
STEPHEN DEERHAKE:

Good morning, good afternoon, good evening, everybody. For the record, I'm Stephen Deerhake, the chair the ccNSO Working Group which is tasked with developing policy for the review mechanism involving ccTLDs. I want to thank you for joining today's teleconference.

For the record, this is the 17 February 2021 edition of the working group that's tasked with developing ICANN policy with respect to review mechanism for ccTLDs as mentioned in RFC 1591, Section 3.4. And this meeting today has been convened at 13:00 UTC.

I want to thank everyone for participating. I want to thank those of you who either stayed up really late or have gotten up really early for your participation on today's call. I note that, timewise, it's pretty prime time for our European and African colleagues for a change. Really early morning for those in the Americas. And, as best I can tell, the ugly middle of the night for our colleagues in Australia, New Zealand, and East Asia. So, I do want to thank you all for spending your afternoon with us, getting up really early or [getting up] in the middle of the night.

And, of course, I want to thank Joke, Kimberly, Bart, and Bernard for their continued great work with this working group and the call today. So, thanks again.

Administrative matters. Since our last teleconference, our sister working group finalized their work product, the "Final Report" on the Retirement of ccTLDs. As noted in my remarks during our last call, the report went out to the group's mailing list for a final round of comments, and we

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received none. Hence, it's considered complete even down to typo correction.

And I now believe it's in the hands of the Issue Manager who, if I understand how this all works, will firmly present it to the ccNSO Council who in turn will [inaudible] overall community for a round of public comment that I think will start from, like, tomorrow or the day after on somewhere into early April.

Bart, that's my understanding how things are supposed to move forward. How badly did I miss represent that?

BART BOSWINKEL: Almost there. Almost.

STEPHEN DEERHAKE: Almost? I know. That's why I'm calling on you.

BART BOSWINKEL: They start tomorrow or this week with the public comment, and then it goes to Council and to the membership for approval.

STEPHEN DEERHAKE: Okay. I was close. Thank you, sir. Sorry to make a mess of that. I don't have any action items in my note. Bart, Bernard, am I missing anything?

BART BOSWINKEL: No. Not to my knowledge. Bernie?

STEPHEN DEERHAKE:

Okay. Well, let's move on, then, to discussing the agenda. As you know, our last call was focused on beginning the process of engaging ICANN Legal in our work on developing the review mechanism. And the objective, then, of today's call is to focus on the requirements of such a process: what to include, the pros and cons of various panel processes, what might make sense with regards to escalation mechanisms within the review process, etc.

The overall goal is to see if we can arrive at an escalation path for review mechanism. We'll certainly not get there in today's call, but we need to start this journey so we're in a position to reengage with ICANN Legal when our thinking about all this is somewhat more solidified.

I'm also very curious of working group members that have any real-world experiences with either mediation arbitration and/or legal proceedings that their registries may have undergone. I think it would be helpful for you could, to the extent possible, share those with us.

And I think now how we're going to proceed today is a quick rehash of Sam Eisner's remarks from our last call followed by a review of escalation mechanisms. And at this point, I think all that Bart and Bernard argue over who takes the lead, and then we'll have some Jamboard work as well. And that's basically it for me. So, you guys want to proceed?

BART BOSWINKEL:

Yes, we will. Thanks, Steve. So, Kim, could you open the Jamboard, please? So, we circulated the Jamboard, and we'll continue with the work we've done. That was, it's already been, four weeks ago. That was the first time we exposed you to Jamboard and doing a bit of whiteboarding.

What we intend to do today is just recap the discussion from two weeks ago and then have a look at, based on these initial discussions, what you think should be or should not be included in the requirements for a review mechanism process.

Then we'll go into a little bit of polling about your experiences, as Stephen said, and try to find some pros and cons of the different methods. But we'll get there.

And then we'll look at the potential escalation path and try to come up with pros and cons of a two- or three-step approach. But we'll get to the details later on.

So, let me start with the requirements of the process. So, what you see in front of you is the result, I believe ... Oh, this is the summarized result, isn't it? Yes. This is the summarized result of the meetings. What I've done for your understanding, or so you understand, is I've copied and pasted all the sticky notes and put them where they are. And as you can see, some are double counted.

And I think it might be useful at this stage to have a more detailed look at some of these requirements themselves and have a discussion about what you had in mind when you put up these sticky notes, and to sort

out the diverging view on some of these items. Can you go to the next frame, please?

So, this frame is the summary, but now in words of what you saw on the Jamboard. And I'll give you a few minutes, or a minute or two, so you can read it. Then I'll start asking you some questions to detail down.

And I want to end with a discussion to include what you meant by—because that's where the diverging views were—the final group of “for discussion, to include.” So, just go through it for a for a minute or so and I'll get back to you.

