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SUSAN PAYNE:

Great. Thank you very much. So hi, everyone. Welcome to our call of the IRP IOT for the 17<sup>th</sup> of March, 2020. Thank you very much for all of you for joining. I always forget that we don't get a sort of official introductory language on these calls. We just... Although [Padma] has put it in the chat. Just a reminder to everyone to please mute when they're not speaking just to try to make it easier for everyone. Also to please identify yourself if you do speak. I think everyone is aware of those requirements. But it sometimes can be easy to forget to do that.

So thanks very much to Bernard for circulating our agenda. To start with, we have a review of the agenda which we're going to just quickly touch on Statements of Interest. I think we'll be spending most of our time continuing our discussion on translations. We have, in our agenda, a reminder of our next meeting on the 31<sup>st</sup> of March. That's in two weeks time. And then we have an opportunity for any other business if there is any. And if anyone has anything now that they want to put on the agenda for AOB, please speak up. Otherwise, please do come back and raise something at the end if something occurs to you during the call. And then we will wrap up until the 31<sup>st</sup>.

So in terms of the first substantive agenda item, I guess, is the Statements of Interest. If anyone does have anything that they want to flag as a change to their Statements of Interest, then please do so. I think that certainly I'm aware of one from Flip that he circulated to the list, so everyone should have seen that. In terms of... Actually, I'll pause just in case... just to allow anyone to speak if they actually did want to. So please speak up or put your hand up.

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*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.*

Okay, I'm not hearing anyone and that's absolutely fine. You'll all recall that we did talk about the form of our Statements of Interest on the last call. In particular, we noted that actually for some people, they were having difficulty using the GNSO format or at least accessing the GNSO system to produce a GNSO one. And strictly speaking, this isn't, in any event, a GNSO Working Group, and so that GNSO process is not really, strictly speaking, the correct one to use. And so we did agree that we would have... we'd start using our own Statement of Interest that would be specific for our group.

That still is the plan. I think we are... We don't have that yet. I think the intervention of the ICANN 67 meeting has thrown a few things out, but I am hopeful that we should have something to circulate over the next week or two and hopefully that we will have something that we can use in time for the next meeting. But in the meantime, if anyone does have any particular changes, any changes to their circumstances, and particularly something that impacts on what we're doing here, then please do take the opportunity to circulate that to the mailing list if you wouldn't mind.

Now I will also just say as sort of introductory remarks – and I'm just quickly scrolling down to see how many people – we've now got quite a good number who have managed to join so that's great. Just to please ask you all to bear with me a little bit. The UK has now recognized the concerns about the Coronavirus and so most people are now in the UK, or certainly in London I would say, many people are now working from home including myself. My company has more or less encouraged everyone who hasn't got a safe means to travel to the office to stay at home. And that's absolutely home, but I do have a fairly small computer

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screen set-up here and until I can work out something better if I need it for the longer term, so at the moment, I only have quite a small screen. I may find myself struggling to keep up with the chat if there's a lot of really substantive comment going on in the chat.

And I also... I hope I will see people's hands. I should be able to do that as well. But again, if I might ask Bernard if he could keep an eye on hands and flag to me if I seem to be missing people who have got hands up in the queue. Thanks, Bernard.

And yes, as I say, I will do my best but perhaps, if you could all kind of bear that in mind and please do think about speaking up so that we have you on the audio rather than just typing in the chat. I know we all find the chat function really useful, but it does sometimes mean that people don't necessarily see your intervention and that's great for plus one's and things, but it's not so great if you're making a really useful substantive point. And I've got a couple of other people commenting in the chat that they're also in interesting circumstances, so we might lose Chris for a minute or two while he tries to get a better connection and David is doing the same as me and set up on a small laptop screen. So I guess we're all in the same boat and we will manage.

So we can turn, I think, to our discussion on translations. And I am hoping we can have the Google Doc up. Yes, it's just in process of being uploaded which is great. And thank you very much to David McAuley and to Kristina who have been inserting some comments and suggestions into that document which is really helpful. So thanks to both of you. And I think we will probably come and touch on much of

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what you have put in that document as we go through our discussion today.

I thought perhaps for a starting point... Thanks, Kristina, noting that Kristina just has to step away for 20 minutes or so. I thought perhaps what we could as a starting point is really just a reminder of what we discussed on the last call. We had a really useful discussion on translation. I wouldn't say that we necessarily had reached a point of agreement. We really kicked off our discussion, built our discussion out of some questions that Kristina raised towards the start of the call which was really, what is the position? Given that we have an understanding that the proceedings are to be primarily conducted, or indeed, are to be conducted in English, that's a bylaws expectation and so that's, I think, something that we have an acceptance of that. But we also have, again, in the bylaws, a statement that there will be some translation service provided in case of need.

So we have an expectation that the proceedings are going to be conducted in English, but we also do have a realization that for some people, they may need translation services. And so there's a sort of honest or fundamental question about what happens about the complaint. The IRP proceedings are kicked off by the lodging of the complaint and if you are someone for whom translation services are a necessity, how does that work? Does the complaint need to be in English and you make a request for translation? Or is there some other means by which we can meet the need of those kind of complainants?

And so I think, as I say, we kicked off our discussion by thinking about that and spent quite some time talking about it. We had some

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differences of opinion, I'd say, amongst the group and I'm going to just quickly summarize. I most certainly am not flagging everything that was discussed or probably identifying what everyone's position was. But I would say we were sort of mixed, I think. And the question of "Must the claim be in English?", we definitely had some in the group who felt strongly that it should be so I know, for example, that Flip very much felt that that was the case. Yes, you file in English and then you make your request for translation services. And I think I would say David was probably in that camp as well. Although, obviously, if I mischaracterize anything, people can feel free to correct me. I would say we had a differing position expressed in particular by Mike Rodenbaugh who was concerned of the impact of that on the non-English speaking complainant. And I would say those were probably the most strongly expressed views. And so we certainly didn't reach a kind of conclusion on this.

But one of the comments that Flip made, which I think is perhaps a good starting point... Oh, thank you. I can see Scott, you have your hand up. Is that... Do you want to speak now?

