DEVAN REED: Good day, all. This is Devan speaking. Welcome to the IRP-IOT meeting on 22nd, August 2023 at 1800 UTC. This call is recorded. Please state your name for the record when speaking and kindly have your phones and microphones on mute when not speaking. Attendance is taken from Zoom participation. Turning the meeting over to Susan Payne. Thank you.

SUSAN PAYNE: All right. Thanks very much, Devan. And thanks to you all for joining. As anticipated, we started the recording when we had a minimum quorum, but we have actually, we've had at least one more person join since then. So, that's great. And we also, I think, are expecting two or three more of our group who have said that they hope they'll be able to join us late. Yes. Thanks, David.

All right. So, this is our call on the 22nd of August, and as usual, the first up, we'll review the agenda and updates to statements of interest. So, I'll do the agenda first, and then we can circle back. First up, we had one action item. Mike Rodenbaugh was going to share proposals for when there might be a duty to notify the commencement of an IRP, which he's done. We actually, have had a bit of a flurry of emails back and forward on that during today, and so we will come on and discuss that a bit later, I hope, yes, which is indeed great. And it's also helped flag that there is some provision already in the rules, which is very helpful.

Okay. Third, agenda item 3 is the substance of our call, which is to try to conclude the initial review and discussion on the proposed revision to Rule 7, and that's continuing on from the call last week. We had got up to Rule 7 paragraph 19. So, we'll continue from there. It's listed as a agenda item by, I think-- I've been viewing it more as 3a and 3b. So, once we've got through to the end of Rule 7, we can circle back and have a discussion about that issue of notification. Then I'd also like to spend a little bit of time just talking about next steps and timing and the plan for the near future for the group. And noting in the agenda there, the next, next call will be on 29th August. So, that's this time next week.

And finally, if there is any, we'll have AOB, but I will pause now and just see if anyone has anything that they want to raise then before we start. Right. I'm not seeing anything at the moment, so that's promising. All right. Then if we if we circle back up to the top of the agenda, updates to statements of interest. This is the usual regular check-in to see whether anyone has anything that they need to notify.

Okay. Again, I'm not seeing anyone, I'm not seeing any hands. Just again, the usual regular reminder to please keep your SOI up to date. You'll remember that for some people, you may actually have two or even more statements of interest, because our SOI for this activity is based on, but not identical to the GNSO statement of interest. So, we all did produce a slightly different one for this IOT. So, just a reminder as well that you may want to keep an eye on this IOT specific SOI as well as any GNSO one that you have.

Okay. All right. Then, just coming back to the agenda on the agenda Item 2. In fact, as I mentioned, as I was quickly running through the

agenda. I think my preference would be for us to just note here that Mike did indeed share a proposal, and as I said, a minute ago, there's been some really useful discussion on the mailing list about that. But my proposal would be that we'll move on to agenda item 3, and we'll deal first with reviewing the rest of Rule 7, and then we can circle back to that particular item, which was with a kind of follow-up from what we covered last week.

So, with that in mind, I think we can move on to agenda Item 3 or, or indeed3/4 and continuing the review of Rule 9 from sub-paragraph 19. And so, if you could, Devan, could we please have the version of the document that is the one the sort of clean version, which still does have annotation, but is the one without the red line? There it is. Thank you so much. All right. And then we are on page, I think it's probably page 4. It's paragraph 19. Yeah. Lovely. All right.

And just as a reminder, for everyone, this section, we're now in the section about intervention. And so, we did start looking at intervention on our last call and covered a few of the paragraphs. We got up as far as paragraph 19, and we did start looking at that paragraph and had some brief discussion our last call, but I don't think we'd entirely reached a conclusion on whether there was comfort with the text as proposed from the small team or whether there was a feeling that any changes were needed. As a reminder, this section is talking about the timing for bringing an application to intervene, and as previously, we have parked the question of the exact number of days, whether it's 21 or 28 for the present. But the point in this that is set out in the final sentence is the one that might run about raised a few concerns on last time around.

So, this is the filing of the motion to intervene, does not stop the clock on the intervener's own time to bring an IRP. And so, a potential intervener should consider whether they will be at risk for being out of time in the event that their application or their motion was rejected. And I think that thinking here in the small group, really, was what we were trying to achieve was not having an application for intervention by a third-party use purely as a delaying tactic by a potential claimant who was almost out of time for bringing their own IRP. So really, the intervention shouldn't operate as being a loophole to get around the timing rule. And that was why we were proposing that language.

And I think the other thing I was going to just flag is just a reminder. I think we all know this, but a reminder that a claimant has 120 days under the timing rule or, if you like, 4 months from when they know or have or reasonably to know that they have a claim to bring their IRP. And so, that is a 4-month period. Now, obviously, it depends on when their knowledge occurred and on when the IRP that they might be seeking to intervene on was commenced. But the suggestion was that those are factors that the potential intervener has to weigh up when they're deciding whether that's the path that they follow. Kristina.

KRISTINA ROSETTE: I was a member of that group and everything that you've said is correct, Susan. I would just add for the members of the team who weren't part of that smaller group, that we were trying to be very mindful of the idea that the IRP should and hopefully once the standing panel is in place will only take 6 months. So, which is why, for example, you see these deadlines, these 21-to-28-day deadlines, proposed deadlines for filing

these types of motions and why you see language where filing a motion to intervene wouldn't stop the clock.

Because it seemed inconsistent to us on the one hand if the entire proceeding is supposed to take only 6 months. That having, for example, a date to file a motion to intervene, having the deadline for that be any longer than a month after the IRP is published just would throw that all out of whack.