So, I hope you had time to read it through. Let me first ask a general question whether you recognized the distribution about “must include.” So, the reference to RFC 1519, reference to the FOI, complete rehearing of the cases. This is from one group only, as a question mark. And “the process and policy MUST be ‘timeless.’”

Again, this is only from [one]. And “look at existing mechanisms to build on.” This could be broad, and we'll touch upon it later. So, I hope you recognize this.

So, let me ask the first question and maybe someone, if you want to chime in. So, all the groups had included a reference to RFC 1591 and to the FOI. And I think maybe that in itself is fairly broad. I have the question, so to what part do you refer to RFC 1591 and the FOI? In what capacity? Is it in the sense of a policy document including for delegation, transfer, and revocation? Or to a specific part of RFC 1591 or FOI?

Eberhard, I see your hand is up.

EBERHARD LISSE: Thank you. Hi, everybody. The first thing is, plain language in the RFC says that if parties are not satisfied, they have an avenue for appeal. So, that's the first thing that we need to sort out.

The question then comes, what can you appeal about? And that basically is based on RFC 1591 as interpreted by FOI. The most important one would be an unconsented revocation. Lesser so the other issues we have come about. And since it originates from the RFC and the RFC is not written very unambiguously, we need to make reference to both.

While I'm at it, we already have an administrative review by the Board ticking off the issues, so for me a complete rehearing is a must.

STEPHEN DEERHAKE: Okay. Bart, do you want to carry on then? Patricio, I see you've got your hand up as well.

PATRICIO POBLETE: Actually, I was thinking perhaps we shouldn't keep making reference to RFC 1591 anymore. As Eberhard said, it's not always unambiguous. It does contain a lot of things that are not relevant anymore. We did a lot of work to bring it up to date and interpret according to the current context when we prepared the FOI document.

I think anything we need to refer to should already be on the FOI report, so taking the RFC 1591 as a source document would only confuse things

because if people start looking at both things, they could find places where they disagree. And in those cases, I think the FOI should take precedence. That's why we did all that work.

STEPHEN DEERHAKE: Okay. If I understand you correctly, you're basically saying that the FOI should be the anchor document.

PATRICIO POBLETE: Yeah. I think the FOI superseded the RFC.

STEPHEN DEERHAKE: Okay. I can buy into that. I'll put that out on the table for the group to think about.

BART BOSWINKEL: May I ask a follow up question before we go to ...

STEPHEN DEERHAKE: Yes.

BART BOSWINKEL: Patricio, so as you know, the FOI is not a formal policy in the sense of like what we do now because it was never developed through a ccPDP. Do you still think, taking this into account, is that relevant or isn't it in your view?

PATRICIO POBLETE: Yeah. It is true that they didn't create new policy. That was outside of its scope. Its role was to interpret policy. So, if we did continue mentioning the RFC, it should always be in a [context] like the RFC 1591 "as interpreted in the FOI."

BART BOSWINKEL: Yeah, okay. Thank you. Thanks for the clarification.

STEPHEN DEERHAKE: I'm going to assume, Kim, that the order that I'm seeing hands is the order in which they were raised. And if that's the case, then I'll go to Bernard next, followed by Peter.

BERNARD TURCOTTE: Thanks. Just for clarification. I was listening to Eberhard. He mentioned something about a complete rehearing of what the Board ... I might have missed a piece of that. Eberhard, can you repeat that last part you were saying, please? Thank you.

EBERHARD LISSE: Yeah. The third line says, "completely rehearing of the case versus administrative review (due diligence check of process)." The ICANN Board does the [latter.] In other words, just having that wouldn't help me. I am for a complete rehearing of the case in whatever way we do this mediation arbitration or formerly remains to be decided. I agree with Patricio. "RFC as interpreted by FOI" is the way of going.

STEPHEN DEERHAKE: Okay. Thanks for that. Peter.

PETER KOCH: First, of course both documents go hand in hand. The FOI doesn't make sense without 1591, and 1591 needs the work that was done during the FOI process. So, the wording that is developing in the chat seems to be the way forward. And hopefully we reach agreement there.

My idea when discussing this—wow, four weeks ago—was, or my perception was that these are the fundamental, the constitutional documents. So, any interpretation of process or procedure needs to be compatible with these documents. That doesn't mean that either one will, in the very detailed wording, provide a solution. It's more the overriding, "It's the constitution, stupid." That's why I think they should be mentioned.

When it comes to the rehearing, I'm not sure we were there already, but I would say it depends on what the case is. And maybe not all of the issues that we've listed should be subject to the same guidance here. If there's a more procedural issue, then maybe rehearing, yeah.

