

## **IOT - Background document on Translation – February 13, 2020**

### **1. Bylaws Provisions**

1.1. The Bylaws which deal with the IRP currently contain the following on translations:

**4.3 (l)** All IRP proceedings shall be administered in English as the primary working language, with provision of translation services for Claimants if needed.

1.2 Provision on costs may also be of relevance:

**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)<sup>1</sup>, 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.

### **2. Interim Supplementary Procedures Approved by Board October 2018**

#### **2.1 5(B) Translation**

As required by ICANN Bylaws, Article 4, Section 4.3(l), "All IRP proceedings shall be administered in English as the primary working language, with provision of translation services for CLAIMANTS if needed." Translation may include both translation of written documents/transcripts as well as interpretation of oral proceedings.

The IRP PANEL shall have discretion to determine (i) whether the CLAIMANT has a need for translation services, (ii) what documents and/or hearing that need relates to, and (iii) what language the document, hearing or other matter or event shall be translated into. A CLAIMANT not determined to have a need for translation services must submit all materials in English (with the exception of the request for translation services if the request includes CLAIMANT's certification to the IRP PANEL that submitting the request in English would be unduly burdensome).

In determining whether a CLAIMANT needs translation, the IRP PANEL shall consider the CLAIMANT's proficiency in spoken and written English and, to the extent that the CLAIMANT is represented in the proceedings by an attorney or other agent, that representative's proficiency in spoken and written English. The IRP PANEL shall only consider requests for translations from/to English and the other five official languages of the United Nations (i.e., Arabic, Chinese, French, Russian, or Spanish).

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<sup>1</sup> Relates to a Claimant who fails to engage in the CEP and subsequently loses

In determining whether translation of a document, hearing or other matter or event shall be ordered, the IRP PANEL shall consider the CLAIMANT's proficiency in English as well as in the requested other language (from among Arabic, Chinese, French, Russian or Spanish). The IRP PANEL shall confirm that all material portions of the record of the proceeding are available in English.

In considering requests for translation, the IRP PANEL shall consider the materiality of the particular document, hearing or other matter or event requested to be translated, as well as the cost and delay incurred by translation, pursuant to ICDR Article 18 on Translation, and the need to ensure fundamental fairness and due process under ICANN Bylaws, Article 4, Section 4.3(n)(iv).

Unless otherwise ordered by the IRP PANEL, costs of need-based translation (as determined by the IRP PANEL) shall be covered by ICANN as administrative costs and shall be coordinated through ICANN's language services providers. Even with a determination of need-based translation, if ICANN or the CLAIMANT coordinates the translation of any document through its legal representative, such translation shall be considered part of the legal costs and not an administrative cost to be born by ICANN. Additionally, in the event that either the CLAIMANT or ICANN retains a translator for the purpose of translating any document, hearing or other matter or event, and such retention is not pursuant to a determination of need-based translation by the IRP PANEL, the costs of such translation shall not be charged as administrative costs to be covered by ICANN.

## 2.2 15. Costs

The IRP PANEL shall fix costs in its IRP PANEL DECISION. Except as otherwise provided in Article 4, Section 4.3(e)(ii) of ICANN's Bylaws, each party to an IRP proceeding shall bear its own legal expenses, except that ICANN shall bear all costs associated with a Community IRP, as defined in Article 4, Section 4.3(d) of ICANN's Bylaws, including the costs of all legal counsel and technical experts.

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.

## 3. ICDR Rules on Translation

### 3.1 Article 18. Language of Arbitration

If the parties have not agreed otherwise, the language(s) of the arbitration shall be the language(s) of the documents containing the arbitration agreement, subject to the power of the arbitral tribunal to determine otherwise. The tribunal may order that any documents delivered in another language shall be accompanied by a translation into the language(s) of the arbitration.

## 4. Useful Links

Transcripts of calls: drop down menu from the IRP-IOT WG Wiki

<https://community.icann.org/display/IRPIOTI/Independent+Review+Process+-+Implementation+Oversight+Team+%28IRP-IOT%29+Home>

IRP-IOT correspondence: <https://mm.icann.org/pipermail/iot/>

## 5. 31 October 2016 draft supplementary rules.

5.1. Does not mention translation.

## 6. Public Consultation - 28 November 2016 to 1 February 2017

6.1. **Translation** was not included in the draft rules presented for public consultation in 2016 however several (4) comments were received on this topic:

6.1.1. AFNIC<sup>2</sup> - We support the comments made by Spain and Switzerland (through their GAC Representatives) on the necessity to enhance diversity and to warrant a level-playing field in the process (with reference to Section 4.3 (l) and Section 4.3 (j) (iv) of the Bylaws). We agree with their proposal to add to the Supplementary Procedures the appropriate measures to ensure **translation** and interpretation at no charge during the hearings when requested by the claimant.

6.1.2. Government of Spain - The selection of English as primary working language may hamper the implementation of the diversity principle that drives the IRP (Bylaws Section 4.3(j)(iv): Reasonable efforts shall be taken to achieve cultural, linguistic, gender, and legal tradition diversity, and diversity by Geographic Region of the standing panel). Hence, appropriate measures should be put in place with regards to provision of **translation** services for Claimants, in order to warrant a level playing field in the process. The following aspects could be added to the supplementary procedures: a) Interpretation services should be granted and provided at no charge if requested by the Claimant. b) Any documents submitted in English should be accompanied by a **translation** in whole or in part into the language requested by the Claimant. c) For the purpose of calculating a period of time under these Rules, such period shall begin to run on the day following the day when a notice or other communication is received, only if the translated documents referred to in the above letter have been sent to the Claimant. Otherwise, the period shall only begin to run when the aforementioned documents have been received. I kindly ask that these comments be taken into account by the drafting team.

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<sup>2</sup> Afnic is a registry operator for top-level domains corresponding to the national territory of France (.fr, .re, .pm, .yt, .wf, .tf). and is also the backend registry operator for 15 new generic Top Level Domains. Afnic is a member of CCNSO, Centr, and APTLD

6.1.3. Government of Switzerland - The Bylaws provide that "All IRP proceedings shall be administered in English as the primary working language, with provision of **translation** services for Claimants if needed." My suggestion to the drafting team would be that they develop this rule in a fashion that enhances diversity. For instance, the supplementary procedures could provide, inter alia, the following concretizations of the above rule: - That **translation** also means interpretation during hearings. - That, when **translation** services are required, they are granted per default (and rejection is ruled out generally). - Also that the translated documents are provided at the same time as the original English documents or, at least, that the corresponding deadlines only count whenever the translated document has also reached the interested party, etc.

6.1.4. ISPCP - The ISPCP is concerned about the lack of mention of language accommodations. The ICDR, in its guidance documents for drafting dispute resolution documents, recommends including a description of the language of the arbitration immediately following the definition of the place(s) of arbitration. While the draft text adequately describes the importance of location and region by allowing virtual hearings, the question of language or accommodation is not addressed. The ISPCP asks that appropriate text regarding language be included. Again, even if the expectations for language and ICANN's are defined elsewhere in the Bylaws, it is beneficial to restate them here in the IRP section.

7. **Email Sept 25 2017** - <https://mm.icann.org/pipermail/iot/2017-September/000313.html>

(DM) Dear members of the IRP IOT: Both here on list and at our next meeting on Oct. 5th (19:00 UTC) I would like us to discuss/address the public comments regarding **Translation** and Interpretation, among other agenda items.(See Bernie's Feb. 3rd email<<http://mm.icann.org/pipermail/iot/2017-February/000150.html>> for compilations of all of the comments.)

BACKGROUND:The governments of Switzerland and Spain (supported by AFNic) urge additional rules treatment:Spain suggested that:\*Interpretation services should be free if requested by claimant;\*Documents submitted in English [the IRP's primary working language] should be accompanied by a **translation** in whole or in part into the language requested by claimant; and\*IRP time periods will begin when translated documents are received by claimant.

Switzerland suggested that:\***Translation**s services include interpretation during hearings;\* When **translation** is required, it be granted as default and not rejected;\* Similar treatment to documents as suggested by Spain.

The ISPCP also requested beefed up clarity on **translation** services. ICANN Bylaw Section 4.3(I) provides: "All IRP proceedings shall be administered in English as the primary working language, with provision of **translation** services for Claimants if needed.

