SUSAN PAYNE: Hi, everyone. Sorry. I'm used to doing policy calls where we get an introduction from someone saying, "Good morning, good afternoon, and good evening." So I'll do that bit. Hello, everyone. Thank you for joining. This is our call of the IRP-IOT, scheduled for the 25th of February. We are intending to cover in particular translations, hopefully, on this call.

I'm assuming that, as with the PDP calls, the attendance will be taken from the Zoom room. But I can see we've got a 703 number that's just listed and doesn't have a name against it. If that's someone on the call, can you just identify who you are.

[KRISTINA]: Hey. It's [K]ristina. That's me.

SUSAN PAYNE: Oh, hello, [K]ristina. Perfect. Okay, so we've got a lovely, good turnout now then.

Turning to our agenda for today, the first item is to review the agenda. We're obviously going to do usual and quickly talk about statements of interests, a quick discussion on the plans for ICANN67 and what the proposal is for our next call, and then hopefully get into a good discussion on the section of the interim supplementary procedures that deals with translations. Ideally, I'm hoping that we'll be able to knock that section on the head during this call. That would be great if we can. Obviously, we have to, before we make changes on anything, do,

Note: The following is the output resulting from transcribing an audio file into a word/text document. Although the transcription is largely accurate, in some cases may be incomplete or inaccurate due to inaudible passages and grammatical corrections. It is posted as an aid to the original audio file, but should not be treated as an authoritative record.

effectively, two readings of something. But I think we could make a good stab at that and hopefully reach a point where we're comfortable with the direction of travel.

Then, assuming there's time, we can have a bit of a tee-up for what we're likely to discuss next. Then I've included on the agenda just Any Other Business. I'll ask now in case anyone has anything they want to put on the agenda. I'll try to remember at the end as well, in case something comes up during the course of the call that someone wants to flag.

I'm not seeing anything in the chat or any hands, so I'm going to assume, for present purposes, we don't have AOB at the moment.

So, statements of interest. We are still missing a small number of them. [Bernard] and I have been discussing this behind the scenes. We did wonder whether perhaps if it'd be preferable for the group if we have a specific statement of interest for this IRP-IOT rather than what we had been doing, which was essentially relying on the GNSO one. It's possibly that part of the reason why some people have perhaps not completed the GNSO one is because this obviously isn't a GNSO process specifically. And perhaps the GNSO statement of interest isn't entirely fit for purpose because of the nature of this particular group. So we were wondering if perhaps that would assist. It would also then allow us to capture things like whether people have direct involvement in an IRP, since obviously that wouldn't be a question that's asked in the GNSO document.

Mike?

MIKE SILBER: I just wanted to say there's also an issue where I've been able to actually log into the GNSO site to actually fill in any SOI. So it's not for want to try, but there seems to be a process problem. So I'm more than happy with a specific [SOI].

SUSAN PAYNE: Okay. Well, then perhaps that makes even more sense than … I know it's quite a flaky process. A number of us have had to go through it because we are doing GNDO PDPs. I do recall that logging in and the like can be quite a challenge. So, yes. I'm seeing some kind of support in the chat. Based on your comments as well, Mike, maybe that does make sense if we have our own specific one, which, as I say, will then allow us to capture the information about active engagement on any live IRPs, which is one of the things that we discussed on an early call. So we can take that away, Bernard and I, as an action point to hopefully have something we can deploy to everyone. Perfect.

I'm not seeing any other comments. I think we're good. Thanks, Chris, for the note from Becky.

Moving on: ICANN67. Obviously, when the agenda was circulated last week, we were still having a meeting in Cancun and we had a slot allocated to us for a face-to-face meeting. Almost immediately when the agenda when out, we then obviously had the announcement that the Cancun meeting is transitioning over to being a virtual remote participation meeting only. The meeting planning team, as I'm sure you all know, is beavering away with the leaders of the SO/ACs and the

various constituencies and stakeholder groups to try and determine which sessions should be prioritized for that remote meeting and which could perhaps either be canceled or could be rescheduled to a time which doesn't necessarily have to be specifically within the timing of the ICANN67 meeting.

Certainly I think there's a perception – I think I would share it – that our planned meeting doesn't necessarily have to happen during the particular term of the ICANN67 remote meeting. The real driver, given the relatively early stage of this newly constituted group, was to have a face-to-face, or rather to take the opportunity of being face to face, to meet each other in person. Since we've lost that, unless anyone feels very strongly that we should try to find a slot during the ICANN67 meeting, it seems to me, bearing in mind the really quite heavy burden on staff and the difficulty in slotting in the things that the community as a whole think are priorities, we could readily dispense with having the meeting that had been proposed and just reconvening on our regular call, which we already have scheduled for the 17th. So, essentially for the week after, we've already got something slotted into our diaries for 17:00 UTC on the 17th. So, as I say, unless anyone feels strongly – feel free to message afterwards if you want to have a discussion on this and don't want to raise it now – I certainly think that the meeting planning team and staff would welcome us deprioritizing our meeting and convening the following week.

I'm seeing some sort from [K]ristina for not trying to schedule it for the specific meeting schedule. Thanks for that. I think – yeah – Robin similarly is pointing to the preference to prioritize PDPs and the kind of cross-community work that we know needs to be done. Thanks,

everyone. So I'm certainly seeing some support for that. So I think you should already have the 17th of March meeting in your schedules, so just keep an eye out for that and recall that, in what's usually a downtime week after the ICANN meeting, we'll be meeting.

Just whilst we pause, we've got a 917 number that I don't have a name for at the moment. Would you mind just letting me know who you are? I think this is going to be Greg. I think I do this every day. Greg, is that you?

GREG SHATAN: That's me.

SUSAN PAYNE: Yes! Sorry about this, Greg. I'm getting better.

GREG SHATAN: Getting better all the time.

SUSAN PAYNE: Yeah. I'm starting to actually spot your number now, which I think is a terrible reflection on how much time we spend on then phone with each other.

GREG SHATAN: Well, we'll have to catch up in Cancun – uh, oops.

SUSAN PAYNE: Yeah. Sometime. Maybe another meeting. Okay, brilliant. Thanks very much.

