

**ICANN**

**Moderator: Gisella Gruber-White  
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Coordinator: Excuse me the recording is now started.

Eberhard Lisse: Thank you, the point is that the location and the delegation are two separate issues and two separate processes. And the role of the participants changes for example, if the incumbent manager has agreed to a transfer he is not necessarily a significant interested party anymore he has no special role in the choice of the new one just like or like everybody else.

So this is a few technicalities but I think we should be on the same language that we propose to the board and that the board and the IANA department are supposed to use so that we know exactly what they are talking about and that there is no misunderstanding.

Steve DelBianco: Eberhard it's Steve, again thank you it's a great work so far and I learned a lot from it but the key part and we'll wait before I paste it all up would be the 2.6 on existing accountability measures and then the language on proposed.

And then it's going to be essential to share this with our colleagues in the IPG and CWG since this is one of the four stress tests, which is really about the

IANA transition, the IANA functions transition. It's really not about overall ICANN accountability per se.

Eberhard Lisse: Then that's fine it will be a little bit of work but we need to get this right it's going to go a long way. What is the email address of this stress test working group? Is this accountability four?

Steve DelBianco: Let me check on that.

Eberhard Lisse: Because then I can send this thing to everybody who is connected to this. It has a water mark so everybody sees it's a draft.

Steve DelBianco: Cheryl did I hear you?

Cheryl Langdon-Orr: Yes you did, they finally got around to getting to me but keep it up, keep on going.

Eberhard Lisse: I see it on...

((Crosstalk))

Steve DelBianco: Eberhard I'm going to paste it into the chat for you.

Eberhard Lisse: It's already pasted.

Steve DelBianco: Gosh okay, three people have done it. So if you could circulate that folks will see Eberhard is coming up with a very concise - but it's nice (unintelligible) it will make this stress test fill more of a page but I think it's well worth it.

We won't - Eberhard if it's okay with you since it's a work in process I want everybody to see it and understand it. You're on the road but I don't suppose it makes sense for us to go through it until it's complete would you agree?

Eberhard Lisse: I want - I am always saying accountability, openness and (thought). What I'm going to do is I'm going to circulate it as a draft and it's a PDF and it has a water mark stating a draft and the day of the draft.

So that everybody can read it so that everybody can provide input and it's clear that it's not the final product. Yes so this is just how far I got until this morning.

Steve DelBianco: Okay and then as we, you know, before we leave for Istanbul I leave Friday night, I will take Sam's edits, I will take your work in process and all the other comments that I've been taking note of since the last call.

And I will circulate a draft version 8 of our stress test application within our working group only and that way Eberhard if more gets to me by Friday morning, two days from now they'll be able to paste it all in there.

Otherwise I'll indicate that it's a work in process if that's all right with you.

Eberhard Lisse: I would prefer you call it a work in progress because I think we need to talk a little bit about the accountability measures because I have my own specific ideas but they might not be consensus.

I am able to get a consensus on most of what I want so it's better we discuss this if some board set an hour or so specifically for the stress test working party and discuss this so that we come up with consensus language that we can have a final document by Istanbul that we can then condense into a one

page table but maybe everybody can read what is the thought processes behind it.

Steve DelBianco: Okay and Cheryl, this is Steve but I do think we should discuss on today's call the question of whether we would meet Sunday afternoon if enough of us have arrived in Istanbul in time for the stress team to get together.

Cheryl Langdon-Orr: At this stage it would need to be after work party one and two have got their gathering. So it would be after, it would be an evening thing after the cocktails as you and I said.

Steve DelBianco: Cheryl I'm okay with that. I did mention to you on yesterday's chat that 2:30 until 4:00...

Cheryl Langdon-Orr: And I did mention to you that my plane doesn't even land until 12:30 and I wouldn't even be probably at the hotel assuming that the plane landed on time by 2:30.

Steve DelBianco: ...okay.

Cheryl Langdon-Orr: You know, I mean...

Eberhard Lisse: This is a breakfast thing we can do this nicely, meet at breakfast on Monday morning, get it done.

Steve DelBianco: Just to ask what time do festivities begin in Istanbul on Monday morning?

Cheryl Langdon-Orr: Nine am.

Steve DelBianco: Yes there's time for breakfast for sure. Cheryl over to you now that you're on board. We were just reviewing a little bit of Eberhard had circulated as a draft.

Cheryl Langdon-Orr: No, no, no, no I think that's good to keep on going. If we have another breakfast gathering, which I'm more than happy to do on the Monday you want to have that as an informal so not a meeting room booked thing.

So wherever breakfast is actually being normally served you just want to gather around a table?

Eberhard Lisse: Yes just a normal, how many are we in this group? We can get six of us at that one table and whoever wants to provide input can come and then we'll sit together and get it done.

I'll have my laptop, at least get it finalized by the time we discuss it in the noon meeting.

Cheryl Langdon-Orr: Okay so I'll work out a 7:30 on Monday, start arrangement then. Okay leave that with me. Steve get back into the next section if you want.

Steve DelBianco: All right, we made good progress over the last of these calls, covered a lot of detail. So today we'll begin on page 5 of the document that (Alice) has loaded. In the chat this is version 7 it has Sam Eisner's edit.

This is the same document we were all looking at last week. I have another draft that reflects things that have come in and the note I took last week but let's just stick with this draft for now so we can move on and get through it.

So it would be best for people to get onto page 5. So stress test three and four are at the top of page 5. On the last call (Sam Eisner) was arguing that this

becomes two stress tests, that three and four gets split making the argument that litigation was sufficiently distinct from regulations and legislation that it should be separated.

And Sam is on the call so I'll give her a chance to comment on that. (Bruce Tonkin) had sent us a note that he thought that the community would develop new policies in reaction to say litigation or regulation and legislation and that would be one of the measures that's both under existing and under proposed.

And I think that's about all I had on that one, there may not be much more to discuss here but Sam if you don't mind explain why we ought to split this into two rather than leave three and four combined.

**Samantha Eisner:** I believe I talked a little bit about this last time but responding to a court order or litigation is different from regulation and legislation. And as I went through you can see on the page I have multiple comments regarding this section but it's much different what you need to do to respond from one to the other.

Often responding to court orders doesn't necessarily bring into to make sure that there might be criminal liability or personal liability for directors as opposed to when you're acting in violation of regulations or legislation.

The penalties are much different, the legal responses are much different, the ability to react to them are much different. And it's like I think it just makes sense to have them as two separate stress tests.

**Steve DelBianco:** Would the, would columns two and three the existing and proposed would they end up being different or the same once we split three and four?

Samantha Eisner: Well I have some fundamental issues with what is in column two I mean, so if you look in column two as it's written right now there is really nothing in there that goes to litigation.

