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SUSAN PAYNE:

Great. So, thanks, everyone. Hi. Welcome to the IRP-IOT call for the 28<sup>th</sup> of April 2020. Thanks to you all for joining. Looking forward to, hopefully, making good progress; possibly, with a fair wind, finishing our discussion on the translation issue, perhaps.

So, for the purposes of our call, I'll just talk really briefly about the statement of interest form. I wanted to also just mention the call for expressions of interest for panelists that has gone out, and then we'll move onto our discussion on translation. And as noted in the agenda, our next call is due to be on the 12<sup>th</sup> of May at 17:00 UTC.

Finally, we'll wrap up with any other business, if there is any, and that'll be the end of our meeting. So, moving straight on, the first thing that I asked [Brenda] to put on the agenda, and just to mention, is that as we've been promising for a few weeks now, Bernard, and I, and Sam worked on a version of the statement of interest that we could use for this group.

As I said when I circulated it, it's based on the GNSO one because I think that's one that most of us are familiar with and many of us have already completed. But we did try to make some of the questions more relevant to the work that we're doing here and to try to reflect some of the questions that we all bore in mind when we were introducing ourselves at the start of this work.

So, I'm happy to take any questions or any suggestion on it if anyone has any, although, ideally, we can just move forward with that document and, indeed, ideally, if people do have any really pressing views on something that ought to be changed we could deal with that on the mailing list.

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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.*

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But I'm hoping that, in the absence of any pressing concerns about it, we could just start moving forward with it and I could ask that you all complete and circulate it.

And then, Brenda will keep those SOIs and, obviously, members of the group would be expected to update them as your circumstances change. So, I'm going to just pause and see if anyone has any comments they want to raise now. Otherwise, we will just move on. Okay. I'm not seeing any hands, which is promising. So, the next agenda item was, again, just more of a mention, really – the expression of interests for standing panelists.

Hopefully, most of you will have seen, if not all of you, that the expression of interest was published two or three weeks ago, now, seeking applications from people to be standing panelists. If anyone hasn't seen it, I can circulate a link to the announcement but it's fairly easy to find on the ICANN website.

With that in mind, this isn't particularly a task for this group as such but it did seem to me that it would be appropriate for us all, given that we all have an interest in the IRP proceedings and in the need for good-quality candidates for the panelists, it seemed to me that it would be beneficial for us all to give some thought to our networks and forward it onto anyone that you think might be appropriate and might be interested. Sam.

SAMANTHA EISNER:

Thanks, Susan.

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SUSAN PAYNE: Thank you.

SAMANTHA EISNER: Sorry, it took me a while to get off mute. Thanks, Susan. This is Sam Eisner from ICANN legal. I raised my hand before you made that little call to action, which is to share it to your networks. We're working internally with ICANN about how we can leverage our networks of our practitioners and those that we're familiar with, as well as the [ITBR], and we've already coordinated with the [ITBR] about reaching out to really appropriate venues to get this spread.

But we know we have a lot of practitioners on this call. We know you're active in various legal and practitioner networks, and anything you can do to spread the knowledge of a call or raise awareness in your networks, we'd really appreciate it. Thank you.

SUSAN PAYNE: Yeah. Thank you, Sam. And just one other point to make, which I think those who've read the EOI will have appreciated, it seems to me that the qualifications for those standing panelists would exclude most, if not all, of us because of the need for people not to be associated with contracted parties, not to be members of the board, not to be associated with ICANN's particular sort of constituencies and stakeholder groups, which is why I was bringing it to people's attention – not particularly for us to be considering making applications ourselves but, as I say, more to see if you can socialize it amongst your networks.

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Because, as I say, I think we all benefit from having quality panelists and there is a little bit of time for this. My recollection off the top of my head was that the deadline for applications is in June. I think it may well be the end of June. So, there is a bit of time. But yes, please do socialize it. Okay. All right. Moving swiftly on.

I think we can now come back to the discussion on the translation issue. It has been a little while. So, we haven't had a call for a few weeks now but, hopefully, we are making some progress, and hopefully most of you have had an opportunity to review the kind of straw-person that I circulated around yesterday.

Obviously, I know that Kurt and Mike Silber both definitely have seen it and took the opportunity to send some comments back. And so, the version that's now in the screen is, essentially, my draft that Kurt had accepted to edits to make it easier for him to include some comments and some questions of his own, to which I, just before this call, made a few tweaks that seemed to me to be uncontroversial, based on the comments from Kurt and Mike, and added in just a reminder for one of the points that Mike raised so that it's sort of, as best it can be, a kind of composite of the comments from Mike and Kurt that we received over the last day or so.

So, even if you may well not have had an opportunity to look at this very last version because, as I say, I just circulated it just before the call, it is largely the version that Kurt included his comments on.

And I think, if it's okay with you, perhaps it is easiest just to start at the top. I think some of the things are relatively uncontroversial that a couple

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of the tweaks that I made in response to Kurt's comments. Some of this probably will require a bit more discussion.