SCOTT AUSTIN: Yes. Just for a moment if I may.

SUSAN PAYNE: Absolutely.

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SCOTT AUSTIN:

I did a little research after our last call to a number of different arbitral bodies, just to see how it was handled in different jurisdictions, different locations. And one, many of them were similar to what we were talking about in terms of English being sort of the primary. But there were also several. I think the one was from a German arbitration code that basically allowed the parties to agree on a language and determine what it was going to be, but that perhaps the offshoot of that would be that if the parties agree on a language other than English, that there would be a requirement that all of the documents be translated into English at the cost of the parties. And so I just wanted to throw that out as a possible option as opposed to dictating English and that then they would have to pay for translations into their native language, if you will, if it was something other than English, or one of the five UN languages. And I can send those around if you'd like.

SUSAN PAYNE:

Thanks, Scott. That's a really good, useful reminder, a good starting point, I think, for us. That... I would say that that seems to me to be quite a common position in many arbitration rules is that those rules usually expect that the parties will agree or that the language of the arbitration will be whatever was put in the contract between the parties or something to that effect.

And even there are some rules which I think envisage that where there isn't some kind of agreement, the panel might make a determination on what the language of the proceedings would be. But I think the difference we have here is that we... whilst we don't specifically have an arbitration agreement or something to that effect between the parties,

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we do, we effectively have that provision or we have this covered by means of the bylaws. And by virtue of the fact that ICANN is one of the parties to these proceedings, and that everyone who is engaging in this process and parties who are choosing to take advantage of the availability of the IRP process, are effectively agreeing that they are operating an action that's underneath the, governed by the ICANN bylaws. And so the bylaws do say to us that the proceedings are in English.

And that is... Yes, that's on 5B. We have our provision on 5B which is what is showing up in the Zoom room at the moment. And sorry, if someone could mute their line, that would be super helpful. Getting quite a lot of background. Thank you.

Yeah, so the first part of 5B reiterates what the bylaws provision is which is in – it's really small so I can't read the numbering – 4.3-something... L, I think it is. That all proceedings will be administered in English as the primary working language. And that the provision of translation services for claimants is if needed.

So although I would agree that it's very common for the parties to agree amongst of themselves what the language of the proceedings is, they've effectively done that. They've agreed that the language of the proceedings is in English. And so I don't think... Without us starting to go down the path where we want to propose a bylaws change – and I don't really think that that's in our scope – we have a language of the proceedings being English. And so what we're talking about is essentially how we set out the rules that govern when those translation services would be available, or perhaps, the guidance that's available to

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the panelists, if you like, for when those translation services should be available. Great. Thank you.

I'm not seeing anymore hands, so I'm going to keep going. But what I was about to come onto was something that Flip had suggested last week and I think it's being touched on in the conversation that's going on in the chat at the moment. And that was Flip, in part, in his support – and again, I'm putting words into Flip's mouth, but I think I'm summarizing my takeaway from some of the things he was saying – was that Flip's point was that English is important for the wider community to know what's happening. ICANN is a party and so it's important also... There's a reason why English has been selected. But he also made the point that he feels that the complaint is a relatively simple document. There's a form and then you attach to it a number of pages up to no more than 25.

And his argument was that in submitting your complaint, you're making a relatively simple submission and that you're not necessarily arguing your full case at that point. It's just a kind of initiation of the proceedings. And so he felt that it wasn't necessarily unreasonable for that initiation of the proceedings to be in English and then if a party feels that they have the need for these translation services, they can be expected to make that request to the arbitral panel at that point. And so... Yes. And so that was, I think, at least in part, is part of the reason why Flip felt that requiring all parties to use English, at least to kick the proceedings off, was a sort of fair and reasonable thing for us to be doing.



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But as I've been talking away, I've seen various questions and back and forwards on precisely how complex the complaint is going on in the chat, and I would certainly say I haven't necessarily been watching while I've been speaking, and indeed, while Scott was speaking. But I can also see that Flip has his hand up. So I will turn it over to Flip and I will try and catch up on the chat in the meantime.

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

SUSAN PAYNE: Yes, thank you.

FLIP PETILLION: Thank you. I am actually trying out my new, very fancy headphones, cordless, no wires, and it seems to work so I'm very happy.

I just wanted to add to the conversation what we should not forget that you don't have a panel in place from the outset. So when you file your request and you fill in the form and you hand it over to ICDR, there are several weeks, many weeks, that the pause between that very moment and the nomination of panel members and the appointment of these members so that they become the panel of that very matter. So you have quite some time to think of translation issues and preparing points you want to raise in additional submissions for which you should obtain the agreement, the consent by the panel. So I just wanted to point out that there is a timing to take into account and you don't have everything settled from the outset. Thank you very much.

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SUSAN PAYNE: Thank you, Flip. And I can see David is next in the queue. David, I'm not hearing you at the moment. I don't know if you're maybe double muted.

DAVID MCAULEY: Susan, can you hear me now?

SUSAN PAYNE: Yes. Yes.

DAVID MCAULEY: And you're right. I was suffering from the famous double mute. Sorry about that. I wanted to say I'm largely in agreement with Flip but I also wanted to comment on what Scott said in the chat. And I think while Scott makes a reasonable point, I'm not even sure that ICANN can waive the bylaws provision. And the bylaws are pretty specific in 4.3L saying that English is the working language.

But I think one thing that maybe ICANN could consider since filing a complaint is a gating issue, is to have a description on their IRP website wherever it is, in the six UN languages that says if you're going to file a complaint, understand one of the bylaw provisions says the working language is in English, and so be aware of that and look to rule 5, or whatever our number is, for translation, for a rule regarding translation. So it would be wise to advise people upfront that that way could avoid timing issues and things of that nature. So I think there's something that

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can be done here, but the bylaws as I read them right now are pretty specific about English being the working language. Thanks very much.

SUSAN PAYNE: Thanks, David. Kristina?

KRISTINA ROSETTE: Hi. If I understood Flip's earlier position correctly, namely that the request – and by request for independent review, I'm referring to the usually 25-page long brief – was not as essential to the complainant's arguments and there were other opportunities so that, such that we could defer decision on translation until after the complaint or the request for review.

