
BRENDA BREWER: Good day, everyone. This is Brenda speaking. Welcome to the IRP-IOT call on 15, November 2022, at 18 UTC. Today's call is recorded, please state your name before speaking and have your phones and microphones on mute when not speaking. Attendance will be taken from Zoom participation. We did receive apologies from Flip, and I'll turn the call over to Susan. Thank you.

SUSAN PAYNE: Lovely. Thanks, Brenda, and thanks, everyone. Thanks for joining. So this is our call for 15th of November. As usual, we'll start with a review of agenda and updates to Statements of Interest. So let's do that straightaway. Does anyone have any updates to their statements of interest that they need to highlight to the group? Okay, I'm not seeing any. Just the usual reminder that if you do have any changes particularly that are relevant to the work we're doing here, please do make an update on your statement of interest and flag it on the mailing list so that people are aware.

Okay, in terms of our agenda review, we've only got really one substantive agenda item, which is to help complete the discussion on the interpretation of the bylaws particularly bylaws 4.3, regarding what are the administrative costs of maintaining the IRP mechanism? So that's our main agenda item. So I think we can hopefully -- I'd like us, if possible, really to try to reach some conclusion on that so that we can put this item to bed. Then our next meeting is scheduled to be the 29th of November at 18:00 UTC.

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I don't think that conflicts with things like Thanksgiving for the US participants, but if it does, could someone just let me know now before we schedule that. I think Thanksgiving is the week before, if I understand correctly. Yes, thank you, David. So with that, then we can come back to our main agenda -- ah, sorry, Kavouss, I see your hand.

KAVOUSS ARASTEH: Yes. Good evening, good afternoon, good morning. I think you have lost a little bit of voice. Is it something, some sorts of influenza or cold or something? Your voice is not as it should have been normally? Everything is okay?

SUSAN PAYNE: Thank you. Indeed, yes, I have a chest infection. I thought I was better, but then I went on a business trip and came home and spent three days in bed. So I'm doing my best. Can you hear me? I will try to speak up?

KAVOUSS ARASTEH: Yes, I hear you very well. Thank you very much. I wish you a very quick recovery. Thank you.

SUSAN PAYNE: Thank you. Apologies if I do have to go on mute for a period, but I hope we can make some progress on the call. So just before we get to the substantive discussion on that bylaws section 4.3, I did think perhaps it would help for me to just briefly identify things that I think we have discussed, and where there was, I think, a good level of agreement on

some kind of principles relating to initiation that I think are not contentious.

I would love to sort of sense check that with you all and make sure that that that is indeed the case and to hear from anyone if they disagree. These are just not necessarily matters that need to be specifically addressed in the rules, although I think some of them do, but some of them maybe matters that we need to just flag in our report as advisory or recommendations that we would like to make to ICANN Org in any event.

I think the first of these is about the need for clarity for claimants and potential claimants who are considering an IRP. I think, based on the discussion that we've had, I think we had a good level of agreement that we all felt that claimants should be able to find the information that they need in a clearly identified section on the ICANN website, and that they shouldn't have to be searching around on third-party websites like ICDR, and trying to work out what applies to them and what doesn't.

So that things like the rules and the forms, they should be on the ICANN site, if possible, and this might be by links from that I can site, from a clearer page on the ICANN site to somewhere else, like ICDR. If it's by links, it ought to be to the specific place where the information can be found, not a general link to the ICDR website. If there's a fee to be paid, then it should be identified by name as the fee for the IRP.

Claimants shouldn't have to try and work out which of the appropriate fees on the schedule of the ICDR is the one that applies to them. Again, ideally on the ICANN site or a link on the ICANN site that takes you to

the specific place where you can find out what the fear is, if there is one. Then, I think we also discussed the fact that, relatively speaking, we have not really much in the way of rules relating to the initiation procedure in the supplementary procedures at the moment.

That may be fine, but if there is differentiation from the ICDR rules on initiation, and there are some we think, such as the timing of the fee payment, if that's the case, then it would be preferable to have a clear rule in the IRP supplementary rules that makes this clear. In fact that fee timing is hidden somewhere else, rather than being upfront.

Then a third one, which I think I'm writing saying is one that Sam had flagged is around language, just that language should be as clear as possible and the terminology should be uniform, or if there are differences in language use between the ICDR rules and the IRP supplementary procedures, then that should get picked up, at least in the definitions.

So, for example, we've got use of the term statement of claim in the ICDR rules and then we've got written statement of dispute in the supplementary procedures, and then we've got written submissions of argument in the ICDR form for initiating an IRP. It's not a big issue, but I think it is something that was flagged, and hopefully it's something that could be a matter that would get picked up at the cleanup at the end so that we've got this uniformity and clarity for participants in this procedure. Sorry. Kavouss.

KAVOUSS ARASTEH:

Yes, Susan, I may suggest something from my experience. With respect to the possible or eventual or potential difference between definition in ICDR or IRP, I suggest that we do not mix them up, but we indicate as I now explain. For instance, I give you an example. In the ITU, you have something which is called the unmanned aircraft. In ECO, it is remotely piloted aircraft, but we put as follows, we say unmanned aircraft known in ECO as remotely piloted aircraft.

So we can use the definition of ours in the IRP saying that known in ICDR as, so you keep both but not replace one with the other because they may be something that makes them up. This is a suggestion, it is subject to your -- I mean everybody, not yourself only, approval that not to modifying our definition and not modifying their definition, because both of them according to what we have worked out during, I don't know, several times, several months, two years. This is by the way, a suggestion, it is up to you to consider the use of that. Thank you.