And so, first off, I did actually just, in the latest version, include a question or a thought for us all. It came out of an e-mail that Justine sent me just a little earlier today. Justine is one of our observers. I think she may be our only active observer. Honestly, I think it's a shame Justine wasn't able to actually be a participant.

So, Justine I don't think has access to the mailing list. And so, she just e-mailed me. But she did sort of say that as she was reading through this it occurred to her that, as we've all been discussing, what we're really talking about here on translations is we're talking about, when is translation being provided by ICANN and at ICANN's cost?

Because, obviously, at any time any party can translate whatever they want if they want to pick up the cost of it. So, I did wonder and did include a question that just suggested, do we actually call this "ICANN translation services" rather than just "translation," to try to clarify that upfront so that it's a bit clearer that this is really what we're talking about here?

Okay. I'm seeing a question from Scott but I'm not quite following it yet. So, in the meantime, I have just seen I've got a series of hands so ... Oh, loads of hands. So, Liz, I'll go for you first because I think you're the first one.

LIZ LE:

Thank you, Susan. This is Liz Le, an observer for ICANN Org. You just touched on the translation issue in terms of other people being able to

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translate it even if it's not something that was agreed, and it being translated by ICANN, previously agreed to ahead by ICANN, or as contemplated in the document here, or determined that the translation is needed by the panel.

I think one of the things that the rules currently do not touch upon, and perhaps we should consider as a group, is what kind of translation record, if it's being translated by the claimant or another party, constitutes the official record of the IRP?

For example, would it be a certified record or is it some kind of a regional equivalent of certification so that we can consider it as part of the formal proceeding? Just wanted to toss that out for the group to ponder and see what thoughts are on that.

SUSAN PAYNE: Yeah. Thanks, Liz. I made a note of that so that we can come back to it once I've heard from Kristina, and then Mike. So, Kristina.

KRISTINA ROSETTE: Hey. Can you all hear me? Sorry.

SUSAN PAYNE: I can now, yes.

KRISTINA ROSETTE: I'm not sure if I'm muting by my phone or audio. Picking up on Liz's point, I think it would be helpful for me, at least, to have a couple of examples

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of scenarios in which that might become an issue so that I can better conceptualize it.

But in answer to the point that you raised in terms of what we should call it, I would suggest that we're probably better off including a sentence in here, wherever, probably at the end, just making it clear, that for the avoidance of doubt, this section addresses only the provision of translation services by ICANN, or however, exactly, we decide that, at ICANN's expense.

And then, to the extent that we make any modification to reflect the point that Liz has just raised, I think that's going to be clear and provide better guidance than just relying on the title. Thanks.

SUSAN PAYNE:

Okay. Thanks, Kristina. I think there might be a sentence somewhere. If it's not clear enough, that's certainly something that we can come back to. Mike.

MIKE SILBER:

Thanks. If we're going to include it we just need to recognize that there is some language in there which doesn't deal with ICANN-provided translation, and I don't like the idea of calling it "ICANN translation services." It sounds like "ICANN language services." It's translation services provided by ICANN when we're needed.

But we do reflect the fact that the claimant-written statement of dispute must be submitted in English, and I just don't want to ignore the fact that that doesn't relate to translation by English. It's a standalone provision.

SUSAN PAYNE:

Okay. Thanks, Mike. So, thanks to Kristina and to Mike. We can scrap my suggestion and I will take it off the table. Let's just make sure when we get to the end that we have managed to cover off the point that Kristina mentioned, that what we're talking about here is translation at ICANN's expense, essentially, if we don't feel we've adequately reflected that. Okay.

So, I'm sorry. I'll just be losing my document. Okay. I've got Kristina and Mike still with hands up but I'm thinking they're both old, so I'm assuming that they are gone. Moving down, I had made a reference to adverse inference, which is something that has come up on previous calls.

I don't think I was specific enough, and so I've just included a slight clarification that what I was trying to get at was that, given that we're saying the claimant has to submit their written statement of dispute in English, there shouldn't be a presumption, then, that if they've managed to do that in English they then don't have a need for translation services. So, that was what I was trying to get at, and hopefully that's a bit clearer now. Thank you for moving the document up a bit. Ah, Mike.

MIKE SILBER:

Thank you. This question of needs, and I know Kurt went into quite a bit of detail lower in the document. The point over there is it's very possible that a claimant needs translation because they are not native English speakers.



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The point that I was trying to get is they need to at least explain why they need ICANN to provide that translation, and I don't think the text as it stands explains why they need ICANN to provide that translation. If we can just put that clarification in?

I'm not trying to set some artificial standard or create a dispute about whether they meet it but I'm just saying that they need to provide an explanation that goes beyond the fact that they're not native language English speakers, to explain why ICANN should bear that cost.

SUSAN PAYNE:

Thank you. Thanks, Mike. I think this is probably one of the key issues. To paraphrase where I think Kurt was coming from, and he will undoubtedly jump in and do so much better than I can, I think this is the really fundamental point, isn't it?

