DEVAN REED: Good day all. Welcome to the IRP-IOT call #99 on 10 January 2023 at 18:00 UTC.

This call is recorded. Please state your name for the record when speaking and kindly have your phones and microphones on mute when not speaking. Attendance is taken from Zoom participation. Turning the meeting over to Susan Payne. Thank you.

SUSAN PAYNE: Lovely. Thanks very much, Devan. Thanks all for joining us. Devan said this is our IRP-IOT regular call. It's our first call for 2023. Thanks. We do look to have a really good turnout on today's call so that's excellent, and hopefully we are on the homeward stretch on getting our rules to a place where we can take them forward.

So without wasting any more time, first up, we'll have a review of the agenda and come on to do updates to Statements of Interest in a minute. We've got a couple of action items. One is on there, which was an action item for Sam relating to costs from pre-transition IRPs. There's another which isn't on the agenda, which Bernard had an action item to look back at some of the CCWG discussions, so he'll give us an update on that as well. Then agenda item three is for us to discuss the strawman proposal on taking forward what I hope is a compromise on initiation. Then we'll need to just allow a bit of time at the end to agree on our next call.

So moving back up to agenda item one and updates to Statements of Interest, if there are any, from anyone in the group, anything that needs to be flagged. All right, I am not seeing any hands and not hearing anyone. So I will take that as dealt with. As ever, just a reminder that if there are changes to your role or some of your responsibilities, we need to keep our Statements of Interest updated. Kavouss, I see your hand. I don't hear you. I wonder if you're on mute.

KAVOUSS ARASTEH: Yes, I said good afternoon, good morning, good evening to you and to everybody. Happy new year to all of you, your beloved surrounding entourage friends, and so on, so forth. I have no problem with the agenda item relating to 2a, provided that is just for information. We don't want to base ourselves if we don't agree on something before the transition. We are after the transition. We are ready to look at what has happened but it does not necessarily mean that we have to base ourselves on that one. Thank you.

SUSAN PAYNE: Thanks, Kavouss, for making that point. Actually, that was something I was going to come on to. I don't think we have Sam on this call. I may be wrong, but I know we have Liz here. As you mentioned, I think on our previous call, we did have some discussion then and that point was made, that we are in a new environment with new Bylaws. So it may be that there could be something useful in the pre-transition cases but there may not be given the change in the Bylaws. I don't know if Liz is in a position to comment on this. But depending on the status of this

work, it may be something that if work is not already underway, then perhaps it may not be such a priority given those comments. But, Liz, over to you.

LIZ LE: Thanks, Susan. I do want to give a quick update on the status of the work, and apologies for the delay. It's been a busy time around here for us and then also with the holiday shutdown. The work is underway. We should probably be able to get something to the group before the next meeting on this data which is also already publicly available, but it's just a matter of compiling it and putting it in a user-friendly, digestible format. So we'll be able to circulate something before the next meeting.

SUSAN PAYNE: Great. Thanks very much for that, Liz. In which case, then we'll look forward to seeing that and using it as it seems most appropriate when we have that. Thank you.

All right. So our second agenda item was, as I mentioned, Bernard had agreed that he would review the CCWG discussions to see if there was anything helpful in there, and particularly to see if there's anything that goes kind of further than what we've seen in the CCWG final report where there are some references to cost items and initiation items. So I'll turn this over to Bernard, if that's all right.

BERNARD TURCOTTE: Thank you, Susan. I'm going to keep this short and really apart from the rules that made it into the Bylaws. Every time those rules on costs were

discussed by the IRP group in Work Stream 1 or in the plenary on Work Stream 1, there was always a mention that yes, there would be an initiation fee. I could not find any detailed discussion on this. No one seemed to argue with that and it was generally considered an implementation detail which would be worked on in Work Stream 2 and this IRP-IOT group.

So I did go through all the plenary discussions on the IRP work group in Work Stream 1. Basically, this is what comes out of it. I went through all the comments that were provided on the second draft of the IRP rules. Again, the results were the same. Back to you, Susan.

SUSAN PAYNE: Lovely. Thanks, Bernard, for doing that exercise. That's really helpful to know that there was obviously some discussion on these topics and we've seen that from the final report but not, as you say, into the level of detail that we're now discussing. Okay. Unless anyone has any questions or comments on any of that, I think we can move on to item three. I'll just pause briefly. But otherwise—okay. I think then, in which case, we can move on to item three.

Devan, I think you've got the strawperson proposal. So hopefully, you'll be able to pull that up into our Zoom window for us. Thank you. Thanks, first of all, to Flip for adding in some references to that new Namecheap decision that came that was published just in the last few days. So for those who hadn't seen Flip's additions, he included a couple of references particularly in the rationales for some of these proposals where there are a few cases where we have some precedent for a

particular stance coming from the .WEB plus IRP. Flip updated that to add that actually this subsequent Namecheap decision also supports that rationale as well. So thanks for that.

Really, I wanted to take an opportunity here to go through this strawperson proposal and to get feedback and generally to see whether we can coalesce around this as a path forward. Just as a reminder—and that's mentioned at the top of the proposal—items one to three were ones that we agreed on a previous call and that there's very high level summary but relate to things like a desire for clarity and availability of information for potential IRP parties, uniformity of language and using definitions for that purpose, and that if there's a significant departure to the ICDR process, that we would set that out in some clear rules on initiation in our supplementary procedures so that there is some clarity, and particularly that we'd have a very short initiation section of our rules, rather than I think what we currently have, which is there's some mention about the timing of filing a fee but it's somewhat hidden in Rule 4.

