SUSAN PAYNE: Hi, everyone. It's Susan Payne. Thanks for joining the IRP-IOT call on the 31st of March.

As usual, if you could try and mute your lines when you're not speaking, that would be great, if you can try and remember to do that if possible. Pleas say your names for the recording—the usual instructions. I'm sure everyone knows this by heart by now.

In terms of our agenda, we really are spending a bit more time talking about the translation issue again today. I'm hoping we can make some good progress on it.

Before we start that, we'll just do a quick check on whether anyone has got any updates to statements of interest. Actually, I might quickly put Sam on the spot just to ask … We have a draft that Bernie and I have produced to hopefully be a version similar to the GNSO statement of interest that we adapted slightly to this group. We're just waiting on comments and review from the legal team. I don't know if there's any update on that, Sam, if you wouldn't mind me putting you on the spot.

SAM EISNER: I saw it come through last week. You guys will have it in the next day or so.

SUSAN PAYNE: Super. That'd be great. Then we can all make an action item for ourselves to fill that in as soon as we can.

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.

In the meantime, is there any particular change in circumstances that anyone feels they need to bring to the attention of the group before we start?

No. I'm not seeing any. Super. Fine. In terms of continuing the discussion—thank you … Actually, just before we start, I'll just check on who we have on the call. I've got a number that I'm not recognizing. Oh, David is the one ending in 64. Okay. Thanks, David.

In terms of today's discussion then, I think we're going to continue our discussion on translation. Thanks very much to everyone. There has been some good exchanges of thoughts on the e-mail over the last few days. A particular thanks, I think, to Kurt for kicking this all off. I'm saying thanks to him but I'm not sure that he's actually on the call with us for the moment—oh, yes. There he is. Hi, Kurt. Thanks very much for kicking that off, and for others who then weighed in over the last couple of days.

I think, to just do a quick recap on where I think we got to on our last call, it's not possible to say we reached a final agreement on things, obviously, because of the need to have one more than discussion on a topic and so on. But I think we did have a few areas on the previous call, where we did seem as a group to be coming around to a similar way of thinking. I think one of the main one on that was we'd spent a bit of time talking about what do we do about the complaints and particularly how do we handle the situation where someone might be wishing to seek approval for translation service assistance because they would be claiming that they had a need for that. But obviously the language of the proceeding is in English and therefore the claim form would need to

be in English. How would we handle that? I think we came to a fairly good agreement generally: people felt that the way to handle that was to allow for a claimant to file in their language, provided that they also accompanied it by a translation into English, and that that would be obviously their responsibility. So they would be having to arrange that translation and pick up the costs for it. But, at the point where they then made a request for this translation service assistance, if the panel was minded to allow that, there could then be a consideration about them getting formal translation assistance going forward. The expectation would be that ICANN would be paying for it as an administrative cost, and there would be the possibility for their perhaps to be some kind of reimbursement of some or all—a contribution or even potentially all—of those translation costs that they had incurred in relation to of the complaint. I think that that was one of the main areas that we reached agreement on.

We also did spend quite a bit of time talking about the languages. I think, overall, we generally felt that, if we were really talking about need, then there was a fair bit of concern for restricting that just to the U.N. six languages. If this was generally something that's to do with provision of translation assistance as a result of the need of the claimant, then why were we seeking to force him into another language that also potentially wasn't their language? Although I think generally there was more support once we were talking about interpretation for hearings. So generally it was more a feeling that we should be trying to focus on the U.N. six languages, which is where ICANN would routinely provide translations services.

In terms of timings of request, I think we didn't really reach a definite conclusion about that in terms of whether it's something that can wait until the panel is impaneled or whether we need to have some kind of provision for this to be something that could be requested as an interim matter before the panel is in place. Possibly, if we are comfortable with the notion that the claimant is going to be doing their own translation initially and then making an application after that for any sort of translation support relief that they need, perhaps it matters less about the timing. Perhaps in that case there is less concern about having to wait for the appointment of the panel. I think that's certainly something we need to explore a little bit more.

In terms of supporting evidence, we did have a bit of a discussion about that. I think generally there was a kind of feeling which was expressed by David as being materiality of the documentation, and by Kurt, slightly differently. But I think he essentially was saying the same thing, that it is a panel discretion but they would be thinking about only the documents that are really germane or relevant and that this would be based on an assessment of how those documents are described in the pleading and how that evidence is described and the explanation given for why it would need to be translated. As I say, I think then intent probably in both of those cases probably was very similar.

So we have had Kurt's quite detailed proposal setting out a lot of that and trying to kick off, I think, the discussion about what the process would be and what the principles would be behind why translation services assistance effectively would be allowed or not and what those principles would be that we would be expecting to get taken into account and then this notion, I think, of trying to capture, as far as

possible, of, if ICANN itself is providing the translation services, then that's reasonable for those costs to be sitting with ICANN, subject to, of course [,Beth,] to this assessment of need but that, if a party wants to be arranging this for themselves for whatever reason—either because they haven't been able to establish the demonstrable or even because they actually want to maintain control of the translation and have that done for themselves and want to be the ones basically choosing who is providing that translation service for them—then that's perfectly within their entitlement. But that then shouldn't be an ICANN costs. Those costs should then sit with that party.

