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BERNARD TURCOTTE: Can you hear me?

EBERHARD LISSE: Yes, we can.

BERNARD TURCOTTE: I hear you very faintly.

EBERHARD LISSE: And you can go into the Zoom?

BERNARD TURCOTTE: Yes. I fixed it. Thank you.

STEPHEN DEERHAKE: Okay, great. Thanks, Bernard. So, good morning—

EBERHARD LISSE: There's Bart.

STEPHEN DEERHAKE: Okay, great. I haven't seen who else is on. There we go. Great. Thanks, Kim, for starting the recording. So, good morning, good afternoon, and good evening. For the record, I'm Stephen Deerhake, the chair the

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ccNSO Working Group that's tasked with developing a policy for the retirement of ccTLDs as well as for the Review Mechanism.

So, I want to thank everyone for joining today's teleconference. This is the 19<sup>th</sup> May 2021 edition of the working group tasked with developing new Review Mechanism. And we have convened this meeting today, again, at 20:00. I want to thank all of those who have either stayed up really late or gotten up really early for your participation. And, as always, a big thanks to our support staff, especially Joke and Bart who are giving up the prime of their evening to be with us. As well as Kimberly and Bernard who, of course, we couldn't do this without them all.

Time wise, again, we know it's prime evening for our European and African colleagues, mid to late afternoon here in the Americas, and an early morning for our colleagues in Asia overall. So, thanks again.

Roll call will be taken in the usual manner, so if there's anybody on audio only, let yourself be known. And I am aware of a couple regrets due to Zoom conflicts.

Moving on to administrative announcements/matters. I really have none, other than the let you know that the proposed split of the retirement proposal from the Review Mechanism that we are working on currently is making its way to the ccNSO Council for approval. Bart, was I semi-inaccurate there, or are we pretty much in sync on what's going on there?

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BART BOSWINKEL:

Yeah. Just for clarification, so the first decision will be the formal decision to separate the PDP on retirement from the Review Mechanism. So, effectively create two PDPs by one is at the brink of decision making of first step of the decision-making process by the Council which one they recommend to support the proposed policy. It will go to the ccNSO membership. Hopefully, the Council will agree that the tentative date for approval by the ... So, the members vote will start around the 6<sup>th</sup> of July. And hopefully we can do it in one round of voting. But, yeah, that's it.

STEPHEN DEERHAKE:

Thank you, Bart. We'll see. Also, as I did during our last call, I'd like to bring everyone's attention that there will be a policy session at ICANN71 involving both this working group, formerly designated as PDP3, as well as the PDP4 working group on IDNs. And I'll mentioned more about that in the next meetings, but you can see from the agenda when that's going to happen, as we now have that nailed down.

And, as I mentioned last time, as we get close to ICANN71, we will be circulating a slide deck for comment by members regarding that session. And that's it from me regarding administrative matters.

With regard to action items, I have none to report. Our main topic today is #4, as you can see. Before I hand things over to Bernard who will lead our discussion, I do wish to first thank, for the record, Sam Eisner of ICANN Legal for pitching up on our last call and engaging with us. Reviewing the transcript, I think was very productive discussion, and we

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will be having her back sooner rather than later, I think, for further discussions because I think it's incredibly useful.

I also want to thank the working group for its approval of the topic clusters which Bart did the second reading of during our last call. I feel that was an important milestone for us.

To set the overall framework for today's discussion, I want to go back to one of Nick Wenban-Smith's comments from the last call. For those of you who were on that call, you might remember that I put him on the spot and he did respond admirably. What I want to bring to your attention is his remark that, to quote him, "I think we should try to do better with something low cost, accessible, and quick in terms of aspiration anyway."

My sense from our last call and from reading the transcript of that call is that we really do want the un-IRP here. I mean, there was, after all, a reason that ccTLDs were excluded from [inaudible] up as the IRP process enshrined in the current bylaws. So, the goal of this call is to advance our thinking regarding review options and processes following our discussion with Sam. And thus, without further ado, I think I will turn things over to Bernard who will be framing the discussion without benefit of slides, if I understand correctly. So, Bernard, the floor is yours, sir.

BERNARD TURCOTTE:

Thank you very much. Can you hear me?

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STEPHEN DEERHAKE: Yes, we can. Thank you. You sound great.

BERNARD TURCOTTE: Excellent. New headset. Working great but unfortunately has a very oddly-placed mute button. So, often, when I take it off, I press that button. Anyways, moving right along.

