BRENDA BREWER: Good day, everyone. This is Brenda speaking. Welcome to the IRP-IOT plenary call on December 6, 2022 at 18:00 UTC.

Today's meeting is recorded. Kindly state your name before speaking for the record. We do take attendance from Zoom participation. We have received apologies from David, Sam, and Liz. And with that, I will turn our meeting over to Susan. Thank you.

SUSAN PAYNE: Thank you so much. Great. Thanks very much. Thanks for being able to join. Although we are missing a few of our active participants, we do have a really pretty good turnout tonight. So thank you for making the time. I know it's getting to a sort of busy time of year. As always, we'll do a review of the agenda before we kick off.

First up is the agenda review and updates to Statements of Interest. Let's do that first. Does anyone have any updates to their Statement of Interest to notify people of? Okay. I'm not hearing any, so that's fine.

We'll then have a quick look at the action items. Our main topic of conversation is to try to make some forward progress on the discussion about responsibility for costs and particularly with reference to the filing fee, although discussion has been a bit more wide ranging than just that. Then I want to just save a few minutes towards the end to just touch on sort of next steps on some of our other outstanding items.

Then our next call, I don't have a time for that confirmed with Bernard and Brenda yet. But I think our next call is probably unlikely to be before

Christmas, looking at how the dates are falling. But I think we'll have to come back on the e-mail with details of the next call. I guess it's possible we could do one on about the 20th of December, which would be the week before Christmas. Before I wanted to fix that, it would be helpful to get an idea of who might be available. So I think we'll try and progress that over e-mail.

Okay. Circling back then to agenda item two, the action items. We had one sort of main action item which was for ICANN Legal. Sam had offered to provide some information on costs towards pre-transition, in case that would help assist us with our discussion on this. I think we're not sure how useful that information will be, but on the basis that it could assist them, Sam and Liz offered to do that. I don't have an update on that as yet. As I said, before we started the recording, Sam and Liz were not able to join today. They have noted that this action item is something that they're aware of and following up on but we don't have that yet. Kavouss?

KAVOUSS ARASTEH: Yes, Susan. I hope you are okay. It seems that the problem that you have has continued. We wish you a quick full recovery. I don't believe that any information for pre-transition would be efficient and useful, because the Bylaw that was worked two years dealing with this issue did not base itself to all situations or procedures before the transition. So I don't believe that rather than dispersing our mind would be helpful. I think we have a good discussion, good exchange of information with the e-mails that it was received or transmitted exchange between the colleagues. I think we have the Bylaw and I think we should base our

self on that one, and not go to the previous revision of Bylaw. Thank you.

SUSAN PAYNE: Thanks for that, Kavouss. I must say, as I've been reflecting on this and when I was working on looking at some of what assistance we had from the post-transition cases, it did occur to me that it may be of limited value. So that is something I will talk to Sam and Liz about. I think perhaps they will review the cases, and if they think there's something useful in there, they will do more work. But like you, I agree. Like you, I certainly don't want them to be doing a sort of substantive exercise if it's not going to prove valuable. So it was something that they offered, and on that basis, I'm happy for them to at least look at this. But it may be that it's not going to be particularly fruitful, and in which case, I'm sure they will come back to us and say that having reviewed or had a quick look at this, they don't think that there's anything of benefit there. But yeah, your comments are well noted, Kavouss. I agree. I think I think we've had some really useful and collaborative sort of exchanges by e-mail that really I'm sort of hoping we might be able to come close to some conclusions here without needing a great deal more sort of background on pre-transition cases.

Okay. All right. Apologies if I go on mute occasionally just for a few minutes. As Kavouss noted, I have still got a chest infection. So I am still coughing a little, I'm afraid.

Okay. So our agenda item three is to continue the discussion on the responsibility for costs and how costs and fees are shared between the

parties. As I said, I think we have had some really useful exchanges over the e-mail. I hope people have had an opportunity to keep on top of the e-mails. But if you'll bear with me, I will try to just briefly summarize the various inputs that we've had, and these were in response to my attempt to start pulling together examples of the types of sort of fees and costs that parties, but in particular, a claimant might incur and how the responsibility for these would get allocated to see if we can give that kind of guidance to a claimant or a potential claimant that we talked about on our last call. I think we all felt that there was some merit in Kavouss's suggestion that we ought to be able to give some clarity to potential claimants so that they do understand the kinds of costs that are going to fall to their responsibility. So I hope you have the time to see. I did circulate a first attempt at that.

If I just briefly summarize, what was interesting when I did that I found interesting and particularly useful, in fact, was that I went back to look at what help we could get from post-transition cases in terms of what costs awards there had been. It was actually a relatively simple task because, in fact, as far as I can see, there's only really one case, the .web case where it falls under the new Bylaws and has also reached a point where there has been a panel decision and assessments of costs and so on. So there was only really one case to look at. But they did find it actually quite helpful to do so. That .web decision helped on a couple of fronts.