"Rule 5 of the current draft the Updated Supplementary Procedures currently provides, among other things: It is in the best interests of ICANN and of the ICANN community for IRP matters to be resolved expeditiously and at a reasonably low cost while ensuring fundamental fairness and due process consistent with the PURPOSES OF THE IRP. The IRP PANEL shall consider accessibility, fairness, and efficiency (both as to time and cost) in its conduct of the IRP. Article 18 of the ICDR Rules of Arbitration provide simply that the language of arbitration shall be as agreed by the parties or, absent agreement, then in the language in which the arbitration clause is stated. Article 18 also says, "The tribunal may order that any documents delivered in another language shall be accompanied by a **translation** into the language(s) of the arbitration. "It would be useful to hear from ICANN Legal as to how this has been handled at IRP before, albeit recognizing we are bound by Bylaw 4.3(I) at present.

DISCUSSION/RECOMMENDATION (by me as issue-lead): While Spain urges **translation** services where a claimant requests it, Switzerland appears instead to ask for provision of the service when required - putting Switzerland in line with the ICANN Bylaw that speaks to need. I believe we should stick to the bylaw "need" standard. In my opinion, need/requirement does not reach instances where the claimant speaks/understands English even though claimant's primary language is other than English. In addition, given the practice by ICANN of using the six official UN languages (Arabic, Chinese, English, French, Russian and Spanish) when it provides **translation** services at ICANN meetings, I suggest these be given primacy, so that when a claimant speaks two languages, and one of them is an official UN language, then that would be the **translation** service provision. For example, I have an in-law in Manila who speaks fluent Tagalog and Spanish. In her case, **translation** services for IRP would be in Spanish, not Tagalog. I also believe that the Bylaw language "if needed" means that if 'claimant' includes more than one person (for instance claimant is a company), then if one of those persons (e.g. an officer of the company) speaks English that would suffice for using English in the IRP. Thus, my overall suggestion is that we ask Sidley to incorporate these overall suggestions into draft Rule 5 along with language that implementation issues are for the sound discretion of the IRP panel (e.g. whether claimant is sufficiently capable in English language, or how to weigh cost of **translation** in decision to hold/not hold a hearing). Please give this your consideration and let's discuss at next meeting. Meantime, best wishes, David McAuley Sr International Policy & Business Development Manager Verisign Inc.

#### **8. 25 Oct 2017 email from DM as preparation for 14 Nov 2017 meeting of the IOT**

Dear members of the IRP IOT: For background, please see my e-mail <<http://mm.icann.org/pipermail/iot/2017-September/000313.html>> of Sept. 25th and you can also see the records <<https://community.icann.org/pages/viewpage.action?pageId=69282208>> of our call on Oct 5th when we got into this subject. In brief, while some commenters asked for these services on request, the bylaw speaks of the services on an as-needed basis. I propose we confirm these as a function of need. And, in my opinion, need does not reach instances where the claimant speaks/understands English even though claimant's primary language is other than English. Put simply, these services would truly be a function of need, not convenience, factoring in all of the languages in which the requester has reasonable competency. In addition, given the practice by ICANN of using the six official UN languages (Arabic, Chinese, English, French, Russian and Spanish) when it provides translation services at ICANN meetings, I suggest these be given primacy, so that when a claimant speaks two languages (but not English), and one of them is an official UN language, then that official UN language would be the translation service provision. I also believe that the Bylaw language "if needed" means that if 'claimant' includes more than one person (for instance claimant is a company), then if one of those persons (e.g. an officer of the company) speaks English that would suffice for using English in the IRP. With respect to the issue of costs that Kavouss mentioned on our call of Oct. 5th, I suggest language along the line that the IRP Panel should assess, when considering the translation of documents, the fair balance to be accorded to materiality of the document versus the costs/delay to translate—all in the context of ICDR Article 18 on Translation and Bylaw 4.3(n) on ensuring fundamental fairness and due process. Thus, my suggestion is that we ask Sidley to incorporate these overall suggestions into draft Rule 5 along with language that implementation issues are for the sound discretion of the IRP panel (e.g. whether claimant is sufficiently capable in English language, or how to weigh cost of translation in decision to hold/not hold a hearing). I hope we can move this to first reading on our next call on Nov. 14 at 19:00 UTC—please comment on list by that date if you cannot be on that call.

If you wish to suggest an alternative handling, please put that on list and state the rationale and include specifically proposed alternative language. I look forward to seeing those of you who plan to attend ICANN 60.

## **9. 14 Nov 2017 meeting – Transcript of call**

Today's meeting is to discuss and hopefully wrap up issues of joinder of parties to an IRP, work on how parties can do discovery and gather evidence, and also work on translation services, all with a view towards recognizing IRP as an arbitration is meant to be quick, to the point, fair, not prolonged and not necessarily expensive, at least when compared to litigation. And so I hope that we will have some fruitful discussion on that, and I have invited discussion on the list waiting up to this call. So that's roughly where we are, and I will invite others in the

group if they wish to make a comment to please, you know, indicate by their hand now. Charene, you're certainly welcome to comment, in light of what I've said, as well.

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>> DAVID: Thank you, Bernie. So we can we can move on then to the next issue, which is about the next supplementary procedure that we were addressing is translation and interpretation. And in this E mail that I sent out, it was a summary of the discussions that we had rather than putting something into words, and so the gist of this is that they were going to ask Sidley, and we have budget with Sidley to polish off the rules when we're done with them to basically capture what we have in this E mail. And the principal elements of the E mail are that the claimant would get translation interpretation services based on need, not on preference.

We did have some public comments that asked that these services be provided if they were simply requested by the claimant. And we agreed and, of course, we have to, really, the bylaws say it's a matter of need. I can't remember the specific paragraph, but the bylaws say these services are available if needed. And so we stick with this element, this concept of need, not preference. And we go so far as to say, and that includes if someone is bilingual and has a couple of language skills. If one of those language skills is English, then there would be no need for translation. If one of those language skills is one of the ICANN six languages of Arabic, Chinese, French, Russian or Spanish and the other language is something a little bit more esoteric, the translation can be done in one of the ICANN provided languages. This is principally, then, Caboose, you brought up an issue with respect to other documents that are requested to be translated, other documents than the Complaint or the response to the Complaint. And there we're basically putting those costs/materiality balancing issues in the hands of the panel.

And so I would like to open the floor to anyone to say if they have any concern with what with what we're doing on language and translation, and I want to offer any other suggestion. The one thing I forgot to mention is that if a claimant is more than an individual let's say it's a corporation where there are directors and officers then the language skill would be met by a director or an officer; in other words, as long as the claimant has some facility in English or one of the ICANN six languages, then that's going to be determinative.

So I open the floor if anyone has a comment. And if anyone doesn't, we will move this to closure for the reading, and we're driving to an early conclusion for this call.

[SP Note: no further discussion on the call. Notes of call refer to "successful second reading".]

## 10. 7 Dec 2017 meeting – Transcript of call

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Translation and interpretation. And I mentioned to take a look at my email of October the 25th we discussed it a couple of times in the written, on calls. And I don't think there's any mainly concern. Kavouss mentioned concern about cost and I think that we can take those into

account. We in large there was a number of requests or public comments saying we have to provide interpreters and translation. And one went when requested. And it's my recommendation and I stated this many times on the calls on the list that indeed we should provide translation and interpretation in reference to the bylaws but the bylaws speak in terms of need. And I think that's where we should maintain that line. You know the services are available. As needed. And so my recommendation, I don't have it in front of me to read it to you. But my recommendations was, this has to be based on need and the need has to take into account the language skills of the person requesting it. For instance, if it's a corporation with people that speak English or whatever language the arbitration is being held in, then they would speak that language and it's also you know going to default to translation into one of the 6 U.N. languages that ICANN uses, if that would satisfy the need for the claimant or the person asking for the service. So in other words, if the person asking for the services is fluent in several languages, one of which is one of the 6 U.N. languages and not English that's we would go rather than translating it into a more obscure language. That's my recommendation. It's been out there on the list I guess I don't need to sum it up. Is there anyone else that wants the weigh in on translation or interpretation services otherwise I'm going the try to close this on the list in the next several days.

## **11. 8 May 2018 – Draft of supplementary rules**

11.1. Contains the following footnote: "IOT agreement to set 15 day deadline for written statements as of 8 Feb 2018. IOT has engaged in substantial discussion concerning translation services. Because translation services were not considered in the initial public comment, consideration of how translation services might be incorporated into the Supplemental Procedures is reserved for the full update."