I actually am going to respectfully disagree with that in the sense that from a general litigation strategy perspective in most requests for independent review process that I have reviewed, it's been very much the case that this is the complainant's first opportunity for advocacy. They tend to be very detailed. They tend to be very well-researched and articulated and that's why, quite frankly, in addition to the issue of the timing of the panel appointment that I wanted to make sure that we thoroughly discussed the issue at the outset as to whether or not the translation services would apply to the request for independent review process because while it certainly is the case that in every proceeding there is substantive briefing after that point, some more than others depending upon whether you have emergency order and emergency release issues, whether you have a [inaudible], that request for independent review process, I don't think we should dismiss it. So I

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think if I have to put myself in a camp on this, I'm going to put myself in the Rodenbaugh camp. Thanks.

SUSAN PAYNE:

Thanks, Kristina. That's helpful. And I must say, just based on my reading of the interim rules, and I think some of the areas of later discussion, some of the areas where I felt there was a bit of a uncertainty or inconsistency come in relation to the written statements part which is Rule 6, that I'm sure we'll get on and talk about later. But as Rule 6 currently is drafted, it talks about initial written submissions and them being 25 pages long, but there is also a clear statement at the outset that the claimant's written statement of dispute should include all the claimants that give raise to a dispute. And so there seems to me to be a kind of expectation from Rule 6 that you're submitting your best case, if you like, and there's also a reference to evidence which it says is included in the page limit. So that suggests that there's an expectation of the evidence being kind of upfront as well. And indeed, that the parties might submit X for evidence in writing and I think we perhaps might need a bit of additional clarity at some point when we come on to talk about this. But it certainly, from my reading of the initial rules, it seemed to me that there was a pretty good expectation that you're putting out your good case at the outset. And this is a perfect time for me to see Sam's got her hand up and go to her.

SAMANTHA EISNER:

Thanks, Susan. I also put a comment in chat. I agree in many ways with Kristina and Mike that goes back to how someone presents their case is

a really important thing and why would we think that someone has the facility to make an initial filing in English if they're really, if they're then going to seek leave of the panel to be able to conduct the rest of it in a language that works for them better. There still is the need for a panel to decide on whether it makes sense within their discretion and the different rules we put in.

But I don't see a reason why we couldn't allow for... fully in compliance with the bylaws, to allow for a claimant to submit its initial filing in one of the six UN languages so long as it's accompanied by a translation into English as long as they are also submitting at the same time, the request to have the translation considered for the rest of the proceeding because that way, they at least can make their initial proffering in a language that's a comfort for them and then the panel will have the opportunity to review the rest of the circumstances around it. And then if the translation is approved for the rest, so then ICANN gives them back for it, right? We look at the cost shifting if that's what's appropriate. And if it's not, then it's a cost that they've warned for the filing of an IRP. I think that there are ways around this recognizing the due process concerns on all sides.

SUSAN PAYNE:

Thanks, Sam. That's a perfect segue. I can see Scott's hand up. I'm just going to quickly throw out some options and then we'll go to Scott.

Because I've been thinking something similar. I think we know the proceedings have to be in English and that means that there needs to be a complaint in English, but it doesn't necessarily mean that there isn't a

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way to do that. It doesn't necessarily mean that there isn't, as Sam suggests for example, a way to have either the complaint in two languages so that someone submits their complaint in the language they're comfortable with but also with a translation.

Other possibilities that I had been thinking about as I was thinking about this call was an alternative to that might be that the complainant submits in their other language, possibly one of the six UN languages, and they make a request for translation, and there's a determination on that request for translation and if it's granted, then their complaint is then translated by ICANN into English which obviously means that there is a short delay whilst we have the panel deciding on the request for translation and that translation to happen. But the proceedings have been effectively kicked off. Or if that translation is refused, then we would need to give that complainant a short period of time to get their own translation in and we'd have to ensure that they weren't disadvantaged in terms of the timing. So that's another option. It's, I think, similar to what Sam is suggesting, perhaps a little more complex and so maybe that's not such a good option but I'd love to hear what people think.

Or the final one that I had thought of was the party is required to make their translation request first effectively. So they haven't even put their complaint in at that point. They make their translation request. If it's granted, then they go on to submit their complaint and it gets translated. Now that does, would need some thinking about in terms of the timing. We'd have to decide whether they have to do that process well in advance in order to make sure they don't miss their timing rule requirements. Or indeed, we would have to think about whether there's

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a kind of pause on the timing to allow for that process to take place. So those are some options.

I can see in the chat. I can see you, Scott. I will come to you shortly. I can see in the chat that Kristina is expressing support for Sam's suggestion and saying we'll need to decide to be clear about what weight, if any, the fact that they got independently obtained translation services has on the further request.

David is saying if the complaint appears in two languages, the rule would need to make it clear which one is operative and he thinks it would be English. To which Sam and Malcom are agreeing. And I think we do have... I don't think any of us are here trying to change the bylaws provision that says the operative language of the proceedings is English. Scott?

SCOTT AUSTIN:

Yeah, Susan. Listen. I have no intention of changing any bylaw. My comment was only this and I sensed, I guess at that last meeting and maybe it was a mistake, that we were having some problem with the idea that ICANN would be paying for all these various translations. Maybe there was some sensitivity to that.

My point was, in accordance or consistent with Kristina's comment, advocacy has a great deal of nuance and that nuance is often reflected in the uniqueness of a language. And if the language is from a minority jurisdiction, maybe it's a dialect of Hindi or from Uzbekistan or from something that doesn't readily, is not within one of the five UN languages and is certainly not English, but if the parties, if both of them

are from that same, that languages, as you have said Susan, they are most comfortable with, that perhaps that should be permitted or allowed as a language of choice for their complaint and for the response which is another issue in terms of do all documents, what are the relevant documents that have to be translated, etc. But my proposal was this, that their initial pleadings would be permitted in the language that they are most comfortable with, but for that benefit, the exchange is there must be a translation into English because that, as we've said, is the bylaw requirement for ICANN because of its involvement and then you can go from there with if there's any other required. But then that that translation, because of the benefit they're achieving by having the nuance of their language they're comfortable with, would be that they pay for the cost of the translation into English. That was the proposal.