I mean I just have some problems with how this is worded in the whole. I - responding or the thing that new regulations or legislations are equal and acquiescing to government demand is kind of a weird thing to say.

I mean we all follow laws are we all acquiescing the government demands on a daily basis? But that's different from how you would respond to litigation, which is different from how you would respond to court orders arising from litigation. I think that these just need to be separated out and worked through separately.

Steve DelBianco: Any other comments from the folks on the call? All right Sam you feel strongly about it so we'll go ahead and split three and four but then we're going to need to undertake the work of figuring out what goes in each column.

So I think that we ought to move ahead though until we get back to that. So I'll split those up in the next draft and hopefully that will give everyone a chance to comment on what's on three and what's on four.

All right moving on to number 19, which is on the bottom of page...

Cheryl Langdon-Orr: Five.

Steve DelBianco: ...five okay. So ICANN attempts to re-delegate a gTLD because the register operators have reached - with the registry operator challenging the action. This is in court legislation I guess and the entity that's charged with the route

zone maintenance would face the question of whether to follow the re-delegate request or to follow the court order.

And this route zone maintenance role is not exactly the same as IANA naming functions coordinator. It's the current role at their assigned place. We have discussed this stress test in draft form I believe on one CCWG call because we said that under the current arrangement NTIA is the contractor to VeriSign.

So VeriSign is protected from lawsuits and so simply publishing the route with a contract from the U.S. Government. And the IANA stewardship transition changes that and therefore the route zone maintainer might not be under a U.S. Government contract and would not be protected from those risk based lawsuits.

And of course ICANN is bound to follow appropriate court orders in courts of competent jurisdiction. I believe that came from Sam that's the comment under existing.

So the conclusion we reached was that this is directly related in the transition of IANA and that existing measures might not be adequate. Under proposed measures we said the community could challenge the management decision and refer things to an independent review panel but this doesn't protect the route zone maintainer whoever that is from any lawsuits.

It would simply say that ICANN might have the board and management that they took action in reaction to a lawsuit. Those actions could be challenged by the community and so with the super majority it might even be vetoed if the community had that power.



I noted in the bottom right hand corner there that the counter parties it would replace NTIA. Remember we've discussed things like contract (co) and trust. That counter party is not clear yet and so we're being differential here to whatever the CWG's structural separation and recommendations are so that will help inform this topic. Eberhard I see your hand up.

Eberhard Lisse: Can you hear me?

Cheryl Langdon-Orr: Yes.

Steve DelBianco: We do.

Eberhard Lisse: Okay I had to mute in the middle of a (unintelligible). One thing is we can protect the ccTLD operator by holding him free, holding them free of damages whatever.

And my registry, my registrar agreement says is that my company is being free by the registrars of lawsuits that are directed because of actions they take.

The other thing is it's the matter of ICANN is bound to follow courts of (unintelligible) jurisdictions and the framework of interpretation working group we have said in the end if you really want to enforce judgment from a third country you have to go to a Federal Court in America and get a Federal Court to basically legalize or issue the same judgment, enforce their judgment.

As a Californian entity ICANN is not bound to jurisdiction in third countries per se unless they fall under this country's jurisdiction. For example, they trade or they have got assets there.

So in (unintelligible) and in Turkey they would fall under the jurisdictions because courts claim jurisdiction of everybody they can lay their hands on but the jurisdiction ends at the national border.

If ICANN doesn't have (SS) in the country, doesn't trade there then it is a matter of whether you can convince a court if ICANN owns property in the country it's not a problem.

Steve DelBianco: All right thanks Eberhard and that hold harmless that you spoke of that was in the contract between your ccTLD operator and whom?

Eberhard Lisse: And our registrars.

Steve DelBianco: Got it.

Eberhard Lisse: So if a registrar is sued or we get sued because a registrar doesn't pay the invoice for a client or not my problem then I just will get stuck with the bill. You understand what I'm saying so far?

Steve DelBianco: I think so.

Eberhard Lisse: While it could probably constructed in a way that because it's a technical function that is operated on contract to another company who doesn't, which doesn't have the technical expertise for example or could say okay, we have the actual originating or responsible party if you want to sue us, sue us.

And you tell the technical partner if you get sued we will cover, we entered the suit as the defendant.

Steve DelBianco: And Eberhard this is not necessarily a money damages type of lawsuit. That choice in the business constituency came up with this stress test last May and it was designed to surface something hardly anybody ever talks about at ICANN and that is the role of the route zone maintainer.

It's really a technical function VeriSign has performed it since we began, they don't get paid for it. It's just the publishing function of the authoritative route, which is then picked up by all of the route servers around the world.

So an injunction is more than likely what would happen under this scenario and again scenarios are plausible but not necessarily probable with the notion being that if we were coming up with a singular plural insanity.

And we said if ICANN attempted to delegate a singular version of a plural TLD that was already out there or vice versa that existing operator, you know, having failed to stop it in the gTLD approval process like sued to block it from being published globally as a way of stopping what they felt was an unjust intrusion on the zone that they were already managing and that would be an injunction I guess to stop that.

Now if that happens as Sam indicated in the comment it may not be possible that the community can do much except to hold ICANN's board and management, hold them to executing the policy that the community had approved.

So if the community had approved it and it's about to proceed then it might be able to weigh in on a board or management decision that was taken as a result of this lawsuit. Sam I see your hand up go ahead.

Samantha Eisner: Yes I think we need to get clearer about what it is that we're trying to get through this stress test because it's really not clear from the text and, you know, a little bit clearer for more conversation but I'm still not clear about it.

So are we looking for protection for the root zone maintainer? I'm not sure and I don't know if anyone on who has looked at this and verified but from everything that I understand there is no immunity that goes to the route zone maintainer today by virtue of the contract.

It just says ICANN does not have immunity from suit by virtue of the IANA function project. So I think the concept of immunity is something that is a bit of a fiction that I don't know that we should be measuring against.

If the issue...

Steve DelBianco: That's critical, that's critical here so we should try to determine that. I was told this by VeriSign.

((Crosstalk))

Samantha Eisner: So is VeriSign's position is they have immunity from suit that's fine. I don't know and I don't know that that's ever been tested in court. The problem is once we have the U.S. Government stepping out we don't have a possibility of protecting anyone through immunity because a private corporation can't grant immunity to laws right?

So the concept of immunity...

Steve DelBianco: There you have it that - right but there you have it it's...

((Crosstalk))

Samantha Eisner: ...but the issue, but I think that the issue still - the issue that's being posed so it isn't even solved by the immunity concern right? The issue being posed here is what is a route domain (unintelligible) supposed to do if there is - if they receive a verification that says go ahead and publish a route with this in there but then there's a competing court order that says don't publish the route?

There is still the issue there right? And so we're not getting to the right heart of what we're trying to get fixed. If someone could help get a little bit clearer to me on that.