## **12. 10 May 2018 meeting – Transcript of call**

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>> SAM EISNER: Good. Yes. I think the bylaws make clear that there has to be board of approval on any set of procedures that go into force.

>> DAVID McAULEY: Thank you. And you mentioned, we would want to get Sidley working on intervention and joinder section and translation. Could you mention just a little bit in more detail what you envision there? In other words, we discussed those and we have come largely to a solution. But are you talking about them taking what we discussed and putting language on it or what? Maybe I just am not sure what you mean there.

>> SAM EISNER: Yeah so I think the two sections raised different concerns for me. Let's handle intervention and joinder first. When with looked at the language that we developed, I think we actually developed more principles as IRP as opposed to language that can actually be placed into the rules. If you take a look to see how we tried to put them in, they are in

brackets in there. There's -- it's not clear how the language that we have used is tied into the defined terms that we have. And I don't think that it's -- it's an insurmountable issue. But I think we do need thought about how we carefully pit it in so we are not creating one standard of intervention that may be unintentionally broader or for joinder as well, that may be unintentionally broader for interim than it would be for a final set. Once you saw it in had place, based on the principles that IOT had identified, they really didn't fit nicely. And they raised many more questions than they answered. I think for that, they were probably too vague for implementation right now. But I think that the principles that the IOT developed, can be very nicely translated into language that I know that the IOT would like for Sidley to take the first step at. That's the other reop we didn't really try to modify the principles into language. So we could again focus on a set of rules we felt were ready for now verses what we need for the final procedures. In terms of the translation, there was IOT agreement on translation. I think if there's work that needs to happen both within the IOT as well as with getting final language drafted for it, because there's the way the translation is mentioned, it's fairly broad. I think that we need to or I would recommend that we take a look at little bit more of the specifics around that. Are we talking translation only in relation to my appearing participation many the way it's presented now means there might be requirement for all translation of materials. We haven't answered the question of who would pay for translation if requested. There's a few different aspects to that that I think also make it hard to just put into implementation now without having some more conversation about that, without having language clearly drafted to meet the intent of the IOT. Again, we didn't want to replace any suggestions we had in place of the judgment of the IOT. So that's another place where we got more work was done. And I think this one requires both the involvement of the IOT as well as in the final language

.>> DAVID McAULEY: Thanks Sam. I have just one quick question then I'll step out of the cue. That question is, on those two things, would you be willing on list to help tee them up with what sort of what you were just describing?

>> SAM EISNER: Yes. Yeah.

>> DAVID McAULEY: That answers that.

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>> DAVID McAULEY: And I'll let Sam talk about why going to interim. But let me also pose a related question then ask Sam to comment. The related question I have Sam, couldn't we take your proposal for interim rules and my suggestion. Couldn't we make this one effort? In other words, take your draft, your red line draft, get whatever we need to Sidley to help on translation and intervention and joinder. Have a meeting on list and on phone to address the translation questions that you thought we needed to work on that we don't have a enough for Sidley yet. And, also, get repose question out for public comment. Couldn't we do this as part of a joint sort of unified effort? Where the interim rules would be bucket one and come into force in some manner while we are getting public comment

on repose. So anyway that's my question. And so I'd be interested in what your thoughts are Sam.

>> SAM EISNER: This is Sam. I think that having something like that would be ideal. You know, we know that there's other work that needs to be done. I think it depends on how long you think we need to get other language right for items. But that are included. And I mean I see no reason combining the efforts somewhat. I think that we do need as a group to be ready to understand if there's an IRP filed, how we want to thing to progress. What ideally would be enforce at the time an IRP was filed. But I don't see any issue with combining those efforts as you suggest.

>> DAVID McaULEY: Thanks Sam.

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>> DAVID McaULEY: Malcolm, what do you think of trying to take Sam's red line approach and joining it in not -- in an effort to get rules out there. Not interim rules but rules out there where we can agree including translation and joinder I hope, and getting repose out for public comment. What's your reaction to this?

>> MALCOLM: Well I would like to get this thing done and out to public comment. Now if this -- I mean I have not done a line by line comparison against what Sam has put up. And the other decisions. So we have taken if what stamp has put up, actually reflects all the decision we have taken. Then yeah, this sounds good. If on the other hand, what Sam has done is simply taken the previous draft, the draft we are -- that went out to previous public comment the draft we moved away from. And not incorporated the other decisions that we have taken. Then, that's more of a problem. Because it doesn't represent -- it wouldn't then represent our agreed approach. It would represent an actual approach we have agreed not to do. So I don't think that would be easier. So I have to ask, does this represent the previous draft we went the public comment? Or does it represent the work we have done in this group since?

>> DAVID McaULEY: Thanks Malcolm. I did go through Sam's red line. I have to admit I went through it fairly quickly. I think it was an honest effort to capture exactly what we have done. You pointed out, there is rule 4 is not quite the way I think you -- excuse me, you would find it. To your liking. But rule 4 aside, that's my take on it. Sam do you have any comments about this kind of approach [I? What we try to rush to the finish line and get rules out on the same timeline you were envisioning if not even faster.

>> SAM EISNER: If we can move that quickly, I'd be happy to see that happen. I think having interim rules could be a benefit. But if we are not able to get to those as quickly as we want, let's move as fast as we can on the final. And get to that. Malcolm I think if you look through the document, you will see, and I put this in chat too. We really tried hard to reflect the different agreements that the IOT had made. After the public comment, so you will see red lines to that. We have also annotated in the document why changes were made to demonstrated where those agreement came from. So we really did take a good faith

efforts to do is that. It's not just a -- the public comment version with other things ICANN wants to see in there. That's not what we did.

>> MALCOLM: Thank you, that's very helpful.

>> DAVID McAULEY: Thank you Sam.

### 13. 24 May 2018 meeting – Transcript of call

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Liz, know in the last call you all expressed concern about translation. Joinder. But I have not seen anything on it since. I'm wondering where are we on that? Can you comment on where you think things are with respect to the Redline proposal. I have a question and then we will see if anyone else has a question on it.

>> LIZ LE: Sure David. I'm not sure I need a little clarity in terms of where we are with the Redline proposal. Are you talking with respect to joinder in translation?

>> DAVID McAULEY: Thanks Liz for taking about the entire document. Let me state a little further. In the last call, as I recall, I know I had read through the document and, also, read it again it strikes me as a fair document over all, totally with, with one exception. I'm not saying it's unfair. But Malcolm was wondering about rule number 4. And I just I guess my question would be, I'll pose my question now then ask you to talk about the whole document, especially translation and joinder. The question I have is the approach I had suggested was that we get out the rules we have agreed on and then you and Sam said let's call them interim rules, that's fine.

If we did that, we would release the rules we have agreed on and in your Redline you're also going the release rule 4, time for filing. Which we have not agreed on. That was my question. What do you intend there? I think Malcolm made a point about it in the last call. Secondly I was going to ask you what were are you in translation and joinder. I am personally stating that it's a g great idea we get the first bucket of rules out those we agree on we can show progress and get those behind us and narrows those. Amongst I will switch those we made a fair amount of progress. Thanks Liz.

>> LIZ LE: ...

I'm not sure where we are, to be honest with you, where translation. And I am not sure I think with respect joinder we have it set out in the Redline document that we set up what the proposed joinder language is that I thought we as a group came to agreement on.

>> DAVID McAULEY: ...

But with respect to translation, I think you and Sam were going to I thought we had reached agreement. But I think you and Sam want the do clarification or something? So we are looking to you to send along those thoughts.

>> LIZ LE: ...

I will circle back with I will circle back with Sam on the translation issue.

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>> DAVID McAULEY: I have a feeling Kavouss we are not yet on agreement of types of hearings and potentially joinder though it looks like those may close quickly and **translations** we will see what Sam and Liz put on the list soon.

>> KAVOUSS ARASTEH: We are talking about this without any actions. What we have to take serious action about the trans lakes issue and joinder and so forth. Let's ask one more meeting to already know that. But if we have an agreement of all this if possible, why not?

>> DAVID McAULEY: No it's a fair point Kavouss we have moved slowly on this. On the other hand, you know we need some participation and help on this. I will promise to get out a statement about types of hearings and joinder within a week. I know that Liz and Sam, Liz you're willing to come out very shortly like within the week on the **translation** issue? I hope? And then we can get this we can move that along. In the interim we need to also keep our eye on getting a public comment ready for rule 4. Go ahead Liz. Sorry, Greg's hand is next.

