**Initiation Strawman v2 30 January 2023**

***Items 1. to 3. were agreed in principle by IOT members on the call of 15 November 2022.***

***Items 4 onwards are a proposal for handling initiation and the associated responsibility for costs that a potential claimant should be aware of when commencing an IRP, based on the IOT’s discussions and email exchanges.***

***Bylaws provisions referred to below are reproduced at the end for convenience.***

1. Need for clarity for claimants/potential claimants considering bringing an IRP (referred to hereafter as the claimant):
* 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 should be a priority.
* Relevant rules, forms, etc., should be on the ICANN website.  If this is accomplished through links to the ICDR website, then these links should be to the specific place where the information can be found.
* 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.
1. 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.
2. Language needs to be clear and terminology needs to be uniform.  That uniformity could be addressed via the definitions section, i.e. “X, referred to as Y in the ICDR Rules”.  This can be dealt-with during clean-up at the end.
3. Filing Fee:
* A claimant should pay a filing fee. The filing fee should be a first gate to limit trivial or vexatious use of the process, but not so onerous to prevent use of the process.
	+ Rationale: Bylaws 4.3(n)(i) speak 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 serve as a barrier to justice.
* 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 of the up-front payment considered necessary by ICDR
	+ Rationale: this aligns with the above and with the spirit of Bylaws 4.3(r), i.e. that ICANN shall bear all the administrative costs of maintaining the IRP mechanism
* Other similar processes, as referred to 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 of maintaining the IRP mechanism, including the arbitrator costs. An appropriate IRP filing fee would be at the mid-point of the range.
	+ Rationale: Bylaws 4.3(a)(viii) refers to resolution consistent with international arbitral norms; 4.3(n)(i) and (ii) also make similar reference.
	+ Examples:
		- ICC: $5,000 plus a variable amount as a provisional advance on administrative costs including arbitrator costs.
		- FORUM Business-Business Arbitration: $800 (non-monetary claims)
		- London Court of International Arbitration: £1,950 (approx $2400) then an hourly rate for LCIA administration
		- CEDR CPR Rules: $1,750 plus admin fee (amount unclear)
* Deserving [needy] applicants should be entitled to seek a waiver of the fee.  Rather than attempting to develop potentially complex rules dealing with such a waiver, this should be addressed via the process envisaged by Bylaws 4.3(y) (establishing a means for meaningful participation for not for profits, etc).
	+ Rationale: while it would be possible to craft rules for an exception process for the filing fee that allows for the IRP to be considered properly commenced in the absence of this fee, and creates a mechanism for late payment if the claimant’s request is refused, this would add complexity that may be used relatively infrequently.  The Bylaws already require that there should be a mechanism to allow participation for those who otherwise could not afford it, and this could be used to address the inability of a claimant to pay the filing fee.  We have also already developed an exception process to allow for the late filing of an IRP by a claimant under rule 4 (the safety valve).  In a situation where the potential claimant sought relief from the filing fee and, as a result of that process, was out of time to bring their IRP (because both the statement of dispute and the fee are necessary for the IRP to be timely-filed), this would seem a good example of a case where the rule 4 safety valve ought to apply.
* 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 be held responsible for the filing fee and ICANN would not be ordered to reimburse them).
	+ Rationale: reimbursement of the filing fee 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.  However, also in line with Bylaws 4.3(r), a claimant whose case is frivolous or abusive may have ICANN’s administrative costs and/or fees shifted to them, which could include this responsibility for the filing fee.
1. Costs of the Panelists:
* ICANN is responsible for the costs of the standing panel
	+ Rationale: Bylaws 4.3(r) expressly states
* 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.
	+ Rationale: 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 panelist costs was ordered to be reimbursed.  This also aligns with the CCWG-WS1 recommendations on which the Bylaws provisions are based, where ensuring that the costs of panelists were covered was considered essential for the accessibility of the IRP mechanism.
1. 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.
	+ Rationale: aligns with Bylaws 4.3(r) i.e. that ICANN shall bear all the administrative costs of maintaining the IRP mechanism.
	+ Examples: costs of ICDR attributable to running the process on ICANN’s behalf; administrative office time in communicating with parties and panelists, fixing hearing times, hosting virtual hearings, copying and postage for providing papers to panelists. WHAT ELSE?
1. Parties’ legal fees:
* Each party is responsible for their respective legal fees
* Where the three-person IRP Panel, on making its final IRP determination, finds that part or all of a party’s claim or defence 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.
	+ Rationale: aligns with Bylaws 4.3(r).  There is precedent for this interpretation on legal fees in the .WEB case.
	+ IRP Panel is defined in Bylaws 4.3(k)(ii) as the three-person panel which makes the final IRP determination. Cost-shifting power is granted to that three-person IRP Panel in 4.3(o) and (r).
* The party to whom administrative costs and/or fees may be shifted has the right to file submissions in opposition.
1. ICDR Form:
* 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 (see attached).

**Bylaws provisions referred to above**

**4.3 (a)(viii)**

…The IRP is intended to hear and resolve Disputes for the following purposes ("**Purposes of the IRP**"):…

(viii) Lead to binding, final resolutions consistent with international arbitration norms that are enforceable in any court with proper jurisdiction.

**4.3(g)**

**4.3 (k) IRP Panel**

(i) A three-member IRP Panel shall be selected from the Standing Panel to hear a specific Dispute.

**(ii)** The Claimant and ICANN shall each select one panelist from the Standing Panel, and the two panelists selected by the parties will select the third panelist from the Standing Panel. In the event that a Standing Panel is not in place when an IRP Panel must be convened for a given proceeding or is in place but does not have capacity due to other IRP commitments or the requisite diversity of skill and experience needed for a particular IRP proceeding, the Claimant and ICANN shall each select a qualified panelist from outside the Standing Panel and the two panelists selected by the parties shall select the third panelist. In the event that no Standing Panel is in place when an IRP Panel must be convened and the two party-selected panelists cannot agree on the third panelist, the IRP Provider's rules shall apply to selection of the third panelist.

**4.3(n)(i)**

An IRP Implementation Oversight Team shall be established in consultation with the Supporting Organizations and Advisory Committees and comprised of members of the global Internet community. The IRP Implementation Oversight Team, and once the Standing Panel is established the IRP Implementation Oversight Team in consultation with the Standing Panel, shall develop clear published rules for the IRP ("**Rules of Procedure**") that conform with international arbitration norms and are streamlined, easy to understand and apply fairly to all parties. Upon request, the IRP Implementation Oversight Team shall have assistance of counsel and other appropriate experts.

**4,3(n)(ii)**

The Rules of Procedure shall be informed by international arbitration norms and consistent with the Purposes of the IRP. …

**4.3(o)**

Subject to the requirements of this Section 4.3, each IRP Panel shall have the authority to:…

(vii) Determine the shifting of IRP costs and expenses consistent with Section 4.3(r).

**4.3(r)**

ICANN shall bear all the administrative costs of maintaining the IRP mechanism, including compensation of Standing Panel members. Except as otherwise provided in Section 4.3(e)(ii), each party to an IRP proceeding shall bear its own legal expenses, except that ICANN shall bear all costs associated with a Community IRP, including the costs of all legal counsel and technical experts. Nevertheless, except with respect to a Community IRP, the IRP Panel may shift and provide for the losing party to pay administrative costs and/or fees of the prevailing party in the event it identifies the losing party's Claim or defense as frivolous or abusive.

**4.3(y)**

ICANN shall seek to establish means by which community, non-profit Claimants and other Claimants that would otherwise be excluded from utilizing the IRP process may meaningfully participate in and have access to the IRP process.