
BRENDA BREWER: Good day, everyone. Welcome to the IRP-IOT plenary call on Valentine's Day, 14 February 2023 at 18:00 UTC.

Today's meeting is recorded. Please state your name before speaking for the record, and have your phones and microphones on mute when not speaking. Attendance is taken from Zoom participation. And with that, I'll turn this meeting over to Susan Payne. Thank you.

SUSAN PAYNE: Thank you very much, Brenda. Yes, thanks all for joining. I think it says something terrible about Flip and I as the Europeans that on Valentine's evening, we are on an IOT call. But hopefully, this won't be a very long call. You'll never know.

All right. As always, we'll go through the agenda and updates to Statements of Interest and so on, and kick off the call. So first up, just in terms of reviewing the agenda, we have a couple of action items, one from ICANN Legal reviewing in the ICDR form. That wasn't particularly an action item for this week, by the way, and one from me to locate and recirculate some information regarding the payment of the filing fee.

Our main agenda item is effectively a second read-through of the proposal which started off as a strawperson on initiation and a discussion about next steps. We're scheduled to have our next meeting on the 28th of February, which is two weeks' time as that's our usual rotation, and then just some time for AOB, if there is any.

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Circling back to the first agenda item. Are there any updates to Statements of Interest that anyone would like to note for the group? Okay. I'm not seeing anyone or hearing anyone. So I'm taking that as no. As ever, just a reminder for us all to keep that SOI up to date.

Next up then to come back to the action items. The first one, as I said, was for ICANN Legal regarding reviewing the ICDR form for initiation of an IRP and updating it. As I said, this wasn't actually an action item for today, but I didn't want to lose it. I wanted to capture it so I included it on the agenda for today.

Liz, if there is an update on that, feel free to speak up. But I'm not necessarily expecting one from you.

LIZ LE:

Thanks, Susan. This is Liz Le with ICANN Org for the record. It is on our action items list and it's something that we're tracking. Unfortunately, we do not currently have an update to provide. We've been pretty much dealing with other challenges, including we spent the latter part of last week in all-hands meeting for Org. So we'll get to it as soon as we are able to.

SUSAN PAYNE:

Thanks, Liz. As I say, I wasn't chasing you. I just didn't want to lose it as an item. I think we've got another document, I think, of a sort of parking list of things that perhaps it can move on to. We don't necessarily need to keep it on the agenda every week, but I just wanted to capture it somewhere so that I didn't forget about it.

The second action item was for me to see if I could locate and recirculate what I thought I had previously circulated about, ICANN being responsible or reimbursing the cost of the filing fee. I have only just done that. I just wanted to flag that I have recirculated. It's not really an e-mail as such. I thought it was something that I referred to in an e-mail but I could only find it in a couple of documents attached to e-mails that I therefore attached to our agenda today. One of them is various extracts from the .WEB IRP decision. And included amongst that, there's some of the schedule of the costs that were reimbursed. In particular, it's highlighted in that document in accordance with the general rules set out in Section 4.3(r) of the Bylaws. Claimants entitled to be reimbursed by the respondent for the share of the non-party costs of the IRP that it's incurred in the amount of \$479,000 (USD), just a little over that. Insofar as I was able to determine, that \$479,000 (USD) came from the combination of the filing fee of \$5750, together with the costs of the panelists and ICDR, which were the bulk of that amount which was \$473,000. The total of those two things came to that figure. So that was the first one.

The other document that was attached to a separate e-mail was one where I've been attempting in a Google Doc to identify different types of fees and where the responsibility for them lies. That one didn't get a lot of traction from the group. But the first table of that included the ICDR filing fee. And there's a footnote to that that is essentially making the same point. We don't have a lot of precedent on this. It was really based on the .WEB IRP. As you all know, we have limited cases that we can actually refer to as precedent at the moment because there have been relatively few IRPs under the new rules. So I just wanted to talk

through that just so that you are all aware that I've dug out what I could to circulate around, and hopefully that fills that gap.

I'll just pause briefly and see if there's any questions or comments. I'm not seeing any hands at the moment. If not, I think what we can do is go on to agenda item three which is the second read-through of the proposal on initiation. This is the amended version.

Following our last call, there was an action item, really, I guess, effectively an action item for all of the group to review that and raise over the e-mail any significant concerns or questions or comments. I haven't seen any. I'm trusting therefore that we are largely in agreement on that strawperson or what was previously the strawperson proposal. I'm aware of a couple of relatively minor sort of drafting comments that did need to get picked up but nothing of major substance.

Brenda, if we could pull that up. I think what we ought to do is just go through the full set of our agreements to be sure that we've done a full walkthrough.

BRENDA BREWER:

May I kindly confirm you want the initiation strawman?

SUSAN PAYNE:

Yes, please. Thank you. The one that was recirculated yesterday. Well, it's the one from last call.

BRENDA BREWER:

Okay. I have that one. There you go.

SUSAN PAYNE:

Yeah. I think that is that. Okay. So, as I said, I think what we should do is quickly go through that. I'll pause after each numbered paragraph. If it's very extensive in terms of bullets, I might pause after the bullets. But I would like us to just try to get through this relatively seamlessly. Obviously, put hands up. But as I say, I will pause so that we don't just read through the whole thing without me checking whether anyone has anything they want to raise.