SUSAN PAYNE:

Thank you, Kavouss. I think that's a really sensible and helpful suggestion. So hopefully, I'll ask Bernard, if maybe he can make a note of that, and that could be something that's considered when we have this cleanup at the end. So before then, we go on, as I said, I think that there was a good sense from our previous discussions on this, that those kinds of principles were ones that were agreed on, and that were not particularly contentious, but I just want to pause and see whether anyone does have any disagreement with that.

Okay, I'm seeing, thank you, David in the chat, saying he thinks that makes sense. I'm not seeing at the moment any disagreements? So I think that is very helpful. I am actually seeing a question. I think it is from Mike in the chat. So I'll read this out unless you want to ask it yourself, Mike.

MIKE RODENBAUGH: Sure, Susan. I remember that ICANN presented quite a long time ago that there was going to be a page put up about the IRP on the ICANN website. So it was just wondering, what has happened since then.

SAM EISNER: Susan, this is Sam. I can respond on that.

SUSAN PAYNE: Thanks, Sam.

SAM EISNER: Sure. Hi, everyone. This is Sam Eisner from ICANN Legal. So we're working on the page, we're working closely with our ITI team, as you guys know, we're kind of doing a big reimagining of icann.org to make it a lot more accessible and easy to use. Part of that goes to the architecture of the new pages that we're putting up.

So we're developing the page with our ITI team to make sure that we have it in the right format to move on to our new platform and having all the relevant information there. The links as you suggested, Susan,

we also think that's a really important thing to do. So that should be done, hopefully, fairly soon. It just got into our chat pipeline here.

SUSAN PAYNE: Thanks, Sam. Kavouss.

KAVOUSS ARASTEH: Yes, Susan, just another suggestion. Again, based on my experience. Whenever we have something in UN organizations, different entities, important and we will want to draw attention of the reader for the first, I would say, first month that look, there is some new web page, and this new web page because in my view, I may be wrong, IRP is one of the most important elements of the entire ICANN activities.

We could indicate that web page for some time with a flash that whenever people go to the ICANN website, and then they see a flash and they indicate the web page on IRP could be found, so on and so forth. Still, for some people that may not be quite familiar with the ICDR, may be newcomer and maybe need to have some not to set, because for me, sometimes such a lot of time.

Some of you are very familiar, but some other are not as familiar as you are. This is another thing for concentration, it doesn't cost anything, it's just is standard, I would say, a yellow flash you put on the website and underneath after saying that the IRP webpage is found, then indicate where you can start. Thank you

SUSAN PAYNE:

Okay, thanks, Kavouss. I would have to obviously defer to the ICANN Org team for whether that's a possibility, but that certainly seems like another good suggestion. So, maybe I'll ask Bernard to note that one as well, and I don't know if it can be done or not, but we can certainly bear that in mind just as a possibility. I think we'd all like there to be an easy way for people to see when this is finally done.

Okay. All right, then. So I think, excuse me. I think now, as I sent in my email last week, obviously, we've had a few kind of issues around the initiation of an IRP that have been discussed, and we had a slide deck with various sorts of questions, but really a lot of our discussion has really kept coming back to what is meant in the bylaws, in Bylaw 4.3 R by the administrative costs of maintaining the IRP mechanism.

I think, issues like whether there should be a fee paid by the claimant to initiate an IRP really stem from that. Brenda, if I could ask you to pull up that slide six from the slide deck. That's perfect. You'll see it, at the top of this I've got Section 4.3 R reproduced there together with a few other bylaws and other sections, but for the moment, we can look at 4.3 R.

Just to remind everyone, I think it's worth us reading this through again, because this is really quite fundamental to our discussion. So what 4.3 R says is that ICANN shall bear all the administrative costs of maintaining the IRP mechanism, including compensation for standing panel members, except as otherwise provided in 4.3 E2, which is regarding cost shifting in the case of the cooperative engagement process, just as an aside.

So except as otherwise provided in that section 4.3 E2, each party to an IRP proceeding shall bear its own legal expenses, except that ICANN shall all costs associated with the community IRP including the costs of all legal counsel and technical experts. Nevertheless, except with respect to the community IRP, the IRP panel may shift and provide for the losing party to pay administrative costs and/or fees of the prevailing party in the event it identifies the losing party's claim or defense as frivolous or abusive.

Apologies. So, as we know from section 4.3 R of the bylaws, each party is bearing their own legal expenses. We also know that the IRP panel can order a losing party to pay the successful party's administrative costs and/or fees. So as I understand, it is not there for their legal costs, but is other expenses incurred in the conduct of their case. It seems to me that that reference to administrative costs, I've thought about this a great deal, and I'm putting this out here as a suggestion, but this is really what we need to be discussing.

It seems to me that there must be those administrative costs referred to there, and that final paragraph must be different to the administrative costs of the IRP proceedings that ICANN bears exclusively. Because otherwise there wouldn't be a reference to the losing party's claim or defense. Because if they were the same administrative costs, they would always be related to ICANN and related to a defense or rather related to a losing party's claim. I think that is correct.

MALCOLM HUTTY:

So Susan, can you take us through what you just said again more slowly.

SUSAN PAYNE:

Yes, I will try. So, we know that ICANN bears all of the administrative costs of maintaining the IRP mechanism, but we also know in the last sentence that the IRP panel might may shift and provide that the losing party pays the administrative costs and/or fees of the prevailing party in the event that it identifies the losing party's claim or defense as frivolous or abusive.

