

**ICANN**

**Moderator: Gisella Gruber-White  
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3:00 pm CT**

Greg Shatan: Why don't we begin? I believe the recordings have already started. It is Monday, January 26, 2015.

This is a meeting of the RSP3 Sub-group of the CWG or IANA Stewardship for the Naming Functions. I'm Greg Shatan.

And we can begin. Although we have no agenda up in the notes, we'll begin with the usual welcome which we've just completed. And we will turn to the usual roll call.

Marika Konings: Hi Greg. This is Marika. As per usual, we'll take the attendance from the Adobe Connect Room. And if any one that's only on the audio can maybe identify themselves. And we'll note them done for the record.

I'm not hearing any responses. I presume everyone that's on the Adobe Connect Room is also - (unintelligible)...

Siva Muthusamy: This is Siva. I'm on the audio line.

Marika Konings: Okay, we'll note your name. Thank you.

Siva Muthusamy: Thank you.

Greg Shatan: Okay, great. Thank you, Marika. That takes care of roll call. On our last call we ran through a number of both structural and functional but primarily structural points of CSC.

Which, while there are, you know points of difference on the composition and powers and actions of the CSC, is possibly one of the more generally agreeable parts of structure - various structures that we are looking at.

Felt it was time to look at a structure that is not quite as beloved across the board - which is Contract Co. As I'm sure all of you know, there's also a RFP3B which is looking at what might be called an internal to ICANN solution.

Or at least at a Contract Co list solution and what such a solution would look like. So that is the activity of that group - expected that these groups given their RFP3 and 3B not (unintelligible) indicates that these groups will attempt to converge at some point in the near future.

But right now RFP3B is kind of the skunk works for an alternative solution or the internal to ICANN solution of various types.

So, felt it was important in this group to look at a Contract Co at some of the things that have been developed before.

Try to develop some of the details behind Contract Co to see where there are areas of conversions or divergent or bi-modal divergent in each of the aspects of Contract Co.

As might be expected, there weren't that many aspects of conversions for Contract Co in the poles - or rather surveys - there weren't poles. That we took before.

I think what I'd look to do is to dive in a discussion and see, you know, agreement/disagreement thoughts, movement we can achieve with regard to what Contract Co would look like.

And, again, this, you know, assumes that there is a Contract Co. That doesn't mean we can't challenge the accepting of Contract Co - quite the opposite.

But given that eliminating Contract Co entirely is the business of 3B. And the idea here is to develop through the usual riggers of multi-stakeholder work - the best possible Contract Co that could be proposed in such a type of proposal.

So I'll begin with the first issue and proposed response and would like to open discussion on each of them as we go along. First, the end to the status of Contract Co as indicated by its name, it would be contended to be a corporation.

And the view generally taken is that it would be a nonprofit corporation. So I'll take any comments on its corporate status - or in particularly on its nonprofit corporate status and any thoughts on that - Martin Boyle.

Martin Boyle: Thanks very much Greg and Martin Boyle here - just showing my ignorance about the nature of U.S. base nonprofit corporations.

Does that give any specific requirement for the resources of the nonprofit corporation? Or can it actually be a \$1 company?

Greg Shatan: When you say a \$1 company, Martin I'm not entirely clear how your and the resources - I'm not entirely clear whether you're asking about how well it should be funded or something different.

Martin Boyle: It's how well it should be funded.

Greg Shatan: Yes, the answer to that and now obviously this is not legal based, although, I am a lawyer.

But, you know, speaking from my best understanding of the subject is that they - a not for profit corporation like for profit corporation has no particular funding or minimum funding requirements.

It may if it's intended to carry on certain activities or if it to, you know, it may be required by counter parties to have a certain amount of funding.

But there is certainly no statutory requirement that would have any funding or funds whatsoever. And just - and I realize we have, you know, people from a number of different countries legal jurisdictions and experience (unintelligible).

One thing that needs to be pointed out for the teams to come up repeatedly on the list and other discussions, nonprofit does not mean that it can't make money.

Nonprofit merely refers to the fact that it doesn't have shareholders. And therefore, it doesn't return profits to any third party. Everyone is familiar with the nonprofit known as ICANN.

Which - while it certainly may make a profit or keep a surplus of income over expenditures it doesn't turn it over to shareholders.

So a nonprofit can be as profitable as it wants to be. But it's distinguished by it not being run to return profits to shareholders.

Typically however, non for profit - a nonprofit has to have a public interest purpose of public benefit purpose of some sort - although, it can also be for the purpose of its members if it's a membership corporation - Avri Doria.  
Hello.

Avri Doria: Thank you. Yes I was unmuting. This is Avri speaking. In addition to the difference between profit and accumulating value, the other difference is that you actually - if I understand correctly in the U.S.

You don't found a nonprofit corporation. You first found a corporation and then you apply for the nonprofit status.

What I'm wondering is - and if that is, by no means, guaranteed. So I'm wondering is, what are the time ranges in that sort of calculation? Because we would need to - perhaps that's not critical to here.

And maybe it's a question that belongs more in one of the RFP's that have to do with implementation. But how long does that take? And what is the likelihood that applying for it gets it for you, thanks?

Greg Shatan: Thanks Avri. You know, let me clarify on that. There are two steps to becoming what, you know, often referred to as a 501 3C organization which actually refers to a type of tax exempt status granted by the IRS.

When a company first incorporates as a nonprofit it is immediately characterized as a nonprofit. And if that status is part of its incorporation and indeed you would have to apply at least - I'm more familiar with New York and California.

But I believe it's basically the same. You need to apply in a different fashion to become a nonprofit. You actually need, you know, some level of approval at the very beginning.

Although, it's fairly ministerial approval - based on you bylaws and article - to be a nonprofit corporation by the state - typically that doesn't take very long. But it can take some time depending upon various things.

So and nonprofit is once a nonprofit corporation is formed, it can then immediately apply to the IRS for tax exempt status which also grants - give the ability to, you know, except charitable donations.

And subject it to various legal privileges and the like to get that applied to tax an exempt corporation. There is 501C3 is the most common.

There are other ones that are based on other types of corporate admissions - such as religious or trade associations (unintelligible).

You know, we can - we look at the deeper. We can dive more deeply into this with a legal expert that will, you know, retain for the purpose. But the basics are that there's two stops.