Firstly, there was an assessment of when there might be a cost shift to a successful claimant. So where there might be a circumstance where the Bylaws 4.3(r) provision comes into play and by virtue of the losing party in the context of that case for the particular element that we're talking

about, the losing party was ICANN, and where there was an assessment by the panel of whether ICANN's defense was frivolous or abusive. There was only a portion of the claimant's case on which they were held to have been successful. So therefore, only a portion of the case where the panel had to consider whether the defense run by ICANN and the behavior of ICANN in its defense was frivolous and abusive, and off that, only really one element where in fact the panel did feel that that was the case. So there were a couple of elements where the panel looked at the proceedings and concluded that, notwithstanding that ICANN had lost it, its defense was not frivolous and abusive. It was a perfectly reasonable defense for them to have been advancing, then one element where it was considered that ICANN's sort of handling of the defense was frivolous and was abusive. So in relation to those particular costs for that particular element of the claim, there was therefore an award by the panel of the claimant's costs. In the context of that case, it's clear that what was actually being covered there was their legal costs.

This ties in with what Mike Rodenbaugh had flagged to us on our last call that Bylaws 4.3(r) has been interpreted by panels to where it talks about the shifting of fees and costs, it has been interpreted as covering the legal fees. Again, in the particular case, the panel felt that the actual amount of legal fees that the claimant was claiming to be responsible or to be relevant to this particular element of their case, they weren't persuaded that all of those fees that the claimant was seeking to claim were appropriate. So there was some discretion exercised by the panel so that they didn't award the full amount that the claimant was arguing related to this element of their claim, but they did award a substantial

amount of costs to be reimbursed by ICANN on the basis of this provision in 4.3(r).

Then the other element that was of particular interest relates to the administrative costs, if you like, of the proceedings. This related to the fact that although there were parts of the case where the claimant had been unsuccessful in their claim and parts of the case where the claimant had been successful. I didn't really see a discussion particularly about whether it mattered if the claimant was considered to be the overall successful party or not. But there was just a section of the decision that talked about the ICDR administrative and other costs. In particular, they had a figure from ICDR of what their administrative fees had been, and the fees and expenses of the panelists, and the fees and the expenses of the emergency panelist and the procedures officer. That was a total of a little over a million dollars. Then the ICDR had also told the panel that the claimant had paid in advance in relation to those costs their share of it, and the figure that that had been paid by the claimant was assessed to be $479,000 USD plus a few dollars. So the panel's comment is that in accordance with the general rules set out in Section 4.3(r) of the Bylaws, the claimant is entitled to be reimbursed by the respondent for the share of the non-party costs of the IRP that it is incurred in the amount of $479,000 plus a few dollars. There didn't seem to be any dispute over that.

Although it appeared that in the course of the case, the claimant had paid a proportion of certain of the costs for the IRP including some administrative elements and panelists fees and so on, they recovered that and there appeared to be no discussion that they were only recovering that because they were the successful party. It seemed to be

entirely due to the interpretation of the panel that 4.3(r) expects that effectively the administrative costs of the IRP proceedings are borne by ICANN.

I also included a link to the cost schedule just because I tried to work out what that $479,000 is related to. In the cost schedule that was submitted by the claimants, it's expressed that there are $473,000 are the costs of the panelist and ICDR, and the filing fee is $5750. When you add those two figures up, that comes to the figure that the successful claimant was being awarded.

So it seems to me that certainly based on the precedent of the .web case, there were costs that the claimant paid up front as a sort of a share of the costs of the proceedings including the filing fee. But then they recovered that the end of the proceedings from ICANN who were ordered to pay that back to them, and not expressed to be as a result of them being the successful party but just because that 4.3(r) provision in the Bylaws and the rules that reflect that the moment make that point that those costs fall to ICANN.

So as I say, I found that quite helpful. Sorry, I'm talking quite a lot. But I wanted to just briefly sort of summarize the reaction to that, which, again, I really appreciated those who were able to find the time on relatively short notice to feed in some thoughts on this. I'll just briefly summarize. I won't read all of the e-mails in depth because I think that's unnecessary. Hopefully, you've had the opportunity to do so. But if you haven't, you hopefully will have an opportunity afterwards to read those e-mails.

David McAuley's reaction or response to this was that he is of the belief that Bylaws 4.3(r) is the administrative cost of maintaining the IRP mechanism and doesn't feel that this includes the filing fee. But he made some comments about what he thinks a filing fee should be and he commented that the filing fee should conform to international arbitration norms and that's a provision in 4.3(n) of the Bylaws. There's a reference to that, and also that it shouldn't act as an unreasonable bout of filing a complaint. He also made some comments on some points that we discussed previously, including about the need for there being a really clear link to the ICDR fees on the website so that claimants can clearly find them. I think that's something that we all agreed as a sort of point of principle on our last call. As far as other costs were concerned, he was not persuaded that it was helpful for us to try and set out what costs fall to the claimant and what costs may fall elsewhere. He felt that it should be left to trust to the panel acting appropriately and in accordance, again, with their Bylaws obligations.