Now, it seems to me that this must be talking about different administrative costs than I talked about in the first sentence, because the administrative costs of maintaining the IRP mechanism are always ICANN's costs. So if it was the same administrative costs, there would never be a shift in the case of a frivolous claim, because the claimant doesn't naturally bear those costs. I'm not making this very clear, am I?

I think what our discussion needs to focus on is what are the IRP costs of administering, rather of maintaining the IRP proceedings, and what does this cover? We know it covers the costs of the panelists, that increase the standing panelists, but it also includes the ICANN-- on one of our previous calls, ICANN Legal did confirm that they consider it to also cover the panelists costs generally, even without the existence of the standing panel.

Then it seems to me it covers administrative costs relating to the procedure as they apply in any case, rather than as they apply in a specific case. This is what I think we need to discuss and agree because one of the big questions is, is it appropriate for there to be a fee to initiate the proceedings, and it really boils down to what that fee is for

and whether it falls within the costs of maintaining the IRP mechanism. I can see lots of hands, which is great, because I really would like to stop talking. So, I will go down the queue. Sam.

SAM EISNER:

Thanks, Susan. So I was involved in the bylaws drafting during that transition time, and there might be other people on the call, I think Mike would have been there, and I think Greg was there, but he's not present today. When we were talking through the IRP section, we did a lot of work to try to align that the IRP section with the CCWGs recommendations. One thing that we didn't do was go through the ICDRs listing of administrative fees and assign what those were, we probably were a bit loose in using the term administrative fees.

This was a big effort to redo the whole of the bylaws, and we worked with outside counsel that were working on behalf of the CCWG as well as from ICANN, and we're really trying to get the concepts in here.

I think we might not have -- what we're learning now is we didn't use the precise language that was intended, but it's also hard to pull out the full intention of the CCWG, but I worry that we're getting into a place where we're interpreting the bylaws as opposed to identifying a concern that's here, that the language isn't as precise as it could be, and to focus on are there parts of this that should be, returned back to the community to discuss what it is that was actually meant, and maybe some principles we can put into the rules as they go through in the event that we do wind up changing the bylaws or not, but there's some

principles we can put in. I don't think that there's much intended by the difference between the language of the sections.

There is no record of what was intended to be in one place versus the other, because we weren't paying that specific attention collectively to some of these unique words as we were developing this entire new set of bylaws in a period of basically a month or two. So, I worry that we could go too deep into it as opposed to discussing the principles of what we think should be reflected in here.

SUSAN PAYNE:

Thanks, Sam. I might have some questions, but there are a number of people in the queue, so, Kavouss.

KAVOUSS ARASTEH:

Yes. For all claimant future potential climate, not all of them are so familiar with the situation. Therefore, we need at least to briefly describe a tentative cost or some set up tentative fee. Although fee and cost are not the same, but it is up to us to say that. You have to say that the tentative cost or tentative fee is understood to consist of, and we say, what is it?

You say for any case, but for a specific case, we have to spell it clearly out that the claimant, they know, well, what is the situation when they start the process? So, we should not leave it ambiguous saying that everybody is familiar. I was also involved in the preliminary discussion, but not the final discussion of this part of the bylaw.

I think still, we need to describe it clearly that what does it mean, and it consists of what, and be quite clear, if you can, but not saying that [00:26:53 - inaudible] includes and say something means that other things could be added, as specifically to see whether we can say that what are the different illustrative cost or tentative fee?

We say then, I heard something from you that I have not heard, you said in any case, but you said that, but not in a specific case. So, I wish to request, what do you mean by in any case or in all case, but not in a specific case? What are those a specific case, if possible? Thank you.

SUSAN PAYNE:

Thanks, Kavouss. Yes, I'll try to clarify that. Indeed, it is just a suggestion for discussion, but I'll go to the rest of the queue first. So, Mike.

MIKE RODENBAUGH:

Hi, Susan. Yes, it's Mike Rodenbaugh. I think the principle that we're discussing here, and I think it is definitely part of our job to discuss is to clarify what these terms mean, and with the fundamental principle that claimants should not have to pay a substantial fee to participate in this program. It seems very clear by the intention here, that ICANN was going to create a standing panel and pay all those fees, that claimants were not supposed to have to pay a huge fee, like \$7,500 than it is today for the two different fees that ICDR charges.

So that's the point I would make [00:28:29 - inaudible] creates a chilling effect on claims, it was certainly not intended by the bylaw revisions. At

most, there should be a fee something like a court fee that you would find anywhere in the world where like 4 or \$500, not \$7,500. Just one final point, I think in the last sentence there, administrative costs and/or fees of the prevailing party has been interpreted to also include legal fees. ICANN has been forced to pay affiliates legal fees in a recent IRP case based on this clause is my understanding. Again, it's only when someone has been found to do something frivolous or abusive. Thanks.

SUSAN PAYNE:

Thanks for that, Mike. I wasn't aware of that, so thanks for that clarification, because I think I may have misspoke there. Okay, Becky.

BECKY BURR:

Thanks. So first of all, I just want to say that when we were talking about this in the CCWG accountability provision here, we were specifically thinking about the cost of the panelists, which is very expensive to the payment for the panelists, and not a filing fee. I know that is what was in our heads.

So I don't think that the bylaws provisions perfectly reflect that obviously. I have a problem. I would be curious about once we have a fully formed standing panel, what the ICDR filing fee is, but I think we should take a moment to reflect that most of the disputes, not all of them, but most of them are clearly commercial, there're significant players with commercial interests at stake. So removing the small step given how much money has been spent on these \$7,500, it's really a small part of what's been spent in fencing these commercial agreements.