Next agenda item: translation. I'm very much hoping that you've all read the background that Bernard pulled together. It was very lengthy, but I think those of you who did read it will have appreciated that there wasn't a huge amount of debate on this translation section, which I think does mean that it does really warrant us coming back to it. We do know that there are a few issues that do warrant reconsideration, some of which were flagged by Samantha when she was taking us through some of the background to the supplemental rules. And I have tried to spend some time pulling out some others that have occurred to me just as I was reading the relevant 5B section in the interim supplemental rules and the background document.

I'm not sure who's controlling our Zoom room, but could we go onto the next page?

Thank you. It's probably Brenda, isn't it? Thank you, Brenda. First off, it's not quite fitting perfectly well, which is why I also circulated it. It also obviously is the text that's in the supplemental rules, so hopefully it's something that people are familiar with. I thought, just for the purposes of the call, it wouldn't be the worst thing to have at hand should we need it. This is 5B, which is the current section on translations.

Do people want me to read this out? I'm very happy to. You may prefer me not to. You may prefer to just read it yourselves quickly. That may be a better answer. I'm going to just pause and see if anyone has strong

views. Otherwise, I'm just going to suggest we all just take a moment and read it.

Just to flag as well that the bit in bold at the start is not in bold in the rules. That was my emphasis because that just reflects, as you can see, what then actual bylaws say, which is fairly light on this topic.

Okay. So I'm going to pause and let people quickly read through 5B, if that's okay.

[BERNIE TURCOTTE]: In the meantime, can I ask Mike to mute his phone when not speaking, please? Thank you.

SUSAN PAYNE: And possibly also Greg, I think.

UNIDENTIFIED MALE: [inaudible]

SUSAN PAYNE: Maybe we can scroll down a little bit to get the last paragraph in, hoping that everyone has got that far. That would be super. And thanks, [K]ristina. I'm noting your hand.

Okay. How are we doing? Anybody need a bit more time, or shall we move on?

Okay. I'm taking silence as consent here – oh, [K]ristina. Your hand is up. Yes?

[K]RISTINA: Thanks. This might be directed at the folks who participated in the previous group. There's something that I keep getting stuck on, and I'm hoping I can get some clarification.

As currently proposed, 5B says that it's the IRP Panel that has the discretion to determine whether the claimant has a need for translation services, etc. Well, the IRP Panel doesn't get appointed, and there is no proceeding until the claimant has actually submitted a claim, which, in my mind, raises the threshold question of, what is supposed to be happening and when do we anticipate that this translation would come up? Is the expectation that the claimant would be expected, not withstanding a later need for translation, to submit their claim in English and that, once the panel was formed, to then submit a request for translation? Or some other iteration of that? Because I think this is a point that, for me, I got really confused about. It seems like that's something that we're going to have to be very, very clear on so that, if we do decide to say, "Okay. You've got to submit your claim in English and then you can request translation," then I think we need to make clear that the fact that the claim was originally submitted in English should not be construed against the claimant in its request for translation services or vice versa.

Again, I don't know if you all discussed this. I skimmed all the history that Bernard sent, and I didn't see it. But it would be helpful to have a

better understanding of how you all anticipated that that would work. Thanks.

SUSAN PAYNE: Thank you, [K]ristina. That is a super question, and that is the obvious first question which I actually hadn't spotted at all.

I've got a series of hands up, and I'm just going to go in order unless anyone wants to leapfrog. Greg first, and then I have David and Samantha.

Greg, I think you're now double-muted. Sorry about that.

GREG SHATAN: Can you hear me now?

SUSAN PAYNE: Yeah.

GREG SHATAN: Awesome. I'm sure David and Samantha will correct or clarify, but my understanding or recollection is that we are going to have a standing IRP panel, out of which the particular panel – I think we may have chosen a different word – would be chosen for any particular case. The standing IRP panel would function as essentially the administrative body or the first-level administrative body for the IRP. Thanks.

SUSAN PAYNE: Thanks. David?

DAVID MCAULEY: Thank you, Susan. My comments are in my capacity as a participant back then, not as the Chair back then. I do recall the comment that Greg just made. But, specially to this point about the language of the complaint, I don't recall that we discussed it at length or came up with a decision on it. As a participant, I recall thinking back at the time that it was my reading of the bylaws that apply that English would be the primary working language and that at least a complaint would be in English. But we certainly didn't agree on that. I don't think the issue was ever discussed pointedly.

Other bylaw provisions that would apply to this … The purposes of the IRP up in 4.3A talk about the IRP being efficient and affordable. Then, in 4.3N, where we get into rules, they also say the rules should ensure fundamental fairness and due process.

It seemed to me that what we were working on towards back then on translation was a set of guiding principles, rule, etc., that could be applied by an IRP panel, whether it's a standing panel on a preliminary issue or the IRP panel in an actual setting, to ensure fundamental fairness and due process.

So my recollection is similar to Greg's but not exactly the same. Thanks.

SUSAN PAYNE: Thanks, David. Samantha, if you wanted to add anything …

SAMANTHA EISNER: Thanks. This is also from my recollection of the proceedings. I don't believe we've ever thought about in the way that [K]ristina posed the question. I think it's something that we really do need to focus on a bit because we have the competing obligations of fairness, efficiency, understanding when a filing is complete, and the obligations on a claimant to prepare a claim in a timely manner to meet their obligations to file it in timely manner but also to participate. That's why we have this translation process. So we hadn't thought about it in terms of the standing panel versus not. We have other places in here, I think, that we have obligations that are assigned to the standing panel or an emergency panel if the standing panel is not available that we could assign this to, but we still have to consider the broader questions of the broader timing issues and fairness and what that means because one of the other things that I think I had flagged in the earlier call was getting more specific about what it means to commence the filing and, if we have a statement of claim that's required, what do we do if the person or the entity that is submitting the IRP doesn't have sufficient fluency in English to state a claim in English for it? So I think, if we frame out that question a little bit more, we might be able to get some clearer recommendation of how the IOT would want to present that.

Thanks, [K]ristina, for framing it in that way.

SUSAN PAYNE: Excellent. Thank you. Flip?

FLIP PETILLION: Thank you, Susan. Do you hear me?