But David did comment that presumably the prevailing party could claim back, could argue before the panel that they should be able to recover their costs from the unsuccessful opponent and that unsuccessful opponent would obviously be in a position to challenge the amount of that. Now, we will come on to that because there was a bit of discussion on whether that's indeed the case. Certainly, Mike Silber in his reaction, he set out as more of a scale of certain types of parties perhaps ought to be able to recover their legal costs if they were successful, particularly if they were a non-commercial entity and that perhaps it wasn't so appropriate for other parties.

I know Flip is on this call, and so he may well want to weigh in. Flip is certainly of the view that not being able to recover your legal fees and other costs as a successful party as a matter of right is unfair and doesn't necessarily align with arbitration norms. But I think on that particular element, we do have the provision of the Bylaws that—I'll ask you, Brenda, if you can pull up the slide deck because it's on page six of the slide deck that we've been using. It's just extracts from the Bylaws and it's helpful to have it in front of us. I don't think that there's much disputes over the terminology in 4.3(r) where it talks about each party being responsible for bearing their own legal costs or own legal expenses it actually says, except that the IRP panel can shift and provide for the losing party to pay if the losing party's claim or defense is frivolous or abusive. So I do think—and hopefully we'll come on to discuss this if there's strong disagreement to this interpretation—but it does seem to me that the Bylaws provision 4.3(r) just simply doesn't allow for a general shifting of the costs from the losing party to the successful party. It's only a shifting if there is this frivolous or abusive element identified by the panel.

But going on, and again, Malcolm's on the call and may well want to weigh in. Malcolm's interjection was partly regarding that, presumably a prevailing party would make a claim from the other party to try and get their costs back and felt that that was a concept more appropriate to the court. Malcolm has pointed out to us the point of the IRP in terms of giving a claimant access to a mechanism to resolve disputes. There's no reference to there being a filing fee payable. He made the point that, in fact, similarly, there's no reference for the request for reconsideration or the ombuds process, which are all accountability mechanisms

intended to keep ICANN accountable, and that on that basis, there's nothing in the Bylaws that says that in order to have access to this accountability mechanism, you have to first pay a filing fee. Malcolm also argued that it's an artificial distinction to be thinking about the costs of the IRP mechanism as opposed to the costs of an individual IRP case. It's a sort of artificial construct that indeed panel fees which are quite clearly covered because they're referred to specifically in 4.3(r) as being costs that are borne by ICANN as part of the IRP mechanism. On any interpretation, those panel costs or panelist costs are costs of an individual dispute. So it's his argument and he referred us back to 4.3(a) in terms of how the IRP is defined as a separate process for independent third party review of disputes. That seeking to make a distinction between the so-called costs of the IRP mechanism or rather the administrative costs of an individual IRP is an artificial distinction and we shouldn't be going down that path.

As I said, Mike Silber's view was—again, Mike was more in favor of a filing fee as a sort of a means of avoiding a trivial or vexatious use of the process. But again, like David, he felt it shouldn't be so onerous as to prevent use of the process. He also reminded us that a needy applicant ought to be entitled to seek a waiver. He suggested from the IRP panel. I think that ties in to another Bylaws provision. Yes, it's 4.3(y) where ICANN should establish a means by which community nonprofit and other claimants who would otherwise be excluded from utilizing the IRP might meaningfully participate. I think he felt that if there's a needy applicant who otherwise would be unable to pursue an IRP because of the filing fee, then that's what section 4.3(y) ought to be addressing.

In terms of shifting of costs, Mike's view perhaps was more in terms of that most parties probably should be paying their own costs except where there's frivolous or abusive behavior, although he did draw a distinction with non-commercial claimants, which was an interesting proposal. As before, given how section 4.3(r) is defined, I don't think we have that flexibility. I think we are required to come up with rules within the scope of Section 4.3(r) of the Bylaws, and that doesn't allow for cost shifting except in the very limited circumstances of where there's abusive or frivolous behavior on the part of the other party. But yes, I think I've in a rather garbled fashion tried to summarize the main inputs from a number of members of this group.

I will pause in case—I know we don't have David with us, or Mike Silber. But if either Flip or Malcolm wanted to add anything, I will pause before I go on. Malcolm?

MALCOLM HUTTY: Thank you, Susan, for that great introduction. First, let me begin by issuing my best wishes again for your health, and my gratitude that you are willing to continue conducting this work despite the fact that you're clearly not in the best of health. So thank you for that.