If it's more operational, then there should have been appeals mechanisms involved before it comes to the review. So, maybe we need to differentiate or put the different issues in different baskets. Not sure yet. Thank you.

BART BOSWINKEL: Thanks. May I suggest that we discuss the complete rehearing more as separate item? Otherwise, let's first focus on the RFC 1591/FOI and how to use it going forward. I think that will make the discussion a little bit easier. I hope you agree. Yeah.

STEPHEN DEERHAKE: I agree. [Thank you.]

BART BOSWINKEL: [Yeah? Good.]

STEPHEN DEERHAKE: Peter, I assume that's an old hand, so I'll go to Jaap.

JAAP AKKERHUIS: Yes. I just wanted to kind of emphasize what other people are saying. I notice that RFC 1591 is for information only. And it actually starts out to say that this memo provides some information on the structure of the names and daily operations, stuff like that. So, we have to watch that we take that as the constitution of how things work, especially if you consider that somewhere else it says that it is extremely unlikely that any other TLDs will be created. Well, we've seen that [paper] before.

So, care should be taken with using RFC 1591. We should not use it as a pick-and-choose menu and forget about the rest. Thank you.

STEPHEN DEERHAKE: Okay. Thank you for that. Bart, back to you, sir.

BART BOSWINKEL: Thanks for the clarification. The way I interpret this—and I'm trying to summarize what was discussed—is the reference to RFC 1591 as a source document as interpreted through the FOI. It sets almost the parameters for the review mechanism, in particular some of the decision makings there, etc. But that is at least from where I stand. So, at least we got some clarity around RFC 1591 and FOI, [how it will] structure the work of the working group going forward.

May I look into the complete rehearing of the case with the administrative review or more the due diligence check that was already triggered by Eberhard? You could also ask or ...

First of all, you've got the role of the Board, of course, as a due diligence of what PTI/IFO has done. You could also argue [that] this should be an external administrative review of what has happened so that you have a third pair of eyes looking at the process. So, that could be another interpretation of administrative review, but I take your point, Eberhard, for that matter. And then a complete rehearing of the case, so I would say that's a full review of the decision.

Anybody who wants to chime in on this particular point in addition to what Eberhard just said or ...

STEPHEN DEERHAKE: Don't be shy, people.

BERNARD TURCOTTE: Anybody else?

STEPHEN DEERHAKE: I'm not seeing any hands.

BART BOSWINKEL: Nor do I. Nor do I.

STEPHEN DEERHAKE: Eberhard, go ahead.

EBERHARD LISSE: It's plain language of the RFC. Let me just bring it to [inaudible] on this.

"The Internet DNS Names Review Board, a committee established by the IANA will act as the interview panel for cases in which the parties cannot reach agreement among themselves."

That means it must be a ... It cannot be just saying, "The IANA Function operator did it the way it's supposed to do according to its own internal guidelines or according to policy." But it must be a substantive review whether it should have been done or not, not how it was done. As far as I am concerned.

BART BOSWINKEL: Thanks, Eberhard. Yeah. Eberhard, thanks. May I ask and probe this little bit? So again, if you go back to the FOI, as we said, [and] the formulation that you agreed upon that it's RFC interpreted through the FOI, the FOI does not mention this part. So, how should we parse that? Go ahead, Eberhard.

EBERHARD LISSE: The language to me is plain. If two parties don't agree, they will make use of the review mechanism, of the review board—whatever we call it that we develop. There is no need to interpret it. The FOI didn't interpret it because they noted there is no such board and such a mechanism must be established that leaves us with the freedom to design what to do.

We could say only an administrative review, but I would not be able to live with this. And that means I would not be able to achieve consensus on that. But I'm not predisposing what the outcome is. I'm just saying we are free in what we're doing because the plain language said the two parties, if they can't agree, they can go to review board—let's call it like this—and we can now decide how this board and the mechanism or the operating procedures the board operates under will be.

BART BOSWINKEL: Thanks. Anybody else? Especially on the ...

Let me put it this way. And this is, again, just to get the temperature of the people attending the call today. If you agree that the review panel, review mechanism, or review process as will be designed needs to be a

complete rehearing of the case, as Eberhard suggested, could you please tick your green mark?

And you can find the green mark on the Reactions at the bottom of your screen. Please check your green mark if you agree with the full review. Maarten, and I see your hand is up. Go ahead.

MAARTEN SIMON:

Yes. I have a question. I agree with Eberhard here, but I have a question. Does that also mean that in the procedure, new facts, figures, information can be brought in that hasn't been judged by PTI before? Because that would open up a lot of things. Or is it limited to whatever ... Okay. Your answer, Eberhard?

EBERHARD LISSE:

That would be substance, and we are free to decide whether to do this or not. And I will defer this a little bit and first look what mechanism that ...