Yes, after going over the transcript, it became quite obvious, as Stephen has said, that people are looking at low cost and effective. I'm going to hone in on one of the key points right away on the binding section. I mean, if you go through the transcript, basically Samantha says that that's not going to happen. And if you go through the IRP, basically it's binding but in an extremely narrow sense. And the Board can still disregard the advice if it believes that it is in the best interests of the corporation. So, binding? Maybe. Maybe not, even in IRP.

In this case, I think it would be a very hard sell. Why am I thinking this? Because I've been on the Review Mechanism for the IRP for the last four years. There, there was a question regarding repose, and basically people have been arguing about this point—which, in many ways, is similar to this point of being binding—for at least three years.

And I think we finally made some headway after three years with the group saying, "Okay, we've tried this every single way and ICANN has just made the arguments going forward. And they have said from the beginning that they would not budge on this. They have not budged on this. They have been accommodating in other areas, but the idea of repose is simply not going away.

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So, after three years, people have said, “Well, we've got to wrap this up, and so there will be a repose.” And some people are very unhappy with this. [inaudible] talking about this because I see a lot of parallels to binding here.

ICANN legal will not support this going to the Board, I think I can say with a fair amount of certainty. And so, that item will decide how we go forward. If this group decides they absolutely want to go forward with a binding, then that will dictate our work. Even if we do settle on something and come up to a proposal, I don't think it's something that will be acceptable to ICANN Legal, and ICANN Legal would advise the Board that they don't think it's acceptable.

And then our chances of getting this through is probably extremely low if we also consider the fact that people always have the choice to take ICANN to court. And a U.S. court decision will be binding on ICANN. That is obvious. But that will imply lawyers. That will imply a very long time. That will imply—let's be clear in this kind of thing—millions of dollars. So, there is an opportunity for binding, but not through these mechanisms.

If we decide to go some other way than binding, it provides us the opportunity that we will probably get flexibility on some of the other points. And it will provide a mechanism. I see your hand, Eberhard, and I will get to you in a minute. It'll probably provide us with a mechanism which we do not have right now. Let's be clear, the IANA Function operator decision goes to the Board. The Board reviews it. And if they feel that IANA has followed its procedures, then they say that and the decision gets implemented.

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So, I think that is a key decision which will dictate how we work, and we should probably discuss that. Eberhard, over to you.

EBERHARD LISSE:

Thank you. This is the language of the RFC and, even as interpreted by the FOI, it's clear—decisions will be binding. We are not making decisions for proposals for ICANN Legal. We're not making [positions] for the Board, necessarily. We're making a proposal for ICANN. If ICANN Board can do it, we'll see. I see whatever any lawyer says in the first instance as the first opening of the round of negotiations. So, if they say no on the first time, that doesn't mean anything. Yeah?

And I think we should not do what they call in German—*vorausseilender Gehorsam*—preemptive obedience. We should not lower our expectations because we think ICANN Legal is going to flex its muscles. If they do, we'll see about it. Many things, even strong opposition from ICANN Legal, can be taken to discussions and both sides can ...

But if they put their foot down say, "It's not happening," then we can stop right now. If the position of ICANN expressed by ICANN Legal is that it will not be binding, then I am not going to be in favor of continuing this because it's a waste of time. And for me, I'm not able to support a consensus that we say just because somebody from ICANN Legal said, "Well, it can't be done," that we stop asking for the sky.

BERNARD TURCOTTE:

Thank you. Stephen.

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STEPHEN DEERHAKE: Thank you, Bernard. Well, this is another reason for continuing in our engagement in conversation with ICANN Legal, but my actual question is for the rest of the working group members on this call. Do you have any thoughts/input on this? Now is the time to start speaking up as we engage in this particular topic of binding in a serious way. Thank you.

And I'm seeing a dearth of hands being raised. I really would appreciate some comments from anybody on this call regarding this issue of whether or not the resulting Review Mechanism Policy will be binding or not. Thank you, Bernard.

BERNARD TURCOTTE: Thank you, Stephen. All right. Don't be shy.

STEPHEN DEERHAKE: Please don't be shy.

EBERHARD LISSE: Can I quickly follow up on myself while we're waiting for others?

BERNARD TURCOTTE: Absolutely.

