.

"Should" doesn't tend to be interpreted as an absolute requirement. So, I think maybe "should" is the kind of standard ICANN language that we would tend to come down on.

I'll note that, and we perhaps have—Scott is saying, "is urged."

In ICANN parlance, I think that's how "should" tends to be interpreted, as being an encouragement to do something but not an absolute obligation. So, that's certainly some useful feedback. I think we will have this proposed language for the whole of Rule 5B out to the list for another couple of weeks for any other comments or inputs.

I had sort of hoped that the next time we came back to this, it would be effectively a final reading. But subject to the amount of any additional comments we have, it may be that we formally need [inaudible] to just adopt this. But it looks as though we're close.

As Bernard teed up, I wasn't planning to literally read through the whole of section 5B in its current form because we have read through it from start to finish on a number of calls now, and the changes are very minor.

I'm not quite sure what your suggestion is, Scott. If you want to speak and make the suggestion, please do. Or perhaps you want to just circulate it. Okay, Scott.

SCOTT AUSTIN: It's what I suggested before. If you reread the sentence now, if we insert "should," the final clause seems out of place. I just think it would read better if it was moved up. I don't have it in front of me.

"If claimant identifies that it no longer requires translation services…" And if you want to put it after "claimant"—"If claimant at any point during the course of the proceedings identifies that it no longer requires translation services…"

The way it reads now, if I say, "Claimant should request a discontinuation of translation services at any point during the course of the proceedings," that doesn't make sense.

SUSAN PAYNE: Okay, I see what you mean. Perhaps it just needs a bit of reworking, but I think that's a sort of relatively easy fix. Thanks for that.

Unless anyone else has any sort of burning comments or concerns about the 5B language, I think we can move on for now. But just, again, to urge everyone to—if you haven't looked at it already or to have a final review of this and put anymore comments that you do have on the list so that we can then hopefully get that part of the rules finalized.

Thanks, Liz. That's perfect. And yes, thanks to everyone for their input—and to Liz in particular who has been picking up the pen on this one.

Our next agenda item, then—to come back to our discussion on consolidation, intervention, and participation as an amicus. I think what would be helpful for us is to review the text that Liz circulated to us a little earlier regarding particular different rule sets. It probably does make sense for us to walk through that because it was circulated fairly recently, so it's possible that some of you may not have had a great deal of time to review it. But I hope that most people have.

Brenda, if possible, if you can pull up the Arbitration Rule Sets document that you did have in the screen earlier, that would be great.

And I wonder, Liz, is this something that you'd like to quickly take us through if you're in a position to.

LIZ LE: Thanks, Susan. In doing our research, I think—as we provided in the brief summary in the email—we've looked at the various rules from the ICDR, from the International Bar Association, and also [court] class actions for JAMS, as well as multi-district litigation. We set out the various component where consolidation under these various procedures are allowed.

Of course, we note that there are some instances where these rules do not apply to, and are not relevant to, the IRP situation that we're in. So we've laid out the rules for the group's discussion.

But I think one of the other things that we want to note and highlight for the group is—beyond us talking about how this is going to be done in the actual procedure—that there are areas that the principles that these rules focus on that probably the group would benefit from discussing, which is: what are we trying to achieve in the purpose of consolidation, and how is it going to serve the purpose of the IRP as a whole?

And if you want to get into talking about the one instance that we have in a real live example where there has been a consolidation in an ICANN IRP (which was discussed on list this morning), we can go into that where you can look at how the ICDR went about consolidating two matters that relate to very different strings—but there seem to be common questions of law and, by agreement, the parties were consolidated.

But I think there are a lot of things that we would benefit from talking about purpose wise, timing wise, as relates to consolidation as we consider these procedures.

SUSAN PAYNE: Thank you, Liz. I certainly found this useful. In reviewing it, I went back to the notes that I had previously made about what we were particularly hoping that this review of the rules would assist us with. I think, in particular, what we had discussed on the last call was that we wanted to try to avoid reinventing the wheel in terms of things like the factors that might get taken into consideration in supporting a decision to consolidate or otherwise, and whether we could get guidance from some of these other rule sets that might be helpful for us.

One of the other issues that particularly came up was a concern that came up on the call about how we deal with the panelists—and in particular, if there's an existing panel in place. The straw person—I'd attempted to kind of find a middle path in terms of whether we keep the existing panel, whether the later case effectively gives up the ability to choose panelists where there's already a panel in place.

And there have been some concerns about that, so we again wanted to see what happens in some other rules sets that might give us either some guidance or some comfort. So those were certainly a couple of the areas that struck me that we particularly thought this review of other rules set might help us with. I think it's helpful for us to look at this research with that in mind.

And as you say, we have some areas of principle in terms of what are we trying to achieve in order to serve the IRP's purposes, and does the rule as it currently stands—which is sort of fairly narrow in terms of talking about consolidation only where there's a common nucleus of operative facts—is that something that perhaps is too narrow?

I'm not expressing a viewpoint on this. I'm sort of seeking thoughts and input from people. I was noting that obviously Liz very kindly reproduced the existing text of the interim rule and also point out that the rule permits consolidation, at the moment anyway, where there's, as she says, a "common shared underlying facts, but doesn't envisage consolidation of IRPs where there are different underlying facts but they share common questions related to interpretation of the ICANN bylaws."

