ICANN79 | CF – IRP-IOT Work Session [C]
Thursday, March 7, 2024 – 1:15 to 2:30 SJU

BRENDA BREWER: Hello, and welcome to the IRP-IOT Membership Work Session at ICANN79. My name is Brenda, and I am the participation manager for this session. Please note that this session is being recorded and is governed by the ICANN Expected Standards of Behavior.

If you would like to speak during the session, please raise your hand in Zoom. When called upon, virtual participants will be given permission to unmute in Zoom. Onsite participants will use a physical microphone to speak. Please state your name for the record and speak at a reasonable pace. I will now turn the floor over to Susan Payne. Thank you.

SUSAN PAYNE: Lovely. Thank you. Let me just check that our remote participants can hear us and hoping so.

GREG SHATAN: Yes, we can.

SUSAN PAYNE: Lovely. Thank you. Perfect. Thank you so much. Thank you, everyone, for making the time when we're on the final day of ICANN79 meeting. So I really appreciate that we've managed to get a quorum for this meeting. We can hopefully make some good progress on getting

through the rest of what we need to do before we can go up to public comment. So I guess as ever, we can review the agenda and Statements of Interest. Maybe I'll do that. So the SOI updates first, just in case there are any. And I'll try and speak up as well. I've had a message that we're a bit quiet. Okay. I'm not seeing anyone in the room or on the Zoom Room with their hand up. So hopefully that means no SOI updates.

All right, then we will just quickly run through our agenda. We're going to continue the review of the legal draft redlines. We've got right through to Rule 7 now. So we just have Rule 7 to go. That Google Doc link is there in the agenda. Then we have some updates to our Rationale documents, the ones that will go out as part of the Public Comment exercise where we identified points we wanted to make in those Rationale documents as we were going through the legal draft redlines. So we will also hopefully do that. Then subject, obviously, to timing, we will continue on with going back and just looking at reviewing and agreeing the drafting instructions for the revisions of the legal draft that we've already looked at. So we'll be just circling back to the start of the redline doc just to make sure that all of the amendments that we wanted to have got captured and that we can sign off.

At our last meeting, we had an update on the Standing Panel. So that agenda item has been dealt with and there is a recording of that from the session on Saturday, I want to say 3rd of March. I think we also have an agenda item to review the report on the second public consultation that Bernard produced, but I suspect we may not get to that point in the agenda. Similarly, time-permitting, we could have begun a discussion on the CEP rules. But again, I think that's probably unlikely in the time we have available. But let's see.

All right, if we could, we'll come back up to agenda item two then. Brenda, if you could pull up the Google Doc. We're at Rule 7 which starts—I'm not quite sure what page. Towards the end. Yes, perfect. That's it. Thank you. All right. As before, I'm probably going to be looking at this outside of the Zoom Room and in the Google Doc itself. But we'll try and keep an eye on whether I've got hands up in the room or in the Zoom Room as well. But please bear with me. And if it looks like I haven't spotted you, please shout out because I am not super good at multitasking.

But as before, we're really just reviewing the kind of redlines so the things that have been changed from the text that we had all agreed as a result of the legal drafting exercise. So you'll be pleased to see that actually in this Rule 7, certainly as we're looking at that initial part, not too much of note. The first in paragraph one, there is a comment about the reference to the term, the first IRP, and it was noted by the legal drafters that it's used in the general section, and subsequently in some of the sections on intervention and amicus, although technically, there's only a first IRP Panel in the consolidation context. So they have noted that and suggested that perhaps we alter the language to better clarify.

When I was looking at this, I did make the comment also in the document that I think we had made this change. We had endeavored to remove the reference to the first IRP Panel from the intervention and amicus sections. Because we also appreciated that, actually, it's only really in the case of consolidation where you have more than one panel. But it's possible that we did miss one or more references, and so that's definitely just a kind of clean-up point rather than anything else, I think.

Then, if we move down, we have, I think, the legal drafters have sort of done some standardization of things like references to section as they've gone through the document. So I don't think there's anything that really turns on any of that in the example in paragraph four.

So in paragraph five, again, a fairly small change, referring to sufficient common nucleus of operative facts rather than fact. I think we worked off what the current text was, and it probably says fact, but I don't feel strongly. I don't know if any in the group are uncomfortable with the change. I guess it's time to speak but it seems to make no difference. So I think we're good. I think we're good.

All right. Then in paragraph six. We in our draft had used the term "should" and the suggestion is to change it to the "shall". So I will just quickly read that. Paragraph six says, "All motions requesting consolidation shall be submitted to the IRP provider with copies to ICANN and any party to an IRP, which is the subject of a request for consolidation. Motions shall be submitted." We have "motion should be submitted". I think shall is more precise, isn't it? So this probably, I think, makes sense. Okay. We're all happy. Yes.