Is the need more than just you aren't a native English speaker and you don't have the English language skills, and therefore there should be translation services, or is there an extra element to it which is you don't have the necessary language skills and you're unable to, effectively, arrange for and pay for translation services yourself?

And I think that's the point we have to decide on. When the ICANN bylaws talk about "need," is this more than about your language skills, effectively? Sam.

SAMANTHA EISNER:

Thanks. I think it's a really difficult balance and maybe we can work better at expressing what the need is, because needs shouldn't just be a cross-

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base thing. The need is about, do you need translation to make the IRP a fair proceeding for you to uphold this accountability right for the ICANN community?

Because there is a cost aspect to it, that ICANN shouldn't be funding translations just for the sake of funding translations, because that takes money away from everything else that ICANN does for its mission. So, there has to be some sort of thought around that.

But on the other hand, it has never been considered by need. I don't know if others have read it differently. Need has never been about, "I can't afford to translate," but it's more about the statement of—and I think we've heard some conversation in some of the previous discussions—if I'm a claimant who is a native speaker of another language, the best counsel that I can find, that I can afford, that can serve my needs, is also a native speaker of another language.

We were talking about maybe counsel in Africa, for example, or places where there is a predominance of French-speaking as opposed to English-speaking. Those sorts of considerations that make it a fair proceeding only when there is translation, and it's not just about a single person's inability to communicate in English but the inability to state a case and defend or bring a claim against ICANN for violation of its bylaws without having the acumen in English. That's really what the need is.

That's at least how I see it, and I wonder if there is a way that we can either agree on that in this group or help put that into writing, because I think that when we step back and look at this as principles—and we're really all kind of talking about the same principles, I think—we want to

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make sure that we have a fair proceeding when people need to use the IRP.

And then, it's accessible for the purpose of supporting the broad ICANN community and calling for ICANN accountability. How do we use the resources that we're going to spend on translation in a fair way to make sure that that happens? Because it's not about individual people, it's about the broader needs.

So, that's kind of what ... I didn't really get there. I feel like it's kind of a broader question but I don't know if that might help us just get to some principles that can drive the translation discussion a little bit more than looking at the specific language on the page.

SUSAN PAYNE:

Thanks, Sam. I think that's helpful. Actually, that was always what I had kind of envisaged by the reference to "need." And maybe we can find, as you say, a better way to explain it. Kurt.

KURT PRITZ:

Thank you. I think that there is the statement of fairness, accountability, and equally accessible to all, and that came down to the bylaw statement or the bylaw element that has to be required, which is "need." I think that means that the IRP is equally accessible to all, regardless of language ability, so that a native French speaker ... IRP should not be more expensive, or a lengthier process, or more administratively burdensome to someone without English-speaking skills than it would be to an English speaker.

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And so, I think a couple of things. So, I think that a statement of need that says, "I can't participate in this as readily as an English speaker without translation services," would service the statement of need and satisfy the requirement for fairness.

I also think that ... Let's see if I can capture the second thought. I think that for ICANN or the panel to try to do an assessment of whether the claimant can or cannot afford, or easily afford, translation services leads us down sort of a level of complexity in administering this thing that we don't want to include in the process. We want to try to make it quick and painless.

But on the other hand, I also think that it's a self-limiting proposition that a claimant that can participate in English, either through his or her own natural abilities or the ability to procure translation services themselves easily, would not want to rely on ICANN-provided translation services, nor would any claimant unnecessary want to try to burden ICANN with translation because it's essentially a burden on the claimant him or herself that adds burden.

So, I think we can do the clean thing here and say, "Give us your statement of need in terms of that you can't participate in a process without ICANN providing these translation services," and, with a couple other small elements to be satisfied that we'll talk about later, you'll be good to go. I don't think that would result in unnecessary costs and I don't think people would tend to take advantage of it unnecessarily because it would defeat their own ease of participation. Thanks.

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SUSAN PAYNE: Thanks, Kurt. David. David, I'm not hearing you at the moment.

UNIDENTIFIED FEMALE: I can't hear him either.

SUSAN PAYNE: Oh, okay. Good. I mean, not good, but I'd started to think perhaps I'd lost connectivity. Okay. David, do you want to put it in the chat? Great. In the meantime, I will just have a quick look back at what we have in the chat. Yeah. So, we do have a couple of comments from Becky: "Concerned about accountable allocation of ICANN's resources."

And scrolling down, Becky does raise the question of whether it's appropriate for ICANN to be picking up the translation costs when it's a kind of commercial dispute between sophisticated parties, which I think is something we perhaps need to talk about a bit more.

But I did see, somewhere, a comment from Mike Silber, I think in response to what Kurt was saying at the time, proposing not that we go into extreme detail and the kind of over-burdensome administrative discussion about affordability and complexity that Kurt was talking about, but just suggesting that, when the claimant is expressing what they need for the services, it should be something that goes beyond just, "I don't speak English as my first language," but goes on to explain why they would be disadvantaged if they can't have translation services.

