
STEPHEN DEERHAKE:

Good morning, good afternoon, and good evening to everyone. Again, for the record, I'm Stephen Deerhake, who's the Chair of the ccNSO Review Mechanism Working Group. And I want to thank everyone for joining today's teleconference. It looks like we've got a pretty healthy turnout, which I'm happy about.

So this is the September 15th edition of the working group. It's tasked with developing ICANN policy with respect to establishing review mechanism for the retirement ccTLDs. And we've convened today at 20:00 UTC.

I do want to thank those of you who have either stayed up really late or gotten up really early for your participation. And again, as always, a big thanks to our support staff. Bart is back from his holidays, so we have him on board as well. And also a big thanks to Susan Johnson, who's from ICANN staff, who is this us today as well.

As per usual, roll call will be taken. If you're on audio only, you can make yourself known to staff. And as most of you know, our last call, the September 1st, was essentially non-call, as we didn't have enough participation of the subgroup members in particular to really engage in a meaningful conversation on binding. So hopefully—and indeed it appears—we've done much better this time around.

Administrative matters. I don't have any. Nor do I have any action items. Nor do I believe staff does either.

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Am I overlooking anything, Joke, Kimberly, Bernard, and Bart? I don't think so but correct me if I'm wrong.

BERNARD TURCOTTE: I don't think so either.

STEPHEN DEERHAKE: Okay, great. Thank you, guys.

As you can see, we're going to dive right into discussion on binding, which is Clustered Topic 1. And we started looking that way back in early August—on the 4th, actually. And we do need to sort our views on this before we engage with ICANN Legal. Bernard will be presenting. I hope we can have a fruitful discussion. We've got several members of the subgroup on board today, which is great. And I think that's it from me.

So with that, Bernard, I shall turn this floor over to you, sir.

BERNARD TURCOTTE: Thank you. Can you hear me okay?

STEPHEN DEERHAKE: We can.

BERNARD TURCOTTE: All right. Excellent. So, basically, the purpose of the group is to come up with a question or questions for ICANN Legal to see if we could come

[up] with a mechanism that would make our review mechanisms' decisions binding on ICANN.

I'll skip the first part there: questions to ICANN Legal. We'll go into the introduction. We'll get back to the questions at the end of the document. The—I called it the BWG—Binding Working Group was created to develop questions for ICANN Legal that would allow ICANN Legal to provide an opinion to the ccPDP-RM with regards to the question of the results of a review mechanism being binding on ICANN. So I believe that clearly states what we're trying to do to allow ICANN Legal to provide the best possible opinion/response to this.

The question should be based on scenario which provides a maximum of detail on which these questions will be based. I think, for everyone, its easily understandable. ICANN Legal can give an opinion, but the quality of the opinion will be directly proportional to the amount of information that we provide in the scenario upon which we're asking questions. Otherwise, they have to suppose things, and the answers become much more variable at that point.

So the group started working on this, and one of the most important details is, what does the ccPDP-RM mean by "binding" in the context of this exercise? The BWG proposes that binding be defined as ICANN having to accept the results of the review mechanism and implement any relevant and effective corrective measures to the case being reviewed.

So that's probably the most important part in defining these things.

You're going a little too far ahead there for me. Sorry. Let's go back down a bit more. A bit more.

Next. BWG has chosen to use the retirement policy as a basis for its scenario because it provides a much more detailed framework than RFC 1591 and its associated FOI. The BWG has also opted to use a variation of the current ICANN IRP as the review mechanism for this scenario because it is detailed, well understood by ICANN Legal, and currently provides binding decisions in its cases.

So what we've done here, in line with what we said we would try and do, is create an environment where as many things as possible are known and detailed. And by using an equivalent to the ICANN IRP, this is something ICANN Legal and very familiar with, and all the rules and some rules about how these things work are perfectly understood by ICANN Legal. The only thing we have to do in our case, as we'll discuss later, is replace basically a deviation from the bylaws by something else. But we'll get to that in a minute.

The BWG understands that the ccPDP-RM has clearly indicated that a review mechanism like the ICANN IRP is not desirable, and the BWG is not proposing that this review mechanism be considered as an option for us. However, using it in this thought exercise allows creation of a very detailed scenario which should allow ICANN Legal to provide us with clear information with respect to binding.

So I'll pause here and see if there are any questions at this point. Are we clear on how we've set this up and what we're trying to do?