So this is a reminder that items one to three, we had agreed in principle back in November. They're included on the list. I think for this purpose, I will quickly go through them just as a reminder to everyone, but I think we have pretty long standing agreement on these first three items.

On paragraph number one, there is a need for clarity for claimants and potential claimants who are considering bringing an IRP, which will be referred to hereafter as the claimant. In particular, that all relevant information should be in a clearly identified section of the ICANN website, we understand that this has been in the pipeline for more than a year and as a group we consider that this should be a priority.

Second bullet, the relevant rules, forms, etc., should be on the ICANN website. If this is to be accomplished through links to the ICDR website, then those links should be to a specific place where the information can be found.

Third bullet, that the filing fee, if any, should be clearly identified, rather than the claimant having to work out what the appropriate fee level is from the general ICDR fee schedule. Just as a reminder, of the thinking there, I think even within this group, we had some uncertainty and had people who had initially assumed that a different filing fee applied to the one that we believe does apply because of the way the ICDR fee schedule is expressed. There was just a general feeling that the less well informed claimant should be able to identify on the face of it. The fee is a particular fee and that that's the one that applies to the IRP and not have to try and work out which fee applies.

So I will pause briefly and just see if there are any hands. If not, I'll move on. Okay. I'm going to move on to paragraph two.

If the IRP initiation procedure differs in any significant fashion from the ICDR procedure, then it would be preferable to have clear rules set out in the IRP Supplementary Procedures. That's, I think, a reflection of the general principle from the IRP Supplementary Procedures, which they are in addition to an amendment of the ICDR rules. But this is again going back to this idea of having the information readily available to a claimant so that they can find it easily. So rather than there being something that talks about the timing of the payment of the IRP fee, that's sort of hidden away somewhat in Rule 4. It really would be better if we've got a rule that deals with that from the perspective of initiation since that's the point at which it's applicable.

I'll pause again. Okay. I'm not seeing any hands so that's great.

Then paragraph three, that language needs to be clear and terminology needs to be uniform and that uniformity could be addressed via the Definitions section. For example, X which is referred to as Y in the ICDR rules. We feel that this can be dealt with during the clean-up at the end when there's a final check and to make sure that the rules will make sense.

I see a hand from Kavouss. So, Kavouss, to you, please.

KAVOUSS ARASTEH:

Good afternoon, good evening all, good time to everyone. This number two, is it a one-time action or is it several times action? And how do we implement that? Who will check whether the procedure differs in any significant—this is a word always I have difficulty, significant, because it is judgment. But significant—what does it mean? Significant fashion from the ICDR. So first question, is it one-time check or is it multiple-time check? And who will do that? Thank you.

SUSAN PAYNE:

Thanks, Kavouss. I think it's a one-time check at the point of drafting the rules. It's part of our job, I guess, is really the point, in conjunction with when the Supplementary Procedures, the rules on initiation are being drafted. I agree that we haven't actually drafted anything. I'm not sure that it's our job to get down to the nitty-gritty of drafting. But one of the areas that we know where there's a slight difference is in terms of the timing of the filing fee, where we have in Rule 4 a reference to that if the fee is paid within a certain number of days that it counts as having been paid in a timely manner. And that's not quite the same as the ICDR

rule. So that is the kind of thing that this is envisaging. If there's something in the rules that differs, it should get captured in its own section in our Supplementary Procedures called initiation. That's certainly what I was envisaging. So I guess that is a task for us. But this document is essentially heads of agreement rather than the drafting of language for the rules, if that makes sense.

KAVOUSS ARASTEH: Excuse me. We have not written these rules yet. Am I right?

SUSAN PAYNE: We haven't.

KAVOUSS ARASTEH: Okay. So this is some sort of provisional for future. Once we drafted the rules, then it should be checked whether it is significant, you are to know, different from that of the ICDR, then we have to do something. So we're putting as an item or standing item or holding item that we need to draft the rules sometime. Thank you.

SUSAN PAYNE: Yes. I say that I don't think it's our job to actually be drafting the language of the rules. I think that's something that ICANN has done, that ICANN Legal does, or instructs Jones Day to do, rather than us actually get down to literally drafting the language of the rules. I don't think that's our job. Obviously, some of us are lawyers, but we're not here to be drafting. But I think that's something that we will perhaps

come on to or will talk about more when we get through this document, which is the terms that we want to see reflected, effectively.

Okay. Paragraph four. This is one where there had been some amendments in order to reflect previous discussion. That amendment, which is all in redline here is what we talked through in some detail on our last call. So this is not new redline. This is text, as I said, that we talked through last time. So paragraph four is regarding the filing fee. First bullet, 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. For these ongoing sections, there tends to be a rationale given.

So the rationale for that relates to Bylaws 4.3(n)(i) which speaks of the IRP rules conforming with international arbitration norms and applying fairly to all parties. A filing fee is the norm in arbitration proceedings, and indeed in judicial proceedings, but clearly should be set at a level so as not to serve as a barrier to justice.