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>> DAVID McAULEY: Thank you, anyone else on this? And it sounds like a way forward. Let's hope anyway. So, then, I need to come to the list on joinder and types of hearing if. Liz and Sam need to come to the list of **translation** and I will also try to wrap up what we just discussed about Greg's idea which I think is a promising way to go. So one way or the other, we are moving towards getting a document out that would be limit rules. Which is a good thing. So we are moving forward on two front. Getting public comments on the rule 4 and getting interim rules out, which if we follow the Greg proposal would be replaced by final rules that would be retroactive when we finally reach final rules. So any other comments? I see Kavouss is your hand back up or is that acknowledge old hand?

#### **14. 30 May 2018 meeting – Transcript of call**

(page 4)

>> SURE, DAVID. THIS IS SAM FOR THE RECORD. SO, FIRST THE EMAIL I SENT EARLIER, ONE OF THE THINGS THAT YOU MIGHT HAVE NOTICED IN THE DOCUMENTATION ON THE PROPOSAL FOR THE INTERIM SET OF RULES THAT WE HAD IDENTIFIED WE MADE A

RECOMMENDATION THAT THERE WAS STILL MORE WORK NEEDED TO GET THE TRANSLATION ITEM TO WHERE IT WHERE IT WILL BE APPROPRIATE TO HAVE IT DISTILLED INTO LANGUAGE. FROM OUR READING OF HOW WE COULD GET IT INCLUDED, WE REALLY NEED SOME MORE INFORMATION. I THINK THIS IS ONE OF THOSE AREAS THAT WE'RE PROBABLY PRETTY MUCH READY TO GET OUT TO OUTSIDE COUNSEL AND BECAUSE WE DIDN'T THINK IT WAS APPROPRIATE YET TO JUST INSERT LANGUAGE ON IT, THAT WE DIDN'T PUT ANYTHING INTO THAT INTERIM BUCKET THAT WE HAD. SO, WHAT I DID IN THE EMAIL THAT I JUST SENT EARLIER THAT WAS FOCUSED ONLY ON TRANSLATION, I CITED SOME LANGUAGE FROM THAT REPORT ON PUBLIC COMMENT THAT WENT OUT EARLIER. AND THEN, I PROVIDED SOME INFORMATION AS TO WHY WE THOUGHT THAT EVEN WITH SOME OF THE CLARIFICATIONS THAT WERE PUT OUT IN THE REPORT, THAT WE PROBABLY NEEDED SOME MORE WORK TO DO ON THIS. I THINK ONE OF THOSE BIG ISSUES IS WHERE THIS FITS INTO COST. BECAUSE, THERE'S THE POTENTIAL FOR US TO SAY THAT TRANSLATIONS ARE PART OF THE ADMINISTRATIVE COSTS. BUT, ON THE OTHER HAND, TRANSLATION THAT'S USED FOR THE PURPOSES OF FURTHERING SOMEONE'S ARGUMENT AND FOR REALLY LAYING OUT HOW THEY'RE PARTICIPATING IN THE INDEPENDENT REVIEW COULD ALSO BE CONSIDERED A LEGAL TOOL. SO, IT'S NOT NECESSARILY CLEAR THAT A TRANSLATION ITSELF IS AN ADMINISTRATIVE ITEM, BUT IT REALLY COULD BE SEEN AS A LEGAL A VEHICLE FOR FURTHERING LEGAL ARGUMENTS. SO, IN THAT SITUATION, WHILE THE PANEL MIGHT SAY IT'S APPROPRIATE FOR THERE TO BE TRANSLATION, WHO IS RESPONSIBLE FOR PAYING THE TRANSLATION AND PAYING FOR IT? BECAUSE IF IT'S A LEGAL COST IT'S A DIFFERENT THING FROM THE ADMINISTRATIVE COSTS. I JUST WANT TO THROW THAT OUT THERE AS PART OF ONE OF THE ISSUES THAT WE WERE LOOKING AT IN TERMS OF WHY THIS ISN'T JUST A CRYSTAL-CLEAR LINE. AND ALSO, IN THE LANGUAGE THAT WAS PUT OUT THERE WASN'T REFERENCE TO THE COMPETENCY OF THE REPRESENTATIVE OF THE CLAIMANT IN ENGLISH. IT WAS JUST ABOUT PEOPLE WHO ARE PART OF THE CLAIMANT, AND WHETHER THEY HAD PROFICIENCY IN ENGLISH AND WE RECOMMEND THAT REPRESENTATIVE PROFICIENCY BE PART OF WHAT IS APPROPRIATE TO HAVE TRANSLATIONS ORDERED WITHIN THE IRP SYSTEM. SO, THOSE ARE SOME OF THE IDEAS WE PUT OUT. AS I NOTED AT THE TOP OF MY EMAIL AND IT'S ALSO AT THE BOTTOM I THINK THIS IS SOMETHING WE CAN EITHER SAY TO OUTSIDE COUNSEL, LOOK, HERE'S SOME OF THE WORK OF THE IOT WAS EARLIER AND HERE ARE OTHER THOUGHTS, CAN YOU TRY TO DRAFT SOME LANGUAGE. OR WE CAN SPEND TIME IN THE IOT, CLEARLY NOT ON THIS CALL, TO TRY TO IDENTIFY IF WE HAVE RESPONSES TO THOSE QUESTIONS TO GIVE US GUIDANCE TO THE OUTSIDE COUNSEL BEFORE THEY START DRAFTING. SO, I THINK ON THIS ONE IT'S JUST A MATTER OF HOW QUICKLY WE WANT TO GIVE IT TO THEM. I THINK IT CAN GO EITHER WAY. BUT THAT JUST GIVES A LITTLE MORE INFORMATION AS TO WHY WE WHY WE MADE THAT COMMENT WITHIN THE INTERIM RULES DOCUMENT EARLIER. AND ALSO, I JUST WANTED TO CLARIFY THAT AS WE WERE GOING THROUGH AND LOOKING AT THIS, I THINK THAT THOUGH I PREVIOUSLY STATED THAT MAYBE THIS WAS AN ISSUE THAT WAS APPROPRIATE FOR FURTHER COMMENT OR MAYBE WE WANT TO DISCUSS THIS IS AN ISSUE APPROPRIATE FOR FURTHER COMMENT, I DON'T THINK THAT IT IS SUFFICIENTLY MATERIAL TO WARRANT GOING OUT FOR FURTHER COMMENT, AND IT'S REALLY ONE OF THOSE GUIDANCE ITEMS THAT THE IOT CAN HANDLE WITH EXTERNAL COUNSEL. SO, I'LL

STOP THERE THEN WE CAN TURN TO THE BROADER DOCUMENT IF THERE ARE FURTHER QUESTIONS ON THAT.