I personally am concerned that we should not remove the things that make people stop and think about whether they're going to actually file a lawsuit, which is what this would be in this case. So I wanted to provide a greater limit to further reduce the bar to accessibility for the community challenge, which is why that is in there, but I do not think that anybody ever intended to remove ordinary filing fees from the commercial complaints here.

SUSAN PAYNE: Thanks, okay. David.

DAVID MCAULEY: Thank you, Susan. Hi, everybody. David McAuley speaking for the record. I'll get to my point in just a minute, but having worked in the CCWG and accountability as well myself, my recollection is consistent with what Becky just stated, and I was very active on the IRP side. The point I wanted to make was is that there may be one other rule that we should look to, and that's rule 4.3 N, which talks about the rules of procedure being informed by an international arbitration norms.

I think it's clear from the first line of 4.3 R that ICANN's role here is to support the mechanism, not an individual claim. I think the existence of a filing fee is consistent with norms, is sensible for the reasons Becky just outlined, and I would submit -- I agree with Mike that whatever the filing fee is, it should not be a bar to legitimate claim making.

There is this existence of 4.3 Y, ICANN should do something to help people who cannot otherwise participate in an IRP. I think that allowing

ICDR to set whatever the filing fee is, is what we should expect. I don't think we can set it, I don't think we would know, and I think that the only thing that we should be concerned ourselves is that it not become a bar to legitimate claim making. Thank you.

SUSAN PAYNE: Thanks, David. Malcolm.

MALCOLM HUTTY: Thank you. I certainly would like to support David's comment that nothing here should be a bar to making a legitimate claim. I do note some points that Becky makes, where what she says precisely I agree with, but I think we need to be careful not to take it too far. In two points.

Firstly, she says that most of the people that bring IRP cases are substantial, well-funded commercial enterprises that are fully able to bear these sorts of costs. That is true as a matter of historical record, but the intent of these bylaws was to change the scope of who may appear under them from something that was essentially entirely geared towards those that were actively involved in ICANN process because it was previously essentially a claim of a procedural misstep, and now it is not, now it is opened up to anyone who has been impacted by this definition.

I'm not going to go back over the definition, but you know that it's much broader than that now, and is much more likely to include parties who are not contracted parties and not engaged. Therefore, that

considerably opens the scope that a legitimate claim might be held by someone who's not one of the commercial entities engaged in trying to get a gTLD assigned to them, which has been really where most of the cases have been in the past. So there's that.

I would also want to speak to what Becky said about the CCWGs, what the CCWG had discussed or envisaged. I agree with her that the only thing that was really discussed was the filing fees are panelists, but that's because the CCWG or much of it was not even aware that there were these other costs, that they were these other fees that were being imposed, or that could be imposed. So while I don't think it was-- I certainly would agree that it wasn't a common collective view of the CCWG that this clause should include the costs that the ICDR imposes for filing.

I would also say that it was not within the collective mind of the CCWG that it should exclude them. I don't think that would be fair to say at all. In fact, I'm thinking it was the main point of this clause was very much what David had alluded to, to make sure that nobody should be barred from bringing a legitimate claim, because they are not able to. I see that Sam is commenting in the chat about a violation to the bylaws and the definition of who gets in there. Honestly Sam, we both understand this.

If I'm slightly misspoken or haven't put that as clearly as possible in the words I spoke earlier, I'm sure we can get back on the same page. So I'm not meaning to expand it now. Nonetheless, there are parties that might be able to bring their case for the breach of the bylaws who are not the traditional parties that would have been in the past that they

might well become be more impecunious, and therefore at risk of being barred by meeting of cost.

This clause was in there to make sure that that didn't happen, and it needs to be read in that light, in that purposive lights, that the clear purpose here is to ensure that all legitimate claims can be brought, and if there are costs that are standing in the way, ICANN bears those costs. You bring your own case, but you pay your own lawyers, but ICANN bears the cost of have that being this arbitration process.

I also see Sam now commenting in the chat saying we do not have the ability to change the ICDRs filing fee. Actually, that's not correct. ICANN is perfectly capable of contracting with the ICDR so as to pay at a flat rate to hear any given number of cases, and indeed, it was very much my expectation when we were having this discussion on the CCWG that ICANN would indeed contract with some provider for the entire mechanism such that there wouldn't be a need for such things.

There's nothing in the record that certainly says that that was excluded by the CCWG's decisions. So I am going to have now spoken for too long, but just to say that I concur with the factual statements that Becky made, but I wouldn't take them any further. I don't think that they're dispositive. Thank you.

SUSAN PAYNE:

Thanks, Malcolm, and thanks to the others for their further thoughts on this. Again, thanks to those who did participate in in the CCWG's work and the drafting of the bylaws and so on. Obviously, it's helpful to hear what was intended, although I think everyone who talks about that

process talks about perhaps the speed with which it was being done, and the inability of that group to spend ages on the detail.

I think we're all seeing that in terms of some of the areas of things that are less clear than they might be or open a bit to interpretation. Again, just throwing this out there for further thought, but it does seem to me that that, yes, the panelists fees are the main consideration, and I think that is clear by the fact that they are specifically referred to in 4.3 R. So there's no doubt that that panelists fees certainly in the context of the anticipated standing panel, is very much covered by this.

Generally speaking, when one has a legal document, which talks about including something, that usually implies that that's not the only thing covered, it does say all of the costs of the administer, or rather all of the administrative costs of maintaining the IRP mechanism, and it identifies a specific item that is included in that, but that is not exhaustive clearly. I thought I should go back to, again, what I had been suggesting as the way that I was coming to view this as a possible way in which one could make the distinction.