EBERHARD LISSE: What you said about courts been binding is true, but we recognized in previous calls that small ccTLDs in particular, or even midsized ones, cannot avail themselves of this facility because they don't have the

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resources. I have been involved in a few court cases. I have been involved in writing an Amicus Brief. And that was quite—in a U.S. case—that was quite expensive even though we brought it in on time and on budget. But we had to really rap the lawyers over the knuckles every week to not over bill us.

But we would not be able to take anybody to court unless they agree we can do it in Namibia which, as the recent case of this Net4, whatever the registrar shows ... In India, they denied venue. ICANN denied venue, but briefed the court as a matter of politeness which I find perfectly in order for professionals. The court decided to give instructions which ICANN says we don't have to abide by. But they abided by them temporarily and then discussed this at court and convince the court to lift that ban. It's always better to convince the court to redirect itself than not obeying a court even if the court has no reach outside the borders.

But in our situation, we should propose whatever we want. We should not be too serious. We should not be too expensive. We should be fair to both ICANN and us. But it should be a mechanism. We should strive, at least, for binding. And then we can ask, as Clinton, it depends on what “binding” means.

BERNARD TURCOTTE:

All right. Thank you for that Eberhard I see Sean in the chat was saying he came in a little bit late and he missed part of my opening statement. Basically, Sean, what we were talking about is that ICANN Legal has basically said that binding is not going to work. And then I brought up the fact that binding in the IRP is maybe not what we think binding is.

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And, secondly, that after working for four years on the review of the IRP for ICANN, there was an argument that was very similar to this being brought by people. And ICANN said at the very beginning that it would not work, and people argued for about it for four years. And it did not work. This is, I think, for them [inaudible] thing.

Now, we can proceed as this, but one of the points I think that Eberhard is making is that we can try, but the shape of a review mechanism that it is going to make a binding recommendation for ICANN is probably very different than a review mechanism which is not. And that is part of the things we have to understand. I think that, in part, the reality is that we have to understand that the “keep it simple and keep it low cost” means keep lawyers away. I mean, that’s basically the reality of it.

As we can see with the IRP that had every intention of being quick, efficient, and low cost, IRP cases are reaching into the millions of dollars for both sides, including ICANN, on a regular basis. So, the reality is that that’s not going to happen cheaply if we bring in a system.

No, if it's the will this group that we build a simple system—and I see your hand, Eberhard, sorry—maybe based on Patricio’s suggestion, and say that the results will be binding, then so be it. We can try that.

Eberhard.

EBERHARD LISSE:

When I raise my hand, you never have to interrupt yourself. I just want to sort of enter the queue.

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Why are we doing this? RFC says that grieved parties can ask a third party, the so-called IDN Board, and the decisions will be binding. We are not saying that we have to bind ... It's a matter of what binding is, but it doesn't have to be the same as people to say we do something and then the Board can decide whether they want it or not. Let ICANN [inaudible]. That's my ditch.

BERNARD TURCOTTE:

Okay. I think that's a fair point, Eberhard. I think what we can achieve, in my experience, is that we can, as we have been discussing, review IFO decisions and make it binding that that review, if there is one, be included in the material sent to the Board. I think in that level of binding, there's probably not a problem. If we're talking about binding from a point of view of forcing the IFO to change a decision it has made, that's where we're probably going to have an issue.

Eberhard, is still the same hand, or do you wish to respond to that?

EBERHARD LISSE:

No. I will just quickly respond. You know I have the utmost of respect for you for well over 20 years, but you're staff.

BERNARD TURCOTTE:

Absolutely.

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EBERHARD LISSE:                   And I am starting to become a little bit concerned about the volume, or whatever you call it, which this is being proposed. We are making ... We are [ccTLDs. We're] making policy for ccTLDs or ccNSO members. And while I agree and I accept your points and I'm fairly happy with the way you're proposing it, I must say I'm starting to feel a little bit uncomfortable. You know, Bernard. We've known each other for many years. There is nothing personally here, and I'm not accusing you of anything. It's very difficult for me to say this, but I'm starting to feel a little bit uncomfortable.

BERNARD TURCOTTE:               Well, I'm sorry to make you uncomfortable, Eberhard. All I'm trying to do is allow you to benefit from my experience in other areas where I have seen very similar things play out. And I'm not trying to force anything. I'm just trying to lay it out so this group can decide what they want to do. And I think that's the way I've presented it, and that's the way I will always present it because you are quite correct. I'm staff, and it's not for me to make that decision.

Stephen. If you're speaking, you're on mute.

