
BRENDA BREWER: Good day, everyone. This Brenda speaking. Welcome to the IRP-IOT plenary number 100, on 31 January, 2023, at 18:00 UTC. Today's call is recorded. Please state your name before speaking and have your phones and microphones on mute when not speaking. Attendance is taken from Zoom participation. We do have apologies from Flip Petillion. And I will turn the meeting over to Susan. Thank you.

SUSAN PAYNE: Thanks very much, Brenda. And thanks everyone for joining on this call. As Brenda mentioned, it's our IOT plenary, it's the 31st of January. First up, as always, we'll do a quick review of the agenda and updates to statements of interest. I'll start with the SOIs. Does anyone have any amendments, updates to their statement of interest that they need to flag to the group? Okay. Not seeing any, which is great.

Then back to the agenda review. We've only really got kind of one substantive agenda item today which is to continue the discussion initiation and basically to review the updated Strawman proposal and the suggested amendments to the ICDR form, which we'll come on to shortly. And then just noted on the agenda is that our next call is scheduled to be the 14th of February, which will be a lovely way to spend Valentine's Day for us all. But that would be two weeks' time and would be the usual call rotation. So that would be the proposal. And Brenda will issue, I think, a mutual request as usual after this call. I know, I know, David. I must say that meeting a hundred milestone is a little depressing.

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Okay. Let's kick off with the substantive portion of the meeting. Brenda, would you be able to pull up the updated version of the straw person that I circulated with the agenda, please. Yeah, super. All right. And I think we can also scroll down to, I think it might paragraph-- Yes, there. Exactly. Filing fee. All right. So first off, just a reminder that on our last call we reviewed the Strawman that I'd circulated, which is this document. And we discussed a few areas of concern. And so I've attempted to address these by making some amendments to the Strawman and also to the ICDR form that you use for initiating an IRP.

And the first area of concern related to the filing fee, and what is the appropriate level of the fee. And so some amendments have been made into that section 4. We had really a lot of discussion last time about the need for some guidance on what is an appropriate amount for the filing fee. So not for us to necessarily set the figure, but for there to be additional guidance on what strikes us as an appropriate filing fee for the IRP.

Bearing in mind what we've previously said and what is captured in the first bullet, which is that it shouldn't be a gate or rather it shouldn't be so onerous as to prevent use of the process or be a block to participation, but it should be a sort of first gate to limit trivial or vexatious use of the IRP process. So a filing fee that serves those dual purposes and reaches that kind of balance.

So one of our group members compared the current filing fee to the cost of filing US litigation, which is substantially lower than the IRP cost. And did argue that since the IRP is expressed in the bylaws to be as an alternative to litigation, then the filing fee should be comparable. And I

would say, on our last call, there was some support for this, but there was also opposition. I don't think it was wholeheartedly supported.

And there were a few points that came up. One was that in terms of the bylaw, that reference to alternative to litigation is not just litigation in the US, but it's litigation in the US or other jurisdictions. And so we can't really assume that the US court fears the automatic measure of what the appropriate filing fee. And also, we did note that there are a number of references in the bylaws to consistency of this IRP process with arbitral norms.

And so bearing that in mind, I've tried to make a proposal for basically that in trying to assess what the appropriate filing fee should be, there should be a sort of a comparison with other comparable processes. We had something similar to that in that bullet two before. But I tried to sort of tidy it up a little to make it a bit clearer and then added an additional bullet that said when we say similar processes, what we're talking about is other international arbitration proceedings. And so proposing therefore that there is an assessment of how the IRP filing fee sits as compared to other similar kind of arbitration processes using other providers.

And I think if we can scroll down a little bit, Brenda, we might be able to get onto the next page at the same time. And again, I think that's for the rationale that I've included a couple of references to places in the bylaws where the references to arbitral norms are made and also included just some examples. I don't think these are binding in any way, but just from a quick look myself at other arbitration proceedings.

So it's not exhaustive, but based on a few of these other well-known arbitration processes. I think we can see that the ICDR fee is sort of somewhat the top of the range, which is being charged by other arbitration providers. And so perhaps would tend to suggest that a lower fee seems more appropriate but without specifically identifying the exact level that should be paid.

And in doing that, I also felt that or the suggestion is that what's appropriate is to be assessing the kind of initial filing fee. In some arbitrations or arbitration proceedings, there are sort of additional fees on top of an additional filing fee. A good example of that is the ICC where there's a variable amount that gets paid, which is essentially a provisional advance on administration costs, but the minimum seems to be based on the minimum that is identified for payment of arbitrator costs.