Stop number one is get incorporated as a not for profit under the laws of a particular state of the United States. It could be New York's. It could be Delaware. It could be California, Alaska.

And then secondly, once you're incorporated you seek and then are granted 501 C3 statuses - which is a good thing to have. But most you're actually accepting charitable donations.

It's not entirely necessary. It is good to have for various reasons. And that can take you only, you know, two to four months. But you can begin functioning immediately as soon as your filing is in with the IRS.

And then it relates back to the original date, the filing when it's granted - so that may be getting into a - getting to weasel a little bit on the explanation and just (unintelligible).

I don't think the funds would be considered charitable donations. But they would be supplied to the extent that there are any funds, I think, you know, through contract - more likely - in any case, Olivier.

Olivier Crepin-LeBlond: Thanks very much Greg, Olivier (unintelligible) speaking. Can you hear me?

Greg Shatan: Absolutely.

Olivier Crepin-LeBlond: Oh fantastic, thank you. So I have knowledge or experience with limited liability corporations. What's the difference between a - I mean, of course, apart from the obvious nonprofit part.

But what else is different between a limited liability corporation and nonprofit corporation as far as liability is concerned? Is there a difference with that? Or can one have a nonprofit limited liability corporation?

Greg Shatan: And, again, we'll get real legal experts who can, you know, dig deeper than I can. But basically, all corporations provide limited liability, nonprofit and profit.

The limited liability corporation is always a for profit corporation. And it was created as an alternative to the traditional corporation. And is kind of a somewhat lighter weight structure for, for profits.

It has members rather than shareholders. But the members - it's not a membership organization, per say. And it has units rather than shares.

And there are certain legal advantages - especially for startups and smaller companies to be formed as a LLC rather than as a corporation.

But since it's a for profit entity, it's actually kind of off our radar screen. And there are. There are a couple of different - each state has its own not for profit laws.

And they vary subtly and sometimes not so subtly from state to state. Then there are sometimes more than one type of not for profit structures. But they are fairly similar from one to the other.



So the LLC is off on a different - is off as part of the for profit menu of perspective entity structure.

Now anything further on...

Man: Greg?

Greg Shatan: Yes.

Man: Greg yes, sort of the - for a follow up.

Greg Shatan: Absolutely.

Man: If I may, so as far as liability is concerned then - I'm just trying to make since of what that entices for employees or director or for any one related to that nonprofit corporation.

Are there any higher standards of liability? Or, I'm not quite sure how to formulate my question, sorry.

((Crosstalk))

Man: Well at the (unintelligible).

Man: (Unintelligible).

Greg Shatan: Olivier at the highest level, you know, corporate - incorporations provide a shield from liability for officers and directors and employees acting within the scope of their duties.

If they go off - out of the scope of their duties, then they may be subject to all sorts of liability. Being subject to - having limited liability doesn't mean immunity from prosecution in the U.S. as in most other countries.

Anybody can sue anybody for anything. If it's frivolous or in bad faith, they both - they may be subjecting themselves to fines and sanctions and all sorts of other bad things.

But putting aside bad faith frivolous lawsuits, if there is a good faith basis for it there are, you know, it's a possibility that the case would be stewed typically.

Companies carry D and O insurance - - directors and officers insurance - which will protect their directors and officers and make sure that they're, you know, indemnified and defended for all actions within the course of their employment.

And, of course, that's a massive over simplification. There are people who have been, you know, every day of their lives advising on nuances in this area. But that's the kind of 10,000 split views, in terms of liability and protection from liability.

There are all sorts of - there are other nuances, as well. But that's the, kind of, the basic overview. So that is the basic, you know, look at what nonprofit corporation - the link under U.S. (unintelligible) a very, you know, simplistic level or simplified level.

You can say something further on the stacked level - looking at the next, always an interesting subject for consideration. I've inserted here the Contract Co of the Delaware Corporation.

And the reason that I suggest - I know there's some of us have discussed and suggested. Having a Delaware Corporation is that that would put it in a state other than California and would provide the possibility in to order in litigation with ICANN - which hopefully it never would be.

But one of the reasons for Contract Co is to be able have the power to enter into litigation to force ICANN to abide by the IANA contract.

And so if both corporations are in California, the federal court jurisdiction that is based on diversity of jurisdiction would not be available.

We would have to look to other types of jurisdiction. And since diversity jurisdiction is the easiest to satisfy, having the corporation to be in two different states for purposes of incorporation would be a good thing.

Delaware, more than any other state, is a friendly home for corporations. There are many particular services set up for corporations that do all of their actions outside of Delaware to have necessary kinds of services such as service of process and corporate filings in Delaware.

It's almost a, kind of, Delaware cottage industry like Vermont - turns out cheddar cheese and maple syrup. And Bernie and others may argue with the quality of Vermont maple syrup versus Maine maple syrup.

But in case, and (Alan) may as well. Since that is what Delaware is set up to provide kind of a good corporate home.

They have very sophisticated agencies and both - and judges that see corporate issues all the time and are not going to be likely to, you know, come to bizarre are unprecedented types of decisions - should that ever be the case.

And their laws are set up to be - also and Delaware law is set up to be very easily adopted in terms of corporations by third parties. And there are a number of presumptions written into the jurisdiction, as well there.

And make it better - that allow for a kind of standard corporate - whether it's profit or nonprofit - aspect of running the corporation to be standardized without having a great deal of kind of custom drafting neither.

So (Donna) your hand is up. (Donna) you may be on mute.

(Donna Austin): I am on mute. I just had to - I'm using my phone instead of my laptop today. So I'm a bit confused. Thanks Greg, (Donna Austin) - so just one of things that I would mention. And I don't know how relevant this is because I'm not a lawyer.

But, of course, all the registry agreements assigned under California law. So there may be some major reasons why the registries would like to maintain Contract Co to be in the U.S.

I don't know for sure. But it just seems that there might be some benefits in doing so. So I thought I'd mention that. Thanks.

Greg Shatan: Thanks (Donna), any other comments on this point. I know that it's one that people are often interested in commenting on. Not that I want to get hung up on it but I do want to make sure we give this its due.

Just to make clear this - you know, and we say jurisdiction here, we're talking about its domicile where it will be considered to be - so it'll be considered to be a corporation formed in the State of Delaware.