I'm not saying it must be a complete rehearing, but it must be a substantive thing. It must be saying, "Okay. The two sides don't agree." So, we're not going to look whether the IFO dotted the I's and crossed the T's, but we must look at which side is right in plain language. How we structure this, whether you can bring in new information or not, is a separate issue, and it's an important one. But I think we can defer this. Just keep in mind that you must raise the issue again.

STEPHEN DEERHAKE: Okay, thank you. Maarten.

BART BOSWINKEL: [I see now that] [inaudible].

STEPHEN DEERHAKE: Okay. Bernard then. Bernard, the floor is yours, sir.

BERNARD TURCOTTE: Thank you. Just a minor caveat on Bart's question. And it indirectly touches on what Maarten was saying. One of the questions that we're going to have to face is do we have more than one procedure? Is there an escalation mechanism? And the notion of a full rehearing of the case could depend [on] if we have an escalation mechanism with a few steps. Maybe not all the steps will redo a full hearing, but the ultimate step which is binding.

And I think we all agreed at our last few meetings that the ultimate step, according to us, would have to provide a binding solution to the issue at hand. Then, yes, that would probably be that. And I tend to perfectly agree with Eberhard that on the question of new material, if we're too early, it's going to depend on the type of mechanisms.

And the question of new material is not a simple one because they're ... Depending on the type of mechanism you have, there are all sorts of rules for page limits, just to name one, and the type of material that can be brought. Thank you.

STEPHEN DEERHAKE: Thank you, Bernard. Nigel, I see you have your hand up, sir.

NIGEL ROBERTS: Yeah. Thank you, Stephen. I'm going to be very quick as I can on this because Bernie kind of stole half of my thunder there. So, well done, Bernie.

Look. What's missing from the situation and what we had a carve out for is that there is no review mechanism for matters relating to [ccTLD] delegation and transfer. That was a deliberate carve out in the Transition when the Accountability Mechanisms Committee and the accountability mechanisms were provided for in the other parts of ICANN.

Now, so what we've identified in the FOI is that there's no review mechanism, and there really ought to be. Now what we don't say is what that review mechanism shape should be, as Eberhard quite rightly pointed out. If you take the literal words of the RFC, it's entirely correct but only covers part of the story as we now understand it 25 years later.

The RFC is basically talking from a position when, if you couldn't persuade John, he would get a couple of the great and good ... That's presumably what was in his thinking, but seeing as it was never exercised and never formed, we can't say what might have been. But what we're designing is a whole accountability mechanism for matters of ccTLD delegation and transfer.

So, what was described in the RFC is what we describe as internal review where the IANA, maybe a higher manager, thinks again. That might then possibly be an appeal to the ICANN Board above ...

But none of these are independent. These are all ICANN. There needs to be also, in my opinion, and I suspect in the opinion of a lot of people on this call, an independent element the way there are IRPs, and then possibly even going to litigation. But that's the job of this group to design. It's not the job of this group, by a wave of the hand, to say, "We won't be looking at that," in my opinion. Hope that's helpful.

STEPHEN DEERHAKE:

Thank you, Nigel. Eberhard, I see your hand is up so the floor is yours.

EBERHARD LISSE:

Yeah. My understanding of the RFC has always been, prior to FOI, that all of these arguments between parties concerned only during the application process. I have left that position because the FOI decided we achieved consensus and it was a small point to concede. If you read it, you could say if there are two contending parties for an application and they can't agree who is the more deserving one, it's not for the IANA operator to decide, but among themselves and then a board. That is not practical.

So, basically, I would think that we read it that if somebody is aggrieved by decision that we are listing in our table and has status or standing, if they cannot get it run through the into the internal escalation, then they

could avail themselves of the mechanism that we are going to design however it looks in the end. Okay.

STEPHEN DEERHAKE: Thank you. Nigel, I assume that's an old hand and so I will go to Allan.

NIGEL ROBERTS: It's always an old hand.

STEPHEN DEERHAKE: Allan, the floor is yours, sir.

ALLAN MACGILLIVRAY: Thank you, Stephen. So, back to Bart's question. And I [well] understand why he poses it. I don't know how I would answer it if I was required to put my hand up now because maybe the question should be, firstly, should there be an escalation procedure? And then I think we should see where we are on that. I would vote yes.

And, personally, I would want to wait until we have kind of evolved that escalation procedure to decide whether we actually need the final step because it may well be that in doing all that, we go. "Look. This is pretty good stuff." The next step could be very complicated and expensive because I'm afraid if I answer yes now, we'll start designing that final step in all its complexity when I think the emphasis should be on the escalation procedure in the near term. Thank you.

STEPHEN DEERHAKE: Thank you, sir.

BART BOSWINKEL: Thanks, Allan.