And perhaps that is the solution. Is it as simple as that, that we have something in here that says that there should be an explanation of why

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the claimant needs such services and why they would be disadvantaged without them?

And perhaps, do we need to go beyond that or can we trust the panel to make the relevant determination based on that? Particularly if we then, when we get further down, do give them some guidelines. I'm going to scroll down and just see if David has managed to put it in the chat. David says in the chat he thinks it needs to be more than a simple statement and the panel should make the ultimate decision.

So, I'm seeing a bit of support in the chat for that kind of relatively simple statement of why the need includes more than simply just a lack of language skill, and goes onto why they would be disadvantaged, but with some considerations for the panel to be taking into account.

If I'm missing other things that people have put in the chat that you want to raise on the call, I do encourage you to speak up because I am definitely not keeping on top of all of it. So, we've got Malcolm with a hand up.

MALCOLM HUTTY:

Sorry, on mute. Thank you, Susan. I like the idea of having a basic statement of principle rather than too much micro-detail on this, but I think we would have to agree what the principle is. I think I've heard what sounded like more than one competing suggestion that weren't, to my mind at least, necessarily compatible with each other.

Kurt put what I considered to be quite a bold claim that the standard should be that nobody who is not a native English speaker should be at any disadvantage compared to someone who is. That's, I think, quite a ...

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I don't want to say "extreme" in a way that would disparage status of proposition. It's a reasonable proposition to take but it's at one end of a spectrum, there.

And Sam put a different proposition in that, actually, this was about ensuring access to the process. I think that if that were the standard then merely somebody that was made to get in there and make their case, barely, maybe with some assistance with some forbearance from the panelists and so forth, would be considered to have access to the process but not necessarily on a fully equal facility with someone that spoke English natively.

So, I think we probably do want to say whether we agree with Kurt that we need to go as far as ensuring full equality between English speakers and non-English speakers or whether it's a slightly less ambitious standard, which is to say that, for example, I need these translation services in order to be able to bring this case at all.

SUSAN PAYNE: Thanks. David.

DAVID MCAULEY: Thanks, Susan. Hopefully, you can hear me this time.

SUSAN PAYNE: Yes.

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DAVID MCAULEY:

Thank you. I wanted to close the loop on what I intended to say earlier, and that is, while I generally frequently agree with Kurt, on this particular issue I don't, probably for the reasons that Malcolm just stated.

It seems to me that what's required here to get translation services that would be paid by ICANN is more than simply a statement of need, it's an actual need. And I think at the end of the day I doubt that this would be contested. I doubt it'll be an issue. In fact, I think we've heard from ICANN, in a previous meeting, that translations, [herefor], they've not been an issue. And so, maybe we can move on.

But it seems to me, at the end of the day, in order to honor the bylaw that says this will be primarily in English, where translation will be provided if needed, then we need to rest discretion within the panel. That's where it is.

And if there's an issue over this, hopefully they can address it, they can find out whether need exists, and the parties can move on. I think they'll want to move on to get to the [gravamen] of the complaint, anyway. So, maybe we're overthinking it. But in any event, I think it's more than a simple, "Here's my hand up saying I need translation."

And I used my example the last time. The example I have is I've lived in Manila for many years. My wife is from the Philippines. And I know many, many people. I mean, it's almost everybody in the city that is fluent in English and fluent in Tagalog. They can operate in English if they ever bring a claim. They're as fluent as can be. Anyway, those are my thoughts. Thank you.



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SUSAN PAYNE: Thanks, David. Mike.

MIKE SILBER: Thank you. Let me agree with Malcolm. I do think we need to go that extra step. Otherwise, why do we have need in the bylaws? You can't simply claim it. I don't think we need an overly burdensome process. So, I'd like to get past the paragraph we were looking at where, when the claimant expresses a need, it needs to just give some explanation.

Obviously, the more explanation it gives, and the better explanation, the more likely ICANN is to simply accept it. Or if ICANN doesn't accept, the panel is able to make a decision.

So, if we can accept that we just need to put something over there which goes beyond why the claimant needs such services, but rather to say why the claimant needs ICANN to provide the services or needs such services to be paid for by ICANN, or whatever additional language we want there, then I think we can move into the meat of what people are talking about: what is the actual threshold and what guidance we can provide the panel with.

Because we will vest discretion there but I do think that we want to give them some tramlines, and I think some of what Kurt is saying has resonance and some of it seems to go a bit too far, and I really like Sam's expression.

So, adding to what we've currently got as number one is, then, the question of, does this interfere with the integrity of the process by disadvantaging a party? To me, that should really cover most of what we

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were talking about. I think the rest is possibly too much detail. If we've captured those two basic principles and the party just needs to give an explanation then I think we're ready to go, pretty much.