STEPHEN DEERHAKE: Any questions? I don't see any hands.

BERNARD TURCOTTE: So either I've been extremely clear, and the group was excellent in defining this document, or people are all asleep by my dulcet tones. Hoping it's the first. We'll continue. Definition of binding. Again, we're just restating it for the purpose of this scenario.

Our group defines binding as ICANN having to accept the results of the review mechanism and implement any relevant corrective measures to the case being reviewed, subject to similar conditions as per the IRP rules in 4.3x of the ICANN bylaws.

And that little addendum there in brackets is really important because 4.3x details all the conditions—the if's, and's, but's, or's—about bindingness of the decisions of the IRP. So, again, by choosing this, we provide a level of detail that is just really very functional in a real-world sense, given it works for the IRP.

All right. Our scenario:

As stated, the ccNSO recently accepted the draft retirement policy and will soon be forwarding it to the Board for adoption, where it is expected that it will be adopted as is. The policy contains two options for the manager of the retiring ccTLD to request a review. The IFO deciding that a change to the ISO status of a two-letter Latin ccTLD does not correspond to an ISO 3166 alpha-2 code element—the exceptionally reserved, basically. If there is a change by the ISO to that code, the IANA

can decide to retire the code. And if IANA decides to retire the code, there is an appeal possible.

The IFO refusing to grant the ccTLD manager of a retiring ccTLD an extension to the period per the manager's application [...]

For those unfamiliar with the Retirement Working Group, basically, the way it works is you automatically get five years to retire the ccTLD. If you feel that you can justify ... Yes, Peter. Thank you. If you feel you can justify an extension to up to an addition five years, for a total of ten years, you can do that. If you make the case for that and it's rejected, then you can appeal that. So, basically, that's what it says in the next few lines directly from the retirement plan, which is required for asking for an extension.

So, if we go down ... I'm reading the chat. Sorry. The yellow line is the one we're interested in: Granting an extension to the default retirement date is at the discretion of the IFO and shall not be unreasonably withheld.

And if we go down a little further—I'm not going to read all the policy document from retirement—there's another yellow line a little further down, I believe. There we go: If the request for an extension is rejected, and the ccTLD manager believes that the rejection is unreasonable or inconsistent with the reasonable requirements document, it may appeal the decision by the IFO.

All right. So the rest is all policy per our retirement document. So let's go to the next section. All right. Right there.

In the proposed scenario, the manager or the retiring ccTLD, who is a member of the ccNSO, has been sent a notice of removal by the IFO as per the retirement policy. The manager of the ccTLD has submitted a retirement plan, which includes a request for an extension to the date of removal. The IFO advises the manager that its request for an extension has been denied and provides a detailed explanation for its decision per the policy. The manager believes that the rejection of the extension request is unreasonable or inconsistent with the reasonable requirements document, which at the time of writing, this scenario has not yet been published by the IFO because the policy is not accepted yet. The manager requests an internal review by the IFO, which maintains its initial assessment of rejecting the extension request. The manager, as a last resort, then promptly files a request for an external review of this IFO decision per the ccNSO review mechanism, which would have been accepted by the ICANN Board as a ccNSO policy.

All right. So that's our scenario. Any questions on that?

Going once ...

STEPHEN DEERHAKE: I think everybody's good.

BERNARD TURCOTTE: All right. Okay. So now let's get into—oh. I see Nick has his hand up. Nick, go for it.

NICK WENBAN-SMITH: Sorry. I think another situation, as you were talking it through, is that the extension would be denied but that ICANN or IFO don't provide reasons at all or adding any adequate reasons. And in that situation, I was wondering either they provide full reasons but it's still denied, or they deny it and then provide reasons. That should be, I think, grounds for this sort of procedure to come into effect. I was just wondering whether it was more likely they'll say no without providing sufficient reasoning and whether that might be worth thinking about in terms of the scenarios. But anyway, just my off-the-cuff thought.

BERNARD TURCOTTE: Okay. Well, the retirement policy—we discussed this, you'll remember, when we were drafting the retirement policy—

NICK WENBAN-SMITH: Yeah.

BERNARD TURCOTTE: It clearly states unequivocally that, if the request for an extension is rejected, the IFO has to produce a detailed document describing why it was rejected.

NICK WENBAN-SMITH: Exactly. And also, they have to be reasonable.

BERNARD TURCOTTE: Yes.