>> THANK YOU, SAM. I JUST WANT TO MAKE ONE OR TWO COMMENTS AND LET ME LOOK NOW AND SEE IF ANY HANDS ARE UP. I DON'T SEE ANY. WITH RESPECT TO TRANSLATION, I TEND TO FIRST OF ALL I HAVEN'T READ IT YET BUT LET ME THANK YOU FOR ANY POINTS OF CLARIFICATION I THINK WE SHOULD LOOK AT AND I THINK WE SHOULD BE PREPARED TO DISCUSS ON THE PHONE NEXT WEEK IF NEEDED. AND I'LL TRY TO SET THAT UP ON THE LIST. HOPEFULLY, WE CAN DEAL WITH THIS VERY QUICKLY. I TEND TO AGREE WITH THE CONCEPT, IN FACT I THINK I WAS THE FIRST ONE TO TAKE IT PASS TRANSLATION AND IT WAS ALONG THE LINES OF MINIMIZING COSTS AS MUCH AS POSSIBLE, MAKING SURE THERE WAS FUNDAMENTAL FAIRNESS WITH RESPECT TO LANGUAGE UNDERSTANDING ON THE PART OF PARTIES FOR DOCUMENTS THAT WERE CRITICAL TO THE IRP AND THAT WERE SUBSTANTIVE, NOT SORT OF I THINK THE DICHOTOMY YOU USED WAS LEGAL VERSUS ADMIN. I THINK I UNDERSTAND THE POINT. WE DON'T WANT TO BE TRANSLATING THINGS SOMEONE IS USING STRATEGICALLY TO AID THEIR ARGUMENT. THEY CAN DO THAT. BUT I TAKE THE POINT THERE NEEDS TO BE SOME, YOU KNOW, WE'RE TRYING TO DEAL AND CREATE A FAIR SYSTEM, WHERE AND A SYSTEM STRIKES ME AS BEING FAIR. I WAS THE ONE THAT PROPOSED IT. IF SOMEBODY, SOME PERSON WITHIN A CLAIMANT SPEAKS ENGLISH OR SPEAKS FRENCH, YOU KNOW, THAT WE WOULD USE THE LANGUAGE, YOU KNOW, THE LANGUAGE CAPABILITIES THAT THEY HAVE. YOU KNOW, SO BEFORE WE GO TO TRANSLATING A LANGUAGE THAT'S LET'S CALL OBSCURE, WE WOULD LOOK TO ENGLISH. THEN UN LANGUAGES THAT I CAN'T TYPICALLY USE. SO, I LIKE THE CONCEPT, I LIKE THE IDEA. I WILL TAKE A LOOK AT IT. I ENCOURAGE EVERYBODY ON THE CALL TO TAKE A LOOK AT IT AND WE WILL TRY TO SET IT UP ON THE LIST FOR A CALL NEXT WEEK. WITH RESPECT TO GETTING SOMETHING OUT TO COUNSEL WE HAVE TO. WE'RE RUNNING OUT OF TIME. JUNE IS THE END OF ICANN AND THE MONEY WE HAVE TO USE IN THIS RESPECT. SO, WE WILL PROBABLY RUN OUT OF THE ABILITY TO TURN IF WE DON'T GET IT DONE LET'S SAY NEXT WEEK OR AS I SAID THE WEEK AFTER THAT. THAT WOULD THEN PUSH I THINK WE WOULD QUALIFY AS HAVING IT DONE IN THE FISCAL YEAR IF WE GET THE QUESTION TO THEM IN A TIMELY FASHION. I HOPE SO. ALSO

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>> OKAY. THAT WAY WE MAY BE ABLE TO USE YOUR APPROACH AND BETWEEN THIS CALL AND THE CALL NEXT THURSDAY WE COULD PROBABLY, YOU KNOW, TWEAK THE LANGUAGE ON THINGS LIKE MAYBE ON TRANSLATION, MAYBE ON TYPES OF HEARINGS. I SUSPECT THAT FOR PUBLIC CONSULT WE'RE PROBABLY GOING TO ONLY GO TO PUBLIC CONSULT ON REPOSE AND WE MAY BE ABLE TO SORT OF WORKOUT THE ISSUES ON TYPES OF HEARINGS AND THE OTHERS AMONGST OURSELVES. SO THAT'S WHY I FEEL THAT WE'RE VERY CLOSE. AND SO, I APPRECIATE YOU YOUR COMMENT ABOUT MAKING A TRANSITIONAL CARVE AUTO TO PROTECT PEOPLE WHILE WE WRESTLE WITH THESE ISSUES. AND THAT MAKES YOUR PROPOSAL WITH THE INTERIM RULES I THINK MORE PALATABLE AND PROBABLY, YOU KNOW, AVOID ANY OBJECTIONS. HOWEVER, I THAN WANT TO GO TO THE GROUP AND I

SEE THERE'S ONE HAND UP. SO, I'M GOING TO GO TO KAVOUSS. GO AHEAD, YOU HAVE THE CALL.

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>> DM - THANK YOU, LIZ AND SAM. THIS IS DAVID SPEAKING. AS A FORMER LITIGATOR, I MIGHT HAVE TO RENEW MY LEGAL LICENSE AND GET MY CLE HOURS BASED ON HEARING THESE NUMBERS. OH, THAT'S A LAME ATTEMPT AT HUMOR. BUT SPEAKING AS A PARTICIPANT, YOU KNOW IT MIGHT BE WORTH WHILE FOR YOU TO PUT THOSE KIND OF EXAMPLES ON THE LIST. I AS A PARTICIPANT TEND TO BE IN THE CAMP THAT ICANN IS. I THINK THAT IT'S IMPORTANT TO RECOGNIZE THAT PEOPLE CONTINUE TO HAVE A REMEDY. THEY CAN GO TO COURT IF THEY WISH. BUT, THAT THE ARBITRATION SYSTEM WITHIN THE ICANN CONTEXT IS MEANT TO BE EFFICIENT, FAIR AND LOWER COST THEN LITIGATION. AND SO, I TEND TO AGREE. HAVING SAID THAT, MALCOLM MAKES GOOD POINTS. AS I UNDERSTAND HIS POINTS THEY ARE BASICALLY LET'S MAKE SURE WE STATE THE CORRECT PRINCIPLES. AND WE'VE STATED THE PRINCIPLES THAT I READ EARLIER, YOU KNOW, ACCESSIBILITY, FAIRNESS, SUFFICIENCY, ET CETERA AND I THINK WE SHOULD AND I'LL PROBABLY ASK MALCOLM TO TAKE HIS STRAWMAN AND BOIL IT DOWN TO PLAINS WE MIGHT LOOK AT OUR RULE AND MAKE SURE OUR RULE CAPTURES. SO, THANK YOU FOR THOSE COMMENTS. I WILL LOOK IN ZOOM NOW AND SEE IF THERE'S ANY OTHER HANDS UP. I DON'T SEE ANY. THAT'S HOW I PROPOSE TO PROCEED. AND I ACTUALLY THINK THAT WE'LL PROBABLY BE ABLE TO DEFINITELY AS A PARTICIPANT I FIRMLY SUPPORT WHAT I PUT IN MY OWN EMAIL OF EARLY JANUARY. THAT IS, I THINK THE RULE IS IN GOOD SHAPE. WE MIGHT TWEAK LANGUAGE IF WE HAVEN'T CAPTURED ALL THE APPROPRIATE PRINCIPLES. BUT THE APPROPRIATE PRINCIPLES WOULD BE BETTER THAN THE STRAWMAN. AND NOT SEEING ANY HANDS RIGHT NOW, I GUESS WE CAN MOVE TO AGENDA ITEM NUMBER 5. OTHER ISSUES. TRANSLATION YOU'VE SPOKEN TO, SAM. I THINK WE SHOULD IF YOU HAVEN'T YET READ SAM'S EMAIL AND I'M ONE OF THOSE, THEN THOSE WHO HAVEN'T, INCLUDING ME, SHOULD COMMIT TO DO THAT IN THE NEXT DAY OR SO AND COME ON LIST WITH REACTIONS TO IT AND WE'LL BRING IT UP NEXT WEEK. WHAT ABOUT JOINDER, SAM AND LIZ? LET ME BEFORE I PUT YOU ON THE SPOT LIKE THAT LET ME ASK YOU, I KNOW YOU MENTIONED YOU HAVE A CONCERN AS YOU STATED IN AN EMAIL AND I FORGET THE DATE. COULD I ASK YOU TO STATE THE CONCERNS CONCISELY ON THE LIST AGAIN? I HAVEN'T HAD A CHANCE TO GO BACK AND LOOK AT THE EMAIL THAT YOU REFERENCED I THINK IN A CALL OR TWO CALLS AGO. AS I SORT OF STRUGGLE WITH MY SYSTEM PROBLEMS. BUT, IS THAT DID I STATE THAT CORRECTLY OR WHAT? WHAT IS THE CONCERN WITH JOINDER?

#### **15. 7 June 2018 meeting – Transcript of call**

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>> SAM, YES, I PUT IT UP BECAUSE I WILL DO THIS AS A PARTICIPANT. AND I APOLOGIZE FOR NOT BEING MORE SPECIFIC. THE THINGS I WOULD MOST BE INTERESTED IN YOU TALKING ABOUT ARE JOINDER, TRANSLATIONS AND I'VE SEEN THE TRAFFIC ON THE LIST. ON THE INTERIM AND ON THE INTERIM RULE FOR TIME FOR FILING I'VE SEEN SOME MAIL BACK

AND FORTH BETWEEN YOU ANIMAL COME AND I THINK YOU ANSWERED THE QUESTIONS AND IT'S IN GOOD SHAPE BUT DEAL WITH THOSE FIRST. THE TIME FOR FILING IN LIGHT OF YOUR EMAILS WITH MALCOM THEN JOINDER THEN TRANSLATION. THANK YOU.

