BRENDA BREWER: Welcome everyone to the IRP IOT plenary call on 25 July 2023 at 18 UTC. Today's call is recorded. Please state your name before speaking and have your phones and microphones on mute when not speaking. Apologies have been received from Kristina Rosette and I will turn the floor over to Susan Payne. Thank you.

SUSAN PAYNE: Thanks very much. Yeah, and thanks. Welcome to this latest IRP IOT call. Good to see that we have a decent turnout. I'm still hoping that we'll maybe get a couple of additional joiners, but we do have quorum so we can kick off and so first, as always, our task is to just quickly review the agenda and see if there are any updates to statements of interest. I'll do the agenda first this time.

Just item two on the agenda will be to circle back on any action items. Item three, and our sort of main task for today is to review and discuss the small team's proposed revisions to rule seven, which is on consolidation, intervention and participation as an amicus. That's a bit of a mouthful. So I will probably just say, I'll probably just refer to consolidation when I'm when I'm talking about rule seven in sort of as an overarching comment, when we actually come to look at the rule, there are different sections dealing with those different forms of participation. Item four is just a placeholder in case there's any other business and then item five noting our next call to be confirmed, but proposed to be in two weeks' time on the 8th.

And I'm just noting in the chat the comment from David McAuley, who is on another meeting and will be joining us in sort of four or five minutes when he's wrapped up on that one. So that's good to know.

All right, statements of interest in case anyone has any updates, and I will pause briefly to see if anyone needs to update their SOI. Oh, Flip, hi.

FLIP PETILLION: Hi, everybody, hi, Susan, I will update it, actually, I should have done it. IPC appointed me as the NomCom rep and although it's only in force or effective as of October, I think, I should update my SOI. Sorry for that.

SUSAN PAYNE: Perfect, thanks for that, Flip. And congratulations. Thank you. Okay, all right, then, so not seeing any other SOI updates, so that's good. Next agenda item two is just to keep this on the agenda, really, that I have an action item to finalize and circulate the agreed text on rule three, which is IRP panel selection. And that is as distinct from the work that's been going on elsewhere regarding the standing panel. So this is this is rule three specifically on the IRP panel selection. And I have an action item which I will definitely get to before our next call. But our aim or my aim, as we've discussed, is having discussed it in a number of calls. It's really something that I think can be reviewed and kind of finalized now over email. It's really a sort of sense check of the final sort of agreed text. So I'm keeping that on there as an action item so that that it doesn't get forgotten and apologies for not getting to that yet.

All right, so then moving on in our agenda to agenda item three, which is the main purpose of this call and is to, as it says there in the agenda, to review and discuss the small team's proposed revisions to rule seven. And I'll just want to sort of say thank you to the to the small team that worked on this. It was quite a small group. David McAuley, Kristina Rosette, myself. At times, I think Liz has participated and or Sam when available. And also Scott Austin was also a member of that group.

We had some fairly extensive discussions and as you'll have seen from the red line that's already been circulated, we did make fairly extensive proposed suggested amendments to that rule seven. Some of them are in terms of sort of for ease of readability, so breaking out the sections on consolidation and then intervention and participation as emicus and removing some of the areas where the current rules have some kind of overlap. So in the current rules, there are some—there's a sectional [inaudible] intervention in a way that I think is probably a little unhelpful.

So some of our amendments are related to that. But I would say the majority were seeking to give sort of additional guidance on how to make an application for one of these forms of participation in proceedings. Matters for consideration for the panel when designing one of these applications and so on.

So I think I'll ask Brenda, if you could, to pull up the clean version with Flip's comments that that I circulated with the agenda. I think that's, as previously mentioned, I think the clean version is the easier one to work from. So the non red line. But everyone has a copy of the red line version as well, which is basically a red line against the current version

of the IRP rule. And it's helpful to have that so that if there's any sort of question about particular language and why we chose it, you can see whether that's something that the small team has come up with as a new suggestion or whether it's something that's carried over from the existing version of the rule. But in terms of the regular readability, it's quite challenging to read the red line. So working off the clean version I think is more practical.

And there are also a lot of comments in the document, which are intended to flag things that the small team wanted to bring to people's attention. And also, in a few cases, there are specific points where the small team felt that it was appropriate that we should bring things back to the full IOT for a discussion and for some decision.

Sometimes that's because in the small team, we were not necessarily all agreed. But in some cases, it's less that and more that we just felt that it was a point that perhaps a very small group of us perhaps shouldn't be deciding and that it warranted discussion in the full working group. But as I say, there are occasions where as a small team, we weren't necessarily all agreed. And so we felt that that we really needed a wider group to get a better discussion going and hopefully reach some kind of a consensus.

Okay, so we've got the text up in the window. Thanks for that, Brenda. And I really hope that you have all had a chance to sort of look through it. But I will essentially sort of start at the top, I think, and we'll go through the rule. I'm not planning on reading the text out word for word in all of the paragraphs, I think that will probably take us much too long. And as I say, you've all had this and you can read it. But we do

have sort of various particular points that are being highlighted and that we'll want to flag.

And with that said, I probably will shuttle back and forwards a little bit between this version that we can see in the Zoom room and my own copy, where it's a little bit easier to read the comments and remind myself of what the point is that we need to particularly consider and flag to the group. So please bear with me. And if I don't see any hands because I'm out of the Zoom room for some reason, please bear with me. But also, Bernard, perhaps you could give me a prod if there are hands up and I'm ignoring them. And so I think first thing to mention in relation to the overarching comment that we made, and it's something that I've touched on already, is that the way we've structured this is to basically separate out the sections on consolidation, intervention and participation as amicus a little bit more than they currently are.