SUSAN PAYNE:

Thanks, Mike. You may have lost me slightly toward the end but I hope not. And if so, that would definitely be my fault. But before we get to that, I think the sense I'm getting from most people who've spoken is along the lines that you've expressed.

I understand where Kurt is coming from. I have some sympathy for it. But it does seem to me that, generally, the support on this call from most, if not all of, the participants is for something that's a little less—to use Malcolm's words—to one end of the spectrum.

And so, I think, perhaps, as you say, we can move on from this if we're agreeing that this explanation of the need is, as you say, something that also includes an explanation of why it is that they will be disadvantaged if these translation services are not coming from ICANN. So, perhaps we can make that change and most, if not all of us, can feel comfortable with that.

I think what you were then moving onto, Mike, is what is it that the panel has to bear in mind, since we're giving them this discretion, ultimately, or they have this discretion? What are the issues that they should be bearing in mind? Which are currently in this draft as six possible considerations.

And if I understood you correctly, your feeling was that most of those are not needed if what we're looking at are the sort of principles that Sam

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was talking about, about how to ensure that the claimant is able to fairly participate in the proceedings and make and defend their claim. Is that correct? Have I understood you correctly?

MIKE SILBER: That's certainly my view.

SUSAN PAYNE: Thanks. Okay. And what do others feel about this? I mean, to my mind we still need ... It's part of the consideration but we still need the kind of materiality of the document, or the hearing, or the other matter. That's part of the assessment, I think, of whether you're being able to properly participate.

And I think, also as part of that assessment, it is the ability to understand English, although I do take Kurt's point about the use of the word "proficiency," which I think was my word, and I perhaps need to find some alternative reference that isn't proficiency because that, perhaps, implies too high a standard. What do you all think about that? Mike.

MIKE SILBER: Sorry to keep talking. I think, possibly, the way to deal with that is to leave the list as it is, unless anybody has some necessary edits, but insert the principle in the lead-in which says that IRP discretion shall have regard to the critical imperative as well as the following non-exhaustive considerations. So, that's why I think we kept to the two elements. I agree with you. There is nothing wrong in any of those items listed, I just don't think that they capture the essence of the issue at hand.

SUSAN PAYNE: Thanks. That sounds promising. I was going to say I'm not seeing anyone disagreeing, and indeed I may not be seeing a disagreement but, Kurt, I see your hand.

KURT PRITZ: Right. So, I don't disagree. My point here was that the first two items of the six, which is the [intent] of the IRP, is to be meaningful, affordable, efficient, thrifty, brave. That one and the reference to the fundamental fairness in the ICANN bylaws, I think those two were combined in order to create the bylaw rule that the provision of translation service is for the claimants if needed.

So, it's sort of a little bit circular. The reason we say we're going to provide translation if needed is because we've said that it's the intent of the IRP to be affordable, efficient, accessible, etc., and for fundamental fairness issues. So, that's why I thought those first two could come out.

So, what do we really care about here? We really care about the statement of need, and I'm not far apart from you guys. I think the claimant should furnish a statement of need. It's in here that a statement of need can be five pages long.

So, I'm for the claimant being very specific as to why this need exists, so he has to provide that. And then, there is the materiality of the particular document. So, the need for translation is moot if the document is immaterial.

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So, that's why I thought those were the two most important things. And then, once you've satisfied that there is actual need and that the document is material, I don't think the cost and delay is an issue anymore because we've determined need, and need is need.

So, that's why I thought that part of it should come out. So, I really think, in an effort to simplify this for the panel, they need to decide that that need exists, like everyone's saying, and they need to decide that, "Yeah, this is a document that's important to an issue we're deciding." So, I think that. So, that's why I thought this could be shortened. Thanks.

SUSAN PAYNE:

Thanks, Kurt. I can see Scott's hand but I will just quickly respond, if you don't mind. On one and two, I don't necessarily disagree with you, actually. What I was trying to do, and perhaps not in the most appropriate manner, was I was just conscious that, obviously, one would expect the panelists to read the bylaws and to be aware of them.

But if we think about these rules as also being things that participants in the process would also be reading ... And I felt that a potential claimant may not always spend all their time scrutinizing the bylaws.

And so, I sort of wanted to find a way to remind potential parties of the bylaws, and what the considerations are, and what the purpose of the bylaws is. But it may be that that's not best addressed in that list of considerations, and maybe it's something that's better captured somewhere else, maybe even in the kind of introductory section, just so that it's a reminder that this is what the IRP is trying to achieve.

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And when you're trying to determine need you've got to have in mind what you're trying to achieve, which is something that's transparent, and just, and so on and so forth. Yeah. Thanks, Kurt. I'm seeing your comment in the chat that maybe the approach is given the objectives of fairness, etc. Yes. I think maybe that's the point. Okay. Sorry about that, Scott. Over to you.

SCOTT AUSTIN:

Thanks, Susan. No problem at all. Beyond some of the loftier aspects that we're hearing, I'm concerned with some of the mechanics. I guess what I mean is there's a statement of need. Well, first, as I look at item [inaudible] two, at the beginning on the request for translation services, it says it may be made subsequently if a new need for translation services arises.