SUSAN PAYNE:

Thanks, Scott. So that does... That sounds as though we certainly, for the purposes of those of us who are on this call, we seem to be finding ourselves largely in agreement, I think. And so I will certainly pause in a minute and see whether anyone disagrees or wants to express a different view. But we do seem to be finding ourselves in agreement that we think the way to try to address this is to allow for the filing to be in another language provided accompanied by a translation. And that then there would be a request then for consideration of the complainant's need for translation services on a longer term basis for the purposes of proceedings.

So I can see Kristina's hand up, so I'll go to Kristina. And then Kurt has put something in the chat which I'm not quite sure if that's a support or

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a non-support. So I might see if Kurt wants to speak afterwards. But Kristina.

KRISTINA ROSETTE:

Hi. Susan, I agree. I support the position that you've just revised, you just articulated. What I was planning to say in terms of why I put my hand up is that I think the potential for prejudice to the claimant if they have to, before they actually initiate an IRP and aside from the procedural issues of what rules would even apply, if they have to first submit a request for translation, I think the potential prejudice and just logistical difficulties of that is, frankly, more than we would want to take on and in particular in light of the potential cost that Kurt has provided us an estimate with. So just to confirm for the record, I support the view that you just articulated. Thanks.

SUSAN PAYNE:

Super. Thanks, Kristina. And I'm noting various other agreements in the chat as well. And so I think that does sound as though we're all kind of coming to some agreement on that which is super. And personally, I agree. I was trying to think of alternatives as straw people for consideration but I do agree. We start making some quite complex knock-on effects if we start doing things like making people put their requests for translation in first logistically. And as you say, the challenge then if they get turned down and so on.

Kurt has put in the chat a sort of estimate of the type of cost we're talking about and I think that was not particularly intended as being a problem, raising those costs from a problematic perspective but more

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just kind of flagging to us that we're talking about probably \$1,000 to \$2,000 which isn't nothing. But it's kind of, when you consider the order of the cost of an IRP overall, we're not talking about a huge sum of money overall for that initial translation.

And as some had suggested, we could also build in some provision or at least some discretion from the panel to consider what they do about the allocation of those costs, either from the outset or at the end of the proceedings. So I do think though, we have to think about what language then.

I think Scott was talking about... I'm trying to read Scott's message in the chat. I think Scott was talking about any language and others have been limiting themselves more to the six UN languages. And I think that is something to also give some consideration to. And again, I would definitely welcome people's views on this. But particularly if from the outset, we're talking here about an initiation of the proceedings and something where the party themselves are going to be providing the translation, at least at the outset whilst they seek assistance on this. If they are Japanese, to pick a random example which doesn't fall within the UN languages, are we making things unduly difficult for the Japanese complainant if we're saying that they have to file in English or in a UN language when none of the UN languages are Japanese. David?

DAVID MCAULEY:

Susan, hi. Thank you. And I did see Scott's point and with respect to whether the complaint itself could be in any language irrespective to the UN's six languages, I would defer to what ICANN's view is on that.

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But with respect to translation services for the ongoing conduct of the IRP, I would sort of just like to restate here what I put in my comment in the Google Doc and that is it's my personal take on this is that the translation should be limited to the six UN languages. I recall a comment that Mike Silber made on our last call when the issue was how difficult would it be for someone in Africa to get to an English speaking lawyer. Or I may be mischaracterizing it. It was along those lines. And he said he travels the continent regularly and you can find lawyers of that capability easily. And so I think if you then broaden it to the six UN languages, that's certainly possible.

It just strikes me that English is the working language requiring that if translations are more needed, that they be done in the UN languages. It seems like a reasonable thing to do and so I'm of the school that says... And as I said, on the initial complaint, I'll defer to whatever ICANN thinks is advisable there. But for the conduct of the IRP, I think it's sensible to limit it to the six UN languages. Thanks, Susan.

SUSAN PAYNE: Thank you, David. Flip.

FLIP PETILLION: Thank you, Susan. I think we need to think of what the purpose is of using another language. Knowing that ICANN is an organization that is organized under U.S. law, Californian corporate law in particular. The English language will always play a major role, a decisive role, I would say. So when I heard you all talking and making and writing comments, I was wondering what are we talking about. Why would somebody ask a

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translation? I think it is to understand something that is made by the other party, [inaudible] item, or it is to make one's self to be understood by ICANN.

So for me, if you really want to go that path, it's whatever language. It can be Swahili. It can be Japanese. It can be non-UN languages. Why not? Because it's actually to serve that party. It's not to serve anybody else because the English translation would actually be available always and to be binding. Look what I just said, the English translation. Somebody expresses himself or herself in a particular language and wants the translation to English so that a message can be sent to ICANN or a message can be received from ICANN. And then I made another comment in the chat. There is a difference between translations and certified translations. And I don't think we need certified translations, but I mention it to show you how important that can be. Just try to be helpful here. Thank you.

SUSAN PAYNE:

Thanks, Flip. Sam.

SAMANTHA EISNER:

Thanks. I think that one of the reasons we had originally been discussing the limitation to UN languages was the ease and availability of accessing interpretation and appropriate levels of interpretation in those languages. So I just have a concern and I don't, I'm not trying to say we shouldn't go with a broader scope of languages but I do have a concern that the more localized the use of any particular language is, the higher the cost it might be and the higher, the longer timeframe it might take

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to get an appropriate level of translation skills available. We know that there's ease of access to highly competent translators in the six UN languages. We've all seen or heard, if we don't speak another language, some of the challenges that people face in using ICANN speak even in those translated terms, among really seasoned interpretation professionals. And so I think that there are a few different risks that pop in and potential costs and time delays that pop in, the more languages that we allow, but I think it's just something that we, as a group, should consider as part of the decision making of how broad that group goes.