And since we have already this understanding from the bylaws that the cost of the actual arbitrators is something that does fall to ICANN, it seemed to me that it wasn't really appropriate to be including those elements of fees that cover arbitrator costs when we're trying to make this assessment. So trying to keep it simple and just looking at the sort of basic filing fee as guidance.

So I will pause there and just see if there's any reaction to that. This is this a straw person proposal. I'm happy for others to disagree with this kind of approach, but I think it would be helpful if so to have some suggestions as to actually an alternative way we could do this because as I struggled to come up with what guidance we could give apart from this. Kavouss, I see your hand, so I will come to you. Thanks.

KAVOUSS ARASTEH:

Yes. Good day. This the 100th meeting. The figure 100th in all policy has a particular connotation. That means it is a test that whether we are successful or not after 100th meeting. I don't have any problem of major point, but I need few clarification, if you allow me, mainly on the underlying turquoise text.

The second bullet, which is turquoise, you have two verb should in the second line, and should in the third line. For the, should in the second line, I'm not very sensitive, but for the, should in the third line I have a fear that it may be interpreted as an option, should exclude. I suggest that they put it a more stronger verb either need to be excluded or shall be excluded. Because that is important point.

The second point I have, I don't understand midpoint of the range. What range we are talking about? Maybe we substitute range by some other terms. Because range, I don't understand what range you are talking about. Range of price, range of what? In the midpoint of range. Midpoint, you are talking of average, you are talking about midpoint. We are talking 50% of without that? A little bit of clarification the sixth line, would be at midpoint of the range. So please kindly clarification the range. So these are the three points. Should in the second line, should in the third line, and clarification on range. Thank you.

SUSAN PAYNE:

Thanks, Kavouss. Noted them. I think regarding your comments about the use of should, that's a very good point. And I think it wasn't intended to be optional. So we can make that change. In terms of

midpoint of the range, I agree the language is a little bit clunky. I'm very open to alternative suggestions.

In terms of the range I meant, the suggestion was that we have some examples of other arbitration proceedings and there are a range of prices of filing fee, or levels of filing fee. And so that was the range being referred to. Yeah, I mean, midpoint, I think that probably aligns to something like median. I was not trying to be too prescriptive. This was really to start a discussion and see what people think. I mean, we could say the average, the mean, or again, looking for feedback from the group and for us to discuss this. David.

DAVID MCAULEY:

Thank you, Susan. So given your invitation, I'm happy to discuss. Brenda, can I ask you to scroll up a little bit to that paragraph at the top? Right there, yeah. I'd like to comment on the paragraph at the top. And I have to admit that I'm not an expert in filing fees, administrative costs, anything like that. And I agree with the principal that I think it was Mike Rodenbaugh that said in the meeting recently. That the filing fee should not act as a bar to legitimate IRPs or an unreasonable bar to legitimate whatever it is. I think that's a fair statement.

So this paragraph and the Strawman that you have. And thank you for doing the Strawman and your efforts on this. Let me just read for a minute, ICANN should review the filing fee against other similar processes, and if appropriate, reduce the fee payable by the claimant with ICANN covering the balance. I don't have any problem with that

depending on, I'd like to hear what ICANN think about that. But I think that the principle that we would state is the fee should not be an unreasonable bar to bringing a legitimate-- well, to bringing an IRP claim.

I do want to just sort of flag, and this probably an appropriate comment for later in this discussion. But your rationale I'm not sure this does align with the spirit of 4.3R. Because as I read 4.3R, it distinguished between the administrative costs of the mechanism and fees. And so I'm not ready to sign off on the rationale, but I do think that it may be reasonable if I see CDR charges such a high amount to bring a case, maybe there is some room for ICANN to cover part of it.

The other thing ICANN can do obviously is discuss with ICDR, why are your filing rates at the top of the range? Can't you lower them or something like that? I mean, there's other ways to skin this cat. So those are my comments on that. Thanks, Susan.

SUSAN PAYNE:

Thanks, David. I would certainly wouldn't want to stop ICANN having that kind of conversation with ICDR, but in reaction to the points made by both Liz and Sam last week, that they had no control over what fee ICDR charges, it was an attempt to address this by another means. And I guess we circle back to the debate we've had a number of times about what constitutes the administrative costs of the mechanism. I mean, I feel like I'm advocating here. And I'm not really intending to, but we've talked a lot on previous calls about the fact that ICANN is meant to be running this IRP mechanism.