It's not essential to do that. It does mean there's some duplication, particularly between consolidation and intervention, where there is quite a lot of comparable text, but it does mean that if you're an intervener, you need to look at paragraphs one to four, which sort of apply to all. And then you can go to your intervention section and you won't be missing a reference to intervention that you ought to have seen in one of the other sections, or at least that's the aim.

So I think as a as a small team, we were we were fairly comfortable with that approach, even if it did mean that there is a bit of duplication. Obviously open if there's strong feeling that that's not the best approach and that we should try and reduce that duplication, we can certainly do so. But I think for now and certainly for the purposes of

going through this, it's I think helpful to deal with the different processes in turn.

And then the other probably overarching comment to flag initially, and this is one that we wanted to refer to the full IOT for comments and thoughts, was that generally speaking, as we've discussed a number of times when we've been talking about the rules, the idea of the IRP in most cases now is that the idea is that the decisions will be binding, that they'll have some sort of precedential effect and so on. And that's envisaged under the bylaws that we're working to.

But there is a provision in the bylaws that does allow for the possibility of there being a nonbinding IRP if the party, the claimant selects that. I think when we've talked about this previously, we've found it quite difficult to come up with any sort of real scenarios where we think a nonbinding IRP might actually happen. But nevertheless, the bylaws have this section that refers to the possibility of a nonbinding IRP. So we have to at least assume that there might be some.

And so one of the overarching questions for the group is what's the most appropriate way to deal with a nonbinding IRP in the context of this consolidation intervention or participation as an amicus? In particular, is it appropriate to allow for those kind of applications to be made where the IRP in question is a nonbinding one? If so, one of the things we discussed in the small team was that we felt that that if we permitted these sort of applications to be made, then it certainly should be the case that they shouldn't change the status of the IRP in question. So, for example, if an IRP was nonbinding and someone wanted to

participate in it, then that shouldn't have the effect of changing it to a binding IRP and vice versa.

And then Flip very helpfully made a comment a little earlier. And his point, which I think was also a good one, was that he thinks if one proceeding is binding and there's a second proceeding which is nonbinding, it wouldn't be appropriate to consolidate those two cases because they're proceeding on a different basis.

So I think where we've probably landed is with those two considerations, which I think will need to be reflected somewhere. They're not currently really reflected in the rules. But I'm interested in seeing whether anyone has any further thoughts on this. Is there anyone who's uncomfortable with that notion of, as Flip says, that you shouldn't consolidate a binding and a nonbinding IRP into one proceeding? And equally, anyone who doesn't feel comfortable with us having a provision that says if there's consolidation or intervention or even participation as amicus, it wouldn't change the nature of the IRP that they're joining. So if it's nonbinding, then it would stay nonbinding. Or alternatively, is there a feeling that actually if we have a nonbinding IRP, we should simply just not permit this type of third-party participation? David.

DAVID MCAULEY: Thank you, Susan. And hi, everybody. So I pretty much am sympathetic to what you just said, that we shouldn't allow consolidation, intervention, etc., into a nonbinding IRP. And the point that you said

that Flip made about not joining a nonbinding to a binding, etc., I think those all make sense conceptually. But I have a concern.

And my concern is that when I read the bylaws—and to be honest, I haven't had a chance to read it again with this point in mind for this meeting. But it's possible, I think, that a nonbinding IRP decision would nevertheless be considered precedential. I find that staggering myself, that there's a possibility that there's a nonbinding IRP and that IRP decisions are precedential. I can't possibly imagine that being the case. But I'm not sure I saw in the bylaws that a nonbinding IRP is not precedent. So I think that problem, if I'm right, and I need to go back and look to make sure that I'm not misreading things, but if that's true, then there's a problem. And I think we need to work on it somehow.

One thing that people who want to intervene bring to a case, especially perhaps to a nonbinding IRP case, is maybe some more motivation and some more of the crucible that you're required to have in litigation to come to a just result. You know, somebody that's motivated to make the case, whatever the case is. So that's my concern. Thank you.

SUSAN PAYNE: Thanks, David. Kavouss.

KAVOUSS ARASTEH: So I have two comments, but I want to just react on David McAuley's views. I don't think that we could mix up nonbinding with binding and make both of them precedential. Legally point of view, the nonbinding is more informative, but the binding is formative. So we cannot make

nonbinding as a formative and take it precedential. So I have some concern about that.

Having said that, you have 29 items. I don't know how far you want to go, but I have one main question. If you read all of the ICANN public comments, public information, when even we reach the word ICANN, they fully [spelled]. They should not say ICANN.

But I don't understand why we want to make the first established or started as a dominant IRP. Dominant and domination and dominating has a different legal meaning. It seems to me that some people believe that the first established has a permanent lifetime. And whatever they decided will be dominating all over the process. I don't believe that we could call them dominant. I have no problem to take what is there, but not call them dominant IRP.

First commenced, I have no problem. And there is no difficulty to say IRP first commenced. Why? In some countries, they always go for abbreviation. Instead of thank you, they say TU. And instead of ITU, they say I thank you. So both is ITU, I thank you. I don't believe that we should call them dominant IRP. We should spell them as it is first commenced. But this is the language.

But now the substance. Do you think that whatever the first established or first commenced IRP will be prevailing for longer than the five years or extension with the five years? This is my first point.

If you allow me, I make my second point. My second point is item four. When it is said that the statement may be modified by the so-called dominant IRP. I have difficulty with that. A statement is a declaration, a

unilateral declaration of an individual or group of individuals. It cannot be modified. It could be accepted. It could be rejected. And it could be partly accepted. But it could not be modified. Legally, it is not appropriate. If somebody makes a statement, you modify the statement. You accept the statement, you reject the statement, or you take partially of that statement in your further action. So I don't believe that we should say modified. Perhaps we should say considered by IRP. You call them dominant or whatever as appropriate as the case may be, but not dominant.