Are we looking for financial protection, are we looking for ICANN as the person that develops or as a person that or as the operator that goes through and assesses delegation requests according to policy as Eberhard suggested maybe providing an indemnity clause within whatever - to a route zone maintainer.

So that if the route zone maintainer was ever taken to court for its action in following an ICANN determination on delegation. I mean that's an easy fix. I don't know if that's what we're trying to get to though.

Steve DelBianco: Yes you're - and Eberhard you're next in the queue but Sam you're starting to zero in on it it's about can the community find a way to hold ICANN management and the board to implement the policies that the community has done.

And those policies could include the delegation of the gTLD, it's been through years of vetting, it's been through the objections, it's now ready to

delegate the contracts and sign and then suddenly something happens exogenously to stop that.

The implication here that is under the current arrangement you probably couldn't stop it because I was led to understand that VeriSign would simply publish it they don't have to worry about being sued so they would simply publish exactly what ICANN told them to publish after, you know, of course it's been certified by NTIA.

But in the post NTIA...

Samantha Eisner: The NTIA...

((Crosstalk))

Steve DelBianco: ...right, that's right so under today's arrangement you can see that there's not any likelihood of interference with that final step of publication. I realize that...

((Crosstalk))

Steve DelBianco: Go ahead.

Samantha Eisner: It's hard because it's a situation that's never occurred and I don't - I think that the discussion of immunity in this actually masks the issue right. Whether or not the route zone maintainer today with the U.S. Government has immunity or not doesn't change what the stress test is supposed to be about.

And so I think that - I don't think that immunity and putting in that discussion actually helps anything within this and making it clearer because the fact that we have...

Steve DelBianco: The immunity, if the immunity is part of the factor to guarantee that the route zone maintainer simply publishes it would be immune - it would not react to a lawsuit.

If that contributes to the ability to get the route published as the community had approved then it is relevant because we would lose that - we could potentially lose that immunity under the proposed transition.

I think it is relevant. I mean it might be confusing to bring it in but it's exactly at the core of what we need to figure out whether we have some other mechanism such as you and Eberhard have talked about indemnification or hold harmless. Some other mechanism that we check the box and we're done. Eberhard.

Samantha Eisner: So I think part of the issue is that there is an assumption that the court order would always be to block a community developed, a delegation that was in line with community developed policy right because there's also the potential that a court order would come in to try to block a delegation that ICANN may have initiated but that the community didn't feel that it was in line with community developed policy.

That's actually how I understood their argument on the singular versus plural. And so...

Steve DelBianco: Okay go with it then go with that one but this particular one also talked about breaching its contract. So it could be that ICANN management and

compliance initiated an action on the breach of a contract and re-delegated a gTLD.

So there are several scenarios community driven or compliance driven.

Samantha Eisner: So that's the problem I'm not sure what we're trying to solve with the way this stress test is written. Can we re-write the stress test to get to what we need?

Cheryl Langdon-Orr: Of course we can.

Steve DelBianco: Yes of course we can.

Eberhard Lisse: I have an issue with injunction for national court. Courts have court jurisdiction. A national court just not have jurisdiction in the United States. United States court usually do not have jurisdiction abroad unless there is specific legislation.

For example the (unintelligible) legislation would say that if an American citizen suffers from a terrorist attack abroad the foreign country can be held responsible.

The foreign country is concerned in a recent lawsuit don't respond to this. In other words whether it is a company or an entity in such a country needs to respond to an injunction of the Federal Court, which (unintelligible) cannot be leveraged is a separate issue.

The difference is if you as Federal Court a court if it's a local or if it's a state issue if they complain from the same state if it's an injunction of course they have to abide by it but if it's a foreign country I don't see it.



((Crosstalk))

Steve DelBianco: Well why don't we say, let's say on the example that it's a U.S. Court thing because that's where the RZM VeriSign is based today. So just for the sake of argument Eberhard let's assume it's a court that would claim and had jurisdiction over VeriSign.

Samantha Eisner: But what are the (unintelligible)?

Steve DelBianco: Right.

Eberhard Lisse: Or courts have, will enforce their judgments. So if a company went to court and that it has jurisdiction over their route zone maintainer it's a court order to the route zone maintainer, the route zone maintainer will follow this, will have to and will they there is no question about it.

Steve DelBianco: Well I guess that is the question I was told by VeriSign that they would simply publish they would not pay any attention to a court. I will check on that and it might be that that clarification will help us understand where this goes from here.

This would be the only stress test that focuses on the role of the RZM and if we succeed at addressing it I think it will help draw some needed attention to the protections for the party that plays that publication role.

If we suggested wait a minute this is just too complicated then we won't be able to address that and it will come up sometime later. But sooner or later I think it will be a concern.

(Larry Strickling) has said that there would be this parallel process. There's the IANA transition and then in parallel there is supposed to be a discussion of the RZM but I don't believe it's happening in the public view. (Jonathan).

Jonathan Zuck: Yes can you hear me?

Cheryl Langdon-Orr: Yes.

Steve DelBianco: We do.

Jonathan Zuck: Okay great thanks, it's always the first time is always a question. So I guess my thought on this is that we kind of need to focus not on whether or not the RZM would adhere to court order but what ICANN would then do as a result of that and would they become engaged in that legal process to enforce their, you know, enforce their view et cetera because in this case it would likely be that the community would be in favor of the re-delegation even though a court order had been issued to prevent it. Isn't that right?

Steve DelBianco: Yes I think that makes sense. Under the scenario the re-delegation for a breach of contract that may well be the case.

Jonathan Zuck: Right.

Steve DelBianco: And the super majority of the...

((Crosstalk))

Jonathan Zuck: So you'd have a situation in which ICANN was at odds with - so the question then becomes what ICANN's action would then be. So we know what the RZM would likely do under the -- well, or we don't know -- but assuming we

know what the RZM's reaction would be to an injunction issued by its home legal authority, what would ICANN's reaction to that be and what could the role in the community be to spur that reaction, whether it's engaging with that national government to get that injunction lifted for example.

So I mean that's - we're dealing with ICANN accountability, not U.S. government accountability. So the issue is probably what would ICANN do to react to this situation and what could the community do to influence that reaction.

Steve DelBianco: That's right. And that's the kind of things that are in the proposed accountability measures column.

Cheryl Langdon-Orr: Cheryl here. Looking at the chat, doesn't that mean that refocusing the problem statement to, as (Sam) has just mentioned in the chat, focus on ICANN as opposed to their manager would make it clearer.

Steve DelBianco: Right. And it is ICANN's focus under the proposed accountability metrics, which is the key column. It's the key column for these stress tests.

Jonathan Zuck: That's all that really matters.

Steve DelBianco: Right. That's all that really matters. And it's already written that way.

Man: It's an academic exercise.