STEPHEN DEERHAKE:               Sorry about that. You had Alan ahead of me, so go to Alan first.

BERNARD TURCOTTE:               Okay. Alan.

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ALLAN MACGILLIVRAY:

Thank you, Bernie. I'll just say right off the top before my remarks that I think we are extremely well served by you, Bernie. And I, for one, believe at all times that you are acting in good faith, and I just wanted to put that on the record.

But this is a very important issue, and I think it's important that we spend some time on it. I think it's very important that we understand each other very clearly. Okay? So, I have a couple of suggestions or questions. I don't know how to put it.

One, I would personally benefit from hearing from Eberhard what he means by "binding", just to elaborate on that just so that we completely understand what it means to him—like what the obstacle is. I think I know, but I really don't want to presume that I know.

Secondly, just as a way of maybe trying to break out of a bit of a box here, maybe we should be thinking about putting a few questions in writing to ICANN to effectively say, "If we brought forward a mechanism that had, at its center, that the decision by this party would be binding on ICANN, how would that be dealt with?" Okay?

So, in other words, Bernie is trying to interpret what he feels would be the impact, but because the issue is so important ... And maybe we should get something, I hate to say it, but something in writing on this. But, also, I'm of a mixed mind on this because I really would like, at the same time, to be moving forward.

So, anyway, I throw those suggestions out in case they're helpful. Thank you.

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BERNARD TURCOTTE: All right. Thank you. Stephen.

STEPHEN DEERHAKE: Thank you. I just want to echo Allan's comments regarding you, and just say that this issue of a binding versus non-binding is one we obviously have to hash out. I know what 1591 says, but we're in kind of another universe now and we've got the IANA Function operator and ICANN Legal structures that need to be taken into consideration. Thank you.

BERNARD TURCOTTE: Thank you, Stephen. Peter.

PETER KOCH: Yeah, thank you. And I'm also joining the group that expressed confidence in everybody, and especially in staff involved in this. And thanks for all that explanation and deep dive, and so on and so forth.

I'm wondering, if we end up in a roadblock situation where this is the core the issue, binding versus non-binding—and then the subtleties of interpreting that verbiage in context, and so on and so forth, set aside for a moment because I'm not a lawyer, as you know. I'm wondering what potential solutions are on the table for getting around that roadblock or declaring it a non-roadblock.

Other committees—probably not ccNSO PDP groups—have consulted external legal advisors, and I'm just asking whether that is an option.

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And one of the reasons is not *not* trusting ICANN Legal but, of course, there's kind of a conflict in goals there because ICANN Legal, of course, has to advise the Board to "protect" the organization and not necessarily has to be creative in finding ways around the [inaudible] procedures.

So, that's one. The other is, at what point would we have to go back to the Council and say, "Dear Council, we are stuck," and make it their problem?

BERNARD TURCOTTE: Thank you for that, Peter. All right. Any other hands? I can take a stab at the lawyer question. There is ...

I see a hand from Stephen. Stephen?

STEPHEN DEERHAKE: Real quick, back to Peter. You're talking ccNSO Council when you refer to Council? I was just confused. [Thank you].

PETER KOCH: Oh, yes. ccNSO Council. Sorry.

STEPHEN DEERHAKE: Okay.

BERNARD TURCOTTE: All right. Thank you for that.

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The thing is, on asking lawyers, the point is that this is not law we're trying to interpret. They have to look at how ICANN is structured and what can and cannot be done. In the context of Work Stream 1 and Work Stream 2, but mostly Work Stream 1, we had lawyers involved at a very high level—probably the senior group of lawyers was Sidley—who spent quite a bit of time looking at various things in a context where things were going to change, where the bylaws were going to change.

Here, if we were to go down that road of asking for an opinion, we'd have to find lawyers that are quite familiar with ICANN. Now, there are a few, but depending where we go, as Sean has pointed out in his message, lawyers can say what they want. At the end, it's a judge. In the ICANN world, lawyers can say what they want. At the end, it's the Board that decides until a court says otherwise.

So, that's an avenue that will take a fair amount of time. I realized this is a key question for folks. This is why I've put it right up front and center. This will be one of the key elements that this group has to decide, and we need to walk our way through this and understand what the realities with those things are. This being said, I thought that Allan's question was very good in trying to explore what Eberhard means by "binding". The reality is that we, myself and Eberhard, had a bit of an exchange on that here, but maybe Eberhard can do his usual very clear simplification of what he intends by binding".