The third issue that I have is there are several areas in this text saying that according to the rules and so on so forth. I suggest that for the ease of reading, when you say according to the rules or according to the text, you cross-reference which text, which rules, which paragraph. These are the three points that I have. And I thank you very much.

SUSAN PAYNE: Okay, thanks for that, Kavouss. Thanks for those helpful comments. So I'll quickly respond if you'll allow me to. In terms of the reference, the use of the term dominant, I appreciate your comment. I think that was probably language I had suggested. It's certainly not intended to reflect the sort of status of the IRP. And so I certainly don't think that there's a problem with using some different terminology, if that is more comforting. And your suggestion of first commenced, I think certainly I personally see no problem with that. I'll obviously defer if any in the group do see that there's a problem. But it was simply a form of terminology to try to differentiate between two sets of IRP proceedings. Or indeed, it could be more than two. But it was not intended to do

anything more than that. So I think that seems, certainly to my mind, not problematic.

There may be, I'm not quite sure if there's a question in your mind about the actual concept of consolidating into that first commenced IRP, and which panelists make the decision. And I know that that's something that is highlighted further on and that Flip had comments on. So I think we will, as a group, we'll come back to that particular issue.

On paragraph four, you mentioned, and ideally, I think I'd like us to go through paragraph by paragraph. But since you've raised this comment, I will quickly respond on it. The way you have read paragraph four is not what we intended. It wasn't intended that the statement would be modified by the panel. It was more that there's a presumption that each claimant can make their own statement. And that would be the case unless the panel says otherwise, for some reason. But I appreciate that if you are reading it in a different way to the way we intended, then that presents a problem. And so, again, I think that suggests that we need to tighten up the drafting a little just so that it's not open to misunderstanding. So thank you for flagging that.

And then finally, you made a comment about references to various other rules and text and so on. I have no problem with us also doing that kind of cross-referencing that you suggest, unless it's causing problems in terms of the understanding. I think I'd probably like that to be something that gets picked up when there's a sort of formal kind of legal drafting on kind of the agreed version of the rule. And that's I think that's the sort of cleanup effort that could helpfully take place at that point. But obviously, if there's specific places where it's causing

misunderstanding or difficulty because we haven't cross-referenced with sufficient specificity, then we can also fix that as we go along. So thanks for all of those comments. That's really helpful.

Not seeing any hands at the moment, so that's good. So I'm going to go back briefly to the—well, I guess before we go on, I suppose it would be helpful if we can reach some kind of a conclusion on how we treat nonbinding IRPs. I've heard David's comments saying that he's got some reservations if a nonbinding IRP had some kind of precedent, that an outright exclusion of all kind of third-party participation could lead to some unfairness. I think, like David, I think the bylaws are somewhat silent on whether nonbinding IRPs have precedent. Having said which, given that they're nonbinding, even the case itself isn't binding and therefore it seems a bizarre outcome if it would somehow then form some kind of binding precedent on subsequent proceedings. That seems contrary to the whole concept of having a nonbinding IRP, but I think that the bylaws aren't terribly clear on this.

But perhaps a kind of compromise solution to allow for the possibility that third parties might have a genuine need to participate would be that we sort of adopt the kind of approach that I mentioned at the start, which is that if we're talking about consolidation or intervening, we're not consolidating a nonbinding and a binding IRP, and that in having parties participate into an IRP, we're not changing the nature of it. So if you want to intervene in a nonbinding IRP, then perhaps that's appropriate if the panel allow it, but it shouldn't change the nature of that IRP into a binding one because someone has intervened. I think that's probably a good compromise that is what I would suggest we go with. Again, subject to views from the group. Flip.

FLIP PETILLION: Thank you, Susan. You somehow actually touched upon what I wanted to say in your last intervention now. I think what is important in practice is we as a group, we should be careful not to add any language that is actually going beyond our mission.

And with regard to binding, nonbinding, precedential value, I think a key issue is maybe a case, an outcome may be not, or a decision may not be binding, but it may have precedential value. Definitely, if in the same decision, there would be a binding effect for the same decision, for other parties involved.

What I'm concerned about is the compatibility of the implementation of both the decision for the parties to whom it's binding and towards the parties for whom it's binding and towards the parties for whom it's nonbinding. How, definitely, if that would imply an action for ICANN, for ICANN board, how would you make compatible a same decision that would be binding for ICANN and a complainant and nonbinding for ICANN again and another complainant or an intervening party? I would find it very difficult to implement together at the same time.

And in practice, another level, it could even be unenforceable at the same time, if one is binding and the other one, well, the same decision would be binding for some, but nonbinding for others. But I honestly think we're not going to be able to solve this one here. But I'm very sensitive to Susan's attempt to come to some sort of a compromise. But I honestly think, if we continue, we may handle this, but then we will

consume all the time and we have already consumed 34 minutes of this meeting.

SUSAN PAYNE: Yeah, I agree with that, Flip. And again, I mean, it's possible there could be some future incompatibilities, but it also seems such an edge case. Yeah, I mean, David is suggesting we kind of keep a log of areas of possible gaps in the bylaws. I think we've got such a log. I'm asking Bernard if he can add this one to it. I suspect we've added it already. This isn't the first conversation we've had about whether a nonbinding IRP has precedent or not. It's come up before. And it's not our job to resolve that. I think it's just one that we can highlight as something that came up during our discussions. OK, Kavouss and then Sam.