Steve DelBianco: That's right. And it's already written that way. So it's not refocusing column one as much as what's in column three. But if it helps people to understand it by rephrasing what's in column one, well then that's fine. But it is something -

- (Sam) to your point -- it is focused on ICANN. That's what the proposed accountability measures column is looking at.

Jonathan Zuck: That's right.

Cheryl Langdon-Orr: (Sam), do you want to own -- Cheryl for the record -- do you want to own having a go at new language for the problem statement or 19 as a stress test. Great? Thanks.

Steve DelBianco: Yes thanks, (Sam). And (Sam) did send over just as we discussed last week, sent over some really tight text for the compromise of credentials. And, (Sam), let me thank you for that. I pasted it in the chat earlier, perhaps before you joined, (Sam). But send that over to me in an e-mail and I put it in the doc.

Cheryl Langdon-Orr: Yes that's before I joined as well. I had a huge problem getting into the AC room today. Thanks.

Steve DelBianco: Okay. So it might be that whole harmless or indemnification could be there, and I will independently reach out to VeriSign and I'll ask hey what's going on with RZM? Do you guys really have some sort of lawsuit protection? Explain that, because it's being questioned on the stress calls. And I'll do that today.

Okay great. Cheryl, okay to move onto to the next one?

Cheryl Langdon-Orr: Absolutely.

Steve DelBianco: Great. Next page. Stress test number 20. And this is the one that was driven by the (unintelligible) example, more so than the previous one. I'll give folks a chance to look at this. And again, the focus is on what is the community's

ability if the community has a near consensus, a super majority view on ICANN's action in this case, how can the community assert its strongly held views in a way that reverses or forces ICANN's board to take an action, which is what (Jonathan) was talking about on the earlier one.

That's all we're really focusing on, the community's ability to hold the board accountable for actions it takes in reaction to this stress test, the scenario. So again, it's a court order similar to the last test but arising under different circumstances. And again, it's between private parties. ICANN operates under contracts and there will be differences sometimes about interpretation of a contract when it comes to a breach in the previous stress test.

In this case it could be a court that tries to block a singular version of a plural that's already in the root. Eberhard?

Eberhard Lisse: I have a bit of a problem. We live in democratic countries where rule of law is supreme. If a court in - if a federal court in California, or California state court if it's a state complaint, reaches a judgment and an order against ICANN, policy doesn't matter. The only thing what ICANN can do is litigate this to the - until it's litigated. But policy defers to the rule of law in every country.

So I can make whatever policy about what I want. If my supreme court in the end decides it's illegal, unconstitutional or whatnot, you have to do this. So the question cannot be whether ICANN can be forced to follow court order or reject or not follow court orders, but whether they - whether such court orders need to be litigated to the bitter end.

Steve DelBianco: Eberhard, I think that's a great way to say it, and we could phrase it different. The board's only decision is to accept or litigate. That might be the only

decision that's subject to challenge. And we could rephrase the stress test in column one so that it reacts to that decision.

So the question comes up under the existing or proposed, does the community have standing and the ability to challenge a board decision to accede to that court versus to litigate the court order. So under that - why don't you go under that assumption and ask - go ahead.

Eberhard Lisse: That would solve my problem. And Samantha is putting her hand already, so I'll defer to her because she's the lawyer.

Steve DelBianco: Samantha?

Samantha Eisner: Sorry, coming off mute. Eberhard, please finish what you were saying. I - my intervention may be a bit different.

Eberhard Lisse: I'm - I like what Steve just said. We cannot tell - the community cannot tell ICANN well if the federal court for the district tells you to do this, do something else. We cannot do that. We can say okay we in the community, the board says okay they accept the judgment and the community says no you shouldn't, then we should be able, like Steve said, the community should be able to force the ICANN board to litigate this in this.

I'm not sure about the consequences. It's a financial consequence. If you pursue litigation, there's cost involved and so on, but we cannot tell ICANN to disregard court orders. That's not what this process should look like.

Steve DelBianco: And to clarify, we're going to rephrase that and say that the management decision is accede or litigate, and if the community had a supermajority that disagreed with ICANN's decision of whether to give in or litigate, what is the

mechanism that the community would have to hold ICANN accountable to forcibly execute the community-driven policies.

I think that's - I mean that really make it's crystal clear what Eberhard is suggesting. And we can rewrite the stress test to focus on just that decision, since I think that's the only decision.

Samantha Eisner: So I understand. I feel that the way that Eberhard has phrased - has characterized it makes it a lot clearer. It still raises other issues that I don't know if a community directive to accept or litigate is really the - is really a workable solution to it.

You know, there's issues such as insurance, and ICANN may be in a place that it becomes not insurable if decisions to litigate are made out in a way that's a bit external to ICANN management. I don't know all the details about insurance, but I know that there are - there could be considerations around that, right?

Because insurers when they come in, expect to have, you know, certain things in place and certain, you know, they would expect to see certain, you know, normal processes in a business and business decisions being taken, and having a community come in and assess a management decision to litigate or not litigate may put that just kind of business reality a little bit at a risk.

But then there's also the risk of what if there was a determination by the community that ICANN should litigate but there's not good faith basis to litigate on. That actually subjects ICANN to sanctions in court if it would come out with arguments that are not really good faith arguments.

Steve DelBianco: Got it. So, (Sam), if it came up, before the decision was voted on by the community, whatever structure we have, members, delegates or permanent cross-community work, before the community took the decision to challenge the board's action, presumably we would have this debate openly on the insurance considerations and the good faith requirements, but the community might still - I mean shareholders can be ornery sometimes, and the community might stills say go for it. And that's exactly what community powers could enable to happen.

The considerations you brought up should be brought into effect, but ultimately the board's decisions should be subject to community challenge and overview. So those consequences could happen.

Samantha Eisner: Yes. So I agree that a board decision in this way or a board action and acting outside of policy and the repercussions of that should be subject to community review. I'm not sure that the correct review mechanism is empowering the community to tell ICANN to go litigate but where it should be review. This could be one of those two (unintelligible) the board or something like that.

I mean could be subject to something very serious, but I don't know that giving the community the power to say ICANN go litigate is really the right place to - is the right accountability mechanism as opposed to other ones. But it should be subject to various accountability mechanisms.

Steve DelBianco: Right. But I'm unaware of any proposed measure forcing ICANN to litigate. All I've heard are community can challenge or veto a board decision. So if the board for instance decided not to litigate, that is a challengeable decision. There's independent review panels as well. So there not any specific measures about litigate. They're really measures where the community would challenge a board decision.



Eberhard?

Eberhard Lisse: As a general observation, I'm a little bit opposed of bringing arguments about costs and this and that when we are trying to put in a general rule in here, specifically general (unintelligible). I mentioned when I said that there may be cost implications and others, I don't know the details, insurance is one of them. I'm an obstetrician. I have had to stop doing deliveries because my insurance went too much up, not because of me but because another country that I'm part of the risk pool. So I have a bit of an insight.