Kavouss asked me what I meant by that. It seemed to me that that there are costs that are incurred that are costs of everyone's so or that are covered, You pay a fee to the ICDR for an IRP or indeed for any other arbitration, and that is, as I understand it, intended to cover things like the ICDR receiving the form and the fee and checking that the documents are in order before notifying the other parties and emailing out or posting out as required under the rules, and setting up the timings of processes along during the procedure, appointing the panelists in the sense of liaising with the panel to get them appointed

and communicating with them in a general sense in an administrative sense.

I am sure there are other aspects as well that aren't necessarily occurring to me now, but along the lines of regular communication, posting things to websites, publishing notices, and so on, that are not case specific, but happened in every case. That was what seemed to me to be costs of maintaining the IRP mechanism, because these are all matters that for every case, if ICANN had not outsourced to ICDR, then ICANN would do all of those things itself.

I'm not suggesting that ICANN shouldn't have outsourced to ICDR, we actually have another bylaws provision that talks specifically about ICANN contracting with a well-known arbitration provider. So it's expected that they would do that. These are all administrative matters that come pin every single case. What probably doesn't come up in every single case is things like, in some cases, there might be lots of documents in a different language that need translating, or there might be some kind of, I'm not sure, some kind of an expert required.

I'm not sure if that's even a feature in this, but there might be other matters, which might be full to be considered as administrative costs and/or fees of a party in the proceedings. They're not things that occur in every single case, and that is where I think there is some distinction. From that perspective, it seems to me that most of the filing fee probably covers those elements that ICANN would be doing themselves in maintaining the IRP mechanism if they had not outsourced to ICDR.

This is just one interpretation, and I would like to hear alternative views or whether others agree with me. I'm not trying to direct our discussion, I'm just putting out a possible interpretation for consideration. Okay, I'm seeing Mike, saying that that seems like a logical interpretation. I'm hearing silence from everyone else. I'm not sure that silence in this case means agreement. Malcolm.

MALCOLM HUTTY:

Yes. I will come in then with some agreements in that I certainly think that that last bit, I'm trying to keep up with the reasoning here, but that last bit that you said, what would it have been the case if I can have be doing it itself? That I think is a very useful analytical tool, as you say, without necessarily suggesting that there was-- without suggesting at all that there was anything wrong in ICANN having gone to or contracted, no, not contracted with the ICDR actually, it doesn't seem to have done so, but I had an arrangement with that.

Certainly, again, going back to what was said in the CCWG, there was never really any discussion in the CCWG, because it would actually look like this, there was the expectation that this would be an ICANN process. So I think some of the wording here has been written without the realization or expectation that it would be designed the way it's turned out to be, and based around the idea that the IRP was something that ICANN would be providing.

So, yes, certainly, to unlock the meaning of the words, imagine that ICANN was doing this itself and how things look then, and what would ICANN be permitted to charge to the claimant under those

circumstances, would then I think, very helpfully explain what burdens were intended for the claimant to bear out under any circumstances. Then the remainder of that, that which is not something that ICANN could adjust to the payments, I would suggest probably was assumed to be within the scope of administrative costs, as the CCWG had intended it to be read. So thank you.

SUSAN PAYNE:

Thanks, Malcolm. David.

DAVID MCAULEY:

Thanks, Susan. David McAuley speaking again for the record. So I raised my hand just because I did want to say silence was, at least in my case, not necessarily agreement. On the issue of translations or experts, it's possible that a claimant would consider documents that they got translated or consider input from an expert that they hired, and ultimately not use, and I don't think ICANN would have to pay for that, I don't know.

My thinking is that we might be making too much of this. To me, it's more of a simple issue that a filing fee is a typical fee that you see in a court case. I think it follows international norms for arbitration. I don't know what happened -- I do agree with the discussion that we didn't get down to this level of detail and CCWG, which may make it interesting to know what happened in the prior iterations of IRP whether they're filing fees, I don't know. Excuse me.

A reasonable filing fee, that's not a bar to legitimate claim making, I think we just ought to accept it and move on. In fact, I think even Mike agreed that a \$500 fee would be appropriate. I'm not saying that's appropriate. I'm saying, let the experts, people like ICDR decide what a filing fee is. I don't think we can do that ourselves. I think we're might be making too much of this. Thank you.

SUSAN PAYNE: Thanks, David. Kavouss.

KAVOUSS ARASTEH: Yes, I am hearing that ICANN may not contract with ICDR. What are the reasons? What are the motives? What was the justification that they look for some other entity, less costly? What are the reasons for that? It should be a choice, option for ICANN to contract or not to contract? Or is it so free for ICANN to decide, yes, I don't want to contact with ICDR, I am looking for another entity? What are the reasons and justifications for that? Thank you.

SUSAN PAYNE: Thanks, Kavouss. So Sam has her hand up, but it obviously wasn't to address that point, but she may be able to comment on that. I'm not sure that -- I don't think it's a question of looking for a different provider. It's more that we or at least the initiation group has been told that there is not a contract between ICANN and ICDR that they could look at, but Sam.

SAM EISNER:

Sure. So I think it's helpful to remember that the ICDR has been the arbitration forum for IRPs since the first IRP that that has been issued. So after the IRP was formed and put into the bylaws, and this was before my time at ICANN, but ICANN went out and talk to other arbitration providers and identified that ICDR was willing to have a set of arbitrations run according to supplementary procedures, and that was a big thing.