KAVOUSS ARASTEH: Yes. I understand that the duty and mandate of our group is mentioned in the bylaw. I understand that normally, rules are established whenever there is a silent issue in the legislation. So nothing prevents us to discuss and possibly suggest and decide on the rules with respect to the appropriateness or otherwise to use nonbinding as a precedence. This is in our duty. If we don't have any solution, that is another issue. But nothing prevents us to discuss that. So that is one point. So once we discuss that, then we come to see what happens.

Susan, I'm sorry, I forgot to say something in another paragraph, but I understand that your wish is to start a paragraph by paragraph. Then I impatiently waiting to start with paragraph one or what is the paragraph you start with, I don't know. And then we will make

comments. So I don't take your valuable time on this particular paragraph 17 that I have some comments. But I have said with respect to the binding and nonbinding to be used as a precedential, I have already mentioned my views that I still believe that nonbinding should not be used as precedential unless very cautiously by some analogy to the precedential case, the IRP panel could deduct from that to—could result from that. Yes, it is in analogy with the binding decisions, but not taking as a blank case all nonbinding could be used as precedential. This is my complimentary view on the nonbinding. Thank you.

SUSAN PAYNE: Thanks, Kavouss. Sam.

SAM EISNER: Thanks, Susan. So going through this discussion, I know I've looked at this before, I think that the inclusion of the nonbinding reference in the bylaws had something to do with someone during the bylaws drafting process raising some level of a corner case around this. And so I appreciate that there's a lot of specificity in there. And we within ICANN can't, we know that we're empowered to agree to someone making an IRP decision on binding. We're not sure when that would be the case. But I think the suggestion by Susan about not changing the spirit of, or the characterization of a case makes some sense. Though to Flip's point about the competing outcomes, clearly, and I don't know if this has a place in these rules or not, because I also appreciate Flip's caution that we not go too far, but part of what ICANN would have to consider if someone was seeking to have a nonbinding IRP would be, is this

something that's been decided by an IRP before? Is there binding precedent on this already? And then also, are there any other pending cases that already are binding, right? Because we clearly wouldn't want someone to be able to convert a regularly filed IRP into something nonbinding because they tried to consolidate or intervene into it under this rule. That wouldn't make any sense. And there also could be the possibility of a later filed IRP on the same topic as a binding IRP that maybe ICANN doesn't have the ability or likely probably doesn't even have the want to tell the second filer in that instance, oh, you should make this nonbinding, so it matches what the other one is.

So there are some possibilities here that I wonder if in the end, it's such a corner case that we need to do much drafting around in here, because there's just some really practical aspects that would have to be looked at in any situation that it might be hard to try to draft some rules around, but also flag that as a community, we probably should have some further conversation about what this means. Like, what does this nonbinding mean? What was the real intention of it? Because I'm not sure that we have a lot of legislative history on what that means.

SUSAN PAYNE: All right, thanks. Okay, I think, well, I think we've certainly got to a point where we feel the need to kind of flag this, to flag that there's this uncertainty at a minimum about the status of a nonbinding IRP and that perhaps it's something where some more discussion needs to be done. Perhaps for the present purposes, that's as far as we can go. We certainly have plenty of other points in the rules to review and agree on. So I think we park this one perhaps for now and with sensible or

sensitive to the point that I think we all think this is quite an edge case, but one where there's a bit of inconsistency or lack of clarity.

Okay, let's move on. We're still in paragraph one, but I think as you'll appreciate as we go through, things speed up, certainly as we get further down the rules where we start to be duplicating, whereas we've got some of the sort of points of principle in the early provisions in this section.

So leaving aside concerns about the terminology dominant IRP, which are well noted, what the small team sought to do was agree who it is or how a decision on an application for consolidation or intervention or participation as amicus should get decided. Whose role should it be to decide that? And if you're familiar with the current rules, you'll recall that we currently have this concept of a procedures officer, which is a single panelist who is tasked with making these decisions on these types of application. But we also had a fair bit of feedback that that procedures officer role and its powers and responsibilities has been quite poorly understood by parties in IRP cases and has caused a certain amount of confusion.

So the initial approach that the small team was tending towards was to still keep that concept of these applications being decided by a single panelist, but to change terminology so that we had a more recognizable terminology used so that we lost that confusion about what does a procedures officer mean.

But then I would say as our discussions went on, we started as a group to feel that actually these sorts of applications are really quite

important ones and that perhaps it wasn't really appropriate for a single panelist to be making these decisions. It has quite an impact on the conduct of the case, potentially on how long it might take, and indeed that if we had a single panelist making these decisions, we were then starting to build in quite a complex process for whether when the full panel, the three-person panel is in place, whether those decisions could be reopened or not.

And so as a group, we then came to the conclusion that we felt really these sorts of applications ought to be determined by the IRP panel, so by the three-person panel. And I think there was a lot of comfort with that. What that does then bring up is sort of the question of what happens then if there's no panel in place. It's quite likely, given the sort of timings that are likely to be, when these applications are being made, it's perfectly conceivable that there might not be an IRP panel in place. And so that's where this concept of trying to have the IRP panel appointed in the first commenced IRP to be the one that is given this responsibility in the ordinary course of events you'd like to think and hope and expect that the proceeding that started first would be further along in its process. And so it was more likely to be closer to having panel appointed, but also recognizing that there might be cases where one has to wait until there is a panel appointed before you can have an application to consolidate or from a third party to intervene actually decided because we haven't got the three-person panel in place.