So, paragraph four onwards, really, then are the ones that I'm hoping we can focus on as these are sort of built on basically the discussions we've had on our recent calls. And also the exchanges over e-mail, in particular the ones prior to our last call, where there was I think a really helpful series of exchanges. This then is my effort to kind of find a compromise. I know we have views at the two ends of the extreme, if you like, within this group. Undoubtedly, this won't be what everyone thinks is the right path forward or the preferred path forward. But I am hoping that this is something that ideally all or at least the majority of us can support and take forward as a kind of compromised position.

So with that in mind, I think since there hasn't really been feedback as such on the mailing list yet, I think it is worth just quickly running through in this call and going through items four to six in turn. It's not particularly long so I will just do that. I'll start with the filing fee element, paragraph four, and then pause before we go on to the subsequent paragraphs five and six, if that's okay with everyone. I won't necessarily read this word for word, but I will do my best to capture all the salient points, if I am paraphrasing at all.

The first bullet on paragraph four, filing fee. A claimant should pay a filing fee. The filing fee should be a first gate to limit trivial or vexatious use of the process but not so onerous as to prevent use of the process. The rationale that I had for supporting that is essentially Bylaws 4.3 and subsection i which speak to the IRP rules conforming with international arbitral norms and applying fairly to all the parties. A filing fee is really quite a norm in arbitration proceedings. And indeed, in judicial proceedings, there's usually some kind of an application fee or filing fee. But clearly, with the purposes of the IRP in mind, this should be set at a level so that it doesn't serve as a barrier to justice.

Mike, sorry, I see your hand. Would you like me to go through to the end of the filing fee section, or should I pause now?

MIKE RODENBAUGH: It's up to you, of course, Susan. You are the chair. I just have a comment and want to have a brief discussion about the proper amount of the filing fee.

SUSAN PAYNE: Thanks, Mike. In which case, why don't I just get through to the end of it? But I will bear that in mind. I don't think this will take very long.

So the second bullet, ICANN should review the filing fee. That's intended to mean the level of the filing fee, if that wasn't clear, like the amount of the filing fee against other sort of similar types of actions and, if appropriate, revise the fee. And again, if appropriate, cover the balance of the upfront payment that ICDR consider to be necessary itself rather than if a review of the filing fee against comparable actions suggests that the current fee is too high. Again, this I think, in terms of the rationale, aligns with what was said previously and with the spirit of the Bylaws 4.3(r), which is that ICANN should be bearing the administrative costs of maintaining the IRP mechanism.

Then bullet three, regarding deserving or needy applicants, they should be entitled to seek a waiver of the fee. My proposal is that rather than us trying to develop some complex rules to deal with such a waiver in this particular context, that this should be addressed via the process that's already envisaged in Bylaws 4.3(y), which is about establishing a means for participation for not-for-profits, etc. That 4.3(y) process obviously would be expected to go further than simply the filing fee, which is obviously not the most significant element of cost in this proceeding. But that seems to me to be the best way to address that. And the rationale for that really was just that we could craft rules to specifically deal with an exemption process for the filing fee. But this seems as though it could be additional complexity and potentially maybe relatively infrequently used. We already, as I said, have this Bylaws expectation that there should be a mechanism for participation

for those who can't otherwise afford to participate in an IRP, and so this could be used to address the filing fee element as well.

Also, when we've been talking about Rule 4 and the safety valve, we've already developed a process for late filing of an IRP. So that if there were a situation where in the process of seeking an exemption from the filing fee as a result of that, a claimant was arguably out of time for bringing their IRP or for bringing a valid IRP because they haven't paid the fee, then we already have that process that we built for situations to cover sort of unusual situations where a claimant is out of time. It seems to me that that Rule 4 safety valve could readily apply here.

Then again, I'm seeing Kavouss's hand. I will come back to my queue really shortly, but I think we have just one more bullet which is that generally a claimant will be reimbursed for the filing fee by ICANN at the conclusion of the case. However, if the panel determines that the claim that was brought by the claimant was frivolous or abusive, it does have discretion to shift this cost. In that case, the claimant would be held responsible for the filing fee and ICANN wouldn't be ordered to reimburse them. The rationale for that is that reimbursement of this filing fee aligns with Bylaws 4.3(r), which talks about ICANN bearing all the administrative costs of maintaining the IRP mechanism. There's a precedent for that interpretation in the .WEB and the Namecheap cases. However, also in line with 4.3(r) of the Bylaws, a claimant whose case is frivolous or abusive might have ICANN administrative costs and/or fees shifted to them. So that could include this responsibility for the filing fee.

Okay, I will pause there. That's us at the end of Section 4 on the filing fee. I'm not keeping up with the chat at the moment. But I will turn to Mike, who's had his hand up very patiently for a while, and then after him we'll come to Kavouss.

MIKE RODENBAUGH: Thank you, Susan. Yes, I just wanted to make the point that the Bylaws say very clearly that the IRP is supposed to be an alternative to legal action in the civil courts of the U.S. or elsewhere. Therefore, I think logically, as a matter of infallible logic, in fact, it ought not cost materially more to file an IRP than it costs to file a judicial action. So we shouldn't just cite to this section of the Bylaws and essentially say that in our recommendations unless it has any logic to argue that it should cost more. Thanks.

SUSAN PAYNE: Thanks for that, Mike. That's a really helpful addition. I personally don't know what it costs to bring a proceeding in court. And indeed, I don't think I need to know. But I think that's really a useful reference as the other area of precedent to be looked at when establishing what is an appropriate level. Mike is saying in the chat that it's about $500 in the U.S. So I guess that's one for this group to consider then, whether there's an agreement on that which certainly does reflect a reduction in what we're seeing as the filing fee at the moment. I will leave you all to ponder on that and turn to Kavouss.

KAVOUSS ARASTEH: Excuse me. Have you given me the floor?

SUSAN PAYNE: Sorry. Yes, I have. Thank you.