ICDR is also a non-profit entity, so ICDR runs at pretty low margins, it doesn't take percentages of a panelist fees, it doesn't run on that model, it gets funded through the filing fees that are initiated. In that way, having the ICDR as a nonprofit entity that works with us on this, it actually probably aligns well with our goals for having the IRPs and not looking at this as a way to put a lot of money into other people's pockets.

We're looking at the money that's used and entrusted to ICANN by the ICANN community. Then through the accountability process, the CCWG agreed even though we identified in the bylaws a process for ICANN finding a new entity to serve in that role, the role that the ICDR was serving that we agreed that the ICDR would maintain in that role and ICANN did not have to start a new tender process.

We always could, we haven't seen any issue with the ICDR's service to ICANN on this, and I'm not sure that we could get a better deal from other places. The ICDR does not require us to have a contract to do this, the ICDR has agreed to allow ICANN to leverage its international rules of arbitration and modify them with the bylaws and to administer the IRPs to that purpose and provide the same service to ICANN in the IRP

claimants that it does for any other arbitration that it has for the for the same feats that it has.

So it's not that we're unable to contract with the ICDR, to set a contract is not necessary for this work. The working together with the ICDR is demonstrated through having them have the ICANN forms and the supplementary procedures and all of that on their website.

I think a part of this, that there's a place to discuss is that, there were IRPs before the CCWG did their work and part of what was being reacted to was the cost of maintaining -- the cost for claimants to come into IRPs, and there was the cost of really -- what we were talking about there was the cost of legal fees, as well as the cost of the panelists fees, because panelists fees can be substantial, IRPs are substantial, lengthy processes in the way that they've been done before.

So one thing that we could do here that might bring some clarity to the conversation to what was being considered before and what types of fees were actually impacted, would be to look at some of the cost awards that happened in our pre-transition IRP to see if that brings any clarity to the conversation. So that's really what I raised my hand to address with this is to offer that from the ICANN side as a bit of research that we could do and share back with the team. Mike, I see your note that there were two IRPs before the bylaws were amended in 2012.

Well, we're really looking at a 2016 bylaws amendment, but in those, there were significant costs anticipated and awarded, and it was those costs that really drove the conversation about how the IRPs could be accessible. So if we look at the amount of the awards that were issued,

and the cost shifting that could have been contemplated there, it was significantly in excess of the current \$7,500 filing fee for the ICDR or for the IRAs today.

SUSAN PAYNE: Okay. Thanks, Sam. So I think you're saying that to your mind, there would be more than two examples, and you're offering to give us a a summary, if you like, of what some of the costs orders were before the rule changed. Is that right?

SAM EISNER: Yes, and even if there are just a couple examples, I think that that types of costs awarded would be helpful to understand.

SUSAN PAYNE: Okay. Well, thank you for that offer. If that is something that could be done for our next call, I think that would be super helpful. I think if it's something that is going to drag on, it may be that the discussion moves on, but I think it sounds as though that might be helpful, so thank you. Is that something that you could provide to us for the time for our next call?

SAM EISNER: Yes, I'll take that back to our team and get that coordinated.

SUSAN PAYNE: Thank you. All right. I have a couple of people in the queue again. So, Mike.

MIKE RODENBAUGH: Yes, just following on. The costs that Sam was talking about, okay, maybe there was three or four cases between 2012 and 2016 that you guys were looking out on the CCWG. I don't know, I wasn't there, but I do know those cases, and I know what happened in those cases. Generally, ICANN was ordered to pay the provider or the prevailing party was ordered to pay -- I'm sorry, the losing party was ordered to pay the standing panel fees. Those are what amounted to hundreds of thousands of dollars in each case.

So obviously, the bylaws were intended to change that by providing very clearly that standing panel fees were to be paid by ICANN not to be at risk for the claimant to pay those unless perhaps it's a frivolous or abusive case. So, this research, it's looking at five or six cases, it can't possibly take very long. I already have a spreadsheet with the information, I can circulate it.

SUSAN PAYNE: Well, thanks, Mike. If you do, and you'd like to circulate it, that'd be helpful. Maybe you want to send it to Sam and Liz, so that we don't have a disagreement between you both about what those cost orders were, but that certainly sounds like that might speed things up. It may be that it's not helpful to us, but it sounds as though it's something that we can have relatively easily and we might find it of use. Thank you. Kavouss?

KAVOUSS ARASTEH: A simple question, has there been a case that ICANN contracted another provider than ICDR up to now, or always has been ICDR? Thank you.

SUSAN PAYNE: Thanks, Kavouss. So my understanding from what Sam said was that it has always been ICDR, yet, and someone has put that in the chat. Mike has put that in the chat as well. I think that was Sam's point was that, ICANN looked for a provider when they first started to offer the IRP and concluded that ICDR was a good fit and that, they believed they continued to be a good fit. ICANN could seek a different provider at some time if they wanted to, but has not felt that they needed to do so, so far.

So I think it may be that we'll get some assistance from the breakdown of the cost before the CCWG made this change the rules. I do note what Mike said, that obviously the significant issue in those kind of cost orders was regarding the very high cost of the panelists and the fact that the losing party often was then expected to carry all of the costs of those panelists, which were a really significant amount.

And that ties in very well with what Becky said to us earlier about the CCWG being particularly concerned to safeguard claimants from having to bear the costs of the panelists. So that does align very well. I'm not entirely sure where we go from here. We have essentially two kinds of schools of thought.

I think one is that costs of maintaining the IRP mechanism would cover those administrative matters that relate to running the procedure and would be common to all cases. And that these would be much of what is covered by something like a filing fee. And we've had very clearly as well from others that there wasn't an intention to remove the filing fee that there is a need for something which serves as some kind of not a bar to entry, but some deterrent to the absolutely frivolous, I suppose is how you would put it.