And so I think basically that's quite a long explanation for the thinking of the small team. Hopefully that makes sense to people and seems reasonable. I do think it certainly can lead, I think, to some situations where there might be some delay in making decisions on these

applications by third parties to participate in the proceedings because there isn't a panel in place and so they would have to wait until a panel is appointed. But that seems a more reasonable solution than trying to do something that involved appointing a single panelist and giving this kind of responsibility to a single arbitrator.

But again, I'm very keen to get the reaction of this group on whether that raises concerns and I know Flip has flagged some, so Flip.

FLIP PETILLION: Well, thank you, Susan. Yeah, I thought to formulate it in my comment you have lawyers and you have lawyers. You have lawyers who take time, try to consider, try to avoid an IRP and you have lawyers who are very happy they have an IRP and they start it, whatever the outcome or the follow-up is going to be. I hope I'm considered to be part of the first group.

But that means that people like that are actually disadvantaged by those who are in a hurry and who want to be the first because they know that their panel will be the dominant panel, even if they don't have that panel in place in due time. So it can have an impact on those who initiate an IRP at the later moment after due consideration.

I think we all agree that it would be good that we consolidate cases. I've done it a couple of times in the past and I think it's really efficient and it never raised an issue. Of course, I was representing the same parties, but if you not have the same council, I think that will lead to separate IRPs. There will be no consolidation and there will be a risk of

contradicting or decisions that are not compatible. That's not good. That's something we should avoid.

So at first glance, when you read the language, I like it. It sounds very logical to proceed as is suggested in 7.1. But here is the problem that I raise and it depends on the professionalism of the parties and their council. We have different cultures. American lawyers tend to handle cases different from continental European lawyers. I'm sorry to say it, but that's the case.

So I see a real problem here and I would find it very unfair that a party that is coming second, third, would actually not have the same say in the constitution of the panel compared to the very first party that in time was the one that filed the IRP.

SUSAN PAYNE: Thanks, Flip. I hear you. This, I think, is one of those issues that we talked about when we were thinking about how the decision should be made. Certainly, if we had a single panelist making these determinations, there is then scope for the parties collectively to have greater say on panel appointment. But for all the benefits that you get from that, you get the drawbacks, I think, of having these decisions, which are very important decisions, being made by this single person rather than by three panelists.

I think that's the trade-off that in the small team we grappled with and we certainly did grapple with it. We had more than one iteration of this rule, as I explained at the beginning, where we started down one path and then began to feel very uncomfortable about where that was taking

us. And hence, we came to this conclusion. And I suppose all I could say is that, yes, definitely there are strong reasons why it would be a good thing to consolidate cases where it's appropriate. But as the second comer, no one is making you consolidate. And so that's part of, I think, the weighing up that the party and their council have to make. If they are the second commenced proceeding, actually, do they do they want to consolidate or not? And they're not being forced into it. There is some scope for them to either not make an application for consolidation or if an application were made to consolidate the case by the first IRP, then they can object.

I don't know if others have sort of solutions that can better address that than those comments. But I've got a few hands now. So I'll come to Malcolm and then I've got Sam and Kavouss and then you again, Flip. So Malcolm first.

MALCOLM HUTTY: Thank you. I listened to Flip's intervention with great interest. As a non [inaudible] practitioner myself, my immediate reaction to what Flip was saying was this is exactly why we need practitioners on the group and to warn us when there are practical consequences to what we do. So I think we should take it very seriously.

Nonetheless, I would ask Flip a follow-up question. Okay. But since this seems logical and if this is going to cause a problem, what are we going to do instead? What would your counterproposal be? Thank you.

SUSAN PAYNE: Okay. Thanks. Sam.

SAM EISNER: Thank you. So and I know ICANN participated in the small group, but I think it's also important to make sure that the plenary is aware that one of the things that didn't exist in 2018 when we developed the supplementary procedures, but is in place now within the ICDR's rules, is there actually is a consolidation section that sets out a consolidation process. And we can drop the link to that in the rules here or in the chat here.

And one of the things that that does is it identifies the role of a consolidation arbitrator, which is a separate arbitrator from those who are hearing the panel. And so I'm going to channel Flip and then he can tell me I'm wrong, but I think it probably is worthwhile given that this didn't exist in 2018 when we did the first iteration with this procedures officer and such, we didn't have this conversation with the plenary, but I think it's worthwhile having a conversation with the plenary hearing Flip's concerns about first to file, but also from the ICANN side.

And I think it's important for cases that are appropriate to be consolidated, to be consolidated and to not have two cases on similar paths and not only first to file, but chasing who has the most efficient panel and who has the most efficient process, because it's not good for ICANN, it's not good for the ICANN community to have its resources spent on dual tracks, as opposed to having everything heard at once, right? That's part of the reason that we're working so hard on this. So I think hearing those first to file concerns, we should maybe have some

conversation about whether it makes sense to deviate from the ICDR's process, which I believe was accepted in 2020 or 2021. And Liz has dropped that in there. And this is at Article 9, if you want to take a look at those rules. Thanks.

SUSAN PAYNE: All right. Thanks, Sam. And thanks for sharing that. It's probably something that I think as a small team, we were probably aware of that. We didn't spend a lot of time looking at that provision in the ICDR rule. But we certainly did have discussions about the use of a single arbitrator, but as others are saying if there are strong practitioner concerns about this, this is why the small team brings its work back to the full working group. Kavouss?

KAVOUSS ARASTEH: I think reference to ICDR, we have discussed it before. And it has some specific situation that we could use that, but not from the outset start ICDR, ICDR. I have some difficulty with that.