KAVOUSS ARASTEH: Thank you very much. I'm waiting not to break the rules. I have no problem for the time being. But I request that either you go to the entire paragraph or I suggest, if it doesn't have any problem for you, on each bullet, you can't just stop and see whether there is any comment on that in order to save the time, not at the end we come back and forth between various bullets. This is a normal standard way, subject to your agreement, chairing this meeting. So either after the entire paragraph or you call on us for any comment. Or I suggest that after each bullet, you ask whether there is any comment. Then if there is no comment, then so on, so forth.

With respect to what Mike mentioned, I'm sorry, I did not clearly grasp what he said. He doesn't want this referenced to the Bylaw or what? Maybe I didn't listen carefully to what he said. Thank you.

SUSAN PAYNE: Thanks, Kavouss. In relation to your procedural point, I'm happy to stop after each bullet. But I have no problem with that. So I will do that for the rest of the document. I can see I have a couple of people now in the queue, which is great.

If I can, I will say that I think what Mike Rodenbaugh was saying was that in relation to the level of the filing fee, so this probably, I think, comes within bullet two. I think that's probably the place to reference it. He commented that the Bylaws talk about the IRP as being an alternative to judicial action so to give claimants a power for bringing an action that doesn't require them to go through the court. So, his suggestion is that in that case, in order to be a reasonable alternative to bringing a legal action in the court, that it shouldn't cost you more to file an IRP than it does to file a case in a U.S. court case. So that is an area, sort of a level of cost that should be considered when reviewing whether the filing fee is currently set at too high a level. Mike will correct me if I have misstated that. But I think that's what I understood him to be saying.

Okay. Then I will turn to Liz who is next in the queue. Thanks.

LIZ LE: Thanks, Susan. This is Liz Le with ICANN Org for the record. With respect to the amount of the filing fee and the setting of that amount of that is not something that ICANN has a control over. That is an amount that's set by the ICDR. I think we've discussed this on prior calls. That filing fee amount is how the ICDR gets paid. They are actually a non-profit organization so they don't have other streams of revenue in their business. The filing fee is how their staff gets paid. So what that amount is is a rate that's determined by the ICDR itself.

SUSAN PAYNE: Thanks for that, Liz. Understood. This is as reflected in bullet two. The proposal was that if the review of the filing fee against other kind of comparable actions determines that the filing fee is higher than other comparable types of action, the amount of fee that the claimant pays should be revised downwards, and that if ICDR considers that there is a difference to be paid that that would be paid by ICANN. The fact of the matter is that ICANN is paying end of the action anyway. So it's just a front loading of that payment, not a new payment on ICANN's part, as I understand it, certainly based on the limited precedent that we have from the two recent cases. David?

DAVID MCAULEY: Thank you, Susan. I have a voice issue so this won't be pretty but I'll be brief. I think Mike makes a reasonable case but it's one, with respect, I disagree. There's a number of efforts by us to make sure that the fees are clear and people shouldn't have to search [quote], and I think this would really set us way back on that. The reference is not just to U.S. courts, it's to other courts as well. What if an Asian claimant comes in and says, "Well, I want my administrative fee that I get in Bangladesh," wherever.

Then we're also supposed to be consistent with international arbitration norms. Courts do not have three judges sitting on a case. Arbitration panels do. They have different kinds of costs. I think what you say in bullet one is good. The fee should be reasonable and not a barrier to legitimate cases. The panel can deal with excesses but ICDR should call this. Thank you.

SUSAN PAYNE: Okay. Thanks, David. Greg?

GREG SHATAN: Thanks. First, get well, David. Second, I think that the proposal, as I see it, is to set a number, not to have some sort of a qualitative formula. So I think David's point is good to raise but it shouldn't be dealt with. I don't think the idea was to get setback and have something that says you pay something that's fair. It would be $500 or it would be $700 or it would be $450. It's the ratio that is in question. We should set that number and it should be reviewed periodically.

The other point is that ICDR will certainly charge what it charges. That does not mean that the claimant should pay all of ICDR's fee. We have the power. And indeed, I think bullet point two and the sub-bullet pretty clearly point toward having the claimant pay something that is within the spirit of the Bylaw and that the remainder would be paid by ICANN up front and that it would be a stated number. Thank you.

SUSAN PAYNE: Thanks, Greg. I thought I had another hand but I seem to have lost it. Malcolm, I don't know if that was who I saw previously. But, Malcolm, I see you so over to you.

MALCOLM HUTTY: Thank you. First of all, happy new year, everyone. My apologies for joining this call late. So I'm afraid I've missed the previous discussion. As

I see that some people are new here and weren't here last time, just to reiterate the main concern that I raised in a previous meeting, the whole thing of the filing fee strikes me as, in principle, not unreasonable but I'm worried about the consistency with the Bylaws. But that's not really my main concern. The main concern is the exposure to other fees. The fact that we had it reported at the last meeting that the one other claimant that has proceeded to a conclusion under these Bylaws, not the previous Bylaws, these Bylaws ended up having to go through the entire process where they were legally bound to pay ICDR's fees. All of the fees, including the panelists fees, and only and will had to wait for a ruling by the panel to transfer those costs to ICANN, that really concerns me. I think that is a real barrier to bringing a claim that people may well feel that the worry about A, having to front them up in the first place and then to claim them back. And secondly, the worry that maybe for whatever reason, they might not be awarded them back. And that would be a bankrupting result for the business concerned in many cases. That really strikes me as a major impediment and barrier to bringing legitimate cases.

So if we ended up in a place that said, "You will pay $500 filing fee," but ensured that they were not having to sign up to those ICDR terms that expose them to the liability to the ICDR, then I think that would be a major step forward. But if we don't protect the claimant from that, I believe we are leaving in place a significant barrier to bringing legitimate claims that has been erected by the manner in which ICANN has chosen to source this and sponsor the provision at the surface of the dispute resolution service. Thank you.