If it's physically located anywhere, they would also have some issues with their state of physical on a domicile. But that's, you know, Delaware's a very neutral corporation.

And probably, in my career of dealing with corporation, probably seem - even on (unintelligible) that I work in New York. I'd probably see as many Delaware or more Delaware corporations than I see New York corporations.

And even New York is considered to be a relatively good space per incorporation. You almost never see corporations from say, Nevada or Oklahoma unless they're very local.

So it's the home for national and multinational corporations, in any case. Let's so - with litigation being Delaware court in Delaware law, those are kind of two separate parts of jurisdiction.

Venue, which is the issue of where in litigation would physically take place. It's typically specified in contracts. It doesn't have to be the same place as the state up in corporation or the state that where the laws will be coming from.

Often it's good to have them all be the same. We could specify California venue applying Delaware law. But I think it's a probably a pretty fair idea to have it - to be able to have litigation be in Delaware according to Delaware.

So any comments here - I just need to the comments to Delaware - same as for Monday laundering. I am not familiar with that.

It's famous for having known as Swedish colony in the United States, in colonial times. Maybe that was where the money laundry were. I'm presuming (Millers) Milton Mueller. Any further comments on the issue of jurisdiction or we'll move onto new membership.

As postulated here, Contract Co would not have members. I know that especially for those of us who are participating in the accountability group, the discussion of membership has been quite spirited.

The reason for membership - at a membership for an active corporation like ICANN - that the members should provide one of the few ways of taking a not for profit corporation and controlling the board - to some extent or having control over the board under limited circumstances.

And new members function somewhat like a shareholder. Given the limited structure and purpose that we'll get to in a little while, you know, postulating this would not be a membership company/membership corporation.

Obviously, there are alternatives that could have a membership. The numbers could be the MRT. Or it could be drawn from reference items of the multi-stakeholder community.

Typically, membership corporations are set up for their members. So they may be something like a religious order a fraternal organization or a coop of some sort.

But there are - there's membership organizations that for other purposes, as well. So, but again, given the idea that we're going to try to control this corporation through its bylaws and don't think that.

And members has a different - an additional layer of complexity and that complexity is one of the things we're trying to avoid - which suggest not having members for Contract Co - any comments on the membership (unintelligible) thing - Alan Greenberg.

Alan Greenburg: My only comment is we started off this premise saying Contract Co would not become another multi-stakeholder organization and having members starts getting perilously close to violating that rule. Thank you.

Greg Shatan: Thank you Alan. I actually agree which I think the crime populate is that it's not a membership organization.

It intended to be as small and boring and under staffed and underweight as it needs to be except when it needs to be essentially blown up to larger and life size in order to take on the (unintelligible).

But certainly, and adding members, you know, adds both complexity and adds a lot more personality to it than we would want. I think it has.

So moving on, seems to be a reasonable amount of agreement that membership is not the way to go. But I didn't want to be too presumptuous in setting this document up for discussion.

Relationship to ICANN, clearly the very essence of Contract Co is that it's independent of ICANN. It's a third party, no structural relationship to ICANN.

The intent, the time and potentially only intent of Contract Co is that it would enter into an IANA function contract with IANA functions operator. And

given the satisfactory job ICANN is doing at the moment and has been doing for some time.

That ICANN would be the first signatory to IANA functions' contract with Contract Co. That's basically, that would be the relationship. That I think is kind of the essence of this.

So I don't expect too much discussion. But I'm not going to control this session. So if there's anything on this point, I will. My mother-in-law is saying, "That it sounds uncontroversial."

Okay, so that is Milton call? Should I listen to my mother or my mother-in-law? There in hangs a problem (unintelligible). In any case, the relationship to the MRT is also kind of a fundamental aspect.

The Contract Co is, "We'll take that direction from the MRT." As we'll see in the next roll, the MRT - how the MRT relationship will take place - Olivier Crepin-LeBlond (unintelligible) you may be on mute.

Olivier Crepin-LeBlond: Yes thank you very much Greg. It's Olivier speaking. And, yes, I'm muting. It is a little harder than sometimes.

You mentioned that it would need to be - I think you used the term beefed up when taking on the (unintelligible).

I mean just saying basically if it were sued, for example, how do you think this (unintelligible)? Or is this something that we're touching on later on?

Greg Shatan: Well I think we can touch on it lightly, at this point. This is something that's contemplated actually in the contract - which is that ICANN would indemnify



and hold harmless and provide UV funding for any litigation in which Contract Co was involved.

That would be one of the necessary clauses of the new IANA functions contract. That way it doesn't need to be independently funded or to have any kind of litigation or (unintelligible) that is separate.

And any newly IANA functions operator, you know, in the some future, would also have to be the indemnifying party. So ICANN wouldn't stay as the indemnifying party.

It is no longer the IANA functions operator. It would be the responsibility of the IANA functions operator to indemnify, defend and hold harmless contract of and lawsuits - whether they'd be from third parties or from the IANA functions operator at best.

Olivier Crepin-LeBlond: Greg, Olivier for a follow up. So that would. I mean that holding and, you know, or indemnifying Contract Co with ICANN would work if there was a contract between ICANN and Contract Co but if the contract is reallocated to another IANA function's operator, would this indemnification still work? I mean would it still be viable or would one say we'll hold and indemnify until another contract operator takes position? I'm a bit confused on that.

Greg Shatan: Yes, the idea is that it would be - I guess this is one of these points where we have to - and I should be careful when I'm talking about ICANN as such and ICANN as the IANA function's operator of the moment.

And so I should rather say that the IANA function's operator will indemnify ICANN - will indemnify Contract Co., and whoever that IANA function's operator will be.

So if the contract ever gets granted to a third party, we'll call it OCL. If OCL becomes the new IANA function's operator or becomes the new indemnifying part.

Now there are certain circumstances - and in many cases the indemnification under an agreement, it will be enforceable after the term of that agreement. So a lawsuit that related to actions that took place during the contract with ICANN would be subject to indemnification by ICANN, even if the contract had terminated.

But under litigation at the same time that related to activity taking place while OCL was the IANA function's operator, it would be indemnified by OCL.