I thought what the investigation that you did on the experience in the .web case was really important. As you know, when we've been discussing this, while we sort of latched on to this initial filing fee as being the thing that we could positively identify as being a cost that the claimant was being required to pay but that which certainly I consider to be an administrative cost at least, my concern was never really

principally about that filing fee. It was never principally about $5000. My main concern was always that the claimant was being required to sign up to the ICDR and accept terms that expose them potentially hugely. Now you have actually uncovered the real evidence of this in this case, this idea that there was $479,000 that a claimant was having to put up maybe half off or at least some major share of in advance and expose themselves legally to, and it was only at the end of the case that they got to claim that back. That's a hugely chilling effect. So it's really this sort of thing that I was getting at as being the consequences of the way that this has been organized despite the fact that it seemed to be clear under the uncontested in that .web case that those costs should never fall into the claimant at all. They should be always be picked up by ICANN.

So I think it's that there, also it's the claimants portion Mike Rodenbaugh said. That's much again for ICANN. Okay. Well, that just shows how incredibly expensive these things are and how really quite forbidding the prospect of those costs are likely to be to many claimants, even commercial claimants. Not necessarily big ones, but an organization like mine, which is a medium-sized entity but not a large entity, would definitely think twice about bringing an IRP case with the prospect of $400,000, nearly $500,000 being on the line even if there was an expectation of recovery at the end of it because you still got to put the money up front and who knows what might happen. So it's this that I think that really is the key issue here. And the $5000 upfront fee is really just the trigger to latch on, to raise this question of should any of this stuff be justified? Can any of this stuff be justified? Can any authority for doing that be found in the Bylaws at all?

Before I finish, I think it's a shame that's actually that Mike Silber isn't on the call to hear me say this next bit, because often he and I disagree on some things. But I actually thought that his reply to my message was very thoughtful, very reasonable. If we were approaching this de novo, I might well be persuaded by what Mike was suggesting as being a reasonable way of going about things. However, I agree with you, Susan, that I think that we are constrained by the Bylaws and that might lost sight of in trying to construct what he thought as being a fair and reasonable way of managing the various competing pressures but without regard to the fact that that decision had already been taken at an earlier stage by the CCWG and then the transition process. It could have been the case that a system would be constructed on the basis of the costs that go to the losing party. But in this case, it isn't. In this case, it was clearly stated that the costs of providing the IRP full to ICANN and your own costs stay with you, regardless of whether you win or lose, you don't get to claim your cost back even if you win, but you're not exposed to paying ICANN's costs even if you lose. I think that was a judgment that was made by the CCWG so as to ensure that claimants were not chilled by the prospect of costs. Because they're able to control their own costs, they're not able to control ICANN's cost. ICANN's cost the defense. And if they had been exposed to the risk of paying ICANN's costs if they lost, then even if they thought they had a fairly strong case, it might just be too big a risk to take. Whereas if you've got your own costs, it's like, "Well, I know how much I'm going to do. I can control my own costs and I can make sure that I'm never going to be exposed to more than a certain amount because I'll represent myself personally."

So that I think was the decision that the CCWG took, and I believe that we are bound to follow it. I don't think we have the right to set it aside. I think that what you have shown in the investigation of the .web case shows the grave importance of making sure that the intention that this honored by ensuring that those claimants are not forced to pay those costs that the Bylaws believe should fall to ICANN. Thank you.

SUSAN PAYNE: Thanks, Malcolm. Flip?

FLIP PETILLION: Thanks, Susan. Also we hope you're going to be better soon. Thanks a lot for the efforts and the time you spent on this. I saw the figures you've mentioned in the chat. The reality is a bit different. You're talking about much more money, frankly. But I don't think that's important now.

Almost two months ago, actually, we tried to approach this a bit differently. I was to sit together with Sam and Liz to discuss the issue of fees and the fees to initial case. I don't know why, but we never managed to sit together to have a call to prepare this. Because this brings me to the point I would like to make tonight is how do we want to proceed? How do we want to handle this? I don't think we are going to make any progress if we continue to discuss that during this call. I think we need some people to sit together and to come with some sort of a position paper that is prepared in an objective and independent way as possible with the necessary distance to the problem, to the issues, to the rules that are at stake here. I do not agree that we should

blindly follow the CCWG's position on the topic, frankly, if the CCWG is wrong because, for example, what it had proclaimed is in contradiction with higher standards which to apply in IRPs, then I think that the group that is preparing the next calls on this should point out that. If there is no rule that is in violation to higher rules, well, so be it. But I don't think that the exercise has been made, has been done. So I advocate that we have some Chinese volunteers to sit together and discuss this and then bring this to this group with a view to bringing it to the next step. But I think we need the full picture. Personally, I'm not convinced that we do have that full picture. So I'm not going to repeat myself. I think I said what I said. Thanks, Susan, and thanks, everybody.

SUSAN PAYNE: Thanks, Flip. Do you mind if I ask you just some question for clarification? I think what you're arguing is that rather than us drafting rules that are intended to give effect to what the Bylaws currently say, so section 4.3(r), that we should have a group sit down and consider whether 4.3(r) needs amendment. Because from your perspective, the lack of that loser pays element is not in line with arbitration norms and is unfair to a claimant. I'm just trying to understand if that's what you're saying or if I've misunderstood you.

