BRENDA BREWER: Good day, everyone. This is Brenda speaking. Welcome to the IRP-IOT Plenary Call Number 96 on the 4th of October 2022 at 18.00 UTC. Today's meeting is recorded. Please state your name before speaking and have your phones and microphones on mute when not speaking. Attendance is taken from Zoom participation.

I'll turn the meeting over to Susan Payne. Thank you.

SUSAN PAYNE: Yes, lovely. Hi, everyone. Thanks for those who have been able to join this IRP-IOT Plenary of the 4th of October. As I was saying before we started the recording, we are a little light on numbers, and I'm not quite sure that we have quorum, so I think to the extent that we might be planning to make decisions we may have postpone that, but I think it's still valuable for us to use this time, and I'm particularly noting that a couple of people who weren't able to join our previous discussion on initiation, which are Liz and Malcolm, and now I think indeed also Sam, but Liz and Malcolm in particular, who were members of the initiation sub-team are on this call. I think it is helpful for us to at least see what progress we can make with the group that we do have.

Before we go any further, I note you hand, David.

DAVID MCAULEY: Thanks, Susan. It was just about the attendance. I think once again it might be worthwhile for us to dedicate one meeting soon to discussion of how we work and encouraging people to come back. Maybe we

should start the discussion on the list. We have a lot of really talented people in this group. However, our attendance typically is low. I think maybe we can throw out ideas. Do we need more subgroups? Do we need less subgroups? Do we need two hours once a month or something like that?

I would be happy to help organize it if we think a discussion of that nature would help. Anyway, that's all it was. Thanks.

SUSAN PAYNE: Thanks, David. It's a good suggestion. Maybe at least we need to start that discussion on the list. My concern would be we might convene a call to discuss this and again have the low attendance, but I agree. We have talked previously about trying to rotate call times and see if that would help as well. Yes, it is unfortunate, I think, that we are dropping off on attendance.

Sam?

SAM EISNER: Hi Susan, this is Sam. I do have a concern with us continuing without quorum only because in the past there was a very contentious issue that happened within the IOT and the discussion level at non-quorum meetings an issue within that IRP. There were questions about the legitimacy of some of the rules that were developed based on discussions that happened at those non-quorum meetings. I do have some concern with us continuing in an on-the-record format.

SUSAN PAYNE: Okay, thanks Sam. I do take your point.

LIZ LE: Though Mike just joined, so that takes us to five, so we've hit quorum.

SUSAN PAYNE: Problem solved for now. Mike, you are very welcome. You bring us up to quorum, so we're pleased to see you. Thanks for joining.

MIKE RODENBAUGH: Sorry I'm a bit late, and I missed whatever Liz was talking about. I apologize.

SUSAN PAYNE: We hadn't really started the call yet. We had a late start because we didn't have quorum, and we were actually just having some discussion about that and about whether we could proceed if we didn't have sufficient numbers. Very pleased that you've been able to join us. Let's take this on then while we do have as many people here with us as we do.

First up, I think we've probably addressed the welcome and intro part of our agenda. First up obviously, as usual, we review the agenda and the statements of interest. We need to review our action items from the last meeting. I have as agenda item four that we'll try to close out the draft text or the draft proposed final text on Rule Four and get agreement that we can take that read to public comment. Now that we

do have a quorum on this call, I think we hopefully can take that forward.

Agenda item five is initiation and the continuation of the discussion of issues relating to initiation. As I mentioned at the beginning, we did have some discussion while we held our plenary meeting in Kuala Lumpur because a small number of us were able to attend that meeting and were there in person. We didn't want to have lost that opportunity, but it was by no means a full discussion. We didn't have a quorum in the room, as we noted, and we certainly weren't making any decisions. Consequently, that's why the Rule Four text is back on the agenda for this week.

If there's any other business, we'll deal with that and then finalize the time for the next call which will be, or should be, on the 18th of October, but I think we have to think about timing.

Back up to updates to statements of interest. Does anyone have any update on their SOI that we need to note in this group? Okay, I am not seeing any. That's all good.

Our next agenda item is item three, reviewing the action items. I think we'll circle back to this one as it relates to the discussion on initiation, but we had an action item which Flip very kindly volunteered that he would check into, how payment gets handled at the moment in IRPs, and particularly whether the claimant receives a proof of payment or not. If I understood him correctly, his point was that someone like his firm has an account, so many gets drawn down from that account by ICDR and it was part of a brief discussion we had on whether we needed

to firm up on the language on exactly when initiation of the IRP is considered to have happened and whether the claimant should be paying a fee, or whether it's that the claimant should be providing ICDR with the proof that they've had a proof of payment or what precisely should be done.

Flip isn't with us at the moment. He has said he'll be running late, but he hopes to join us. When we get onto initiation we can circle back to that if Flip is with us.

Next, I think we can move therefore straight onto agenda item four, which is just formally closing out the draft text or draft proposed final test for Rule Four and agreeing that we'll take that forward to public comment. I don't think that it's necessary for me to talk through that text and read through it word-for-word. I think, Brenda, if you have it to hand you might be able to pull it up, if you have time, onto the Zoom window. This is the text that was circulated on the 29th of August, so has been with people for some time.