We should look at more implications our decision has but we should not say okay we leave that because it may have implication. So I'm grateful for Samantha to bring this up, but we should not be deterred by considerations that are more on a lower level than the community accountability that NTIA expects from us.

Steve DelBianco: All right. (Sam), I think your hand's up but I think (Jonathan) as well. Go ahead, (Sam).

Samantha Eisner: Just on the insurance issue, Eberhard, I was not raising it actually as a cost issue. How litigation is paid for is one thing, but it's actually about an insurability issue which goes to the health of the organization which has a whole trickledown effect. It's not about the cost of the litigation, it's about the insurability and the business integrity from the business operational side of the organization that I was concerned about.

Steve DelBianco: And, (Sam), you're hearing from a lot of the rest of us...

Eberhard Lisse: Can I just...?

Steve DelBianco: Go ahead, sorry.

Eberhard Lisse: Excuse me please. Eberhard here. I'm not saying that. That's not the point. The point is not a cost issue. I didn't want to be understood that way. But I'm saying the cost and insurability and these are secondary issues that influence the global issue that we are dealing with. So it's good that we know what the consequences of our proposals are, but we should not say okay because there is now business issues that prevent us from having accountability measures to sort of globalize this for a specific (unintelligible).

Cost is not necessarily the issue. Insurability is an issue, but I think we should look at it more like what I already said, what consequences our decisions may have and take them into consideration, but not say okay because that will affect the way we do our business, we can't have that mechanism. Not that I'm saying that's what you're saying. We should keep this in mind while we're discussing this.

Steve DelBianco: (Jonathan)?

Jonathan Zuck: Yes I guess what's interesting about this discussion is that it's easy to lose the forest for the trees in that what we're really looking at here is, is this particular stress test covered by the proposed accountability measures or does this stress test call for an additional accountability measure that we have not yet thought of. And that's the interesting thing.

I mean the actual accountability measure itself is very generic, which is, you know, the ability of the community to overrule the board. What (Sam) may be pointing to is an additional question that needs to go to the CCWG legal consultant as to whether or not there need to be any limits on that

accountability mechanism, in particular conditions that would affect insurability.

And those may need to be discussions that have to be had, that it's not actually a question of whether this stress test requires a different accountability mechanism but it may be a question about whether or not this is a place where limits need to be placed on a particular accountability measure or a context in which limitations need to be.

So that's the question that it feels like has actually risen to the top in this discussion is a question for our legal consultant. In the actual discussion about whether or not to go forward in litigation, all of these things would come to the surface. And I think, you know, whether or not it's a - whether or not there's just cause for litigation, et cetera, would be subject to interpretation. And I think we are willing to say that the community as a whole needs to be able to do that, but I mean there may be a question about whether or not a limit needs to get placed on this.

So that's a question that we need to set aside. It's outside of this specific exercise, which is are there going to be exception instances for the accountability measures that we propose. So we need to set this aside as a question for the legal team.

Steve DelBianco: All right. So we're going to rephrase this to be the question is how does ICANN's board respond to this court order, and the chair says to litigate or follow it, and does the community under the existing and proposed, what is the community's standing and the tools available to the community to challenge or reverse that decision.

And all the considerations that have been brought up about insurance and good faith, those are part of the conversation the community would have before it made a decision to override the board's decision. Great.

All right, good discussion. Ready for the next one? Any further items on this? Okay.

Next stress test is number ten. I'll give you guys a chance to read that. It's on the next page. It's actually a combination of number ten and number 24. (Malcolm Putzy) added number 24, and you can see some of the language that (Malcolm) used, the (unintelligible). And he talks a little bit about the mission of (unintelligible).

The comparison between existing and proposed and then he looks at the fact that today NTIA with its control of the IANA functions contract has the ability to discipline ICANN and keep it within its limited technical mission since it could withhold the IANA contract if it felt ICANN had expanded too broadly. And the community does have input on things like the strat plan and budgeting, but it's not definitive and it cannot challenge that strat plan and budget, you cannot challenge decisions that were made.

(Sam) had added under the -- since we have discussed this before -- (Sam) had added that the California attorney general has jurisdiction over nonprofit entities. So that's certainly an existing mechanism.

Under the proposed, we talked about some of the standard things we've covered before, this notion that the community could veto a budget, overturn a board decision if it was something that the board voted on. Empower the community to challenge a board decision through an IRP. Of course the standard and review is the key there.

And then finally in the lower right-hand corner of the proposed thoughts, another measure is the prescriptive restriction on ICANN's activities. Those of you who were on last night's CCWG call when Becky Burr was discussing work party two, that is one of the items that they're trying to design is a golden bylaw, I believe they called it, to prevent expansion of scope beyond what's needed to protect the operation integrity of the DNS and the unique identifiers.

So if that were there, it's a fourth mechanism that would be able to prevent this. And all these would replace the sort of soft discipline that NTIA holds over ICANN today through the IANA contract. So we'll take a queue on this one.

I'm guessing this maybe this isn't such a controversial stress test. It's pretty clear that we're focusing tightly on what the community can do to either prescribe or remedy it if ICANN acted to expand its mission.

Cheryl, unless you have...

Cheryl Langdon-Orr: No moving on.

Steve DelBianco: ...anything to add. That's great. So I think this one passes the sniff test. Let's go to number 12 on the same page. I think that Eric Brunner-Williams had added this stress test. It's called capture by one or several groups. This is a tough one, because so much of what we're proposing has to do with supermajority which is not something that's subject to capture.

There is one stress test we have focused on, which is the notion of the GAC changing to majority voting and if it did so, GAC advice carries with it the

obligation working on a mutually agreeable solution. I mean that's part of our bylaws. So there's a discussion on I believe the stress testing team when we say that ICANN should change its bylaws so that only consensus advice carries that high, high bar of working on a mutually agreeable decision with the GAC.

So we focused this one mostly on the only place that capture could potentially come from, which is the GAC, and it ends up being the kind of capture that a lot of this transition is discussing. One of the conditions of the transition imposed by NTIA was that ICANN - it would not transition in such a way that the functions currently maintained by NTIA could be assumed by government or intergovernmental entities.

(Sam), you're in the queue. Go ahead.

Samantha Eisner: So one of the - when I read the stress test of capture by one or several groups of stakeholders and watching some of the discussion around the hearings in Washington and, you know, I read this as a lot more of a broad statement that part - one of the key stress tests that we need to come out of is that any new structure that we create help protect against the - any group, not just the GAC acting with undo influence in the system, but we need to try to build in protection or at least look over every single structure that's coming out to see how we can protect against undo influencing exercised by any single group

Sure we have a specific issue as it relates to policy that's set out right now with - that's been expressed as it relates to the GAC and in a two-thirds bylaw, the two-third vote and consensus, and of course the two-thirds vote by the board is off the table but the consensus, the supermajority issue. But that really is just a very small part of it.