STEPHEN DEERHAKE: Eberhard and, Nigel, you have your hand up as well.

BART BOSWINKEL: Nigel is [inaudible].

STEPHEN DEERHAKE: Nigel, go ahead.

NIGEL ROBERTS: Is Eberhard before me?

STEPHEN DEERHAKE: No. You're showing up above him, so I'm assuming you're [next].

NIGEL ROBERTS: Oh, okay. Thanks. I would certainly agree with Allan that we don't plunge straight into designing the ultimate [level]. But I strongly disagree with the implication that most of what Allan said was ...

If there's one thing I've learned in my short term, first as a member and then as a chair of the Board Accountability Mechanisms Committee, it is

that it is absolutely crucial for both the people affected and for ICANN as a community and as an organization that there be an independent tribunal providing checks and balances about what we do. It's absolutely crucial.

We cut that out from the Transition for a very good reason, and we were all in favor of that at the time. But the time has come where we need to be looking at making sure that there is an independent. Otherwise, we're going to end up in a situation whereby somebody who is aggrieved for either a real or imaginary or misperceived reason will go to law. They may go to law in jurisdictions whereby there's a question over even forum conveniens and so on and so on and so on.

And we must give the opportunity for these ... They're admittedly extremely rare circumstances, but to have an adjudication by tribunal that's clearly independent. So, we will need that stage. There's no doubt in my mind. Thanks.

STEPHEN DEERHAKE: Thank you, sir. Eberhard.

EBERHARD LISSE: I agree in most, in substance, in particular to what Nigel says. We must have an independent mechanism. We must have an internal mechanism, and I think I like internal remedies. The courts in Namibia also like internal remedies. You can't just sue somebody if you had an internal remedy and you didn't use it because that resolves issues early. It costs less. And it's more convenient if, for example, one has an issue

with the IFO, one uses the internal mechanism and they agree we made a mistake [inaudible]. Then we are done.

If that does not, one must have a mechanism. And that mechanism, however it looks, whether we call it a pane, a tribunal, or board. I would like to call it a board because that's what the RFC says. However that mechanism looks like is a separate issue, but it should be independent so that it is trusted by all sides.

BART BOSWINKEL:

May I make a suggestion that we—effectively two suggestions? Thank you, first of all for the discussion, by the way. I think that was the whole purpose of this part of the exercise. So, that's good. If I look at complete rehearing of the case, administrative review, I tend to agree that this might be too early, and the implications are huge if you do it this way. So, we can park this.

But let me rephrase it, although it was not included in the initial exercise as an item by any of the groups. But let me rephrase this to ask you the question if you agree that at least one step in the escalation process should be independent. So, there needs to be an independent forum/board/tribunal where the aggrieved parties can go to.

So, if you agree there needs to be an independent forum, could you check your green mark? Because I think that sets already a very firm requirement for whatever process the working group will design. Please check your green mark if you agree there needs to be an independent. And if you disagree, the red mark.

I see one green. Two. Anybody else?

STEPHEN DEERHAKE: [We need more voting] here, guys.

BART BOSWINKEL: Any reds marks?

STEPHEN DEERHAKE: I'm not seeing any reds, but I'm not seeing a lot of checks either.

EBERHARD LISSE: We are building consensus here.

BART BOSWINKEL: It's just to get the temperature of the room.

STEPHEN DEERHAKE: Right.

BART BOSWINKEL: If you do not vote, is that because ... Nigel, go ahead. You had your hand up, or that's a green check?

NIGEL ROBERTS: [inaudible]. Can you hear me?

BART BOSWINKEL: Yeah, we hear you.

NIGEL ROBERTS: I think what two or three in favor and no against means is that we haven't discussed it enough and we haven't, should we say, convinced people what we're talking about when we talk about independence.

BART BOSWINKEL: Let me put it the other way around, please. If you haven't put your mark in, could somebody speak up who did not take a position on just this temperature of the room? I appreciate that you do not fully understand, but at least set direction on the work to move forward. Is there anybody who hasn't checked either a green or a red mark who wants to speak to that point on whether one of the fora needs to be independent? So, there needs to be an independent [forum].

In the chat, "I do not vote. Just agreeing with the concept." Yeah. That's the whole point about the check marks. This is not a vote. This is definitely not a vote, by the way.

STEPHEN DEERHAKE: No. It's not a vote.

BART BOSWINKEL: Francis, I assume you're in favor of an independent. Peter made that point earlier. Yes, I agree, but it would be nice if you just checked the

green mark if you agree with it because that gives ... At least then we can strike it from further discussion or stop discussing.

Okay. Nobody wants to speak to it who didn't vote, and now we see some checks. I don't see Nick on the call because I recall that his point was around the timeliness of the process and policy. So, that was, again, from one group. We'll discuss it at a further meeting when he's around to introduce it.