NICK WENBAN-SMITH: The problem is, what's the recourse if they're not reasonable and don't provide sufficient reasons? Well, I think then we come into this review mechanism.

BERNARD TURCOTTE: Yes, exactly.

NICK WENBAN-SMITH: And that's why it might be a useful scenario to consider, whereas the policy says that they have to produce reasons. And the policy says it has to be reasonable in their discretion—whether or not to grant us an extension. If those things are not met in the opinion of the retiring manager, what do they do about it? Well, the answer is this policy is what they do about it? Right? So [inaudible] feasible scenario; that, in breach of the policy obligations, they are not either reasonable or don't provide sufficient reasoning to enable the registry operator to work out, why the hell have they rejected our request for an extension? Right?

BERNARD TURCOTTE: Absolutely.

NICK WENBAN-SMITH: That's kind of where I'm coming from. Sorry.

BERNARD TURCOTTE:

Yes. Okay, understood. Thank you. And just for a reminder for everyone—thanks for that, Nick—Nick was part of our subgroup which actually worked on this.

The review mechanism. The ccPDP-RM Working Group proposes that the review mechanism for this scenario, and only for the purposes of this example at this time, would be as similar as possible to the ICANN IRP, where the focus of a breach of the articles of incorporation and bylaws in the IRP would be replaced by the ccNSO's policy for reviews, the retirement policy, RFC 1591, the FOI for RFC 1591, as adopted by the ICANN Board, and the IFO's reasonable expectation document, as well as any other relevant IANA documentation.

So, basically, the substitution we're doing is the review mechanism in this case—the IRP one ... We're saying, well, substitute the bylaws and articles of incorporation for these other ccTLD-related documents.

As such, the review mechanism can only decide if the policies have been adhered to as not. And this is exactly the same type of language that is in the IRP. The IRP is, "Have you followed by the bylaws and the articles of incorporation? Yes or no?" The objective in choosing this mechanism is to allow ICANN Legal to have a clear understanding of the proposed mechanism for this question.

So—Patricio?

PATRICIO POBLETE:

I can understand the wish to pose a question that ICANN Legal will be familiar with, but in doing so, I think we're risking getting an answer

that's not at all useful for us. What do I mean? In practice, what's going to happen is not that the IFO or ICANN would not have followed all the relevant policies. In the case of unreasonably denying an extension, I think that ICANN and the IFO may very well prove that they followed every policy to the letter, but still they've been unreasonable. So to give a more useful answer, what we should be asking ICANN Legal is what they think would happen if their request have been denied in an unreasonable fashion.

BERNARD TURCOTTE:

Well, Patricio, I think we're saying that, I believe. If we can back up a bit to our scenario portion, maybe we just need to make that a little bit clearer. Oh, okay—at the bottom of that section. Okay. And let's get going. Let's get going. Okay. So—keep going. Sorry. Next part of that section. Okay.

So the IFO ... And if we are saying this, we need to say that. Yes. Okay. If the proposed scenario ... The manager of the retiring ccTLD has applied per the rules for an extension, the IFO advises the manager that its request for extension has been denied and provides a detailed explanation for the decision per the policy. The manager believes the rejection for the extension request is unreasonable or inconsistent with the reasonable requirements document.

So we're saying it right there. That's the basis for making the appeal.

And if we go down just a bit: then the manager requests an internal review by the IFO. That doesn't work. Then, as a last resort, the manager files a request for an external review of this IFO decision.

PATRICIO POBLETE: Yeah. Bernard, if I may?

BERNARD TURCOTTE: Yes, please.

PATRICIO POBLETE: I'm not disagreeing with the scenario. I think it's a very good scenario. What I'm disagreeing with is the question that we're asking ICANN Legal.

BERNARD TURCOTTE: Well, okay. Let's back up a bit. We're not at the question yet. So what we finished going through was the mechanism. Maybe, if you'll give me a couple minutes—this is not a long document—we'll get to the bottom and the questions and see if we still have a problem. Is that okay, Patricio?

PATRICIO POBLETE: Good.

BERNARD TURCOTTE: Okay. And, again, the reason for having a mechanism which talks about the policy is that this matches up to the IRP. So that's why we went there.

So the decision by the mechanism. The panel in the review mechanism produces a [final exploration] that the refusal of the IFO to grant an extension goes against the Board-approved policy for the retirement of ccTLDs.