I don't know you have had time to see what I circulated about an hour or so ago. I know that there have been some concern that perhaps what Kurt was suggested was quite formulaic and detailed and perhaps too detailed, but what I did think it was useful for doing was reminding us of some principles and reminding us of the different areas where we might need translations, the different types of documents, or indeed hearing interpretation. I certainly found that helpful because I know, on the previous call, there were people expressing finding that, because we were a little bit jumping around, they were losing track of why this matters and what we are actually talking about here and why does it matter whether someone is allowed a translation or not and what are we translating? So I felt that, although perhaps it's more detailed than ultimately what we really need, I think it's quite a good way of breaking thing down.

But it has by means got complete support from everyone. We have had a bit of exchange also from Becky and Mike and a couple of others who perhaps are feeling that we're going to far and that we should be really

focusing more on areas like interpretation for hearings and on claimants who have a financial need because they're saying not-for-profit or something like that.

So I haven't attempted in a summary to pull various of those considerations together, along with some of the principles and suggested rules that Kurt had put forward and then also tried to capture, as I said, some of the things I think we had quite good agreement on last week to see if that starts looking like something that we could get behind but also feeling very strongly that it probably does need more discussion and probably could do with a bit of tidying because I was doing quite quickly and it's not necessarily perfect.

So I guess I wanted to see whether anyone had had an opportunity to look at that or whether it would help for us to actually go through it.

Lovely. I've got a hand, which for some reason I couldn't see. Mike Silber?

MIKE SILBER: Thanks very much. To me, the critical thing is I think we need to trust in the panelists and I think we need to trust in the process. If a party incurs costs and charges, they should be able to recover it. I think what we're talking about here is a situation where they're not in a position to actually incur those costs and getting up to a hearing. There, I think, we need to be very cautious about opening this up too much. I think the panel should be in a position to make determinations, but, again, Susan, based on your pushback on the list, I refined my approach because I agree with you. For-profit/not-for-profit, as we've recently seen … Some

not-for-profits have very deep pockets. To me, the question is really, is this a procedure which is likely to generate commercial benefit for a party? My view is, if it's likely to generate a commercial benefit, then really you should be paying your own costs. If you're raising an issue as a matter of principle—there's no direct or indirect commercial benefit—then I think the principle is you go to the panel and you explain why you need the help and you should get it if you've given a reasonable explanation. Then it's a question around your preferred modalities showing to a panel that those are reasonable. ICANN make a different suggestion. ICANN can suggest that it has better cost control of translators, and it should be brief them. Whatever the case may be, that, to me, gets argued before the panelist.

The principle to me is, if you're trying to get some commercial benefit, then you should be putting your hand in your pocket because you can't expect the community ultimately to be paying for your commercial benefit. This doesn't come out of Sam's salary. This comes out of community resources that [could] be otherwise used.

SUSAN PAYNE: Thank you, Mike. I'm going to ask you a couple of questions. Then I'm going to turn it over to Malcolm because he has also got his hand up. Just to ask you a couple of question first, though, how would you see this playing out with—I don't know I'm trying to think of an example—a small registrar, say, who, by virtue of a decision that's been made, is now in a position where they are needing to challenge that decision and they are bringing an IRP? Obviously, if successful—let's say it's a termination of their contract, for example— then they obviously have a

financial commercial benefit in the outcome because it gets them reinstated. But can they—

MIKE SILBER: Susan, as I suggested, if they are significant factors … Maybe, because I'm an American, I don't believe this has to be a litigious process. But I think there has be a real exceptional situation for any entity with a commercial interest to get ICANN to attend to translation. If they can show it—I don't think this has be an adversarial situation of ICANN litigating—if they can convince the compelling reason for them to deviate from the standard approach, then the panel will make that call. I think we're looking at finding a panel that can be trusted to make good decisions on difficult issues.

Sorry. Maybe I should have said "Over" before anybody else speaks.

SUSAN PAYNE: Sorry. I was speaking without having unmuted myself, wasn't I? Apologies for that. I was just going to say I was just quickly noting in the chat that Mike Rodenbaugh is rather disagreeing with the other Mike and feels that the party shouldn't have to litigate against ICANN in order to get translation assistance and feels that's why we need detailed rules or at least detailed series—I'm putting words in his mouth now—of factors that would get weighted up to at least provide some assistance to the panelists.

I'm going to turn it now to Malcom, who had his hand up for a little while now. Sorry about that, Malcolm.

MALCOLM HUTTY: Thank you, Susan. Thank you, Mike, for putting out that case clearly. I'm going to respectfully disagree with the principle that Mike just elaborated on there. I don't feel particularly strongly about the translation issue, and normally I would stay out of this. But Mike advanced an idea there that, if you're a commercial entity, then it should be entirely down to you because, otherwise, it's the community putting its hand in its pocket. I'm afraid I don't see that as the principle in which we treating this process and that might have implications in the future.

I think it's wrong to see this question of paying the translation costs as being some kind of subsidy for impoverished entities. What we're really talking about here is, well, access to justice, really. "Justice" is probably too strong a word in this context, but it's access to be able to get a fair adjudication on an issue. That should be open to everyone. Those that are based in English-speaking countries or countries that have very strong English-speaking traditions have an advantage in being able easily to access that system. We are talking about what to do about those who are not able to do so easily. It's ICANN that chose to be an American company—a company that is based in America, that is largely English-speaking, certainly. It is ICANN that chose—well, I mean the community chose for ICANN—collectively and corporately to set English as the standard language of these proceedings. So the question is what we should do about those who find it difficult to engage on that basis.