Olivier Crepin-LeBlond: But -- it's Olivier -- as a follow-up then to this, sorry to be just pointing on this since, you know, we're having a discussion and I think it's important to be a bit clear on this, what stops ICANN from having a third party suit.

I mean that seems to now start to widen the indemnification to wider than just ICANN itself and leave a lot of green lights for Contract Co. to do as it pleases.

Greg Shatan: Well the indemnification protects Contract Co. from any third party litigation and from ICANN. So the first thing that would prevent a third party from suing the Contract Co. is it would need to have a valid cause of action against Contract Co.

And if a third party sued Contract Co., then under this scenario ICANN would be bound to indemnify it and then hold Contract Co. harmless.

Olivier Crepin-LeBlond: Okay, thanks.

Greg Shatan: Thank you Olivier. Alan Greenberg has been patiently holding his hand up. His virtual arm must be tired.

Alan Greenberg: It's very tired. I'd like to talk about the MRT. The concept that it's a committee of Contract Co., I think this is the first time I've heard that. I may have missed something in the past.

That sounds problematic on several different levels. First of all it goes back to Contract Co. having the essence of a multi-stakeholder organization which again, we were trying to stay away from.

It implies that the Board of a company - of a non-profit company can take direction from a committee of that company which has been disputed strongly by some members of this group that it couldn't work in ICANN.

You know, maybe Delaware law is so different from California law that it would allow it. But it's been claimed it isn't allowed currently. We've never actually gotten a legal opinion on that, but it's been used continually. And this seems to be problematic on a whole bunch of levels.

On top of that, Contra MRT giving instructions to the Board, it's not clear how the Board could not change the MRT; one of its subservient committees. So, this sounds problematic on a whole bunch of levels. And I'll put my hand back...

Greg Shatan: I can respond to that a couple of different ways. First, the items that are in this structural analysis in brackets are kind of alternate themes or alternate takes, and not the mainstream of what has been discussed over time. But there are some that have cropped up as variations.

And so I've put them in here, not because they work or because they're better than what is not in brackets, but because they deserve some level of an airing. And so you know, that's one point that explains what the bracketed language is here to do.

Secondly the - there are - you know, this is something we do need obviously, to get a legal opinion on. But there are certainly ways in which Board committees control and advise the Board. And the Board is more or less duty bound to take their advice, subject sometimes to very technical methodologies to do so.

So the MGPC is an example of a Board committee that generally gets to instruct the Board, but obviously it's not a mandate. It still can be voted on and not only always voted in favor of.

Delaware law may provide some other aspects of that. There are some appeal to having it be a committee, but I actually tend to agree Alan that having it as a committee kind of doesn't put it in the right place for relationship to the company.

I'm not so - (unintelligible) coordinator hat, I'm not endorsing any part of this. In the sense of trying to put together a good Contract Co., you know I particularly don't have a - any love the idea of MRT being a committee of Contract Co. But it's out there as a possibility.

Martin Boyle?

Martin Boyle: Thanks Greg. Martin Boyle here. I'd like to go back to your exchange with Olivier because that sort of led me to a certain number of alarms on indemnification.

If you're seeking ICANN to indemnify Contract Co., and then presumably the MRT, bearing in mind the MRT is the organization that eventually will instruct the Contract Co., what you're saying is that if ICANN believes that the Contract Co. or MRT are working beyond their mandate, or because they are misbehaving in some way, then ICANN would have to fund a component cost, even if it won the case?

It just seems to me that what we're now saying is that, you know, there seems to be almost a sort of risk of freedom for the Contract Co. and/or the MRT not to have any direct controls on them on misbehavior.

And that seemed to me just to be a little bit wrong. So I'd just like to explore a little bit more, what are terms of indemnification would seem to be reasonable. Thank you.

Greg Shatan: Well there's quite a bit in there and I'll try to unbundle it a bit.

First, the U.S. as a jurisdiction is almost always a jurisdiction where each party bears its own costs. So loser pays is generally speaking, not a part of the U.S. legal system.

And obviously indemnification can contain who ultimately pays. But if you have two parties; one suing each other, they almost always will bear their own costs, regardless of who wins.

There are certain exceptional cases, especially under certain statutes, where there will be - where the winners will - where that will be upset. So that's - but that's the general case.

I know that in the UK and a number of other jurisdictions, each party bearing their own costs, regardless of the outcome, it's not the law.

So you know that said, indemnification itself is a very common; almost universal aspect of contracts between parties. It's somewhat less common, but not all that uncommon at all, to have the indemnifying party indemnify against the third party - indemnify a third party against third party litigation - against second party litigation if you will, by the indemnifying party.

As well as Milton points out, ICANN forces its Registry registrar contractors to indemnify it. And typically the indemnification is often something that's negotiated on the basis of leverage so, you can take what you will from that.

As far as whether that decreases Contract Co.'s culpability or accountability, I don't think that it does. Obviously, you know, losing would still fundamentally be a problem since typically losing doesn't involve payment of costs.

And even if its damages are being paid by ICANN, specific performance and equitable relief injunction and the like would still be borne by Contract Co. And also if Contract Co. is in essence an arm of the multi-stakeholder process

and the multi-stakeholder model that embodies MRT, then that's a problem for the multi-stakeholder operation as a whole.

So that's a - you know, it seems to me that, you know, we have the fundamental, you know, is not that because you have indemnification you can act with impunity. If that were the case then we would have all sorts of corporations and individuals running around acting with impunity because there are, you know, indemnifications in hundreds of thousands of contract, if not more, in the United States. Alan Greenberg.

Alan Greenberg: Thank you. Back on this subject I raised a little while ago that we seemed to have wandered off of, of the MRT being a committee of Contract Co., I tend to agree with you that having it as a committee opens a set of problems.

But not having it as a committee or not having it as the Board as someone has suggested, opens up a whole new host of problems of exactly what is the relationship between the nebulous MRT and Contract Co.?

Contract Co. is going to be taking orders from it, but all we have is a three-letter initial or a full name, and nothing specifying exactly who or what it is that we are taking these orders from.

There's an interesting MRT.org I believe that's a repertory company. And we might want to take orders from it. Thank you.

Greg Shatan: I think we'll do a little better job of defining the MRT. As a matter of fact if you think back to our earlier discussions of, you know, the MRT structural analysis last year, you know, that the MRT would have a charter.