I can see your hand Malcolm, and I'll come to you very shortly, but what I'm hoping we can do is we can recognize that this text is a compromise that we've been working on for some period of time during our calls and so on, and also that not everyone in the group does support this compromise position. I do think we have reached consensus on this amongst this group, at least insofar as to take it forward to a public comment opportunity.

Malcolm?

MALCOM HUTTY: Thank you, Susan. Sorry, I didn't mean to rush you. I didn't mean to jump the gun on this, but in order to move forward I think what we will need is not only the text that we are proposing to the community, but also any description, justification or rubric that will accompany that text, basically the wording of the public comment itself as opposed to the text that is being submitted for comment. How do we propose to go about that?

SUSAN PAYNE: Malcolm, I think I agree. When we put something out to public comment, we will need a description of this and it's something that will need to be drafted. I think that's the next step. There will be other things that also go out to public comment and would equally probably need some description and explanation. Obviously, the text of that would come before this group to be approved before we go forward with it being published. I hesitate to say how this normally happens or how this has happened in the past in this group, but my assumption would be that it's something that probably I'd ask for Bernard's assistance to draft and I'd work with him, and then we'd bring it back to the group. Does that answer your question?

MALCOLM HUTTY: It leads naturally to the follow-up question, which is what about the opportunity for minority opinion.

SUSAN PAYNE: Again, I can only speak for other examples of public comments that I've seen. I can see Sam saying she can provide some insight on the public comment process, so perhaps I'll turn to Sam, and if she doesn't say what I was thinking might be the way forward I will come back, but I'll turn to Sam. Thanks.

SAM EISNER: Thanks, Susan. I know that we haven't discussed this, so I think this is a good conversation to start and get the expectations out on the table. As you indicated, Susan, this wouldn't be the only portion of the rules that would go out for public comment. We would want to put out as much of the changed language as we have. I know, for example, we concluded on translation language earlier in the IOT process and that's still waiting, and if there's anything else that's ready to go, we'd move that out to public comment. I just wanted to let the group know one of the things that we're working on internally with the anticipation that the Rule Four language that's being presented today will be confirmed by the group to move to public comment is we're working to get a red line between the existing supplementary procedures and what is being proposed to be put in there, so that people can view it in context.

We had also had some discussions early on in the regrouping of the IOT, after you joined as Chair, Susan, that there are a couple other things we wanted to make sure that happened within the rules, such as some numbered paragraph items to make it easier for reference and things like that. That will all be incorporated into whatever version of the red line is being produced. Also, just confirming once we see the language

and context that the terminology matches the other terminologies within the rules, just to conform it all.

Of course, once that's completed, we would provide that to the IOT to take a look at. I think the question that Malcolm is raising, this is an item. If this is something that the IOT is putting out for public comment versus ICANN Org putting out for public comment, we could handle it either way. For the IOT, if there was a position that the group wanted to draft in terms of what the majority position is for a justification of what's being presented or some explanation, ICANN Org could certainly help, between Bernard or whatever help Liz or I could give to help develop what language might be. If there was a wish to have a minority statement, it's not something that's frequently highlighted within a public comment proceeding. Typically when things like that are highlighted it's something that's done within a report. I don't know if the IOT wants to generate a report. That's not something that the group has done before. Then there'd be a whole issue about ratification of that report and how that would happen.

There's nothing that precludes any member of the IOT in their own right from participating within the public comment and making sure that their comments or positions on language that's presented are available to the community, but I think that is a discussion for the group to have about how that would be reflected, because we don't have a practice within the IOT, particularly since it's not necessarily a report-based group, of developing that level of minority positioning.

SUSAN PAYNE: Thanks, Sam. That wasn't quite what I was expecting, although I think as you say, it's really good for us to have this conversation because perhaps there isn't a clear understanding of what the process is. I'm including myself in that. My assumption has been that rather in the same way that a PDP would put out something for a public comment, generally speaking, that when that goes up for public comment would not include the minority positions as formal statements, but usually the document that goes out for public comment would try to reflect the different positions. Then it's only when something is finalized, and from a PDP it would be a final report, that there would be an opportunity for participants to put in a minority statement.

As I say, my assumption had rather been that there would be a similar process here, but that may not be the case. Perhaps this is something that we need to have some further discussion on or further consideration on. That would have been my assumption, that there would be some kind of a report from this group that explains what the group has done.

Malcolm?

MALCOLM HUTTY: Sorry, I don't mean to interrupt. Please, carry on.

SUSAN PAYNE: I think I talked myself to standstill. Carry on, Malcolm.

MALCOLM HUTTY: In the past when this group has presented something it has produced a form of report that said, “This is what we’re doing and this is why,” and that justified it. I’m willing to cooperate in contributing the alternative opinions into the report, so long as there is a fair opportunity to express the other point of view. I don’t think that the formality of it being signed by me, or something is important. I’m more concerned that the community should not be misled into thinking that this is a consensus position that has no criticism and that the input from the previous public comment wasn’t properly noted. I would like to see that being re-mentioned and rearticulated to show that it’s there, so that when the community receives this report they can see it in the context of the previous work that’s been done and the previous work that’s been done by the community on this subject.

As I say, if you’d like to do it working together to reflect the various opinions rather than do it as, “Here is a majority opinion, here is a minority opinion,” I’m happy to work with that, too.