I certainly take Mike's point that the IRPs do not now take anywhere close to 6 months. I've lived through one. So, I would suggest that at a minimum, if these dates and this language stays in, that we drop an explanatory footnote for the community to explain what our rationale was, because I don't know that's necessarily going to be clear from the language of any other proposal on its face. Thanks.

SUSAN PAYNE: Thanks, Kristina. That's really helpful additional comment from the small team. So, I appreciate that. I think the other thing I had had thought about, just reminding everyone of and had forgotten to mention was that we did talk on, I think it was our last call about applying a deadline for the panel to make their decision. I don't recall without going back and I would need to go back and look through my notes or, in fact, possibly listen to the recording. I'm not sure where we came out on what that deadline should be if indeed we reached the conclusion. But I think that ought to also be something that is of assistance to a potential intervener knowing that we are intending to

set a relatively narrow time period for the IRP panel to make their decision on this intervention.

Thanks. And Kristina is confirming that we did discuss it but doesn't think we did come to a conclusion on that. Mike.

MIKE RODENBAUGH: Yeah, I don't think we did. I think we just started touch on it. I'll just I think reiterate a point that I made last week, which is if the potential intervener doesn't have some comfort that the IRP panel is going to rule within 14 days or something, 21 days, maybe at the outside, then you're really just basically making the intervention process illusory. There's no way that anybody would-- They would just file their own IRP. And so, then you're going to have a lot more consolidation motions, I guess, which I don't know that it matters very much. But it would be foolish for somebody to bank on intervening when the panel could easily take months to rule, which is what they typically do these days on just about anything. Thanks.

SUSAN PAYNE: Thanks, Mike. I think that is a really good point. Again, we're trying to set rules that will respect the bylaws and desire for IRPs to be wrapped up within 6 months and trying to set timings that will assist with that rather than make it impossible for that 6-month timing to be met. And so, there does seem to be a good justification for, trying to set some kind of a deadline for the panel to give their decision to help just generally move the case on, but also to address this concern about intervention. Malcolm.

MALCOM HUTTY: If the panel's supposed to rule within 14 days on this, Tthen the only time that we are saving from people abusing this is that 14 days, which rather puts it to perspective whether it's really necessary to have this at all. But if it is thought, necessarily, then how about this? That the clock should continue to run for those 14 days, which are the foreseeable 14 days. But if the panel should be delinquent in turning in that decision, the clock then stops after those 14 days thereby preserving the opportunity for the potential applicant to claimants to file their own IP if the reason is for not their fault as to why the clock is run down, but rather the panels. Was that clear?

SUSAN PAYNE: Yes. Thank you. It was. Sorry. I was struggling to get off mute. Yeah, that seems like a good suggestion Malcolm, and I'm seeing a bit of support for that in the chat. I'm not sure that we had agreed specifically on 14 days, but I think that the point remains. And indeed, I would welcome some views from people on what is a reasonable period of time to give the panel to make a decision. But that does seem I think there's support for that.

MALCOME HUTTY: Well, you should bear in mind that the applicant only has 180 days in total.

SUSAN PAYNE: I know. It is a challenge. Yeah. Okay. I think, as I say, I'm seeing a lot of support for that. So perhaps, when I come to go through the rules and tidy up in response to the various discussions we've had, I'll try to propose something that reflects that. I appreciate the suggestion. As I said, there's very much of support for that as being a kind of reasonable compromise.

All right. I think then, unless there's anything else anyone want to raise on this paragraph 19, we can move on to paragraph 20, just again to flag that one. I don't think there's a huge amount to say on that one. Paragraph 20 very much reflects the kind of comparable provision under consolidation. The requirement for the request to set out the basis of why there's the right to intervene. And so, I will keep going and, again, unless I see any hands.

So, on 21 then, again, this very much reflects what we had in the comparable provision in relation to consolidation. We in the small team, as previously discussed, had had felt that it was appropriate to expect the potential intervening party to make a declaration just to the effect that their statements are true and correct, that they're not seeking to intentionally mislead the panel and they're not seeking to intervene for improper purposes. And we identified some non-exhaustive examples of improper purposes.

The one that I think is worth flagging and considering is that third one, having the primary intent of changing the IRP panelist who will hear their dispute. In this context, that would be a reference to-- The term there is intended to be a reference to the intervener. And so, actually in this particular case, the intervener hasn't brought their own claim yet,

hasn't commenced an IRP themselves, so they don't really know who the IRP panelists would be, who might hear their dispute. And so, this one perhaps seems less likely to be relevant and perhaps even is not really needed. I think, certainly, I'm in two minds as to whether it's worth keeping that sub-paragraph triple a in there or not. I welcome thoughts on this. And thank you, Kristina. You've saved me.

KRISTINA ROSETTE: Anytime. I think it's important to keep it in there because-- And maybe the problem is the issue is with the word there modifying dispute. Because I could certainly, if I'm being exceptionally Machiavellian about it, I could certainly imagine a scenario in which a potential intervener does in fact file a motion to intervene, and knows that there will be a conflict, that their intervening and becoming part of the proceeding will create a conflict for a member of the standing panel who's been assigned to hear that dispute and that this is a way for them to kind of force that issue. So, I would propose that we keep the language in, but I do think your point about the modifier there is well taken.