It would be an organization that would have a multi-stakeholder - although we haven't decided exactly what multi-stakeholder composition it would have. And the bylaws, which is the next box we get to; the bylaws of Contract Co. would specify that it takes its instruction from the multi-stakeholder review team.

So I don't think it's all that poorly defined. And indeed, I think keeping it one of our original ideas in the design was to keep each of these entities somewhat free of each other so there would not be any, what some people call, empire building.

So keeping MRT somewhat independent of ICANN while a lot of Contract Co. is part of the design. But I think it would be, you know, well-defined, at least as well-defined as any chartered organization or activity would be.  
Milton?

Milton Mueller: Can you hear me?

Greg Shatan: Yes, we can hear you now.

Milton Mueller: Good. I don't have a very good signal strength where I am. So I am - -was proposing or not proposing but thinking about whether the MRT should just be the Board of the Contract Co.

And I agree with your - you sort of answered that question when you said you wanted to keep these entities separate so that there wouldn't be any empire building.

Isn't it possible, as part of the articles of incorporation and so on, to keep the MRT within the same bounds as Contract Co.?



And then I would like to hear more. If you don't think that's a good idea, I'd like to hear more about the nature of MRT as a committee which is independent of Contract Co., but can give it orders.

How would the MRT be able to constitute itself? Would it be constituting itself under the Contract Co. bylaws and articles, or some other way?

Greg Shatan: Thanks Milton or (unintelligible). I think that it's not - we should not dismiss out of hand, the idea of the MRT or a multi-stakeholder Board acting instead of the MRT.

But I think for purposes of discussing things in module, to say that the MRT could be the Board of Contract Co., and that yes, (unintelligible) incorporation and bylaws you know, would restrict the actions of the MRT as the Board and, you know, that would be, you know, as effective.

And we can talk about that, as any other, you know, set of restrictions against the overreaching of a Board.

I think that however in contrast to ICANN where that is an issue which is, you know, getting a great deal of discussion and, you know, for obvious reasons in the Accountability group, that setting up a new corporation from scratch with a very limited mandate.

And the idea that the mandate will remain very limited, you know, gives you a lot more ability to really restrict the actions of both the Board and the executive staff if there is one. And the idea is to have little or no staff, of course.

But when setting up a company from scratch, you know there are a lot of models for a limited purpose corporation that take place under a variety of scenarios, that do little - that do very little or have, you know, a single role to play of one trick pony which, you know, ICANN can never be.

So, it is I think, worth considering, you know, that adds some issues and takes away others. We don't have this issue of MRT hanging out in space so to speak, not being affiliated with any of our organizations in particular. So that's an advantage.

And the disadvantage is that it could potentially become more powerful. It also, you know, makes it clear how MRT can instruction Contract Co., but then it's the Board.

So you know there are certain advantages actually, to collapsing the MRT into the Contract Co. Board which, you know, certainly I think is, especially as we garner legal advice, you know we can get the pros and cons of how we can structure both the MRT as an independent body with the powers that we have talked about.

Also, as a Board, with both the powers and especially the restrictions that we know that it has to have so that we don't end up with another independent thinking organization that seems perhaps to get away from the community or get in front of the community more often than perhaps it should.

So I think that touches on the subject of - that I think Milton has brought up. So if we don't have anything - Alan Greenberg, your hand is up.

Alan Greenberg: Thank you. I wanted to comment on something that's going on in the Chat, claiming that if the MRT is in fact the Board, we're not recreating it through ICANN because it doesn't have a policy responsibility.

If I remember the earlier discussions when we talked about - or it was being proposed, a concept like a Board on top of ICANN, then that was deemed to be another multi-stakeholder holder body and therefore another ICANN.

And up until now when we've talked about recreating another organization with multi-stakeholders, the policy component was not the critical issue. It was another organization which remakes the controlling entities of ICANN.

And I'm afraid putting the MRT as the Board does that exactly. It's no longer an independent organization that has no mind of its own, it's the multi-stakeholders are now guiding that organization. And I think we've reverted right back to where we didn't want to be. Thank you.

Greg Shatan: Thanks for your comments Alan. I guess I would think that to some extent it's a distinction with - not a distinction without a difference, but a distinction with less of a difference.

I think that one of the differences is generally is that there is no policy making function being written into Contract Co. And that it still would remain very limited in its nature.

And even under the, kind of the basic framework of this - I'll call it the (Frontfort) proposal, the MRT as a multi-stakeholder body was instructing Contract Co. So while Contract Co. had no mind of its own it's mined by extension with a multi-stakeholder mind.

So that's my thinking on that point. I think that it is not - we would not be kind of remaking all the same mistakes over again, but that's just my opinion.

Anybody else on this point? I mean I still see there's lots of stuff in the Chat. I'm trying to follow it all as much as I can. I think some of the things we will get to in the next box or two.

So seeing no further discussion of this relationship to MRT point, I'll move on.

And I think, just to see something going on in the Chat with regard to whether ICANN was originally set up to be a policy body, I think if you look at the original or the mission statement that's in the - I believe in the bylaws, it includes the IANA functions and it includes a policy function in there as well. But I'll just mention by-the-by.

Next up, speaking of organizational documentation, is the organizational documentation of Contract Co. So the idea, you know, given a pretty standard for - or the only standard really for a U.S. non-profit corporation is it would have our codes of incorporation that bring it into existence a relatively short, you know, and state some fundamental basics about it.

And then the bylaws would provide kind of the internal law as we know, of the way that the corporation runs.

So since we're getting a chance to set these up from scratch, we would set up both the articles and the bylaws to make it clear that this is a limited purpose corporation, and that it was unable to act outside of very narrow mandate.

The term limited purpose corporation is relatively well understood under U.S. law you know, at this simplistic level which, you know, we can discuss U.S. law.

The idea that there would be a clear and very limited mission statement and fundamental principles of limitations for Contract Co., so that it was basically chained up to the greatest extent possible, and not able to, you know, creep its own mission so to speak.

And that the articles and bylaws would make it clear that the sole purposes of Contract Co. were to hold the right to grant the IANA function's contract to some third party, to serve as an IANA functions operator.

And the general assumption we are all running on is that that first contract will go to ICANN. That it would serve as a legal entity actually granting the contract. It would be the party, and to the contract the counter-party.