"Look at existing mechanisms to build on." Again, at least one group, and I think there was only one group who said it must be included in our way forward. So, what to include for further discussion is [to] look at existing mechanisms to build upon. And maybe, probably, other groups as well.

Is there anybody who wants to speak to this point? I don't see any hands up.

BART BOSWINKEL:

In a way, it's self-explanatory and we will proceed. And this is where it becomes interesting. So, some considered it nice to include. It's not a high importance, or not considered highly relevant. Let's continue. I don't see further [inaudible].

"Whose decision or action to be reviewed." That was considered nice to include, I think, in a way. So, you've been working with the spreadsheet, "whose decision or action to be reviewed." So, in a way it's addressed already as a starting point. And then the scope of the review was nice to ...

Bernie, I see your hand is up. Go ahead.

STEPHEN DEERHAKE: Bernie, I see your hand.

BERNARD TURCOTTE: Yeah. On the spreadsheet. After meeting with Samantha, we're going to have to review that because, after review, she basically told us the meeting that the reconsideration request was not applicable because the IRP is also not applicable. So, that would change the dimension, if you will, of what we're looking at.

Also, let's keep in mind what Sam told us at the meeting. To a certain extent, if a decision is made by IANA and sent to the Board for approval, and there is a process that we institute and the Board approves it and if we bring in a process to reverse the Board decision based on the PTI decision, that can create all sorts of issues because of the contract between PTI and the ICANN Board. And I'm sure that will be a concern for ICANN Legal.

So, we have to keep these things in mind, and we probably have to consider that our best place for intervention is in between the time IANA makes the decision and prior to it going to the Board, and making sure that there is no, if you will, spillage which could create a lot of secondary issues possibly. At least a consideration. Thank you.

STEPHEN DEERHAKE: Thank you, Bernard. Eberhard.

EBERHARD LISSE: That can be solved. In German administrative law, if any civil service office makes a decision that negatively impacts you, they have to put down what—it's difficult—what's called a rechtsmittelbelehrung. That means that they must write down what options you have and how long you have until you can file a request or an appeal or whatever. And if they fail to include that in such a thing, it stops prescription.

I'm not trying to be very formal, but it's something that one could consider that before PTI goes to the Board, they say, "This is our decision. You have got X days or weeks. If you're not happy with it, you've got X days to do this and this and this and this. If you fail to do this, then you run the risk that the decision becomes final when voted to by the Board."

I have no particular preference whether we can appeal to the Board because the Board is basically ticking off whether internal processes and policies have been complied with, but they don't usually go against the substance. So, if we want to appeal the substance, I have no particular preference whether we do it after ICANN Board or before the ICANN Board.

BART BOSWINKEL: Bernie.

BERNARD TURCOTTE: Thank you. And Eberhard's reference to the German procedure, I think, fits in quite nicely with a lot of the things that we were thinking about in

the spreadsheet. And, yes, definitely one of the things we're going to have to think about as we move this along, especially with ICANN Legal. Thank you.

STEPHEN DEERHAKE: Thanks, Bernard. Nigel.

NIGEL ROBERTS: Yeah, thanks. The statement that the Board just rubber stamps and checks that the procedure is followed is an interesting one because it is contained within a no longer operative contract between PTI and ICANN. Well, there are a couple of things that we have to bear in mind here.

The Board has ultimate fiduciary responsibility for the entire corporation. And by fettering the discretion of the Board to act in the best interests of ICANN may not be lawful. It certainly may not be desirable. So, while you may say by convention it's the IANA that makes the decision and the Board simply approves it, you really want the legal position to be as it is in law with the fiduciary duty, which is that the Board has ultimate responsibility for what PTI does.

And that may be something that you can include when you design the three-stage—or however many stages it is—process between, “Hey, IANA. Think again ... Hey, your decision I don't agree with will go to this ... Hey, we'll go to a completely independent, ADR-style independent-chaired tribunal which is binding on ICANN and PTI.”

So, there are all these three different stages, and I think that the Board falls somewhere in the middle of that at the moment. But let's not try

and completely oust the ability of the Board to correct a mistake if the mistake is being made. Thanks.

BART BOSWINKEL: Thanks, Nigel.

STEPHEN DEERHAKE: Nigel, I assume that's an old hand.

NIGEL ROBERTS: It's always an old hand.

STEPHEN DEERHAKE: Yeah. Thank you. Bart, back to you, sir.

BART BOSWINKEL: Yeah, okay. So, as a result of this discussion ... And I don't know whether it's important or not, but it's definitely something to review—and maybe that's something for either the next call or the call after—is to go over the starting point which are the decisions. So, decisions, what Bernie alluded to. So, first of all the reconsideration in context of whether or not to have an independent, or if you don't want the IRP so people understand the implications. And also, the decisions and stages of decisions under all the Board that were identified originally.