And whilst it's expressed in the bylaws that it should be that that process is outsourced, clearly the admin of handling, of keeping the process going and communicating with parties and setting up hearings and so on and so forth, if that wasn't being done by ICDR, that would have to be done by ICANN. And therefore, I would argue surely that is the administrative cost of the mechanism. And actually I've tried to cover that off in a subsequent numbered paragraph, so we'll maybe come back to that. But that certainly was the thinking here. But I will pause and see whether there are any other comments. David, yeah.

DAVID MCAULEY:

Thanks, Susan. It's David again. And I appreciate what you just said. The reason I said what I did was in the last meeting, I didn't mention it. But earlier, I'd said I'm of the view that the administrative cost of the mechanism is talking about keeping the process set and does not cover individual cases. You know, there may be costs in individual cases like for translations or whatever it might be, experts, who knows, that may not fall into the same bucket of maintaining the mechanism. And the only reason I mentioned it is I don't want to be silent too long. That's a point that I still maintain. But I think you're right. Maybe we could discuss this later. So thank you.

SUSAN PAYNE:

Yes, thanks, David. I know we've had a bit of a discussion about or at least we've started to have a discussion about what cost fall into what bucket. And I think some in our group felt that this wasn't something that was appropriate for us to do, but I think there is a lack of clarity

here, and I think it would benefit from some clarity. Because otherwise, it's being left to the arbitration panel to determine in a particular case what they think more or less on a case-by-case basis.

Okay. I think let's park this, but we will come back to it fairly shortly, I think. If no one else has any hands on this paragraph we could move on to the next one down, which I think would be six. Yes. Okay. Oh, indeed. The next one down. I should be looking at the document. Next one down was what are the administrative costs of the IRP proceedings?

So there we are. I mean, we did discuss last time, and there was definitely a feeling that since ICANN is responsible for the administrative costs of maintaining the IRP mechanism, let's put it that way, those costs that do fall to ICANN as under the bylaws, then ICANN should be paying them as they're incurred rather than the claimant having to pay them and then being reimbursed at the end of the action.

And the reason that people felt that was particularly because we've had some recent IRP decisions such as the .web case where it looks as though they can be quite substantial. I think in the IRP, in the .web case, it included the panelist cost which is perhaps separate from the administrative cost of the IRP mechanism, but there was a figure of about \$479,000 that the claimant was being reimbursed for.

And that wasn't a cost shifting payment. That was just for a reimbursement from ICANN. Of course, the full to ICANN under the bylaws. Obviously, if the ICANN legal team disagree with this, they can

correct me. But that is my understanding from the assessment that I carried out. Oh, thanks.

So that was the first point to make in that number six and bullet one. And I think that that aligns, as I say, with 4.3R. But as we were just been discussing, I think we really do need to give a bit of clarity on what falls within that administrative cost of the IRP proceedings and what doesn't. It seems to me that it's the costs incurred by ICDR in attributable to running the process on ICANN's behalf.

So things like administrative office time in communicating with the parties and the panelists, fixing the hearing times, hosting the virtual hearings and admin that falls around that. Perhaps copying and postage of providing papers to the panelists. I didn't include on that list costs of translations or costs of experts. It's certainly a question for discussion, but I had left them off because it seemed to me that they were, as David has just said, perhaps cut costs that are more attributable to a single action rather than the maintenance of the IRP mechanism.

So that was my suggestion. And again, looking for feedback and input from others on whether that's the right sort of costs, whether there's anything missing. I didn't include the panelists on this, and I think actually that was probably an oversight on my part because I think, under the bylaws, the panelist costs are something that we know once the standing panel is in place, it's very, very clear that those costs fall to ICANN.

But the panelist costs as Liz and Sam have been telling us, that they are something that ICANN has accepted it should be paying in recent IRP

actions. So again, I will pause here and I see a couple of hands. I'm very grateful for that. So David first, and then I'll come to Kristina. Thanks.

DAVID MCAULEY:

Thank you, Susan. David speaking again. Can excuse me. On the panelist fees, obviously, I think ICANN recover those. I don't know. Maybe I'll find out that they're actually billed to both parties and then the claim is reimbursed at the end. I think that would make any sense. But with respect to these fees, I think you've done a good job of indicating some of them.

I think it might be helpful if the practitioners in the group on the claimant side, that'd be Mike and Flip at least, and on the ICANN side, Sam and Liz, maybe discuss maybe there's a group of fees that everybody that's a practitioner agrees is in one bucket or another bucket. I think that would help us think this through. Because I'm certainly not experienced with these kinds of fees and trying to figure out where they belong or what they are. And I have some trepidation about us trying to get down the weeds on fees. So maybe that would help if that could be arrange. Thank you.

SUSAN PAYNE:

Yeah. Thanks, David. Kristina.