My question is, one, how many times can they go back to the source? And two, in the statement of need that they provide initially, beyond the threshold that basically says, "Listen, we're low on funds," things like that, should we provide some guidance in terms of what that statement of need should provide for the course of the proceeding?

In other words, should they, for example, provide some kind of a budget anticipated need for discovery or for hearings if they think that there are going to be specific hearings? And if so, will there be witnesses? How many people will need to appear?

That sort of thing that's almost a litigation budget, if you will. Should that be something that's put into that initial statement of need? We've gone to the level of saying it can appear, it can be displayed on five pages, a

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limit of five pages of text, double-spaced, etc. We go into incredible detail in terms of what it's submitted on.

I don't know if it's done online, as well, and if we have limitations there or what, but I guess my point is, should we go into some detail in terms of what the need should state? The statement of need – how detailed should it be in terms of what they think will be required?

Because again, then we talk about the panelist down below in [inaudible] one, and two, and three what documents. I suggested, maybe, a rewrite of that, the documents and [we're hearing] for which the need relates or to which the need related.

And so, we're saying the panelist is going to rule on that. But perhaps we should require something be given to the panelist or the panel to rely upon, that the claimant is required to come up with, that provides sufficient detail so that their ruling is based on facts. Thanks.

SUSAN PAYNE:

Thanks, Scott. So, there are a few things in there. I'm going to go to the easy one first, which is in terms of the five pages of text, and double-spaced, and in 12-point font, to some extent that suggested five pages was my straw-person. The double-spaced and the 12-point font is a reflection of elsewhere in the rules where we have some similar requirements for written statements.

And so, I was mirroring that and somewhat plucked "five pages" out of the air based on the fact that the written statement included, for

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example, the claimant's initial written statement of dispute is limited to 25 pages in that format.

And I felt, in that case, what's a reasonable absolute maximum length for this kind of request for translation services? So, that is the origin of that and certainly is up for discussion. If people think that is significantly too much or too little, I suspect it's more likely that there might be a view that this is too much, that the request should be shorter than that, given that you're meant, in 25 pages, to be making out your whole claim. So, that would be my first reaction, as I say, just to the easy one.

In terms of the "do we want more detail on the statement of need?" I think that's what we've been talking about and I think we certainly have a desire to have more than a base statement. But I think my sense from the discussion of the group to date, and certainly on this call, is that we've been keen not to be excessively prescriptive to people, to claimants, when they're making these complaints.

And so, there is a certain desire to leave it to them to make out their argument in a manner that's persuasive for the panel. That would be my reaction but I would certainly welcome hearing what others think, if they have views on this.

SCOTT AUSTIN: Can I briefly respond?

SUSAN PAYNE: Absolutely.



SCOTT AUSTIN:

Yeah. I have no criticism whatsoever with the five pages of text, double-space, 12-point, and you don't need to justify anything. I think all these comments are brilliant. My question was, rather than be ... I think "prescriptive" was too strong a word. I was suggesting, should we provide some direction, with this blank piece of paper or five blank pieces of paper, what a panelist or the panel would be looking for to make a determination?

And if this idea is that if we say anything, we're going to be directing their steps in the wrong way, then so be it. But my concern would be there may be some folks who fear that they'll be, essentially, giving a blank check if they don't know how it's going to be used, just the fact that they need it, but that perhaps there should be some direction given. Not prescription, necessarily, but direction given, support given, for what the panel would need to see to make a determination if the need has been met or if the needs are valid.

Some of that could be some kind of a roadmap in terms of elements in the proceeding where translation would be crucial or critical and to see that they've anticipated that, so that, suddenly, there isn't a need for another dip: "Oh, well, we forget about that," or, "well, we didn't realize we were going to have 25 witnesses," and, "they all need to be translated," or "the transcripts of when they appeared need to be translated," that sort of thing.

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Some kind of an anticipation of what really is, realistically ... if it's possible. I mean, we're all speculating, but rather than for the panel to have to speculate perhaps we should give some guidance. That was my point.

SUSAN PAYNE:

Thanks, Scott. Yeah. Again, I'd be interested to know what others think about this. I'm not reading this as being that once one makes a request for translation services there is some kind of budget being allocated to this, so much as that if, for example, we're at the beginning of the proceedings and there's a determination that a claimant needs these services, then the panel's determination would be that, for example, ICANN's statement of response should be translated and that as and when there is a hearing there would need to be interpreters.

That kind of thing, as opposed to the idea that there might be a sort of having to keep coming back and asking for more money. I can see David's put in the chat, "Direction, as Scott suggests, might justify a dreaded form to request translation services, with questions needing an answer, plus some free form of a certain length." That's a possibility. We did talk about, is it appropriate to have a form? Mike.