SUSAN PAYNE: Yeah. Thanks, Kristina. I think that's probably correct. And indeed, maybe this is a case where we need to rethink it. In fact, in the comparable paragraph 8 where we have that same language, but in fact, it's possible to envisage in a consolidation, that you might be-- I think it might be possible to envisage seeking to consolidate further in the same way to be to be forcing a change to the other claimant's panel, if you like, rather than your own one. And so, maybe that term there

isn't really appropriate in in either sub-paragraph 8 or in this paragraph 21. Would that make sense?

I am not seeing any hands on that. I wonder if it's worth going back up to paragraph 8 just quickly, Devan, if you don't mind.

DEVAN REED: I'm sorry. That was paragraph 8?

SUSAN PAYNE: Yeah. Thank you. With apologies. Obviously, we're jumping back to something we already covered because the text is basically the same. That's what we had in relation to the declaration for consolidation. And again, we're talking about the party seeking to consolidate. It being a primary intent of theirs to change the panelist who would hear their dispute, but in fact, it may be either dispute that's relevant in this context as well. Does that make sense? And we've lost Kristina for a bit. I may take silence as kind of agreement unless-- Because I think that does align well with what we've just been discussing. Okay. Yeah. All right. I will assume for now, obviously, there'll be opportunity to look at this again when we come back to the revised version of the rules.

So, all right. Let's keep going, Devan. So, we are now on Paragraph 22, I think it is. Yes. Which runs over both pages. This is another section which has some overlap between this and the comparable or similar paragraph 10 that we looked at already in relation to consolidation. Something strange happened there with my computer, but hopefully,

there, it's gone back. But we've just included fewer circumstances for the panel to consider, basically the views of the parties, the progress already made in the IRP that they're seeking to join because there's only one IRP in this case, and whether allowing the request might require previous decisions to be reopened or steps to be repeated or whatever, and whether granting the request to intervene would create a conflict of interest for an already appointed panelist.

And there is slightly fewer circumstances included because this is a situation where there's only one panel in place at the moment rather than two. And so, for example, one of the circumstances we had previously was whether there was an IRP panel appointed in one or both cases. But in this situation, they're inevitably as an IRP panel appointed because they're going to be the ones hearing the decision to intervene. And so, I think, just pausing to see if there are any concerns or reflections on this one. Mike.

MIKE RODENBAUGH: Yes. As I said in the chat, it seems to me that the party that's filed the IRP should get to oppose the motion for intervention without waiting for panel to order a briefing schedule. That should just be built into the rules that within 14 days of being served with the motion for intervention, the claimant should file an opposition or a statement of non-opposition. So, that would be more standard litigation practice.

SUSAN PAYNE: Thanks, Mike. Are you saying it would be standard practice to be able to--? That if one party has commenced an IRP, that it would be standard practice for them to be able to refuse an intervention?

MIKE RODENBAUGH: They should at least be heard. They should at least have the right to be heard on the issue and point out why intervention would be inappropriate. Perhaps point out that the intervener is trying to force a conflict of interest. I mean, yeah, we can't rely on the panel to figure that stuff out. You have to allow the other interested party a chance just like with any motion in any court anywhere.

SUSAN PAYNE: Thank you. I've got to say I thought we'd got some provision in there that addressed that, but I'm now concerned in case we haven't. But I may be wrong, and we may have missed something. We certainly have it. Oh, okay. I see. Paragraph 23 has a reference to-- No. I'm actually missing something. Oh, okay. Sorry. It is this paragraph 22 where it's discretion to order briefing. So, your point therefore is that it's limited to briefing, and they should have a right to be heard as if right is, I think, is your point.

MIKE RODENBAUGH: Yeah. Let me clarify. I don't think it should be within the panel's discretion whether or not the claimant can file an opposition to a motion to intervene. I think it should be built into the rules that the IRP

claimant has the right to oppose a motion to intervene by filing an opposition within 14 days of receiving the motion.

SUSAN PAYNE: Yeah. Okay. Thanks for flagging that. I think that was something that is intended and perhaps we have missed. We certainly have that right to be heard included in relation to consolidation. And it does look as though perhaps we've missed it when we got on to intervention. So, thank you for flagging that, Mike, and I will make a note. David.

DAVID MCAULEY: Thank you, Susan. Hi, everybody. It's David McAuley speaking for the record. I think what Mike said makes imminent sense. They should have a right to speak in opposition, but with respect, I think I may have lost track of where were, but if the request was also that the panel need not request briefing, I think they should have the explicit ability to request briefing if, for instance, the claimant doesn't speak about this, doesn't insert a motion to oppose intervention or to non-oppose it. I think the panel has to have the right to say we want this briefed. for whatever reason. Thank you.

SUSAN PAYNE: Sorry. I'm talking on mute. yes. Thanks, David, for that. And again, I think that makes sense to me. I do think, as I said, I am looking while we're discussing this to see if I can see where this is covered in the rule, and I think it isn't. So, I think this has been missed, and I don't think that was intentional from the small team. It may be just something that was

missed when we were carrying over, when we were splitting out the sections on intervention and consolidation. And it's a point we picked up in consolidation but didn't pick up here. All right. Okay. I've made a note that change does need to be reflected, and I appreciate you picking it up.

All right. Moving on then, I think, 23, I think very much follows the same concepts as we've talked about previously in relation to consolidation where in this particular case, there is only one IRP panel. It's the one that was already in place for the case that's been commenced. So, inevitably, the view is that that panel stays in place after the intervener joins the proceeding, assuming that they do so. And that if there is some sort of requirement for a panelist to be unable to continue as a result of something like a conflict of interest, that the party whose panelist has had to withdraw would be the one who selects a new panelist following the panel selection rule 3. So, we're not trying to recreate the wheel here. We're just seeking to follow what's already the case where there is a situation that a conflict of interest comes up.