I think we need to look a little bit more holistically about capture or undo influence being exerted at any place across the board. So this would go to as we're developing, you know, we were talking yesterday on the CCWG call about a potential, you know, standing cross-community working group.

What protections are we building into that to make sure that no single group or entity can influence across the different stakeholder groups that are represented there to make sure that ICANN does not become a vehicle for any single entity or collection of interest to actually determine the will of the organization. I think this is more broad.

Steve DelBianco: Right. And (Sam), I don't know what to say. I mean read what it says in the upper right-hand corner of this box. It's about the broad issue of supermajority as being - we're suggesting the supermajority requirement is effective prevention of capture by one or a few groups. So it might be that we haven't defined whether it's two-third, three-quarters or four-fifths. We don't know yet because the CCWG hasn't come up with its proposal.

But it's possible also to add the question of what is a quorum. What if four of the eleven AC, SO and SGs simply abstained from a decision, leaving only seven, and five of those seven decide to vote for it, would those five represent a supermajority in that case and would they have the ability to capture the community's point of view.

I mean it's possible, but we are dealing with the general case. That's what the - that's the primary part of the stress test is by requiring supermajority. Did we miss that?

Go ahead, Theresa.

Theresa Swinehart: Hi. So thanks, Steve. I think one of the aspects - I hear where you're coming from with regards to the proposed accountability measures on that, but I don't think that actually solves for the broader question of how does one ensure that there isn't capture overall within the structure or any new things that are being created.

What are the mechanisms, you know, in the SO, ACs, what are the mechanisms of responsibility and accountability and prevention of capture across the structures within the organizations as well as looking at obviously, you know, the question in the context of the GAC at governments have come up in several contexts.

But I think that really the broader question is, you know, to the point 12, capture by one or several groups of stakeholders across the entire structure of the organization and what mechanisms are in place, do those need to be checked or strengthened in any way. Because that's all part of it, right? Even if you have a community empowerment mechanism of any sort, that community empowerment mechanism has to be ensured that it isn't prone to capture in any way.

So I think there's a broader issue here. And I'm not sure how to phrase it, but there is a broader issue that has certainly come up in, you know, all the discussions that you and I and everybody else have been hearing.

Steve DelBianco: Theresa, you're right. So let's do two things. We'll add to the right-hand box that in addition to supermajority, a question of what constitutes an adequate quorum and within each AC, SO, and SG that comprise the community, we have to examine the requirements for transparency and accountability to ensure that capture doesn't occur within those groups. Do I have that right?



Theresa Swinehart: Yes, I think that's a start to what needs to be looked at from a holistic standpoint.

Steve DelBianco: We say holistic but we're drilling down to the underlying communities to see whether those communities themselves have accountability, transparency and measures that prevent capture by some party that's external to them. Because if the ALAC is captured by At Large users, that's not capture. It's only a question of whether some other group, let's say the registries, have begun to exert influence in other non-registry AC, SO, and SGs. That would be what you're looking for protection against.

Theresa Swinehart: Well I think you're looking for protection against capture by one or several groups of stakeholders. And by holistic, I mean across the organization, right? So you want to ensure that you have the checks and balances mechanisms in place across the structure and then especially if you're looking at, you know, discussions around community empowerment mechanisms. There has to be accountability and prevention of capture within those community structures as well, right?

And so what are the tools and mechanisms to ensure that there isn't any possibility of capture and that there's tools and mechanism for transparency, accountability and responsibilities and clarity around that so that if there were, a situation of capture would become immediately apparent.

Steve DelBianco: Okay. And so I think I proposed adding that to the text in the right-hand box as something we would want to evaluate when the proposals come back. But there's benefits of surfacing this while we're all together in Istanbul so that work party one and work party two that are developing mechanisms to empower the community be conscious of the need for transparency and accountability to prevent capture across AC, SO and SGs.

So I think I've got that right. (Sam)?

Samantha Eisner: Steve, I think that you - how you just summed it up was where I was going to, that this is really about testing each of the accountability measures. This one's a little bit different from the other stress tests that we're discussing, because the other stress tests that we're discussing go to specific issues and do accountability measures to get to those.

This is something that has to be really applied - first there can be places where we identify as we have for some accountability measures to protect against it, but also this is one that needs to be overlaid over every structure and every new measure that we're coming up with through the ccWG. It's that double-edged sword there.

Steve DelBianco: Sort of a Meta (sic) acquirement isn't it, yes.

Samantha Eisner: Exactly.

Cheryl Langdon-Orr: Yes.

Steve DelBianco: Okay. All right, it applies as well to the CWG to the extent there are mechanisms to the CWG for naming, numbers or protocols, it's possible that the groups that would exercise, you know, the placement of NTIA's role would have to have the same examination.

Cheryl Langdon-Orr: Yes indeed.

Samantha Eisner: What (unintelligible)? That's one of the purposes of the NTIA's criteria.

Steve DelBianco: And Sam, I do think that we are supposed to apply our stress tests to all proposed solutions. Once the proposed solutions come back - but you're right. This one has a particular significance in that it covers all of these community empowerment items.

Any other discussion on Number 12? Okay, seeing none, let's go to the next one Number 13.

This is somewhat related. It's a (Meta) application of tests because we are concerned that, if you recall in Frankfurt, we talked about empowering the community but by increasing the accessibility and affordability of review and redress mechanisms, you know, such as the IRP every consideration. And yet if we make them more accessible and affordable to the community, I guess the more accessible and affordable to individuals too -- agreed individuals.

And so the stress tests asks the tough question how do we prevent on the purposeful paralysis of ICANN to the use of review and redress mechanisms that were designed. This is going to be a challenge.

With respect to existing and proposed measures, the conclusions here are that we don't think we have this right. And it may be that the existing measures that we have today, because they make it so hard and expensive to file an IRP that it's still done, but it isn't perhaps the scope it would be if we made it so much more affordable and accessible.

Now under the proposed measures, we did say that when the community had standing to make those measures more accessible, that the community itself was only able to do so through super-majority, that we could add to this one the same discussion of quorum, accountability and transparency within the groups that we just discussed on the previous stress test. That way that if the

community were given special standing and access to an IRP or reconsideration that the community could act but individuals might not.

And I'm not close enough to what Work Party 2 has been discussing. Anybody on the call that can help us on this? Is Work Party 2 considering making IRP reconsideration more accessible to individuals or only to this so-called community action? Eberhard?

Eberhard Lisse: I don't know what they're doing, but as far as ccTLDs are concerned, there much be redress for individuals. You cannot have the community decide whether a ccTLD can redress anything.