Eberhard, over to you.

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EBERHARD LISSE:

Well, first of all, when I started to make this previous intervention, I spent several minutes on expressing my confidence in you in a convoluted way. And I want to make absolutely clear that this is nothing personal. But, as said, I start to get a little bit uncomfortable.

The literal meaning of this is “binding”. A decision binds both parties. If a certain island wants to have its ccTLD from a commercial entity in Northern Europe and there has been no substantial or any other misconduct, I don't think, if the ccTLD manager agrees to it, that such a transfer can be done whether the GAC became involved and wanted it or not.

If such a decision was then being made to transfer the domain name—and there have been very stupid decisions by the Board, the last one that I recall is [mali.ml]. If such a decision is patently wrong in the face of RFC 1591 as interpreted by FOI, then what alternative, what option does the ccTLD manager have? Other than going to court, none.

And therefore, there must be a barrier to prevent anyone—the Board, IFO, whoever, outside courts—to say, “Whether there is substantial misconduct or not, we revoke and transfer in this example.” There must be a barrier somehow to prevent ICANN from violating its own bylaws or the RFC as interpreted by FOI. And that's what we're here for, and if we can't ... If we give up before we have tested the waters, before we have seen what the negotiation produces, then I think that we are not doing enough. I don't want to say we should just stop, but we should [start] from ... We should ask for more.

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I went to negotiation class once, and I think a few others as well. And one thing I recall very well is that the trainer said, “No matter what, especially if you win your negotiations, always ask for more.” In other words, you must always ask for more than you want to want to get. If it's a negotiation, you must always have positions that you can give up to achieve the position that is important for you. To just allow the other side categorically to say, “No, it can't be done.” Then we don't have to do this.

I see this as a negotiation, in the end, where we need to explore what does this article or this opinion that the lawyer [inaudible] where it says, “Generally the corporate law in California prevents certain things, but some can be done.” So, we need to go into more detail just to categorically say ICANN can do [whatever the Board says] the fiduciary responsibility is.

It is for us, at the moment, I think too early. As usual, convoluted and simple.

BERNARD TURCOTTE: Thank you, Eberhard. Stephen, next. You're on mute, Stephen.

STEPHEN DEERHAKE: That's not helpful. I'll give way to Allan.

BERNARD TURCOTTE: All right. Allan.

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ALLAN MACGILLIVRAY: Sure. Thank you, Eberhard. This is very helpful. So, certainly I think if you poll all of us, I think a vast majority of us would prefer a binding mechanism. I don't think the issue here is what we want, but certainly for myself, I do not want to go through a process all the way to the end, then to have it rejected. Okay? So, I really liked your negotiating school analogy. I think that's very apt in the context because in that approach, you think through what your fallback options are.

And so, what I would encourage you to do is to say, "Even though we all want binding, if we didn't get binding, what would be an acceptable second-best outcome?" So, I'd asked you that. Can move forward on the basis of a dual track? If not binding, then something else. Thank you.

BERNARD TURCOTTE: Thanks.

EBERHARD LISSE: If I may reply. It is extremely poor negotiation tactics to put your goals that you want to achieve and your fallback position in a recorded and published thing. That is very difficult to do.

BERNARD TURCOTTE: All right. Thank you, Eberhard. Stephen, your hand's still up and you're still muted.

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STEPHEN DEERHAKE:                   Okay. We're having issues with Zoom today.

BERNARD TURCOTTE:                I can hear you.

STEPHEN DEERHAKE:                Thank you. And this is really a question to both Allan and Eberhard—because it feels like we want to go back and engage with ICANN Legal, if I understand—at least their two views on this. And Allan, I believe, representing the majority of the group by what he just said regarding if we polled them formally. To go back to more formalize what we feel as a working group is our definition of binding and play it out with ICANN Legal and get an additional response back from them. And I'll leave it at that.

I see Eberhard's got his hand up, so I turn it back over to you, sir.

EBERHARD LISSE:                    I would agree with this as a second step. I would first prefer that we review the material that is available. We have got a couple of lawyers on the group. Bart is a lawyer even though he's staff. So, he's neutral. Nick Wenban-Smith is a lawyer. I don't know who else is. Nick Wenban-Smith is a native English speaker, so it's easy for him to read this text.

I think we should actually review this document and maybe get a little summary of what points are interesting in our context. And then we can talk to ICANN Legal and say, "Look, this is what we have identified. We appreciate the fiduciary responsibility."