SUSAN PAYNE: Thanks, Malcolm. So I think in the absence of seeing any other hands on the filing fee, this takes us on to look at paragraph five. I think that deals with the cost of the panelists and I hope at least in part addresses the point that you make, but we can see whether it does so. Again, seeing no one else wanting to comment on paragraph four in relation to the filing fee, I guess I will just briefly summarize where I think we've got to on that. I think generally there's support for these proposals on the filing fee.

We do have some differences of opinion over what sort of level that fee should be set at. We certainly heard from Mike that he felt that taking into consideration the cost of U.S. proceedings was a relevant factor in addition to looking at sort of comparable arbitral proceedings. I think David disagreed with that and points out the difference between arbitration and judicial proceedings.

I would say, Greg, I think is probably closer to Mike's view but has suggested that it should be the role of this group to actually set what we think is a reasonable filing fee level and that that should be revised from time to time. That isn't something that I had envisaged we would be doing, as in fixing the actual price. But I welcome additional thoughts on that as we take this forward. Liz?

LIZ LE: Thanks, Susan. Just to touch back on the filing fees itself, well, I understand that Mike and others may have made a comparison between the cost of filing a lawsuit in U.S. courts versus the filing fee in arbitration. I think that also we need to factor into consideration that

the cost of filing an arbitration that the fee set by ICDR is consistent with norms of international arbitration. In fact, if the claimant is determined to be the prevailing party, the claimant will be able to recuperate those costs under the Bylaws. I also think that with respect to the argument that the costs of the filing fees create a barrier for those who cannot afford it. The Bylaws itself, which is Section 4.3(y) sets forth that ICANN will seek to establish a means or mechanism by which claimants that would otherwise be excluded from utilizing the IRP process may meaningfully participate in and have access to the IRP process. So, that directly provides that if ICANN that shall seek to do so, it is not within the remit of the IOT to create the rules on what are the criteria and what that mechanism looks like. So those are some relevant thoughts that I think should be factored into consideration with this group. Thank you.

SUSAN PAYNE: Thanks, Liz. So I do have a bit of a queue but let's move on to Flip.

FLIP PETILLION: Thank you, Susan. Hello, everybody, and happy new year to everybody. I think a lot of people have made a lot of good points here. Mike did, Greg did, Becky did, David did. I think we have to distinguish the initiation fee and the fees and costs of the arbitrators, and we have to distinguish that in time. The initiation cost of fee is meant to cover the cost to initiate the case. But it's also meant to avoid that just anybody can start whatever case. I think we discussed that already and I think everybody agrees with that. We should keep in mind what Bernie said

and that is the idea of the CCWG's findings, which we ought to be in compliance with and which was, if I remember well, that there was the idea and we can't walk away from that, that there is an initiation fee to be paid to start a case.

So combined with my previous comment, I think the job is to help find what would be a correct amount. I don't know what the figures are. I do only know what it costs to initiate the case here on the continent in Europe in Euro money. I don't know what it costs in the UK. I don't know what it costs in Bangladesh. But if the purposes of this group that we try to find what would be a reasonable amount, well, let's try to find that. Let's suggest what that amount should be for the future. And if it doesn't match with what ICDR is asking now, well, it won't match and then the difference will indeed have to be covered.

But all that is different from the costs and fees of the panelists. There are cases like [inaudible] case where one of the parties has actually advanced part of the fees. It was a bit more complex because there was an emergency arbitrator who was nominated as well. If that is the case, if a party or claimant is making payments and that party is ultimately entitled to reimbursement, well, it will get that reimbursement. I do get the point of Mike who says, "Well, that can be a lot of money." And it's not for all, frankly, but for some it's hard to advance that money.

Then we come back to Becky's point. For people who have a difficulty to actually initiate the case where they have a right to do so, just because of that barrier, there is that solution, which is already provided, in my humble opinion. I hope this helps.

SUSAN PAYNE: Thanks, Flip. Greg.

GREG SHATAN: Thanks. First, I didn't necessarily suggest that we should set the actual dollar or euro figure for the filing fee, although it is possible. I think that it perhaps will be more in the spirit of our role as an implementation oversight team that we provide the criteria and guidance and then oversight over the setting of the fee by ICANN. I think that's true of the other things, including specifically what Liz mentioned as ICANN's responsibility. It may be their responsibility but it's not their responsibility to do it without oversight and accountability, including the oversight of this group. So it should be clear that ICANN is operating within a structure of accountability. After all, that's what started this whole ball rolling in the first place. So that's my point on that.

Again, with regard to the fees, I think that we need to spell out that ICANN will pay the administrative fees as they occur and not nearly reimburse them at the end. That needs to be locked in to this whole process. In terms of affordability, obviously what Microsoft can afford is different from what I can afford and different from what a simple domain name owner and farmer in Lesotho can afford. So the idea here while it's useful to know what ICDR charges, it's, in many ways, irrelevant because this is our process that we're setting up. And while we are following arbitration norms generally and certainly with regard to the substance of the matter, the economics are, I think, a part where the idea that we have to act like commercial arbitration is our model is

not a good idea because many of our complainants will not be commercial. Some of them will be and maybe we even need to find some way to deal with that fact, but I don't know that I want a sliding scale that might just complicate things. Thanks.

SUSAN PAYNE: Thanks, Greg. Becky?