As I think you put well, Susan, there are many businesses that are very small and are not rich and not particularly advantaged. To exclude them

on the basis that they're intended to be profit-making from being able to have access to this would seem to be an unfair bias in favor of similarly situated companies in the English-speaking world.

So I think the better way of looking at this is not to think of this as a subsidy for impoverished not-for-profits (but if you're commercial, somehow that doesn't count) but instead to say ICANN should be seeking to make its process available to everybody, but there are natural and pragmatic considerations that limit its ability to do that. So how far in extending translation services is it reasonably possible to do rather than suggest that some people aren't entitled to it because they're profit-making, or, for that matter, any other consideration. I think we should be aiming to get everybody to have access to this procedure, subject to reasonable and pragmatic limitations.

So I think where we got to last time we met is we started focusing on the U.N. languages, and [a person in the legal department] had said that they were comfortable with that. We then started ranging beyond the U.N. legal languages and then we get Becky's intervention this afternoon. I must say, my reaction to Becky's intervention was that it was perfectly reasonable in an underlying principle to say, "Let's not overreach ourselves and go too far in a way that ICANN might find difficult to be able to feasibly discharge." We can always add to it later. It's much easier to add to it than to take away. But I wouldn't necessarily be persuaded that we shouldn't do anything by way of translation, given that ICANN themselves, or the ICANN staff themselves, have said this is a feasible thing to do.

Sorry. That was quite longwinded, but I wanted to lay out that this starts from a matter of principle and then looks for pragmatic application of that principle. If you think what's being advanced as the wrong principle, then it deserves an explanation as to why and what flows from that.

So, I'm afraid, Mike, that I think what you advanced there, while very clearly and eloquently put, is not the principle we should be seeking to apply.

MIKE SILBER: Except you misstated what I said completely, Malcom. But, be that at as it may …

MALCOLM HUTTY: Oh. In that case, please restate it because, in that case, I misunderstood. I certainly wasn't meaning to be disingenuous in any way. Please correct me.

MIKE SILBER: My comment was simply that, if you have a profit motive/a commercial motive for taking up an issue, then the general principle should be that you should be able to fund it yourself.

MALCOLM HUTTY: Why?

MIKE SILBER: Can I finish? And if you are successful, then the administrative costs may be awarded to you by the panel if it's reasonable and justifiable because it's a business expense, as you would have in any other situation of litigation. But, if you don't have a profit motive, then I think it's reasonable to expect ICANN to incur those costs upfront because I was never suggesting that the panel doesn't have the discretion to provide for reimbursements of costs. We're talking about upfront payment of costs.

MALCOLM HUTTY: Okay. That's an interesting distinction. But, while I take your point about trusting the process, it is [rather for] us to set some guidance to the panel on what we expect from them and whether we think it should be the normal case that a commercial entity that was not able to conduct itself in English should entitled to translation or whether non-commercial entities are somehow entitled to translation but commercial entities are discriminated against in that respect.

SUSAN PAYNE: Thank you both. We've got a couple of other people with their hands patiently up. Flip?

FLIP PETILLION: Thank you, Susan. I listened very carefully, although it was [not always] easy for me to follow. It raised a point. We really need to be clear on what [ball] are we really looking at? What do we want here? Do we want to think of a legal principle and at it to the applicable rules? Or do

we want to do some politics here? Then I would say that's not the place to do that.

Whatever is agreed to ultimately—it's definitely going to take more time than I expected to discuss the translation language issue—we should really respect the principle that everybody should be treated equally. I do understand the intellectual difference made between commercial interest and not and [advance] payment and reimbursement afforded by the panel, but I struggle with it because, first, the discussion of today shows that we apparently discussed completely different concepts last week. So I would like to understand what do we want to cover?

Second, let's not forget we have a lot of lawyers around here. Let's not forget to treat everybody equally. Thank you.

SUSAN PAYNE: Thanks, Flip. David?

DAVID MCAULEY: Thanks, Susan. The reason I raised my hand is I wanted to underscore something that Mike Silber said. I'm supportive of his approach. The thing I wanted to underscore was the notion of trusting the panel. It's my belief that what we should do here with this rule is engage a rule of parsimony or something like that and be brief and to the point and remind then panel basically that the bylaws apply here and the bylaws would establish four corners within which to make these decisions. Corner 1 would simply be English as operative. 2 would be that need is

the criteria, not preference. 3 would be that fundamental fairness is due to both parties. The claimant has to be able to make their case in a fair manner. 4 would be due process. The claimant has to have an effective way to make their case. But those latter two run in ICANN's favor, too. It's a balancing act for the panel to apply this.

So my thinking on it would be that it will be impossible for us to try in a rule to envision every conceivable potential issue. I just would urge that we move towards simplicity if we could.

Thank you very much. I hope all well in these difficult times. Thanks, Susan. I am now finished.

SUSAN PAYNE: Thank you, David. I'm not sure if I've missed anything in the chat. I quite possibly have. I don't know that we're necessarily quite as far as it sounds, although I might be being optimistic here. With clarification from Mike, he certainly wasn't trying to exclude all commercial entities—or commercial endeavors, shall we say, [or] outcomes—from any prospective of getting translation assistance.