Second, the way that these rules are amended with a red line, which for me is a very good text to see the red line. It seems that first of all, I understand or understood from your statement or your language or your words distinguish, Susan, that you refer to single panelist IRP. Am I right or am wrong? Then I have following question. If you refer to single panelist, you remember again that some meeting ago, I had difficulty with that. And my very distinguished colleague, Flip, mentioned that this would be for some urgent issues and some specific cases. And normally one single panelist is not appropriate because human being is

human being. Emotion is emotion. Not intentionally, but unintentionally, it might be something happened with one single. We cannot guarantee that it would be fair or normally fair or generally fair. That is why the use of the one single panelist should be with total caution.

Second, the way that this text all read or written is retroactive because it is said in the first paragraph that request for consolidation, intervention and or participation to an amicus shall be considered and determined by the IRP panel and then appointed by the first commenced IRP. If you have IRP first commenced in first January 2024, for example, in first January 2032, a case of consolidation, intervention and participation arrived. Do you want to refer back to the panel or panelist which was established on first January 2024? That person may not be existed in the panel at that time. If it's a single panelist or even if a panelist of three persons, and I don't understand this retroactive decision-making, why you want to do that? Do you think that the first established has more right and more authority and more legitimacy than any other panelist or any other or any other panel established after? The way you drafted the sentence is this should be determined by the first established and the first established either may not be in position at that time or maybe one single which would be unintentionally not taking appropriate decision and why we have to refer the case arriving in 2032 to the case of the panelist established in, for example, 2024. This is to be carefully considered and decided. So I have some difficulty with this implicit retroactiveness. Thank you.

SUSAN PAYNE: Okay, thanks, Kavouss. So, Flip, I see your patient hand. I will just react to that. I think if I'm understanding you correctly, Kavouss, then I think there's some misunderstanding. This whole section is about joining a particular IRP that's ongoing. So in the case of consolidation, it would be merging two ongoing IRPs together, or in the case of intervention or participation as an amicus, it would be an application to join into an IRP case that is ongoing. So it is not the case that if a panel, sorry, if an IRP was commenced in 2024, that in 2032, applications for consolidation would still be being made if that case was no longer underway and there was no panel still in place. Now, I suppose it is theoretically possible that you could have an IRP action that was going on for that sort of six years or whatever. And so in theory, someone could make some kind of an application to consolidate into an existing case that had been going for six years. But I think that is where the discretion of the IRP panel comes well into play in making the assessment, which gets covered further down in the rules about whether it's appropriate to permit this application or not.

And I think it would be a bizarre situation where maybe it could happen, but I think it would be very unusual to have a situation that the IRP panel, in a case that had been running for six years, thought it was appropriate to consolidate a newly brought IRP into it and that it wouldn't cause sort of delay and unsatisfactory outcomes. But I suppose it's theoretically possible.

And I'm noting your comment in the chat and thanks very much. What can I say? I think that some of this text is existing in the existing rules. I think there's some presumption that this is how it's understood. If it's not understood like that, then maybe there needs to be some

amendment to the drafting to make that clear. But I must say, I'd defer to others if they feel that this text is unclear. Perhaps we can tidy it up to make it a bit clearer. But I would like to think that there was an understanding that we're talking about joining a case which is still ongoing, not that the first IRP that is commenced after these rules are adopted somehow has some permanent precedential impact for decisions on consolidation. Flip.

FLIP PETILLION: Thank you, Susan. I'm coming back to what we discussed earlier with Malcolm and Sam. And I'm sorry, but I had difficulties in following the last discussion with Kavouss, but I will maybe listen again. It's a bit late here and I'm tired. So that may be the reason.

So coming back to our earlier discussion, first, let me share another problem. And I do agree with Sam. We really should encourage consolidation where possible, because imagine you have two panels and one party manages to get an IRP decision, which is not really the outcome that ICANN and the claimant expected in another case, which is later that would have or could have a binding effect. If we had consolidated the cases, maybe the outcome of the first would have been different and inherently the outcome for the second case. So just a comment.

Second, I have not examined it further, but I liked the idea of somebody who is managing the process. So a procedural, how do we call it? I saw a reference to procedures officer, but of course, who is that? Would that be a panelist? Would that be an arbitrator or a consolidation arbitrator?

And I do like the suggestion of Sam to further read the ICDR rules and see if the solution is there. And I have not examined it again. So I'm not really prepared on that point, but I like the suggestion. And I think that that would be practical. It would be, I think, fair, just, efficient, and that would be in compliance with the purpose we all have.

SUSAN PAYNE: All right. Thanks, Flip. Okay. I'm by no means wedded to the concept of using the IRP panel, the three-person panel, for these decisions. This is not to say that—just for the avoidance of doubt, it doesn't mean that because we have a single panelist deciding on this decision about whether to consolidate or allow an intervention, that there's then a single panelist deciding the case. That's absolutely not the case, for the avoidance of doubt. I don't feel strongly.

I would say that we, in the small team, as I said, we discussed extensively, and some of the small team felt very strongly that we should have these decisions made by three people and not by a single panelist. So I guess I'm looking to this group. We've certainly heard from Flip, and he's raised these concerns as the practitioner. I don't know that we've got any other practitioners on here, but obviously we've got Sam and Liz, who ICANN is certainly a party, but I think they generally have said that they are not the ones who usually are handling these.

But I guess, if the feeling of the group is that we should be exploring that, we can certainly do so. It will have some knock-on effects on many other aspects of the rules, because there are certain other parts of the rules where it talks about which case takes precedent and so on. But it

doesn't mean that we can't look at some of the other principles in this rule seven, some of the concepts and what we expect an application to include and what considerations we think that whoever is deciding this application should bear in mind when they're deciding whether to consolidate or allow intervention. So it doesn't mean that if we don't decide on this, we can't proceed and look at some of the rest of the rule. Flip.