MIKE SILBER:

Thanks. One question, going back to the list of considerations. Do we want to indicate what's off-limits so that we don't get into a situation where somebody wants us to translate the ICANN bylaws into a language so that they can prosecute their claim? We make it clear that this is restricted to the documents used in the proceedings and not ancillary ICANN documents.

SUSAN PAYNE: Thanks, Mike. I think that would probably have certainly been my understanding. And so, I would see some benefit in, perhaps, that being expressed. I mean, it does beg a completely different question, which is, shouldn't the ICANN bylaws be available in more than just English? But that's not really what we're here to be talking about.

MIKE SILBER: They are.

SUSAN PAYNE: I don't think they are.

MIKE SILBER: Well, they are, just not official versions.

SUSAN PAYNE: Right.

MIKE SILBER: No, there are a number of community translations that have been developed over the years.

SUSAN PAYNE: Oh, I see what you mean. Yeah. Not on ICANN's website, though. But yes, that's a digression. But yeah, I hadn't considered that and I think that's

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probably a point worth making, if others agree. I'm just making a note so I'll need to make an amendment for that. Okay.

MIKE SILBER: I think that if we can indicate what's excluded it, to some extent, limits the possibility of misuse of the process.

SUSAN PAYNE: Yeah, agree. I'm just scribbling myself a note so I don't forget that. Okay. All right. So, I'm not sure that we've really put to bed Scott's suggestion of needing more direction for what the panel needs to see. What is the view of David's suggestion that if we were to do that we might be talking about some kind of a form with some questions?

Albeit that I could still see those questions really only saying things like, why would you be excluded from participation without this service? Would a form be helpful? Brenda's reminding us we have 30 minutes left. Yeah. Kristina thinks a form might be helpful. Sam, does that seem a reasonable thing for us to propose?

SAMANTHA EISNER: I think so. We'd be happy to work with you to help get on someone [who's updated] in the section.

SUSAN PAYNE: Yeah. Okay. Thank you. All right. Thank you. Okay. So, I think we're making progress and there certainly is a bit of support for a form that

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would at least help to remove that blank sheet of paper kind of element to making such a request for the purposes of the claimant.

Okay. Then it is a small point but, since I did mention it and it was a change that I had proposed, it probably would be worth circling back and I'll keep asking for thoughts. Is five pages reasonable? Do we think that's too much? Too little? A form would obviously help with that, but given we're talking about free text, as well.

Yeah. Flip is thinking it's reasonable. Five is seemingly long to David. Obviously, five would be a maximum but it does seem quite long. Suggestion of three from Kristina. Yeah, at a maximum. What do we think about a sort of three? Okay. There is plenty of support for five but making it clear that that may be more than is needed. So, if we have our form, maybe we can do that. Okay. All right. Yes.

And then, I think another thing we haven't actually talked about yet is the idea of who should be hearing this, and more particularly I think the general rule would be I think there is an expectation that it would be the IRP panel. It may be that there is never an emergency need but it did sort of occur to me that there might be a scenario in which it's more urgent and that waiting for the panel to be appointed might be too late.

And so, I was proposing that we at least build in the possibility that this could be a sort of interim measure where an emergency panelist could be appointed to make a determination on this in kind of exceptional circumstances.

Now, the section that we've got in the rules at the moment that deals with interim measures is really about interim relief, as in interim

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injunctions and the like. And so, I think it would need some slight tweaking to that section, but I think that that's something that's relatively easy to do. But in principle, does that seem reasonable, that we would have an expectation that, generally, these decisions would be made by the IRP panel but that there could be an emergency application if it was needed?

The main consideration that came to my mind was that you don't have a panel in place at the time when ICANN would be putting in its statement of response, for example. And so, the statement of response from ICANN would be coming through in English and, until their panel has been appointed and there is a hearing about language services, the claimant doesn't have that statement from ICANN, having been translated.

Does that cause issues, do you think? Or you do you think this is good enough and that if there is a real issue, a real concern for the claimant because they can't read ICANN's statement in response, then that would be a scenario where there's an emergency? Okay. I'm not seeing any hands.

Our document has gone a bit odd but that might have just been on my screen. David McAuley in the chat is suggesting that he thinks it's reasonable to keep it to just allowing for, at least, the scenario where you could request it as an emergency panelist.

A comment from Kurt. He thinks there is only one harmful outcome here, that ICANN, or ICANN personified by the panel, refuses a request for translation services and the claimant afterward publicly alleges non-fair process. That's the only outcome that's damaging to the ICANN model.

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I'm not sure, Kurt, if that's specifically a comment in relation to the timing and who the consideration of the request is made by or whether this is a more general comment. I'm reading it as a more general comment.

But I think, isn't that really all part of the panel's responsibility when it's making a determination of need, to be bearing in mind that the claimant needs to have a fair process? Okay.

Yeah, okay. He says it's more general but it would apply to the emergency situation, too, and allowing for rapid consideration. Okay then, Kurt. In which case, do you think allowing for the opportunity or the option in case of emergency is good enough, or does that leave you with concerns?