And David has made the very good point that the bylaws do also talk about following the standards and norms of an IRP proceed of a commercial arbitration. And that consequently that is what the filing fee is. It is a standard just as a court fee is, it's standard in an arbitration to have some kind of a filing fee to off your case. And that we shouldn't be viewing this any differently. I will continue, but I see Kavouss' hands, so I'll come to you, Kavouss.

KAVOUSS ARASTEH:

I'm sorry. I just want to be ensured that we will describe clearly what we mean or what is meant by administrative costs or administrative fee. Thank you.

SUSAN PAYNE:

Thanks, Kavouss. I think we can probably, and again, I'm looking to all of us to help with this in particular those who have experience of things that have actually been ordered. But I think we may be able to come up with some examples to give some guidance to participants. I suspect it will be perhaps difficult to identify all possible administrative costs.

It's certainly helpful for us that we've understood on this course that when it refers to administrative costs and or fees that some panels have considered that to cover the actual legal fees of the party or of the parties. And so, that in itself is, I think a useful clarification.

And so, I think perhaps we identifying some examples of what would fall within that administrative costs or fees, would probably be quite useful for the parties to understand in the same way as we talked earlier about how it's important for a potential claimant to understand what potential costs they are opening themselves up to when they commence an IRP.

And this would be part of that because obviously if a claimant is unsuccessful and is held to have been frivolous or abusive, they could be paying ICANN's administrative costs or fees. And it seems clear that the intention wasn't for this to cover the cost of the panelist, for example, because that is as we've heard one of the reasonings for this change to the rules in the first place.

I don't know if we, I think possibly at the moment on this call, Mike may be the only attorney we have on here who has done significant IRP's. So I might be putting you on the spot a bit, Mike. But, generally speaking, when there are cost orders that you are aware of are specific items set out as to what falls within that administrative costs and fees?

MIKE RODENBAUGH:

Generally, what's the orders I've seen they will provide that ICANN should repay the filing fee and should pay all of the IRP panelist fees. I think there's one or two cases where ICANN was the benefit of such an order the claimant was ordered to pay those panelist fees. But I have

seen panels break out the two items between the ICDR fees and the ICDR panelists fees definitely.

SUSAN PAYNE:

Thank you. So as I said, I'm not quite sure how we take this forward. Obviously, we don't have everyone on this call. I wouldn't say that I don't feel we've got a consensus view on what falls within the administrative cost of maintaining the IRP mechanism. It is interesting to hear from Mike that the ICDR filing fee can be something which becomes part of a cost order at the end of the case.

And so maybe that is at least something even if the fee is something that a claimant may have to pay up front, there is scope if the panel considers that ICANN's defense was frivolous or abusive. They can order for that filing fee to be repaid. And so that is obviously, some good news for a claimant who has incurred a filing fee. I think perhaps what we need to do is we certainly need to try to address what Kavouss has been saying in terms of giving some examples of administrative costs and fees that are so that we can give that kind of a guidance for claimants.

And perhaps we will need to try to sort of, and unless people want to make some suggestions now, maybe we will need to try and do that over the email. I'm seeing again in the chat, Mike is saying he's heard no explanation from ICANN as to what they think the administrative costs are that they're required to pay. Given this is the administrative cost of maintaining the IRP mechanism. Liz is probably putting her hand up to respond to that. But I think perhaps that's a starting point of what

ICANN thinks those costs are and then perhaps amongst ourselves we can try to agree what that is. That's really what we are here to try and understand. And so I'm going to go to Liz and see, Liz.

LIZ LE:

Thanks Susan. This is Liz Le with ICANN org for the record. I don't think that characterization of ICANN not provide an explanation is accurate. We've had substantive discussions on this before and ICANN has definitely stated for the record that per the bylaws as stated that the administrative clause that ICANN should bear are the cause associated with maintaining the IRP mechanism. One which includes the standing panel.

We're not here to interpret what the bylaw says that is exactly what it says on its face. I think it's also not accurate to say that we've not paid any administrative costs for so many years when in fact, we have been paying the cost of the panelists and the absence of the standing panel. So I just wanted to note for the record that ICANN has been clear about this position of what is set forth under the bylaws itself. Thank you.

SUSAN PAYNE:

Before I go to Kavouss, I will just query that then Liz. So what you are saying or what I'm hearing you say is that ICANN is responsible as it says for the administrative costs of maintaining the IRP mechanism. And that in practice, those costs are the costs of the panelists and those costs alone. Is that what you are saying?

LIZ LE: So Susan, this again, this is Liz Le for the record. It's actually not an interpretation of in practice that the cost of the standing panelists is a cost of maintaining administrative class of maintaining the IRP mechanism as stated in the bylaws. Because we do not have a standing panel yet in place, ICANN has been paying costs for the panelists for current IRPs in the absence of a standing panel in place.

SUSAN PAYNE: I'll go to Kavouss and maybe come back with another question. Kavouss?

KAVOUSS ARASTEH: Thank you Susan. I think what I am interested or I wish to indicate is not only saying that what is the responsibility of ICANN, I would like to know what is the responsibility and duty of the claimant? We should not discourage potential claimant for starting to initiate claiming if they don't know really gross or model in general, what are the costs that they have to pay? Bylaw is not clear and I am sorry I don't take it as interpretation, I take it as clarification but not interpretation. It's not clear that, even we don't know that what is the address of cost and so on and so forth. So irrespective what is ICANN responsible, which is clear mentioned in the bylaw.