And then moving on to paragraph 24. Again, we have a comparable provision in the consolidation section, which deals with the provision of materials related to the disputes, so that an intervener has a right to access to documents and so on. But also builds in, the opportunity for either of the existing parties, so the existing claimant or ICANN to object where there's sort of issues of commercial confidentiality and so on. And again, as I said, that's mirroring what we already had in consolidation as well. So, I will pause briefly just see if there's any hands before we'll move on to the amicus section.

All right. Then on paragraph 25, which is our section that begins the participation as an amicus. This is a section where there were various aspects of this quite long provision where we did as a small group, we wanted the views of the full group here. We felt it was appropriate to get thoughts. In particular, flagging our view on the role of the amicus was that the participation as amicus has seemed most appropriate for those who weren't eligible to be a claimant. And so, if you're eligible to be a claimant, effectively, you should be joining as an intervener or having your case consolidated rather than participating as an amicus. That's one of the points on which we wanted to air with the group.

Secondly, we felt I think there was agreement within the small team that it may be helpful to explain the role of the amicus, and that is that highlighted text in the middle of that first paragraph about what the purpose of participation as an amicus is to assist the IRP panel in offering information expertise or other input that has a bearing on the issues in dispute. We may not have been entirely in agreement on as to precise wording on that. And I will leave it to the small team members if they want to express differences of opinion on this. It was certainly one where we had some discussion, and we weren't entirely agreed. Particularly, we weren't entirely agreed on that next sentence in square brackets where the small team were not all in agreement to include that specific reference to the fact that for the avoidance of doubt, an amicus curie is not a party to the dispute.

Certainly, some of the small team felt that this was an important information that amici should bear in mind and that it was beneficial to make it clear in the rules. I have no doubt that you'll hear other views on that. And then we also will, I think-- Perhaps I'll pause at that point.

There was one of the specific subparagraph 4 on those who have right to participate as of right, was also one that we wanted the views of the group on. But I think perhaps I will pause first before we get on to that subparagraph 4 and just see whether there are any views on this first part of paragraph 25.

Okay. I'm not seeing any hands at the moment. It would be helpful if there are objections to inclusion of the language in square brackets, it would be helpful to hear them. Otherwise, we will keep that language in. All right. Then I will keep moving down. And, Devan, if you could scroll down to show-- Oh, now I've got two hands. Sorry about that. We'll go back. Mike, first of all, and then Malcolm. So, Mike.

MIKE RODENBAUGH: So, I admit I don't really know how this works in US courts, but maybe Sam or Kate or somebody else does. And maybe it doesn't matter US. Maybe Flip has some idea how it's handled in Europe. But it seems to me like maybe there should be also a right to oppose somebody filing an amicus brief. I don't think the courts just allow anybody to file an amicus brief. So, I don't know. Seems like there should be a process to object to it is my thought. Thanks.

SUSAN PAYNE: Thanks, Mike. And again, I'm not sure now on the who, if we've built that in, I think we had, but again, it may be one where we've overlooked it. So, I'm going to take a note of that. I think it would be unlikely that we deliberately excluded a right for the parties to the proceedings to

have no say here. I don't believe that would have been our intent. In the meantime, Malcolm.

MALCOM HUTTY: Thank you, Susan. I want to address the issue of excluding people who have standing from filing an amicus brief. Our standing requirement is somewhat open to interpretation because it depends on whether you've been materially affected. And if you've been materially affected, then you are going to have standing. And I think that we may be in danger here of closing off the [inaudible - 00:41:19] just here by a sort of circular reference. I also think that even if that's not the case, you might want to allow people to file an amicus. The question of how material you've been harmed may be quite variable. Yeah.

If, for example, you've got somebody who's been affected as a registrant by a-- Because remember, I'm here mostly on behalf of non-contracted parties, and well, only on behalf of non-contracted parties. If you've got a registrant who is being harmed by the way that ICANN is setting rules that are trickling down to them in a way that is said to be beyond the bylaws. Some of them might be very severely affected, large amount of money at stake, absolutely willing to back an IRP case. Others might not be. Others might find it's disproportionate, or just simply do not have the resources to bring an IRP case. And yet they might have something relevant to say, particularly if the main case that was being brought was only on a one particular issue, but there was a broader issue at stake.

So, I would suggest that we don't write that language in a way that completely excludes someone with standing from eligibility. It would certainly make it a matter of dispute at that point. In terms of seeking, you'd be arguing, oh, well, this person's got standing, so they can't possibly be allowed to finance for you. And then you'd be arguing about that. And I don't think that's potentially helpful. You'd rather get on to the substance of the matters, particularly when you're talking about amici. You don't want me talking about procedural matters with amici, really. Just read what they've got to say and move on.

So, I would say that it might be better to write this in a way that said that a person who has a material interest, even if they do not satisfy the standing requirements may participate in the amici rather than but does not satisfy. So, it's not to make that move such people outside by definition. But I see Sam's got her hand up, and she may well have a good counterargument to me. She often does.

SUSAN PAYNE: Thanks, Malcolm. Sam.

SAM EISNER: Thanks. So, Malcolm, I actually don't disagree with you. I don't disagree with what you're saying. I think the reason that we had the language there was to make clear that someone who wasn't a claimant or who didn't meet the level of being a claimant still had the ability to share that knowledge with the panel if they followed this process and the panel accepted it. But it wasn't necessarily meant to be the definition of the qualification. So, I think I agree with what you've said. Right?