Then we have a question about publication. I think this is a question we have talked about before. There was a note about publication needing to be defined. In fact, when we were talking about one of the earlier rules, we did have a similar conversation about when publication was. And there's a reference due to the need for it to be defined. In our Rationale document at the moment, we have noted in the Rationale document that commencement of an IRP requires knowledge of the third party proceedings, which someone may not have. And so it was proposed by this group that we run the timings from publication since

that places everyone in the same position. I think there's also a Bylaws obligation on ICANN to publish promptly. And Rule 6 contains provisions for specified interested parties to also be notified. But perhaps it's as simple as we say publication by ICANN or publication on ICANN's website. Both of those. Liz?

LIZ LE: This is Liz Le with ICANN Org for the record. Do you want me to comment on the procedures what we normally do when IRPs come in? Normally we get notification from the ICDR that an IRP has been initiated, and so it's the notice of filing and the filing fee has been paid for, which means that at that point in time the IRP profiling has been perfected, so to speak. It's usually within 24 hours that we immediately publish the notice on our IRP webpage. And 99% of the time, they are accompanied by the brief from the claimant. There are some instances where we've gotten in the past, and maybe Flip can speak to more recent ones. But some instances in the past where we did not receive the substantive briefing, we will still publish the notice of IRP filing, which is then, I think for a purpose of this, we can look at it as probably the trigger point for it because that's where that would become available to the public that an IRP has been perfected and filed.

SUSAN PAYNE: Okay. I have a follow-up question, I guess, then. So in that 1% of cases where maybe you published the notice of the IRP but you don't have the claimant's written statement, effectively, from the notice of the IRP, does the wider world have sufficient information to know whether they should be seeking consolidation or intervention?

LIZ LE: No, it does not. When we do not have the substantive filing, we'll go back to the ICDR to flag that there hasn't been a substantive documentation or the actual brief itself has been filed to see if there's a submission. Because in that instance, it's not only that there isn't sufficient knowledge for anybody to seek a consolidation under this rule, but there would not even be sufficient information for ICANN to respond to the ICDR. So my understanding from the past is I think the ICDR will flag to the claimant to file one. It may be in some instances where, if one does not get filed, there might be certain administrative issues that get raised through the ICDR on how to get that briefing file. But until that actual substantive brief has been submitted with ICDR and provided to ICANN Org, we cannot publish anything and there is no substantive knowledge of what the claims are.

SUSAN PAYNE: Thanks for that, Liz. That's really helpful. So, actually, I suspect that there'll be agreement that we probably do need to define publication. Yeah, Liz?

LIZ LE: I think, though, one thing to mention is we've made it pretty clear in our rules, the way we've written it is that a filing needs to constitute not just the notice, but it also needs to constitute the actual written statement here. So I don't know if it maybe makes sense to reference back to that section itself. But I think with the way that we've amended the rules, we probably won't really see those outlier cases where we did not get a substantive briefing.

SUSAN PAYNE: Okay. I think maybe it's an action for me, I will just double-check. But I feel like we do need to check that there isn't a loop that needs to be closed there. Because clearly what we are intending, I think… Let's put it this way. I believe what we're intending is that the timing is running from when the wider world would be aware of what the IRP is about. So it's publication of sufficient information, which would be the notice of IRP and the written statement of claim. Otherwise, the third parties can't know whether they should be intervening or not. Okay. All right, I will take an action to double-check. And maybe, if necessary, we'll simply add something like a footnote that makes that point and we'll put something in the Rationale document. Thank you.

Okay. Then we can move down to seven which is just operative facts. Again, I think we're all good with that. So I will just keep scrolling down.

We have in eight—this is probably more of a question of drafting style, removing ands and so on. I think it's fine. In a different context, we had someone who was a non-lawyer flagging yesterday in relation to the Subsequent Procedures implementation that where there were multiple statements that were all "and," that they would like to see the "and" in relation to each of them because they weren't a lawyer. But I think in a legal context, it is correct that one would normally just move the and to B. So I think that looks good to me. I don't think there's anything tons on that. And similarly with the "or".

But in terms of subparagraph iii, we do have a slight change here, which is having the primary intent. This is whether the motion for consolidation, that it shouldn't have the primary intent. And we had

changing the IRP Panelists who will hear either dispute. It's been suggested it's selecting. The note from the drafters was that changing has been edited to selecting in order to reflect a situation where the panelists have not yet been impaneled in one of the IRPs and the party seeking to consolidate suspects that they will have a better outcome based on the panelists selected from the first IRP compared to any possible panelists that might be selected in their own IRP. Obviously, when we did this review, there was no objection to the use of the word selecting. So I think we're probably good unless anyone speaks to the contrary. All right. Okay. I think accepted. All right.