And that it would, to the extent that the legal party can't delegate these rights to MRT -- and many rights can be delegated to the MRT -- it would be the formal hand escalating the agreement and ultimately terminating the contract, if there is the kind of significant, longstanding, uncured, incurable type of non-performance that would cause one to rip this out of ICANN's hands. Or possibly at the end of a term, cause you to grant it to a third party.

The contract itself would embody all of the escalation and termination procedures and the like and limitations. So this is not an unlimited thing, but to the extent that there's anything that's agreed between ICANN and the Contract Co., the articles and bylaws are not the place for it; rather the IANA function's contract would be the place for it.

So, in an idea world I might have even tried to pull out of my back (unintelligible) a draft set of bylaws for a limited purpose corporation. But I have not and frankly might even be better off getting that from our higher corporate counsel you will, you know, we're going to hire to be, you know, very specifically expert in these types of topics.

And this is not my area. The best I would do is just to show you a model that, you know, demonstrates how it gets done, but not suggest that that's the way exactly we could do it.

But there is, you know, a fair amount of precedence for bylaws for limited purpose corporations that are set up to avoid very kind of mission (unintelligible) for self-starter sort of activities that we fear, both from Contract Co. and any other organization that we tend to discuss.

So, any points on this point? Martin Boyle.

Martin Boyle: Thanks Greg, Martin Boyle here. If it is listing a contract, then presumably part of its role is going to have to be to negotiate with those people who have responded to the request for proposals being devised by the MRT. And that may or may not include proposals from a contractor - potential contractor for the charges that it was going to levy.

Where do those responsibilities lie? Do those go back to the MRT? So in other words is the MRT the organization that actually decides on the eventual contractor?

Greg Shatan: Martin I think under the model that we've been discussing, those duties would be - are delegable and they would be delegated to the MRT. Depending upon structure and the legal advice we get, there may need to be some sort of final

approval by the Board of Contract Co., or maybe purely mandated by the MRT.

Regardless the idea, if in fact the Contract Co. Board has to make any decisions, the way that they make those decisions and how they - and what they weigh in making those decisions will be very specifically set out in the bylaws which is not the case in the ICANN bylaws, and really frankly create whole purpose or multipurpose corporations very difficult to set out, kind of very specific rules about how decisions are made.

But for a corporation that has to make a fairly limited set of decisions, it can be done. But the actual - I think the day-to-day work of, you know, running an RFP would fall to the MRT.

Martin Boyle: So if I can just do a quick follow-up to make sure I've understood that, when the Contract Co. goes to the process of retendering, it's the MRT that would receive the tenders, choose the contractor, and then turn to the Contact Co. and say, you must contract with this organization? That's actually the model that you're putting forward, is it?

Greg Shatan: Martin that's correct; yes.

Martin Boyle: Okay, thank you.

Greg Shatan: Sort of the mother-in-law model. That kind of takes us through the concept of basic documentation that would be needed and how it would be set up. (Unintelligible) further on this point, I'll move on to transparency.

You know clearly one of the things that's important here is that we have full transparency that would have Contract Co. be transparent, open Board

meeting, open corporate records to the greatest extent. You know, allow by law, you know, that maybe some cases where you're dealing with confidential or sensitive information, that you, you know, would just not be able to even get, unless you agree to a certain amount of confidentiality.

And only to the extent that that's absolutely necessary for their running of the corporation would those be held in any sort of confidence. But the idea is that this would be a highly transparent organization and at the same time, of course, the idea is that we'll do as little as possible for as long as possible and therefore hopefully that transparency would be mostly viewing a dormant company. If there are comments on that? Seeing none, then we'll move onto the accountability.

First, the board and staff, if any, of contracts that would be accountable to the MRT and this would be part of the relationship and that we will also see the board members would be subject to appropriate recall mechanisms and that the performance of Contract Code would be subject to annual public comment review of the MRT and the global multi stake holder community and the budget, such as it is, would be subject to an equivalent review. Hopefully the budget will be as close to zero as humanly possible for such an organization.

I think the idea, again, is to make the board. Another comment on the board is that there are essentially services that provide disinterested board members who are essentially professional board members who's only interest is in carrying out the role that they understand the corporation is to be and they're not interested in making the board or the company go in any particular direction other than what it's been told.

So professional board members do get paid a small amount of money even though sometimes they get paid a large amount of money. Then again, non-



professional board members also get paid. That's an issue no matter how you slice it.

Now, it could be that we have a volunteer board. So by no means, this is getting down to a second or even third level of detail about how do you get board members who aren't going to get silly ideas into their head.

One way of achieving it on top of all of the other controls in the articles of incorporation bylaws, accountability, recall mechanisms and the like is to get professional board members but that by no means is common in the US nor is it at all necessary for this type of model.

It's somewhat more common offshore jurisdiction, Jersey, (unintelligible), places like that have companies that make their business out of providing board members. So while it's a possibility, I would frankly recommend against it partially for the reasons that Avri and (unintelligible) brought up that having board members who are being compensated for being board members adds a layer of cost to things.

Again, I think this is one of the areas where some good legal advice could tell us on whether if the costs are modest, if it costs a few 1,000 a year could get a completely disinterested, uninterested person to serve as a board member. Under very narrow circumstances, it may be worth it.

On the other hand, as we're trying to be as uncomplex as possible, that's the thing I would tend to stick away from or stay away from unless we were advised that for some reason it's a vastly better idea than having a volunteer board and given that there are definitely a number of volunteers around, then we could certainly deal with that that way.

So (Martin) says, I prefer to maybe pay an independent rather than pro bono with vested interest. That is the balance. It may be - given what we expect Contract Code to do -- which is not to meet very often and not to have many responsibilities -- that the cost of board members could be quite small and I would expect that to be part of the born by the IANA functions operator in some fashion through the contract or otherwise.

It's not a case where you'd have board members being paid hundreds of thousands of dollars a year. I think it would be a small and uninteresting amount of money. Not that money is always inherently interesting, of course, and we'll not go into a long discussion of capitalism, the existence of money, loss of barter or economy, et cetera but I think that is - the idea is to try to find a way that the boards only motivation is to carry out the very limited scope of the company and to take the appropriate directions of the MRT.