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I know that Board members have to be very careful what they put on Facebook and what they put on other social media because it triggers immediate preservation and other issues, what they do, because it can be discovered and so on. So, I don't know all the ins and outs, but we should at first not ask the party that we want to talk to how far we can go. We should first look at what the material that we have at our hands says about this now.

No, as you know, I'm only a gynecologist, but in the immortal words of Otter in National Lampoon's Animal House, "What's the difference?" But we need to look there. In that article, there are some options where the Board can be bound, as far as I read it. So, we should maybe ask a few native English speakers on the group like Nick. Maybe we should task Nick to lead that. He's not here, so we can volunteer him today. So that we should set up a subgroup or something to just look at this then come back to the group on that that.

BERNARD TURCOTTE:

Right. Thank you, Eberhard. Now, so what we're talking about as an approach here before going back to ICANN Legal—and I think it's always good to have things in writing—is a small group look at the available material. And I think by "available material"—please clear this up for me, Eberhard—you're talking about that Sidley memo that was circulated?

EBERHARD LISSE:

Bart. I think Bart circulated such a memo a couple of—four weeks ago.

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BERNARD TURCOTTE: Weeks ago.

BART BOSWINKEL: It was—

EBERHARD LISSE: [Something like that].

BART BOSWINKEL: Sorry, Eberhard. You're right, but that was the note that was sent by Sam, and that was the Sidley notes that they prepared during the Transition discussions. And that was, I believe, on the scope of the fiduciary duties, etc., on the Californian law. So, it was clearly not coming from ICANN's lawyers, but it was a note from ...

EBERHARD LISSE: No, no, no.

BART BOSWINKEL: Yeah. It was a note from Sidley, yeah.

EBERHARD LISSE: I think, however, that ... I fully agree. It was from one of the law firms that advised during the Work Stream 1. I think we should look at the material that was developed during the accountability process. And such

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a memo, or whatever is there, is at least something that can inform our discussion if we then ...

We are basically, at a moment, in a situation that we have to ... We heard from ICANN Legal it can't be done, and that's the end of it. Whereas, the devil always lies in the details. We have to have a proper look at this and read the material and say, "Wait a minute. There is maybe this and that," so that we come to a solution that is fair, both to ICANN and to the ccNSO members or the ccTLDs.

I am not trying to be one sided here. As I said, I'm a big fan of fundamental fairness, which means both sides basically must be treated fair and it must be accessible. But we, at the moment, are struggling a little bit with the know-how of the fiduciary responsibility which has been given as a reason why binding is deprecated.

BERNARD TURCOTTE: Stephen.

STEPHEN DEERHAKE: Thank you, Bernard. If I recall correctly, that memo was both by Sidley and Adler, the other law firm involved. And it was in the run up in the midst of the Work Stream 1 process. And I guess, if I understand Eberhardt correctly, the question is how did what they say get rolled up into and incorporated into what became the ICANN 3.0, as I call it, October 1, 2016—I think it was now—bylaws and institution that resulted from that?

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And I'm not quite sure how we could trace that down. [EI], if you have any comments on that, I'd appreciate them. Thank you, sir. Thank you.

EBERHARD LISSE:

I haven't really ... Sort of, I'm on the spot here. I haven't really got a big, detailed insight into this, but one thing is really clear for me. We shouldn't give up in the starting blocks, so we should spend some thought on this. And we have material that we haven't really reviewed, so we should review this. And if it is difficult to understand, then should ask the lawyers—especially the native English speakers—here in our group to have a look at it and maybe condense it down to an executive summary that even I can understand.

BERNARD TURCOTTE:

All right. If we're going for this approach, there's ... What was I going to say? All right. Usually, the way we proceed on these things, staff can do some of the early legwork of peeling out some of the relevant sections. We can bring it back as a topic paper to this group. Lawyers and others can look at it as the points we would like to send to ICANN Legal for understanding their reasoning. Once it gets approved by this group, then we send it for formal—

BART BOSWINKEL:

Bernie, you're breaking up.

BERNARD TURCOTTE:

Oh, sorry. Once we send it to ICANN—

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BART BOSWINKEL: Or is it just me?

BERNARD TURCOTTE: I don't know. Stephen, can you hear me?

STEPHEN DEERHAKE: Yeah.

EBERHARD LISSE: I can hear you very well here in [inaudible].