SUSAN PAYNE:

Thanks, Sam. And actually, this reminds me of one of the questions that Kristina had put in this document where she, and I think if we scroll down on the screen, we should be able to see it. And she just sort of flagged up or highlighted in the last paragraph that, certainly in the current rules, the interim rules, there's an assumption that ICANN's language service providers would be used and that seems to me to make a certain amount of sense for the reasons that you've identified and as you say, that's one of the reasons why UN languages were being talked about. But Kristina did ask the question and sort of said she suspects the answer is yes, but have we confirmed that ICANN language service providers do have the capacity to do this kind of written translation? And I'm hoping you might know the answer to that, Sam.

SAMANTHA EISNER:

Yes. Our language service providers can do this. It wouldn't necessarily be the same people that are sitting in our translation booths during the

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meeting. But yes, we have access to a network of translation providers that could provide us with the written translation.

SUSAN PAYNE:

Great. Thank you. Okay. So I'm not hearing multiple voices feeling very strongly. Well, to the extent that I'm hearing people talking about the kind of ongoing proceedings and the languages that we would want to limit the translations to, we've heard Sam reminding us that ICANN has its own language service providers and that the benefit of them and their operation in the UN's six languages is, of course, that they, there's ready access and that they, to some extent, have been trained up in some of this terminology which actually can be pretty complex. And so that's certainly not to be ignored.

We've also had, I think, Kristina in her comments in the document had supported the notion of the UN languages and David, certainly, has very much done so. So I think my question though would be, if we're making an assumption and I think we have reached, we appear to be coming to agreement on the UN's six languages, do we think that that's the case for the initiation of the complaint? Or in fact, if the complainant is Thai or is Japanese, are we benefiting them at all if we're saying to them that their only sort of translation, the only languages that could be translated from, when we're asking them to do the translation at the start, should be one of those UN languages? Or in fact, if they're Japanese, is there a problem with them making their initial arguments in Japanese and providing their English translation and then we move on from there? Kurt.

KURT PRITZ:

Hi. Thanks very much, Kristina. I'm probably going to be a little inarticulate here but it seems that if one party gets to select the language, and in this case, it's ICANN. And I think it's just not a bylaw requirement. I think it's perfectly reasonable because ICANN is a party to every IRP. So by creating the... I think it's reasonable for ICANN to have that prerogative. But if one party gets to pick the language, then the other party is sort of at a disadvantage and then so it seems that the party that gets to pick the language should pay for the translation whether it's a UN language or not.

But there's a balancing, right? So I'm sitting here in a country. I've interacted with ICANN before so like somebody has brought up, I have some access to English or some use of English in the past. And I know that the tribunal, the panel, is going to make its decisions based on an English language translation. So if I'm getting too [inaudible], but if I'm in that party, I'm deciding do I want to provide these documents in English so I know exactly what they're saying? Or do I want to provide these documents to a translator and then run the risk that there's a nuance that, in my very sophisticated argument, is missed in the translation? So even in the case where ICANN is paying for the translation, the other party might not opt for that. And if it does, it's paying an additional price. So it might get its translation paid for, but it's still taking some risks. So I think we should think about that coupled with the costs of translation and the effect that might have on the whole revenue balancing of the process. Thanks.

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SUSAN PAYNE:

Thanks, Kurt. Yeah. I'm trying to decide if I completely followed what you were saying. I have a nasty feeling I didn't. But I can see Sam, you've got your hand up as well. I don't know if it's a new hand. Okay. Not hearing from... No, old hand.

So Kurt, let me see if I'm following you correctly. Your initial comments that it feels like the party selecting the language should be the one who pays for it, that certainly sounds like a reasonable and sensible thing. And I think that does seem to match what the expectation has been with this being treated as sort of an administrative cost and the expectation under the bylaws being that ICANN is responsible for administrative cost. And so provided that we remain in agreement that this approved translation is viewed as administrative cost of the proceedings, then the expectation was that they would generally sit with ICANN, although I think there's a provision for transferring, shifting those costs in certain, quite limited, circumstances at the outcome of the proceedings. But generally speaking, the expectation would be that ICANN is picking those costs up. And I think that's something that you are supporting.

Where I... apologies, I got lost, and that's entirely my fault and not yours, was that there may be circumstances where a party does not want ICANN to be doing the translation for them and using their own service provider and would, indeed, actually want to be themselves responsible for the translation because it's their document and they want to have control over it. And in that case, that they should be paying for that. Is that correct? Is that what you were saying? Or did I completely miss the plot? Thanks, Kurt.



KURT PRITZ:

I'm sorry for my incoherence. Yeah, that was my second point was that, not so much the ICANN translator, but any translator, if I don't know English, I'm relying on this translator to translate my documents and that puts that party at some risk too. So they're already at some risk, not conducting the hearing in a language that's not their own. So that puts them at a little bit of a disadvantage again. So that's sort of another argument for ICANN paying for translation. I didn't think of whether we limit their translation services to the ICANN-provided translator or any translator. But we could do that. We could say ICANN will pay the translation costs and recommend the translation service that will be used because it's well steeped in ICANN lingo, as Sam pointed out.

SUSAN PAYNE:

Thank you. Okay. So well, I'm not sure we've quote got agreement on this although I think we're heading in the same direction. I'm not quite sure that we've overall absolutely agreed on whether we are limiting ourselves to the UN languages or not. There certainly seem to be arguments both ways and maybe this is one way we have to see if we can have a bit more conversation over the e-mail over the next couple of weeks between this call and the next one.

But perhaps let's... I can see Flip's hand so I will turn to Flip and then I'm thinking perhaps we should move on and start thinking about how the decision on translation is going to be made if we don't yet have... Do we need to worry about that? Do we need to worry about having a kind of interim decision or can we wait until the panel is appointed? That is

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something that I think would be useful to think about and I also would quite like to think about translation of supporting evidence and documents which is something that David touched on in his comments in advance of the call. But Flip.

FLIP PETILLION:

Thank you, Susan. While I was quite sympathetic towards the idea of limiting of languages to the UN languages, I really completely changed my mind on this because the other party that is ICANN, why would ICANN actually think of limiting the possible list of languages that another party might be interested in? It shouldn't care and it should allow and respect everybody's other language to be involved and... because it's really for that party. It's not for ICANN. And ICANN shouldn't worry. The final and binding document is English. But I'm happy to discuss this further offline or in e-mails, but I'm just trying to find a reasonable approach and not to focus on issues that are actually not a problem.