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- >> LET ME ASK IF ANYBODY ELSE HAS A COMMENT. IF NOT, SAM WE CAN MOVE TO JOINDER AND TRANSLATION, UNLESS YOU HAVE SOMETHING ELSE YOU WANT TO SAY ABOUT THAT.
- >> I THINK THAT THAT'S ALL I HAVE ON THAT ONE. I WILL SCROLL DOWN TO FIND TRANSLATION. SO, LET ME DEAL WITH TRANSLATION FIRST. IF ANYONE THAT IS OFF THE TOP OF THEIR HEAD, THE PAGE NUMBER, LET ME KNOW BECAUSE WE WILL HAVE TO HAVE EVERYONE SCROLL THROUGH THAT. I THINK WE'RE ON PAGE 6.
- >> OKAY, AND ALSO LET ME JUST MENTION TO FOLKS THIS WAS IN YOUR EMAIL OF THURSDAY MAY 31ST.
- >> YES, THANK YOU. SO, UNDER RULE 5 WE'VE PREVIOUSLY AGREED AMONG THE IOT THAT WE NEEDED TO MAKE SURE THERE WAS SOME REFERENCE TO TRANSLATION OF PROCEEDINGS. THERE IS ACTUALLY A REFERENCE TO TRANSLATION IN THE ICANN BYLAWS. AND SO, WE KNOW THAT THIS HAS TO BE WE THINK IT MAKES SENSE TO HAVE IT INCLUDED IN THE PROCEDURES AS WELL. SO, AS WE WERE LOOKING OVER THE CONVERSATION FROM WITHIN THE IOT TO CONSIDER IF THERE WAS TEXT READY ENOUGH TO GO INTO AN INTERIM SET OF RULES, WE IDENTIFIED AND YOU CAN SEE ON THE FOOTNOTE THAT WE INCLUDE IN HERE, FOOTNOTE 20 THAT WE HAVE WE INITIALLY SAID IT NEEDED TO BE IN PUBLIC COMMENT BUT THERE WAS A QUESTION OF WHAT TRANSLATION SERVICES MEAN. I WOULD LIKE TO POINT THE IOT MEMBERS TO THAT MAY 31ST EMAIL BECAUSE IN THERE WE IDENTIFIED SOME MORE SPECIFICS ABOUT WHY WE THOUGHT THIS RULE WAS NOT READY TO GO INTO THE INTERIM PROCEDURES AND WHERE WE THOUGHT WE MIGHT NEED TO FOCUS SOME EFFORT ON DRAFTING AND SOME DECISION MAKING AMONG THE IOT IN ORDER TO GET TO THE FINAL RULES. AND SO, I RAISED SOME OF THE CONCERNS SUCH AS TRANSLATION OF PLEADINGS OR PEOPLE'S BRIEFINGS ACTUALLY CAN BE CONSIDERED PART OF A LEGAL STRATEGY. IT'S REALLY IMPORTANT FOR PEOPLE TO BELIEVE THAT THE TRANSLATION IS AN ADEQUATE REPRESENTATION OF WHAT THEY'VE PUT FORWARD. SO, I THINK WE NEED TO CONSIDER IF WE THINK THAT ALL TRANSLATIONS ARE PART OF ADMINISTRATIVE OR IF THERE ARE CERTAIN PARTS OF TRANSLATION THAT IS ARE CONSIDERED LEGAL COSTS, WOULD WE THINK THAT TRANSLATION IS ALWAYS ICANN'S RESPONSIBILITY TO OBTAIN OR IF IT'S A LEGAL PLEADING WOULD THAT BE THE RESPONSIBILITY OF THE SUBMITTING PARTY AND PART OF THEIR LEGAL COSTS? IF YOU RECALL WITHIN THE COST STRUCTURE OF THE IRP, ICANN IS RESPONSIBLE FOR ALL ADMINISTRATIVE COSTS AND FOR THE EXCEPTION OF THE COMMUNITY IRPS, EACH PARTY IS RESPONSIBLE FOR THEIR LEGAL COSTS. AND SO, THIS DOES HAVE SOME ACTUAL IMPACT IN TERMS OF THE COST OF THE PROCEEDINGS TO BOTH ICANN AND THE CLAIMANT, DEPENDING ON WHERE THAT IS CUT. SO, WE LAID OUT SOME ITEMS IN THERE, IN THAT ELM MAIL TO THINK ABOUT. THE PROPOSAL I MADE WITHIN THAT E MAIL WAS THAT I THINK WE CAN GO ONE OF TWO WAYS. WE CAN EITHER GET SOME OF THESE THOUGHTS OVER TO EXTERNAL COUNSEL NOW TO START A DRAFTING

EXERCISE TO SEE IF THEY HAVE PROPOSALS OF HOW THESE ITEMS CAN BE WORKED INTO A FINAL SET OF RULES OR ON THE IOT WE COULD CARVE OUT SOME TIME IN ONE OF OUR MEETINGS THAT WILL HAPPEN SOON TO SEE IF WE HAD A SENSE OF WHERE THE IOT WANTED TO GO ON THIS. I THINK WE COULD GO EITHER WAY. FOR THE TIMING CONCERN, BECAUSE WE DO HAVE SOME BUDGETARY CONCERNS AROUND EXTERNAL COUNSEL AND WHEN WE CAN ACCESS THEM. I THINK I LEAN MORE TOWARD GETTING THIS ISSUE TO EXTERNAL COUNSEL TO HAVE THEM WEIGH IN ON THE TEXT AND POSE QUESTIONS BACK TO THE IOT IF WE'RE NOT ABLE TO GET THIS ISSUE TEED UP FOR CONVERSATION WITHIN THE IOT SOONER. BUT I THINK THAT ALSO WEIGHS TOWARDS IF WE'RE LOOKING AT GETTING OUT A SET OF INTERIM RULES THAT I ALSO ASK FOR THE IOT'S CONFIRMATION THAT THIS ISN'T YET AN ISSUE THAT'S READY FOR INCLUSION IN THE INTERIM RULES, BUT WE WILL HAVE IT READY LIKELY WITHOUT NEED FOR PUBLIC COMMENT, I REALLY DON'T THINK WE NEED IT, IN ORDER TO GET INTO THE FINAL SET OF PROCEDURES. DAVID.

>> THANKS, SAM. DAVE MCAULEY SPEAKING AS A PARTICIPANT. THANK YOU FOR THE COMMENTS IN THE EMAIL YOU SENT MAY 31ST. IN MY OPINION I THINK YOU RAISE A GOOD POINT ABOUT COSTS, ABOUT LEGAL STRATEGY AND WHETHER PART OF THIS MAY BE IN COSTS. LET ME JUST BEFORE I GO ON TO MY CONCLUSION ON THAT JUST ADDRESS ONE OR TWO OTHER THINGS IN YOUR MAIL. WITH RESPECT TO THE APPENDICES, TRANSLATION OF APPENDICES WE DON'T HAVE PAGE LIMITS. THE ONE THING THAT WE DID SAY IS IN WHAT WE WERE GOING TO SEND WE SAID WHEN CONSIDERING THE TRANSLATION OF DOCUMENTS, THE PANEL OR EMERGENCY PANELISTS SHOULD ENDEAVOR TO STRIKE A FAIR BALANCE BETWEEN THE MATERIALALITY OF THE DOCUMENT AND THE COST TO TRANSLATE. IT SEEMS MATERIALALITY MAY BE LESSER THEN THE AN PEPPED CEASE. IT MAY BE COVERED AND WE MIGHT WANT TO SEE WHAT IS SENT BACK IN RESPONSE TO THAT REQUEST. AND THE OTHER THING YOU MENTIONED IN YOUR MAIL WAS MENTION SHOULD BE MADE OF THE PROFICIENCY OF THE CLAIMANT'S REPRESENTATIVE IN ENGLISH. AND I THINK WHAT WE SAID, WE SAID IN OUR SUGGESTION IN ADDITION IF THE CLAIMANT INCLUDES MORE THAN ONE PERSON, FOR INSTANCE CLAIMANT IS A CORPORATION THEN IF A RESPONSIBLE MEMBER OF SUCH PERSONS. I TAKE OPTION 1, WE SHOULD POSE THESE AS QUESTION AND DO WHATEVER WE CAN TO GET THEM TO THEM. WE ARE ELEMENT OUT OF TIME FROM GETTING ANYTHING FROM SIDLY. I DON'T THINK WE CAN TEE IT UP ANY FURTHER. WHAT I WOULD SUGGEST IS WE I CAN'T READ FOOTNOTE 20 RIGHT NOW BUT BASICALLY, WE SEND WHAT WE HAD IN OUR SUGGESTED INSTRUCTION TO SIDLY ASKING FOR ALTERNATIVES FOR US. DOES ANYBODY ELSE HAVE ANY COMMENTS ALONG THE LINES OR SAM DO YOU HAVE ANYTHING YOU WANT TO SAY IN RESPONSE?