STEPHEN DEERHAKE: It's just you, Bart.

BERNARD TURCOTTE: All right. So, basically, so we don't jam up on this part, this is what I think we could propose. We'll go over the material and we will bring it back to this group or a subgroup, if you prefer. But we probably can start by bringing back the whole group. If it looks too complicated, we can allocate a subgroup to refine it. Then we can get a final position which will be sent to ICANN Legal for formal comment. Is that sort of a way forward?

Eberhard.

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EBERHARD LISSE: Before we answer that, I see Maarten is on the call. If I recall correctly, he is also a lawyer. Would you maybe pipe up and voice a quick opinion off the cuff, perhaps? And/or volunteer to join the subgroup?

MAARTEN SIMON: Hi, Eberhard. Yes. I was joining late. Sorry for that. And I heard a large part of the discussion. So, I think the way forward in a small group, yes, I'm definitely available for that. And I think if we can work with Nick, that will be very helpful as he's a native speaker.

I must say I'm sort of puzzled because I was on the IANA Working Group at the time when they drafted this thing, when the lawyers came up with this thing. But I'm a bit surprised about what they say now—that it's impossible. So I think, yes, we should dive deeper into it and see what we can get out of it because it's a bit too simplified for me for now.

BERNARD TURCOTTE: All right. So, let's work out the details here. Do we want to let this group start the work or do we want staff to pull things together? And we haven't decided if we're having a subgroup right away, but some people seem to be interested in participating.

So, first question—the staff pull together a paper for internal review here at this group? Eberhardt.

EBERHARD LISSE: I would think staff should pull together a list of available documents that referred to this with a two-liner of what they feel is relevant so that we

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have got the material together. And then we can maybe, at the next call, decide, "Okay, we start with the sub-group, or we can do it over the list."

BERNARD TURCOTTE: All right, excellent. Thank you, Eberhard. Next in line, Stephen.

STEPHEN DEERHAKE: I'll defer to Allan.

BERNARD TURCOTTE: Allan.

ALLAN MACGILLIVRAY: I was going to actually make almost the same recommendation as Eberhard. I think would be a bridge too far to ask staff to summarize complex legal opinions. But what I think would be useful, just like Eberhard said, is to bring all the information together and then if there was something on top to say, in effect, "You might want to look at paragraph 47. That seems to be most relevant to our discussion, etc." In other words, bring it together, point us to the important parts to read. But I think it's too much of a challenge to ask for a summary. Thanks.

BERNARD TURCOTTE: Well, certainly staff would not provide any opinion or anything like that. Yes, I think it's more in line—what you're describing, Allan.

Stephen, your hand is still up.

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STEPHEN DEERHAKE: Thank you, sir. I agree with Allan. I think we want to perhaps have the group take a look at this from a timeline basis. This memo got turned out towards the end of the Working Group 1 process. It was available prior to the intensive 10- to 14-days sausage making that produced the bylaws that we now live under. And perhaps, the question to look at is what was incorporated and excluded from that memo into the final thinking that went into the bylaws and what became ICANN 3.0 Administrative Operations Manual?

And I don't think it's appropriate for us as a working group to ask you guys at staff to try to sort that out. It would be nice to know from the participants in the sausage making what they thought of the various points of that memo. We know who those people are. Maybe we should reach out to them directly. I don't know. I'd leave this up to an opinion of the working group as to how to proceed forward on that. But I agree with Allan. I just don't see that we can ask you guys to suddenly put all this together. It just doesn't make sense to me. Thank you.

BERNARD TURCOTTE: All right. Thank you. Allan. Allan, you're muted.

ALLAN MACGILLIVRAY: Old hand.

BERNARD TURCOTTE: Okay, thank you. Bart.

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BART BOSWINKEL:

May I suggest that, from a staff perspective, we just try unearth the various documents—because I think we know where to look in the archives, etc.—and come up with a first batch of documents on the next call and then see how this group wants to proceed with these documents? And we will not even try to summarize it, only maybe what we could do is provide the context of when the document was produced. So, say, in [between] the time so you have an understanding. And then have a look at it before we start thinking and speculating who was involved, etc.

There is documentation available. Let's first unearth it and then take the next step, especially with people like Maarten and Nick, and maybe some others who have a legal background or an interest in legal stuff; that we look at it. And in the meantime, may I suggest that we also start looking at other topics and not get bogged down on this because that will ...