FLIP PETILLION: No, your right. Actually, if that would be part of that open discussion within the group that would prepare the next step, then I think we should intellectually be ready to have that kind of discussion. It's going to be a debate. If that group comes to some sort of a resolution, the

better. If it does not, then it should come back to everybody and say these are the positions, this is the point that was the position by one or two, and this was the position by others. Now, the groups have to take it from here. I would not have that little group prepare, decide, and say, "This is the way to go on." No. I think the group would need to make that intellectual exercise.

I very much liked your draft, Susan, that you shared today, the Word document that you shared on the Google, where you started pointing out to the possible items we would actually need to discuss. I like it. That's what we need to do. But I don't think we've done the preparatory work that is needed to have a meaningful discussion on the topic.

SUSAN PAYNE: Thanks. Again, if you'll bear with me, Kavouss, I will just respond again, just briefly. I'm not unwilling to try to put together a small group and say that this how we started this process with a group of, albeit volunteers, and obviously that inevitably then involved, if you want to look at it this way, people on both sides of the argument. But there was a small group where we're attempting to discuss this issue and come back with a recommendation to the full working group, and they were unable to reach an agreement. Indeed, that's why we're now having this discussion in the full working group because they couldn't reach an agreement to make a proposal back to the full working group.

Mike is pointing out that indeed, yes, the whole group is actually not that big. Tonight actually is quite a busy call but we quite frequently are

sort of waiting to start the meeting until we have five people on the call to be able to have a quorum. I do have some reservations about us opening up the scope of the Bylaws just because there have been a number of areas where we've discussed our disagreement of some of our group with what the Bylaws may say on some elements of the IRP. But what we're tasked with here, I don't say that it isn't a task to be done by someone. I don't even say that we couldn't make a suggestion that we think this task should be done. But I don't believe it's in our remit to be to be spending our time trying to change the Bylaws as opposed to trying to put in place rules to give proper effect to what the Bylaws currently say, at least for now.

FLIP PETILLION: Just to avoid any misunderstanding, yes, that's indeed not my focus. What I think, Susan, is that the way that these meetings are taking place, they are usually preceded by very late communications by one another, and I don't think this the way to handle this discussions and to come to a resolution very important topics that are supposed to explain how the Bylaws and to what the CCWG meant to regulate should be implemented. So I really advocate another approach here. Really, if this is the way we are going to have these meetings on whatever topic, sorry, but for me, frankly, this is a waste of time. I want better preparations. I want to focus of topics. I want a position paper so that we clearly understand what we are going to debate, because otherwise, we will have as we've had over many, many meetings when and if they took place over the last two, three years. I'm very clear, I know it. But at least, I'm honest about my position.

SUSAN PAYNE: Okay. Thanks, Flip. Again, apologies, Kavouss. You've been bearing with me for a very long time. I appreciate your point. Certainly, it's on me frequently for not circulating, thinking and perhaps sort of suggested strawpersons and so on a bit earlier in advance of the calls, and I will endeavor to do better. But I feel like we probably on this call can't wrap things up because, as you say, we have been having quite a late discussion on this. But at the same time, I do think the kind of exchanges of the e-mails over the last couple of days have been really helpful. I can sort of see the glimmers of a path forward. So I'm keen to get people's thoughts on this, but I will, once we've heard from Kavouss, make a suggestion on what I might see as a path forward and see if I can get some initial reactions, but then give people an opportunity to really reflect on that and engage on that before we have our next call. I hope that will help. All right. I will stop talking now. Kavouss, thank you again for your patience.

KAVOUSS ARASTEH: Thank you, Susan. I think we have to divide the issue in two parts. First, what is the problem, and second, if we identify that there is a problem, then how to repair that? Two different things.

As an introductory part, I would say that the condition and circumstances under which the Accountability group or work stream drafted, prepared this is different from now, because now we have I would say a better analysis and better understanding. I'm relatively in favor of analysis of the case by experts, small group, but currently we

have four people who just comment on that—David, Malcolm, and Mark. Whether, first of all, all these four are ready to be the only or part of that reflection group or not, but I think it's warrant that we look in this situation and prepare a table putting the items, putting the understanding, and putting the Bylaw to see that whether we find some area that need further reflection.

Having said that, Susan, this is, in my view, one of the most top delicate and important issue that we have to deal with, much more important than the rule for or other, and so on, so forth. Because we should be very careful that what is in the Bylaw is implementable. We should be careful that everybody is treated fairly. We should be ensuring that not discouraging the claimant to submit a claim and not to making something that's not fair with the colleagues. I don't want to judge the potential arbitrator or panel members. I don't know yet who they will be and what are their capabilities, and so on, so forth, and how they are elected or selected, I don't know. I am a member of that group but they have some reservation in the way that is going on. I don't want to turn this group to the comment. But I think that in principle, I agree with a little group to find out what are the problems, what are the difficulties, and so on, so forth.