>> THANKS DAVID. I AGREE WITH YOUR SUGGESTION. THE INFORMATION AND COST COULD GO TO THE APPENDICES, I THINK WE MIGHT WANT TO BE A LITTLE CLEARER ABOUT THAT BUT I THINK IT'S STILL I HAVE THE SAME SENTIMENT BUT I THOUGHT IT STILL LACKED A LITTLE BIT THERE MIGHT BE MORE THAT WE CAN DO ON THAT. BUT, I THINK THAT YOU AND I SOUNDS LIKE WE'RE ON THE SAME PAGE.

>> THANKS, I THINK WE'RE ON THE SAME PAGE BUT SAM I NEED TO ASK YOU AND LIZ FOR SOME HELP HERE AND WHAT I'M SPEAKING ABOUT IS IN GETTING SOMETHING TO SIDLY, I WOULD SORT OF ASK I THINK WE'RE GOING DOWN THE ROAD OF USING YOUR RED LINE

DOCUMENT. AND SO, WE HAD TWO CHOICES. WE COULD HAVE GIVEN THE INSTRUCTIONS THE WAY WE WERE GOING, BUT THAT DID LEAVE A LOT OF UNCERTAINTY. AND AS AN ALTERNATIVE YOU PROPOSED A RED LINE VERSION. SO, I WILL NEED YOU TO MAKE SURE YOU HAVE THE RED LINE VERSION IN SUCH FASHION THAT WE CAN SEND IT TO SIDLY. MAYBE THE CLEAN COPY. WHAT YOU SHOULD SEND TO THE LIST IS THE FINAL RED LINE VERSION AND CLEAN COPY SHOWING WHAT WE'VE DISCUSSED. AND I THINK MALCOM WOULD PROBABLY AGREE WITH WHAT YOU SAID ON TIME FOR FILING. I THINK YOU PROBABLY ANSWERED HIS QUESTION SATISFILY. AND SHOWING THE JOINDER WITH SOME **TRANSLATION** QUESTIONS, YOU KNOW, BOIL YOUR EMAIL OF MAY 31ST QUESTIONS TO SIDLY THAT WE CAN SAY YES THIS IS WHAT WE NEED TO SEND OR NO IT'S NOT, LET'S TWEAK HERE SO WE CAN GET IT DONE. WE HAVE TO GET IT OUT. TODAY IS JUNE 7. IF WE FINALIZE THAT NEXT WEEK, JUNE 14TH WE WOULD GIVE SIDLY HALF A MONTH. LET ME STATE PARENTHETICALLY BERNIE, COULD I ASK YOU TO MAKE AN ACTION ITEM THAT YOU AND I SHOULD GET READY TO CALL HOLLY AND TELL HER UNFORTUNATELY IT'S COMING LATE BUT IT WILL BE COMING? AND WE NEED TO FIGURE OUT A WAY TO MAKE IT HAPPEN IN THIS FISCAL YEAR. I THINK SAM YOU SAID WE HAVE TO MAKE SURE WE GET A BILL IN THIS FISCAL YEAR. I DON'T KNOW HOW IT WORKS.

>> WE DON'T NEED A BILL IN THIS FISCAL YEAR. WE NEED TO HAVE THEM WE NEED TO ACTUALLY HAVE THEM DO THEIR WORK WITHIN THIS MONTH. WE GET THE BILL A LITTLE BIT AFTER THE END OF THE FISCAL YEAR BUT THEY NEED TO DO THE WORK WITHIN THE FISCAL YEAR. AND ALSO, DAVID I KNOW YOU AND I HAD AN EARLIER EXCHANGE WITH HOLLY WHEN WE GAVE HER A HEADS UP SO WE CAN ALSO JUST WRITE ON TO THAT CHAIN AND SAY, HEY, THIS IS GOING TO START TO COME.

>> OKAY.

>> SO, WHAT I TAKE FROM YOUR POINT, DAVID IS AN ACTION ITEM OF SO WE WOULD SEND THEM THE INTERIM RULES, NOT REALLY AS A DIRECTION OF WHAT THEY'RE DOING BUT TO SHOW THEM WHAT WE'RE THINKING ON THE INTERIM RULES AND DOCUMENTS THEY CAN WORK FROM AND IT SHOWS SOME OF THE PLACES WE'VE PROGRESSED. AND THEN THEY MIGHT HAVE SOME IDEAS ON SOME OF THE LANGUAGE THAT MAYBE WE'VE INSERTED IN THERE AND HOW WE CAN BETTER IT FOR A FINAL SET OF RULES. AND THEN WE ALSO HAVE AT LEAST THIS **TRANSLATION** ISSUE AND I THINK THE JOINDER ISSUE AS WELL WHICH LIZ WILL TALK TO IN A MINUTE, WHICH ARE PLACES WHERE WE'VE IDENTIFIED SOME CONCRETE QUESTIONS THAT WE THINK WOULD HELP GUIDE THE FINAL DRAFTING OF IT, WHICH ALSO SUPPORTS WHY WE'RE NOT READY FOR IT TO BE IN THIS INTERIM SET. ON THE TIME FOR FILING, I THINK WE NEED TO AWAIT THE OUTCOMES OF THE PUBLIC COMMENT BEFORE WE GET TOO MUCH OTHER LANGUAGE OR USE THEIR TIME TOO MUCH ON IT, BECAUSE WE DON'T WANT TO JUST BECAUSE THERE'S MONEY AVAILABLE DOESN'T MEAN WE SHOULD HAVE THEM BILLED UNDER COMMUNITY CONVERSATION.

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>> THANKS, SAM. AND CAN I LOOK TO YOU AND LIZ TO SORT OF TEE THIS UP? TO TEE UP THIS WHOLE DOCUMENT, WITH THE IDEA OF SOME QUESTIONS ON **TRANSLATIONS** AND ON JOINDER?

>> YEP. AND WE'LL LOOK THROUGH AND SEE IF THERE ARE ANY OTHER THINGS WE HIGHLIGHTED AS NECESSARY FOR SOME FURTHER CONVERSATION.

## **16. 25 Sept 2018 – Draft of supplementary rules**

### Translation

As required by ICANN Bylaws, Article 4, Section 4.3(l), “All IRP proceedings shall be administered in English as the primary working language, with provision of translation services for CLAIMANTS if needed.” Translation may include both translation of written documents/transcripts as well as interpretation of oral proceedings.

The IRP PANEL shall have discretion to determine (i) whether the CLAIMANT has a need for translation services, (ii) what documents and/or hearing that need relates to, and (iii) what language the document, hearing or other matter or event shall be translated into. A CLAIMANT not determined to have a need for translation services must submit all materials in English (with the exception of the request for translation services if the request includes CLAIMANT’s certification to the IRP PANEL that submitting the request in English would be unduly burdensome).

In determining whether a CLAIMANT needs translation, the IRP PANEL shall consider the CLAIMANT’s proficiency in spoken and written English and, to the extent that the CLAIMANT is represented in the proceedings by an attorney or other agent, that representative’s proficiency in spoken and written English. The IRP PANEL shall only consider requests for translations from/to English and the other five official languages of the United Nations (i.e., Arabic, Chinese, French, Russian, or Spanish).

In determining whether translation of a document, hearing or other matter or event shall be ordered, the IRP PANEL shall consider the CLAIMANT’s proficiency in English as well as in the requested other language (from among Arabic, Chinese, French, Russian or Spanish). The IRP PANEL shall confirm that all material portions of the record of the proceeding are available in English.

In considering requests for translation, the IRP PANEL shall consider the materiality of the particular document, hearing or other matter or event requested to be translated, as well as the cost and delay incurred by translation, pursuant to ICDR Article 18 on Translation, and the need to ensure fundamental fairness and due process under ICANN Bylaws, Article 4, Section 4.3(n)(iv).

Unless otherwise ordered by the IRP PANEL, costs of need-based translation (as determined by the IRP PANEL) shall be covered by ICANN as administrative costs and shall be coordinated through ICANN’s language services providers. Even with a determination of need-based translation, if ICANN or the CLAIMANT coordinates the translation of any document through its legal representative, such translation shall be considered part of the legal costs and not an administrative cost to be born by ICANN. Additionally, in the event that either the CLAIMANT or ICANN retains a translator for the purpose of translating any document,

hearing or other matter or event, and such retention is not pursuant to a determination of need-based translation by the IRP PANEL, the costs of such translation shall not be charged as administrative costs to be covered by ICANN.