SUSAN PAYNE: Thanks for that, Malcolm. Sam?

SAM EISNER: One of the things, I’m trying to find it and I’ll drop it in during this conversation, we did during the first time that the rules went out for public comment on the time for filing, we got that targeted one regarded time for filing where we identified the competing positions within the group on it. I can’t recall if that was at a period where there was a formal lack of consensus or how we phrased it, but I’ll try to find

that. That might be a way that we can identify a path forward to reflect this and also reflect our prior practice on this as a group. I also think it's important for you as Chair, Susan, to identify the consensus level on it before there's a declaration that it's not by consensus.

SUSAN PAYNE: Thanks, Sam. Sure. I think I've done that in the sense of my sense from the extensive discussions and the positions expressed by the participants in the working group is that we've got a consensus, but we certainly don't have full consensus. There is some disagreement with this. We certainly can't put this language forward as being a full consensus of the group, because it's clearly not, but I do believe that of the working group members, I do believe we have had a consensus. Thanks for you comments about looking at what happened previously. I think that certainly would be quite helpful. It doesn't preclude us from doing something different, but it might at least give me a starting point to understand how this has been handled previously. Yes, in terms of the Rule Four text as opposed to any accompanying description or explanation of the work that has been done to get to this point, as I said, that would be a latter stage, but for present purposes what I'm just hoping that we can now do is just agree that we've come to the end of our work for the time being on this Rule Four and that the text is in the form that we anticipate will go out, subject obviously to all that Sam said about production of red lines and introduction of paragraph numbering and so on. The content of the text.

I'm not seeing any objection. I'm not sure that I can do more than take silence as consent, really. The opportunity is here now for objection if

there is any. Otherwise, I think we can call our work on Rule Four done for now. I'm not seeing any further hands wanting to discuss this further, so I think we can then move on to our next agenda item, which is the discussion on initiation.

Brenda if you, thank you, yes, pull up the slide deck. Again, thanks to those who were able to join the meeting we had in September when we were in Kuala Lumpur. It was, I think, a useful introductory discussion if you like. We certainly were disadvantaged in that we didn't have the benefit of having attendance from the members of the initiation subgroup who had been working on this, so it's obviously very helpful now that some of those members have been able to join this call. As I explained at the last meeting, and hopefully those who weren't there have had the opportunity to listen to the recording, but for those how haven't, the initiation sub-team was tasked to consider some issues specifically around initiation, particularly whether there were issues around initiation that are not currently adequately addressed in the interim rules that we have as they supplement the ICDR rules. There were some specific items for them to look at, including the fee for initiation and whether there needed to be any clarity on exactly when the IRP is considered initiated in terms of timing and particularly in terms of the timing of the filing of the statement of claim with the ICDR as opposed to the timing at which the initiation fee, if there is one, is sent in.

I think they had a general remit to look at what it currently says in the rules on initiation of the IRP and to consider whether more work is needed. That group did have some useful discussion, but really had some strong areas of robust debate and disagreement about certain

issues. When we move on through the slide deck, we'll see some of the questions. Indeed, the group didn't really manage to agree on a formal report back to this main plenary, but I think it's clear that there was agreement from the subgroup that they felt that these matters were ones that ought to come back to the plenary for discussion, and that they shouldn't be handled by such a small group.

I put together this slide deck based on having listened to a number of the initiation calls and certainly the final group call of that subgroup seemed to be a pretty good reflection of the nature of the areas of debate and disagreement, and also I had the benefit of the draft report that Bernard had put together for that sub-team, which, although it wasn't agreed, also gave some background and so on. This slide deck was my attempt to reflect the areas that it seems to me that sub-team was struggling with and felt should be referred back to the full plenary for consideration. Obviously, if anyone from that sub-team feels that anything is mischaracterized, or if anything needs to be added to this, I'd welcome that. I have made a few very small tweaks to reflect some feedback that Liz gave me. I'm hoping that in the absence of other reaction from the initiation sub-team members that they're comfortable with this as a good enough reflection of what the issues are that we need to consider. Obviously, it's excellent to have those sub-team members here and they can expand on this or clarify if they feel something is needed.

If we turn to the next slide, Brenda, actually, yes, I will just quickly look at this slide, just so that everyone is on the same page. The way the process appears to work is the IRP is initiated by submitting the relevant form to the ICDR, who are the providers who manage the IRP process. It

includes the statement of dispute, and there is a filing fee as set out in the ICDR fee schedule. We did have some discussion during our plenary meeting in Kuala Lumpur about some of the challenges for a claimant in terms of finding some of the relevant information and identifying precisely what the fee is, so I do think that there's probably some work that could be done to make things a bit easier for a claimant or a claimant's representative who perhaps isn't a regular user of the IRP process. Generally speaking, I think that's as much as we need to say for now on this slide, although we can come back to it if we need to. I've included here the text of the ICDR rule, Article Two, and also what it says in the interim rules, currently says in Rule Four, although actually our new Rule Four language has proposed to slightly change some of this.