FLIP PETILLION: Thank you, Susan. Just a question. Will the standing panel have a president, a chair and a vice chair? Because maybe the solution could be that the chair is actually taking these kinds of decisions. I'm thinking of the European Court of Justice. Currently, the president is Mr. Koen Lenaerts. He happens to be a Belgian, but he's very powerful and he is the person who is having a big say in who is handling what cases at the European Court of Justice. So I like that approach. It's working. It's practical. It's very professional. Is this the way we think of the approach of the work of the standing panel? Thank you.

SUSAN PAYNE: Thanks, Flip. I can't answer that, but I'm hoping that a couple of people who have their hands up may be able to. Sam?

SAM EISNER: Thanks, Flip. There are thoughts of having a chair of the standing panel. There would be certain administrative duties that we would likely ask that chair to take on. Whether it remains appropriate for that chair to

be identified as the default single source in certain cases, I think it's something we still need to talk about a bit more. We've heard some concerns from the ICDR case managers and those who work with panels that we don't necessarily want to always put the chair in a position that they're not able to be part of the full panel. And there could be some conflicting issues if you have a consolidation arbitrator or that single arbitrator, because typically when you use that sort of role or an emergency arbitrator role, that person is then not able to take on a panel role in it as well. And so we might not want to automatically cut out the chair, but there are ways to use the chair, either in the selection or in some preferential process within this.

SUSAN PAYNE: Lovely. Thanks. David, I think I saw your hand, but it's gone down. Is that?

DAVID MCAULEY: It did go down. I agree with what Sam said, and I'll just mention that the bylaws do make a reference to a chair, but they don't talk about how it's established, etc. I'll find the reference report in the link. Thanks.

SUSAN PAYNE: Thanks, David. Yes, and I think I was minded to make the same point that Sam was making just about I think it would be something we would need to consider if we wanted to give this role to the chair, it would likely, it could mean that they wouldn't be eligible to be an actual panelist. That was certainly one of the considerations that we'd had

when we were looking at this concept of having a single panelist make determinations on these applications. Our presumption, and I think it's also something in the ICDR rules, but would need to double check. I think the presumption is that if you've been hearing that kind of application for consolidation or intervention, then you wouldn't also then go on and be appointed as a panelist for the actual full hearing. And so it could have the effect if there were lots of these types of applications, it could mean that the chair of the standing panel never gets to be an IRP panelist, which I don't think any of us would think was appropriate.

Okay, and I'm just seeing a quick comment from Kavouss. I do want to just react to it, Kavouss, regarding the ICDR rules. I think it is important to bear in mind that the ICDR are the provider for the IRP, for this dispute process. We have talked about that at length during a number of our previous calls. And so the starting position is that IRPs operate under the ICDR rules, except where a set of additional rules or amending rules are developed by this group.

And so it is always the case that if we leave something blank—yes, supplementary rules, that's the terminology I was struggling with. If we leave something blank, then the default is that the ICDR rules do apply. And indeed, I think it's appropriate for us to take the view that if the ICDR rules do the job effectively, then there is no requirement for us to create some different rule for the sake of it. But certainly, this is a very specific type of proceeding. And so this is why we have these quite detailed supplementary rules, because they sit alongside the ICDR rules. And in some cases, they sort of enhance them. In some cases, they

replace what the ICDR rule says. I'm just wanting to make sure that we all kind of appreciate that, and I know that you do.

Okay. All right. Then I think let's move on. I think the questions in paragraph two, which deal with, well, paragraph two, actually, I think we can quickly come to. And this just deals with the situation where actually the parties involved are in agreement. So if all the parties, including ICANN and the existing claimant and any kind of new claimant who wishes to join are consenting to the particular form of participation in the proceedings, then as drafted in paragraph two, there's a presumption that the application will be permitted except if there are extraordinary circumstances. And so this was something that we did flag to the working group for some inputs, whether we need a reference for extraordinary circumstances, whether having just a presumption of participation or presumption of granting the application is sufficient.

And Flip did make some comments, and I will actually go to Flip because I'm not quite sure I understood if he was proposing something different. I think as it's drafted, there's a presumption of the request being granted. And Flip has suggested, I think, something a bit more obligatory than that, so that it would be, application would be allowed except in exceptional circumstances. So that's a little bit more than a presumption. I think that's the distinction Flip is proposing. But if you don't mind Flip, I will kind of come to you and see if I've understood you correctly. And again, looking for whether there are any other comments or concerns on this paragraph. But I do actually see Kavouss' hand that went up first, so I guess I'll come to you first, Kavouss.

KAVOUSS ARASTEH: Yeah, thank you. I suggest paragraph two, we replace the word expressly by a specifically, unless or except as otherwise specifically stated, but not expressly. Although they are a synonym, but normally in legal tests, you say unless otherwise specifically mentioned, or unless otherwise specifically stipulated or stated, but not expressly.

And then there is a part in the square bracket. So I would like to know what happened to that part. Thank you.

SUSAN PAYNE: Thanks. And the part in the square bracket is the bit that we're here to discuss. Well, we're here to discuss all of it, but specifically was being flagged for discussion. Flip.

FLIP PETILLION: Thank you, Susan. Can you briefly repeat your question regarding this point?

SUSAN PAYNE: Yeah, sure. I just wanted to see if I understood your comment correctly. As drafted, this provision sort of assumes that if there's consent by all the parties, then there's a presumption that the panel will permit the request except in extraordinary circumstances. And you had suggested the wording in a slightly different way as being perhaps that the panel must permit the request in absent extraordinary circumstances. And I'm just seeking to understand if in suggesting that, is what you're suggesting that you think it should be not simply a presumption, but more that there is an absolute obligation on the panel to accept the

application except in some exceptional circumstances? Or have I read more into your comment than you intended?