So I think a useful question for us to be considering is whether we want it to be a little bit more permissive than it currently is—particularly noting your comments, Liz, about the one consolidation that we have had which obviously predated these interim rules but where, perhaps, there were, as you said, similar issues to be considered but not identical facts.

So that's one thing I think is worth us considering. And indeed, whether this common nucleus of operative fact is quite as narrow as common underlying facts or whether there is a bit more of an element of a shared common background or common issue that's really the more relevant factor here.

I feel I'm waffling and David has his hand up, so I am going to go to David.

DAVID MCAULEY: Thanks, Susan. I would like to say that in my view, you have put your finger on some important issues with respect to this recital part of this rule. I tend to agree with you, or at least agree with the premise of your question that maybe this is too narrow. The things I want to mention are not just the common nucleus of operative fact. I think that may suffer from being a little too narrow.

But also the phrase, "would foster a more just and efficient resolution." I actually think both might be a little bit broader. And the one thing I want to mention in this context is the idea—or is the notion—that we need to keep in mind that IRP decisions are creating precedent. And I think it's important that we take that into mind when we consider the premise on which consolidation, etc., are going to be decided.

Maybe one of the ways to address that is not just looking for "a more just and efficient resolution," but looking for something that is more in line with or more in pursuit or more in furtherance of the purposes of the IRP which tends to wrap in those things like precedent and others you were mentioning. Thanks.

SUSAN PAYNE: Thanks, David. Yes, I think that would certainly be something that we would want to consider.

Actually, it may be helpful—you mentioned, Liz, that you might be able to give us more information about the existing case that had been consolidated, if I heard you correctly, about the circumstances of that case that might help us. Did I understand you correctly?

LIZ LE: Hi, Susan. Yes, I can try. And I see that Flip is also on the phone and perhaps he can add to him as he represented the claimant in that matter.

As I can recall—because the consolidation happened in 2015—both of the matters were individually filed on their own and they involved very different strings. They both related to similar questions of law, but not similar questions of fact. It concerned community priority evaluation for these two strings, .eco and .hotel. Shortly after the two requests were filed—I would say within a month and a half—it appears that through agreement of the parties, the ICDR merged the two matters together because they involved common questions of law.

And [there was] no formal consolidation request that was filed—now I will note that the parties did agree to keep the briefing separate. So while there was one hearing—up until the hearing, all briefings were done very separately so the parties from .eco filed their own briefing. ICANN responded to that. The parties for .hotel filed their own briefing and ICANN responded to that, and so forth.

And then during the hearing, as I recall, there were separate times set out for arguments for each one of those matters. There was one final

determination that was issued on both matters, but they too dedicated their own section in that final determination on each case.

I don't know if Flip has more to add based upon his representation of the parties in that matter.

SUSAN PAYNE: Based on what he said, I'm not sure if Flip is going to be in a position to speak up. Obviously, if he does we will be happy to hear from him.

In the meantime Liz, just for my understanding, can you clarify: when you say the parties agree, does that include ICANN? It wasn't just the claimants who were agreeing. Was it a situation where ICANN as well was also agreeing that it made sense to consolidate?

LIZ LE: Yes, it included ICANN. I think one of the things I could see from my recollection and my review of the briefings and the final determination (the matter that was part of the decision by the ICDR and the panelist to merge it)—is that there are common questions of law which, when I reviewed the current draft of Rule 7, it doesn't address the common question of law as we discussed. It talks about common nucleus of operative facts.

When you go to look at the ICDR arbitration rules of when consolidation is appropriate, you will see that it hits subpoint A and subpoint B—I'm sorry, not B because there's no arbitration agreement. But the parties did agree to consolidate, and I think that probably was one of the main reasons for consolidation in this matter along with the other reasons of

common questions of law and that [inaudible] to the efficiency and justice in terms of resolution of the matter.

But I think one thing that we do consider going forward as part of our discussion is that the principles served by the IRP, [and the fact that IRP, and now,] are binding. So that, too, might be something we want to take into consideration if we want to expand the current language under Rule 7 to include other factors for consolidation beyond the common nucleus of operative facts and just an efficient resolution

SUSAN PAYNE: Thank you, Liz. That's really helpful. Malcolm.

MALCOLM HUTTY: Thank you, Susan. There's sometimes when it's really helpful to be specific, if only to give guidance to the panel, but this is one of these cases where I think actually being more general so as to allow for that discretion is going to be our friend. It strikes me that it's really immaterial whether the matters to be decided, that there's a commonality between, are factual or questions of law [inaudible] interpretation.

So long as the matters that need to be decided in order to bring the results of dispute are essentially the same or closely linked or closely intertwined in that way, then it could be much more beneficial and efficient to decide it together. So I generalize between the factual and the [inaudible] and just say something like, "If the matters to be decided were…" rather than what type of matters they are.

And for the same reason also, the “just and efficient”—that’s fairly broad language, but actually we’ve set out some quite extensive standards in the purposes of the IRP, and efficiency is one of them; but there are others.

So maybe the language should also be generalized to say, “pursuant to the purposes of the IRP,” and then all the issues in the purposes of the IRP could be borne in mind by the panel in decided whether or not to consolidate.