SUSAN PAYNE:

Yeah. Thanks, Flip. Yes, I agree. I think that's one of the areas where we're kind of struggling, we're grappling with at the moment. But what I think we're saying, or certainly what the interim rules are saying, is not so much that there couldn't be translation from other languages. But more that we are talking about where the cost lies. And so the notion has been, certainly to date in the interim rules, that ICANN is picking up the costs but only in respect of the UN languages. And so if there were a complainant who wasn't translating from one of those six UN languages,

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then because for whatever reason, they didn't speak any of them and they couldn't find a representative who spoke any of them, that then they would be the ones picking up the cost and being responsible for the translation in those circumstances. I think that's correct. That's been my understanding. Chris.

CHRIS DISSPAIN:

Thanks, Susan. I'm glad you started off down that track because I'm getting slightly confused and probably my confusion arises because I'm not entirely sure the context in which we are talking about translation. And listening to Flip, I kind of agree with what he said to some extent in the sense that I can use whatever language I like.

But what context are we talking in? Are we talking in simply providing a bunch of documents to a panel? In which case, then it does come down to the simple question of who pays for the translation? If we're talking about something else, then it's different because you're talking about having the possibility of ongoing interpretation. And are you talking about intending to have documents translated back into languages by someone to go back to other parties? And that, again, becomes more complicated.

So I've heard conversations about English being the language that ICANN... Sorry, that the dispute is dealt in. But I'm not clear what the context of the translation is and how far it actually goes.

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SUSAN PAYNE:

Thanks, Chris. That's probably because I've allowed us to range around a bit too much. But so my take on this, and I welcome other people to correct me or express their own views. But my take is that there are a few different areas, really, where we're talking about translation. And actually, one of those was when I had wanted us to come onto which is what are we talking... What about the... What is the obligation and who is, what is allowed in respect of what I suppose I would be calling evidence? So the documentary support that someone might be attaching in order to make their claim. And I think that is one area of translation that we need.

But there is also the pleadings, if you like. And in that case, we would be talking about translating from the complainant's language, whatever we've decided we're limiting that to, into English for the purposes of the proceedings, and then we'd be talking about translating ICANN's pleadings back into their languages, the complainant's language so that this complainant who doesn't understand English is able to understand what ICANN's case is. And then I think we would be talking about potentially translations of things along the way. So applications for particular interim relief or particular orders from the panel and I think we'd be talking about the ultimate decision. And that's certainly one of the questions for us which comes a bit further down the list is things like the timing and what we do about the translation of a decision. But so that's my take on it is that there are different areas. We're probably not talking about interpretation services for the purposes of a hearing because generally speaking, there wouldn't be... There's an expectation generally that proceedings happen on paper, although in theory, that is possible as well I suppose.

So that's my take and I'm just going to have a quick look at the chat because I can see there's some stuff going on but I'm not really tracking it. Yeah. Helen is reacting to someone's earlier suggestion about a hardship application and supportive of that kind of notion and wondering whether that's something that ICANN currently does, although Sam is not aware of it. And I think the notion of a hardship application would be, is I think this notion that perhaps a complainant at the outset might be able to make a request for some financial support, but I will defer to others or alternatively, we'll come back and look at the chat later.

I think, as I said, I'm happy not to cut the conversation off but we do seem to have sort of a little bit ground to a halt. And so maybe we need to be debating this a bit further in-between this call and the next one and see if we can bottom out. But I think we've made some good progress. We seem to be heading in a direction where we're more comfortable about how we deal with the complaint and what the sort of timing is.

Assuming that we have reached that agreement, that we're going to have the complainant able to submit in another language, provide a translation and then make a request for ongoing translation services, is this something that we can leave the determination of their ongoing translation support until there's a panel appointed? Or do we need some kind of... Do we need this to be an activity of a kind of interim panel, if you like, one of the kind of interim measures or something that gets decided by the standing panel before we've got our panelists appointed? Does anyone have strong views on that? Particularly, I realize I think we've learned on previous calls that we don't really know

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of anyone who has had this kind of experience of translation needs in relation to an IRP, but may have done in some other arbitral proceedings. Is there anyone who can comment on how they have encountered this in the past? And if not, we can... It's something we can circle back to.

Okay. I am not... Helen, hi.

HELEN LEE:

Hi. I'm just trying to unmute. So I haven't dealt with this in an arbitration context, but I know that the Swiss courts, at the outset offer upon service, translation by the Embassy. So that's kind of a thing.

I'm also kind of sensitive to the fact that this could be used by the parties to delay proceedings. Sometimes translations take two or three days or maybe a whole week depending on how complicated, in what language it's coming from. And so I think if we kind of establish it at the beginning of the process, maybe before the panel has been paneled, that tends to sort of cut that out. And then it's baked into the process and so it's less likely to be used by parties as an additional sort of tool, for what that's worth.

SUSAN PAYNE:

Okay. Thanks, Helen. So you were suggest... Sorry. Again, I'm not doing very well at multi-tasking and reading in the chat and hearing at the same time, which is clearly a skill that I need to be developing. But it sounds as though your concern is maybe just to ensure that we don't

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allow translation to become something that's a kind of delaying tactic. Is that correct?

HELEN LEE:

Right. Yes. And then also in answer to your question, I think Swiss courts allow it and they provide it at the beginning through the Embassy. So it's kind of an already baked-in process and so nobody's arguing about it. I don't know what the specific requirements are or whether some languages are available for translation or not. And I can look more into that, but that's just been my experience.

SUSAN PAYNE:

Okay. Thank you. Well I think we've got also Kristina who had a sort of previous experience in a different type of proceeding and is interested in having some time to kind of think about, to look back on what her previous experience was as well. So maybe that's one we can somewhat park and circle back to. So if there's anything between this call and the next one, Helen, that you wanted to share to expand on that, that would be super helpful. Thank you.