I think the fact that we're having this conversation and that we've been having this conversation suggests that, if we can try to find some criteria that we could give the panel as considerations that they should be bearing in mind, would be helpful. Otherwise, we have bylaws language that just says that translation will be provided where there's a need. We clearly have a number of people with different views as to what that need would be, as in, is it need because we're trying to put, insofar as we possibly can, everyone on level playing field and recognizing that

those for whom English is not their language are already at a disadvantage and therefore we're trying to at least do what we can to minimize their disadvantage, if you'd like, versus the notion that, if someone who succeeds in their IRP is going to have some commercial advantage or benefit from the outcome of it then therefore they should be picking up the costs of being able to get themselves into that position? So I think that that was really where I was feeling that we all, within this group, can quite reasonably be suggesting a different perspective of what we mean in the bylaws by need. Therefore, to expect that the panel are going to be making consistent decisions seems, to me, optimistic.

So, whilst I'm very on board with the idea of trying to keep this as simple as we can, I think I would favor the idea of give the panelists at least some kind of guidance of the factors they should be weighing up. Those factors could include thing like the kind of commercial outcome, the financial need, and the kind of language skill need, I think.

I'm just going to have a quick look in the chat. Robin is saying she thinks we should provide some factors for the panelist. "So commercialism would be on factor, but perhaps not entirely dispositive, as there are situations of fairness and transparency that could require translations. But factors for consideration is a better approach than a bright-line rule that could preclude equity in some instances."

Thanks for that comment, Robin. I think that that's certainly, as I said, where I'm coming down on this. Well, that's my personal view. I guess that's what I'm saying. It's not really my view as a chair. But I think I'm hearing, as the Chair, that there are a number of different perspectives

on what “need” means. Therefore, it seems to me that some factors would be beneficial.

I’m not seeing any hands. If we –oh, Kurt?

KURT PRITZ: I think that, as we’re all lawyers here, we’re predisposed to creating a set of factors for balancing by the panel. I’m just concerned with creating a play-within-the play that adds cost for both sides and becomes more of a burden to litigate the translation decision than is worthwhile for a party which creates a bar for that party from even participating.

I harken back to my early law school days where negligence is based on the balancing of 13 factors and all the appeals based on whether the 13 factors are found. That’s in mind on one side, and, on the other side, I’m thinking that, as Mike Silber said, most parties do have English-speaking lawyers and most parties do litigate in English. Scanning down the list of arbitrations to date and the ability of those parties to communicate in English, I wonder if it’s just not cheaper and more welcoming to all parties to participate in the long term if we just say, “If you express this need, there’s a strong presumption that the panel is going to grant this request for translation,” and not make it complicated but make it simple and have a strong presumption or preference in favor of the party asking for translation services. Thank you.

SUSAN PAYNE: Thanks, Kurt. Thoughts on that?

Becky? Thank you.

BECKY BURR: I guess I'm having trouble with … First of all, in most circumstances, what would happen would be that the panel would make a determination about … I just looked at a few of the international arbitration rules, noting that this may be a situation where people are not parties to a contract. So you can rely on a choice of language provision in a contract. But typically the translation and language issues would be determined by a panel based on fundamental fairness principles.

If you walk through all the processes that you have to go through, what you're saying is that ICANN has to translate a bunch of stuff into every language in the world when we know that the likelihood that some of this will be used is extremely low. I guess I don't understand why, beyond identifying fundamental fairness principle and due process principles, we're locked in to rely on the panel to make a decision about fair access to the dispute resolution process. A presumption that everything gets translated without a showing of need strikes me as not fundamentally promoting access to justice if anybody can come in and say, "Translate the documents," even if they don't need it.

SUSAN PAYNE: Thanks, Becky. I think you've got some support for that similar position from the chat. I think there's some feeling from Malcolm, and I'm assuming David and possibly Flip and a few others, that perhaps Kurt's strawman suggestion there of the kind of presumption of, if you're

asking for it, you should have a need and should get it is perhaps going too far.

I think we've ended up talking about this largely because we were talking about what languages. I think we've become somewhat bogged down in the needs aspect because there's been, certainly in the interim rules, a provision that talks only about the U.N. languages. In my mind and to the minds of some of us in the group, that felt that that didn't address the need—that, if there is a need for translation services from someone, why are we unduly constraining them by saying, "But, even if you've got a need, you can only really have it satisfied if the translation is to another of the U.N. languages," when, really, if you've got a need for translation, you've got a need for translation and you may well not be speaking any of the U.N. languages? So I think that's why I've allowed us to get bogged down in this concept of need and how we encourage the panelists, but I will defer to others.

Becky, your and is still up, but I'm guessing that's an old one and I'm going to go to Hector.

HECTOR: Hello from Argentina. [I want to think of this issue by way of a Spanish-speaking country]. If we have a [inaudible] where one party is and English-speaking person or company and the other is Spanish-, French-, or Chinese-speaking, always the party that is not speaking English has a certain kind of [inaudible]. This is not a thing to [inaudible]. Any lawyer that speaks in a language—

UNIDENTIFIED FEMALE: Hector?

HECTOR: [inaudible] better can …

UNIDENTIFIED FEMALE: Hector?

SUSAN PAYNE: Hector?

HECTOR: Hello? Can you hear me?

SUSAN PAYNE: Ah, that's better. Yes.