So the panel in the mechanism has looked at the policy as set and agrees with the plaintiff that this doesn't meet up with the stated policy.

Now the question is for ICANN Legal. How can the panel's decision in this example be made binding on ICANN? ... Sorry, I was reading the chat. How can we make the panel's decision in this example be made binding on ICANN. And what is required to ensure this? If the decision made via the mechanism proposed in this example cannot be made binding on ICANN, please explain in detail the reasons for this and identify, if any, the types of mechanisms which could produce a decision which would be binding on ICANN in the above example.

All right. So now we're at the question. Back to Patricio.

PATRICIO POBLETE:

If we can go back just a little so we can see the decision—yeah—we're asking ICANN Legal if this decision can be made binding. So the decision is part of the question. And I think the decision is not the kind of decision that we expect to get from this scenario. If the decision had to do with ICANN and the IFO following a [pro] policy, I think that the decision would go forward for ICANN. But if the decision were to be on whether the refusal is reasonable or not, it might very well go for the

retiring manager. So it didn't matter what we present to ICANN Legal as a decision to be made binding.

I know that, if we present this decision, it looks very much like the IRP, but I say again it is not the kind of decision we would very likely get from our [IFO] from this scenario. The decision should mention whether the refusal is reasonable or not.

BERNARD TURCOTTE:

Okay. We can expand on the question.

Next: Eberhard.

EBERHARD LISSE:

I agree with Patricio, and I think we should not, as I wrote in the chat, be too specific when we ask ICANN Legal. I can be perfectly happy if a decision from the IANA function operator or ICANN is fair and reasonable. [But that] any panel tosses any complaint against it [?] I don't have to ask if the decision is fair and reasonable when this and this and this and this doesn't happen. "Fair and legal" is a legal term. I think many lawyers and most judges perfectly understand this concept, and I want the behavior of the IANA function operator and ICANN to be fair and reasonable, preferably in accordance with their policies and what we write down. And in specific sections, if the reasonable requirements document says, "This and this is okay," and then the IFO violates that, then it's definitely unreasonable. But like Patricio said, you can go do everything according to the documents that

we have provided and what we have foreseen, and it's still unreasonable. "Fair and reasonable" is a legal term

BERNARD TURCOTTE:

No, I understand that. I understand that, Eberhard. We've got Nick here. Sometimes Nick has some great comments on this, so let's go over to Nick and see if we can help us here.

NICK WENBAN-SMITH:

I think this is largely a thought exercise. I suppose my main reservation with this is that, whatever it is that we propose as our review mechanism we know is not going to be the IRP. So I share some of the concerns expressed, really, by Patricio, that they may give us an answer [inaudible] sort of thing.

But I think, for the moment, we're in a bit of a bind because we've been told that the bylaws would make it difficult for these sorts of review mechanisms to be binding on ICANN. So the whole point of this exercise is to try and work out what sort of latitude we have to come up with something which we'll actually fight to make ICANN reverse its decisions in these sort of cases where we need some protections. This is the most fundamental question that registry operators of a country code are going to face, and they need to be as binding as they can be.

So I think, as long as the question is expressed to ICANN ... I worry that ICANN Legal's job is to defend ICANN, and what we're asking them to do is to expose ICANN. And they may not be particularly cooperative in that regard when it comes to giving us a clearer path on Californian law as to

how to make these sorts of procedures binding on ICANN. But I think it's a useful exercise to go to.

But the final thing I want to say is, really, let's not make affection the enemy of the good. I think this is a good scenario to try and get our heads around a bit more on what we can do. What's the [art] of the possible in terms of having a review mechanism which will actually work as a review mechanism? Because if we go down a long route without this sort of process, I worry that we'll also produce some sort of really great review mechanism which actually won't fulfill the primary task it has got, which is to make ICANN backtrack on something with is manifestly wrong on the country code operator in this scenario. So hopefully that ... Well, that's what I think, anyway.

BERNARD TURCOTTE:

Right. Thank you, Nick.

So what I'm taking away from this is, in the decision, we should include the "fair and reasonable" component in there.

Is that what I'm getting this from, Patricio and Eberhard?

PATRICIO POBLETE:

Yeah, exactly. And what I was as trying to think of is whether we could add something to this hypothetical decision. How about: the panel in the review mechanism could use as a final declaration that the refusal of the IFO to grant the extension is unreasonable and therefore goes against the Board-approved policy for the retirement of ccTLDs.