I will pause there because that's quite a big bullet. Also, I see a hand from you again, Kavouss. Kavouss, over to you.

KAVOUSS ARASTEH:

Sorry if I raise a hand again. Just on the second bullet, at the end of the line we say "if appropriate". Wouldn't it be possible if we say, "If necessary, reduce the fee"? Thank you.

SUSAN PAYNE:

Thanks, Kavouss. Quite possibly. I haven't got to that bullet yet, I don't think. Have I? In fact, I'm not sure that I see that in the second bullet. But I think that is something that is a little bit further down the document. So we will come to that and consider that in a moment.

So, paragraph four, second bullet. ICANN should review the filing fee against other similar processes—this is your point, sorry—if appropriate, reduce the fee payable by the claimants with ICANN covering the balance of the upfront payment considered necessary by ICDR.

The rationale to that being that this aligns with the above 4.3(n)(i) and with the spirit of Bylaws 4.3(r), i.e. that ICANN bear the administrative costs of maintaining the IRP mechanism.

So, apologies, Kavouss. Could I trouble you to make your suggestion again, if you don't mind?

KAVOUSS ARASTEH:

I will make my suggestion again. Nothing wrong with "if appropriate," but that is a very broad expression. I suggest two approaches or two alternatives, either "if justified" or "if necessary". In my view, "if justified" is more implementable. You compare the fees. If justified, then you start. If it is not justified, don't do that. So, two alternatives: "justified" preferable alternative, "necessary" second alternative. Thank you.

SUSAN PAYNE:

Okay. Thanks, Kavouss. I don't see any other hands. It's certainly a tweak of language. I hope the intent is the same. I don't feel strongly, I probably prefer "if necessary" personally, but perhaps we can follow up after this on e-mail. David is saying in the chat, he could support either of those. Yes. I think you say, Kavouss, you prefer "if justified," let's propose that over e-mail after this call, see if there's any disagreement with that tweak to the language. Thank you for that. I see your hand up. Is that a new hand, Kavouss?

KAVOUSS ARASTEH:

No, old hand. Sorry. I'm sorry.

SUSAN PAYNE:

Thank you. No worries, no worries. All right. So paragraph four, bullet three. Other similar processes as referred to above and that is a reference to the bullet point above. Includes other international arbitration proceedings. The assessment should be against the filing fee for a non-monetary claim. Other administrative fees or costs of arbitrators charged in addition to a filing fee should be excluded from consideration. Since ICANN is responsible for the administrative costs—I think I need to scroll up, if you don't mind, Brenda—of maintaining the IRP mechanism, including arbitrator costs. An appropriate IRP filing fee would be at the midpoint of the range.

The rationale for this is Bylaws 4.3(a)(viii), which refers to resolution consistent with international arbitral norms, and 4.3(n)(i) and (ii), which also make similar references. Then included there, just by way of example, I won't read through them all, but examples of the fees for the

ICC, the FORUM, and the London Court of International Arbitration, and CEDR as well.

Again, just to clarify the reason for excluding panelist fee elements and similar types of additional fees that might be charged by some arbitration fora up front is not that these are not costs of the IRP mechanism, but rather that, in some cases, some arbitral fora do charge at an early stage the cost of the arbitrators and would not be comparing like with like because ICDR charges that element later.

So I've got two hands for this. Firstly, Kavouss and then Sam. Actually, just before that happens, I will just mention that there was a reference on the previous page to the word should in line three. Kavouss had flagged a concern with that as suggesting it was something that was optional. This is where it says other administrative fees or costs of arbitrators charged, in addition to the filing fee should be excluded. Kavouss pointed out that that can sometimes be considered to be optional language, and we should tweak that to make it non-optional. There was no disagreement to that tweak being made on our last call. It just hasn't been captured yet. So I just wanted to flag that before handing the mic over to you, Kavouss.

KAVOUSS ARASTEH:

Could you go back to the previous paragraph, if you allow me?

BRENDA BREWER:

I'm sorry. I don't know which paragraph. Page down?

KAVOUSS ARASTEH: Yeah, here. This bullet which says, “Other similar processes.”

BRENDA BREWER: Thank you.

KAVOUSS ARASTEH: The two sentences are separated by a full stop. They should be connected because they are complementing each other. Either you add at the beginning “with respect to the other similar process” and so on so forth, then after proceeding, put comma, the assessment should be against the filing, unless I misunderstood the objective. Because when you put full stop, you separate these two paragraphs, they are not connected. So they should be connected. They’re complementing each other. Am I right or am I wrong?

SUSAN PAYNE: Okay. Thanks, Kavouss. Yes. Again, just to reiterate, this isn’t the text of the rule. This is really just meant to be capturing the terms that we’re agreeing, like the scope of our agreements. But I have no objection whatsoever to adding in the language “with respect to” at the beginning of that bullet so it says “with respect to other similar processes”. This is not in full sentence form. It’s more of a draft to capture our agreement rather than being in perfect English. But I’m happy to make that change. So thank you for flagging that. Sam?