SUSAN PAYNE: Thanks, Malcolm. Just noting what you say and not necessarily disagreeing with it, but it did occur to me as I was reviewing the language that Liz circulated that it seems quite common in other arbitral rules to refer specifically to questions of fact or law, and certainly in our interim rules we don’t have that because the interim rules were drafted, as we’ve been discussing, quite narrowly to just commonality of fact. So we might also, I think, address your suggestion by reinstating that notion of commonality of questions of fact or law. I think. But leave you to ponder on that further while I go to Scott.

SCOTT AUSTIN: Thanks, Susan. A couple of point. I guess I have a question to Liz first. She had mentioned—and perhaps it was just thinking broadly here about consolidation, but she used the term “merger” and I just want to make sure there’s no separate procedure for the merging of two pending proceedings as opposed to consolidation. That was my first question.

SUSAN PAYNE: Okay, thanks. Sam's got her hand up, so I perhaps will let you answer that, Sam, in addition to whatever it is that you were wanting to cover.

SAM EISNER: Just quickly, the answer is no. We don't have a separate merger section. Then I'll keep my hand up and allow Scott to go on.

SCOTT AUSTIN: The second item is just really saying that I agree with Malcolm in terms of a more open opportunity for the panelist to make those decisions, and I agree that a lot of times we do need direction. But I've always been a big fan of JAMS. In fact, I reference them for arbitration in documents that require arbitration frequently because I think their rules are very well done. And the materials that Liz has kindly provided—it seems their materials are much more open and much more permissive in terms of factors. She specifically says they don't have as many explicit considerations. They have fewer explicit considerations that the ICDR rules.

There are also some points made regarding [how] newer arbitrations consolidate into older. I don't know if we have that or if we have that in certain detail, but something to think about also in terms of which arbitrators will survive or remain.

My original questions deal with the procedures officer—if there is one for each proceeding that's declared early on in the proceedings. Are there are two procedures officer if there are two pending proceedings?

And if so, which procedure officer would be the one who makes the decision regarding the consolidation?

SUSAN PAYNE: Thanks, Scott. So that is a bunch of questions. If Sam doesn't mind, I'll quickly do my best to answer some of them off the top of my head.

The provision of the new emerging into the older—I don't think we have that covered in our current interim rules, but you will note when we come back to the straw person that is a kind of markup of the current rules that we've been talking about in the last few calls—I had tried to introduce that concept and tried to address which arbitrators survive, which panel survives and that kind of thing.

But obviously, with the intent that the people would review that and express their thoughts if they felt that it wasn't a sensible suggestion that I had circulated.

The procedures officer—to some extent we have to, ourselves, work out what we're doing with the procedures officer, whether they call them that or the consolidation arbitrator. I think we've all felt that it would be helpful to have more clarity or what their actual role is. But my sense is that not every proceeding has one because they're playing the part of a consolidation arbitrator. And so I don't think it's automatic that in every single IRP there would automatically be a procedures officer put in place unless one was actually needed to make a determination on this kind of question.

But that probably is something that, at least from recent experience, Sam obviously would have more idea on than me. So I am going to actually let Sam take the floor now because she has had her hand up for quite a long time.

SAM EISNER: Thanks, Susan. I had the same reaction on the existence of the procedure officer or whatever we wind up calling it. IT wouldn't necessarily be a position that would be activated for each IRP, and it would be something that would need to be activated when the need for it arose, as under the subcommittee procedure. So that might be a point that we want to take down, making sure that we understand when it would be activated or not. Or if we do intend that there be a procedures officer for each IRP, how that would take shape.

I wanted to go back a bit to the idea of the discretion and what kind of latitude we want to give the panel. I think that there should be latitude of course, and there should be the discretion. But I think that one of the things that we need to make sure that we're keeping in mind as we're building a supplement procedure set that's specific to the IRP is that in the end, every IRP has a question that, at its base, is, "Did ICANN violate its bylaws or articles?"

So, we wouldn't necessarily have a lot of variance as to the question that's posed. It's just in terms of which action is being challenged. I think that we might consider, from the principles aspect of our work and what we want put in may be some recognition of the fact that there typically are many commonalities posed by IRPs. So what are the other principles

that we think that the panel might want to take into account while exercising that discretion?

We're charged, as the IOT, to take into account the principles of international arbitration, but this is one of places where there's a huge variance because of the unique nature of the IRPs, that we don't have arbitration agreements to get into an IRP, that we have a very limited set of conduct that's able to be challenged through an IRP, and that we have a very limited set of outcomes that's able to come from an IRP.

I've heard a couple of different things, and it might be worth making them a little bit more expressly stated in a document. If we look at the example that's been discussed today about the .hotel IRP where the panel consented to the parties' agreement that they be handled together, that was something that seems to be focused on the efficiency of the proceeding.

It made sense to not repeat the use of resources on something that was so inherently linked. And even though it came out with a declaration, that declaration actually addressed the two items separately. So that's a possible outcome.

But then we also have the possibility that because the question of what ICANN did is so related in many instances that now we have this preclusive effective IRPs that maybe we also have a separate purpose which is to make sure that the binding nature of IRPs is justly protected, right? Because we do want to make sure the people who believe that they will be impacted by an IRP's outcome have the ability to have their claims heard.