There are some nuance between various things. I have read the exchange of e-mail, believe me, more than two times. Mike and Flip, three times, and also Malcolm, David once. But I still have some difficulty to find the actual difficulties that we all agree. So we need to have that working paper or working document to discuss that, whether you limit the discussion to these four people or there are some other experts that you know that they could have some comments even

informally, so on, so forth. That is up to the meeting. I don't want to suggest something. But if you look into the Bylaw preparation in that Legal group, you'll see some other people. They might have some opinion, and so on, so forth. So that is the case. I don't want to repeat myself. In principle, I agree with the reflection group. Thank you.

SUSAN PAYNE: Thanks, Kavouss. Okay. Again, I'm not opposed to the idea of a small group. But I do feel that we've tried that once already and that that group struggled to come to an agreed path forward that they could bring back to this group. Admittedly, it was a very small group of people. But we're all of the view that there was a fairly fundamental issue and that it wasn't their place to be trying to decide it, it needed to be decided by the full group. So I'm hesitant about trying to go back down the idea of a small group path, but I think we have some very able people in this group and I am hopeful that we can come to a sort of a shared understanding of both what the problem is and what we think the solution would be by a combination of discussing it, and hopefully some real work between now and when our next call is by over the e-mail. As I said, we've had really great inputs in the last few days that I think has really taken things forward.

I think Malcolm probably summed up to refer to your comment, Kavouss, about you're unclear still what the difficulty or the problem is that we're trying to fix. I think Malcolm did sum that up quite well, in the sense of just his concern that comes out of the only precedent that we currently have, which is the .web case, where the claimant in that case expended a proportion of the sort of administrative costs of the

proceedings, including things like panel fees to the tune of $479,000. And yes, they got $479,000 we paid to them when they finally got to the end of the case and the panel made that award to them, citing 4.3(r) of the Bylaws. I think the point that Malcolm was making and I think it's difficult to argue with is that that is chilling or it must be chilling on many claimants. Even if you know you should get that money back from ICANN at the end of the proceedings, that's nearly half a million dollars that you're paying up for perhaps months or years before you get the money back.

So we started this discussion, really, talking about the filing fee. But I think really, the filing fee is a drop in the ocean. My proposal would be—and I will perhaps try and put a sort of straw person proposal that that will be, to some extent, based on the discussion that has been happening over the e-mail, including Mike's proposal—I think there is something to be said for having a filing fee, provided that it is set at a level that is not a part of proceedings but just as a sort of a slight hurdle to rule out the purely frivolous cases. If that fee is in the order of a few thousand dollars, and the claimant will get that back at the end of the case because it is part of the cost of the administration of the proceedings, that maybe isn't chilling and that probably is within, I would argue, the arbitration norms that is also referred to in the Bylaws. But what is chilling would be to expect the claimant to be paying much more substantial sums than that in the belief that they have to do so, because otherwise, their case won't be taken forward.

To refer back again to Mike's comment about he felt that we could take advantage of 4.3(y) of the Bylaws about this having a process by which a claimant who really cannot afford the filing fee, building in a process

whereby they can seek an exemption from it. Mike's proposal was that they would seek this exemption from the panel. I'd love some views on whether people have any views on how we might structure that if they think it's a good idea. I think it's challenging to have it dealt with by the panel just because, as with all of this stuff, we don't have a panel at the time when you're needing to pay the filing fee. As the rules currently are stated, you haven't validly commenced your IRP until you pay the fee. So we would need to build something into the rules to cover that. And it might be that that's something that gets referred to an individual panelist for a quick decision before the case goes forward and then the claimant has a period of time. If they get turned down, they've got a period of time to find the filing fee and complete their claim. But I think that would be a path forward.

Then much of Mike's proposal regarding the sharing of fees, I think when you actually drill down in his proposal, they were to the effect of that the claimants are bearing their own costs, accepting his proposal that there should be some different scenario for a non-commercial participant. I don't think we have the scope to do that. But that aside, as Mike's suggestion covered the idea that mostly the parties are paying their own costs, if there's frivolous or vexatious or abusive behavior, then there's that element of cost shifting possible. I think we could build something based on that. But I think we need to build something that reflects the fact that there isn't the sharing of the very heavy administrative and panelist fees up front that currently appears to exist. Kavouss?

KAVOUSS ARASTEH: Maybe I was not clear or I was misunderstood. So don't take it so stringent that small group. It seems to me that you're more or less in agreement with what Malcolm said. Does everyone else following that in this group? That is what I said we have to discuss. Prepare the table and provide differences between views and some solutions, like solution proposed by Mike and others. If you are not in favor of having a small group, at least the issue needs to be discussed in a more practical way, in a tabular form, and to see what are the ways and means how to come to an agreement. If there is a need to have a rule, not necessarily to change the Bylaw, we try to do that one. For the time being, I don't think that all members of this group, they have agreed on a proper course of action. Am I mistaken? Do we have all agreed with the course of action that's proposed, for instance, by Malcolm?