Then in paragraph 10, highlighted As the IRP provider or the respective IRP Panels may stay either or both IRPs. We have again a note that clarification may be needed to explain the interaction between 7.10 and 7.3. Well, I guess we'll have to go back up and have a quick look at that. But 7.10, it appears that as though initially the IRP Panel would make the decision, but if there is no first IRP Panel appointed, then perhaps the IRP provider would stay the proceedings. However, in Rule 7.3, it requires that if there is no first IRP Panel, then the request for consolidation is paused until that panel is in place. Okay. So three, as pointed out, was in the event that no IRP Panel is in place for the first IRP when a request for consolidation intervention or participation as an amicus is made. The request will be suspended pending the IRP Panel appointment for the first IRP. Then 10 says, "The IRP provider or the respective IRP Panels may stay either or both of the IRPs in their discretion, pending a decision on the motion for consolidation, provided that the nonmoving parties shall be granted an opportunity to make representations."

I guess that perhaps is inconsistent if we are not dealing with the motion for consolidation until we have the IRP Panel in place. So perhaps we just have the respective IRP Panels. Is that causing anyone concern if we make that change? Do I have any hands? Sorry, I thought I had. Oh, yeah, Liz. I have a hand. Liz, sorry.

LIZ LE: Thanks. I agree. I raised my hand to flag that. I think 7.3 stands on its own and this seems to contemplate what we intend to contemplate here in 7.10 is that there is already an IRP Panel in place. So I agree with that, your suggestion to strike out the IRP provider.

SUSAN PAYNE: Okay. I'm not seeing any objections. So I think we can take that as agreed. All right.

Then if we keep scrolling down, we have a nice, non-red section for quite some time, which is good. Until I think we get to paragraph 16. Okay. I think maybe I'll just read this so that we can all get our heads around it.

Excluded materials exempted from production under Rule 8 exchange of information below, which is new text, but I think that is uncontroversial. The first IRP Panel shall direct that all materials related to the consolidated dispute be made available to the parties that have had their claim consolidated unless, etc., etc. Consolidated dispute, that makes sense to me since we are in the section on consolidation. And made available to the parties has a bit more to think about since there's a note for us to consider including a protective order. I'm

guessing that is something that if it's not dealt with, it would be something that is presumably within the remit of Rule 8 since that, by the look of it, relates to exchange of information. So I'm not sure that we would be necessarily needing to make a protective order here. But I'd be very welcome to hear the thoughts. I mean, I don't know. Liz, if there's something specific that the drafters were thinking about here. Perhaps it would be helpful for us to get some clarification on that.

LIZ LE: Thanks, Susan. I think we're going to have to take this back to see what the drafters were envisioning with this question.

SUSAN PAYNE: Okay. I think that makes sense. And in the meantime, I think I should have done so. I haven't read Rule 8 recently. I'll have a look at that as well.

LIZ LE: Do you want to speak on the microphone, Flip?

FLIP PETILLION: Flip here. Yeah, I just don't see the problem, actually. I don't see any issue here. We're talking about 16, aren't we?

LIZ LE: Yeah. Do you ever see an issue being the practitioner that you would have a situation like this and there needs to be a protective order?

FLIP PETILLION: Yes, it's possible.

LIZ LE: Okay.

SUSAN PAYNE: But something that presumably the panelist could do, right? I mean, we don't need to provide for in the rules.

FLIP PETILLION: Yes. Usually, the panelist do at the request of parties.

LIZ LE: I agree. Yeah. They can sort that out.

SUSAN PAYNE: All right. Well, maybe if you wouldn't mind, Liz, if you take an action to just double-check. But otherwise, we feel like perhaps this is something that doesn't need to be specifically addressed. All right, and then we can keep scrolling down.

We have in the intervention section a couple of references to the first IRP Panel which have been highlighted as comments. These are ones that I think in the final version of the rules that we were working on in our Rationale document. We had already picked this up and removed them. So I think we had taken the view that we would use the reference to the first IRP Panel when we're talking about consolidation and that we didn't need it elsewhere in the rule. So I think we're fine with that.

FLIP PETILLION: That's correct.

SUSAN PAYNE: And we have a reference in paragraph 22, the full term Independent Review Process rather than the IRP, which I guess is okay, although we have references to the IRP in many other places in the rules, but that probably could be something that actually gets picked up and cleaned up at the very end. In paragraph 21, the change is just a reference to how the terminology is standardized.

So we come down to 22. And this is really just another of these questions for the IRP about the appropriate filing fee. The note for us is that the appropriate filing fee should be defined likely in Rule 4. We did have a bit of a conversation already when we looked at Rule 4 about the filing fee, and that we wouldn't be obviously identifying it by reference to a particular amount. So I don't think that there's anything we need to do here in that context unless anyone has concerns. Okay, all right. We also have in 22 another reference to facts, which is fine.