SAM EISNER:

Thanks, Susan. I have a reaction to the comparison to the other examples. So we know what filing fees are, right, and I think that those are clear. From what I understand about how the ICDR charges that might be different from how other arbitration providers might charge is that they don't put on any other types of percentages on top of arbitrator fees or those sorts of things. So the ICDR really gets paid. They don't get a lot of money as a result of the IRPs. They get the filing fee, and then at the end there's a final fee if the case goes to a certain point. And those are basically the only two payments that go to the ICDR. But some of the other providers, what they do is they'll have a filing fee so that money goes to them, but then there are also percentages put on top of arbitrator fees and others, where ICDR basically just does a pass through of the actual billed arbitrator fees. So it's not necessarily an apples versus apples, right? So we know that we wouldn't put in the arbitrator fees as a component of this. But those additional top offs that are also payments to the arbitral forum can't be ignored as part of the cost of an IRP above the arbitrator fees.

SUSAN PAYNE:

Thanks, Sam. From my perspective, these were given as examples. But I do think it's important for us to reflect on what we're trying to do in terms of the filing fee, which is to have something which is a sort of a reasonable level of fee and comparable to other filing fees for similar types of proceedings. But also to bear in mind that, as per the documents that I recirculated just before this call, in the wash up, ICANN has been picking up the cost of the filing fee anyway as part of the cost of the IRP proceedings. So it's not about this should be a cost. It's only about setting a fee that's a reasonable level to be a deterrent

but not so much as to frivolity, but not so much as to actually be a bar to bring in proceedings. The suggestion was that we try and find something that is kind of comparable to other similar types of proceedings, bearing in mind that at the end of the day, when the case washes up, this cost gets reimbursed anyway to the claimant. But I think these were also just some examples. I'm completely open to you all on the ICANN side, coming up with reasonable proposals as an alternative of the types of fora that you should be looking at to set an appropriate level of fee. But I don't know what more to say. This was just some examples.

I'm going to go to Kristina. Obviously, feel free to respond if you want to. Kristina?

KRISTINA ROSETTE:

Thanks. If you could scroll back down so we could see the particular language. I am generally supportive of the concept that Kavouss is advocating. But I actually think that perhaps we should go a little bit further and be more specific. I think putting having language in there about "if appropriate"—it's just too mushy and I think it creates the potential for some people to take the position that it is appropriate, others to take it that it's not. For those who think that it is, has ICANN gone far enough? Where I'm going with this is that I think once we identify the universe of comparable processes—and Sam's point is well taken—I think we need to figure out what it is that we want to do here and say that. In other words, if the goal here is that the filing fee as paid by the claimant should be no more than 10% higher than the filing fee paid for comparable processes, then I think we need to say that and

note that ICANN is responsible for making the appropriate adjustment, and that maybe it's reviewed every two years or every three years. I think if we're not clear about what the intention is, I'm just concerned about the unintended consequences. I realized that there's some danger in going too far in being too specific. But I think as it is right now, it's potentially problematic. Thanks.

SUSAN PAYNE:

All right. Okay. Thanks for that, Kristina. Well taken. Kavouss?

KAVOUSS ARASTEH:

I have two points. First of all, when we say similar, other similar and so on, so forth, there may be, I don't know. Some people may know but I don't know. There may be five or six. Is this comparison should be done with five or six? And then how we decide on that? Do we take an average of these five or six? Because A will be 10% more than the initial one, B would be 5%, C would be 12%. So what we do? Which one of those others we take for comparison? That is one point. So, if some has any suggestion, it should be put a concrete proposal. Describing the problem is one issue but suggesting solution is another issue. This is one.

Point two that I have, do we need to go up to the last point of positions or we need to put some sort of, I would say, threshold, so on, so forth, and not making more strict? In other words, we should not overregulate the situation. Thank you.

SUSAN PAYNE: Thanks, Kavous. Okay. I can see a comment also from Sam in the chat. I'm not sure if you want to speak to it, Sam. I'm not sure if I'm understanding you correctly. I think you're saying that you disagree with what the purpose of the filing fee is.

SAM EISNER: No. I don't think it's a disagreement with the purpose of the filing fee. I think that we're discussing the filing fees as they relate to IRPs with a different lens than filing fees are normally discussed within arbitration. It's not a qualitative judgment, it's an observation that we typically wouldn't look at arbitration fees as whether or not they're serving as deterrence to filing or deterrence to filing frivolous claims, but surely could be part of it. But that's a much bigger item that I'm hearing is part of what we're trying to achieve from the IRP side than would typically be involved in a conversation in a regular commercial arbitration.

SUSAN PAYNE: Okay. I think that comes back to the fact that we have the Bylaws provision that we keep coming back to regarding ICANN bearing the cost of the IRP mechanism. That I paraphrased. I haven't said that exactly. Without wanting to reopen the whole discussion all over again, there were some in our group who felt that that should actually be the upshot of that should mean that there was no filing fee whatsoever because that is what the filing fee is, is part of the administrative costs. So for some period of time now, we've been coalescing around the idea that we do see the need for a filing fee so as to weed out the frivolous but that it should be set at a reasonable level. As I said, I think over a

number of calls and indeed some e-mail exchanges as well, I think we coalesced around that idea, and I don't want to unpick that again now, because I think we did all agree that that seems reasonable.