Okay, moving on. On my list, and to some extent, this is what we've previously been talking about already. But I do think we need to think about leaving aside whether we determine that pleadings and the like, whether we decide that we limit them to UN languages or not. What should our approach be or what do we feel that the approach should be to supporting evidence. And particularly bearing in mind that there will be an inevitability that some of that supporting evidence if the complainant is not based in one of the countries that utilizes the six UN

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languages, then the documents that they have and that may be fundamental to supporting their case may not be in one of those languages.

And it seems to me that we... that if it's important evidence, clearly it needs to be translated. Otherwise, it's not in English. Do we feel that this is something that is reasonable for it to fall again within these administrative costs and something that falls to ICANN to be responsible for the translation thereof? I know Kurt made... not Kurt, David did make some comments. I'll circle back to that but I can see Kristina's hand up so I'm going to go to Kristina.

KRISTINA ROSETTE:

Hi. Now I'm unmuted. Thanks. Susan, my point was on a slightly different aspect of the supporting documents. Namely, I do think it's important that the translation services be available for them, but given the potential volume that we're talking about, I think we do need to put some caps on numbers of pages. I... And maybe what we do is figure out kind of generally the number of [annexed] pages that have been submitted in each of the IRP proceedings and kind of take 75% or 60% or something, some limit like that because I know, for example, in some of the IRPs that I was looking at earlier today, you had almost 800 pages of supporting documentation submitted with the request for IRP. Translation costs for 800 pages are going to be magnitudes higher than translation costs for 25. So I do think it's prudent that we do come up with a fair, but a ceiling nonetheless, on what those, how many pages we can be talking about. Thanks.



SUSAN PAYNE:

Thanks, Kristina. That's a really good point. Might it, in fact, be reasonable to suggest that the party has to pick that cost up and we treat it somewhat like the complaint. And that, therefore, it's kind of for the party to be prudent about what they view as needing translation. So if it's a crucial document, they will put it in and they will be translating it and that that gets something that's considered by the panelists when they're considering the allocation of the cost afterwards. I think it would certainly focus the mind and you'd be unlikely to pay for 800 pointless translations. Is that an option? Kurt's got his hand up, probably not in response to that but I'm going to get to Kurt.

KURT PRITZ:

Well, maybe close to that. So this will display my ignorance of how these hearings work. So evidence is evidence in whatever language it's written. So a translation of it is sort of a hearsay version of that evidence. So it has some inaccuracies, although it would be allowable hearsay.

So I think the panel might decide under what circumstances a translation is required or not, or whether the graphic evidence needs translation or not. The panel could also decide in that it's making its decision based on a limited set of issues. And some evidence will be relevant to those issues and some evidence won't. So we could rely on the panel to decide which evidence is translated and not, and ask the panel to translate those documents, only those documents that are germane or relevant to its decision making.

SUSAN PAYNE: Thanks, Kurt. So I like that idea sort of, but I'm wondering how they could do that. And I'm just... I'm thinking of myself here, which I would never be a panelist but supposing I was, I only speak English. I can only read English. I can read, very poorly understand French, certainly not well enough to be able to make any kind of proper determination of content for these kind of purposes. So how is the panel going to decide what to translate if they don't actually know what that evidence is? That would be... That's where I'm struggling.

KURT PRITZ: Can I respond?

SUSAN PAYNE: Sorry. Yes, please.

KURT PRITZ: Yeah, so I think the pleadings would make that clear. The pleadings would say, "Here's our evidence. Here's this document which shows this. And here's this document which shows this. And here's this piece of evidence which demonstrates that." And that would be enough evidence, or that would be enough information for the panel to say, "Oh, we're very interested in that and that, but not so much interested in that and that because we're not making our decision based on the proof of that. We could accept that as true," – this is an example – "but we could accept that as true, but that doesn't settle the issue for us so we don't need that document translated." So I think there would be

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enough information in the rest of the documentation to point the panelists in the right direction. Maybe not though, so I don't know.

SUSAN PAYNE:

Okay. Thanks, Kurt. And David is saying in the chat that materiality should be the standard for considering the translation, that obviously the complaint is clearly obviously material, but beyond that, for other documents including for evidentiary documents that are kind of attached, that it should be whether they're material and that should be the test that's supplied.

I think we're probably saying the same thing, or Kurt and David are saying the same thing, although not necessarily reaching a decision on it in necessarily the same way. But I can see Flip has his hand up and then David, so I will go to Flip, then David and then I'm looking at the time and conscious that last time, I overran. So maybe then we will need to wrap this up. But we can... Now that our ICANN meeting is over, we'll hopefully be able to make a bit more progress between calls. So Flip first.

FLIP PETILLION:

Thank you, Susan. Actually, I liked the observations that were made, for example, by David. What you are concerned about is that a translation or a request for translation becomes unreasonable. I'm coming from... I am in a country where there are several official languages and I've been practicing for more than 30 years. And I've seen an evolution. Thirty years ago, when a party wanted to submit a document in another language than the language of the proceeding, that party had to submit

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the entire document, have it translated and have it actually translated by a certified translator, a very expensive thing. And from the documents that were exchanged, submitted, only, sometimes only a couple of paragraphs or even a couple of lines were really useful and were material.

And we moved to a system where parties are allowed to only translate the paragraphs or the lines that are [really relevant]. And only when the other party or parties questions the accuracy of the translation, additional steps were taken to see how to improve the language. But I must say that in practice, that actually never happens because everybody who is submitting or who was referring to documents in another language or is referring to paragraphs or lines in a particular document, every counsel is really looking after it so that it's to the point, it's efficient, it's effective, and it's really cost saving.

I do know we have potentially different cultures here involved in IRP proceedings who do not have that experience, who do not have that approach and who are not time and cost sensitive. But I like the approach, and that's why I share it with you. I know in IRP cases, if a counsel would come with a mass of documentation that he or she wants to be translated, I'm sure the panels will react to that and that counsel will, and that client of that counsel will ultimately be punished for it. Thanks.

SUSAN PAYNE:

Lovely. Thanks, Flip. That's very helpful insight there. David, you have the last word on this for the purposes of this call.