If we move on to the next slide, there were various questions being referred back to the plenary, coming from the initiation subgroup, and they're set out on the next series of slides. I think perhaps we start with the first one, and rather than me run through this whole slide deck, taking up the time on the call, I'm going to hope that you've all had the opportunity over the last couple of weeks to review this deck so you have some familiarity about what the other questions are, but that we start at the first one, and then as we need to we can jump towards the end of the deck, where I thought it would be helpful for us, in the last couple of slides, to just have reproduced the language from the bylaws that seems relevant. Also, some language that came out of the Accountability Work Stream 1 Report About Accessibility and Costs and some other provisions that are contained in the bylaws about initiation. As and when we need them, we can turn to them, but if you happen to

have the slide deck in front of you, you might find it helpful to have those sections in front of you while we're having this discussion. Much of what we'll be talking about probably turns on what the bylaws say and how we feel that is correctly interpreted.

I'll pause there because I see Malcolm's hand.

MALCOLM HUTTY: I think I can probably assist in clarifying at least what I see as the rub here, because we do get into the details quite a bit, but I think it might clarify really the essence of the concern here. If you could turn back to the first slide that you put up on this section. No, okay, the next slide. The one with the bylaws. There we are. Right, there we are. This, I think, is really the rub. Really, the first paragraph there contrasted with the bullet points.

The first paragraph there says how things actually work in practice at the moment. The IRP is initiated by submitting on the relevant ICDR form, which contains the written statement of dispute, to the ICDR, accompanied by the filing fee, per the ICDR fee schedule. Because it's on the relevant ICDR form that actually forms a contract with the ICDR, between the claimant and the ICDR themselves. That's when the IRP is initiated under the current practice. If you don't from that contract with the ICDR and if you don't pay their fee the IRP is not initiated.

The bylaws, however, are quoted as you see in the first bullet point on that slide, an IRP shall commence with claimant's filing of a written statement of dispute with the IRP provider. That doesn't happen. It doesn't commence when the claimant files a written statement of

dispute. If you file a written statement of dispute with the ICDR nothing will occur. You have to do it on their form accepting their contract. You have to agree to their contract, and you have to pay their fee. There's a clear variance with the bylaws there, and that's why this was really a relevant matter for the initiation group to consider, because this is the initiation itself. An additional step has been introduced that is not mentioned in the bylaws, that is a gatekeeper for initiating a dispute, and that is to form a contract with the ICDR and to pay a fee.

We can all have views as to whether or not that's actually a reasonable thing that claimants out to be required to do, but again, we're not supposed to be considering what we privately consider reasonable, we're supposed to be considering what the bylaws have accepted shall be the case. I know that hasn't been our practice, but that is our mandate. The position here is that there is this additional step. That clearly has a consequence. There will be some claimants that will be put off by the fee itself and given that the fee is relatively low— I'm not exactly sure what it is, but I think it's somewhere in the low thousands of dollars. I think it's probably $1,500 or something of that nature. Please don't quote me on that, I may be quite wrong, but I think it's in that ballpark. Anway, something that I think certainly most organizational claimants would consider not really a serious barrier to bringing a claim, but individual claimants might.

Of course, you may think that it's a good thing that individual claimants are barred, but nonetheless the bylaws don't make such a distinction, and actually rather to the contrary when it comes to the statement about impecunious claimants. Also, what in my view is much more serious is that because you have to form this contract with the ICDR you

are accepting to the ICDR liability for costs that will be incurred by the ICDR in the course of the dispute. The bylaws contemplate that actually the cost of administering the dispute ought to be paid for entirely by ICANN, and only your own costs should be covered, but there's now a dispute as to what constitutes administrative costs, and it's argued that ICDR costs aren't actually administrative costs at all, they are something else and therefore the costs of the claimant. Again, that seems to be a variance between ICANN's legal position, where they say one thing, and what they've mostly but not entirely accepted in practice, which seems to be another. Again, I don't want to go into that, because I don't really have full knowledge and I'm in danger of misstating. What I can stay is that there's a clear discrepancy here between these two standards here and that discrepancy will have clear consequences in terms of a chilling effect, because even an organization, if they don't know what kinds of costs, they're going to be liable for during the course of a dispute may well be chilled from bringing a claim that they might otherwise bring. Especially when we're supposed to be here open to organizations of all sizes.

I think this is material and I think it is a matter of initiation. It seems to be a gate upon initiation, and that seem to me something that we should be considering. That said, we're not an IRP ourselves and we can't tell ICANN that their interpretation is wrong and ours is right, not in the sense of ordering it. What we can do, however, is through our report say that we believe that this bar on initiating a claim ought not to be there and ought to be removed, and that's what I would recommend. Thank you.

SUSAN PAYNE: Thanks, Malcolm. Just to say, these issues are related, but I do think they are two slightly different issues in the sense of if we'd run through what seemed to me to be the questions coming from your initiation subgroup back to this plenary there was one related to the initiation fee, and a second one related to a more general question about other costs, and what it is that an IRP claimant is agreeing to and signing themselves up for being responsible for and so on. I was endeavoring to try and deal with these two things separately to try not to get too bogged down. It may be that's not possible, but certainly was trying to focus at least initially on the fee element that you certainly started your comment referring to. I've got a couple of other hands now in the queue. I'm going to come to Sam first, and then David, I'll come to you after that.