But I do take Kristina's point about what are we expecting from—if we have this assessment against other types of procedures, then what are we expecting to be done as a result of that, and that there should probably be greater clarity on our expectation for the avoidance of doubt so that there is not misunderstanding.

As I said, I these were some suggestions of comparators. I'm hoping that Sam, on behalf of ICANN, can propose some alternatives of what is the best way to make this assessment of what is a fair filing fee, if you think that this isn't it, if there are other proceedings that we should be comparing against. I'm not sure that we're going to make more progress on this now, but let's move on to the next bullet and we can always come back to this if we need to.

Okay, next bullet down is that "Deserving [needy] applicants should be entitled to seek a waiver of the fee. Rather than attempting to develop a potentially complex rule dealing with such a waiver, this should be addressed via the process envisaged by Bylaws 4.3(y) which talks specifically about ICANN establishing a means for meaningful participation for not for profits, etc." I've paraphrased that language. But further down in this document, which you all have, the actual text of Bylaws 4.3(y) is reproduced.

The rationale for this is that while it would be possible for us to craft rules for a specific exception process for the filing fee, that would allow

an IRP to be considered properly commenced even in the absence of the fee, and that created a mechanism for late payment if the claimants request was later refused. This seems like an unnecessary level of complexity for something that one would hope would get used relatively infrequently. The Bylaws already have this requirement for there to be a mechanism to allow participation in the IRP generally for those who couldn't otherwise afford it. That process should be applicable also for the claimant who can't afford the filing fee. Again, noting that that's probably likely to be fairly unusual circumstances.

When we've been discussing Rule 4, the safety valve, we've already developed an exception process for where there needs to be a late filing of an IRP due to sort of unusual circumstances outside of a claimant's control. That seems an appropriate place for a claimant to seek recourse if, again, in the unlikely circumstance as a result of not paying a filing fee, if they were then held to not be sufficiently impecunious that they might somehow be viewed as not having filed their IRP in a timely manner. So that was the thinking there that we didn't feel that we should be developing a specific stand-alone process for waiving the filing fee, but that there are other mechanisms already envisaged that hopefully that adequately addressed that.

I'm going to pause again. I'm not seeing any hands so I will keep going. So the next bullet point down.

Generally, a claimant will be reimbursed the filing fee by ICANN at the conclusion of the case. However, if the panel determines that the claim was frivolous or abusive, it has the discretion to shift this cost, i.e. the

claimant would then be held responsible for the filing fee and ICANN would not be ordered to reimburse them.

The rationale for that cost shifting is in line with Bylaws 4.3(r)—well, the rationale for all of that is in line with that. So firstly, that ICANN should bear all of the administrative costs of maintaining the IRP mechanism. As I mentioned, there is precedent for this interpretation that ICANN will reimburse the filing fee at the end of the case. That was the certainly the case during the .WEB case where that was specifically ordered by the panel in line with Bylaws 4.3(r). But also in line with Bylaws 4.3(r), if there is a claimant whose case is frivolous or abusive, then ICANN's administrative cost and/or fees could be shifted on to them. So that could include the responsibility for the filing fee. David?

DAVID MCAULEY:

Thank you, Susan. Hi, everybody. I had a question which I put in chat and Flip answered, I think. But I'm just so puzzled by this notion of reimbursing a filing fee. There's something you said just now, Susan, about the .WEB case, some may be surprised to learn but I have not read that case. But if the panel ordered the filing fee to be reimbursed, that sort of indicates to me then it wasn't reimbursable sort of ipso facto. And so I'm wondering, is it real that the filing fee is routinely reimbursed to a claimant? So that's my question. Thank you.

SUSAN PAYNE:

Well, the challenge routinely is having to do rather a lot of work when they've been so many or rather so few cases. But all I can do is refer you

to in particular that extract from the corrected .WEB IRP decision that I recirculated with the agenda.

Brenda, do you have it to hand? Do you want to pull it up?

BRENDA BREWER: Which document, please, Susan?

SUSAN PAYNE: Sorry. Let me see if I can recirculate.

DAVID MCAULEY: Susan, I'd be happy to go read that separately. I don't want to hold up progress here. Thanks.

SUSAN PAYNE: Okay. Let me just quickly read the bit that was highlighted. It's part of paragraph 4.12 of that panel decision. At the end of that paragraph it says, "In accordance with the general rules set out in Section 4.3(r) of the Bylaws, the claimant is entitled to be reimbursed by the respondent the share of the non-party costs of the IRP that it has incurred in the amount of \$479,000 (USD)." And it's in excess of \$479,000. And this is not expressed to be as a result of a frivolous or abusive defense by ICANN but just in the ordinary course of what is envisaged under Bylaws 4.3(r).

Thank you. Yes. You can see on the screen here, the filing fee is at the top just now, \$5750. Then towards the bottom of that second table

there is the cost of the panelists and the ICDR, which are \$473,708.27. The sum of those two items comes to that \$479,000 that's being referred to.

Okay. David, I think that may be a new hand, then there's also Malcolm. David first.