BECKY BURR: Thanks. I mostly agree with everything that Flip said. It seems to me we do have the principle that the fees should not be so high, that they are a barrier to seeking justice is the principle, and where that barrier, where that threshold is, is very different. I feel like we're designing a process that is focused entirely on a category of dispute that we've actually have very, very few numbers of, which is most of the disputes are commercial disputes between ICANN and commercial actors. So I really feel like we should lean on the principle and lean on the fact that there is a mechanism already that says ICANN has to figure out a way to make this not a barrier. In those cases, I really don't understand why this group would actually set the fee. I mean, I understand that some of us are involved in commercial arbitration but it seems to me we don't really have that level of expertise. So with the exception that we should set the fee, I agree with Flip's sentiment and let's lean on the tools that we have and the principles that are there.

SUSAN PAYNE: Thanks, Becky. Sam?

SAMANTHA EISNER: Thanks. And apologies for coming in late. So I apologize if I'm repeating anything that was said. Listening to Becky, I echo what she said. I think there's also a caution here. The ICDR's fees are what the ICDR's fees are. The ICDR, as a non-profit organization, has a much different fee structure than many other arbitration providers from what we understand. So ICDR has this filing fee up front and they base it on the value of the claim and all IRPs are non-monetary claims. That's where the basis of that dollar amount comes from. But one thing that the IRP does not do is it doesn't charge any other percentages on top of other fees that are charged on top of arbitration percentages or anything. The ICDR gets a very limited amount of money as it relates to each IRP or each arbitration that it administers. That comes from the filing fee up front and then there's a fee towards the end of the proceeding.

So that's really where it comes from. So we don't have within, even from the ICANN side, I don't believe that we're in a place that we have much flexibility in telling the ICDR what its fee should be. If the IOT is recommending to ICANN a note to supplement fees or to pay the fees differently, that's a different conversation. But this isn't about setting the fees. I do think if we're worried about those who cannot pay the filing fee that we do have other obligations under the Bylaws to make resources available and to figure out how that goes into place. So I really don't think that we have leeway as an IOT to tell ICDR what its filing fees are, and particularly in light of their fee model which is on the whole fairly low in aggregate when you look at the full amount, understanding that maybe the initial filing fee isn't among the lower.

We really don't have leeway with them to tell them what we will pay them to do their job.

SUSAN PAYNE: Thanks, Sam. Yes, you joined late. But Liz very ably made that point before you joined, I think. Our comment back, I guess, was that we're not suggesting that ICDR should be told to change their fees so much as there may be a level of fee that's appropriate for the claimant to pay up front. And if that is less than what ICDR feels that they need as their filing fee, then that balance is something that as part of the IRP mechanism ICANN should be paying. And I say that and just to reiterate, again, based on the limited precedent we have, this is not a new payment on ICANN's part but merely a time shifting of when they are responsible for that cost. It is something that's been reimbursed at the end of the case. It's not a suggestion that ICANN should be paying more just earlier. But yes, we understood that we cannot tell ICDR to set their fee at a different level if they have a fee level that they need in order to be operational, and that's not the suggestion.

Okay. Kavouss and then maybe we will move on to discussing the panelists. Kavouss?

KAVOUSS ARASTEH: Thank you, Susan. I am not discussing or dealing with a fee established for ICDR. I want to see that you have to look to the process in a global way. A claimant at a point of time recognizes, understood, or aware that it has been harmed by action and/or inaction of the ICANN Board or ICANN staff and submit a claim for IRP. If you set the fee discouraging to

that, we establish a rule that that claimant should suffer from the harm. We have to avoid that. Thank you.

SUSAN PAYNE: Thanks, Kavouss. A perfect summary, I think, of what we're trying to achieve here. So thank you. Okay. Let's move on then to paragraph five which relates to the panelist fees. And this, I hope, as I said, will go somewhere at least to addressing the concern that Malcolm flagged earlier.

So paragraph five, the costs of the panelists. The first bullet point, ICANN is responsible for the costs of the Standing Panel. I expressed that just for completeness. The rationale for that is Bylaws 4.3(r) which expressly state that. So I will pause before going on to the next bullet but I hope there's nothing controversial in that statement. Okay. I am not seeing anyone. So, I will carry on to the second bullet.

So in the absence of a Standing Panel, as in where we currently are, where the Standing Panel is not quite in place yet or in any other circumstances where it is necessary to seek panelists from outside of the Standing Panel as envisaged under Bylaws 4.3(k)(ii)—and I will come on to that and we'll look at that briefly in a minute—ICANN is responsible for the costs of the panelists. These costs should not be initially shared by the parties and then reimbursed to the claimant at the end of the case. The rationale for that is, as I said, this aligns with Bylaws 4.3(r) i.e. that ICANN shall bear the administrative costs of maintaining the IRP mechanism. There is precedent for this interpretation in the WEB case and also in the Namecheap case, Flip

tells us, where the claimant's share of the panelist costs was ordered to be reimbursed by ICANN. That was irrespective of the decision on the merits. It also aligns with the CCWG Work Stream 1 recommendations on which the Bylaws provisions are based, where ensuring that the costs of panelists were covered and was considered essential for the accessibility of the IRP mechanism.

Just to take us to Bylaws 4.3(k)(ii), it's not a provision we've looked at very frequently, but this deals with the process of selecting panelists and talks about the claimant and ICANN each selecting a panelist from the Standing Panel, and the two panelists selecting the third panelist. But then in the second sentence, it goes on to say, "In the event that the Standing Panel is not in place when an IRP Panel must be convened for a given proceeding or it is in place but it does not have the capacity due to other IRP commitments or the requisite diversity of skill and experience needed for a particular IRP proceeding, the claimant and ICANN shall each select a qualified panelist from outside of the Standing Panel, and the two panelists selected will then seek the third panelist."