And it might also have an impact on the on the retirement process if you think about it. But “whose decision or action needs to be reviewed” is

something that we need to revisit as well on one of the next calls. So, that's the spreadsheet. We need to revisit it with Sam Eisner or ICANN Legal, whomever. Okay.

"Scope of review." I think this is almost similar, at least in my view, to complete rehearing of the case administrative review. Again, that will be parked unless somebody else has another opinion about this specific item. I don't see [inaudible].

STEPHEN DEERHAKE: Not seeing any hands.

BART BOSWINKEL: No, nor anything in the chat. And then the "Do Not Include." That's an interesting ... Again, I think there was only one group that put the sticky note "subject to local law" in the "Do Not Include." And other groups did not include that sticky note at all, so I've listed it here.

I don't know which group it was. I believe it was the group from you, Stephen, but I'm not sure. No, it was Bernie's group. But whomever raised this point "subject to local law" in the "not to include" category, could you speak up to that point? So, first of all why you raised the point of "subject to local law" and, secondly, why you put it in the "do not include" category.

So, first of all, "subject to local law" as an issue or as a topic. Anybody want to speak to it? And "local law," I assume, what was meant by it is the law that governs the ccTLD [or this. So,] from the territory.

Eberhard, I see your hand is up.

EBERHARD LISSE:

If I recall correctly it wasn't my group, but I spoke out very strongly afterwards. It's not possible to have the proceedings that we design to be subject to each of 250 different local laws when this is going to happen. Every entity sitting in a certain jurisdiction is subject to that jurisdiction whether we want it or not. That means I, as the ccTLD manager and my company, is registered in Namibia so we fall under Namibian jurisdiction, intellectual property concerns, separately.

But we cannot have a process that is different for 253 ccTLDs. That must ... So that if it happens in Namibia, it goes like this; if it happens in Zimbabwe, it goes that; if it happens in Angola—which are three neighboring [countries]—it goes like this. Different languages can't work. That doesn't work.

So, the process itself cannot be subject to any local law as much as I would like to have it because ICANN is never going to accept that they are subject to 253 different situations over which they have no knowledge, they have no control. It's different languages and it just ... This just will not work.

BART BOSWINKEL:

Thank you. Anybody else? Nigel, I see your hand is up.

NIGEL ROBERTS:

Yes. I just want to remind everybody who may not have been in one of the two earlier groups particularly, and also just remind ourselves. First of all, law is not the same as jurisdiction. You can choose your law. You may have jurisdiction imposed on you. So, the two are not the same thing.

And the second and more important one is that there is a common conflation, a common mistake, misunderstanding that there is not a one-to-one correspondence between an ISO code, which is used for ccTLDs, and the system of law. I'll give you an obvious example, the United Kingdom, where the ISO code—irrespective of whether you say it's GB or UK—but where the ISO code represents an area where four completely different systems of law, to a greater or lesser extent, exist.

So, I'm kind of agreeing with Eberhard here, but I just want to make those two points so we keep that clear because we keep making this assumption that there is this thing called "the local law of the ccTLD," and there may not be such a thing.

STEPHEN DEERHAKE:

Thank you, Nigel. Bart, given our time constraint, how do you want to ...?

BART BOSWINKEL:

Eberhard, your hand ... Is that an old or new hand? Then I'll get back to you question.

STEPHEN DEERHAKE: Okay.

EBERHARD LISSE: It's a new one. I would just support what Nigel said. It's not 253 local laws. It's even more than that. It may be, if the ccTLD in the UK is located in England, it's English and Welsh law. If it wasn't sitting in Liverpool, it would be Scottish law which is quite different from what I understand. So, it makes even more sense that we avoid this pitfall.

NIGEL ROBERTS: Yeah. There are 51 in the U.S., for example.

BART BOSWINKEL: So, at least it is very clear, and I don't see any ... Let me ask it this way and then I'll get back to your point. Let me ask it this way. Is there anybody on the group who, if you agree that there should be no reference to local law in the process procedure, please check your green mark. And, again, this is just the temperature of the room. This is not a consensus call because we can't. But it gives a little bit of direction moving forward. Again, yes.

If you disagree that you ... So, you agree there should be a reference to local, please check your red mark. So, again, thank you. And there are people haven't made up their mind, but that's fine.

But at least it's very clear that the initial thinking of the group is [that] there should be no reference to local law. Thanks.

So, first of all, thank you for the, I think, very fruitful discussions to put some meat on the bones of the requirements around the process you want to design.