KRISTINA ROSETTE:

Hi. Thanks Susan. I like the approach here of having ICANN cover the administrative fees as they're incurred rather than circling back and reimbursing the complainant, a claimant rather. I will just note for

illustration purposes that unless we're including panelist fees with administration fees, that might not necessarily amount to a whole lot of money. And just for illustration from the .Amazon IRP, the decision in the final declaration in paragraph 126 sets out that the administrative fees and expenses of ICDR or 5750. And the compensation and expenses of the panelists which they consider at least in this declaration to be separate, are \$314,590. So depending upon whether or not you do the panelist fees as an administrative expense, which at least from this declarations seems that ICDR does not, you're talking huge magnitudes of difference.

Which brings me to my next point, namely, I don't recall because it's been a while. And I don't know if anyone on the phone, whether any of the other practitioners or anyone from ICANN legal has ever actually asked ICDR, from their perspective, what do they consider to be administrative costs, just so that we know if we are going to be making a decision that for purposes of the IRP and for purposes of our work, that we're going to be including panelist fees that we do that with intention and that there's obviously would need to be consensus on that, I think. Thanks.

SUSAN PAYNE: Thanks, Kristina. Kavouss.

KAVOUSS ARASTEH: Excuse me. On the point six, the first line, what do you mean by as they are in cumed? What do you mean by that?

SUSAN PAYNE: Sorry, Kavouss. I think it's just not coming up very clear in the Zoom room. It is meant to be well, it actually says incurred. So as those costs, particular administrative costs get incurred, they should be paid by ICANN rather than there be a payment by the claimant or a payment by both parties and then a leveling up later.

KAVOUSS ARASTEH: I'm talking of incume, INCUME. What does it mean?

SUSAN PAYNE: I think it's just not displaying very well in your Zoom room Kavouss. It is incurred, it's not incume.

KAVOUSS ARASTEH: Incurred. Yeah. Okay. That's okay. Incurred.

SUSAN PAYNE: Yes.

KAVOUSS ARASTEH: Okay. Because double r just so close to each other. It looks like m. Thank you.

SUSAN PAYNE:

Yes. No worries. I think it is just a little bit indistinct in the Zoom. Particularly because it's in blue. Okay. So in terms of asking ICDR, it's not something that I have done, but I do believe that there have been attempts to get input from ICDR on more than one occasion. And I think perhaps not terribly successfully. But I will check back in with Bernard on this and see whether there's any merits to, sorry. We can see whether this something that we can do. I think it does make sense.

To my mind and I'm basing this just on the bylaws language, and I am going to just quickly have a look at that now. Based on the language of 4.3R where it talks about ICANN. In fact, the first sentence of 4.3R, is ICANN shall better all the administrative costs of maintaining the IRP mechanism including compensation of the standing panel members.

Obviously, the standing panel members are slightly different to the compensation of panelists who are not members of the standing panel, but as previously discussed, it does seem that there's been an understanding and certainly there've been awards of costs back to claimants in cases like the .web case, which reflect the share of the panelists that the claimant had paid for.

So I think perhaps given that language of the bylaws, it does make sense for us to also include in this bullet as an example, the cost of the panelists. Again, I would suggest or propose that that should be added. But again, looking for feedback if there is any agreement or disagreement. Kavouss, is that a new hand? I'm not hearing you at the moment. Are you on mute still? Oh, no, old hand back the look of it.

Okay, thank you. All right. I'm not seeing any further hands at the moment. I'm taking silence not exactly as agreements because I think people will want time to reflect on this, but for present purposes, I think we can move on. And we will, obviously, people will have an opportunity to give this more thought over the next couple of weeks.

All right. Then if we move down to the next paragraph number seven, the party's legal fees. So these amendments really were ones that I made because we talked a bit about the cost shifting provision in again 4.3R of the bylaws. And there was concern expressed that if there were to be that kind of order to shift the costs in a frivolous or abusive case from one party to another, that it should be a three-person panel that was making that kind of order and not something that was made by a single panelist.

Now when we were discussing this on our last call, I hadn't been able to look back at the bylaws. But when I did subsequent to the call, it seemed to me that when I look back at the bylaws, it's clear from the bylaws that that is what is intended, that it is a three-person panel who is making that determination. And the reason I say that is what I've set out here, that basically the IRP panel is defined in 4.3K as being the three-person panel. And then it's the three-person panel that is making the IRP determination. And then there are a couple of places in the bylaws, including 4.3O and 4.3R, which talk about that the cost shifting being made by the IRP panel.