HECTOR: My reasoning is that any lawyer that wants to defend a client wants to use their own language to defend the case because, for sure, they will be better in his own language. We are adopting English as a compromise language. We should choose one, and ICANN decided English a long time ago. Always ICANN gave a translation facilities for all the participants because they understand that this is part of the game. More in a contentious case, in a litigation, we should give warranty to a non-English speaker so that they can do the best that they can to defend their interests.

I can tell you that even providing translation is not the ideal situation. You always want to do your litigation in your own language because you are [relying on] a translator. There's a saying that a translator always is a traitor because he never can really take all the [management] of your language, and the translation is never of the same quality of the person that is speaking. For this reason, I think that, at a minimum, we have to warranty a translation to the litigator that wants to litigate in this system.

On the other hand, I imagine that the decisions that will take with arbitrators/with the panelists will be part of, in some way, the future law of this part of ICANN or the Internet. We have to ensure that the quality of these decisions will be the highest possible. The expenses of a translation will not be so high if we think that we are building in some way the law by this case law that will be created with the system. That's all.

[OLIVIER]: We're not hearing you.

SUSAN PAYNE: Sorry about this. I don't know why I'm incapable of unmuting myself on this call. I was just saying thank you to Hector. It's incredibly helpful to have the input from those in this group who are not English native speakers, although the English skills of everyone in this group are fantastic. But it is really helpful for us to get reminded that not everyone is a native English speaker and that there is that fundamental

disadvantage there. I think that's why we're having this conversation, obviously.

I hear what Mike has been saying about the bylaws being in English and so on, and I do recognize that, but I think ICANN does go out of its way to try to make itself accessible to the world at large and not to be unduly exclude. I think that's something we do have to keep in mind. Obviously it's something that we would be expecting the panel to keep in mind.

I think perhaps we also have to bear in mind that, when we're having this discussion, we're not talking necessarily about everything being translated into every language. We're talking about the identification of a specific need in a specific case. We're not talking about translating all documents into every language around the world. We're talking about a specific case where a specific party needs assistance.

I hope that, when we bear that in mind, we can feel less concerned that this is going to be disproportionate and a huge expense because I think, if we have a proper assessment of what "need" means, then that would apply at various places in the case. So, for example, it doesn't necessarily mean every single document, no matter how long they are, gets translated, for example. That's all part of an assessment of, is it material/is it necessary?

Is it worth us brainstorming on some factors that we would like the panelists to bear in mind, if people want to suggest some? Or is better that we perhaps if we try and brainstorm on that in between this call and the next one in the hopes that we can actually, to some extent,

wrap this up? Because I think this conversation that we've been having about translation is obviously incredibly important, particularly for those of us who aren't English speakers, but we do have other parts of these rules that we do need to move on to talk about.

I wonder if it's perhaps worth—I'm not seeing any hands and suggestions of factors, but maybe we try and brainstorm them after the call— it to make sense to quickly run through the rules as suggested by Kurt and as I went through and annotated or added to. When I say "rules," I don't think any of us are expecting that this is actually what ends up being the IRP rules. I think it's more the principles that we are hoping that the rules will capture—the outcomes that we're hoping to see, if you know what I mean.

The first is—as we know from the bylaws, we've got, again, the understanding that the official language is English, and ICANN will be paying for translation into English—where this need has been assessed. That should then include the initial claim and accompanying pleading that goes with the claim. As we talked about on the previous call and as I think we did pretty much all seemed to be coming down in the same position—that obviously we need the claimant to be making their claim and submitting their claim in English but recognizing that they may well want to bring their claim in their own language—we could allow that and that could be permissible that they're arranging the translation into English at that point. Then, if there is a later determination that they have a need for translation services, there would be an expectation that the panel would then consider a request for some kind of contribution back of funding back to ICANN if they then manage to persuade the panel that they needed that translation assistance. There

shouldn't be any kind of prejudice to them making that request by virtue of the fact that they had managed to organize the translation for this claim.

I'm going to … Actually, I'll just carry on to 1B of that. This would be all languages, not only the U.N. six. Again, I'm happy to hear thoughts on this. The thinking behind that is that, of course, as I was saying earlier, if we've established that there's a need, then why are we limiting that claimant only to another U.N. language which may also not be their language, and, at this point, they are the ones who are making the translation? So it seems reasonable to allow them to translate from their own language rather than have to try and work in Spanish or whatever it is because that's the only U.N. language they've got a hope of making their claim out in.

I'm going to pause and just see if anyone wants to react to that/disagree or not. I'm hoping not because we did, as I say, have quite good agreement on this last week. I'm just going to pause and quickly look in the chat.

Sam is flagging that obviously it would be a loss to all involved in the IRP if we're encouraging substantial briefing around needing translation. I would hope that wouldn't be the case. And there's some support for that but hoping that we can develop some factors and focus on not making it adversarial. That would certainly be, I think, what everyone would like to achieve. But there is always a risk of things become a little adversarial since this essentially the IRP is an adversarial process.

Malcolm?

MALCOLM HUTTY: Thank you, Susan. I was actually going to slightly disagree with your suggestion that we should go beyond the U.N. five. I think this is a balance. I spoke before to disagree with Mike so as to speak in favor of being more open about translation, but I think that going beyond the U.N. five causes the risk that we might be placing an undue burden on ICANN.