I think this is an important point because it reflects the fact that yes, the Standing Panel is anticipated to provide a lot of consistency of panelists to hopefully keep a handle on costs, that ICANN will be meeting the cost of those Standing Panelists on an ongoing basis. But even when we have a Standing Panel, that doesn't mean that we would never have to get a panelist from outside of the Standing Panel. There are two different types of circumstances envisaged there. Because the Standing Panel are already too busy or because there's a particular skillset needed and the Standing Panel members don't have it. So given that there's clearly envisaged to be panelists appointed from time to time who aren't

Standing Panel members, it has to be the case I am suggesting that those panelists costs are met by ICANN and that has been reflected, as we've said, in the couple of cases that have gone to a decision where the claimant's share of those panel costs have been reimbursed. So it really should be the case. I have suggested in strawperson that the claimant shouldn't be subject to this potentially quite significant barrier to entry in the proceedings by having to pay those costs up front and wait sometimes years to get them back. So that is the proposal. I think that goes, I hope, to addressing that concern that Malcolm just raised with us a little earlier on the call. I see Kavouss in the queue. Kavouss?

KAVOUSS ARASTEH: If you're dealing with paragraph six or point six, party's legal fee, the second bullet said where the panel finds that part or all of the party's claim or defense is frivolous or it has the discretion. Are we talking of a panel of three or are we talking a panel of one? If you are talking about panel one, this sentence or clause is dangerous because you give full right to one single person to decide to shift or not to shift. But if it is a panel of three persons, they have discussed among themselves, and normally, the majority views prevailed. So I have some comment. If by panel, we mean a single panelist. If it is not single panelist, I have no problem and that is okay. But for single panelist, I have difficulty with that because of the very clear meaning of discretion, having the right or power to decide as he so wishes. This is a dangerous problem. Thank you.

SUSAN PAYNE: Sorry, Kavouss. I cut you off. Thanks for that. We were actually still on paragraph five regarding the cost of the panelists. I will bear that comment of yours in mind for when we come on to paragraph six. We will come back to that very shortly, I think. Just before we do that, I don't see any hands at the moment. Any concerns or disagreements, let me say, with paragraph five and what is being proposed there? I'm not seeing any. I think maybe we can then move on to paragraph six which relates to the party's legal fees as the last element of the upfront cost that we're particularly concerned with.

On paragraph six, the first bullet point, each party is responsible for their respective legal fees. I haven't given a rationale for that but I do think, generally speaking, that is covered in the Bylaws. I will pause before I just go on to the next bullet. Flip?

FLIP PETILLION: Thank you, Susan. Maybe I should wait until the next bullet. But let me share my views because the next bullet is going to touch upon the frivolous or abusive claims or defenses. The question that I want to ask, I think, to Mike and Greg is that not much more important than the initiation fee. Is it acceptable that a party who is prevailing, a claimant who is prevailing, has to pay all the legal fees for a case in which that party is prevailing, although the defense by the other party, ICANN, is not frivolous or abusive? I'm not going to answer it because I think the answer is in my question. But that is much more important than who should pay the initiation fee, ultimately.

Maybe some will say, “Well, Flip, interesting thought but that’s not in the remit of this IRP-IOT. This should have been discussed in the CCWG.” Well, then if you raise that to me, then I say should we not reconsider that? Because I think it’s not normal that we should keep the situation as is. I think ultimately, when a party is prevailing, although the defense is not frivolous or abusive, it should get at least part of the legal fees reimbursed. Thank you.

SUSAN PAYNE: Thanks, Flip. I’m sure we will come on to talk about that very shortly. But before that, Kavouss, I see your hand. I’m not hearing you at the moment, Kavouss. I think you’re on mute still.

KAVOUSS ARASTEH: Yes. I would like to raise the question that I have raised before. With respect to the second bullet of paragraph six, if there is a single panelist, it is a dangerous approach. You give the full authority to one individual to decide on his own discretion. Human being is human being. Everyone is subject to a potential mistake or sentiment or other things. I don’t get to any other at this stage and would be not in favor of the claimant that he decides the decision made by a single person. The paragraph says it, that it’s the panel. If the panel is one, has the discretion, has the power and has the right. And you can’t decide that you’ll reply to this question or others question, and I would like to seek reply for that. Thank you.

SUSAN PAYNE: Okay, thanks. Look, I think I'll just quickly—there's a bunch of hands up. If you will just bear with me, I will just quickly go through this second bullet because we haven't gone through it yet. Then we can turn to the queue. The second bullet is where the panel finds that all or part of the party's claim or defense is frivolous or abusive. It has the discretion to shift and provide for the losing party to pay administrative costs and/or fees of the prevailing party. This can include legal fees. The rationale for that is that it aligns with what the Bylaws 4.3(r) say and there is precedent for this interpretation relating to the legal fees in the .WEB case and in the NameCheap case. In particular, this discretion that the panel has is something that set out in the Bylaws.

To address your question, Kavouss, I think there is always an expectation that the final declaration of the panel is a declaration of three panelists. I don't believe there's ever a scenario except in the case of emergency proceedings where there's only a single panelist. The full consideration of a claim is always via three-member panel. I see you back in the queue but I will take the queue from the top first. I'm sure we'll have some discussion around this. Flip?

FLIP PETILLION: I'm so sorry, Susan, but that's an old hand. Sorry, guys.

SUSAN PAYNE: Perfect, then I have a shorter queue than I thought. Malcolm?

MALCOLM HUTTY: Thank you, Susan. I'd like to respond to what Flip said and also to what Kavouss said. Flip's point, his argument that it would be better to allow at least some portion of that costs to be recovered by a successful claimant, even if ICANN's defense is not frivolous. If we were writing this from the get-go, including writing the Bylaws ourselves, I would be persuaded by that and I would support it. But I must, in all honesty and consistency, say that just as I have previously argued that we can't do certain things however much the group might wish them because they're simply not authorized to us by the Bylaws. I'm afraid the suggestion—on my reading of the Bylaws, I don't think that we have the authority to do that. The Bylaws clearly set out the circumstances on which there was cost shifting and I don't think we have the authority to supplement it, however much I might wish to in the circumstances that Flip proposed.