BERNARD TURCOTTE: I have no issue with that, if the other members of the group which are present don't have any issues.

I'll take that as a friendly amendment.

NICK WENBAN-SMITH: Certainly no issues from me. I think that's a good idea.

STEPHEN DEERHAKE: If anybody has issues, please speak up.

BERNARD TURCOTTE: Okay. So I've got the document open here. I'm going to type it right away in the next version while I have Patricio here, just to make sure we don't have to go back to the recording.

The panel in the review mechanism produces a final declaration that the refusal of the IFO to grant the extension is unreasonable—

PATRICIO POBLETE: "unreasonable and therefore" ...

BERNARD TURCOTTE: And goes against the Board-approved policy for the retirement of ccTLDs.

PATRICIO POBLETE: I would say “therefore” because that’s the reason why it goes against.

BERNARD TURCOTTE: “and therefore”

PATRICIO POBLETE: Yeah.

BERNARD TURCOTTE: “and therefore goes against the Board-approved policy.” Okay. I’m okay with that. We have the official text, if that’s the only change. I don’t see that we have any issues.

Eberhard, I see your hand is up.

EBERHARD LISSE: I don’t want the words “it goes against Board-approved policy.” That would not include RFC 1591 as interpreted by FOI, by example, if you’re picking nits.

BERNARD TURCOTTE: That is interesting. I understand your point now. However, the framework of interpretation was accepted by the Board. So just having policy is an issue because the FOI is not a policy. I think we can work our way around that. Thank you for that, Eberhard.

Patricio?

EBERHARD LISSE: I'm fully in agreement with the substance. What we must be careful with is wordsmithing.

BERNARD TURCOTTE: Yes, absolutely, especially in dealing with lawyers.

Patricio?

PATRICIO POBLETE: I don't think that's a problem because the Board-approved policy we're talking about is the Board-approved policy for the retirement of ccTLDs. I'm talking about any other policy. And the policy for the retirement of ccTLDs will hopefully shortly become a Board-approved policy. So I don't see any problem with that wording.

EBERHARD LISSE: Yeah, but not only is retirement appealable. Also revocation is appealable.

PATRICIO POBLETE: In this particular scenario, in this particular decision, we're talking only about the retirement policy. This is just one possible. There are many others, but this one is about the—

EBERHARD LISSE: Okay. No problem. Just make this more clear.

PATRICIO POBLETE: [inaudible] the retirement policy.

EBERHARD LISSE: Just make this more clearer, that, in this particular paragraph, we are purely talking about ... But the point is, if we are not careful, this can be used against the thing. Therefore, I'd like to be as general as possible in these principles or as wide as possible. The more narrow you are, the more problems you can run into if somebody then says later, "Okay, we used that in a different context." These things have happened with ICANN in the past. So if we write something, I'd like to write it so that all our concerns are sorted out.

BERNARD TURCOTTE: The friendly amendment I would propose, Eberhard, would be to go back to what we elucidated as the key requirements for the review process and stick that in there instead of just the retirement of ccTLDs.

I agree with Patricio that, in this specific case, just stating the retirement of ccTLDs covers it all, but a more general statement which has that in it, too, does cover it also.

Patricio?

PATRICIO POBLETE: Yeah, I suppose it can be done. We'll have to read what the final text is, but I wouldn't be opposed to doing that for the time being.

BERNARD TURCOTTE: Okay, great. Thank you. So I think we're editing the decision by the mechanism, and we've got one edit which we've got no issues with. And we'll be adjusting per the definition and the mechanism, so everything that we're listing in the mechanism as we're proposing it is made here—so just to have the full link, which will reassure Eberhard. Excellent.

Now, let's go on to the questions—Patricio, your hand is still up. Do you have something else?

PATRICIO POBLETE: No, it's mistake. Sorry.

BERNARD TURCOTTE: Okay, thank you. Old hand. So let's go over the questions again. So we've got one more edit to do to the decision by the mechanism, which we'll match up to the text we've got above that. Now let's make sure—Stephen?

STEPHEN DEERHAKE: Thank you. I just saw Peter has posted in the chat, and I was wondering if he could provide a little clarification on what he is getting at there. If you could, Peter, thank you.