We don't want to say that just because someone could meet the definition of a claimant that they can therefore then just elect to participate as amicus just for the purpose of knowledge sharing.

I think on the other hand, we still want to be clear that amicus participation is different than party participation, right? And so, we want to make sure that concept remains upheld, but I don't have any problem with clarifying that as long as we also make clear that you don't have to be a claimant in order to try to come into a proceeding in this way.

MALCOM HUTTY: Thank you, Sam. Sorry, Susan, if you don't mind me coming back to try to help Sam here.

SUSAN PAYNE: Carry on, Malcom.

MALCOM HUTTY: Sam, I completely agree with you about making clear the difference between being a participant and being an amicus. I think that's being addressed by the second sentence. I don't know. I have a view on whether it needs to go further to satisfy what you're saying there, but I'd be happy to make that, do anything necessary to make that clear. So, I was going to ask you, if Susan will allow us to dialogue, what do you think then about changing "but does" not in that first sentence to "even if they do not"? Which would be less-- it wouldn't be definitional language anymore. It would be inclusive language.

SAM EISNER: Yeah. I'm very visual, so I kind of need see things written out, but in concept, I have no concern with what you're suggesting.

MALCOLM HUTTY: Thank you.

SUSAN PAYNE: Thanks, Sam. And I would note that there does seem to be a fair amount of agreement with that in the chat as well to the extent that I'm managing to follow the chat. Yeah. And there's also some chat which I think goes to whether there should be some right to object from either of the parties or not. And I confess I'm not managing to follow that. There's an awful lot of back and forth. So, I'm hoping Kristina's got her hand up to address perhaps that. Kristina.

KRISTINA ROSETTE: No, actually. Well, let me address that briefly. There are in the federal rules of appellate procedure, so federal appeals court. I have copied into the chat the relevant portion regarding briefs of amicus curie, namely, if they have consent of the parties or otherwise the court has to agree. But I'm actually disagreeing with the proposed elimination of the but does not satisfy the standing requirements for a claimant set forth in the bylaws language, which is I think what everybody is saying.

I really am quite strongly the view that if a party would satisfy the standing requirements, then it is their obligation to either file or initiate

their own proceeding and seek to consolidate or alternatively to intervene. It does not seem fair for lack of a-- I can't really articulate quite so clearly beyond that why I'm having objection it. But it frankly just doesn't seem fair to the claimant in the proceeding in which that potential amicus wants to participate. If the amicus would otherwise have standing and be able to participate, but has decided they just don't want to spend the money, but instead, I'm going to muck around in this other proceeding by seeking to be enemy gifts. Thanks.

SUSAN PAYNE: Thanks Kristina. Sam.

SAM EISNER: Thanks. I also have a lot of sympathy for what Kristina just said because-- And I think this goes back to the point of what is the heart of amicus participation. And we have to also remember, and I think this this goes to the purpose of the IRP, someone could meet the definition of claimant, but they might not actually want to allege anything about ICANN's conduct. Right? So, there could be some people who have things or entities that have information to offer in an IRP who are not interested in challenging ICANN's conduct but have an interest in making sure their view is heard.

And so, there's this balance here, and I think we're struggling on this balance of what's the right place to say to people if you're trying to assert a claim against ICANN, you should be a party. You should come in. If you are not trying to assert a claim against ICANN, even if you could, you might have something to offer to the proceeding. And I think

that's the balance that we're trying to strike, but I'm not sure how to use that language correctly here.

SUSAN PAYNE: Thanks, Sam. Yeah, I do think this goes back to what the purpose of participating as an amicus is, doesn't it? Because as you point out, if you are eligible to be a claimant and you want your claim heard and you want to be a party to the proceedings, then that's the basis on which you have to join. If you join as an amicus, you're not a party to the proceedings. So, you're rather more there at the discretion of the panel, and the information you're asked to provide is, again, at their discretion, the panel's discretion, and you're not, no matter what the outcome of the IRP is, that there will be no relief for you, if you like, except if it's tangential. Malcolm.

MALCOM HUTTY: Maybe we should remember and recall at this point, the purposes of the IRP. One of these purposes here is to actually ensure that ICANNN is held to its bylaws' commitments. Now it is a mechanism by which an individual party can gain redress, but that's not the only purpose. And the reason why somebody might wish to participate might be motivated, not by the fact that they want some kind of redress for themselves, but by the fact that they want to see the bylaws upheld so that they can have, continue to have confidence in ICANN as a robust institution.

And if that is their motivation, they're unlikely to want to file an IRP or to intervene. They would just simply wish that the panel takes into

account the aspects that they believe that the case might inadvertently, and I think it's particularly the things that the case might inadvertently decide, is when amici most useful. Because they were on issues that are unlikely to be raised by the parties themselves because they're not relevant to the party's particular interests, but the presidential matter is of general public interest.

So, those are the circumstances where an amici, I think, are the most useful. And they may well not then, if that is the scenario, wish to intervene themselves, want to become a party to the proceedings. Thank you.

SUSAN PAYNE: Thanks, Malcolm. Okay. I think I'm hearing a lot of support for the points you've made, Malcolm. In the chat, David has reminded us also of the purpose of the IRP for reducing disputes. And so, having some reasonable permission of having amicus participation under the control of the panel and to let the panel decide if it likes about whether it's appropriate to let someone to join or not. I hear here and appreciate Kristina's alternative perspective, but I would say I think there seems to be a weight of support for making that slight change to this paragraph 25 that doesn't close off the possibility of someone who has standing as a claimant, nevertheless deciding that's not the manner in which they feel it's appropriate for them to participate.