And so I think it's certainly the intent and I think it's clear that it's the three person panel that is being tasked with this power to make an order to cost shift and not a single panelist. In the event that there is

ever something that is being determined by a single panelist, it's not a final determination of the IRP, and so they don't have that power under the bylaws. I think it says that in the bylaws, but it certainly doesn't cause any harm to reflect that in our kind of agreement here so that we're all on the same page. But that was the reason for making those changes to the second bullet of this section.

And then the third bullet that I also added was to reflect. Also again something that we discussed on our last call and the feeling that if there's a likelihood that costs might be shifted onto one party from another because of this kind of finding that they've been abusive or frivolous, that they ought to have the right to file submissions in opposition. And again, so I think that I had rather taken that as red, and I think in practice, it probably happens, but again, it seemed wise to actually capture that point. And so that's the reason for that new bullet point that's been added at the end of seven.

So I am again going to pause here and see if there's any feedback or reaction to that. Okay, I'm not seeing any. And then in which case, I think I will move on to paragraph eight, if that's okay. And that's regarding the ICDR form. And again, on our last call, but it's not something that was a new point, we'd had previously raised the concern that by commencing an IRP using the form from ICDR and thereby agreeing to what it says on that form about being bound by the ICDR rules and so on, that a claimant might be agreeing to accept responsibility for certain things, including certain costs. That actually they're not really liable for. So they are entering into effectively a contract with ICDR that says that they will pay for things that perhaps

they wouldn't expect to have to pay for because that's for example, cost of panelists and so on. That don't fall to them.

And that was something that caused some concern by a couple of people on last week's call, so I went back and looked at the ICDR form. And I did feel that it probably was not the intent of the language in the form to make the claimant liable for things that they weren't intended to be liable for, but I also thought that the language of the form would probably benefit from a bit of tweaking. Brenda, if you could pull the form out that would be great. Actually, before I do that, I'll just go to David because he has his hand up.

DAVID MCAULEY:

Thanks, Susan. This David McAuley again. Because I'm not a practitioner, I've never seen that form before, the one that you sent along and that Brenda is going to put up on the screen. But that's a real head scratcher in my view. And so if we have a concern that we need to address the idea that the form might create some kind of an obligation, we should address it maybe in the rules and say that the form is submiss or whatever the term is to is takes after first the bylaws and then the, what do you call? The supplemental rules.

And one reason I say that is I read that thing that you sent along. I can't remember all of it, but I remember a couple of things. One is it said that the chairman of the panel will decide the size of the IRP panel. I don't think that's the case. I think it's three-member panel. And then near the bottom, it said something like, the decision by the ICANN Board will create binding precedent. That's not the way I read the bylaws. I

thought they the bylaws said the decision by the panel is the thing that creates the precedent. So I was really, as I said, scratching my head after I read that form. I think if it needs tweaking, it needs some serious tweaking, I think. Thanks.

SUSAN PAYNE:

Thanks, David. Yeah, I think probably we need both. I think we probably need some amendment to the form in areas where we've identified that we're unhappy with it, but I like your suggestion as well that we should have something in there that says, where there's a conflict between the form and the rules, then the rules prevail. I think that would be all the rules and the bylaws, I guess, is really what we're saying, then they prevail. I think that would be beneficial. Kavouss, I will come to you. And would you wait before we do so to pull up the ICDR filing form or do you not need it for the purposes of your comment?

KAVOUSS ARASTEH:

Whichever way you wish, but I am not sure I understood David's suggestions. The size will be decided by panel or so and so on. I have not where it comes from. Thank you.

SUSAN PAYNE:

Super. In which case then, Kavouss, thanks for asking. We will pull up the form and we can look at it. So the first part, and let's do this bit first because the place where I did make the amendment. You will see just

about, not quite halfway done or just a little over halfway done the page.

There is a provision that says that the claimant is seeking independent review under ICANN's bylaws. And that the claimant agrees that the IRP is conducted pursuant to the international arbitration rules of the etc. But in the current version of the form, it says as supplemented per ICANN'S bylaws. And I actually think what's intended by that when it says as supplemented is a reference to the fact that under ICANN's bylaws, there will be supplemental rules to those ICDR rules that govern certain parts of the proceedings.

But I did think that this isn't terribly clear, and so my suggestion was that we actually make it a bit clearer by simply calling that out. So IRP is being governed or conducted rather under the ICDR rules as they're supplemented and amended by ICANN supplementary procedures for the IRP per the ICANN bylaws, which and those supplementary procedures for the IRP are the rules that we are working on here.

And so then if we have something in the ICDR rules, which says, for example, the claimant will share the costs of the panelist, but we have amended that in our supplementary procedures, then it's very clear that the claimant isn't somehow waving away or committing themselves to make a payment for the panelists, which is not intended and which we've superseded in the supplementary procedures.