SUSAN PAYNE: Yes. I hear you fine.

FLIP PETILLION: Thank you. Very interesting point that is raised. I just wanted to share the following experience. ICDR cases may be conducted in any language that is chosen by the party. I mentioned it because it means that we have full liberty. So ICANN can, in the rules, decide what it would like as a language to start procedures in. And I think it's done in quite a number of institutions. You just start in English, and you have rules or you don't have rules that handle the translations at the later stage of the proceedings. I know for sure that, with a view to respecting the [rights of defense] and balancing the presentation of arguments, that panelists will do the best effort possible to allow translations and to discuss how to solve, practically speaking, language issues. Thank you.

SUSAN PAYNE: Sorry. I managed to freeze myself there. Thanks, Flip. David, I think that's a new hand.

DAVID MCAULEY: Thank you, Susan. It is new. It's triggered by what Flip was saying, not so much by what he said but the fact that he said it. It strikes me that, on this issue, and maybe on all the substantive issues that come along, it would be good to ask ICANN's legal counsel and the practitioners

among us that have been engaged in IRPs – I know that Flip and Mike Rodenbaugh have for claimants, as I understand their statements before – to comment on what we're dealing with – in this case, translations. "Has this been an issue? How's it been handled? What's your experiential sense of this?" It might help us as we give it some thought. Thanks.

SUSAN PAYNE: Thanks. Flip, back to you.

FLIP PETILLION: Thank you very much, Susan. Thank you, David. No, actually, personally, in the seven, eight, or nine cases that I've handled, that issue never came up. So it is really new, but it is my experience in other cases with ICDR or ICC or other institutions that that is traditionally handled in a very practical way by the institutions. In [our case], that would be ICDR and the panelists. Thank you.

SUSAN PAYNE: Thanks, Flip. Mike, and then I think I might put myself in the queue to ask a question as well. But Mike first.

MIKE SILBER: Thanks, Susan. I'm just a little concerned. I take Flip's point that panelists will strive for fairness. I just do have a concern that, in seeking a [critique], the responsibility and the cost is always going to passed onto ICANN. If that is the case, then let's make it very clear and let's

accept that. But personally I think that a little bit of guidance and not relying on the fairness and the attempt of panelists to push towards equity would go a long way, especially when you're dealing with an organization which now has the expense of a standing panel and then has potentially the expense of translations, which could be used to weaponize the process.

SUSAN PAYNE: Thanks, Mike. Someone has put in the chat – oh, Samantha has put in the chat – to remind us that the bylaws confirm that the IRP is administered in English. So the expectation is that it would be in English and that proceedings would be conducted in English. So we are talking more about translation to ensure someone who's a claimant for whom English is not their language isn't disenfranchised. I think certainly the current version of the interim rules, as they're drafted, is intended to try to create a fairness for those who are not English speakers but also to try to maintain the concept of need, which is something that's expressed in the bylaws.

I'm going to just ask my quick question, which is probably a question to Flip but maybe also a question to some of the others who have been very active on arbitration – so possibly for Mike Rodenbaugh or others. It's really a question about timing for those of you who are active practitioners. Where these translation requests come up in other proceedings that you've been familiar with, has it been the case that there is an expectation and an understanding that, if there's a limitation period for bringing a claim, the claimant has to get their decision on

translation in before that? Or is there an expectation that time is allowed or time pauses to allow for a translation?

I can see Flip his hand up anyway, so I'm going to do Flip first and then Mike.

FLIP PETILLION: Thank you, Susan. This is typically a question or a topic that is discussed in the very beginning of proceedings. An experienced chair of the panel and the members of the panel with experience will expect that kind of question to be posed at the very beginning of proceedings so that both parties can know what to prepare for or who to call upon as a third-party service provider and also estimate the cost of all that.

Talking about cost, and coming back to what Mike Silber said a few minutes ago, it's not necessary the case that ICANN is actually paying all the costs. Absolutely not. In the ICDR cases that have been handled over the last eight years and where ICANN was a party, I recall that quite a number of panels have decided to share the costs over both parties: the claimants or claimees on one side, and ICANN on the other. Thank you.

SUSAN PAYNE: Thanks. Over to you, Mike Rodenbaugh.

MIKE RODENBAUGH: Well, Flip, think part of the point is that ICANN should have been paying those expenses, even though claimants have been paying them to date, although I'm not sure it's been required. Are you saying, Flip, that it's

been required in any case you've worked on? Because I haven't seen that in any of the [orders] I've seen in any cases. Not to say it's not there somewhere.

I think then point is having an English-only rule is not fair, clearly. I feel like we probably would have consensus on that in this group. So we need to develop something better that would be a bylaws change recommendation to the Board on this. We should make more of a firm rule than just leaving it loosey-goosey and up to the standing panel in any given case because that's just going to introduce another litigation step, I would say, in a lot of potential cases. If we opened up to being non-English only and leaving it debatable, then that to me is a problem.

Then I think you were asking about, in other contexts, how these issues are handled. I guess I'm just familiar with the UDRP as one where, as long as you file, then I believe there's time later for translations to happen. But we can go and check the UDRP rules on that specifically.

SUSAN PAYNE: Thanks, Mike. I think you might be right in relation to the UDRP. I was looking at that earlier, and it seemed to me that, again, there's an expectation of … yeah. [K]ristina is pointing out: "UDRP is done in the language of the relevant registration agreement." [inaudible] So that's a slightly different situation.

FLIP PETILLION: Susan, Flip here.

SUSAN PAYNE: Yeah, Flip?

FLIP PETILLION: Well, on UDRP, I handled UDRPs in different languages. It's not necessarily so that there is an automatic translation because there's a request, for example, for a French-speaking claimant to have the language changed, although the complaint had to be initiated in English. The panelists typically take into account [inaudible] by the claimant with the English language with a view to not change the language of the proceedings. This is really done on a case-by-case basis. Frankly, I think it's the cases in ICDR and ICC.

I would like to come back on one point that Mike raised (Mike Rodenbaugh). I do not agree that we should set it as a rule and even carve it in stone: that ICANN should bear all costs. I disagree with that. It's going against a fundamental principle of equality of both parties, and it is up to the panelists, after having the parties and after having conducted the whole proceedings, to decide what parties should bear the costs and possibly if the parties should share the costs. But you could not set it as a rule that one party should simply bear all the costs as a blind rule. I would never accept that. That would be unfair and fairly empty arbitration-minded.