### **17. 9 October 2018 meeting – Action item**

Rules 5B Translation - DM – To confirm as per MH comment that language will be inserted that states that the final decision will be posted in English.

### **18. 9 October 2018 meeting – Transcript of call**

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>> BERNARD TURCOTTE: [SP Note: Bernard read out the text of the proposed section 5B on Translations. Transcript as captured is not entirely accurate to the text and so not reproduced here – refer to the relevant text above instead.]

>> DAVID McAULEY: Thank you Bernie that was quite a lot.

That one is now open and on the floor. So comments? Questions about it are certainly welcome. I see Malcolm hand up please, go ahead.

>> MALCOLM HUTTY: Thank you I had two things. Firstly the authoritative language for the decision. I don't see, this is already new language that the currently not considered I don't see it stated where that the authoritative decisions shall be in English for the purposes of future reference. It says that the English will be the primary working language. But that's not the same as the authoritative text of the decision.

So I think that should be added.

My second is, the final sentence, if ICANN retains translator, even if it hasn't been by the claimant that will be a cost that is not in the administered cost and can be assigned to the claimant, that doesn't seem right.

For example, if ICANN picks a panelist that requires **translation**, claimants could end up picking up the crux of that. This would be a significant hurdle in the way of per say claimants.

So I would say claimants should only be exposed to the cost of **translation** if they request it.

>> DAVID McAULEY: Thank you Malcolm. And the third point.

>> MALCOLM HUTTY: Those were my only points.

>> DAVID McAULEY: So with respect to the authoritative decision point, I see -- before I start commenting I see Sam's hand is up. Go ahead Sam.

- >> SAM EISNER: This is Sam Eisner for the record. Malcolm if there was a need for translation at the panel level, that would, I think that would be covered by the administrative cost of the hearing. So the cost that we would envision the claimant to be responsible for would be for example, you could say that someone would -- if they wish to control the translation of their briefing document or something because of the way it's translated might be important for the statement of their legal argument. That would be something that the claimant would be responsible for. But other translation for moving the process along would be considered administrative. That's where the administrative cost comes in. Because ICANN there's already a requirement for ICANN to be responsible for administrative costs. So my sense is we don't need to add anything to cover that. So you can, if you want the read the rules again with that in mind, let me know. And see if you want the add anything else.
- >> MALCOLM HUTTY: Can we just have clarification of what you were thinking of a circumstances in which ICANN would retain a translator at its own request, not at the claimants request, at which that would not be considered an administrative cost?
- >> SAMANTHA EISNER: So, there could be a possibility that ICANN, separate from the administrative cost in the proceeding, if ICANN needed to provide a translated version of its briefing papers, that because that is a -- because the statement of it, and the way that claims are presented, might be really essential to how ICANN is stating it's case. That would be something that wouldn't be an administrative cost, that would be a legal cost.
- >> MALCOLM HUTTY: I don't understand this point. Could you please give me some examples to why this -- give some example that would give some reason as to why a claimants, the circumstances in which a claimant would be properly exposed to a translation that ICANN is doing for its purpose bus not because the claimant asked for it.
- >> SAM EISNER: The claimant is responsible for cost if ICANN made the translation?
- >> MALCOLM HUTTY: If these are legal costs rather than administrative costs, then the claimants particularly exposed to having the cost shifted on to them vendor.
- >> SAM EISNER: , I imagine if they are choosing -- if the claimant for example chose to control the translation of it, as opposed to using the translation service that would be made universally available, then that would be something that the claimant would then assume as a legal cost.
- It doesn't mean they have to use their own translation service to do that. But if they wanted to control how the translation was prepared and presented, within the IRP, then that would be their own legal cost. They don't have to do it that way.
- >> DAVID MCAULEY: Can I interrupt for a second? Malcolm can I make a at the same time? It's David speaking for the record. Malcolm when you stated your concern about this part of the translation you mentioned it stemmed from the last sentence.

And the last sentence owns with the words the cost of such translation shall not be charged as administrative costs to be covered by ICANN. Is it possible if that language was simply to expand it and say the cost of such translation would not be charged as administrative costs to be covered by ICANN if the translation was requested by the claimant and if the translation was requested by ICANN it wouldn't apply under here any way. Something like that. Is that what you're getting at.

>> MALCOLM HUTTY: It's broadly what I'm getting at but it's much simpler and more restrained edit that would achieve it. The sentence begins additionally in the event that either the claimant or ICANN retains a translator. If we delete ICANN, yeah.

Okay.

>> DAVID McAULEY: Uh-huh.

>> MALCOLM HUTTY: Then wouldn't that cover it?

>> DAVID McAULEY: Sam what do you think?

>> SAM EISNER: So there is the ability and the reason it makes sense to remove it now, although I think this is something that we should talk about, do we remove part of this if we are having issues moving it forward? So we can get interim set done. Or do we do more revision of it as we are working on the final set. There's the provision for ICANN to gain cost shifting in the event of, I forget the language in the bylaws in the event of some bad faith from the claimant.

So there's benefit in both ICANN and the claimant understanding which parts of the add man strive costs and which parts are the legal costs that are aligned to the proceeding.

And so, just as a claimant would have a legal cost, if it were to choose to move forward, I think we are understanding each other on that part, there's also the possibility that ICANN would absorb cost that are not truly administrative costs in there. You know if ICANN wanted specific control over how a translation was done, it would be the same as a claimant. So I don't think that we should remove ICANN from that, either.

>> MALCOLM HUTTY: Sam I have no problem with what you just said there.

Yeah.

My only concern is that limited to ICANN incurring translation costs other than, for the benefit of the claimants. If ICANN has other purpose why it needs translation done, that should not form part of the legal costs that is essentially exposed to whether the claimants exposed to ICANN's operating costs. Only things done for the translation done for the to meet the needs of the claimant should be potentially chargeable to the claimants and should be only chargeable with the claimants consent.

If the claimant requests **translation**, absolutely for that to be something they are potentially exposed to cost of that, that's perfectly reasonable. I have no objection there.

>> SAM EISNER: I think the legal cost shifting itself is kind of a broader conversation because into bylaws it can go either way. So I think that if there's that need, it's not actually ICANN's operating cost, it's the cost of defense just as there's a cost of the claimant bringing that. So I think you know if there's consent, the consent kind of goes all the way around, I would think. I'm not sure we want to consent place on that.

#### **19. 11 October 2018 meeting – Decision**

Rule 5B – Translation – Approved for Interim Rules with the understanding that the issue of cost shifting of documents translated at ICANN's request must be addressed in the final rules to avoid unfair shifting of these to the plaintiff (agreed MH, SE).

#### **20. 11 October 2018 meeting – Transcript of call**

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>> SAM EISNER: So I wanted to raise two items. First, I wanted to give a heads up to the group that in anticipation of the IOT being able to complete the set of interim rules we are putting on to the floor's agenda for their meeting at the end of Barcelona the board's consideration of the interim rules to get the rule because there's a step for board approval.

We will coordinate with appropriate committees. And all given that the rules are not yet finalized but the board is waiting to see that.

And I -- on a personal note I wanted to note by thanks for how we have really worked together as a group to get to the interim set of rules. We are really appreciative from the ICANN side, having a set of rules in place I think will be of benefit to everyone and I know we still have more work to do.

In terms of the rules, there was one other action item that I was aware of which Malcolm and I remember charged with going and looking at language on **translation**. So Malcolm I don't know if you want to report on what we agreed upon. I think we have one change that we agreed we would take out the and ICANN. Or I forget which one but we have a place we agreed that we would take on out some language but otherwise we wouldn't reflect any additional language in there although Malcolm and I agreed that there's a need to continue looking at we are doing the final set of rules to see if there's any caveats we need to include the appropriately reflect the times when ICANN is choosing to make **translation** available to the community particularly those that aren't used in the IRP, so that there's better understanding around the community and we agree that those are not things that are appropriately charged to either party as administrative or legal costs and those are things

that are really sunk in operational costs with ICANN but we will make sure that concept of a choice to make **translations** that are really for the benefit of the community and not for essentially for use in the IRP are not things that will be appropriately charged to the parties as IRP related cost.

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