SAM EISNER: I definitely have other thoughts about some of the other things that Malcom discussed, but we can discuss that at a later time. I wanted to focus more on the fee issue. I listened to a lot of the conversation from the discussion that happened during the Kuala Lumpur meeting, and I think that there's a lot of value in trying to get clear in the supplementary procedures what is meant. One of the things that I think we've had as an assumption but haven't made clear, and we can use the supplementary procedures to do that, is to help make affirmative the statement that the [inaudible] claim that's referenced in the ICDR rules is equal to the statement of dispute, which is one of the requirements to initiate an IRP. I think that there's some potential to read some daylight between those, but it wasn't intended to be there.

Then we have the separate discussion. The ICDR rules state the contemporaneous payment of the notice of claim with the initial filing fee, but as we have in our current rules— One of the things that we do before we put the rules out for public comment is we actually give them to the ICDR to say, "Do you have a problem with this? Can you administer it this way?" The ICDR had the opportunity to look at the last version of the supplementary procedures and did not have a problem with those three days written in. If we wanted to give that three-day grace period so it wasn't a contemporaneous requirement, but there was that three-day window, we could do that and maintain that. That would be fine. I think that there's also some value in making clearer in the supplementary procedures that IRPs are intended to be non-monetary claims, so that there's no question about the level of the fees, though the fee schedule could change of course. There's no question about where the IRP fits into the fee schedule. If you look at the ICDR fee schedule, it lists many different potential values for those fees based on the value of the claim, but then they also have the non-monetary claim, and because IRPs are not seeking monetary damages, but are seeking a declaration as to ICANN's conduct, that would be considered a non-monetary claim. If we were to make that clear in the rules, I think that would also be a beneficial thing to do.

I'm interested to hear what Flip has to say about what kinds of documentation are received back after payment and all. If we're going to change too much the timing here, we do have to go back to the ICDR and test those to make sure that's something they could administer and fit into their system, but that's always a possibility for us to do.

SUSAN PAYNE: Thanks, Sam. David?

DAVID MCAULEY: I fully support what Sam just said about this is a monetary claim. I was not part of the subgroup, but when I went through this deck and started seeing some of the issues that were under discussion I went to see if I could find what a filing fee was and it's different than what Flip put in there. I went to ICDR, and it looked to me like if the claim was less than $75,000, which is what I thought a non-monetary claim would be, then the initial filing fee was $1,000 and there was a final filing fee, I think, of another $1,000, but I have to defer to Flip. I'm not a practitioner. I may have been on the wrong schedule. Who knows?

To me the bylaws say that ICANN is responsible for the administrative costs of maintaining the IRP mechanism. To me that's maintaining the mechanism, making sure that it's there and ready to be used. I think there are administrative costs to bringing a claim and I think that a filing fee is one that a complainant faces. The bylaws also say that we'll conform to international arbitration norms, and a filing fee is a norm. I don't know of a provider that doesn't charge a fee. I don't know of a court that doesn't charge a filing fee. I don't think it should be high, but I do think that there is a cost. I think having no fee to initiate an IRP would be an invitation to mischief. When we get to that substantive question, I will be on the side of saying a reasonable, not a bar to bringing a claim, a reasonable filing fee is something that we ought to adopt. There's always Bylaw 4.3(y). At some point ICANN should provide some means for people to be able to participate who otherwise could not. It mentions people like civil society organizations. We know that

some civil society organizations are rolling in money. They should not be entitled to it, but others may be, or people who have been personally aggrieved who can't otherwise bring a claim. A standard filing fee, to me, seems absolutely appropriate. Thanks.

SUSAN PAYNE: Thanks, David. I'll note, also, that Flip has put in the chat quite a lot of information. Flip, I don't know if you want to speak to any of that. Yes, thanks.

FLIP PETILLION: Hi, Susan. Hi everybody. First of all, sorry for being late. I had a couple of other appointments, but here I am. I listened to Sam and David. I agree with a lot of what they have been saying, and David is right. You file an IRP; you have to make some payment. It's part of every arbitration procedure, it's no different here. I don't look at details like this, so I asked my associates to have a look at this and they had to come back to me with a summary of what the filing fee is, what the panelist fees are and how other costs are dealt with. That's what I've shared with you.

The amounts that I see seem appropriate and normal to me in view of the several IRPs we've filed in the past, but of course I'm happy to dig into the details and check them again. I do agree with David and Sam that this is, indeed, for non-monetary claims. There were some alternatives that were offered, but frankly we would need to dig into more details here. I think you have here, you roughly have how it works. It's not very formalistic.

I heard Malcolm talk about, sorry if I mis-recall what Malcolm said, but I don't think there is something like a contract or an agreement you have with ICDR. It's a very simple mechanism that was set up by ICANN, I guess after discussing this with ICDR. It's quite easy for a party to start to initiate an IRP. To use David's words, there is that filing fee just to avoid that just anybody could file whatever IRP that would be clearly groundless. That is clearly provided.

Listen, I'm happy to look into this in more detail, and if there is a possibility to discuss and prepare this with a couple of others before our next meeting so that we have more clarity about all that, but [inaudible].

SUSAN PAYNE: I'm hearing two different perspectives, one being the perspective expressed by Malcolm, which is pointing specifically to that bylaw language about commencement of an IRP being when there's the written statement of dispute or statement of claim, whatever one calls it, and his perception or his view that also applying a fee to that and the IRP not being considered initiated in the absence of that fee is inconsistent with what it says in the bylaws.