SUSAN PAYNE: Thanks, Flip. I've put my hand up to make some comments on that, but Scott has his hand up before me. So I'm going to do Scott first, and then I've got my hand up as well.

SCOTT AUSTIN: Thank you, Susan. Can you hear me?

SUSAN PAYNE: I can.

SCOTT: Okay. I apologize to everyone. I'm getting over a cold. [K]ristina raised the same thing that I was trying to type a fairly lengthy chat item on, and that was – please forgive me; I'm a newbie to this group – that I was not sure if, at then heart of the claims, as there is in a UDRP, there is some particular agreement at least involved. And that agreement, if you look in the materials that are provided for today … There's also a reference to the ICDR rules, which seem to focus on documents containing the "arbitration agreement."

My question is, is there, in these particular proceedings (the IRP proceedings), a document or an agreement that the parties have entered into that would provide what the language of the proceeding is? Or is that something that is separate and apart from this type of proceeding? Because, in arbitrations, that would provide for it.

SUSAN PAYNE: Yeah. Thanks, Scott. I think my interpretation of that would be – I think I'm acting more as a participant here than necessarily the Chair – that, effectively, we don't have an arbitration agreement, per se, but all the parties do have the reference to the bylaws. So we have the bylaws

reference, which talks about IRP proceedings being administered in English as a primary working language with provision for translation services for claimants if needed. So theoretically we could talk about making changes to those bylaws, but I'm not sure that that's really within our remit: to be suggesting that.

I'm terribly sorry. There's a car alarm going off outside – oh, good. It stopped. It seems to me that our job here as this IOT is to implement the new requirements for the IRP as set out in the bylaws that came out of the accountability work that many members of the community spent a very great deal of time on. It's not our job to start reworking what was agreed to in that process. That would be my assessment.

So I think it's been really useful getting everyone's input. It's been fantastic to start off by thinking about this. But I agree with [K]ristina that we basically have a fundamental question to decide amongst ourselves, which is … We know that the primary working language of the proceedings is English and we know that, if there's a case of need that there should be provision allowed for for translation. So what we need to decide as a group is, does the claimant have to submit their complaint in English, even if they are someone who actually has need of translation services? Or do we feel that that's unfair and untenable and that there should be some way in which they can submit their complaint in a different language? Or, indeed, do we feel that there needs to be some assessment on the language of whether there is translation provided into any particular language? And that needs to happen as a primary step before the complainant can go on and make their complaint, in which case how does that fit with the timing?

I've got multiple hands, so I'm just going to start at the top again. I've got Scott first. I can see there's also some stuff in the chat, so I'll have a quick read of that while I hand the mic over to Scott.

SCOTT AUSTIN: Thank you, Susan. Just a quick follow-up question, and that is, again, with the IRP proceedings, are there documents in some way at the center of the proceeding? And are they a directive? Do they direct the proceedings in terms of what language may apply for translation? Again, I apologize that I have not had that much experience with the particular proceedings of the standing panel. If you would have, for example, two parties who were both Russian or two parties that were both French that were claimants, one who was bringing the claim and one who was, I guess, perhaps responding to the claim, if it was registrar or a registry that they were taking issue with, would that then dictate that, in fact, the language of those particular parties should really determine or be at the center to alter the language that would be primary used, and hence the translation?

SUSAN PAYNE: Over to Flip. I'm just making a quick comment in the chat in the meantime.

FLIP PETILLION: Thank you, Susan. To answer Scott, no. I think the rule is, in this kind of proceeding, that you stick to the language arrangements that have been set in the rules. That's the language that would need to be followed to

initiate the proceedings. But the parties would afterwards be free to opt for either conducting the case in another language or have translations.

I would like to stress something – well, two points. We can actually set whatever we want as a rule. I know that every single panelist and every single Chair and also ICDR would be very concerned about the rights of defense. They will always seek for the practical solutions to make arrangements once the proceedings have initiated. So I wouldn't really worry about that.

The second point that I would like to raise is that the English language is quite important, not simply for the parties involved in one particular case but for the entire community. It's very important that ICANN and all the interested stakeholders can keep track of what's happening and why people start IRPs and [what any outcome of IRPs are.] So the purpose is actually to build case law, to understand why cases are initiated, what the outcomes are, and what we can learn from these cases for the future. So language is quite important. Accessibility is important. Transparency is quite an important value of ICANN. It's also quite important in these proceedings. Thank you.

SUSAN PAYNE: Thanks, Flip. We've got David and Malcolm, and then I'll go to the suggestion that Sam made in the chat. David and Malcom first.

DAVID MCAULEY: Thank you, Susan. I wanted to address [K]ristina's point. I have two thoughts on it. One is I agree with [K]ristina that that's an important

question. But two is I don't agree that we have to decide that at the outside. I think we have to decide that among other things that we have to decide. There are other things. For instance, if someone has a facility in English and Swahili and they say they want the pleadings to be in Swahili, do we agree with that? There are other things that apply besides just the initial pleading.

Should we limit translations to material documents? Things of that nature. In a corporate setting, it a senior official has a facility in English, is that sufficient? We should look at that. What will translations be? Will they be any language spoken on the planet, or will they be limited to the ICANN-supported languages that you see at an ICANN meeting, which I think are then U.N.-supported languages for translation?

I think we have to make decisions on all of those points, and that may color what we decide on the issue of the initial pleading or the complaint pleading. So I think it's important that we address [K]ristina's question. Because the initial pleading is at the outset of the proceeding, I don't think we have to decide that separate from these other issues. So that's my thought on that.

I do think that English is the primary working language. Those are the bylaws' words. And, as a consequence, the initial pleading should be in English. I do appreciate Samantha's practical points that she put. I think we should discuss those. There may be some nice accommodations we can make based on what Samantha said, but, to me, an initial pleading has to be in English. I'm just reading the bylaws and thinking that's what they say. Thank you.

SUSAN PAYNE: Thanks, David. Malcom?