And there doesn't necessarily need to be the rush to file in order to have that happen. So, what are the principles that maybe we want to express to help guide the discretion of the IRP on that outcome? And then separately we might have a principle of efficient use of resources. Sometimes those will align perfectly, and sometimes they want. But maybe we want to express that a little bit more to the IRP panel in terms of how they exercise their discretion.

SUSAN PAYNE: Thanks, Sam. David.

DAVID MCAULEY: Thank you, Susan. I just wanted to respond to what Sam was saying and maybe ask a question of Sam. I think I agree with much of the latter part of what she said, and I certainly agree with the notion that an IRP panel's—the essence of what they decide is whether or not ICANN violated articles or bylaws. It's basically a declaration, and it's not a direction to go pay money damages or whatever. So I certainly agree with that.

But when we talk about whether or not we should be generous with giving the panel discretion to put together claims that have a common nucleus of operative fact or common nucleus of legal questions, etc.,—I guess my question for Sam would be, wouldn't it be possible that an IRP panel have several questions posed to it but that it deal with them in one IRP because the factual discussion or the predicate for these decisions is going to be largely intertwined?

I speak in these contexts—I'm always keeping in mid this idea of creating precedent, and I like the terms Sam used. We don't want to rush to file. We don't want people to try and affect others by creating precedence that someone else didn't have a chance. Those are the things I'm getting at. This idea, this notion of precedent. Thanks for that.

SUSAN PAYNE: Thanks, David. I keep coming back to what we actually mean by common nucleus of operative fact because that's the current standard. I think we probably feel it's too narrow, but I do actually wonder whether it's as narrow as the summary that Liz circulated suggests. Because it does seem to me that one could argue—even in the case of something like the hotel and eco situation—yes, the strings were very different; and yes, they were individual decisions that had been made in relation to those strings.

But fundamentally, they were questions about the same panel process, I think. And I would need to be corrected if I'm completely wrong here. So, the sort of underlying factual circumstances the disputes were operating in seem to me to be similar, albeit that the detail facts were different. And is that actually what's really being intended by this common nucleus of operative fact that's in the interim rules at the moment? And are we trying to fix something that perhaps doesn't need fixing? I don't know the answer to that, and I suspect that if there's ambiguity and none of us are quite sure, then behooves us to fix that ambiguity at a minimum anyway.

I don't know if there was a big discussion in the previous situation of this working group on what was actually intended to be covered by that particular language that is in the interim rules.

Greg has his hand up. Whether that's to answer or comment on this, I don't know. But in any event, Greg.

GREG SHATAN: Thanks. It is to comment on this. I did some very fast research on common nucleus of operative fact, and it is a term that we have borrowed, as we have in other cases, from U.S. jurisprudence. However, it's used in cases where the actual facts were the same. In other words, not that they were related or raised similar questions of fact and law, but that the operative facts—in other words, what took place—were the exact same facts. Like you were in a particular bar at a particular time when a particular person drops a particular anvil on your foot; not that you happened to be in a place where somebody dropped a heavy object.

I think what we want is more of a related facts and common questions of—maybe common questions of fact or law, or common questions of law. The common nucleus of operative fact is really intended to deal with whether a case should be in state court or federal court; if two cases are too similar to be held separately. It's kind of the opposite test in a case than what we really want. As far as I can see, it's not really a joinder test, but rather it's a test of whether there are two cases that are going on that are covering the same actual facts. And therefore, one case is redundant.

SUSAN PAYNE: And that just demonstrates the challenge I have when I'm not a U.S. attorney, I think, because I was rather optimistically interpreting this as perhaps being a lot more permissive that it actually is. It sounds like it's incredibly narrow. It does definitely sound as though tit's not particularly what we're trying to achieve here.

Liz.

LIZ LE: Thanks, Susan. I wanted to make a comment on the point you were addressing earlier as it relates to the example from .eco and .hotel. It goes back to what Sam was also saying. I think in that case, the facts were very specific to each case and there were not that many commonalities.

But what was common were the questions of fact and law in terms of whether or not [inaudible] to the allegation; whether or not the ICANN Board—[this was in] 2015, so IRPs were only actionable on ICANN Board actions or inactions. And the commonality was whether the ICANN Board violated the bylaws in its actions as it relates to the CPE provider.

And that brings us to the purpose of the IRP and being the decision to consolidate the two matters because it was [just and] efficient to deal with these questions in one proceeding.

SUSAN PAYNE: Thanks, Liz. That's also very helpful. Greg, you have your hand up, but I think it's an old one. Although I'm going to pause and just see.

GREG SHATAN: Old.

SUSAN PAYNE: Thank you. I wonder if the kind of language that you highlighted for us on the second page of this summary in terms of the ICDR rules, Liz, were some of the factors that they would be taking into account if you were seeking to consolidate under ICDR would be—I'll just go through those; there are five of them.

Applicable law. That's, I think, not quite so relevant because we're basically dealing in all circumstances with the—as you said, the same issue. Has there been a breach of the bylaws, effectively.

I think that's right, but again, people can express their views or correct me if they think that's a useful factor.