So 23. This is the change we were talking about just a few moments ago in terms of changing from "changing" to "selecting" I think for the same reason. So, again, I think we're fine with that edit unless anyone has any concerns. All right. keep on scrolling down.

We are, I think, right down to paragraph 28. We're talking here, again, about making documents available. The same point we were just talking about on the protective order and a change from entities to parties. I am assuming that that change is made because actually once

you've intervened, you are a party. So strictly speaking, that probably is the correct term. Again, I'm pretty comfortable with that edit that was made by the drafters. Pausing just in case there's any concern. All right, I think not. Okay. Then we will keep going.

We are at paragraph 29. Again, this is just references to how the rule numbers are being referred to, so there's nothing substantive in that one.

Paragraph 30 is a reference again to how the rules are referred to and another reference to our appropriate filing fee, which we just discussed.

So we come on to paragraph 31. A typo, which is super. Again, we've got that changed back to the Independent Review Process for some reason.

And 32. Let's come to that one. That looks to be a little bit more in 32. So in 32, we've got ICANN and any IRP claimant who is a party to an IRP, which is the subject of a request for participation as an amicus, shall be entitled to submit a statement in response within either 21 or 28 days of receipt of the motion to participate as an amicus. So there are just a couple of things there.

A question, firstly, about whether a person, group, or entity who's requesting to participate as an amicus has an entitlement to submit a reply to such a response. So that's quite a substantive point and a question for us. I think it's probably something that maybe warrants consideration but perhaps it's something that we ought—since this is for us to start considering that now that would be a substantive discussion. So my thinking is that perhaps we ask that question in our Rationale document, are there strong feelings on that? I mean, I'd imagine that in the course of one of these applications, the panel would,

in any event, have the opportunity to give them a chance to reply, but it's whether it's built into the rules or not. I don't know if I've got any hands. I have Flip. Flip?

FLIP PETILLION: There are other circumstances completely different procedures like for the European Court of Justice, where you do not have actually a right to respond to an amicus brief that was sent in. So if you want to provide that, I would advise that we do that expressly. If we don't want it, I would also advise we do that expressly.

SUSAN PAYNE: Just to clarify, Flip, I think at this point, the party in question is still seeking permission to file an amicus brief. So they are seeking permission and then the parties to the proceedings are given an opportunity to respond. So do we then give the amicus a chance to respond back or not? Yeah. I think that's my understanding.

STEPHANIE PERRIN: It was mine as well first, and then I reread it. And I thought that I misread it first. So let me read it again. 32 clearly talks about ICANN or the IRP claimant who will have the possibility to respond. That's not the party that has shown interest in participating as the amicus.

SUSAN PAYNE: Let me clarify. Yes, I am referring to that highlighted text in response where the question from the drafters was, should we then give the requester to participate as an amicus or a right to respond back again?

As I said, I'm not sure that I would want to make such a change at this point in our drafting process. But if the group thinks it's an important question, then we maybe should put it in the Rationale document.

FLIP PETILLION: I would not grant that and I would not provide that. Thank you for clarifying, because that's really helpful. So I would not do that because that would be an open discussion. So no is my answer.

DAVID MCAULEY: Hi. The no that you're giving is to the phrase in response, is it? Is that right?

FLIP PETILLION: Good question. The no is you have shown interest to participate as an amicus. There is a response. The question is now should there be another response by the party that has shown interest to participate as an amicus? And there I personally would say no.

SUSAN PAYNE: I'll come to you, Liz. Let me just say do either of you or do any of you think that this is something we should ask a question of the community of or are we comfortable with the rule as we drafted it? I will turn to Liz because she had her hand up anyway, but have a think about that. Liz?

LIZ LE: Thanks. I agree with that. I don't think we need to provide a surreply to this. That might end up frustrating the purpose of having the IRP

finished within six months or as soon as we can, and this will just prolong it. So I support not putting in a surreply. In my opinion and on behalf of Org, I don't think that we need to put it out to the community to ask for their comment on this procedural aspect of it.

FLIP PETILLION: Let me maybe add the [inaudible] is the reason why we actually do that, I think. You're not a party to the procedures, that's first. Second, if you really want to participate as an amicus, you get one shot. You have to show that you're in a position to come as an amicus, and you'll make your point on the substantive discussion. Period. That's how it's done in many other circumstances.

SUSAN PAYNE: Thanks, Flip. So I've got two people in the queue. Now I've got David, and then I'll come to you, Greg. Thanks for your patience. David?

DAVID MCAULEY: Thank you, Liz and Flip. I agree. I wanted to speak specifically to your question, Susan. Should we ask a question in the Rationale? In my opinion, no. And the reason I say that is there is a request to participate as amicus, which presumably will state an interest and there is a response from the participants. That's perfectly fine, in my opinion, from a legal point of view. And this is going to go to public comment, people can comment on whatever they want. I don't want to tee that up. I don't think we should tee up very much. And part of why I'm saying that is I think we have an interest in moving this along. There's a fair chance to comment, go ahead and comment. But I don't think I would

prefer that we'd be very judicious in what we ask questions about. Let's make sure this process can keep on moving. Thank you.