I also have a suggestion in response to Kavouss's point which I think is a good point. Even if there are very limited circumstances in which that would happen. Maybe, Susan, from what you said, maybe you might think this is unnecessary. But for belts and braces, I think that I can't see any harm in that any explicit provision and it would be a legitimate matter of procedure, that as a matter of procedure, the rule on cost shifting for party's legal fees, the abuse of cases may not be used unless by a decision of a three-member panel. That's a single-member panel. If they wish to refer the issue to a three-member panel for consideration, that probably will never happen. But I can't see any harm in saying, as a matter of procedure, it must be a three-member panel that takes such a serious decision that could have such grave consequences for the claimant. Finally, I think we could also improve this by stating that if a

motion is made for cost shifting by reason of the case being frivolous or abusive and the party who admits has made an against shall have the right to file a brief in opposition. Thank you.

SUSAN PAYNE: Thanks, Malcolm. I think maybe Flip or Mike can comment on that latter point. My belief is that there is an exchange of briefs before the final decision. We've covered things like cost quite routinely, but I will defer to the other practitioners on that. Greg?

GREG SHATAN: Thanks. I was going to answer Flip's question in substance but I think I agree with Malcom that it's not within our remit to cover that. But just briefly, I think I'm perhaps somewhat prejudiced since the U.S. system is generally that, except in exceptional cases, each party bears their own legal fees throughout. If we wanted to have a nuanced rule, perhaps that'd be the case. But overall, I am comfortable with each party bearing their legal fees, understanding that it can be a very significant amount of money. Having one party bear both sides legal fees is even more onerous and even more of a deterrent. That's one of my concerns with the whole idea of shifting fees. It's a double or nothing game which is usually a pretty risky way to gamble. Thanks.

SUSAN PAYNE: Thanks, Greg. Kavouss?

KAVOUSS ARASTEH: I'm sorry. I have not received any answer to my question. You said that normally there would be no single panelist. If you put that with normally means that there are exceptions and they would not know the exceptions, number one.

Point two, I don't agree that each party should pay. It depends on the judicial principle of different countries and so on, so forth. In many countries, the loser pays the legal fee but not the winner. I don't want to take the principle of one or two particular countries to cover this situation.

My third question, what is administrative cost? Is it a different cost from other costs? What is this term or adjective of administrative here? Thank you.

SUSAN PAYNE: Thanks, Kavouss. Flip?

FLIP PETILLION: Thank you. I wanted to address these questions. I hope I recall all of them. Administrative cost is actually the internal ICDR cost. It's nothing more than that. It's the cost to be the secretary, let's say, of the case, to keep a record of what is filed in the online filing system and to inform parties to invite them to meetings, to hold these meetings, to organize and set up the Zoom meetings, to check that they are recorded, etc. Cases are handled by one panelist when there is an emergency panelist. I don't think there is any other hypothesis in which we can have only

one panelist. So it's only in emergency cases. Your second question—I forgot the second question. Can you help me, Susan?

SUSAN PAYNE: I am not sure unless it was the question about when there's a discussion about cost shifting, does the party who may be being ordered to pick up the costs of the other party? Are they given an opportunity to file some kind of a brief or make representations? I would assume that they are. But that was certainly a question that I had.

FLIP PETILLION: It depends on the panel that is in place. Parties usually ask that. But let's keep in mind the principles that are at stake, that I have reminded you of, that Greg has referred to and Malcolm as well. If we don't have that freedom in the IRP-IOT, it doesn't make sense to continue discussion about that. But intellectually speaking, it's interesting to raise the point and to say should we not bring that to the attention of the community and to the Board in particular and say, "Is this something we need to re-assess?"

The question was related to what is usually in jurisdictions. I don't think it actually matters, because again, we are bound by what our mission is here. It's not in our remit. It is completely irrelevant what the system would be in a local system of, for example, a claimant who is initiating a case against ICANN. It's irrelevant what the system is in that claimant's jurisdiction, whether or not that jurisdiction would say that the loser pay or that costs follow the event. Again, we have to play with the rules we have and within the limits we have, unfortunately.

SUSAN PAYNE: Thank you, Flip. I think then that that has addressed a lot of the questions, in particular the ones that you raised, Kavouss. Just to reiterate, generally speaking, there will be three panelists. As Flip has said, there may be a single panelist just where someone is seeking for emergency relief for some reason. But that's not a final disposition of the IRP. That final disposition of the IRP is something that is heard by the three-member panel. But Malcolm had suggested that perhaps we could include some kind of an explicit provision that points to the fact that where there is some decision of a single panelist, we could make the point that it's not in their remit to order cost shifting but they could identify this as a matter to be considered by the three-member panel integrals.

I think perhaps that's a good thing that for us to consider. I don't think that particular point is one that relates so much to initiation, but it's something that I will have a look at what the rules say around the use of the emergency panelist and the procedure for the emergency panelist and see if there's a suggestion that could be made in that rule to build that in for consideration by the group. I have a couple of hands. Flip, is that a new one or an old one?

FLIP PETILLION: It's a new one.

SUSAN PAYNE: Okay, Flip.

FLIP PETILLION: Thank you. Another observation I would like to make before I have to leave, because I think some people will look angry at me for dinner. I don't need an answer. But wouldn't it be fair that parties will accept the rule that they will not be represented by somebody who works under a contingency fee? I think the system is even 100% clearly forbidden in Europe. I know it's not in other jurisdictions. But frankly, it creates an inequality in representation. I think this is also something we should reflect upon and think of. I just want to share that with you. Thank you. Bye.