DAVID MCAULEY:

Thank you, Susan. Yes, it is a new hand. I saw Flip's answer in the chat. Thank you for that, Flip. I think he makes a good point but I just want to state something I've mentioned before and I want to continue this point. And Flip's point was why not reimburse filing fee if ICANN is covering the cost?

The point I want to reiterate that I've not yielded on so far is that I see a difference between costs that have to do with maintaining the IRP mechanism as opposed to costs that have to do with an individual IRP case. To me, it's comparable to courts. The state has courts in place. And the courts have rooms. They have seats for jurors and seats for participants. They have microphones, they have judges, they have this set in the other. So that allows citizens to come and make a complaint. The mechanism is in place. But a case is a case and it generates its own fees. So I myself see a distinction between maintaining the IRP mechanism and cost that may be involved in any individual case. So thank you for that.

SUSAN PAYNE:

Thanks, David. Malcolm?

MALCOLM HUTTY:

Thank you, Becky. David and I are just going to have to agree to disagree on that last point, I think. I set out before that this is a process and that the costs that are being referred to here for administrating the whole process, it's not merely the cost of the room.

But I've actually had put my hand up in response to David's earlier point. He argued that the fact that the IRP panel in this case had ordered the reimbursement to the filing fee somehow brought into question the idea or made it questionable that this would be a normal thing to do. But what we can see in front of us looks to me like a comprehensive statement of matters and I would not expect it to be left out merely because it was normal that it was reimbursed. I would expect the panelist ruling to be as clear and comprehensive and legible as it could be. So I don't think the fact that's mentioned there in any way undermines the suggestion that this would normally happen. Thank you.

SUSAN PAYNE:

Thanks, Malcolm. Yeah. Certainly that's my reading of that decision. David, obviously, you will, no doubt, want to read that yourself when you can do at leisure, but hopefully that will put your mind at rest on this. And if not, no doubt, we'll talk about it again.

Okay. I think we can go back to the strawman. Thanks, Brenda. Thank you. Okay, we're now on paragraph five, which is the cost of the panelists. I will read through all of those bullets because it's not too big a section. So first bullet, ICANN is responsible for the cost of the

standing panel. The rationale for that is Bylaws 4.3(r) where it expressly states that. I don't think we've got anyone disagreeing with that point.

Second bullet. In the absence of a standing panel or in other circumstances where it is necessary to seek panelists from outside of the standing panel, as envisaged under Bylaws 4.3(k)(ii), 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 that it aligns with Bylaws 4.3(r), i.e. that ICANN shall bear all the administrative costs of maintaining the IRP mechanism. There is precedent for this interpretation in the .WEB case where the claimant's share of the panelist's costs was ordered to be reimbursed. That is what we were actually just looking at as well. This also aligns with what the CCWG Work Stream 1 recommendation said, which is what the Bylaws provisions are based on, where ensuring that the costs of panelists were covered was considered essential for the accessibility of the IRP mechanism.

We are we are soon to have a standing panel, and so hopefully costs of non-standing panelists will be a relatively rare occurrence once we have the standing panel. It is still envisaged in the Bylaws in 4.3(k)(ii) that there could be circumstances where you need to go outside of the standing panel, either because you need particular expertise which isn't reflected in the standing panel or because the standing panelists are all busy. If there were a massive run on IRPs, it might be that there simply is no capacity left in the standing panel, and the Bylaws specifically envisage that. So even though when we have a standing panel, most

cases will have arbitrators drawn from that. It's not the case that we would never need to consider costs of panelists from outside the standing panel. It is something that still needs addressing even though we hope to have the standing panel very soon.

I will pause there. I heard someone speak. But I don't see any hands so maybe we can move on.

All right, paragraph six. Administrative costs of the IRP proceedings. ICANN should pay for the administrative costs of the proceedings as they are incurred rather than reimbursing the claimant at final determination.

The rationale for that is again that this would align with Bylaws 4.3(r), i.e. that ICANN should bear all of the administrative costs of maintaining the IRP mechanism. I had suggested some examples of what that might include such as the costs of ICDR attributable to running the process on ICANN's behalf. So administrative office time and communicating with parties and panelists, fixing of hearing time, hosting of virtual hearings, copying and postage for providing papers to panelists. There may be other matters as well. But I think those are probably the main ones.

We talked on our last call about this needing to include the cost of the panelists too, and I agree that it does as in line with Bylaws 4.3(r), but it's just not included here because we've got a whole paragraph five dealing with the cost of the panelist specifically. So that's the reason why they're not referred to here, because we've already dealt with them above.

So I will pause again. I don't see any hands but hopefully we can move on then to paragraph seven, party's legal fees. Each party is responsible for their respective legal fees. Where the three-person IRP panel on making its final determination finds that part or all 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 Bylaws 4.3(r), which is we keep referring to. And there's precedent for this including legal fees in the .WEB case. The IRP panel, just to close off something, that had been a concern on a previous call that IRP panel is defined in the Bylaws in 4.3(k)(ii) as meaning the three-person panel, which is making the final IRP determination. So that just makes it clear that this cost shifting power is granted to the three-person IRP panel. It's not something that would be picked up by a single panelist at some stage mid proceedings. Becky?