MALCOM HUTTY: Thank you. I don't wish to take a position on what documents and when things should need to be translated into non-English languages or indeed on whether the initial pleading could be submitted in a language other than English and, if so, what the consequences of that are. Is that acceptable? Or maybe that would just [stay] time, or all sort of things might happen. I'd set that aside.

What I would say, though, is a very important thing: the way that things are being written at the moment has assumed that everything will be in English and that the only time when it's not in English is when it's being translated into the claimant's language at the claimant's request, where either the claimant is paying for it or ICANN is paying for it as an administrative cost.

If things happen in languages other than English, more generally, even by agreement between the parties, then you also have to consider the interests of English language speakers to be able to access the proceedings, which are actually ignored, essentially, by the existing one because it doesn't arise because, well, everything is in English. So there's no concern here.

In particular, the current rules assume, as written … When you read them, you assume, "Oh, [when we were] talking about the claimants. You were talking about one party." But actually, because of [joinder]

and consolidation and so forth, "claimant" actually refer to multiple people. For example, if a claimant submits a document in English and there is another claimant, and the claimant has a right to it in a non-English language, does the claimant that submitted it in English have the obligation on them to provide translation services? We would have to start dealing with that sort of thing.

Now, the current language doesn't have that problem, but, if we start changing this language, we're going to have to review it for those sorts of considerations. Thank you.

SUSAN PAYNE: Thanks, Malcolm. Flip, that's a new hand. Do you want to intervene before I turn to the suggestions Malcolm was making in the chat? Or do you want to go after?

FLIP PETILLION: I can go after thank you.

SUSAN PAYNE: Okay. I'm just going to scroll up and find it. Just for the benefit, I think everyone is in the Zoom room as well, but just in case anyone isn't, and also because – I don't know about everyone else – I'm finding the chat is scrolling through quite quickly, so I'm not necessarily catching it all as it's going. Samantha has suggested some possible options – practical options that we might consider – and one would be to require the initial filing to be in English, and, together with a request for translation, we could then specify the ability to consider that request to allow for an

amendment to the filing in the preferred language and to reset a briefing schedule. Those are options that we could consider.

Just briefly interjecting, taking David's point, I absolutely agree that this is not our only issue and that there are a bunch of them and that some of them may impact. But it seems to me that there is an assumption that, in the case of need, there will be translation available. And it seems to me that, if we were talking about that translation being limited perhaps to only critical documents, there isn't anything more critical than the complaint. Potentially for a complainant or a claimant who genuinely has need of translation services, do we not risk removal of access to justice, effectively, if they have to make a claim in English and have only later the option to ask for a different language? That would be my concern or the thing that I would say: do we need to think about this? Is that something where need to address that? Because, yes, most people who operate in this space expect everyone to be fluent and familiar with English, but we do know that, for some registry operators or some members of the community, English is by no means their first language. Some of the IDN operators may have very limited English. Are we removing their access to justice?

Flip?

FLIP PETILLION: Thank you, Susan. That's a really good point you just made. I would like to recall that initiating an IRP is not a complex action. Actually, there is a form. It's a one-pager or a one-and-a-half-page that is a form you have to fill out that is prepared by ICDR. You add a complaint and you're free

to write a long or a short complaint. There is a maximum number of pages: 25. The style in which the complaint must be prepared is also set. I believe all complaints have been initiated in compliance with the rules.

You don't make your case in your complaint. The complaint is just a way of initiating proceedings. A case always must become mature during the discussions on the procedure on when and how many times people will exchange briefs and whether or not there'd be hearings. In some cases, there are no hearings. And in some cases, there are no hearings in person. It, at most, would be a telephone conference.

So it is really, as set up, not complex to initiate an IRP. I think we should keep that in mind, together with what I said before. These are practical issues that dealt with by the panel once a case is initiated.

SUSAN PAYNE: Thanks, Flip. I'm just looking back to see what we've got in the chat. I'm not going to scroll all the way back, I'm afraid.

Mike is feeling that we should allow a claimant or complaint in any language with a request for translation into English and that, otherwise, we're requiring someone to hire a lawyer who speaks English. I think someone else's comment in response to that was that, if it was going to be submitted in other languages, it ought to be accompanied by an English translation.

We've had a question from Scott, just asking if any proceedings have, to date, required translation. "Do we know of any?" To which I think most people feel no.

Just in terms of in advance of this call, I did have a quick look at some of the previous IRPs – by no means all of them, but just a quick skim to see if I could see whether and how this was treated. I would say I certainly couldn't see anywhere where the complaint had been sent in in a different language to English. I did see the .thai case, which didn't proceed to hearing. So it terminated at a relatively early stage. They certainly did have exhibits that accompanied their initial complaint. Some of their exhibits were in Thai, but I couldn't see any clear indication that those exhibits were translated.

I'm not sure if we're going to reach a conclusion on this one. It may be that we do need to start moving on and start thinking about some of the other topics, although this has been a really good discussion and I'm loathe to have us park it and then come back and have the same conversation all over again, which so often happens.

I've got a couple more hands, so I'll go to David and then Sam.

DAVID MCAULEY: Thanks, Susan. With respect to the language of the complaint, I've already stated my view that it should be in English. I think the bylaws support that.

I certainly understand Mike Rodenbaugh's position. I think he makes it reasonably, and it's a reasonable position. I simply don't agree with it.

But, if we allowed complaints to be in languages other than English, we could be setting up preliminary skirmishes that need not happen if you have a requirement that a complaint be in English. For instance, if a

complaint …I'll use a different example this time: Tagalog, which is the language of the Philippines, where I lived for five years and where my wife is from. I have some minor facility in that language. If you did it in Tagalog and then ICANN translated the complaint for the panelists (let's assume that the panelists don't speak Tagalog but do speak English), you could get into arguments as to whether the translation was sufficient. It just seems to make no sense to me that the baseline document that kicks off the entire arbitration process should be a cemented document that is understood equally by both sides. I recognize Mike's point. There could be a translation issue, but I'm just stuck on the bylaws and not setting IRPs up for skirmishes that they don't need to have. Thank you.

SUSAN PAYNE: Thanks, David. Sam?