SUSAN PAYNE: All right. Thanks, David. Greg?

GREG SHATAN: Thanks. I agree with what's been said before. I think we do not add a surreply. We do not ask the community what they think. This is really a sideshow. An amicus is important but we don't need to turn amicus into its own set of proceedings and filings. I was thinking about whether we perhaps should offer the amicus the chance to ask for leave to reply. But even then, I think let's not go there. If there's something that's so out of the ordinary, an amicus is feeling like they need to make noise, they'll figure out whether there is some process by which they do so. But I think, by and large, the primary proceeding needs to be moving along a certain path. And anything more we do to kind of put byways and nooks and crannies into this is just counter-productive.

SUSAN PAYNE: Super. Thanks, Greg. And thanks, everyone. I think we're in a place of much agreement. Okay. Paragraph 33, we have nothing there. In paragraph 34, we just have the usual kind of tidying up of references to the rules.

So the next one with anything kind of substantive is 35. We have the addition of a reference to a person, group, or entity participating as an amicus. I think we probably then in our draft originally must have only had the reference to a person, but I don't have any concerns, really,

about that addition in the language that probably gives clarity. So, again, we have a note in this section about whether we think about protective orders. So that's something we've already talked about in relation to previous clauses. So I don't think we have anything more we need to be concerned about specifically on this.

Oh, I'm just seeing your hand, Greg. Is that an old one or a new one? Okay. I'm going to treat you as an old hand, Greg.

GREG SHATAN: Old. Old, old, old.

SUSAN PAYNE: Super. Thank you. All right. Oh, and there we go. We're at the end. I know. Big, big round of applause. Yeah. All right. Okay. If only that were the end of our work.

All right, so we've been all the way through the rules now. In relation to all of them, except Rule 7, I have gone through and tried to kind of reflect any responses to the drafters or anything that the drafters need to pick up. I will do the same for this Rule 7. So we will need to do a sort of quick pass through again to double-check on that. That's a subsequent agenda item for if we get on to it. So we aren't quite finished with these. But we're very close to finish now because we have been all the way through and it's really now just to check that I've captured everything when we go back through.

Okay. So we on our agenda then I think can go to the Rationale documents and just pick up some places where when we were going through the rules in this exercise. For a couple of the rules, we identified

things that we would capture in the Rationale document. So I had them attached to the agenda, Brenda. I think the first one is Rule 3. Yes, please. There we go. Thank you.

And again, as before, I am taking the opportunity to look at it just sort of outside of the Zoom Room just so that I can scroll through and see the comments and so on, but I will try and keep an eye on the hands. As before, give me a shout if I've missed anything. So these were updates on Rule 3 that came about as our discussion of the legal redline, where we just identified a couple of areas that we thought were worth reflecting in the Rationale document. And it comes right at the top there with a bit of a sort of a warning that I've done that update as of the 28th of February. The updates, I've made it to the Rationale text. But obviously, where we've got some change to the text of the rules itself captured in the legal redline document that hasn't been moved into the Rationale document yet. So there is definitely some tidying up to do where the rules have been drafted. So I've just captured the things where we had a conversation and we said, "We should capture that in our Rationale document and tell the community about that." Those are highlighted in yellow. There aren't a huge number of them, I hope, but I'll just scroll down until I find the first one.

Okay. So it would be on, I guess, it's the second page. Yeah, the second page, Brenda. And if you could scroll down, then you will find some highlighted text. Yeah. Super. So these are the additions that that came out of our discussion. So I want to just flag it for people so that everyone's comfortable with it. So the IOT seeks input on whether the Standing Panel should move panelist appointment along of its own volition or only were requested to do so by one of the parties. And that

is a reference to the discussion that we had because the rule is drafted in such a way that this rule about appointing of panelists and what happens where one party doesn't appoint their panelist or the two panelists can't agree on a third, that kind of thing. It's drafted as the Standing Panel can act if they receive a request from one of the parties to do so. So the question was is this only where a party makes a request to them? Or should we be building in something that has the proceedings moved along, even if neither of the parties are asking the Standing Panel to do so? So as we discussed, we thought that we would ask that of the community. And then continuing on, the IOT considers that once the Standing Paneling is in place, then it should be responsible for resolving panelist appointment issues. But the IRP provider or ICDR administrator should act as a fallback where the Standing Panel is unable to reach agreement for some reason. That's more of an explanation of what we've got in our rule. And that the IOT discussed whether the task of selection where the parties have not done so should be assigned to the Standing Panel itself or to its chair. And we concluded that it should be the Standing Panel, and the IOT anticipates that once convened, the Standing Panel will agree its own administrative procedures. And again, that's just something that we discussed as having been highlighted as a question to us by the legal drafters where they asked us if we were intending it to be the Standing Panel or the chair. So we discussed and we had agreed it should be the chair but we felt we should highlight that in our Rationale document.