The second one, B, is whether there's one or more arbitrators already appointed or whether they are the same or different ones. I think that's one of these ones that's about progress of the case and will this delay things and how far have you already got—that kind of element.

The third one being, actually, progress already made in the arbitrations. And I think we would all agree. We talked about timing a bit last time and felt that there has to be a cut off point at which you've made so

much progress in at least one of the arbitrations that justice perhaps isn't being served if you tried to consolidate.

The fourth one, D, was whether the arbitrations raise common issues of law and/or fact. Then E was whether consolidation would serve the interest of justice and efficiency.

We've got that concept of just and efficiency already that we have been talking about, but perhaps we do go back to rather than limited this to the common nucleus of operative fact, we do take our steer from the ICDR rule. And indeed I think JAMS says something similar, bearing in mind that that would seem to align more clearly with what the consideration was in the hotel/eco type situation.

So I suppose the question is firstly, do people feel that that would be more helpful? And second, does it raise any red flags like does that then go too far?

Yes, David's reminding me of the purposes of the IRP as well, which we should also not forget—and is helpful

I'm not seeing anything in the chat, but I think we will try and catch David's suggestions regarding justice, efficiency, and purpose of the IRP.

Perhaps I think what I'm suggesting is, do we think about reinstating that concept of common issues of law and/or fact and hope that that gives slightly more flexibility and a bit more of a stair for whoever it is that's making this determination about consolidation.

Greg, I think that is a new hand.

GREG SHATAN: Indeed it is. Conceptually, I support that. I wonder whether, in this particular arena, the term "law" is not quite the right term to use, or maybe not the only term to use—"law and consensus policy" or "law, bylaws, and consensus policy," or something along those lines. We, after all, are not a legislative body with actual laws, and if someone here is actually talking about enforcing the law, they probably shouldn't be in an IRT at all. They probably should be in a court. We're not a body that's deciding whether things are violating the law.

Other than that, I think it's the right tact to take here because it's really more about common questions of policy and interpretation, or analogous facts.

SUSAN PAYNE: Okay. Thank you. That's another one to ponder on. And whilst we're pondering on that, Malcolm.

MALCOLM HUTTY: I agree with what Greg said, but I raised my hand to support what Sam said earlier and the relevance of that to this, especially since she's just had to leave. I don't think [inaudible] the ICDR criteria are helpful in this. All of the claims and the arbitration made under the same arbitration agreement. Well, all cases here in the IRP are going to be cases under the IRP rule set, so they're all going to be under that same agreement. That's not sufficient.

And it’s not going to be sufficient to say that the basis of the claim is that ICANN breached the bylaws because that’s the only basis of a claim. It would have to be something more than that. It would have to be the ICANN breached this particular bylaw, and probably in this particular way—and the meaning of what that is.

So if you’ve got, for example, some bylaw that says that ICANN can’t do this—actually, looking at some of the mission stuff and [inaudible] the content regulation. If ICANN is complained of as having done something that breaches that, then the question at issue is what is the meaning of that bylaw? How far does that go? How far does it restrict ICANN? That’s the sort of thing that we should be looking to, rather than what this says in the ICDR. Otherwise, everything will be up for consolidation and, as Sam said, that wouldn’t be right.

SUSAN PAYNE: Thank you, Malcolm. I think that’s absolutely right, which his why we have a separate rule . If the ICDR rule on consolidation worked for this circumstance, we would be just relying on that. I think you’re absolutely right. We’re looking at these various other rule sets because they might give us some guidance, steer us down a particular path, avoid us reinventing the wheel as I said earlier on. But we can’t assume all of it works for our circumstances. And that’s our challenge—to find what does what and what’s appropriate that doesn’t go too far.

Scott.

SCOTT AUSTIN: I just want to say, first, I agree wholeheartedly with Malcolm's assessment that it is a specific bylaw or article. I put in the chat a link to the consideration of the .eco and .hotel IRP declaration because I think it focuses on some of the terms with what the panel decides, what ICANN does with that, and essentially what the end result is—which was helpful to me in terms of making it a bit more concrete.

But in terms of what Malcolm's saying, it spoke to—although ICANN was declared the prevailing party (because I was starting to look at this as a declaratory judgment action, but it's not; there's still a prevailing party). The Board considered the measures to be added to the future to increase the consistency and predictability of the CPE process.

It declared, first of all, that ICANN did not in any way violate its articles of incorporation or bylaws. So it seems to me, as you've said, that's always going to be at the heart. But it will be a particular one that would be the identity between two particular proceedings that would be support and consolidation. In that way, it does veer from JAMS and many of the others that have to deal with many, many different areas of law that may be affected. But determining, maybe, it's facts [inaudible] bring consolidation to the forefront as opposed to just the law.

So I just thought that was helpful to limit it, and it may be useful in terms of what we decide on the actual wording of the policy.

SUSAN PAYNE: Thanks, Scott. That sounds like a useful source for us to review.

I'm conscious—we've just got about 25 minutes to go. I did mention that I wanted to leave a small amount of time to talk about the timing rule and to tee up that discussion.