The alternative view, I'm not sure if Sam specifically spoke to that, but certainly David commented that there are also other bylaws provisions, and of all the bylaws provisions I think I've included in this deck, I probably haven't included this one, there is some reference to the IRP, as David said, conforming with arbitration norms, and that it would be

normal for there to be a fee to be paid, which I think we've certainly heard Flip agreeing with.

I think probably since he's not on the call I'll take the opportunity to just flag what Greg said, or Greg's initial reaction to the fee in terms of what sort of cost it constitutes. Perhaps before I do that, could we go to, I think it's the second-to-last page. That one, with 4.3(r). I think in addition to the provision that Malcolm referred to 4.3(r) is clearly something that is of relevance because we're talking about where responsibility for particular elements of the overall cost of an IRP fall, and I think we need to get comfortable with where we think that these costs fall. 4.3(r) talks about ICANN bearing all the administrative costs of maintaining the IRP mechanism and that's something that David was just referring to, including compensation of standing panel members. That's obviously non-exhaustive, but it's making it clear that standing panel members are covered. Other than that reference to the standing panel members, we don't get any other specific guidance in the bylaws as to what else is covered. There's a carveout for what happens where there's a CEP, but except with respect to that CEP carveout each party to an IRP proceeding shall bear its own legal expenses, except that ICANN shall bear all the costs for a community IRP. There's this final provision that talks about, again, excepting respective community IRPs, the IRP panel can shift and provide for the losing party to pay the administrative costs and/or fees of the prevailing party in the event that it identifies the losing parties claim or defense as being frivolous or abusive.

It seems in the bylaws that there are two different types of costs envisaged. One type of cost being administrative costs of maintaining

the IRP mechanism, which fall to ICANN, and the other type of cost being the legal costs, where the parties bear their own costs. Those are the only specific types of costs of the proceedings that the bylaws refer to, but I think there is a question here which I heard in David's intervention, which is that there are administrative costs in maintaining the IRP mechanism, which is the process of an IRP and all that goes with it, and that should be distinguished from the administrative costs of an individual IRP brought by an individual party. I think that's something that we need to consider as a group, whether that distinction is indeed the case. If there is no such distinction, then it seems to me that the filing fee falls within the admin costs of the IRP mechanism, but this is an issue for us to consider and try to reach a conclusion on how we think this provision is interpreted.

I said I would just raise what Greg had argued. His reaction was that he felt that arguing that the filing fee was not an administrative cost of the IRP proceedings was, as he termed it, 1984-ish, because ICANN has outsourced the administration of the IRP to ICDR. My understanding, and I'm putting this out there as devil's advocate to try and get the conversation going, my understanding of what Greg was getting at here was that there are costs of running the IRP. There's no overall cost that's paid by ICANN to ICDR to manage this process for them. There are incremental costs that ICDR incurs in managing this process for ICANN in this outsourced manner which get picked up in each individual IRP. One could argue that those incidental costs that are spread across every IRP are the administrative costs of maintaining the IRP mechanism, but we've also heard from David arguing a different perspective, which is that there are different types of admin costs. Some relate to the

mechanism, and some relate to individual proceedings. I feel I'm paraphrasing a lot here, and I'm not trying to express a view. I'm just seeking to flesh this issue out so that we can feel it's had a proper airing and try to come to some kind of conclusion on where these costs ought to lie.

Sam?

SAM EISNER: Thanks, Susan. I did not participate in the small group on initiation, but I heard some of the conversation that was going on. I think part of the issue that's here is the language that's in the bylaws, but the language that's in the bylaws was based on the CCWG deliberations that concluded in 2016 and then were put into force into the bylaws. I can confirm that when we did the bylaw drafting there was no review of the ICDR fee schedules or anything to identify what could be administrative or what couldn't. I'm not sure that we even referred to the ICDR fees to consider whether or not they had a grouping of things that were listed out as administrative. We were working very quickly with a group of community members as well as external council both from ICANN's side and the group that was supporting the CCWG to develop bylaws that were in accordance with the CCWG proposal. The discussion that was there was really about the major source of costs for IRPs, which is the panelist cost.

These was agreement reached within the CCWG that ICANN would be responsible for the panelist cost unless the panel itself decided to fee shift, and at times legal costs could be built in, too, if the panel

determined that anyone's conduct within the IRP warranted that. There was no magic behind the use of the word administrative.

When ICANN agreed to take on the cost of paying those panelist fees within the arbitrations, that is a significant impact not just to ICANN, but to ICANN as it stands as a steward to the resources that it's entrusted with from the global community. There are some lines here about where it makes sense for ICANN to fund versus not fund. We have an IRP that is intended to be open and accessible for the purposes of challenging ICANN's accountability. We have other accountability processes or precursors, such as the CEP, through which people can narrow claims and identify if they really need to bring an IRP to reach a declaration as to whether or not ICANN violated its bylaws. The record from the CCWG proceedings where the IRP was greatly revised was never intended to be the place where ICANN would fully fund anyone who chose to come in off the street and challenge ICANN.

We do have some other places where that is reflected, such as if people don't meaningfully avail themselves of the CEP, then they could have full cost shifting against them. There are some protections already built in, but ICANN has never, and we've heard from, Flip is a practitioner, that most practitioners when they approach the IRP system have never understood the filing fee itself to be among those types of fees that were intended to be fully covered, though there is the opportunity for further cost shifting at the end if the panel identifies that to be the case.