SUSAN PAYNE: No. I'm not suggesting that at all. What I was trying to suggest was a possible path forward that somewhat builds partially on what Malcolm has proposed, but partially on what was coming from others including Mike and David and less so Flip. I'm afraid, Flip, just because of where Flip was focusing more of his attention. But I think Malcolm would argue quite strongly that there should be no filing fee, for example. My suggestion for consideration by this group is that at least there's an upfront matter, there is some merit to having a filing fee but recognizing that at the end of the case, that is something that does constitute administrative costs of the mechanism and would be recoverable. But I wasn't suggesting that we remove altogether the upfront filing fee, although I believe that would be Malcolm's position on this matter. I think that position isn't shared by everyone. Certainly there are others

who feel quite strongly that there's a benefit and a merit to having a filing fee. Malcolm? Malcolm, I'm not hearing you at the moment.

MALCOLM HUTTY: I'm sorry. Big pardon. Hardware switch. Thank you. You characterize my position very fairly. Honestly, I'm kind of inclined, really. I think that you're right in an important sense. I agree. I think that having a filing fee has a lot of attractions, a lot of benefits to it in terms of dissuading the frivolous and ensuring that there is some—I mean, we're not just talking about random members of the public here that put in frivolous claims. We're also talking about companies that think, "What the hell? There's no harm in this. Let's give it a go even if there's no real prospect of success." Because even commercial outfits of substance can do that sort of thing when there's no downside. A filing fee I think would help to deal with that problem.

So if we were considering this matter de novo, I must say I might well lean towards that. But we're not considering a de novo, and there are arguments to the contrary, and they have been considered, and a decision was made. The arguments to contrary are that if you're relying on paying a fee to ensure solemnity and to avoid frivolity, you are privileging those who have plenty of resources who might not be dissuaded by $5000 even if it was fairly frivolous. Certainly, a case that was vexatious by claimants that was just really worked up and very angry at ICANN that had no merit at all but they wished to make themselves difficult because they just had lost patience or confidence or so forth in ICANN. If they have plenty of money, they might be prepared to pay $5000 just to do that. Whereas on the other hand, there are

people from not only organizations that are impecunious but also thinking about the developing world, people that are in not such a privileged position who would be disproportionately harmed by such a thing.

Now, if it would just be entirely on my own with nothing that binds me, I might lean towards some balance, "Yeah, let's have it." But the CCWG was an important process. It was a process by which ICANN reached out to the entire global community and sought support for a settled approach that would be fair to everyone that would ensure that ICANN will remain accountable to the whole world. And there were issues that came up in there that were very much the perspective of not people like me, people who are paid by relatively wealthy organizations from wealthy countries that were actually thinking of a very different perspective, and making sure that ICANN's fundamental accountability processes weren't conditioned upon money weighed with the CCWG. That's worthy of respect.

Is there a way of squaring this? Maybe. What if this weren't a filing fee? What if, instead, it were a panel setup fee? At that point, you filed and you've got your case established as being there is a complaint here, and the adjudication of—what do we call it? The procedures officer or whatever. I forget what we're calling it. That person had been appointed. Then you're asked to pay a $5000 fee for the case to go forward. But that if you are an impecunious party with a case that is clearly not frivolous, you could apply to that procedures officer to have that waived. Would that be your way of squaring this in a way that at least gave—I still worry that that might not be formally consistent with what is written. But maybe it would be in keeping with the spirit of what

is written in a way that we could compromise upon. I mean, I don't know. But maybe we should go away and think about such things.

I regret that we spent so much time on this call talking about process. But it is fair to say that we often are only motivated to come back to these issues immediately before meeting. And then people think, "I haven't had time to review these comments." So maybe we should finish early today, allow people to go away and think about the points that have been raised on the list and discuss them perhaps with a proposal. And maybe the comments I've given Susan would give you some ideas for developing such a proposal. I don't know. If so, I hope they were helpful. Thank you for your patience.

SUSAN PAYNE: No need to thank me for my patience. I think that was incredibly useful. Thank you for that. I really appreciate the attempt to think outside the box a little and is there another way we could do this. Like you, I wonder if that would work and does that just push a bit further down the line, the point at which a claimant may find that they just can't go forward with their case because they can't afford it? But perhaps it's certainly worth thinking about. I certainly will ponder on it and I hope others will do the same.

I agree. I think we actually only have 15 minutes left. What I would like to do just before we come on to the next item is—Brenda, would you be able to pull up the Google Doc that was linked in my e-mail? If you look at the chain of e-mails with Flip and Malcolm and so on, right at the

start of that, I circulated a link to a Google Doc. Are you able to pull that up into the Zoom Room, do you think?