SAMANTHA EISNER: Thanks, Susan. I wanted to just put in one other point of some of the knockdown issues that come out of this. We certainly have an obligation under the CEP. If a complainant goes to IRP and initiates the CEP (Cooperative Engagement Process) before then, we don't have translation available on that. So, if we're saying that people don't need to engage at all in English with ICANN before they file an IRP, there are some knockdown issues around that. It's not insurmountable: the choice of what people could do. I think there are multiple ways that we could handle what we're hearing here while still upholding the principles in the bylaws that the principal language of the IRP is in

English. I think, if we are allowing people to file in other languages, we do have to think about the issue of what if the IRP panel does not feel that the request for translation was taken properly and denies that. What is the impact on that if we were to go down that path?

But I think that these are solvable issues, and I think we're hearing certain principles come out: we want to make sure that there's a certain level of access and fairness to claimants who might not have the ability to mount an IRP in English. So, starting with that principle, what are the ways we can develop this section in a way to really uphold that principle while upholding the other purposes of the IRP?

SUSAN PAYNE: Thanks. Greg?

GREG SHATAN: Thanks. One more issue that would need to be dealt with, not as a paramount as some of the others mentioned, is which version will be the official version, the version of record? And will that always be the English version, or is going to be the version of the complainant's language. And could we run into issues with the quality of translation? We certainly have run into issues with the quality of translation in the past. I recall that in some other areas. It's important, regardless, to establish which one is essentially the official document and which one is just the translation, one way or the other.

SUSAN PAYNE: Thanks, Greg. I have some comments on that. I think, again, obviously, we are here to work out some of these issue, but I think, in terms of what is the official version, the official record, I would say that we come back to what the bylaws say, again, which is that the proceedings should be administered in English as the primary working language.

I do also recall that, somewhere in the rules but not in this section, there is something – I think it's in the bit about the decision – which says that the authoritative version of the decision is the English version. Now, again, obviously that's the rules as this group has determined them, but I would contend that certainly would accord with this bylaws provision about that the proceedings are in English.

So I think we know where we stand. I'm getting a sense that there's quite a lot of support for ensuring that we don't disenfranchise people. But I think there's also a lot of viewpoints expressed that we have this bylaws provision that English is the primary language and therefore that, at least at the point of the initiation of the proceedings and the completion of what Flip is telling us is relatively straightforward, albeit that does obviously depend on your language skills … But I think we've got quite a lot of support from people in this group for saying the complaint should be in English. It's certainly not universal. Mike Rodenbaugh in particular has taken a very different stance. I would need to double-check in the chat to see who else has.

But I think we've had a good discussion of this. We've certainly had quite a lot of viewpoints on it. I definitely would like to back and look at the chat again. I think we've got many of this call, but obviously not the whole IRP-IOT group. So perhaps we do need to see whether we can

progress discussion on this by e-mail over the next week or couple of weeks. Hopefully we can circle back to this, either feeling that we've reached a point that everyone can live with … In the meantime, we could, I think, at least start to think about some of the other possible issues.

I'm going to ask, Brenda, if we could scroll up. These are the … next page. Sorry. The ones that are Points of Discussion. Yes. This is not quite all fitting on the screen, but it may be different for you all because I have a slightly odd resolution on my – ah. Perfect. There we go. These are by no means exhaustive, as has been made absolutely clear by virtue of what we've been discussing just now and, indeed, something that Malcolm raised as well. So these are certainly not exhaustive, but these are just issues that came to my mind when I was looking through the section on translations and trying to determine what we need to talk about and what needs to be covered [and] where we have questions.

Malcolm raised an additional one, which isn't specifically captured here and possibly gets captured once we start talking about joinder and intervention. Malcolm's point was that all was somewhat assuming that the complainant is a single party –or claimant, if you like – where it's entirely possible where they may be more than one claimant and they may have different language skills.

Now, I think that may be something that can be addressed but relatively simply by a provision that just addresses where the costs lie. We already know that, generally, the expectation is that the costs of translation are any administrative cost to the proceedings and that they sit with ICANN.

But we also know that there is a provision in the bylaws which is therefore captured in the rules that says that that presumption that ICANN will pay the costs can be altered where it's felt that [it's] essentially for fault of the party, of the claimant. I think that sort of provision will work. It seems to me that sort of provision will work, whether it's one claimant or two claimants or three claimants. It's perfectly possible for the panel to determine that one of them, for example, was bringing a frivolous claim and that they should be therefore responsible for some translation costs or some administrative costs as a result.

To my mind, there were essentially a bunch of other things that occurred to me. Some of them may be simple to solve. Some of them may kick off more discussion. It may be that the discussion on translations isn't going to be as quick and simple as I thought it was, and that is fine as well.

Essentially I wanted to flag, just at the beginning, that we're supposed to be, under the bylaws, ensuring the accessible, transparent, efficient, consistent, coherent, and just resolution of disputes and that we as a group are meant to be coming up with rules to ensure fundamental fairness and due process. Just to keep it in mind to ourselves. And also to keep in mind all the time that what we're generally talking about is, at the moment, that, where there is translation ordered, it's an admin cost and it's going to be borne by ICANN. But there are some provisions in the rules which deal with situations where that isn't the case. For example, where there's a determination that there isn't a need for translation, then generally speaking, any translations that happen because the complainant wants them are effectively viewed as their

costs – their legal costs – with this provision that shifts the burden in certain cases where the claimant was frivolous.

In terms of the list, I'm not sure that they're particularly in any order. I think one of the ones that seemed to me to be worth discussing was one that I know did come up previously when these rules were being put together. This is the language – which languages are we talking about? The rules are providing that it's to and from English and the five official languages of the U.N.

So the question again to the group was, what about the scenario where a claimant doesn't speak a U.N. language? For example, if those claimants in the .thai case had not spoken in English or not had representation by someone who spoke English, they also don't have a U.N. language. Again, have we got the right balance there?

I'm particularly raising that because, looking back through the briefing document, I know that David McAuley's suggestion along the way was that there ought to be some primacy given to the U.N. languages so that, if, in these cases, like the scenario that he mentioned, the claimant speaks more than one language, then you'd be dealing in the U.N. language rather than the non-U.N. language. And that's fine.