We have a lot of exercises in mind. If you don't mind, I want to call it a day because we're nearly done. It's nearly the top of the hour, and we do have a couple of items where the groups diverged. And so, that will need some more discussion.

Kim, just go to the next page just to show and to prep, and you can read it at your leisure. So, we did have a polling around the different panels—or fora, how you want to call it—experience you had. We will not do it, but this is something for the next meeting.

And then go to the next one. Have a discussion about the pros and cons of these different types of panels.

Next frame, please. And then the escalation path is what you could do, a two-step or a three-step. And somewhere in between around that blue—initially was my thinking when I drafted this for discussion—is the Board decision. But, based on the discussion to date, that may need to be amended.

And then the next frame was a three-step approach because you haven't discussed this. But this, I know, is one of the possibilities. A full, independent review to be followed by an appeal because, in some cases, people do want an appeal on the initial independent review. And both would be external. And, again, that's where you see that Board decision in between.

But that's for the next meeting. This was just to alert you on what is coming. So, back to you, Steve.

And can you go back just to the agenda, Kim. Thanks.

STEPHEN DEERHAKE: Thank you, Bart. Can we have the agenda?

EBERHARD LISSE: And in the meantime, can I just make a short note?

STEPHEN DEERHAKE: Yes.

EBERHARD LISSE: We should maybe look at the language that we're using—subject or referencing or whatever. The point is that I don't want a process that, if ccTLD manager from [some country], from [ccTLD.zz] uses the mechanism, then the law from the country of referenced by [ISO ZZ], applies. And if it's .xx, then the law from XX would apply. That's what we don't want whether it's ... We are all subject to local law, but we should just be careful on our language. That's what I'm trying to say.

STEPHEN DEERHAKE: Okay, thanks. Okay. With regards to Any Other Business, is there any other business? I'm not seeing a waggle of hands, so I'm assuming not.

With regards to next meetings, you can see the schedule there. I believe we've got Sam Eisner from ICANN Legal doing an encore performance at our next meeting.

BART BOSWINKEL: Stephen?

STEPHEN DEERHAKE: Yes, Bart?

BART BOSWINKEL: May I suggest that before we meet again with Sam that we wait one more meeting? That we continue this exercise.

STEPHEN DEERHAKE: I'm happy to do that, actually. I think it would be useful that we get a little further down the road in our collective thinking before we reengaged with her.

BART BOSWINKEL: Yeah. That would be my suggestion because at least you have a strong, or a stronger sense of where you want to add and to have a more fruitful conversation with her.

Bernie, what do you think? Because you've been talking to her and you've been introducing her to the group.

BERNARD TURCOTTE: I think that would probably be fine. We have to book her again, and we have to see how that fits in versus ICANN meetings, etc.

STEPHEN DEERHAKE: Yeah. [We're going] to book her at a bad time, too, at the 05:00 UTC meeting.

BERNARD TURCOTTE: Yeah. That's ...

BART BOSWINKEL: That's not too bad for her. She's nine hours. It's early in the evening.

BERNARD TURCOTTE: It's the same as the last time we met with her.

STEPHEN DEERHAKE: Yeah.

BERNARD TURCOTTE: So, that's not too bad. Yeah. I don't think it's a problem. Why don't ...

BART BOSWINKEL: Let's check what her availability is, but I—

BERNARD TURCOTTE: Yeah. Let's check with her and make sure that—

BART BOSWINKEL: But I think, yeah.

BERNARD TURCOTTE: Otherwise, we might be a month and a half down the road, and it's possible that if they did manage to do some research, their thoughts could help us with this because there is no intention that when they show up again that it's going to be final. It's an ongoing process which will be ...

But let's check with her, and the chair and the vice-chair can make a decision based on the results.

STEPHEN DEERHAKE: All right. Let's do that. So, tentatively you can see what our next meetings look like. My understanding is that we got a bit of a break because of ICANN70 between March 17th and the April 7th meeting. And then we will carry on.

BART BOSWINKEL: Please be reminded that April 7th we're into the area of the time of daylight saving, but we'll stick to the UTC times.

STEPHEN DEERHAKE: Yes. Good point, Bart. Thank you.

That's it for me. I just want to thank everyone for participating. Sorry we went into a little bit of extra time. I just want to thank Bernard and Bart and Kimberly and Joke for their support and contributions. Thanks for doing the heavy lifting today, Bart. I hope to see everybody virtually again on the next call, and hopefully all of you physically soon when that becomes possible.

I just want to thank everyone for their turnout today—we had a good turnout—and their participation. And I think with that, I'm going to declare this meeting adjourned. So, thank you. I wish you and those dear to you all well, and please continue to stay safe.

Kimberly, you can stop recording. And thank you for your technical support. And we're done. Thank you, guys. Have a great—

[END OF TRANSCRIPT]