Yeah, if the whole working focuses and waits for this, we lose valuable time and this will not be resolved—is my guess, based on the discussions we're having right now. Within one or two meetings, let a small group look at it and come back to the main group with some ... And then have a full discussion again around this very important topic.

But I think the first step might be, and that would be my suggestion for you is let's first try to find the relevant document, as Eberhard suggested, and create that small working group or subgroup who can

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look at it. And then let that group come back with their findings and inform this group. Thanks.

BERNARD TURCOTTE: Thank you, Bart. Eberhard.

EBERHARD LISSE: I agree with both points. We should not stop the work until we have got that. We should proceed with something else until we've got the ducks in a row. But you are a lawyer, Bart, so I don't think it's too difficult. First of all, we unearth the documents. That's what I wanted. And then to have a look. "Okay, that document says something about this, and this, and this. That documents says something like, 'it's relevant because it [inaudible] this and this [inaudible].'" And we know these things.

And, I mean, you're quite right. We should be able to read these things ourselves. We should not be spoon fed or demand to be spoon fed. We have got a couple of lawyers. We have got a couple of people who are not lawyers, but who are interested, like me. And whether you're in the subgroup or not, we can all read the documents and provide input.

So, I think I would support both of your suggestions—that we first unearth these things. When we've got them, we move on them. And in the meantime, we carry on with another topic.

BERNARD TURCOTTE: Thank you, Eberhard. All right. So, I think we have way forward. Staff will gather up the documents and bring them forward for our next

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meeting—is what I’ve taken away from that. We will then spend a little bit of time going over that. If there is a lot of time required, then a subgroup will work on them. The objective will be to frame a question or questions for ICANN Legal regarding binding in the context of those documents.

Is that the general sense of things? I have—

STEPHEN DEERHAKE: That's my takeaway from it.

BERNARD TURCOTTE: All right, excellent. I will simply note, for historical perspective, Stephen was mentioning the sausage making that brought forward the ICANN 3.0 bylaws. I will simply note that I was the only non-lawyer present at that meeting in California when all the lawyers sat around a big room for a couple of days representing Work Stream 1 interests. So, I do have a bit of context.

All right.

STEPHEN DEERHAKE: And scars.

BERNARD TURCOTTE: Yeah. A few of those. Now, this being said, we're at the top of the hour. I don't know if we wanted to start a new topic.

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Stephen?

STEPHEN DEERHAKE: I think we're kind of spent after this one. I did not expect this one to quite go the way it did, to be honest with you, Bernie. And I know it's getting late in Europe. Are you guys up for another half hour or do you want to drop off? Perhaps a show of hands.

EBERHARD LISSE: I'm done.

STEPHEN DEERHAKE: All right. I know—

BART BOSWINKEL: Stephen, sorry. I should have put my hand up. I think this is a nice conclusion of this one. We have a way forward. I think we got some very clear direction of travel right now. And let's reconvene and come up with a topic, unless you have one. But starting the discussion now and everybody is still with his mind in the binding, this is probably not a good idea.

STEPHEN DEERHAKE: Bart, I had no idea that Zoom had a mind reading capability, but you read mine. So, yes. Bernard, if you'll give me back the floor, I will move to AOB and wrap this up, sir.

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BERNARD TURCOTTE: It's all yours.

STEPHEN DEERHAKE: Thank you. So, we are now on to Any Other Business. I have none. Anything anybody else wishes to bring up? Any complaints about my management of the group are always welcome, publicly or privately, of course. I'm not seen big waving of hands.

So, with regards to next meetings, as you can see, we've got one more on the 2<sup>nd</sup> of June at 20:00 UTC on Zoom. And then we have our ICANN71 policy session on the 16<sup>th</sup> of June from 10:30 to 12:00 UTC. And I want to thank Kimberly for confirming it to me even though I should have just looked at the agenda because that's where it was.

So with that, I'm done. I want to thank all of you for attending today's call. I think it was a rather robust discussion with regards to the concept of binding. And I want to especially thank Joke and Bart who are attending our call out of band. And, of course, thanks to Kimberly for her usual Zoom magic, and Bernard for really doing the heavy lifting and leading this discussion today.

And with that, I declare this meeting adjourned. And Kimberly, you may stop the recording. Stay safe, everyone. And I hope to see you all next time. Thank you.

VANDA SCARTEZINI: Bye, everyone.

MAARTEN SIMON:           Bye, everyone.

[END OF TRANSCRIPT]