So, I think, I am going to, I think, conclude that I think with the strong support for making that change as raised by Malcolm. I confess that I'm not clear where we've come out on whether the parties should have a

right to object. Perhaps it would be appropriate to at least give them in the rules an opportunity to make their own representations, even if this decision will ultimately be for the panel. And again, if there was strong feeling being expressed in the chat that wasn't appropriate, I'd really appreciate it if someone puts their hand up. Otherwise, it does seem to me that we should, if we haven't got in the rule already, at least an expression of why an opportunity to express views from the parties, then we probably should build that in.

All right. I'm not seeing any hands, so I'm going to again take that as support for that idea. All right. Moving on then. The paragraph 4 is the one that we also as a group wanted to flag. The paragraphs 1 to 4, or rather subparagraphs 1 to 4 there in 25 reflect, particular circumstances where it's considered appropriate to give a right to participate as an amicus. So, sort of less non-discretionary. 1 to 3, I believe, are in the current interim rules and the fourth one is one that I had suggested to the small team, as in any person, group or entity that's directly or materially impacted by the covered action, which is the subject of the dispute but does not meet the requirements to be a claimant.

When we discussed this in the small team, there was some pushback and actually, which seemed reasonable to me, I confess. So, having proposed this language, I came to the conclusion, in fact, that this went too far. Effectively, those who have a right to participate as amicus already are ones who have a material interest in the dispute. And so, what I'm proposing or what I had been proposing was effectively circular, that 1 to 3 are situations where you get that right, that opportunity as of right. 4 actually just identifies the circumstances where there's a discretion but not a right. And so, we agreed in the

small group to refer this to the full working group, but I would say that I think this language came from me, and I personally actually do feel that it goes too far and shouldn't be there. But keen to get the-- Again, we wanted to get the views of the group. And so, we didn't take it out because we wanted to specifically revert it to the group. Sam.

SAM EISNER: Thanks, Susan. Reading this one in line with the discussion that we had about the right to oppose, I think I'd agree that this seems appropriate to take out because you still have to demonstrate some direct and material impact, right, and there could be some discretion. And what we're doing with 1 through 3 here is we're removing the ability to oppose, I think. These are the people who are or the entities that are presumed to be okay to be there as an amicus for removing some discretion from the panel. Therefore, also removing discretion from the parties to object to the use of the information provided by the amicus and instead having to just counter, I guess, the information provided by the amicus.

So, if we do think that it's appropriate to have that right to oppose, we should really think about that in light of all three or four of these items that are listed in this in these romans down here. But I do support the removal of the iv down here.

SUSAN PAYNE: Thanks, Sam. And I'm not sure if anyone else is in the chat saying, commenting one way or the other. David, I don't know if you want to

put your hands up and comment. I confess I'm not really following your comment in the chat. David, thanks.

DAVID MCAULEY: Thanks, Susan. So, I was just talking about those people who are impacted by a covered action in a good way and support ICANN, don't have a complaint to make. So, they would not meet the requirements to be a claimant. However, as Sam pointed out, these 4 subparagraphs are just basically being illustrations of who could be included, but not they're not exhaustive. So, I don't have hard feelings about it. I think it's possible that somebody would want to support ICANN in certain cases, perhaps from a bit of an oblique angle where their interests don't perfectly align with ICANN, but generally do. But if we remove this paragraph, I still think they could come in as an amicus. So, as I said, I don't have strong feelings about it. Thanks.

SUSAN PAYNE: Thanks, David. And just in reaction. Yes, I think as Sam interpreted it and as I'm interpreting it, I think 1 through 3 or 1 through 4 at the moment are those who are effectively being deemed to have the material interest because of the nature of their circumstances without having to prove that to the panel. And in that context, 4 doesn't really fit because it's not. It actually, it seems to me is kind of goes circular back to the initial description of who can be an amicus or what an amicus has to satisfy. Malcom.

MALCOM HUTTY: Thank you. Let's say, a couple of things. Firstly, again, I agree with Sam that this "shall be permitted" is probably the problem here rather than the list itself, because this is removing all discretion. And maybe that's what the problem here, that this is going too far, that this is actually intended as an illustrative list of the kind of groups or entities that might normally be permitted. But that shouldn't remove the possibility of opposing them, if there's a good reason why they should not be heard for maybe because of some particular circumstances specific to their own case. So, maybe what we should be doing is turning down that "shall be permitted", and that would allow us to leave this list more intact.

But I've got another point to make as well, which is that, again, going back to the purpose of an amicus, I'm really interested in having amici being able to participate not when they are materially impacted by the covered action, but when they are materially impacted by the interpretation of the bylaws that will be decided in order to resolve the dispute. But not by the action that's complained of. And under those circumstances, those are the times. Because amici are useful when they're going to say something new. They're not there to participate, and they're not there to just try and do a better job of pleading the case than the claimant does. That's not the purpose of amicus.

The purpose of an amicus is to draw attention of the panel to the broader issues that might not get properly briefed by the parties because that broader issue is not, does not actually affect the parties and their own particular interests, but nonetheless, maybe an inadvertent or unwise or unthoughtful, maybe overt or maybe interpretation of the bylaws might have broader impact that would

absolutely impact the interests of others who are not before the panel. That's when amici come into their own, to warn the panel against those kinds of teams and to point out in particular, the value of narrow decisions.