So there are a variety of options there. I think it was (Donna), she (unintelligible) (nom com). To bring in a (nom com) is always looking for things and there are people who have an interest in being seen as somewhat more credible in the field of internet, management or governance that might want to serve there but then again, the whole idea is that they shouldn't have a say. They're not there to run the company in an independent fashion. They are there to serve the corporation and this is not uncommon and (eliminated) purpose corporation but I think I actually get to the next point.

If we had directors regardless of if we look for directors to be as disinterested as possible and to understand as a mandate, as part of taking the job on, what their very limited roll is and while they may need to assess the instructions from MRT, the idea is that the bylaws would provide very explicit guidance on how to assess those instructions so that anything other than a rogue MRT should be able to have Contract Co accomplish what it needs to accomplish.

Noted here also is that the staff of Contract Co would be as small as possible and hopefully services could be arranged for and it probably needs very little in the way of services since its duties are by and large being delegated to the MRT. Next question here. If there's anything further on board composition, I see there's some stuff in the chat and is there any in particular that anybody would like to bring into the oral section, now would be the time to do so.  
Mark Carvell?

Mark Carvell: Thanks Greg. Mark Carvell here. I just heard you say that - well you said several times now about the duties from Contract Co being delegated to the MRT but we're anticipating the MRT to be a group of volunteers and an awful lot of the roles that we're asking MRT to carry out could, in worst instance, be quite onerous but am I actually hearing you right that you are expecting a lot of these activities to be done by the MRT and that is not only the decision making body but also the body that will draw up the documentation, the contracts and stuff like that because that does trouble me a little bit?

Certainly on things like drawing of the contracts, policing the contracts, that was something that I had assumed would be part of the role of the company that was holding the contract. Thanks.

Greg Shatan: Thank you Mark. Let me back up one step. I think that putting aside the RFP for the moment, there's not expected to be a lot of activity that Contract Co would do and as far as policing the contract, that really is part of the role of the CSC and the MRT at different levels as we set them up so that Contract Co would not have a third body which is actively looking for breaches of the agreement or for ways to invent or insinuate a breach, that the recording and the reporting responsibility of the IANA functions operator would be going

primarily to the CSC and on some of the longer arc annual or multi-year reports. I think we've seen those going to the MRT.

So those, in fact, are already, I think, in our model delegated.

The RFP is probably the most onerous task that would be involved and it's entirely possible - first of all, I think we see the MRT or as the MRT has been proposed there would have (unintelligible) it but the RFP being a relatively rare occurrence, you would not want to have a permanent level of staffing necessary to issue an RFP. This is something that could, to some extent, be contracted for, to a party that runs such things or the MRT at that point could garner more support from the multi stakeholder community in order to run the RFP but I think that it's a basic issue that obviously is here.

If you're going to run an RFP, it's not a small process. It's not a short document to drop an RFP. I think, however, we have a lot of knowledge of what the IANA functions operator should do. So the RFP is not going to be drawn up from scratch and then you have to read a lot of long submissions that come back and make some judgments.

So I think that ultimately does fall to the MRT and there would need to be some form of funding for that or and possibly the acquisition of additional skilled individuals or contracting out for certain resources. I think that was little reads metal machine music.

In any case, that's how I look at it here and in terms of enforcing the contract, as I see (Martin) said, I think, again, that goes under the indemnification provision but I think that even there the enforcement really comes from the MRT and the Contract Co's is a sock puppet for the MRT. That may be a bad analogy so don't draw any bad conclusions from it but that's basically the idea

is that Contract Co is the necessary tool that is used by the MRT to accomplish its functions and not a separate power structure. Anything else on this point? Seeing none, I'll move on.

I'll skip the question about members. That's not board members. That was intended to be member, members. So I think that can be skipped. Next section is how would the board meet? Primarily phone, internet, 10 to 2. This is a not a junket for however and hopefully few people as would be on the board. Term lengths would be limited. They would be staggered as before as in the other cases to avoid knowledge gapping. How will decision be made?

Decisions would be made by the MRT and adopted by the board of Contract Co and here is where, obviously, we need legal advice. Just some questioning adoption is not possible, the board could rather than would -- I'm typing this up -- could be required to vote unanimously against the MRT's instruction.

This is an idea, I think, that's being looked at by the accountability group too is to change certain voting levels to if not absolutely control, effective control. Given the limited mandate of the board here, the idea that this board that has been picked to put forth the model, would unanimously vote against something that would seem to be consistent with the model would seem to be highly unlikely to say the least. Alan Greenberg?

Alan Greenberg: I guess I would say highly unlikely unless someone is trying to take control of the board and offer them - remember, if we're not paying them, there's no financial incentive for them to, perhaps, take direction from somewhere else on an individual basis one by one. So that sounds like it's counter to all the stability we want to bring into this.

Greg Shatan: Well, I think the point of view of capture is or the point of capture is always lurking in the back of any of these structures whether they're internal or external or no matter how you structure them.

That might be the reason to have a nominal or small amount of compensation consistent with the number of hours a person of reasonable level of sophistication would spend in a job such as this or whatever that number may be then as opposed to having the be on a purely volunteer basis but again, I think that you'd have to have unanimous capture which gets to, I think, fairly extreme scenarios.

It's something we do need to look at and that's, I think, why there need to be recall and accountability by the board to the community. Anything further on this point?

Support needs, next item up. The intention is that the Contract Co would have and would require little or no staff and delegate its day to day functions either to the CSC, or the MRT or the secretary depending on its - or the MRT's secretary which may be the same as the CSC secretary for all of its day to day functionality.

You'd probably have to have some form of a website but not even necessarily. This is supposed to be a dull organization as possible. So it may not even need a website although there would be a certain irony in it not having a website and if it didn't, probably somebody would hopefully fake one up and obviously we would need to have email list functionality of some sort. So that's at least reason for it to have a domain name.

Again, the irony of it not having a domain name would be one to avoid as much as I like certain ironies but the idea is to have as little structure as

possible and if there are some structure, as things are delegated to the MRT, that it would also have the support would largely be off at the MRT as well.

Alan Greenberg knows that if it had a website and a domain name, it could join the MTSG. So maybe we'll file for a (unintelligible) and then it can join the IPC and we'll have a fight over Contract Co.