I think that there's a concern from the ICANN side that this IRP-IOT might take action that actually interprets the bylaws in ways that they weren't intended to be taken. If we need to take action to clarify the

bylaws, we can do that, but we don't believe that the history of the bylaws provision is clear enough to really press forward and say therefore ICANN is responsible for 100 percent of any money that the claimant would have to pay in order to access the IRP.

I do also concur with some of the points that Flip and David raised earlier about the different bylaws provisions that are here which show that maybe that wasn't the intention anyway.

SUSAN PAYNE: Thanks for that, Sam. I certainly found that very useful, to hear that perspective from you. Malcolm.

MALCOLM HUTTY: Thank you. There's an awful lot that Sam said that I find myself in complete accord with. I find it a bit unfortunate that we're focusing so much on the filing fee per se when actually the gating issue here is the broader question, of which the filing fee is only one. I'm afraid I have to slightly disagree with Flip when he said that there was no contact with the ICDR here. I really think there is. I think that when you sign up and submit this there is a legally binding requirement that you are entering into to pay the fees that the ICDR levees upon you in the course of this process. That even extends to the panelist fees. They're charged separately, but they are chargeable, and you are required as part of this to accept your liability to pay those. It may be, and it seems to be that right now ICANN is agreeing to pay the panelist fees even though there is no standing panel.

Let's ask this. What would be the legal position if ICANN refused to do so? Where would the panelists stand and the ICDR stand? I think it's clear that the answer is that they would be entitled in law to recover those panelist fees from you, the claimant, and your claim that ICANN should be picking them up would be a matter for you to enforce against ICANN. That's the chilling effect that I see here. This has been brought about because of the way ICANN has chosen to set up this process.

I think now it is worth noting the points of agreement with Sam's description of the CCWG. Yes, it is certainly true that there was no detailed investigation of ICDR processes, costs, or anything of that nature in the CCWG. In fact, I don't think that most of the CCWG was really even aware of, or more than dimly aware of the ICDR, and certainly not in the sense of it being something that we were committing to using these processes and this system in this particular way. On the contrary, I think that what was imagined was that when we were talking about establishing the IRP, we imagined that we were building something new, something that would be required to be constructed. A standing panel. A process that is to be created and to be administered and so forth. That process would provide these systems and processes that are described in the bylaws, and the costs of running that, which are described of the administrative costs, would lie with ICANN, while the costs that you incurred yourself in bringing your case to that process would lie with the claimant.

The whole notion that the ICDR is even the body that does this is a private decision by ICANN. It doesn't have to be that way. It certainly wasn't part of the CCWG consensus that it should be. ICANN could quite easily have gone to the ICDR or somebody else and said, "We require a

system to be built which will manage this process in accordance with the rules that are set out in these bylaws. How can we construct such a thing? By the way, we're going to end up having to pay for this. What will your quotes be for administering such a service, and the running costs?"

To say that every last little cost that's incurred in the course of this is not administrative cost because somehow there's a mechanism— Except there is no mechanism. There is nothing else apart from the administration of these cases and the adjudication of these cases. This idea that there is a separate, somehow, the existence of a thing that you pay for, but it doesn't actually exist or do anything for you because you pay for those costs as you incur them, that doesn't make any sense to me at all I'm afraid, David. I just don't understand that concept. Clearly the costs of the mechanism are the costs of the mechanism. You can pay for them on an as-they're-incurred basis or you can pay for them so that they're all totaled up at the end of the year, but they are the cost of the mechanism, and there are no two different concepts there at all. It's conceptually incoherent in my view.

What we've got here is a paradigm issue that ICANN is seeking to persuade us that the ICDR system is the way that it works, and we'll change the bylaws if necessary to make it work that way, but that's, again, a separate matter slightly outside this group. We're working with the bylaws as they are, and the bylaws do not provide authority for any of these things to be leveed, except under the cost shifting mechanisms.

Others have said that nonetheless it is a good thing that a filing fee exists. It deters the frivolous. Quite frankly, I'm inclined to agree with

that argument, but it's not relevant. There is no authority for leveling it, and if we were to wish to do so we would want to impose a mechanism that wouldn't create an undue chilling effect, that would only have a limited way of doing that. It might be to say, yes, to require just this filing fee, but it certainly wouldn't be that you would assume legal liability for the panelists' service fees, the panelists' own payments in the event that ICANN were to decline to pay them. Never mind whether it would be, it wasn't what the CCWG agreed, and I think we need to stick to what the bylaws say, what the CCWG agreed, and ICANN needs to conform to that and not to ask us to conform our recommendations and indeed the bylaws to how it wishes it were otherwise. Thank you.

SUSAN PAYNE: Thanks, Malcolm. We've got 21 minutes left. I've got Flip and Sam in the queue. I think that will probably be then end of our queue for this call, but we will continue this discussion, I'm sure. Flip.

FLIP PETILLION: Thank you, Susan. We have 10 minutes left, I think. I would actually propose that we introduce a maximum two-minute rule, because it's very, very difficult to comment when somebody is actually taking, I don't know, three, four, five minutes to make a point and at the end you don't know what to reply to.