But the important point is the claimant. What is expected of the claimant to pay? At least in a general term without having a full explanation of everything at least saying that these are mainly the cost that they are expected to pay. There might be some other unforeseeable costs that maybe on a case by case, but currently, there

is no such a guidance for the potential claimant and we have to have that one clear. Thank you.

SUSAN PAYNE:

Thanks, Kavouss. Malcolm.

MALCOLM HUTTY:

Thank you. The same really, I agree. I share's Kavouss' thoughts like we're trying to work out what it is that the claimant must bear. And I think we do that through the light of the fact that this clause is intended to ensure that people aren't forced into paying things that they would prevent them from bringing otherwise legitimate claim. And they bear everything except the administrative costs.

And therefore, we need to understand what's in practice the administrative costs mean. And so we really need to investigate that. And I'm sorry if I'm being dumb in not following what the explanation this has given us, but I thought when you summarized it, Susan, that was how I heard what she said. I understood it to mean well we think that administration certainly means the panelist fees and if that's the case, we need to be clear about that, that that's ICANN for you.

But I would ask Liz to come back and say whether she agrees with this because I think it would be strange if that were the case. Because some of the talk that we've had in this group on this subject up to now, has been around the idea that, oh, well the mechanism is somehow distinct from bringing the case and that things that are unique to a particular case are not covered.

And that was basis for saying the filing fee isn't covered. But the panelist costs in a particular case, are no less specific to the case than the filing fee. You hire particular panelists, you identify and agree between the parties, particular panelists, and they have different fees according to which ones you pick. So they're clearly particular to the case.

And if ICANN think's that they are administrative costs, then what basis is there, what distinction, what limiting principle is there that says that the cost of sending out the forms and all this stuff that whatever it is that is covered by the filing fee is not an administrative cost. Because I think we need to understand the reasoning there and see whether it stands up to scrutiny because I fear it may not. Thank you.

SUSAN PAYNE:

Thanks, Malcolm. So Liz does have a hand up, which may be to come back on exactly that point. And, Liz, you probably are having the final word for today's call. So Liz, please.

LIZ LE:

Thanks, Susan. This is Liz Le with ICANN for the record. I do want to address Malcolm's point as well as the comment that Mike made in the chat. I think this it's a difficult discussion because the cost issues are part of an ongoing IRP and it currently being litigated. So in some ways a lot of the questions that are being asked are at issue right now, they're being asked by practitioners who are also advancing this argument in an IRP.

And ICANN has indicated its position in the IRP clearly, and I think this is also, something that ICANN has also communicated here. It's not an ICANN interpretation that would be responsible for paying the fees of the standing panel members as part of the administrative costs. That is not something we interpreted from the bylaws as what I previously said.

And I will say it again, is that's what is written in the bylaws that the mystery of cost of maintaining IRP mechanism includes a compensation of a standing panel member. There has been discussions in the past and it was raised that because there isn't a standing panel member, ICANN then agree to pay for the cost of the panelists while the work to comprise the standing panel is in place in continuing. And once that the standing panels in place, ICANN will bear the cost of paying for the standing panels as provided for under the bylaws. Thank you.

SUSAN PAYNE:

Thanks, Liz. So thanks for that explanation. I think that has helped all of us to understand why this has been difficult to get to the bottom of. I think we all have been struggling with understanding what ICANN's view is regarding what falls within the administrative cost of the proceedings and your explanation helps explain why perhaps this is such a difficult topic to discuss at the moment.

I'm not sure I need to give some thought to how much progress we can make I in light of that at the moment, but are you able -- do you have any sense of when there might be a decision from the panel that are considering that matter at the moment in the case that you mention. It

may be that we will get very helpful guidance very shortly, but I don't know if that's the case.

LIZ LE:

I am afraid I don't, but I would defer to Mike as he is representing the party in the case, that this is being litigated and so he might have a better idea of the schedule.

MIKE RODENBAUGH:

First of all, any position ICANN has taken in the superior court litigation that my clients have brought or in the IRP's that my clients have brought can be public. So there's no reason why that's not brought out to this group. And frankly, without getting too argumentative, I don't believe ICANNs answered this question about administrative costs of what they are. But as for schedule, there's not going to be a decision of either the IRP panel or the court final decision until at least next year. I mean middle to late next year.

SUSAN PAYNE:

Thanks for that, Mike. We won't be getting some helpful guidance in the very near future. We are close to end of time. Malcolm, I see your hands up, but I think that is an old one. I hope that's the case.

MALCOLM HUTTY:

No, that was a new hand done Francis, but maybe I it should come back at the next meeting then. Because I think this is critical if this is actually so okay because it's contentious and it's being litigated and we are

going to get at some point a resolution. Whatever we decide now may be overturned in the light of that decision and whichever way we go if we guess wrong and we have to think about how we are going to preempt that and how we're going to accommodate it. Thank you.

SUSAN PAYNE:

Indeed. And it may be, that's what I meant. I think when I said I need to give some thought to how we deal with that. But in the meantime, I think, we do have administrative costs and or fees that fall to which can be assigned from the prevailing party to the losing party. And I hope that some examples of what those are not something that cuts across whatever the litigation is.

I do think, if we can identify those over our email and come back to that and hopefully have sort of crowd source some examples by email in the next couple of weeks. I think that would be a good use of our time. So, let's try to do that and then we'll see whether we feel we can take this any further. Thanks all for your time. Keep an eye on your inboxes and we have another call in two weeks. We can stop the recording. Thanks, Brenda.

UNKNOWN SPEAKER:

Thanks, Susan.

[END OF TRANSCRIPTION]