You asked the question of why shouldn't we do whichever language it is that they [held do and are] equally entitled to whichever language they find they need rather than … And it might not be one of the U.N. five. As a matter of principle, yes. I think it's a pragmatic question that, if you open it up to the any language, then there are hundreds in the world and their might be real difficulties here. The point that Becky made on the list earlier really comes into play with that, I think. We can always add to it later if there is a [inaudible].

So I'm looking to seek a balance here. I would be comfortable with the U.N. five. I think opening it up to whatever language they wish worries me. It worries me that it might be an undue burden on ICANN. Maybe we might pick others beyond the U.N. five but stop somewhere. But then the question is, where? I don't know the answer to that.

SUSAN PAYNE: Thank you. If you wouldn't mind, Greg, before I turn to you, if I could just explain where my reasoning for that was, or at least why I suggested that or one of the reasons why I was suggesting that, as a straw for people to think about. That was that I was looking … Well,

twofold. I looked back at the discussion that happened before the interim rules were adopted and the proposals that David McAuley had been circulated around the group. As expressed by David, it was more of a preference for the U.N. so that, if a party … When you're looking at the need, you're looking at if they have someone who can speak English either as an officer, director—whatever—or their representative, or can they speak one of the other five U.N. languages. If that's the case, the translation would be to that language rather than to some other to prioritize the U.N. five. So I was proposing that we try to build that into the factors that taken into consideration by the panelists when they're making their translation order. But to unilaterally to say to someone that's Japanese—that's not one of the five U.N. languages—that, if they can't speak English and they can't speak any of the other U.N. five languages—then how is this access to justice for them? So that was my thinking and what I was wanting us to think about and discuss.

Greg?

GREG SHATAN: Thanks. On this point, I think maybe we need to think more on a policy level than an implementation level, or at least than at a higher level. I think that we can say that other languages will be accommodated, assuming that there's no significant additional cost or delay. That would allow some judgment to be made. Finding a Japanese business language interpreter shouldn't be horribly difficult. I have no idea how different it is in cost. But, on the other hand, finding somebody to translate into [Quechua] or [Akinabashin] is going to be much more difficult. So giving people full run at any language in the world regardless of the number of

speakers, the number of interpreters, etc., I think is at least theoretically troublesome.

We could also talk about some demonstration of need, but then that gets more subjective. I don't know if we necessarily want to really go there. I don't think we need to go granular—either have an absolute prohibition against any other language—or have an open season on all languages. The idea, I think, here is to be practical.

Written translation is different for a live translation. Translation of documents, especially lengthy documents, can get really expensive. Then we might need to talk about what kind of budget there is for translation, even for the U.N. five or six or whatever it is.

That's one other thing to put on the table while we're talking about translation: to think about accessibility as well or participants who are either visually impaired or hearing impaired. Thanks.

SUSAN PAYNE: Thank you, Greg. That's another issue altogether. Well, we've got the range of difference of opinion, I think. There is definite support for sticking with the U.N. five, although Mike Silber is noting that, if it's official documents or documentary evidence, then there does need to be an ability to accommodate other languages. We've got others, like Greg's "Let's not be too prescriptive."

Perhaps a compromise is that there's a strong preference for U.N. five but the panel have some discretion where, as Greg is saying, it's not significant additional cost in delay?

I'm sorry. I'm going to look in the chat. I'm not managing to keep up with the chat, I'm afraid. So, if anything has they want to say that they want to speak on, that would be super. Otherwise, I am going to leave us to mull on that and try to find a middle ground, perhaps.

Going back to the suggestion—sorry, I'm just pulling my document back up—then we've got Suggestion #2, which is from Kurt's suggestion –oh, sorry. I've just seen your hand, Mike Silber.

MIKE SILBER: Thanks, Susan. I think the reality is that parties may have requirements from all over the world. Official documents, wherever they come from, will need to be translated so that the panel can engage with them.

The critical question we're asking here is not, "Should things be translated?" but, "Who bears the cost of translation? Is it borne by the party and then potentially reimbursed at a later stage? Or can the party ask ICANN to make those translations?"

I'd like to go back to what David McAuley said. Generally, you'll find … I'm sorry. I work in some of the poorest countries in the world, not just in Africa. In every one of them, I have found incredibly incompetent English- and/or French-speaking counsel. If I'm going to litigate in the Democratic Republic of the Congo, I don't take an English lawyer. I take a local lawyer who speaks French and enough English to explain to me what's going on. I think that we're being a little caught up in being politically correct by ignoring the fact that they're going to have competent local counsel who speak local languages and at least one of the U.N. languages.

So, in terms of preparing documentary bundles and evidence bundles, I think it's any language. But, beyond that, I really don't think that we should be considering translating proceedings into an unlimited number of languages. I really think we need to keep it [tight]. As I said, you'll find local counsel who have fluence in multiple languages and least U.N. languages. I think what we're doing is we're not saying English is the only language but we're saying you need to employ local counsel who's competent in one of those languages.

SUSAN PAYNE: Thanks, Mike. That's also a helpful reminder. I want to go back to what you said at the start because actually I think this may be where and I are at cross purposes. It may be that others are not. It may just be me because my reading of the bylaws and indeed my reading of the current interim rules is that basically ICANN is responsible for administrative costs with the possibility that, in certain circumstances where, to very much paraphrase, it was a hopeless case that should never have been brought, the panel does have a discretion to pass some of those administrative costs back to a claimant who loses. So there's this assumption that ICANN is responsible for administrative costs, and the parties are responsible for their own legal costs.