KURT PRITZ: I'll just talk. I think this is fine, now we've made an allowance for it.

SUSAN PAYNE: Cool. Okay, thank you. I just wanted to make sure I was understanding you correctly. Perfect. Okay. All right.

MALCOLM HUTTY: If I may interject, I think, actually, what you've just said, Susan, demonstrates the importance of those considerations that we enumerated and briefly consider dropping. But the first two there, it directly came up in your reply just a moment ago.

SUSAN PAYNE: Yes.

MALCOLM HUTTY: So, anyway, I'm glad that we've kept them.

SUSAN PAYNE: Okay. I mean, we had talked around, or I had talked myself around, perhaps moving them so that they were part of the introduction to that list. And so, they weren't the considerations but they were more a reference to the role of the IRP panel, or rather the role of the IRP that the panel is empaneled to bring about. But I was hoping we wouldn't lose them altogether. But you are feeling that they are better left in the list?

MALCOLM HUTTY: I'm not terribly fussed where they appear. But it is useful to recall that these are things that should be brought in mind when exercising this sort of discretion because it directly answers the point that was just raised.

SUSAN PAYNE: Yeah. Okay. Thank you. That was my thinking in including them, to keep everyone's minds focused on what we're trying to achieve here or what the IRP is trying to achieve here. Thanks, Malcolm. Okay. All right. Can we scroll down to the next page, please? Brenda, are you able to scroll down for us, please? Thank you. Okay. Yeah. I think, maybe, if we can go a bit further? Perfect. Yes.

So, in terms of the last few paragraphs, Kurt had queried why we are referring to administrative costs. I just wanted to check that my explanation, or why it was referred to in that way, was making sense and

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that there was general comfort with that. This may have been a sort of redline text in the version that I circulated but it certainly has been in the current interim rules. Okay. Thanks, Kurt. So, maybe as a reference back to the bylaw provision that would work. Okay. All right.

And then, also to address comments from Kurt, I slightly tweaked around the wording to address your concern that we need to have had it determined by the panel that there wasn't a need for translation costs, rather than it possibly being interpreted as meaning that a determination hadn't been made. So, hopefully that makes better sense to people, although all comments and objections are welcome.

Finally, moving down, this last part is where we're capturing the notion that a claimant might do their own translation, and that could either be because they wanted to—so they have translation needs but they don't want to take advantage of ICANN and have the translation performed by ICANN language services, and they don't want it to be at ICANN's cost—or because they had made a request and the request was denied.

Obviously, there is nothing to stop a party who has a need for things to be translated into a language that they are more comfortable with. There is nothing to stop them doing that at their own cost. But in that scenario, then, that wouldn't be considered to be the administrative costs which, under the bylaws, are allocated to ICANN.

So, that would be considered to be part of the legal costs. And again, as the bylaws say, parties to the proceedings are bearing their own legal costs. And again, I could reference the relevant section in the bylaws that

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refers to that. I think it's probably the same section. But that would probably make sense, as well.

And finally—I'm not seeing any hands so I will just keep moving through—it seemed to me that, if we are having translation for someone who has this need, that could have an impact on timings and deadlines. And indeed, it could even have an impact on the timing of an appeal since the party who ... If we're assuming it's the claimant and they're unsuccessful and they might want to appeal, they ought to be able to read the decision in their language if they have this need.

But felt that, perhaps, the best way to address that was really not to get too prescriptive and just say that there is a discretion here for the panel to extend deadlines or allow additional time to take this translation into account.

And that would then address, also, I think, the concerns expressed way back by a couple of the governments who commented when the first version of the rules went out to public comment—which I think was certainly Switzerland and it may have been Spain or one of the others—who were concerned that, at the time, the rules hadn't built in any kind of allowance for timing and delay.

So again, hopefully that seems reasonable to people and uncontroversial. Again, not seeing any hands. Okay. All right. So, I think we're close, it seems. Certainly, after this discussion I've got a few changes that I will suggest and recirculate. But I think we are, hopefully, close to all being on the same page on this.

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Perhaps this is, since we've got a few minutes left, a good opportunity to just pause and see if anyone wants to circle back to anything or has any further thoughts before we wrap up. Okay. I'm not seeing any. None from David. Not seeing any hands.

Wow, Kurt. I always think of you as radical. The 1900's? Okay. Kurt is feeling old. Fine. Then we are, I think, looking good. In which case, reminder, again, our next meeting is in a couple of weeks' time. I don't have anything to raise as any other business but I will just pause and see if anyone does have anything they'd like to raise before we wrap up.

Okay. Not seeing any hands. Okay. I think that looks like I can let you have ten minutes or so back on your day. I will make an effort to get a revised version of this around as soon as I can, and hopefully we can all feel quite comfortable with it by the time we get into the next call on the 12<sup>th</sup>. All right. Thanks, everyone. Speak to you all soon. Yes. Keep safe and healthy. Thanks, Brenda. We can stop the recording.

**[END OF TRANSCRIPTION]**