Just to be clear, ICDR is a mechanism that was chosen by ICANN to administer IRPs. It's a choice. It's a choice that was made based upon reasonable grounds. It could have said AAA, it could have said ICC, it could have chosen another dispute resolution center. Having made that

choice doesn't enter anybody into a contract with ICDR. I don't even think that ICANN has a contract with ICDR just by opting for ICDR to invite it to handle IRPs at the initiative of a claimant. When a claimant initiates a case, it's not entering into a contract with ICDR. It accepts that the ICDR is administering the proceedings.

There is one major contract that parties enter into, and that's the one when they agree to proceed with the case once all arbitrators are appointed. For example, in most of the cases it's done as follows. ICANN nominates an arbitrator. The claimant or claimants nominate an arbitrator. Both go in search of a third arbitrator the nominate. Then it is ICDR that formally appoints the arbitrators. That's where the contract takes effect. That's where the parties ask the arbitration panel to render a final and binding decision, what we call in IRPs a declaration. That's what they are asked to deliver. That's the only contract in place. I just wanted to point that out, just to make things clear. This is actually how arbitration works. This is the contractual relationship that is installed once the arbitrators are not only nominated but appointed.

SUSAN PAYNE: Thanks, Flip. Sam.

SAM EISNER: Thanks, Susan, and thanks, Flip. I fully agree with how you laid that out. I wanted to go back and make sure that the record is clear on how the ICDR remained as the provider coming out of the CCWG process. During the CCWG process there was this discussion about what would happen if ICANN selected a different provider, and during the CCWG process I

know I presented to the CCWG itself about how we'd led to the ICDR as the provider at that point.

At the point when ICDR was first brought in there was difficulty in finding a provider that was willing to abide by different procedures than what they laid out, and what was willing to incorporate supplementary procedures into their processes that would make for a proceeding that was different from the traditional arbitration. That's how we wound up with the ICDR many years ago. We discussed that with the CCWG and there was agreement at the CCWG level before the report was concluded that ICANN would proceed with keeping the ICDR, so long as the ICDR was willing, as the administrator of the IRP. Thereby ICANN would not be taking on the tender process that's laid out in that first step of the bylaws provision that people are referencing. There was discussion about the ICDR's role. If there's a determination that that needs to change, then we have a process in the bylaws about how we'd go through and do that. We recommend from the ICANN side that that not happen right now. We're really getting close to the cusp of identifying a standing panel. We're working closely with ICDR about how they would help us support that standing panel and all roads are leading towards us being able to complete that too. We'd hate to have to start everything anew and figure out what that means while we still have people who are actively trying to file IRPs.

I just wanted to make sure the record was clear, because there was discussion of the role of the administer during the CCWG process. Thanks.

SUSAN PAYNE: Thanks, Sam. Certainly, I don't think any of us are arguing that the ICDR needs to be replaced with another provider specifically, but I think our role here is to work with the bylaws as we have them and the provider as we have them. If the provider was the change in the future, then some updates to the rules would be needed, but I don't think we're feeling that that's something we need to talk about here, or indeed that it's appropriate for us to be talking about. What you say might impact on your reaction or on the feedback that you give to something that was just occurring to me as a what-if as some of you were talking, including for example Malcolm, who has expressed some real concerns about the commitments that you make when you sign the ICDR form to initiate the proceedings.

I hear what Flip says about it's not a contract per se, but you do say something along the lines of, "I agree I'll pay the fees." If we think that is problematic, what scope do we have, or do we have scope for a suggestion that there needs to be a different form, that there should be a particular form that's appropriate specifically to an IRP, which is still an ICDR form, but it's the ICDR form for an IRP? Similarly, we've had some discussion early on about the fees, and that may be the case, Sam. Maybe what it is, is we need to have a look at that form. Are there suggestions we should make about changing that form? Similarly, if we're talking about making it clearer that this is a non-monetary claim and we could do that in our rules, alternatively, is there not an argument for saying that we'd like the ICDR on their website, when they have a list of fees, to say, "IRP, here's the fee," rather than you having to try and work out what your fee is? Some, what seem to me, relatively

easy wins, but given what Sam was just saying about the challenge in finding a provider, maybe they're not so easy wins after all.

I'm going to just leave that floating. I think we need to wrap this up now because we've just got two minute to go. It's been a useful discussion. I think we need to spend obviously a little more time on this. We haven't clearly finished our discussion here so we will come back to this, I think, on our next call.

Thank you all for your input. I don't believe we have any items of AOB, but we do have a final agenda item, which was regarding the next call. We have a date for that call, we don't have a time. I think for present purposes we probably should stick with the time that we've been using, but I'm going to ask. Better to take an action item now, to perhaps do a Doodle poll to the whole group about future times to see if we can perhaps rotate times so that some of our other participants perhaps have an opportunity to at least join some calls in a more convenient time for them. I don't think we've got time to bring that in for two weeks' time, but if we can have a Doodle poll we can perhaps do so for the following call.

Thank you very much. There's a bunch of information in the chat, and I know I will need to go back and read that because I do feel the chat was slightly getting away from me. I'm sure the same is true for some of you. Thank you all for your time and we'll come back to this on our next call.

UNIDENTIFIED MALE: Thank you.

UNIDENTIFIED MALE: Thank you.

[END OF TRANSCRIPTION]