So, I would suggest that we do something, a fifth one maybe, that is not a group of entity that's not directly materially impacted by the covered action, but is likely to be impacted by an interpretation that is required in order to resolve the dispute. Thank you.

SUSAN PAYNE: So, Malcom, before I come to Kristina, I would just reflect again that I think the intent of 1, 3, 3 or 1, 3, 4 as it currently is to identify without limitation, groups and persons, groups and entities who are deemed to have a material interest, which doesn't exclude others, but it's meant to be-- So, if you were in a contention set, and someone else from the contention set is bringing an IRP, then you're automatically deemed to at least meet that material interest element of relevance to the dispute, but it doesn't stop anyone else being able to establish that they have a material interest relevant to the dispute.

And that initial language in paragraph 25 is drafted quite broadly. I would argue that relevant to the dispute would cover the kind of scenario that you're thinking about where you would have to explain to the panel what your interest is, why there's this interest relevant to the dispute. But it's not one of the ones that's a given, but you're able to brief the panel on why it's appropriate. That's certainly how I've

understood this to be drafted and the intent to be. But I'm going to go to Kristina. Kristina?

KRISTINA ROSETTE: Hi. I am really starting to think that we should consider modifying the language that introduces the person's groups are entities that are deemed to be able to participate as amici as a right. Because otherwise, I do think for those categories, it renders moot the whole point of being able to oppose. And it seems to me that one potential compromise would be instead of saying "shall be permitted" is instead of making it automatic, perhaps making that more of a presumption that is rebuttable on, well, the panel can make that decision whether or not it's been rebutted, through the opposition briefing process. And I would very much like to hear what Mike and Flip think about that idea. Thanks.

SUSAN PAYNE: Okay. I'm not seeing any more hands on this at the moment. If anyone does want to come back on it, otherwise, it seems to me that perhaps this is one that requires a little bit more work and maybe some suggestion of a revision to try to pull together the various points that have been raised. Greg.

GREG SHATAN: Thanks. Just briefly looking at the 4 specific types of entities that are listed in 25 Roman 1 through 4. I think they seem like those that should be able to participate as of right and not merely a presumption. They

are a fairly limited list. And maybe we need to phrase this to be a little bit more clear about the general, about the everybody else. Or maybe it is clear just a fairly naughty paragraph, overall, and some redrafting here. But the idea that there's a group that may participate then we need to talk about the limitations there are set out for them. And then there is a group that has the right to participate should they so choose, they are absolutely allowed to participate.

And it seems that the types listed here the logic of why they have a different status and maybe can participate even over the objections of the participants. It's important to get to a fuller picture of what's going on. Thanks.

SUSAN PAYNE: Thanks, Greg. Yeah. And I think that's perhaps a good point to pause this at that point. Flips mentioned he may come back on the email or on our next call to discuss this, but in the meantime, I will see what I can do as well to perhaps try and propose some clarification, if I can do when I reflect on the points that have been made, All right. I think we, unfortunately, are not going to get right to the end of this Rule 7 on this call. We've got a couple of other agenda items that we do need to briefly cover. So, I think we should pause this at this point.

The next point on the agenda was to reflect on Mike's proposal about being notified. And, actually, I think, obviously, I circulated that agenda before we had the exchange of information on our mailing list, including the comments from Sam that elsewhere in the IRP rules, there is a provision that does deal with some notification requirements, and Sam

shared that. So given that we have that, I think that without wanting to lose that discussion, we absolutely need to keep it. I think that we can park that discussion for now. It's not something we need to address in Rule 7, but it is something that we will need to reflect on exactly what obligations for notification currently are in the rules as Sam flagged to us and whether it's adequate.

So, I'm not at all suggesting we won't cover it, but I think it's not something that we need to specifically pick up in this Rule 7. And in the interest of finishing Rule 7 and also what I'm going to come on and talk about, I hope you'll agree that's an appropriate approach. So, we're absolutely not dropping it. Perhaps we don't need to fix that and address that specifically in this rule, because it's dealt with somewhere else in the rules.

All right. So finally, then, or more or less finally, sort of next steps and timing and the plans for the near future for our group. We've had some discussion before about public comments. There is a strong desire for us to be putting something out for public comment for the community to be able to see what we're working on and also for us to get the views of the community on the direction we've been going in, and the work that we've done to date.

And so, my intent or I hope our intent as a group is to put out what we have to a public comment as soon as we can do. And that would be those sections that we've already discussed and have some mock-up text for. And that would be before we go through a full kind of legal redrafting and clean up. The reasoning being that we may well get some input from the community, and it would be helpful to have that

before rather than after. We perhaps have a fairly lengthy period arguing over legal precise legal terminology.

So, what we would be putting out to public comment would be basically the sections on translation, on initiation, on panelist selection, on this assuming we can wrap this up, on this consolidation intervention and participation as an amicus. And, of course, the rule on timing and the fixed additional time proposal. So, we would be putting out to comment the various bits of text that we've been working on. And that would be accompanied by a report explaining, just giving some background to what we've done and how we've reached the language or the proposals that we've reached.

I would very strongly like to put this out to public comment before the Hamburg meeting, so ICANN78. In practice, this means we need to get something in a position to be to be published by the end of this month, so by the very beginning of September. And obviously, that would require, quite a commitment from us all, but I think we can get there if are willing to do so. And, essentially, if we can agree that we will put out what we've got If we can't wrap up this consolidation, so for example, we may not-- Oh, sorry. I'm being corrected. I've got my timing wrong. We need to get out to public comments by the end of September, rather, to allow for that three weeks before the ICANN meeting kicks off.