But what about the scenario where the claimant doesn't speak more than one language? They just speak Thai or just speak Japanese. Is it reasonable to say to them that they could have a translation into a U.N. language which they also don't speak?

I don't know if there are any views on that. I think David's intention was certainly intended to be captured in the way that the rules were drafted

in these interim rules. But I don't know whether any of you who were previously members of the group felt that the way it was captured in the rules was what you had intended. I guess particularly this is aimed at David. Were the rules as they were adopted what you were intending? Or were you intending more to say that, if there are two languages spoken and one of them is a U.N. language, then that's the one you'd be dealing with? David?

DAVID MCAULEY: Thanks, Susan. I will qualify what I'm about to say by noting that, when I got into substance on these things, I was speaking as a participant rather than as Chair back in the day. My recollection is – it's just a recollection, so it's probably faulty in some respects; I'll call on others that were there to weigh in as well – that we felt that, if a claimant was fluent in two languages, one of which was English, then the proceeding would be in English. If the claimant was fluent in two or more languages but not including English but one of them was an official U.N. language, it would be in that U.N. language.

Beyond that I don't think we got, but I think we impliedly or perhaps directly expected that that would be the limit for ICANN. It's almost like Mike Silber's comment in the chat. You can find a lawyer that speaks one of the six U.N. languages. It doesn't seem an unfair burden, keeping in mind … There are counterbalancing bylaws provisions. Of course, there is one for fundamental fairness/due process, but there's another one for being efficient and affordable. When it says "fair to all parties," recall that ICANN is going to be a party to all to these – every single IRP.

So it struck me that, back then, that's what we thought: English first, then a U.N. language. And that was basically it. Now, I may be incorrect, but that was my intent as a participant and I thought that's where we ended up. Thanks.

SUSAN PAYNE: Thanks, David. There's a useful conversation going on in the chat regarding whether ICANN provides translations at meetings or for documents in anything other than the U.N. languages. And Sam is commenting that she believes they will go beyond the U.N. languages if it's the language for a location of a meeting – for example, Japanese in Kobe – and that they also do provide Portuguese for the GAC, but generally, by the sound of it, not further than that.

So we've heard from David about what his expectation would have been in terms of the languages and the emphasis on the official U.N. languages. Anyone else have strong views on this? Again, my concern or what I just wanted just to air and decide if we're happy with is, are we comfortable that that's the right balance? Are we worried about a claimant who is Japanese or is Thai – someone who doesn't speak a U.N. language? Do we feel that we've got some balance, bearing in mind David's comment about that they should be able to find a lawyer who can speak one of the U.N. languages?

Greg, I think your hand was up before I started speaking, so you may not have your hand up to answer this. But over to you.

GREG SHATAN: Thanks. I do think we strike the right balance with what David said. I think we need to keep a couple of other things in mind. First is that we're not depriving people of translations. The other alternative is that they make their own arrangements for translation. There are plenty of companies all around the world, and I'm sure there are, in their native country, those who will translate from English plus the U.N. languages into their language.

Secondly, keeping in mind that, for an IRP, they're going to be dealing with documents, evidence, etc., that are going to be in English, which I don't think we are saying will be translated, even the concept of translation will only go so far in helping people or giving people help on this. If they need to read other things, they will need to make their own arrangements. I think that's just fine. We're giving quite a bit of support here. It should be adequate under the circumstances. Certainly something we can study. If somebody wants to propose that the ICANN foundation or whatever is going to come out of the auction proceeds – create a fund for translations into lesser-used languages or non-U.N. languages and put some money into that – that could be fine, too. Thanks.

SUSAN PAYNE: Thanks, Greg. There's always someone wanting to spend the auction proceeds.

Well, this is helpful. It certainly seems like views expressed on the call so far is certainly a feeling that we've got the balance right on U.N. languages. I'm not hearing anyone who feels differently. Again, I haven't

scrolled through all of the chat. So, if someone is on the call and they are feeling differently, do speak up as well because I am not necessarily managing to spot everything in the chat.

To me, this then perhaps brings a next question. It's leapfrogging down to #3 on my list, but it's related to it. In the circumstances where, for one reason or another, translation isn't going to happen, either because there's been a determination that it's not needs-based or this kind of scenario where we're talking about language translations into and between the non-U.N. languages, do we think … Greg has made the point that we're not depriving the claimant of translation. We're just saying to them that they will have to make their own arrangements, and therefore we're essentially talking about that being their cost. Do we think that the successful in that scenario should have some scope to recover their costs, bearing in mind that we have bylaws provisions that talk about legal costs being borne by the parties/parties bearing their own legal costs, but administrative costs being ones which are generally borne by ICANN but where that can shift over to the claimant in certain circumstances? But do we feel that this falls into some sort of gray area, where it's not necessarily a legal cost? It's arguably a subset of administrative costs that we've determined ICANN shouldn't pick up at the outset. But should there be some scope for that to form part of the costs to shift onto ICANN if the claimant was successful? Again, I'm throwing it out there.

Flip?

FLIP PETILLION: Thank you, Susan. I believe that's already the case in practice. Thank you.

SUSAN PAYNE: Sorry. I didn't catch that. Would you mind saying that again?

FLIP PETILLION: Well, I believe it's already practice that a successful claimant gets an award saying that ICANN covers that kind of cost.

SUSAN PAYNE: Well, I think they do in the sense that, if something is viewed is an administrative cost, there is a presumption that ICANN will pick up the cost of that. But we also currently have provisions in these rules that talk about certain translations having been determined as being on a needs basis being administrative costs and therefore there's an assumption and an expectation that other translations aren't administrative costs and don't fall to ICANN to pick up.

So I think, at a minimum, if we think that is something that should be addressed, then I think we need to be clearer in the rules because I don't think that currently is the case. Or at least I'm not sure that it's not clearly the case.

Indeed, many people may not think that this appropriate. You may well feel that, just as there seems to be a good feeling that the balance is right on the number of languages, in those circumstances for that claimant, it's fair that they need to pick up those costs.

Flip?