Hopefully it would be a member of nothing because it would be such a nothing company but in any case, back to work. When would the board meet? The board would meet as rarely as possible consistent with legal requirements. Obviously they would meet more often if there is an RFP situation going on or if there is enforcement rising to the level of termination or things needed to be voted on but the idea is that it does as little as possible and as rarely as possible.

Funding. This is somewhat of a punt. Same as the MRT and last, Alan Greenberg's honorary (unintelligible) capture. Safeguards must be in place to ensure that the board and staff cannot be captured or unduly influenced by governments, intergovernmental organizations or specific economic or ideological interest and what those safeguards are, other than very narrow purpose and good vetting of individuals and transparency all of which I think are all part of avoiding capture, we would need to explore.

Certainly we don't want anybody hijacking Contract Co. According to the Washington Post, apparently civil society is the way the foreign governments with ill intent will cause ICANN and perhaps Contract Co to be captured. That was only in an editorial. I think they must have been smoking something. (Matthew) shares, outrageous editorial. I think they're trying to one up (unintelligible) of the Wall Street Journal and absurd editorial and I think they actually achieved their goal.

Any comments on capture or thoughts on how to avoid capture in this or any other situation?

Seeing none, I'll say, are there any other thoughts on Contract Co generally and also while there isn't any - we haven't put in front of the group here a document that's a functional analysis of Contract Co, I think we've touched on assumptions a number of times but if there are any other comments on the functions of Contract Co, given the divisive nature of Contract Co, I would be curious to hear any thoughts in general, in favor or opposed to it or how it could be better if you're one that doesn't think it's good enough the way it is but as we're all looking at proposals that we don't love, to try to see if there are ways that we could love them more.

I think that's the essence of conversions and ultimately of consensus is to keep an open mind and try to come up with the best proposal that we can amongst all of us. Milton?

Milton Mueller: Yes. I'm (unintelligible) capture issue.

Greg Shatan: Yes.

Milton Mueller: Okay. Good. So you can hear me. Yes. I think one of the things we have to watch out for when talking about capture is that I think we all agree that registries, both CC's and G's, have a - as customers of IANA have a particular and very vital interest in the IANA and so I wouldn't want to define capture by specific economic interests in a way that precludes the actual registries who are the customers of IANA, including the root server operators, from being defined as a special interest group that's capturing a function that they depend on. I recognize that we want the MRT to be multi stakeholder but I also don't



want any kind of definition of dominance by a particular interest group to make it impossible for registries to be able to safeguard their direct interest in proper performance of the IANA functions.

Greg Shatan: Thanks Milton. I think that's a good point. I think that given the nature of the IANA functions themselves and putting aside issues of decisions that are made about the IANA functions but that don't take place within the IANA function but that take place elsewhere within ICANN as policy which I think we generally see as being outside of this whole structure, I would tend to agree with you.

I do have concerns as I've watched and participated in ICANN over the years that any particular group can try to exercise and outsize influence or an overarching influence over the activities in which it has an interest.

I think there are some who might even say that the registries have exercised a great deal of influence over, say for instance, the applicant guide book but I think that one of the reasons - one of the ways that you combat that imprint is to point at the multi stakeholder model and to point at how the pushing and pulling of working groups and others have kept any group from complete access, at least idealistically speaking but I think especially if we define the IANA functions right and if we define the roles of these organizations right, then there should hopefully be very little interest and very little latitude for interesting things to happen through the oversight of the IANA function operator.

(Paul Cann) I think said this is all supposed to be very boring and by keeping roles and responsibilities narrow, I think that the registries that have an interest in the best possible function in IANA to function smoothly where the trains run on time, should be on the interest of all stakeholders but getting to

the point of defining capture versus not capture by any particular organization, I think the definition of capture need to be, I think, flexible and not merely a counting of (those).

Milton, is that a new hand? I hope it is because I'm holding for it here and I'd prefer not to do that. Milton says, it's okay. I'm glad to hear that. Anything further on Contract Co?

Clearly, Contract Co being somewhat less easily understood than the MRT or the CSC which resemble in rough form working groups that we're all familiar with is the one where we need legal advice to make sure that it is workable and appropriate and perhaps to calm the concerns of those who are concerned or perhaps to underline and to confirm the concerns of those who are concerned.

There's only so far that we can go in any of this without legal advice. I will assure you that we are working and redoubling our efforts to move toward getting legal advice and this is a subject of action on my part every day for the last little while and hopefully we'll see more happening public in a very relatively near future.

On that point, I would ask that if anybody has any thoughts on a particular counsel that would be appropriate, first rank counsel on this thing with the type of areas and expertise that we're looking for, we are all ears for such referrals and it's recognized as a major dependency for our group regardless of the framework whether it's internal corporate governance for an internal to ICANN or external corporate structuring for an external to ICANN and a little bit of both for either as well as not for profit and trust law advice.

There is really only so far that we can go without expert legal advice and we are hopeful that that will come to us in the very near future.

So anything else on this point? I'm up to switch to any other subject that we have because we don't have very much time but if there's anything anybody wants to bring up, not that I'm creating an open mic. This is not a committee public forum here but based on what we've discussed so far, if there's any thread that has been thrown out there that anybody wants to pick back up, this would be the time to do so and Milton, if that's still a hand, obviously, you can speak. The hand has disappeared.

So I think given that it is now 20 of and given that for those of us who are on the eastern seaboard, if we're not in our homes, we should get to them because we're all about to get snowed in or many of us will.

Clearly not those in Florida but there is a two to three foot snow storm coming in for most of us. I'm not going to tempt the metrics conversion whether that is historically bad. So I will let us all get a little extra time to move on. We have enough hours of CWG business scheduled this week as (Grace's) email pointed out that we can take 20 minutes.

Thank you Avri for the 30 to 60 centimeter conversion there. I think it might even get to a meter in some places and plus, there's going to be 50 mile and hour winds and so it's a blizzard. So in any case, I will say goodbye to you all and I will ask that we stop the recording.

Avri Doria: Thanks Greg. Thanks everyone. Bye.

Greg Shatan: Well, goodbye all. Stay safe if you are in the path of the storm and I'm sure that I will hear you all very soon and see many of you in Singapore. Goodbye.

Woman:           Thanks. Bye.

END