BECKY BURR:

Can we just add "in accordance with the Bylaws" there so it's just not sitting out there? I mean, I understand that that's the intent, but I would feel better if we just had that.

SUSAN PAYNE:

Is that in the first bullet, Becky? Where it says each party is responsible for their respective legal fees, is that where you're suggesting?

BECKY BURR: Sorry. I was really looking at the cross shifting portion of that.

SUSAN PAYNE: Okay. Yeah, it's in the rationale but we can include it in the bullet.

BECKY BURR: Yeah. Okay. Yeah, it's not that important. I'm looking at this again. It's sort of there.

SUSAN PAYNE: Okay. All right. Thank you. Apologies, everyone. I actually missed a bullet which was also part of seven. So we'll just do that now. The final bullet on paragraph seven is that the party to whom administrative costs and/or fees may be shifted has the right to file submissions in opposition. To my mind this, I think, would be a perfectly reasonable thing. It seems likely that that would be the case and I think has been the case in previous IRPs, but we felt it was important to make that specific point that before there's an award of costs or fees against a party, they have a right to make some representations.

Becky, your hand's still up. I'm treating that as an old one. But shout if I'm wrong.

Then we can move on to paragraph eight just to finish this off, which is the ICDR form. The first bullet, the ICDR form for commencement of an IRP should be amended to make it clearer that the claimant is not agreeing to be bound by those parts of the ICDR rules and procedures which have been superseded by the ICANN IRP Supplementary

Procedures. That is the point that we were talking about when we were discussing the action item that's sitting with ICANN Legal to review the form. Although I had drafted or I had suggested some amendments to the form, which obviously ICANN Legally taking away, this is an action item that ICANN Legal have. There is agreement that the format present is not quite as it should be and that it would benefit from some clarity, including on this point.

Again, I'm not seeing any hands. I didn't really expect to see any on this paragraph eight particularly. Thanks for that. There are certainly some little tweaks as we've been discussing. I think the main area where it's perhaps more than just tweaks is that there is a feeling that we need some greater clarity in relation to the filing fee in paragraph four, particularly around looking at other arbitral proceedings and being a bit clearer on what the expectation is, rather than just saying that perhaps the amount paid by the claimant should be revised, if appropriate, that we should be a bit clearer on what the expectation is from this group. So I've made a note of that that that does need to be revised. As I say, there are also a few sort of tweaks of language as well, as we've been discussing on this call.

Okay. I've got a couple of hands. Becky, I think that's still an old one. I will just pause and see if it's new. Okay. I am not hearing anything from Becky. I'm going to assume that's an old hand and go to Kavouss.

KAVOUSS ARASTEH:

Have you given me the floor?

SUSAN PAYNE: Yes, please.

KAVOUSS ARASTEH: Two comments. First, in the last call, we talked about some adjustment to the forms. I don't know. You said it has been done or has not been done or being done. That is one point.

The other point, Susan, I have still difficulty with the comparison of the fees and so on, so forth, with other arbitrations. Because those other arbitration, first of all, they might have quite different fees. And then the scope of those arbitrations may be different from the scope of arbitration that we are facing, so I have some concerns. However, the concerns may be met if in appropriate part of that, we add where feasible, we do that. If it is not feasible because of several reasons, ICANN cannot reduce the cost because it's difficult to make judgments, three or four or five different arbitration entities with different scope of arbitration of subject, then trying to—I'm sorry to say these bad examples—appellate potato. It doesn't seem to be appropriate. Either we don't mention that, or if it were mentioned, put some qualifier somewhere where feasible. They can do this comparison [inaudible]. If it is not feasible for the reasons and that they could not find it's possible to do that, they don't do that. Thank you.

SUSAN PAYNE: Thanks, Kavouss. I think, yes, that's a reference back to this paragraph four and some of the other comments as well, reflecting a desire to see a bit more thought on that paragraph four and how we express it and what the expectation is. So I think that is one that I will give some

further thought to. Obviously, if anyone in this group has other recommendations on a better way to address this, that would be most welcome.

Also, as we discussed, as we were going through this, I think the particular arbitral bodies that were identified were just some examples that I had to get us going. I think the expectation is that this would be a task that ICANN would perform to make a proposal as to what is a reasonable filing fee. But for present purposes, probably in the absence of other hands, I think that's maybe as far as we can go.

In terms of this document, we've talked about it briefly already at the beginning. But just to reiterate that this is not the draft of a rule as part of the Supplementary Procedures. This is an attempt for us all to coalesce around an agreement on how we think these matters should be dealt with, and that my expectation is that this is then something that gets taken by ICANN or indeed it may be something that they delegate to Jones Day to do on their behalf to actually draft the rules that reflect our Terms of Agreement. I don't think it's our job to be to be drafting the actual language of the rules. And indeed, if we do so, it almost certainly would get redrafted anyway. But just as a reminder that sometimes some of this language is a little imprecise. If it's imprecise and therefore could lead to disagreements on interpretation when the rules are being drafted, we don't want that. But where some of the language is not perfect English and so on, that isn't the end of the world because this isn't the language of the rule. The rule still has to be drafted. Malcolm?