So, in my mind, as I've been thinking about this, we don't have a scenario where we've got the party paying the costs but having the opportunity to be reimbursed later in the way you're envisioning it. That may just be because of how I've been reading the rules. If we think that we're able to give that general discretion back to the panel to allocate

the costs after the event, then that's a different matter. But I haven't read the bylaws as allowing us to do that.

MIKE SILBER: I'll need to go back and look as well because my understanding is that the panel is able to make a determination in terms of costs.

Sam, keep me honest.

SAM EISNER: Mike, I agree with you that we have the ability for the panel to make this as part of an administrative. If we go back the interim supplementary rules as drafted, they actually allow for items such as translation to be considered in the administrative cost. Then they [break up as other concepts of] need-based translation.

So, in the end, any translation that has a reasonable cost associated with it that was done appropriately we could identify as administrative costs that are able to go be considered as part of the cost shifting upon a successful claim.

SUSAN PAYNE: Thanks, Sam. I think my assumption had been that that the administrative costs sit with ICANN, and the cost shifting happens sometimes at the end, where the costs get shifted back onto the complainant if they have lost and been held to essentially have brought an inappropriate action. But you're looking at this more as the cost shifting in the other direction, that there could be administrative costs

which a party might be bearing but then get shifted to ICANN at the end of the action. I will look back at that. Maybe we can pick this up offline, if you don't mind.

SAM EISNER: [Yeah]. Flip, this is where some of your experience on a claimant side with the IRP that you've done might be helpful, too. I know that we've had a shift in the bylaws that presume that ICANN will have more of those administrative costs borne on it at the front end, but I don't think it precludes the panel for administering additional administrative cost shifting at the back end.

FLIP PETILLION: I agree.

SUSAN PAYNE: Okay. All right. Thanks for that then. Then maybe that's why I'm slightly at odds with the stance that Mike Silber has been expressing: I have been looking at the cost shifting as working in the different direction. So I will give myself an action point to look at this and then perhaps circle back on it to make sure that we're all in the same place.

I am going to keep moving on down. We've got, essentially, in Paragraph 2A, an assumption where we've had this need-based assessment but the translations would be done by ICANN's translators. I think that's intended to try to keep costs manageable for ICANN and allow them to maintain control and to be identifying translators who they can hopefully have more of a contractual arrangement with. Also,

as we discussed last time, we all know that there's some quite technical language involved here. So, the more that translators who understand this world can be used, I think we all feel better.

In terms of evidentiary documents, we've got this concept of them only being translated where material. So there's an understanding that there could be voluminous documentation, and some of it may be of marginal relevance, that it doesn't all need to be translated. The suggestion is that this is something we really should be leaving to the panels' expertise in determining what's necessary. They would make that based on the arguments about the references to that material in the pleading. The reference would include why that document is important and material to the case and therefore would be allowing them to make a decision on whether it's appropriate or and whether it's necessary/whether it's needed.

We did talk last week about if we did need some kind of page limit. I think perhaps, if we are having this kind of assessment of materiality before a decision is made to start translating evidentiary documents [like annexes] and the like, then perhaps that's what we need. It doesn't necessarily need a page limit because we are here to trying to assist the parties in making out their claim. Obviously, to the extent that the party is putting translation of its claim at the start of the proceedings themselves and will be making a request for translation later—to the extent that they're going to be translating every [annex] documents at that point, then it's going to be in their interest to keep that narrow and limited to material documents because, if they're going to be asking for reimbursement, then they are going to be needing to persuade the panelist that what they translated was necessary.

So, again, I'm hoping that this is not going to be particularly controversial for people. I'm not seeing any hands. I can see Mike is commenting on cost shifting. Thanks for that, Mike. I am going to pick this up and double-check myself and perhaps circle back with you afterwards.

Moving to #3, we want to have some process for … Well, "Do we want to have?" I suppose is the suggestion. This is the suggestion: we want to have some process to keep things fair and avoid any suggestion of, I suppose, compromise or conflict by suggesting that the translators will be somewhat at arm's length from ICANN staff, and particularly that ICANN legal wouldn't be engaging them. The suggestion, which I think I've mentioned before is that, obviously, if the non-English party wants to do their own translation, then that's entirely up to them. But the cost of that would sit with them.

What do people think about Kurt's suggestion on having the translators at an arm's length kind of relationship? Does that seem necessary? Or indeed does that seem reasonable and appropriate?

I'm, again, not seeing—Flip is saying, "Appropriate." I'm not seeing any disagreement or any hands at the moment. Mike Rodenbaugh is also supporting that as being important. Subject to any later thoughts to the contrary, it looks like that is reasonably supported.

#4. I think this is the corollary to what we've just been talking about. Just as we've been talking about the party and the translation of their documents, this is around ICANN's documents. If we've got this need for translation, then the suggestion is that therefore ICANN is going to have

to translate its own pleading and arguments into the language of the complainant that they work in in the same kind of way and that they would expect to use their ICANN translators again.

Sorry. I'm circling back to the choice of the translation service. Question from David: "Are we saying that ICANN can't use its current translation service provider?"