So I'm going to just pause and see if that causes any concerns or if anyone feels that doesn't reflect what we were intending. But I'm hoping it's not too controversial. I'm seeing no hands. I'll just check.

Perfect. I will keep going. All right. Then we have another one a little bit further down in relation to paragraph three.

Paragraph three talks about where the IRP perhaps doesn't have capacity to see a full panel, and paragraph three deals with that. In fact, I will just scroll down and say paragraph 3C, which is what this new text is referring to. It says, "If one party has not selected a panelist within 30 days of the commencement of the IRP, then at the request of the other party, the administrator shall make the selection." The text that is in yellow that I added into the rationale was with respect to 3C, community input is specifically sought on whether the 30 days should be from the date of initiation—that should probably say initiation of the IRP—or from when the Standing Panel informs the parties that it does not have capacity, which could be something around about 45 days from initiation rather than—yes, at the moment we have drafted it as 30 days from initiation. But the question is, is that the correct starting point for timing? Or should it really be from when the Standing Panel informs the parties about the lack of capacity? We're not here expecting ourselves to answer that question. We have it drafted in one way, but we agreed we'd ask the community that question.

Again, I'll just quickly check in the Zoom Room and see if I've got any concerns. But otherwise, I'm hoping that everyone's happy that that captures what we agreed we would do. Cool. All right.

If we scroll down again, in relation to paragraph E, which is the section that talks about the absolute fallback position is the use of the kind of list process that we adopted from the ICDR rules. We added some additional text into the rationale for that paragraph E, that the IOT has not proposed any limits to the numbers of names which each party may

strike out from the respective lists since this reflects the current ICDR process and the IOT is not aware of any of this having caused any issues in practice, but input to the contrary is welcomed.

This, again, came up as a question that we had from the legal drafters about whether there should be any limit to how many of the names on the list from the ICDR the parties could strike off. We don't have a limit as captured here. That's the current process. There is no limit. And we're not aware of a problem but we agreed we'd ask community. Okay. I'm not seeing any hands again. So I think we can keep going.

I think that was all that was picked up for this document. So again, just to reiterate, we do have a clean-up exercise that we will have to do to make sure that the Rationale document, the actual legal text is the same text as we've been just looking at from the legal drafters. But in terms of the explanatory text, that's fairly stable now. All right. So then we can, I think, move on to the other document, Brenda, which was Rule 4. We similarly had some edits to the rationale. I think it's there. Yeah. Perfect. Thank you. Yes.

Again, same comment. The changes to the actual legal text aren't captured in this Rationale document yet, but we're just looking here at updates to the rationales that we talked about as we were going through the legal text review. I'm going to quickly scroll down and see if I can find this. Okay. All right. It's a fairway down. It comes after paragraph eight, Brenda. Okay.

So this is capturing the principles of initiation. Because before we had the legal drafting done, we'd got some sort of high-level principles for initiation that was our original document. As we discussed when we

looked at it, when drafting the legal rules, some of the principles didn't adequately translate into needing a legal rule to be drafted. But we didn't want to lose them. So I have moved them here and just captured them. So the explanation is that in addition to agreeing the text of the rules captured in Section 4A, the IOT agreed a number of principles of initiation. These are not appropriate for inclusion in the rules themselves but will form recommendations from the IOT as part of its final output. So these principles of initiation with rationales are reflected below. These are what we had in our Rationale document, basically. So the ones that haven't made it into the rules but were in our Principles document, I have just reproduced. I haven't, I don't think, drafted anything new here. I just captured what we previously had in that Rule 4A document in its previous version before we had some rule text.

So I'm happy to read through them all. I'm not sure that I really need to. As I say, these are all things that we had in our Rule 4A document. But I just wanted to highlight that that's as agreed what I've done. Obviously, it won't be highlighted in yellow at that point. It's highlighted in yellow just for the purposes of us being able to spot what has been done.

So I think I will pause and let people just quickly cast their eyes over. Obviously, there's an opportunity after this meeting if you spot anything that does cause concern, but I think that's not new text, basically. That is just a reproduction of something that—well, now that we have rule text, it doesn't have a place.

All right. Then we can scroll down a little further into Rule 4C, please, Brenda. If you just would keep going. Yeah. It's probably a few pages. There you go. Thank you. Yeah, one thing I was noticing was there's no

page numbers on that document. That's annoying. Keep going. Yeah, the highlighted bit. Keep going. It's coming soon. Yes, there. Okay.