Steve DelBianco: And Eberhard, is that the same under existing as well as proposed?

Eberhard Lisse: Existing - there is no existing mechanisms at the moment for ccTLDs.

Steve DelBianco: So under the existing call (unintelligible) there is no present mechanism for a single ccTLD operator to achieve review and redress of decisions?

Eberhard Lisse: If a ccTLD is revoked and transferred, that's it; there's nothing you can do so far or nothing that you can afford to do so far.

Steve DelBianco: Got it.

Eberhard Lisse: I think ccTLD would have of course the financial resources to have this then adjudicated in court. But most ccTLDs - and that's what basically has happened; just get driven over by the big truck and go by the way side.

Steve DelBianco: Mm-hm. Could - if it had new powers that you just described, could a single ccTLD operator with the power to challenge, could it actually paralyze

ICANN's policymaking and operations by using that challenge? It's not obvious to me.

Eberhard Lisse: No, you just asked whether the realized mechanism should be restricted to the community and not only individual, and I said I think we should not restrict it only to the community and not to an individual because that will take any redress of ccTLD might be able to have out of the equation.

Steve DelBianco: Oh, no I understand your reaction and so I probably set you down the wrong path.

What I was suggesting is that one of the things we decided that we wanted to do when we were in Frankfurt was to make IRP and reconsideration more accessible and get the community standing, so make them accessible and affordable, and make the community allowed to file a reconsideration and IRP and not have to come up with a million dollars to do an IRP. Because the community itself doesn't have a bank account.

What I said earlier is that it's possible that those affordability and accessibility improvements, it's possible that they would open the door for individuals to paralyze ICANN. So the question became should the affordability and accessibility improvements be restricted to the community? And if they were, individuals would still have the exact same powers they have today whether ccTLD or an individually agreed party.

So I don't think there's any attempt to reduce what individuals can do. It's a question of whether individuals get empowered to the point where they could paralyze ICANN. Does that make more sense?

Steve DelBianco: It makes more sense, but individuals in the CC sphere will not be able to paralyze ICANN because an individual can only deal with one ccTLD. Since an individual has - if only the ccTLD manager has impact, he can sort of litigate it to the end and be done. It's not that, for example, I can go and the last ten re-delegations/revocations we had, and I now ask a ccTLD manager or maybe even an unaffected third party, start redress procedures against each and every one and go and take it to the end. That's not the point.

But we should sort of find a way to avoid paralysis, but we should not at the same time sort of kill two birds with one stone and have unintentional consequences.

Steve DelBianco: Okay, agree completely. And yet nothing in this discussion would remove the current capabilities for CC to operate (sic). If you're suggesting that...

((Crosstalk))

Eberhard Lisse: There is none.

Steve DelBianco: Understood.

Eberhard Lisse: We are adding some, but now we are asking the ones that we're adding, will we add them - to what level will we add them? We need to add some, but I fully agree we must limit to the extent that it will paralyze. But at the moment, a ccTLD operator has no recourse whatsoever if he cannot afford legal fees; billable hours.

Steve DelBianco: Okay understood, and we have a separate stress test, the one you just contributed a lot of work in progress on, but (unintelligible) giving more power to challenge a revocation decision. And I get that.

This particular stress test asks a different question. What if we've increased the accessibility of community review and redress to the point where it could paralyze ICANN's policymaking?

So it's not likely to be the case, but the improvements we recommend as a result of the ccTLD stress test would put us at risk as a stress test.

I'm not seeing the connection there, and I may have gotten us off on this unnecessarily, but I don't see the connection here. We're just talking about paralysis of ICANN. And the key paragraph is in the lower right-hand corner which is that some ccWG proposals may make redress more accessible and affordable. And that would increase the ability to block.

So we're really suggesting here that this stress test identifies a risk. Remember, that we just covered in the last one, the risk of capture. Well the risk of paralysis is very parallel to that. And so it's both an advice to those of us who are designing things in the ccWG, but it also says that the stress test chain (sic) is going to take a look at that.

Let's suppose Work Party 2 came back with the ability to drop the cost of independent reviews for anyone, for any agreed party, to drop the cost of inaccessibility and that we would look at that and say, "Hang on, hang on, this adds to the risk of Stress Test #13 and it might need ability to be remedied."

And the remedy (unintelligible) to stop an individual from filing anything or to reduce their capabilities from what they have today. The remedy to that could be that the improved accessibility and affordability were only available to the community at large.

Any further comments on that?

Eberhard Lisse: As convoluted as you make it sound, the point, if I condense this down, is that (unintelligible) ccTLD manager has no recourse. Now we're implementing some accountability measures but it will in the end prevent individuals/ccTLD managers from using them because they have use what they have now which as I said repeatedly is zero.

Steve DelBianco: And Eberhard, do you believe that we're going to address that in the stress test that you're working on now?

Eberhard Lisse: I am contributing to the discussion that you have been starting on Stress Test 13 when you said, "Individuals can use what they have now..."

Steve DelBianco: Mm-hm.

Eberhard Lisse: ...and hypothetically; don't get me wrong. But basically you stated that individuals can do what they have now, but communities can get more. And I'm a little bit concerned and that's why I bring this up.

Steve DelBianco: Okay. What would you propose we do to take note of that concern on this stress test?

Eberhard Lisse: I haven't really thought about it that much because we - we're not - as I just saw on the Chat, we're not really stopped for time because it hasn't been resolved on Work Party 2. So we can continue thinking about this.

Steve DelBianco: Okay. To put a placeholder there, I will note...



Eberhard Lisse: Under no circumstances, under the guise of increasing accountability or accessibility, not increase the accessibility of individuals who (unintelligible). I fully agree we shouldn't increase the accessibility to individuals to the extent some will file complaints just for the filing purposes and for the satisfaction they get from it.

But I'm really concerned about this more as ccTLD interests have been rewarded and that are busy (unintelligible) rewarded. And I want to be able to those - I wanted those individuals, more ccTLD (unintelligible), get as good accessibility and accountability measures as possible.

Steve DelBianco: Okay, so I'm going to note in the existing column that there's no present mechanism for a single ccTLD operator to challenge a revocation. And then in the proposed measure, I'll say that ccWG may need to increase the accessibility and affordability for an individual ccTLD operator to challenge a revocation.

How does that sound?

Eberhard Lisse: My point is not what individuals or ccTLD managers have. What I don't want is that we say we increase this for the community but individuals stand challenged to prevent individuals from overdoing it. Yes?

So I don't really want - if an individual is affected by the decision, (unintelligible) whatever way, the CC/ALAC/gTLD, it doesn't matter. If an individual is affected by the decision, that individual must have recourse.

And if currently the envision has no recourse, it must (unintelligible).

Steve DelBianco: And I think that's exactly...

Eberhard Lisse: We must be careful that we don't fall into...