So that was the first suggestion. If anyone feels that that language is still insufficiently clear, again, I'm not wedded to it, but certainly that is the intent behind that first suggestion. And I will just pause. But if I

don't see any hands, then we can go on to the next page, which is the point that David was referring to. And this it here. I highlighted it because I didn't want to delete this language, but I did think that we needed to talk about it.

And on this form, it also says on the second page that the chair of the standing panel for the IRP retains the ability to decide on what is the appropriate size for the panel based on matters such as the complexity. And it also says that in the event there's no standing panel, the ICDR will assist in determining the appropriate size for the panel.

And as David just said, that seems incorrect. It seems to me under the bylaws that there's a very clear expectation of there being a three person panel for the IRP. And it doesn't seem actually that there's a great deal of discretion built in at all on the size of the panel. And so it seemed to me that we should be deleting that language because it doesn't seem correct. And so that was the first point. Exactly. Thanks, David. 4.3K, which is dealing with panel size.

And then David made a further point, which actually I very much appreciate you picking up because I hadn't done, was this final paragraph on the form which talks about the ICANN Board's decision from the declaration of the IRP panel is final and creates a precedent for future IRP proceedings. And as David commented, he's not sure that that is accurate either. And his view is from the reading of the bylaws that it is the IRP panel decision that is final and creates the precedent, not the Board's decision on it.

And so it may be that there is that part of the form also possibly requires amendment, although I can see Sam has put her hand up. But so those are a few areas where I think we probably would benefit from proposing some amendments to the form. Sam, I will come to you, but Kavouss has had his hand up for a little while, so I will go to Kavouss first. Kavouss.

KAVOUSS ARASTEH:

Yes, thank you. I think this sentence, which is written, or which is indicated in the highlighted yellow, it's very odd sentence. The chair of the standing panel for the IRP retain the ability. What does it mean? Retain the ability. Simply, decides on, but not retain the ability. And then on what the appropriate size. Decides on the appropriate size. We don't need on what the appropriate size will be. So it is a little bit ambiguous. We should put in a simple way.

If the chair of a standing panel would decide on the size of the panel based on the issue such as complacent as more. So put the sentence in a more clear manner, but not saying that retain the ability to decide. That means there has been some ability given to that and he retained that ability, where that ability was given to that. If you want to say that the size will be decided by the chairman or chair of the standing panel, just simply say that the chair of the standing panel decides or will decide on the size of the panel and take into account the complexity of the issue, or based on the complexion. Very simple sentence. Why we turn it around? Thank you.

SUSAN PAYNE:

Thanks, Kavouss. And to be clear, this not my sentence. This the sentence on the current form as it exists. But I think our point as we've just been talking about is that we don't think that the bylaws gives the chair of the standing panel that discretion on the size of what the panel should be. We think the bylaws say that the panel is three people. So we're not sure that this a correct sentence to be on the form. But I will come now to Sam who may well put us right on all of this.

SAM EISNER:

So I'm not sure there's any putting right. I appreciate the attention on the form and calling this out. I don't know that we've actually combed back through the form since we changed the bylaws, right? The form has kind of been in its state for a while. And so I really appreciate the calling out. I agree this not consistent. Right? And if there's one thing that bylaws, for example, are clear on is that IRPs are decided by a three person panel.

So what I propose here for the ease of the IOT and to keep moving on the other items is why don't we take this back to a close read against the bylaws and show an edited version to the IOT to start with. Because I think the IOT doesn't necessarily have the remit over this document itself. But I think the fact that you guys have pointed out, it's not consistent with bylaws, it might be inconsistent with parts of the supplementary procedures that the IOT is working on. You know, this a really important thing for us to get in line.

So we'll take that as an action item and make sure that this gets updated. Because I think the updating of this form doesn't require

public comment, it doesn't require approval, it really just needs to match, and we can update this form as often as we might need to make sure that it matches with current practice. And I think that's something we need to take back as an action item for ourselves to check anytime that there's a major version change to the bylaws or the supplementary procedures to check it. So we'll take this back and get this better aligned and then also add an action item that once the supplementary procedures are updated again that we confirm that it remains in line.

SUSAN PAYNE:

Lovely. Thanks, Sam. I'm very happy to divert you guys to your review, but Malcolm, I guess I should come to you first.