This, again, I think is something that came up when we were discussing the legal draft. So there's just a new additional insert rationale for A and B. The IOT have proposed that timings should be by reference to publication of the request for reconsideration decision since this is information available to all. Some IOT members have argued that timing should run from notification of the decision to the party who brought the request for reconsideration. Rather than them being obliged to check the ICANN website for publication, community input is sought on this.

That I think reflects our discussion. Does that seem adequate for the notice the explanation we give to the wider community? There isn't a reference, for example, in there to the fact that if we were talking about third parties, they wouldn't be getting notification. So they are reliant on publication. But I'm not sure how relevant that is because we are talking here about someone who is taking advantage of where they filed their own request for reconsideration and that, therefore, is extending their timeline. But nonetheless, I think this is sufficient. But I question. Yeah. Okay. I'm getting a thumbs up from David, which is great. So again, just flagging it captured because we discussed it, that's the change that we would make.

All right. Then 4D, I will scroll down quickly but I'm not sure that there was anything else. No, 4D didn't have anything else. So that was it.

There was nothing in the Translation document Rule 5B that we needed to capture in our Rationale document. So that's why that one wasn't

included with the agenda because there were no changes that I had made to that one. So we now have sort of relatively stable text on the Rationale document as well. I think based on our discussions today, I don't think there are any updates. I will double-check my notes, but I don't think there are any updates to the Rationale document that I need to make on Rule 7 based on our discussion today.

Okay. So thanks. We are now through a couple of our agenda points. In which case, if you can bear to do so, we could start back. I'm just reviewing the drafting instructions that are in the legal text document. So basically, where I've captured what I think the upshot was for referring it back to the drafters. Actually, Brenda, we go back to that redline doc that we were using earlier, but back to the top. Okay. Super. All right.

So I've tried to capture everything that's a sort of drafting instruction or a decision point in here in the comments. So the first one. Can people see the comments? Maybe I'll just highlight when I come to the drafting point one. There are a couple in here that you will see in the Google Doc that I've captured that there were points for us to capture in the Rationale doc. So that's what we've just been looking at. The first one, I think, that's an action for the drafters is tribunal. So that's in paragraph 3E. It was picked up right at the end of 3E, there was a question about what we meant by tribunal. So there is now in the instructions for the drafters just an instruction to replace tribunal by IRP Panel and an explanation that the term tribunal… I think maybe if you hover over it. There it goes. Yeah, okay. Well, I'll read it, and then hopefully, if you're following along or you're able to go back to it afterwards.

The term tribunal had come from the ICDR rules where there's a reference to both tribunal and arbitral tribunal. So the equivalent in the Standing Panel would be the IRP Panel. So that's the suggestion as we're replacing that. Then I'm going to keep scrolling down.

Another action for the drafters is in paragraph 5C, which is the section on conflicts of interest. Yeah. There you are. You can see the action for the drafters. Oh no, that's a different one. How weird. There. Okay, I'll read it. Action for the drafters, delete the example, so the last sentence, and replace the subsection with text reflecting the following. Prior to accepting any appointment, potential IRP Panelists are also expected to consider whether other circumstances of the relevant IRP are liable to give rise to a conflict of interest or to give rise to the appearance of a conflict of interest. That's the discussion and the exchange of e-mails that that Malcolm kicked off where we felt that we weren't quite reflecting the concept of appearance in that paragraph 4C. So that, I believe, is where we ended up in our discussions, and I think we're all happy with that proposed suggestion. So the request is just for the draft to be updated to that effect.

Again, I'm not seeing any hands so I will keep scrolling. I don't know if there's a way… Brenda, if you review you click on that, does it bring up? Yeah. That's it. That's the one. Yeah. Okay. All right, I'm not seeing any concerns so we can keep moving on.

All right. My next point for the point for the drafters to take on board is in 4D. We have where at anytime an IRP Panelist develops a conflict of interest, and we agreed we would have that changed to "becomes aware of". Yes, Liz?

LIZ LE: I also had noted from our discussion on D is I think we talked about after a conflict of interest, adding the phrase "or the appearance of conflict of interest". I think there was a point that might have been raised by Malcolm and there was a discussion about it to add that phrase.

SUSAN PAYNE: Yes, there was a discussion about it. My recollection was we agreed not to change it but I wouldn't feel confident about that.

LIZ LE: We can ask the Jones Day to go back and check the record on that to make sure if there was an agreement to capture that. But the notes I took away from it, from that discussion, was that this sentence D would change to "where at any time and IRP Panelist becomes aware of a conflict of interest or the appearance of a conflict of interest, they must recuse themselves".

SUSAN PAYNE: Yes, that does make sense to me. And I do remember the discussion. I may have not captured it properly. Yeah. Okay.

LIZ LE: We'll ask them to double-check.