PETER KOCH: Thanks, Stephen. I think I just paraphrased what was then subsequently discussed anyway. There is a certain potential for misunderstanding this, but since this is dealing with a particular example case, of course, the ruling or the findings of the panel will rightfully refer to the basis of this particular example case. It's not a template ruling, but I think that was what Eberhard was a bit of afraid, and I agree with that. So just make it more clear that this is an example.

BERNARD TURCOTTE: And we've agreed to fix that.

PETER KOCH: Yeah. And I guess we fixed that in the discussion. So thanks, Stephen, for pointing that out again. But I think it is about to be solved.

BERNARD TURCOTTE: All right. Great.

STEPHEN DEERHAKE: Thank you, Peter. Back to you, Bernie.

BERNARD TURCOTTE: Thank you. So we'll just go back to our questions and make sure we're okay with that.

How can the panel's decision—the new decision—in this example be made binding on ICANN, and what is required to ensure this? If the

decision made via the mechanism proposed in this example cannot be made binding on ICANN, please explain in detail the reasons for this and identify, if any, the types of mechanisms which could produce a decision which would be binding on ICANN in the above example.

So this is our proposed approach for asking ICANN Legal to comment/give an opinion on this with the changed decision text.

I see Nick. Nick?

NICK WENBAN-SMITH:

Basically, I agree with the questions and the decision. Back to Patricio's question originally around what value are we going to get from this, we haven't examined our review mechanism. But I suppose I'm a bit worried that they will say, "Well, provided you pick a mechanism like the IRP, it should be binding on ICANN," which doesn't really move us any further. I suppose I just want to chuck that on the table and see if that's ... In terms of the chess moves, if we go down that route, saying, "Well, it's like IRP," and they say, "Well, if it's like IRP, then it's probably binding on ICANN," then doesn't that kind of paint us into a corner in terms of picking something which is like the IRP as our review mechanism [inaudible] discussion point.

BERNARD TURCOTTE:

Let's be clear here. We're not committing to anything by asking this question, and this is only the beginning of getting the discussion going. So if they do with something like that, then obviously we have to go

back and look at this. And it doesn't mean that we can never ask another question of ICANN Legal for an opinion.

But I digress. Eberhard?

EBERHARD LISSE: If ICANN Legal mentions the words, "This is probably binding," we are good to go to the next round and get into more detail on what we want and what we consider binding and so on so that we can then develop a mechanism.

The first problem we have that some of us feel [is] what ICANN Legal said—that the California law would prevent anything from being binding, which I paraphrase here. If we can move away from this first step in the negotiation to the next step and say there can be some bindingness, then we can figure it out and, eventually, after some iteration, arrive at something that they and we can live with.

BERNARD TURCOTTE: Correct.

EBERHARD LISSE: Fair and reasonable. I want to be as fair and reasonable as I expect the other side to be, to be really honest.

BERNARD TURCOTTE: Thank you, Eberhard.

All right. Any other comments or questions?

No. Not looking at that. Okay.

STEPHEN DEERHAKE: [inaudible], Bernard.

BERNARD TURCOTTE: I think we're good to go. I will edit the text and recirculate that tomorrow, my time, and ... Well, actually, since we're doing so great on time, if people will give me two minutes, I will actually produce text and see if that makes sense for everyone. Is that okay, Stephen?

STEPHEN DEERHAKE: [It's fine].

EBERHARD LISSE: I don't like it. I don't like amendments on the fly. I like this to be thought out. You sleep over it and then wordsmith it tomorrow and put it to the list. That's much better than producing something on the fly. That's my personal view. It's the same as making motions on Board meetings and stuff like this.

BERNARD TURCOTTE: We can do it that way, too, but I was really just going to copy and paste text from previous lines. But we can do it online tomorrow. That's no problem.

STEPHEN DEERHAKE: I personally prefer to see you cut and paste now because we do have considerable time left. And if there is any hesitancy among the group members on that, then we can revert back to Eberhard's proposal and have you spend some more time on it, sleep on it, etc., and put it on the list.

My concern with just doing that directly and not having an opportunity to discuss it here is that the list seems to be rather quiet. And I'd rather see if we could noodle through this, given that we do have 20-some minutes left, if there's not a vehement dissent from Eberhard.

And I see your hand is up, so, sir, go ahead.

EBERHARD LISSE: Vehemence. No, we need to it twice anyway. And I really don't like amendments on the fly.