Now, ideally, I do think we can wrap up those sections I mentioned and have something to put out. If it turns out that we are still working on something and we can't get the consolidation section out because we're still discussing it, so be it, but that would be the intent. And then we

would aim to have, at the ICANN Hamburg meeting, two sessions. One of which would be a public session what we've put out for consultation. And the second would be a working session where we discuss next steps on what else we need to look at in the rules, anything we haven't finished, what we do next, and what else needs to be done subject obviously to the public comment input that we'll get after the Hamburg meeting. I think what else we need to do on the rules is relatively minimal, but we will obviously, there will be a certain amount of work to do once we get the public comment input as well.

And so, that is what I'm really hoping that we can achieve. I it turns out that we can't achieve it and we are just not going to make that deadline, we would still have requested two sessions at ICANN78, and they would be repurposed so that they would both be working sessions and we would use them to get the public comment, to get ourselves to a position where we are ready to put something else public comment. But as I say, I believe we can make it. We've done a huge amount of work. We've covered some really difficult topics, and we have plenty that we can share with the community. So that, as I say, is what I wanted to share on the intention for where we go with this and next step. So, I'll just pause and see if there's any reaction. David.

DAVID MCAULEY: Thanks, Susan. So, I have two questions. First is, so of the eight hours that we requested for ICANN78, we're going to get four in two sessions. Am I correct in that assumption? And then do you want me to state the second question? I can state that now. The second question is when you started talking, I thought this may not be a great idea to seek public

comment, but I was thinking of a formal public comment that gets listed on the public comments page etc., but I suspect what you're talking about, which has some attraction to me, is to just have a request for comments from the community sort of informally saying, "Hey. We have been talking about these for a long time. We're going to actually start meeting at ICANN78 in person. We would like your input along the way. And here's the things that we've been working on and that we would like input on. "

So, if it's that, that sounds attractive to me. You know as well as I know that people organizations like constituencies and the GNSO have a hard time responding in three weeks, but maybe we could get that to happen. Anyway, my two questions are one is we have 4 hours at ICANN78. Is that right? And two is, is this an informal request for comments to help us make 78 productive? Thanks.

SUSAN PAYNE: So, David, I think the answer is no and no. I think we're unlikely to get more than a couple of sessions. And based on this, what I'm proposing, I don't believe we need more than a couple of sessions. I think one session presenting our public comment and flagging to the community what we're asking of them, and one where we have a working session. Those sessions, if we're lucky, would be 90 minutes. But it may be that it's one or, well, it's possible one of them would only be an hour. I very much hope not.

But in terms of putting something out to public comment, no, not some informal come along and tell us what you think. We have on the rules

that we've been dealing with, we've spent an enormous amount of time discussing and agreeing kind of like minutiae of language to a great extent. We've actually got draft amended text to the rules. But as I understand, whatever ends up in the final rules will have gone through a legal review and assessment and potentially some redrafting by ICANN's lawyers or James Day.

So, simply proposing to put out what we have, at this point, some of which there's a very strong resemblance probably to what it will finally look like. Some of which might get tweaked when there's a final drafting, but, no, it's tough to say to people this is what we're proposing on timing. This is the red line of what we've drafted. This is an explanation of how we got there and why. We're seeking your formal input here. Not sort of three weeks and come along and everyone express their views in a meeting. No. Kristina.

KRISTINA ROSETTE: I very much support getting this out for the official formal public comment before the Hamburg meeting. I think the only thing that I have a question in my mind about is that I know of it seems to me there's at least one topic that there seems to be some broad agreement that we would tackle, that we have not, namely CEP. So, I wasn't really quite sure how we would handle that. If it's possible to put it out for what we have for public comment with the introduction, making very clear that were still working on these subject areas, but in the meantime, we wanted to have the community review and provide their input on what we were proposing. Thanks.

SUSAN PAYNE: Indeed, Kristina. Yeah. That is the intent. On CEP specifically, I think I envisage them as a separate set of rules, obviously, very much related. And I guess I see them that way simply because that's the way they were historically. So, there's a sort of separate batch of CEP rules. But the idea would be that, yes, we're putting out what we have now. Because it's not the full set of the rules because inevitably we may be still working on some things, there likely might have to be a subsequent comment of final, final text. I'm not looking to block the opportunity for the community to see what actually is proposed as the final rules. But really just to get something out to the community so that they can see what we've been working on, what progress we've made. To sense check if there is extremely strong community pushback, it would be good for us to know that kind of thing.

Okay. All right. I'm not seeing any other hands at the moment. I can also see we've only got a couple of minutes left. So, I'll leave you all to cogitate on that, but that's the intent, and that's the desire is for it will require us to get a move on a little bit and to put-- we may have to have some a few extra calls weekly rather than biweekly, that kind of thing in order to get through. But I do feel that if we possibly can, we should try and put something out so that we can talk to the community about it when we're in Hamburg.

Okay. I'm not seeing any further hands. So, our next call is, with that in mind is scheduled for next Tuesday. And I am going to wrap things up at this point. So, thank you again, everyone for your comments. I'll do my very best to try and get something circulated to reflect where we've

reached with our discussions and we can reconvene next week. Thanks very much. All right. And thanks, Devan. We can stop the recording.

[END OF TRANSCRIPTION]