Just before we do that, I wanted to just flag to you all the other area that I mentioned, that I thought we were particularly looking at other rule sets to help give us some guidance on, and that was around which arbitral panel gets retains and, in particular, it came out of a comment which I think may have been Flip on the previous call where he was concerned about consolidation leading to a scenario where a party has effectively lost their ability to choose their own arbitrator.

It is helpful to some extent to look at, in particular, both the ICDR rules and the JAMS rules, which both have this concept of the newer proceeding being consolidated into the older one. And both of those rule sets talk about the parties being deemed to have waived their rights to appoint an arbitrator in this consolidation scenario.

As addressing I think, or at least as serving as a precedent for this notion that either one or both sets of parties, because of the proceeding, might no longer have the ability to be involved in the arbitral panel selection. I think if and when people are looking back at the straw person that was the markup of the current rules that I was circulating for discussion purposes, I tried to envisage a scenario that was pragmatic—that took into account that if there was already a panel in place in the older proceedings, that you wouldn't want to be necessarily spilling them, but that that might be an option for the procedures officer where he feels it's appropriate.

But I'd also come to the conclusion that we could well have a scenario where there is no arbitral panel in either of the proceedings, and perhaps the ICDR or the JAMS process or n one getting to pick an arbitrator isn't necessarily as far as we want to go. So I tried to build in something that basically took people back to Rule 3 but built in a process for both sets of claimants to be agreeing or trying to agree on the appointment of arbitrators together.

But as I say, that was very much a straw person and with this new review of the various rule sets in mind, and particularly for those who have to a bit more direct and recent arbitration experience, it would definitely be helpful to have that reviewed and to have people think about whether what I had suggested is workable or if, in fact, it doesn't create more problems than it's worth.

And, indeed, do we want to go back to what ICDR has suggested which pretty much envisages that the provider takes on the role of appointing arbitrators because you've got this unusual scenario where lots of parties are not getting involved together?

Kristina.

KRISTIA ROSETTE: Hi. Thanks very much. A few thoughts on this. First, I think it would be extraordinarily unfair to the first in time claimant to take the position that either their selected panel—again, assuming that there is a panel—that their selected panelist gets knocked out by the consolidating party. Or that they then lose a panelist entirely. I think the idea that the

claimants in a consolidated proceeding—that neither of them would choose a panelist seems rather unfair.

My view would be the following: if a panelist has already been selected by the initial claimant, then that panelist would stay if the proceeding is consolidated by a second claimant unless there is some kind of ethical conflict.

If the panelist that the claimant gets to pick hasn't been selected yet, then I think you have to require all the claimants to jointly select. The one caveat is that I think we would just need to note that if ICANN is the consolidating party—the party requesting consolidation—that would not then mean that ICANN gets to select multiple panelists. It would still only have one. And maybe that's the way to go about doing it. Under no circumstances would any party be entitled to select more than one panelist unilaterally.

As for the joint panelist, then I think, again, that would stay. If that person had already been selected by ICANN [and] the initial claimant, then that panelist would remain, again, unless there was an ethical conflict that would require recusal or exclusion under—and I think we would probably want to use the ICDR rules for that. Thanks.

SUSAN PAYNE: Thanks, Kristina. That's really helpful. Great.

I think at this point, bearing in mind the time, I think we've had a really good discussion here. I'm not quite sure what the best way to take this forward. It does feel to me like this might be something where perhaps

a possible way forward might be that if there's one or two or three of you who would like to do so, this might be something where it's appropriate for a small group maybe to take on the role or reviewing what we currently have as the straw person language, but improving it and taking into account what we've been discussing on this call.

I don't know if that's something that seems workable to people. I don't necessary need volunteers on the call, but maybe that's something that I can seek some volunteers afterward and see if that's a way forward.

The alternative, I guess, would be that possibly I could try to do so, but I am conscious that probably between now and the next call, I will have limited time. So I would like, if we can, to see if there's a way to move forward in between this call and the next one.

Thank you, Kristina. Kristina is volunteering. And David is suggesting maybe a call on the list. I think that's probably sensible. Thank you very much, Kristina, for putting your hand up on this. Perhaps one or two people will volunteer to join you.

With that said, I think it's time just for us to really quickly talk about the next topic, which is the question of timing—the timing issue. I realize we, by no means, have finished consolidation, intervention, and participation as an amicus. But I do think it would probably be helpful for us to be trying to progress on with some of the other topics as well, perhaps in parallel so that we perhaps can try and make a bit more progress, speed up our progress a bit on these rules. I'm conscious that we've sort of make a bit of a gentle start. We do have quite a lot of work to do, and I think we have to try if we possibly can to pick up the pace.

With that in mind, one of the big issues that we know we have to address is the rule on timing. This is specifically the rule that deals with the time for bringing an IRP, or the time limit for bringing on IRP from the time that the claimant becomes aware of the appropriate circumstances that impact them.

Also, the issue about whether there is any outright limitation period, for want of a better word—or what's been called the repose—as in, notwithstanding, whether they knew about the impact and were impacted themselves, whether there is any backstop after which point no IRP could be brought.

Bernard has circulated for us all, a few days ago, some—perhaps it was even only yesterday, so you may not have had time to look at it yet. But really, the idea was to circulate some background materials that I want to encourage everyone to start looking at now—particularly over the course of the next couple of weeks in order to get yourselves up to speed on what has happened to date on timing, and what the various input from the wider community was on these two elements of what the time limits is for bringing an IRP action.