BERNARD TURCOTTE: Well, how about we do both? Those that wish to provide an opinion now on what we're proposing, I will do it. Then we will post it to the list for any additional changes. Is that okay?

EBERHARD LISSE: The argument that people are not active on the list is no argument, as far as I'm concerned. This is the forum. If it's not being used, then we read it twice and we take it as non-objection.

STEPHEN DEERHAKE: We only have one more minute, which I'll discuss further on down the agenda before we break for ICANN72. So I'm inclined to see what Bernard has got for us. If there is pushback, then, yeah, definitely we can continue this on the list.

BERNARD TURCOTTE: All right. Let me try this, and then we will see where we are. So, right now, I'm proposing that "the IFO grant the extension" goes against ... Well, that's not the text we have now. The text says, "The IFO to grant the extension is unreasonable and therefore goes against" ... And I'm proposing to remove "Board-approved policy for the retirement of ccTLDs" and replace that with the text from above as a straight cut-and-paste. "goes against the ccNSO's policy for reviews," the retirement policy, RFC 1591, the FOI for RFC 1591, as adopted by the ICANN Board, the IFO's reasonable expectation document, as well as any relevant IANA documentation," which is exactly what we had as text in the mechanism three paragraphs above. So we're not inventing any new text. We're just expanding the text that is there.

Eberhard?

EBERHARD LISSE: It's still limiting because it still limits "fair and reasonable" to what we list.

BERNARD TURCOTTE: Yes. This is true, but I think, in a mechanism like we're proposing here, you can't simply say, "The IANA decision was fair and reasonable." That's open to a lot of interpretation, which is we've got it defined here in a number of ways—A, in the retirement, and then, B, we're stating it—the IFO's reasonable expectation document.

EBERHARD LISSE: Refine it overnight, as I said.

BERNARD TURCOTTE: Yes, sir.
Okay. Any other comments?

STEPHEN DEERHAKE: Bart, you got your hand up, sir?

BART BOSWINKEL: Yes. Thanks. Before we broaden this, I think this is another way. If I recall, the drafting team of this scenario had a more over[-]stepping-stone approach in mind. So come up with the simplest scenario where you can really pin down the need for a review mechanism because it was mentioned in the retirement policy itself.

I really understand it, but maybe we should clarify it: this is one scenario. It doesn't limit anything else. But this is a particular case mentioned in the retirement policy which we wanted to use as a starting point to check the scope of binding and bindingness because

this is more or less the lowest level you can get where it's very precisely defined [and where] there needs to be a review mechanism.

So that was the original intention. By broadening the decision by the mechanism already, at this stage I think we lose track of the stepping-stone approach. Thanks.

So going back to Eberhard, maybe in addition, think about it overnight and then have a review in two weeks again, first online, on whether this clarifies that the text can be supported by the working group. Thanks.

STEPHEN DEERHAKE:

Thank you, Bart.

Bernard, I just want to point out that Eberhard has posted to the list, and this looks like he may have a way forward.

BERNARD TURCOTTE:

Yeah. "and therefore goes against, for example"... Is that what you're proposing, Eberhard?

EBERHARD LISSE:

I haven't gotten the text in my head now. Think about it. Then point is that you put it in so that it does not only restrict it to the documents. "unreasonable; for example, violating blah, blah, blah, blah." That will solve my problem.

BART BOSWINKEL: Yeah.

STEPHEN DEERHAKE: Excellent. Thank you.

BART BOSWINKEL: Yeah. And it reinforces the stepping-stone approach because that was the whole explanation about building it from the start.

[STEPHEN DEERHAKE]: Yeah.

BERNARD TURCOTTE: All right. I will post it in the chat. That's probably the most effective thing to do at this point.

EBERHARD LISSE: Both. Chat and list, please.

BERNARD TURCOTTE: Yeah.

EBERHARD LISSE: Chat is gone. List is forever.

BERNARD TURCOTTE: Yeah. So I will also post it to the list.

STEPHEN DEERHAKE: Yeah. And it'll definitely be on the list when it's sorted.

BERNARD TURCOTTE: Yeah.

EBERHARD LISSE: Remove the ["the"] before the FOI example. "goes against, for example, blah, blah, blah."

BERNARD TURCOTTE: Yeah, I agree. Okay.

STEPHEN DEERHAKE: Okay. This is progress.