Well, good question. Mike?

MIKE SILBER: Susan is [inaudible], but I'm getting really confused in terms of how do you then get non-ICANN service providers that paid for ICANN? Who selects them? How does that process work? How does that mechanism work? Who determines what is required or not? Because, if I'm a translator and you told me, "How many pages do you want translated?" I'll tell you you want all of them translated. More work for me. So practically I just don't see any way of doing that unless the panel makes those determinations. Otherwise, it's a free-for-all with an expectation, maybe with the best of intentions, of ICANN just picking up the check.

SUSAN PAYNE: Thanks, Mike. I don't think that was what I was anticipating at all. I think the expectation was that the panel are going to making the decision about what needs translating. But the panel wouldn't be doing the translation.

MIKE SILBER: I know. So it seems we need a standing panel of translators because, respectfully, there aren't certifications. Different people are accredited by different courts for translations. There is no international system of translation. Some people are more accredited and have better-recognized accreditations than others. But there's no single standard version of translation expertise in the world, especially if we start looking at those obscure languages that Greg was so gracefully suggesting.

SUSAN PAYNE: Thanks. I'm going to go to Sam because she's got her hand up and she may have some insight on this.

SAM EISNER: Thanks. To the extent that we also have some of those principles of moving towards lower cost [or inflation] to having people who are familiar with ICANN, surely it doesn't cover every language of the world, but, as an implementation step, we could easily provide a process that ICANN would use in order to have our language services group oversee that type of translation and document within that process the un-involvement of the legal department or those who are involved in defending the IRP. That's part of our normal process now. We send in a ticket. We don't do direct engagement from legal. We have a separate department of legal services that's not engaged with the legal department. They process. We can usually, if part of an implementation document is processed [slow, know] where the outputs of those would go. So I think that we have some operational things that we can do for

languages that might be most cost-effectively done through ICANN and also with that focus on that understanding of the ICANN realm. If that's where we go, we have an easy way to handle that, I think.

SUSAN PAYNE: Great. Thanks, Sam. That's really helpful. As I said, I don't think necessarily all of this would end up in rules. I think it was to try to set up the areas that we may or may not be able to agree on or may or may not think we're useful. So that's a helpful understanding of something that is actually you can do in implementation and you would anticipate doing.

I think, going back to this list therefore to see if we could get through the final few bullets in the last few minutes, discussion on … Sorry. #5 is relating to evidence and I think is very much in line with what we said for the complainants' evidence. So I don't think we need to spend too much more time thinking about that.

Again, other areas where there might need to be translation would be questions and decisions for the parties.

One that we haven't really talked about but was something that Becky and others had raised in the e-mail was about hearing. I had recalled the rules or the current interim rules slightly incorrectly in that I assumed there was a presumption against hearings at all, but in fact it's more of a presumption against face-to-face hearings, which doesn't mean that there won't necessarily be telephone hearings and the like. So it seemed to me that, since we're spending a lot of time talking about documents, we shouldn't forget that, if there's this need for translation,

that that could potentially extend to interpretation service, which, again, I don't think means that, in every case where there's translation service requirements assessed by the panel, they would necessarily assess that all of these have to be applied in each case. I think what we're saying is that the panel would be making a determination based on what the party was asking for.

#8. To just quickly scoot down, Kurt's comment in summary of his points was that the complaining party should be deciding at the outset whether they're going to bear the translations costs because, in circumstances where they don't do so, then the expectation [is that] subsequent costs would flow on from that. So, if they've decided they want to pick up their own costs of translation, then that would flow through he procedure, which certainly, to my mind, seems fairly reasonable.

I wanted to flag a couple of final things, which I had just added to Kurt's list, which was really about timing, just to take into account the fact that I don't know exactly what flows from what time limits flow. But it seemed to me that there ought to be at least a discretion for the panel to extent a time limit, if there is one, to take into account the time needed for a translation. I thought that that ought to include if there's a decision which has to be translated into the language of the claimant so that, when the panel has made its final determination, then there is a time limit that we'll be talking about later for appealing. So that time to appeal really ought to run from the translation is available, to my mind. This is certainly one of the areas where we had governments commenting originally when the rules were put out for comment. That was one of the thing that the government commenters felt very strongly

about. To my mind, again, it seems a reasonable one for us to be proposing or at least for me to propose for people to think about.

Conscious that Bernard is giving me a time check of five minutes, which is now actually down to three, I think this is a good place for us to wrap up. I've given myself a couple of action items to look at things. I think it would be good for us to try to wrap translations up if we possibly can as quickly as we can. It's obviously important. It's important for access to justice, but, as I said, we do have other rules we need to start thinking about as well. Maybe if I circulate where I think we've come out on this, insofar as we have—we aren't entirely all agreed on everything—we can see if we can maybe get buy-in for that. Hopefully, in between now and our next call, which is on the 14th of April at 17:00 UTC, we can make a bit more progress on this and maybe progress towards the finishing line.

Thanks very much. I don't have any AOB, but we do have a couple of minutes if there's anything that anyone wants to raise as AOB.

Okay. I'm not seeing anything. Thanks, all of you, for joining. I hope everyone is staying safe and healthy. Hopefully I look forward to engaging further on this on the list and then speaking to you all again in two weeks' time. Thank you.

Thanks. We can stop the recording.

[END OF TRANSCRIPTION]