Just as my own high level summary of the background—and then, obviously, I'll turn over the mic to anyone else who might want to speak in more detail about specific issues, but just briefly. This is one where there has actually been two public comment periods. The first comment period was the general public comment period on the whole set of draft rules that went out to the public and elicited comments on various aspects.

In particular, there was quite a lot of comment on this timing issue. As a result of that timing issue, the working group were proposing—or were considering—some quite substantial changes to the timing rule compared to what had been put out in the previous public comment. My understanding is that it was therefore felt that there should be a second public comment period, and that second public comment period was specifically just on this timing rule.

That public comment—Bernard has included the announcement for public comment period as one of the materials he circulated because that way it gives a little bit of background for those of you who aren't already aware of it.

Then that second public comment period closed some time in August, 2018, but my understanding or my recollection from my own background reading when I was getting up to speed on this is that the working group at that point—by August, 2018—spend little or no time reviewing the public comments. For one reason, by that point there was a proposal to put some interim rules out, so discussion focused more on the interim rules and on including some transitional provision to address what would happen if the timing rule changed between the interim and the final.

Then we also had the scenario where obviously a lot of participants in the working group had dropped off, so the group was having difficulty getting to quorum. So, there was a lot of discussion basically about reconstituting the group, getting more volunteers, and picking the work up then.

Whilst there may have been a little bit of review of the comments—and I'm sure those who were involved more intimately at the time may have some comments on this—ultimately I think a task for us is to review all of that public comment input from the second public comment period and to review and revise the interim rule on timing in accordance with that in our subsequent discussions.

And just to be absolutely clear, for those who don't appreciate it, the interim rules that we currently have in place contain the original version of the timing rule that was what was in discussion for the first public comment. So all of the discussion that happened after that, and the proposed changes, and the proposed language or version of the rule that went out for the second public comment period—that was not the version of the rule that is in the interim rule, which is why there was therefore some discussion about transitional language and the need for that.

So that's a really high-level kind of summary from my perspective. As I say, I wasn't a member of the working group them, but I've obviously been aware of the comment periods and was trying to keep on top of this issue when I was going to join this group. But there are others, obviously, here who may have something they want to add to that.

I can see David, indeed, already has his hand up and that's great. And I will turn the mic to David. Also, I may ask Malcolm if he has anything that he might want to add as well—or indeed anyone else who was previously in the working group. David.

DAVID MCAULEY: Thank you, Susan. I thought it would be wise for me to speak up right now because, at the time you're talking about, I was the chair of the IOT. I want to say that in my opinion, the summary that you just gave—that is that the group got these later public comments in the middle of 2018; we were then focusing on interim rules and the group was starting to struggle with participation levels. I think your summary was very apt and very correct. That's my recollection as well.

And I think your suggestion that we get into this discussion, which in the past has been a difficult discussion—but in my view, characterized by good faith all around—I think to look at the public comments as you suggested would be a good idea. That's really all I wanted to say. Thank you.

SUSAN PAYNE: Lovely. Thanks, David. That's really helpful because, obviously, as you say, indeed, you were much closer to this than I will have been.

Just really pausing and seeing if Malcolm has any sort of comments he wants to make on the substance at this point.

MALCOLM HUTTY: Thank you, Susan. I'm not going to get into the details of the substance here. This is a complicated issue and I'm sure everyone here, if they're not fully up to speed on what's under debate here, will want to study it carefully. It is quite complex. If anyone is struggling with that, I can possibly help by pointing out that really the substance of what is under debate here is not actually the time for filing—even though it's called

"the time for filing." It is when the clock should start running on the time for filing.

That's where the crux of the matter is being debated That may be something helpful to have in mine while you review the documents.

Secondly I would also actually suggested that there is one further document from public community inputs on this that people might like to give attention. That is when the boards announced that it was planning to adopt the interim rules. There was a letter from all the constituencies of the non-contracted parties' house to the boards that raised concerns specifically about adopting interim rules because they were being adopted in a way that was not consistent with what was put out the second round of public comments.

Because that was signed by each of those constituencies, it obviously has a certain weight in terms of reflecting that there was a portion of the community that was very engaged about that, that they felt it necessary to right to the board in that way, even for an interim thing.

So in addition to the things received in our public comment rounds, it's probably worth having a look at that as well. Thank you.

SUSAN PAYNE: Great. Thanks, Malcolm. And Liz.

LIZ LE: Thanks, Susan. I wanted to get a better understanding of what Malcolm was saying in respect to the letter because I don't agree with his

characterization of that letter. But I'm not sure [about] the relevance of that with respect to Rule 4, which is what we're talking about. As you noted, Susan, Rule 4 is in the interim rule that was the original version of it, and because at the time the board adopted it, we recognized that there was still further work to be done on Rule 4.

SUSAN PAYNE: Thanks, Liz. It looks as though Malcolm wants to respond to that.

MALCOLM HUTTY: Liz asked me what the relevance was, and it was that that letter addressed itself specifically to the time for filing question and urged the boards to adopt interim rules that were in line with the version at the time for filing that was put out in the second round of public comments and not as they did the one that was consistent with what was put out in the first round. That's why I mentioned it, because the letter was about this topic.