MALCOLM HUTTY:

I wanted to thank Sam for that offer. I think that's a very helpful way forward. That said, I thought that her comment that how easily this can be adjusted without oversight to, like she described just current practice, rather highlighted my concerns with what the claimant was asked to sign up to in order to do this, in order to enter the IRP in the first place as a matter of initiation. I mean, really, I think this should be got into a state where actually it is subject to a more clear oversight, and that the claimant should not be signing away in this form rights that the IRP would otherwise give them or narrowing the scope of their rights or incurring duties that are not authorized by the bylaw on the IRP.

SUSAN PAYNE: Thanks, Malcolm. Sam.

SAM EISNER: Just to be clear, and I appreciate how my words could have been taken to mean we can change this anytime to what we want. I don't think that's the case. I do think that there is oversight. I think that this something that if we were to put in language here that is not consistent with the bylaws or not consistent with practice or substantively changes rights, that's something that ICANN could be challenged on and we should be challenged on to, if we try to use this form to try to change the IRP.

I think it's really important that this form is aligned with it. You know, I have some concerns as I read it about this last paragraph here. And if that really is aligned with how we want to express the binding nature of the IRPs, and if this needs to be refined. Right? I think we need to look at that. And I don't want to belittle that the role that the community would have in any sort of larger oversight. And I think having IOT is a place, we certainly would bring back changes here just so there'd be some view of it.

But I also noted Susan's recommendation earlier, some statement within the supplementing procedures and also included on the form, that if there's any sort of conflict between the form, the supplemented procedures, and the bylaws, that we would confirm that the bylaws and the supplementary procedures would override any conflict with the form. So in no way should the form be determinative. But I also take your point Malcolm that we have to be careful that we don't use the

form to try to slip in other things that would bind the community members in different ways than the IRP allows.

So I think we're aligned. This a sensitive thing. We haven't changed it much. I don't think we want to keep changing it, but we do want to make sure that we change it after we have revisions so that it always remains stable. Stable with the overriding bylaws and supplementing procedures.

MALCOLM HUTTY:

I love it when we're so much on the same page, Sam. 2023 is going to be a beautiful year.

SUSAN PAYNE:

Yeah, likewise. What a wonderful spirit? Thank you very much, Sam. I think we're all in alignment there that we feel the form could do with a little bit of an overhaul. Nothing substantial, but there are some tweaks it could definitely do with. All right. And thank you. So we'll note that that one is being taken up by ICANN legal team. Kavouss.

KAVOUSS ARASTEH:

Thanks, Susan. Do we need this text, by submitting the notice claim and acknowledge the following. Do we need this text? If you read the paragraph after the first one, the IRP panel shall have the power to dismiss their request summarily. Why we need to say summarily? They dismiss or dismissed. That's right. How they dismiss, we don't need to mention how they dismiss. My question is that do we really we need

this part. By submitting the notice claim and acknowledge the following.

SUSAN PAYNE:

Thanks, Kavouss. I think that all falls part of what Sam and Liz will review and look at the text and suggest some amendments. I didn't draft the form obviously, but my assumption is that this just an attempt on the form to specifically draw to the attention of the claimant certain key points that it was felt should really be drawn to their attention and have them appreciate and acknowledge that they're going to be bound by.

But some or all of that may not be needed depending on whether it's conflicting with what actually is in the bylaws. If it's in line with what's in the bylaws, then it's not an issue. As Becky is saying, it's kind of ensuring that the claimant is agreeing to be bound by certain terms. But Sam and Liz are going to take this away and look at all of this text on the form. So I think we can come back to that once that happens. Malcolm.

MALCOLM HUTTY:

I was just going to say, I think that's a great question from Kavouss, and I would like Sam to consider it specifically and make recommendations.

SAM EISNER:

Yeah. I've noted it. I think it's a really worthy question to think about.

SUSAN PAYNE:

Super, then our agreement and alignment is continuing. All right. Thanks everyone. And so I think if we go back to the Strawman, please Brenda. But I will do so only to show that we reached the end of the points that I've made amendments on. The other amendments, as you will see are just some additions of extra bylaws provisions to assist the group when they're reviewing the document. This not my language. It's just I picked up the additional sections of the bylaws that were being referred to above just for convenience of the group, not for anything more than that.

So at this point, then we've reached the end of the Strawman and our review. Obviously, before we wrap up, I will pause and see if there's anything else anyone wants to comment on this. But what I'm going to suggest is that we take the time between now and the next call for people to review this properly and give more thoughts. And if I could ask if people could share any reactions, or feedback, or suggested amendments with the group but over email in advance of our calls.

So perhaps by the Monday, before our call on Tuesday. That would allow everyone the opportunity to consider that feedback. So we can go into the call, hopefully, with everyone on the same page and able to either discuss any issues that seem to require discussion or to agree amongst ourselves that we think the amendments are an improvement and something that we can agree on. Because I would like us to try to reach a conclusion on this exercise on the initiation, if we possibly can, on our next call. Kavouss.