FLIP PETILLION: No, I think you're right. I see a practical issue. I mean, what is an extraordinary circumstance? It's always dangerous to leave that kind of language. Definitely when we are talking about rules, procedure rules, I don't like that very much because it's so abstract. It's difficult to implement, or no, it's difficult to predict. Definitely when we are talking about consent, why would the panel say no when there is consent? Yeah, I think I would repeat myself if I continue. Sorry, I don't have more input.

SUSAN PAYNE: That's fine. And I can see a couple of hands. This is probably the last thing we'll talk about before we kind of start to wrap up. But that is why that terminology is there in square brackets because we weren't in agreement in the small team whether we should keep that language in. And if we did have that language, do we need to somehow try and define what we mean by that, which then gets complex? This is why we were seeking the input from the wider group on, do we have that language, do we take it out and just leave it to the panel to have some discretion where they consider it's appropriate or whatever. But I'll go to David.

DAVID MCAULEY: Thank you, Susan. So I was a member of the small team, but I'm speaking here as part of the larger team. My personal view is leave the language in and we can't define extraordinary. Let's not over-engineer it. I think we trust the wise discretion of the panel. What extraordinary tells them is this is not run of the mill. This should not happen all the time. Something more is needed and let them fill in the blank. That's my feeling. Thanks.

SUSAN PAYNE: Thanks, David. Kavouss.

KAVOUSS ARASTEH: Yes, I put my comment in the chat. Extraordinary circumstances have different meaning for different people. In rule four also we refer to extraordinary circumstances, but at least giving such as examples and so on and so forth. That means the extraordinary has some sort of the blanket, but not extraordinary. So everything could be extraordinary or nothing could be extraordinary. So it is very vague language and we should not put that in the rules unless we say such as or including, but not limited. Thank you. And give examples.

SUSAN PAYNE: Okay, thanks. I think then I'm sort of hearing people generally of the same view that we build in some uncertainty and vagueness and difficulty by a reference to something like extraordinary circumstances, unless we're also able to define them and that doing so would be pretty difficult to do. We should perhaps be sort of trusting to the expertise

and skill of the panel in this regard. So I think that's what I'm hearing. And of course we do know that when the panel do make these types of decision, they would be expected to give an explanation of their reasoning. So there is some sort of expectation there that there's a reasoned decision being made by the panel if they were to do something unexpected.

Okay, all right. So we're close to time on this call and I think this is probably a sensible point at which to sort of wrap up. We haven't made as much progress as I'd hoped that we would, but for very good reasons. There are some tricky concepts and particularly this concept and this decision about how these applications are handled and so on. It's quite overarching and it is one that there are elements of the rules we can still discuss without a decision on that. It does come into play throughout this whole Rule 7. And so if we can come to some agreement on how we handle this, that would be preferable. And so I think at this point what we should do is we'll sort of wrap this call up. I think I'd like us all to take an action item that we will review the provision in the ICDR rule that deals with the concept of the consolidation arbitrator and we will come back to our next call having done so and able to come to, I would trust, some agreement on whether that process as set out in ICDR either in its current form or with some IRP specific tweaking will work for our purposes, and if so, that then will allow us to move on with our review of this Rule 7 generally having put that quite important preliminary decision to bed I hope.

So as I say, I'm giving everyone an action item for that. Bernard will circulate the link that was previously shared in the chat after this call so that everyone has it and we will reconvene. At the moment we're due

to meet in two weeks' time. Given that we are trying to make progress and that we particularly are looking to try and have something wrapped up and able to put out to public comment insofar as we possibly can do, I do wonder whether we should actually try and meet next week and rather than leave it two weeks when we've been making—we've got a bit of a head of steam going here. And so I guess I'm looking for, are there strong objections to us meeting next Tuesday rather than leaving it for two weeks? Kavouss?

KAVOUSS ARASTEH: Yes, I think it is better we think it over, it is better we carefully, based on the discussion of tonight which was useful, to think it over and come back after 15 days but not next week. Thank you.

SUSAN PAYNE: I'm seeing support for that, either because people feel that two weeks would be preferable or indeed due to other scheduling conflicts. So okay, we will stick with the plan. We'll have our next call in two weeks' time. And I will look to you all to have done some homework before we reconvene. So thank you all very much. Again, I had hoped we would get a bit further through the paragraphs, but we've been having some really useful discussion and so it's been, I think, very valuable and I really appreciate you all engaging on this. So David?

DAVID MCAULEY: Thank you, Susan. I have one AOB and I'm hoping that in August at the next meeting or the one after that, we can start planning for ICANN 78.

We may have eight hours. It'll be generous if we get that from ICANN, I hope we do, but I do think we want to plan, we want to put out work to our members and we should start thinking about helping you by offering to be facilitators on this issue or that issue. I think if we put our mind to it, we can finish the rules by ICANN 78 and that's my hope. In fact we may have to take votes and we may have to talk about process, but I think we should start thinking along those lines. Thank you.

SUSAN PAYNE: Yeah, thanks, David. The hope had been that we would finish the rules and have something out to public comment before ICANN 78 and so what we would be looking at in ICANN 78 would be more of a presentation to the community. But that does require us to get through this and get something in a form that's suitable for going out to the public. So, yeah, I think we have our work cut out for us, I think, but that's certainly the hope.

All right, with that in mind, but I will take on board the comment about ICANN 78 is going to approach faster than we might wish and let's wrap up for now. We will reconvene in two weeks' time. So thank you very much.

[END OF TRANSCRIPTION]