BART BOSWINKEL: Bernie, I would limit this to the retirement, again, for the reason ... because this is, for example, the retirement ... You make it very specific because it's mentioned in that one. That was the basic idea of going for the lowest level of an adopted policy where it clearly states that there should be a review mechanism.

BERNARD TURCOTTE: All right. So we've actually got now Peter saying he's no longer convinced this makes sense.

So we've got two camps now. We've got the "limited to what the original text was," which is the retirement policy, and then we've got this expanded text.

And I see Patricio's hand is up. Patricio?

PATRICIO POBLETE: I'm with Bart in the camp of speaking only about the retirement. And there is another reason for doing that. We're deciding a scenario to present to ICANN Legal, and in this scenario, we are stating a decision by the mechanism. The decision would never say, "for example." The decision would be very specific about which policy was violated, and in this scenario, the policy that would have been violated is the policy for the retirement of ccTLDs. A ruling from the mechanism would never say, "for example."

BERNARD TURCOTTE: Which is why we had written it in that fashion originally. Putting in "unreasonable" was fine.

So now we've got two angles on this.

STEPHEN DEERHAKE: Definitely we're going to have to hash this out on the list.

BERNARD TURCOTTE: Yeah. So we've got Peter: "That's more along this line."

All right. So what we will do is I will actually post both versions on the list, and we can have a debate about which one we'd like.

STEPHEN DEERHAKE: I think that's a good way forward. I [greatly] encourage everyone to be active on this. This is a really important piece of language we need to deal with for this scenario.

BERNARD TURCOTTE: This was the other language. I've just posted in our chat now.

STEPHEN DEERHAKE: Yeah, let's have it on the list, everybody.

BERNARD TURCOTTE: All right. So I will get this ready and post it to the list, and people can go to it. Is that okay, My Chair?

STEPHEN DEERHAKE: That works for me, sir. I appreciate it.

BERNARD TURCOTTE: All right. Thank you very much. Back to you, Stephen.

STEPHEN DEERHAKE: All right. Thank you very much for that. We've made some good progress on this. I also want to extend my thanks to the working group—the subgroup members—who noodled through on this before coming back to the main group with what Bernard's got presented to us today. I want to thank everyone for what I thought was a lively and what I think was a useful discussion. That was good.

And I guess, Kimberly—yes. She read my mind. You have the agenda displayed. I'm going to switch AoB to next meeting because that's just the way I have it my head. So bear with me. We have our next meeting on the 29th of September, and we can do one apparently on the 13th if staff is available because my understanding is that the—what do they call it?—Prep Week for ICANN72 begins on the 12th. And I believe it's several days, Kim, but if you can correct me on that. I don't know what your availability will be around Prep Week. So, Kim, if you got any thoughts or comments on that, that would be great.

KIMBERLY CARLSON: Yeah. It's really up to the working group on whether they want to meet on the 13th or defer until after ICANN72.

STEPHEN DEERHAKE: I would love to get one on the 13th because, in theory, we might be able to, if not put this to bed, get it really close to being put to bed before ICANN72. And I think that would be a useful milestone for the working group.

So definitely plan on a meeting on the 29th then and, I think, also on the 13th. If anyone has any issues with the meeting on the 13th, you can correspond with me directly or put it on the list, depending on how public you want to be with that.

Bart, I see you've got your hand up.

BART BOSWINKEL: Just in response to your question as well, my understanding is that our availability during the prep week is not really affected by Prep Week itself.

STEPHEN DEERHAKE: Okay, great.

BART BOSWINKEL: So we do have one policy support session, but that's not on the regular date, I believe. So we should be available to support the group.

STEPHEN DEERHAKE: That was the unknown answer. So now we know that. So, yes, we will plan on the 13th as well. So we got two meetings coming up before ICANN72.

Moving on to Any Other Business, does anyone have any other business? I don't.

I'm not seeing any hands. So Any Other Business is going once ... going twice ...

And I believe, at this point, we can pretty much wrap this meeting up. I'm done. I want to thank everybody for attending. I especially want to thank Joke and Bart for attending out-of-band and, of course, Kim, for her usual Zoom magic, and, of course, Bernard as well for his continuing contributions and the work on this.

And I think, if nobody has any other comments or questions—and I don't see hands—I'm going to declare this meeting adjourned. And Kimberly can stop the recording. Everybody stay safe. We'll see you on the next call. Thank you very much for attending. I appreciate it. Bye-bye, everybody. Stay safe.

[END OF TRANSCRIPTION]