FLIP PETILLION: Thanks you, Susan. I would really leave that to the panel. It is really part of arbitration practice. A counsel that is well prepared will complete the claim with a claim for reimbursement of costs. That counsel will make the distinction between admin cost, legal costs, and other costs. I would really leave that up to the panel, and it is for the counsel to convince he panel whether or not the other party should proceed to the payment or reimbursement of [inaudible] costs. Thank you.

SUSAN PAYNE: Thanks. Any other views on that? To my mind, it still seems to be something where, if that's something that we want – if we want to be leaving it to the panel – I think we need to be saying that because I'm not sure that we are leaving it to the panel at the moment.

[K]ristina?

[K]RISTINA: Hi. I support Flip's position that it should be left to the discretion of the panel, but I do also agree with you that we need to be very clear that we are leaving it to the discretion of the panel so that it's not just something for the inside-baseball counsel to know that they can do it and counsel that haven't necessarily done one of these before. [They] may not know. We just, in the interest of fairness, need to be very clear and specific about that. Thanks.

SUSAN PAYNE: Yeah. Thanks, [K]ristina. Sam, your hand was up, but it's gone. Is that …

SAMANTHA EISNER: I was just typing basically a +1 to what you and [K]ristina said. I think, noting Flip's practitioner note, if we just make sure that the rules themselves say that translation costs could appropriately be considered amongst those administrative costs, that would alleviate a lot of questions as to whether they can be counted or not.

SUSAN PAYNE: Thank you. Sorry. Bernard is reminding me here of the time. I think we have about seven or so minutes left. Malcolm has his hand, so, Malcolm, I'll go to you first. Then maybe we'll move on to just a quick discussion on next topics and so on.

MALCOLM HUTTY: Very briefly, it sounded like we were coming towards a consensus that the panel would have discretion on shifting the costs to the claimant rather than having a fixed rule that it should be ICANN's costs. I take not position on that generally but only in the direction of in requiring translation from English into another language or of a document submitted by the claimant in another language into English.

However, in no circumstances should a claimant who has submitted a document or other materials in English be required to pay for their translation into another language. If ICANN's rules for whatever reason

is thought fit should require that because there are potentially multiple claimants who have that right, then that should never be at the expense of the claimant that submits them in English, only either the expense of ICANN as an administrative cost or at the expense of the claimant that needs it in another language. If the panel does not order it to be the claimant that requires it in another language to pay for it, then it must lie with ICANN and not with the claimant that submitted it in English.

SUSAN PAYNE: Thanks, Malcolm. That sounds right to me. Certainly I don't think we've particularly covered that scenario yet, but that certainly seems to me to be supportable by the notion that, generally, the primary language is English and therefore a claimant who is happy to be operating in English shouldn't somehow then be picking up the cost of translating into other languages for other people. That sounds about right to me, I would suggest.

I agree with you. As you helpfully said, it was worth making a note, wrapping up, that we seemed like we were reaching an agreement on there being some discretion about allowing the panel to allocate some of these costs to ICANN. My understanding of that – where we seemed to be coming into agreement on that – was that that would be in the scenario where the costs aren't automatically falling to ICANN as being what's already determined as administrative costs. So essentially we were reaching that kind agreement on costs that are falling outside of what we've already determined or will already be determining are translation costs that are viewed as administrative costs that are viewed as being ICANN's and less of a fault-based determination otherwise.

It probably would make sense, I think. Maybe I will try to do some kind of high-level notes summarizing where I think we got to on this call, just as an aid/memoir for me and for other people who are on the call and for those who weren't that would then hopefully start us kicking off a bit more discussion in the chat or rather on the e-mail list.

Bernard is reminding me very forcibly that we're now coming very, very close to the end of the meeting. Brenda, if you wouldn't mind scrolling up to the next page as well. As I said, I rather optimistically thought that translation might be quite a quick conversation. I don't have any problem with it not having been a quick one. I was simply quite concerned, when we came into this call, that perhaps we would have relatively little to talk about and we wouldn't know what to spend our time on. That obviously was me being unnecessarily optimistic. So I think clearly we need to keep going on translations. There's more to discuss. So I'd like to do that on the last call. I assume that that works for everyone else. There seems no point in dispensing with it.

But I think it's also worth us teeing up in advance what we would move on to and talk about next. A couple of points, really, to make. One was that we talked on the last call about capturing in something like a Google Doc the other items or essentially our list of action items that we need to discuss. Some of those are the ones that Sam has talked us through, which have come up in recent proceedings in which there are some inconsistencies and areas where clarification has been identified by ICANN as being useful.

We've got some others that have come up with ourselves during discussion, including things like reaching an agreement on a few quick

rules on what happens if ICANN doesn't participate. There are a handful of others.

We were going to have a Google Doc to let anyone else who had spotted anything that they felt needed reconsideration to flag that. That Google Doc hasn't got circulated yet, but I think everyone now is in a position to use Google Docs. So we can send that around. We'd urge everyone to try and do that. Ideally, we'll use that single document to capture all the things we still need to work on in relation to these rules.

In terms of moving forward, once we finish translation, my suggestion would be that we move on to consolidation, intervention, and [Amica]. There's no particular magic to picking that topic. It's mainly that I know it's quite a big one to address. We know it needs addressing. It was one of the ones identified in the rules as needing addressing. So it seems like a good place to move onto next. Then we have another list of things we'll come to after that, including things like the timing rule.

Mike is reminding that there's some discussion on the [Amica] issues in the .web decision that will be also very interesting to us.

I think, if there's no strong objection to us moving onto that, that would allow some time for a similar sort of briefing document to be pulled together along the lines of the one that we had for the translation that looks back at what public comment input this group had, what discussion this group had previously, what the rules say at the moment, and so on. So I think, unless I hear any sort of noises to the contrary, that would be what I would suggest. We would hopefully all have that in plenty of time to start getting up to speed.

Okay. I am not hearing objections. I'm hearing, I think, a bit of support in the chat. So I think I'm going to assume that's the path forward for the present. But we will keep going on translations, first of all.

I've run over time by a minute. I'm very, very sorry. Thank you very much, everyone. This was a really good chat. It's been really interesting. "Goodbye," [says] David in Tagalog. Speak to you on the next call.

I should probably say we should stop the recording, shouldn't I? Thank you.

[END OF TRANSCRIPTION]