KAVOUSS ARASTEH: Yes. May I request you to go back to the form, the last page?

SUSAN PAYNE: Yes, to the form Kavouss?

KAVOUSS ARASTEH: Yes. To the form, please. If possible.

SUSAN PAYNE: Yeah. Brenda, can you pull the form up for us?

KAVOUSS ARASTEH: I am talking of the area to be acknowledged by the claimant. Go to that part, please.

SUSAN PAYNE: Brenda, I think Kavouss is looking for the ICDR form again.

KAVOUSS ARASTEH: Yes, ICDR form. Please. Yeah, if possible. Brenda, if possible, this ICDR form.

BRENDA BREWER: I'm looking for it. I'll have it there momentarily, please.

KAVOUSS ARASTEH: You'll it momentarily. Yeah. So I have some difficulty with the last part to giving something to the ICANN and so on and so forth saying that. Yeah, the last part. The ICANN Board's decisions following so on, so forth. Where is come from? What is the origin of that? If the subject matter of the request on the summary issue and so on so forth, whether the ICANN Board decision the prior IRP panel is binding and serves as a ground for summary dismiss. Where is come from? It's come from bylaw? I think it has been before the bylaw of 2016, this text. There is no legal basis for this.

SUSAN PAYNE: Yeah, thanks, Kavouss. Yes, I think that may be right. And I think that may be something that as Sam was saying, she was not sure that necessarily the form has been amended since we moved on to these new bylaws, or at least has not been amended in full. And so that was a paragraph that I think David also flagged with some reservation. And so Sam has undertaken to look at this and to look at all of the language on the form, but including that last paragraph, where there are some concerns that that maybe doesn't align with what the bylaws say. And so if it doesn't align, they will propose some amendments to the form. So I hope that addresses your concern, Kavouss.

KAVOUSS ARASTEH: Yes, it does, provided that if people draft something, should have a legal basis from the bylaw, but not something that giving more authority to the ICANN Board than is providing the bylaws. So if you have to be. But

I am not in favor of this last part by submitting. I don't see the necessity of that at all. Thank you.

SUSAN PAYNE:

All right. Yeah. Thanks, Kavouss. Again, I think Sam has noted that and I think you are not the only one. I think Malcolm also actually agreed with you about that section. So I'm not saying that it will come out, but Sam and Liz will look at this form and will make some proposed changes. Thanks. Thank you. Thanks very much.

So as I say, to go back to the Strawman. The proposal is if you could please to review it and reflect on the proposed amendments and our discussion today over the course of the next couple of weeks and by the 13th of February. So Monday the 13th, if you could share any feedback or proposed additions or changes over our mailing list, and then we will have an opportunity ideally, before the Monday, we can engage in discussion over our email list, but at a minimum, we will be able to come into the call on the 14th and hopefully finalize our agreement on this area. David.

DAVID MCAULEY:

Thank you, Susan. David McAuley speaking. I would like to ask a question that might help us or might shorten our work in between, and it's to Sam and Liz. I personally read bylaw 4.3R as making distinction between the administrative cost of the mechanism and the fees, including, like, say, a filing fee.

But I thought I heard in the last meeting, and I believe I heard this, but maybe I'm wrong. That ICANN is in the practice of reimbursing the fees, including the filing fee. If that is in fact the case, then I would like to know it because that would keep me from working on doing anything with that particular point. If it's become a practice to reimburse the filing fee, is really sort of the question. So if we could get information on that between now and the next meeting it would be helpful. Thanks.

SUSAN PAYNE:

Thanks, David. So I will leap in and say, if I'm right, I think we've only had two cases. I believe that certainly on the .web case, my belief is that that was the case. I will look out the email that I circulated previously and share that and confirm whether it does indeed say that. But I will also defer to Sam and Liz to comment on this as well. Not necessarily now, but although please feel free if you are able to, but certainly in response to that. But that is my understanding.

And hence, I think that is why I had suggested on this document that we were not looking to ICANN to put extra costs on ICANN. We were just looking to change the timing at which they we're picking those costs up. But yes, I will recirculate what I had identified previously if I can locate it and perhaps we can take it from there.

All right. I am not seeing any further hands. In that case, I think I'm going to be giving you all 20 minutes back of your day, which hopefully is a positive. So we will be meeting again on the 14th. And as I said, please feedback, share on the list before then by the 13th, if possible.

So thanks very much everyone for all of your thoughts and comments.
And have a good rest of day.

[END OF TRANSCRIPTION]