As for the weight to put on that letter, I was just pointing out to everyone that it existed so that you can read it and assess its merit for yourself.

SUSAN PAYNE: Super. Thanks, Malcolm.

Obviously, anyone can read that letter should they choose to. And indeed, if Malcolm, if you wanted to there is certainly nothing to stop you circulating that, perhaps maybe as a reply to Bernard's email about

the timing, so that you make it easier for people to find. Obviously, everyone in this group will need to place the weight on that letter that they feel is appropriate, but certainly it's a reflection of some of the history on this.

I think it also probably is a good reflection on why this topic has been a challenge, why it raises quite strong feelings. Indeed it's why, when I volunteered to take over leading this group, I was discouraged from starting on timing. And I'm grateful for those who discouraged me, but it obviously is a really important topic.

There was a public comment, and we owe it to the members of the community who submitted comments on a version of the rules that is not currently the version in place—we owe it to the community to review the comments that were submitted and come to a decision about what the final version of this rule should look like, bearing in mind what was put out to comments and what input came back from that.

I think if you look at Bernard's summary when he sent around some of the background documents, he also pointed out that, generally speaking, there's a reasonable degree of alignment about the time for when you bring your IRP. Indeed, there was quite a lot of alignment in the comment about removing this notion of a repose; although, obviously, not everyone is in agreement on that. And that is one of the big issues that we will have to grapple with.

There were also various people commenting about things like, how does this timing all fit with some of the other procedures that also have to take place like, for example, other accountability mechanisms like

reconsideration; and ensuring that in building some rules, we take into account things that need to get taken into account if it's appropriate.

And finally, some concerns about the "ought reasonably to have been aware" standard. That's another thing that we'll probably want to review the comments on, and we'll also, I'm sure, have views amongst ourselves on that language.

I'm talking too much, as usual. I can see Scott and Liz. I'll turn the mic over to Scott and then Liz. And we are close to the end, so we'll need to wrap up. Thank you.

SCOTT AUSTIN: I'll try and make this brief, but it's a bit complex. I think that I totally agree with Malcolm's concerns and considerations about the timing issue and the fact that the beginning of the running is extremely critical in terms of an analysis.

My history on things like this is that I served as the reporter for the rewrite of Florida's LLC Act quite a few years ago. As the reporter, I worked with the legislature on the statutes and limitations for claims for LLCs, both after dissolution and during their period where they were still active in existence. It was one of the most contentious and difficult issues to determine, both going in and going out in the sense of when the running of the statue of repose begins and what period of time should be over. Although, that was fairly set because of some other torts and things like that—under Florida law, anyway. But I agree with you that it is difficult.

The other thing I'll say is that I have seen this used as a weapon in at least one instance where one of the things proposed during the RPMWG was the creation of a statue of limitations for UDRPs. It was not properly drawn and, thank God, it was shut down. But the issue was that it was sort of like some kind of phantom timeframe that was running, that if you didn't file your UDRP within a certain period of time after the acquisition of the domain name—which now it's extremely difficult to determine when that happens and who owns it, etc.

But at any rate, I just want to point out that it can be manipulated if it's not carefully drawn. Thank you.

SUSAN PAYNE: Thanks, Scott. Liz.

LIZ LE: Thanks, Susan. One thing I wanted to address and be clear with respect to the Rule 4 that was included in the interim procedures—and this is coming from someone who was a participant in the former group—that was a decision that the group made at the time that there still needed to be further work done from the second public comment on Rule 4, which is why the current version of Rule 4 exists as it does in the interim procedures. That was, again, a decision by the former group.

I think, as we discuss the public comment from the second comment period, what we'll see and what will come across—the points ICANN has always consistently raised in the previous group, and will continue to

raise, is that we would not recommend that the board not adopt supplementary procedures where there is no limitation on the time to file.

We can discuss that as we get further into it, but I just do want to make note of that as conversations of what transpired in the former group.

SUSAN PAYNE: Thanks, Liz. I think we also have to recognize that obviously this was, as I mentioned—feelings run high on this one. We know that. There are, no doubt, some people who were not happy with the way things panned out and the interim rules and the rule that was incorporated into the interim rules. But that is the interim rules that we have, so I think our job now as a group is to try to take a deep breath and view this afresh.

We have interim rules. We know that timing rule is not the final timing rule, based on the fact that we put something different out to public comment and we have that public comment to review. So I think our job here is to come to this with fresh eyes and try to collectively come to the best outcome based on what has gone out to public comment, and what input has been received, and all other relevant input.

I hope that we can do that. I will probably try to have us run consolidation and start the discussion on timing in parallel [inaudible] from the next call onward. So I would really like to encourage all of you to look back over the material so you can come to this discussion next time well-briefed on what the input from the public has been, and what the issue is, and what it is we need to address.

I am terribly sorry for keeping you all late. I've run over by four minutes and I apologize for that. I should have wrapped this up a bit quicker that that. But anyway, thank you everyone so much. I will let you all go now. As I say, thank you very much for you time and I'm very sorry to keep you all late. Lots of homework. Speak to you all in two weeks' time.

[END OF TRANSCRIPTION]