DAVID MCAULEY:

Thank you, Susan. Hello again, everyone. I just wanted to reply a bit to what Kurt was saying about how would a panel do this and how would that operate. And it's been a long time since I've done litigation but the way it would work as I envisioned it when I made my comment in the Google Doc is that the concept of materiality would apply, and basically, what would happen is a claimant would ask for translation and ICANN would know what the parameters are and they may just let it go. Even if they could object, they may say it's not worth it. Let's just keep on pressing and we'll translate it. But if ICANN lodged an objection, they would have to say why. The other side would have... They would basically have a chance each to say why this is or is not material and that would give the panel something to make a decision on. It's possible the rule would have to cover that eventuality but that's what I was thinking of. Thanks, Susan.

SUSAN PAYNE:

Thank you. Okay. So I think, again, we may need to think about and flesh out and agree on exactly what the process is, but I think we kind of... It seems to me we're on the same page in terms of materiality and in terms of whether that's because it clearly expresses material in a document or, as David's suggesting, there's some kind of a request and opportunity for objection and submissions on materiality. But I think, again, we seem like we're kind of in agreement. We just, perhaps, need to try and flesh this out.

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So I am going to... I think we need to start to wrap the call up for now. But I think we have made some good progress. I think a summary of where we've got to will come as shortly as possible. Let's try to keep this discussion going. I will give some thought myself to seeing if I can make some kind of straw person for people to think about and I will try to do that earlier rather than later.

And so we can then take it from there and then hopefully we will be in a position to kind of wrap up our consideration on translations fairly promptly because we have plenty of other things to talk about as well.

Finally, on our agenda, we had just an opportunity for anyone to raise any other business if they had any. We didn't have anything identified at the start, but if anyone has anything they want to raise now, then please do. I am pausing briefly. Kristina.

KRISTINA ROSETTE:

Just a quick question. I will confess that my plan to participate remotely in last week's meeting kind of fell apart. Was there anything that was discussed during that meeting or that came out of that meeting that's material to our work here?

SUSAN PAYNE:

That is a good question. Not to my knowledge. I am going to see whether Sam, in particular, has any thoughts on that if she's still with us.

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SAMANTHA EISNER: Thanks, Susan. I'm still here. I don't think I heard anything that came out of last week's meeting that impacts the material [inaudible] we're focused the discussion were fairly narrow so I didn't follow all the different sub-groups that were going on. But in terms of broader issues that came up in public forums or some of the more well-attended public sessions, I can't think of anything that arose.

SUSAN PAYNE: Thanks, Sam. Kurt.

KURT PRITZ: I think, Sam – maybe you can correct me, or David, more importantly – I think in the RySG session with the ICANN Board, they specified dates for which they are going out for solicitation of the standing panel. So that seems to be underway to me.

SAMANTHA EISNER: Yes. Yeah, thanks, Kurt. Thanks for the reminder. We have an announcement and documentation stage for going up. We were trying to get it up by yesterday but we had a couple things we had to make sure were fully lined up like e-mail boxes and things for the opening of the expressions of interest as well as the community engagement portion of the standing panel work. So this week, you will see going up, a document that had, once it's getting through our queues here, you'll see a document going up.

First of all, the call for expressions of interest and then a document that summarizes all of the community inputs that we received from the SOs

and ACs on the path to get to the standing panel selection process, which really has work to do. And then the outcomes of that, just so you guys have a preview of it, is that while there were a couple groups that suggested that ICANN should do a broader public comment on the qualifications for the standing panel before we release the call for expressions of interest, there was actually significant consensus among those who put, who gave us some input that really, what we've tracked out of the bylaws and we previously shared with the IOT here in its former iteration, the base level qualifications seems appropriate but that we do have to do some more work which we can do in conjunction and coordinate with the community on identifying how those should be prioritized and if there are any really specific skills or types of experience that should be [inaudible] to the top or serve as disqualifying as we're moving forward.

The one thing that came across as very clear for disqualification is any sort of sense of non-independence from ICANN and some also provided that information, non-independence from the ICANN community. So it's really that conflict of interest consideration at the outset that's the big disqualification.

We will then also be working. This will be detailed. It is detailed in the paper that's going up. We'll be working with the policy development team to coordinate a group of representatives from the ICANN SOs and ACs that will further this work along with ICANN Org. One of the first responsibilities of that group will be to work closely with ICANN Org to identify the type of expert we're going to use because there is also consensus that getting assistance from an expert to help the community kind of stage some of this and figure out how to look at those

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qualifications would be really important. There's those questions about how binding that expert's work would be if the expert would make the decisions for the community versus give input to the community. But we'll be working with the community group to get that done, so we'll form a group of representatives from SOs and ACs, first step. Work with that group to then identify what the appropriate level of community engagement, the expert, because we heard clearly from the community that they did not want ICANN Org to have the sole power to select that expert because of the community nature of this work as well.

And then once we have that expert engaged, we would task them with developing a work plan that would include prioritizing those qualifications with the community and then also getting to the interview process, how the expert and the community will work together in the community portion of the interviews so that the community can then bet and then get to the identification of a panel slate.

So we're anticipating that we'll leave the expressions of interest open for a long period of time to allow for a lot of that community work to happen while we're receiving those inputs and then we'll be able to kind of tie everything up at the end of that work. So that is what stage should go up this week. We were hoping to get it up yesterday. Again, with... We've moved a lot of our ICANN people to working off site and the timing after the meeting and everything was getting pushed back a little bit. This stuff is ready to go and as soon as we get all of the little administrative components of it, you guys will see this up and then I'll get a link sent to the IOT so you can follow the work.

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SUSAN PAYNE:

Thanks, Sam. That's incredibly helpful. And yeah, I'm really pleased that, I can't remember who it was who reminded us that there had been some discussion on this in the Registry Stakeholder Group as well, because I hadn't been in that session. So that's excellent and we will, all of us, look out for that and read it with interest.

Okay, everyone. So we're just a minute or two over time now. I think we've got to the end of our agenda. Next call in two weeks' time on the slightly later time slot. And let's all try and wrap this all up by e-mail as much as we can during the intervening two weeks. Thanks again, everyone, for your excellent engagement. This was, I think, a really good discussion and we're making some progress. So thank you, everyone. We can stop the recording and get on with our days.

**[END OF TRANSCRIPTION]**