SUSAN PAYNE: Okay. Thank you. So that's in three, 5D. Yeah. Thank you. I'm going to make a note as well. Because at a minimum, I'll add that into the Google

Document that we're asking them to double-check. Yeah. Thank you. All right.

I think that takes us to the end of Rule 3. I think we could perhaps can start Rule 4 or at least 4A. I'll see how many actions for the drafters there are. I don't want to exhaust everyone. But let's see if we can get through a little bit of this. We'll maybe get to the end of 4A, hopefully.

So 4A, we have an action for drafters in relation to paragraph one. It just says, "Move the clause relating to the three-day leeway for an IRP to be considered timely filed"—it's not spelled right—"to Section 4A as a new Section 2." This is a reference to, we do have in 4B at the moment some language or it was in 4B that said, "In order for an IRP to be deemed to have been timely filed, all fees must be paid to the IRP provider within three business days of filing the written statement of dispute." I think we agreed that if we were going to talk about timing and initiation, that it seemed more appropriate to have that captured right up front. So we were just asking them to move it, but it's not a change in the drafting. So that was certainly the first that I captured.

Then a second action for the drafters also in that paragraph one is in relation to the reference to the appropriate filing fee of, currently, it's in there in square brackets of x dollars. We have given a note to the drafters that no, we do not propose to set a specific fee amount in the rules. Again, as we discussed, we didn't feel it was appropriate that there is a filing fee and we want to refer to it. But we certainly don't want to be putting a specific figure in the rules.

We'll keep scrolling down. I think actually those were the only ones in 4A. Given it's 26 minutes past the hour, I think this is probably a good place to stop. We'll pick this up at 4B when we have our next call.

I got a message from Bernard that, just to remind everyone of when our next call is, it is due to be on the 19th of March. That would be two weeks. I'm just double-checking. Because traditionally… Yes, that would be right. We wouldn't have a call next on the 12th because it's the week after the ICANN meeting. So we would reconvene on the 19th. That I think makes sense. I hope we will get close to finished by then. David?

DAVID MCAULEY: Thank you, Susan. Before the next meeting, I noticed that our next thing on the agenda is the Rules for CEP. But I thought it might be wise to ask ICANN Org, ICANN Legal and practitioners like Flip, is that what you think is most urgently next addressed? There are things we could address such as CEP Rules, limits on appeals, more conflict of interest, considerations for panelists if we think that's needed. Liz, I think you said you're going to share with us what the training regimen looks like and we will have a chance to weigh in. So I think it might be worthwhile to hear from ICANN Legal and practitioners, yes, they agree we should move on to CEP or maybe there's something else we should move on with respect to urgency. That's it. Thanks.

SUSAN PAYNE: Thanks, David. I'm not sure we've got time to hear about it now, although Flip has his hand up. So I'll give you a moment, Flip.

FLIP PETILLION: It's just a technical question. Brenda, can you please send an invite? Because I don't see anything in my agenda for the 19th. Thank you.

SUSAN PAYNE: Maybe that's something that I put in the agenda for the next call. If I send that around promptly, then people can come prepared. I think if it's possible, Liz, do you think there would be a reasonable prospect of having the list of training materials in time for that call? Because I think that would be leaving aside everything else. Given what you've said about the status of the Standing Panel, it does seem like that is something we ought to look at sooner rather than later. Do you think that's possible?

LIZ LE: Yes. We'll make sure we circulate something before the next meeting on the training program for the Standing Panelist.

SUSAN PAYNE: Thank you. So then I think, obviously, we'll finish up our final review and walkthrough, and then we can have a conversation about what we turn to next. But I think we can also start taking a look, I think, at the training materials unless our discussion leads us to think that there's something more urgent than that. But in terms of just finishing up on the documents, I think what we'll do, we won't go through things again that we've already been through. I think we will really quickly canter through the rest of the drafting instructions. But if people could take the time to look at it in advance and flag any concerns, then that would certainly speed that review up and would definitely help.

I will do that same exercise of tidying up and putting the drafting instructions in for Rule 7. And if we have any updates to the Rationale document for the Rule 7, I'll make them. But I think based on our discussion, I don't think there are any of those. And that will allow us then to send the legal rules back to the drafters, just for those few final edits. Then we'll be in a very good place for getting things out to public comment.

All right. Brilliant. Thank you very much, everyone. I really appreciate everyone sticking with it to almost the final moments of ICANN79.

DAVID MCAULEY: Especially from online.

SUSAN PAYNE: Yeah. We really appreciate that we managed to make good progress today. And thanks for joining us. Okay. We can wrap.

GREG SHATAN: Bye all. It's been a pleasure.

SUSAN PAYNE: Bye, Greg.

BRENDA BREWER: The meeting has concluded. We may stop the recording. Thank you.

[END OF TRANSCRIPTION]