MALCOLM HUTTY:

I'm sorry. You said that it's not our job to be actually drafting the rules of procedure. Is that actually correct? Maybe I need to read this more carefully. But I thought that was exactly what we were supposed to be doing, potentially, with the benefits of legal advice, where necessary. But are we not the final arbiters of our own reports? I mean, certainly boards can choose not to adopt our report, but I thought that we were supposed to be developing clear published rules of procedure. Was that not up? I believe that's our mandate.

SUSAN PAYNE:

Malcolm, I think that's not what I meant by what I said. What I mean is we're not here as ICANN's lawyers to draft the actual text. What we are here to do is agree what the text should say and have delivered back to us a draft of the rules that we then review and confirm, meet what we intended. I don't believe we're being paid here to be drafting the rules. We're not being paid to draft the rules.

MALCOLM HUTTY:

Okay. Let's be very precise about this. I have no problem at all with us giving an instruction note to outside lawyers who then actually draft the text that we then review and approve as being our recommendation. But I don't think the process is that we just develop a drafting note and then they go and do their thing, and it doesn't come back to us. We can work with the benefits of a professional advice. There's nothing wrong with that. But it is our rules of procedure. We are the ones that are tasked with developing clear published rules for the IRP "rules of procedure".

SUSAN PAYNE: Malcolm, we're entirely in agreement.

MALCOLM HUTTY: Perfect. Thank you. Thank you.

SUSAN PAYNE: Okay. Kavouss?

KAVOUSS ARASTEH: Yes, I am in full agreement with what Malcolm said.

SUSAN PAYNE: Brilliant.

KAVOUSS ARASTEH: CCWG accountability. They have separation of authorities and separation of accountabilities. We don't want to transfer everything to the executive body. So it is our duty. If we don't know, we ask external advice. We have done that—the CCWG, CWG, ICG. We ask advice and so on, so forth. But I don't think that we could leave it to the ICANN to draft the rules without bringing it back to us. I have no problem if you want to bother them. I'm most appreciative to them, but not coming back to the people, they are oversighting team, so we have to have a look at the possibility to that one. Two heads work better than one head and in different way. ICANN staff or ICANN Legal, they are one side of

the table. We are other side of the table. So the two sides maybe work together but not only one side. So I fully agree with Malcolm. Thank you.

SUSAN PAYNE:

Thanks, Kavouss. And me too, I also agree with Malcolm that there is no suggestion that anything that was drafted wouldn't be coming back to this group for confirmation and sign off. That was not the intent of what I was saying.

Okay. I think in terms of our discussion, I'm not seeing any other hands apart from the one from Becky, and I think that is still an old hand. So just a reminder that we will have a further call in two weeks. Hopefully, we can make some progress on what needs to be thought about for that paragraph four in light of the discussions here, and then we can pick this up on our next call. But ideally, we will pick this up over e-mail before that as a group.

So our next call is on the 28th of February. Does anyone have anything they want to raise as AOB before we wrap up this call? I'm not seeing any hands so I am going to take it that we can—oh, Flip? I do see your hand. Flip, I'm not hearing you. Over to you.

FLIP PETILLION:

Thanks. Do you hear me, Susan?

SUSAN PAYNE:

I do now. Yes.

FLIP PETILLION: Thank you. Yes, I have a general question. It's an organizational one. I'm actually wondering on timing. Where are we? Where do we want to be and by when? Because we've been going on for quite some time and I just want to understand when we intend to land this. Coming back to earlier comments that were exchanged in the chat, I did hear you that we were kind of discussing the heads up, which would mean that at some point in time, we are going to the next step which is drafting or reviewing draft texts. So what's your view on timing?

SUSAN PAYNE: David?

DAVID MCAULEY: Thank you, Susan. Hi, everybody, again. I think Flip has raised a really good question. But it's so important, at least in my view, that maybe we could dedicate a meeting to talking about this. And preceding the meeting, we would seek suggestions, input ideas/concepts from all of our members, and then just chatter through. I don't think we should land all of that responsibility on you, Susan. I think we as a team—and this might be a good chance to invite back those who are less frequently with us. But I think it's a great question. So that's my two cents. Thanks.

SUSAN PAYNE: Thanks, both. I think we did have a list of items we needed to deal with. We have addressed many of them now. I think one thing we had talked about was perhaps having a small group to just do a read-through and

identify if there's anything we've missed. We had tried to do that during a full plenary call and didn't succeed with that.

But yeah, let me pick this up with Bernard offline and see where we can get to in terms of some clearer kind of timeline. But I think we're close to having addressed all of the items that we had on our list that needed looking at. We do know we are going to have to have a public comment as well. So there is still that to be done. Okay. I think there's quite a lot in the chat on this as well. So let me review that and we will make some suggestions, if that's okay.

All right. Thanks, everyone. I think that's probably as far as we can go on this call. So thank you all for your time, and keep an eye out on the e-mail. Please do continue to exchange thoughts on that. We'll meet again in two weeks' time. Thanks.

[END OF TRANSCRIPT]