SUSAN PAYNE: Thanks for that, Flip. I think that's an interesting point. I don't think it's one we've thought about before. Again, I'm not entirely sure if it's in our remit. We may need to think further on that. But I will tend to Kavouss in the meantime.

KAVOUSS ARASTEH: Thank you very much, Susan. I think without making any reference to a particular country, most of the people are coming from a single country or two countries' similar ideas and so on so forth, I don't think that always each party pay for his own fares and so on, so forth. In some judicial arrangement, the loser will pay the fee but not the winner, number one.

Point two is that emergency. It's a vague position, a vague expression. Anything could be termed as emergency. What is emergency? Who

define that something is emergency or urgent or not urgent? That is another point.

Second, thanks to Flip, mentioned about administrative but at least whenever we refer to administrative, we should say "such as," at least give some example. He gave some example of a Zoom and note taker, and so on, so forth. I agree. We should avoid all of these ambiguity and non-clarity. But still I have difficulty of emergency cases. In other areas that I am attending other the meeting, I was not in favor of a single panelist or single person, and so on, so forth. Because the minimum three is something that will work and always avoid any mistake. But unintentional mistake, I'm not saying that intentional mistake. Unintentional mistake, emotional actions, and so on and so forth. We don't want that. People pay based on that so it needs clarifications. Unless like other groups, the people, they said that there is consensus but not full consensus. So I need to have some explanation on the emergency, what are the emergency cases and on the payment, unless the case is frivolous or the like. Otherwise, the loser will pay in some legal or some judicial arrangement but not in all. So we have to be careful we are not devising a rule for one or a particular country or countries, and so on, so forth, while respecting all the rules and arrangement of that country. Sorry to raise this question. Thank you.

SUSAN PAYNE: Thank you, Kavouss. I think if I understand you correctly, that you, like some others on this call, have been arguing that it's fairer and more usual for there to be a loser pays provision. I do not disagree with you. It's certainly in litigation proceedings. In the UK, it's extremely common.

It's the norm for the loser to pay the cost of the winner. But I think as a number of us have said and many of us have sympathy with that position and believe it to be a more just one, I have to refer back to the point that Malcolm made earlier, which is that the Bylaws do not say that. The Bylaws make it very clear that there's only a limited cost shifting where there's those sort of frivolous or abusive circumstances. Unfortunately—well, not unfortunately—our job in this IOT is to follow the Bylaws and set the rules that comply with the Bylaws. Whilst I think many of us would feel that a loser pays provision would be fairer, we don't have that scope to make that change because that would be contrary to what the Bylaws say. My understanding is that this was the decision reached by the CCWG, and that is what we have to live with.

In terms of emergency, I can't answer that now. There is a section of our rules that deals with applications to the emergency panelist. I will review that after this call. It may be that it needs a bit of work to flesh it out. But I can't answer off the top of my head whether the rule is sufficiently clear on what constitutes an emergency or not, I'm afraid. But I take your point on us giving some clarity on what are the types of administrative costs that are being referred to. I will take that as an action point to see if I can identify those and set them out. I will probably need some assistance in that from our practitioners, so from Flip and Mike. I will do my best to try to do that so that we are giving a bit more clarity to a potential claimant.

Okay. I'm noticing that we have five minutes left. I see your hand, Greg. Then I think we will need to wrap this call up.

GREG SHATAN: Thanks. I do think that Section 4.3(p), which is I believe what you were referring to whether the emergency panelist is discussed, goes fairly far in showing the limited circumstances and essentially what defines what an emergency is. It may not be an emergency per se, but it's limited to interim relief. In other words, essentially, a preliminary injunction or something along that line that talks about prospective interlocutory, declaratory, or injunctive relief. But in any case, it's all interim. The idea is it's a stay. It's a temporary holding pattern or the like. To my mind, that implies, and we may want to make it explicit, that fee shifting would not be something that would be decided in an interim relief situation. An interim relief really is just granting the relief requested, and it's not deciding on any other matter. I assume that once the actual case went forward, this would be decided ultimately by the three-person panel that would handle the actual case where the interim relief was being sought. Thanks.

SUSAN PAYNE: Thanks for that, Greg. That's really helpful. Actually, yes, I think, from recollection, that actually does align with what happened in the .WEB case, where some of the costs and expenses and fees that were being considered by the three-person panel at the end of that case did relate to applications for interim relief. That does align very well with the points you just made.

Okay. I have two minutes. Kavouss, I see your hand. Very quickly, please, if you don't mind.

KAVOUSS ARASTEH: Very quickly. I don't want to argue with Greg but I think that as you have kindly mentioned or promised that there is a need for a clarification here about not to based on something that someone believes is the reply. We need to have something formal and written. What do you mean by emergency? What do you mean by augmentative? And what do you mean by single panel and the three-panelists panel? Thank you.

SUSAN PAYNE: Okay. Thanks, Kavouss. All right. In which case, I have a bit of work for myself. I may be reaching out to a couple of you for some assistance, if I need it, between now and the next call. I think going on our usual time schedule, the proposal is that we have our next call on Tuesday, the 24th at 18:00 UTC. I am hoping that that is okay for people. That would be our usual time slot. I think we will have a calendar invite go out shortly after this call.

All right. Thank you all very much for the really helpful discussion that we've had today. I think we were making really good progress on wrapping this particular topic up. There are a few bits of clarification that I will seek to do, and then hopefully we can put this to bed quite quickly. I will see you all in a couple of weeks but on the mailing list before that. All right. Again, thank you, everyone, very much. Devan, we can stop the recording, please.

DEVAN REED: Thank you, Susan, and thank you all for joining. This call is now adjourned. I will end the recording and disconnect all remaining lines. Have a wonderful rest of your day.

SUSAN PAYNE: Thank you very much. Okay.

[END OF TRANSCRIPTION]