BRENDA BREWER: Yes, give me just a moment, please.

SUSAN PAYNE: Thank you.

BRENDA BREWER: You're welcome. Okay. I'm looking in your e-mail and I haven't come across it yet. It's the e-mail to Malcolm, David, Mike, Flip, or to me?

SUSAN PAYNE: I'll put it in the chat if I can find it. Here. I'm putting it in the chat now.

BRENDA BREWER: I am opening it. I'm sharing it. I'll make it fit. One second.

SUSAN PAYNE: That's perfect. I just wanted to pull this up. Again, you may not all have had time to look at this. Just to circle back to your desire, Kavouss, for us to try and address this in a tabular way, this was my attempt to do so in identifying the various different costs and where they fall that a party might incur. This may not be quite what you were intending and that you were talking about today, but I was hoping that this was a way that we could try to capture the different costs that we're talking about and

who picks up the bill for them. I think you mentioned, Kavouss, also having a reference to the relevant section of the Bylaws and what the justification is. And that maybe I will come back myself and have a look at this and see if there's a way for that to be done, although I think largely all of these costs fall within the scope of 4.3(r).

But I just wanted to, again, remind people that I think for all that, I don't think everyone thinks that necessarily we need to try and break down all of the costs of an IRP proceeding. I do know that others feel that being able to give a claimant a bit of a better understanding of what costs they're going to commit themselves to is helpful. And indeed, when we're having this conversation ourselves, it's helpful for us ourselves to be understanding what we're talking about. This document is an attempt to capture that. I've given you all suggesting powers so that you can put in edits in a way that show up as input so that we can see where people are making proposals and suggestions. I really would appreciate it.

If anyone has anything to add to this in terms of costs that haven't occurred to me and that we need to be bearing in mind as part of this discussion, then that would be really helpful between now and our next call. I'll obviously need to give myself a cut-off date as well and work towards it. But I think bearing in mind the comments about not having an opportunity to properly think about the input in advance of a call, I think we'll also set a cut-off date for input. So that when we come on to our next call, people have had a few days to really think about what's been suggested and they're not coming to it without having had an opportunity to look at it and consider it. Kavouss?

KAVOUSS ARASTEH: First of all, you may be very optimistic that you have something ready for our next call. I don't exclude that but I think if not, for the next to the next call. Second point, I think it would be helpful if secretariat or ICANN staff look at the notes or transcription from two or three sessions that they discuss this very particular part of the Bylaw to see what were the discussion and argument. That may be helpful if staff could take note of that and bring us something, or at least to yourself, it would help you to see what are the elements, because I don't think that these things coming out of the blue. There was some discussions and so on, so forth, some pros and cons, and some of us were in that issue. If it is possible, that would help. I don't know whether the staff would do that or not. Thank you.

SUSAN PAYNE: Thanks, Kavouss. Could I clarify, are you talking about our discussion in this IOT or are you referring to some previous discussion, for example, in the CCWG? I just want to be clear I understand.

KAVOUSS ARASTEH: CCWG, Susan. CCWG but not an hour. Thank you.

SUSAN PAYNE: Okay. Well, I will take that offline with Malcolm and see if that's something that is possible. Not Malcolm, sorry. Bernard. Although Malcolm, if you wanted to do this, that would be fine. But I didn't mean to give you a task there, Malcolm. Sorry.

All right. Then the other point I wanted to just quickly cover before we wrap up was just I'm conscious that we had a session where we looked at a list of outstanding items and had some discussion on whether we should take any of them forward. The suggestion was made that perhaps this was something that was appropriate for a small group who could take that list, review it together and identify which, if any, of those items actually need to be dealt with. Bearing in mind that perhaps we don't want to be making perfection the enemy of the good in terms of getting these rules finished and out for review by the community and hopefully finalized. Please keep an eye out for that. I will be looking for people to volunteer to be in that small effort to just take offline the review of what else we need to deal with, if anything, or whether once we've wrapped up on the items that are still under discussion, including this initiation and wrapping up the discussion that we had on consolidation in a small group, whether we could look at ourselves as being done. That's all I wanted to say. Just keep an eye out. Please volunteer if you feel you can assist on that. Because it would be very helpful to just have that small group effort to work out if there's anything else we need to address.

In terms of the next call, I think we will take that to the list but my suspicion is that many people will have wrapped up their activities by the 20th of December and that we may be better to be reconvening in the new year, having then allowed ourselves a period of time to work offline between now and our next call to be really making some good progress on this.

Okay. I will pause briefly and see if there are any other hands before we wrap this up. Okay. I'm not seeing anyone. So I will call it a day for

today. Keep an eye on the mailing list. Thanks, everyone, for joining, for the really helpful input. I do think we can find a path forward here. I really do. Hopefully we can have a strawperson to think about. Thanks very much.

[END OF TRANSCRIPTION]