Steve DelBianco: I think that's exactly what I just said, that we will take a note in this stress test.

Go ahead Cheryl.

Cheryl Langdon-Orr: I just wanted to pick up that (Jonathan) has his hand up, and since he's part of Work Party 2, he might have something to help focus us on a future time when we'll be discussing this in greater detail.

Steve DelBianco: Yes, go ahead (Jonathan).

Jonathan Zuck: Thanks Cheryl. Again, all I guess I was going to say is that this conversation about great accessibility is definitely a heated one within Work Party 2, and so, you know, and about affordability. And there is an awareness of the risks associated, the over accessibility, if you will, of these accountability mechanisms what the implications of that might be.

So that's probably the place for the conversation about what should go into the framework. We're not coming up with the framework here; we're looking at examples of stress tests of evaluations based on a hypothetical framework in this particular work group right now.

So I mean I think, Eberhard, this isn't the place for the group of people right now that are trying to figure out what these accountability measures are going to be, but just trying to figure out if we've gone through a sufficient stress test exercise and the type of hypothetical exercises of comparing the stress tests, using the stress test to measure against the accountability mechanisms.

So I think it is a hotly discussed topic right now and it will be part of that conversation that's happening in Istanbul, and it is on the list as well about how to increase accessibility without increasing noise in that particular accountability mechanisms.

But it's not our - this group isn't the one making decisions about what accountability mechanisms should be put in place.

Cheryl Langdon-Orr: Thanks (Jonathan). Did you want to very briefly respond to that Eberhard?

Eberhard Lisse: It's not our place but it is our place to decide what stress test (unintelligible).

Jonathan Zuck: Sure and I think we all can see that making an accountability mechanism that was previously infrequently used due to cost cheaper will potentially increase the frequency with which that accountability mechanism is used, and that could in a sense aid its own stress test.

So that's really just the issue (sic), but how we address that risk is another conversation. So I think all we're establishing here is is that possibility, is that risk potentially increased by increasing the accessibility of this particular accountability mechanisms? And I think we can all agree that risk increases.

Now we might all agree that that's okay and it's worth it, right. But I mean the question is does that risk (unintelligible), and I think we can all agree it does.

Cheryl Langdon-Orr: Yes.

Steve DelBianco: (Jonathan), I might also suggest that if we gave increased powers for a single ccTLD operator to challenge a revocation, that's unlikely to rise to the level of

paralyzing ICANN. So it's possible that (Everhart's) concern would never even have entered the stress test.

Jonathan Zuck: That's right too; I would agree.

Steve DelBianco: Okay. All right, any other discussion on this one? I'm going to add that the quorum and accountability/transparency requirements for that capture, I'm going to add that to the right-hand box.

And take note of the fact that if we give individuals new powers as a result of this transition, those new powers themselves can be stress tested for paralysis, but we shouldn't rule out the ability of enhancing individual redress; not at all. And (Eberhard's) example is a good one.

Okay, let's move to the next one; it's number 16. We discussed this pretty extensively in Singapore.

So Cheryl, it's possible this one doesn't need further discussion. What are your thoughts on that?

((Crosstalk))

Cheryl Langdon-Orr: Yes. Look, I wouldn't mind this particular group having a quick run through mainly because part of our exercise with this run through, which is, again, preemptive which we'll understand until all the other mechanisms are in our possession. But what we're also trying to do is change the status of each of these stress tests in our running tally of where we are.

I'd like to see everything certainly to a second if not third read before we get too much further into drafting for public comment work. That's also a brief

run through just to make sure the I's are dotted, the T's are crossed, and of course we do have Sam's comment which was posting (sic) 4.1.

Steve DelBianco: And with respect to Sam's comment - I mean Sam - the community today, the community has no standing. It could not have challenged a poor decision to (unintelligible) (unintelligible).

You wrote here that any of the appropriate mechanisms could have been initiated. Well yes, but not by the community and that's our point.

So this is why existing measures are inadequate; the community had no standing, only individuals and agreed parties had standing.

Samantha Eisner: That's fine but it's not based on the secret nature of the resolution, it's based on the status of...

((Crosstalk))

Steve DelBianco: Exactly. So if it helps I can break that paragraph into two, but I didn't say that it was a secret part. But there's no way for the community to challenge a reverse of decision. I don't think that statement is an issue here.

Any other discussion on this one? Okay, hearing none, Cheryl, if we jump to the next one, this has been discussed on two of our ccWG calls. This is Stress Test #18, the infamous...

((Crosstalk))

Cheryl Langdon-Orr: Don't call it infamous yet.

Steve DelBianco: No, it's a good one; it's a really good one. And we just - I especially like it because it gets straight to the heart of US Government's requirement that we not transition in a way that increases likelihood that governments or intergovernmental bodies could capture ICANN decision-making.

So I believe this one has been through the ringer a few times. It may not need too much further discussion by this group.

Cheryl Langdon-Orr: Probably not too much; no.

Steve DelBianco: No. And the GAC's answer - I mean I shouldn't say the GAC's answer; sorry. The GAC's Chair wrote back to the chairs of our ccWG, but the answer was completely non-responsive to the proposed bylaws change that we're evaluating in the stress test.

Because the bylaws change is only with respect to what ICANN must do when it gets GAC advice, and it can strain the requirement or coming up with a mutually agreeable solution or mutually accessible solution to only those instances where the GAC advice was supported by a consensus of the GAC.

So that leaves the GAC to change its rules. And it might do a majority voting and sometimes it might be send advice over that is consensus and sometimes it might not be.

But it just says that on the ICANN side, the obligation of a mutually accessible solution is only there when it is consensus.

So I hope we keep this one alive and stand firm on this one; this is a vital improvement as a result of the transition. I don't think it's directly related to

the transition except to the extent that the US government placed a condition that we guard against the stress.

Cheryl Langdon-Orr: Certainly from the conversation at the most recent ccWG call, I see no evidence that would suggest we do other than run this stress test as she is writ. There's cert no down side to running it.

Steve DelBianco: Agreed; agreed. And Alice posted Thomas's letter, which we don't want to call a GAC letter because it wasn't represented as a GAC consensus.

Cheryl Langdon-Orr: No, no, no. And we also should note that in the most recent call as well, we probably need to update the discussed dates there when you're doing the next draft. So just capture that so we get the most recent call which was my time yesterday.

There was other GAC members saying that their local interests would be, or individually or in some small group, putting other advice - not that that advice would be any way different - but there will be other materials coming in.

And regardless of all of that, the stress test as it is writ still I believe should stand. Unless anyone on today's call can argue very strongly against that, I think that's just how we run Stress Test 18.

Steve DelBianco: Good. Finn Peterson, a GAC member, looks to be typing something in the Chat. Finn, should we wait for you to finish that? Oh great.

Cheryl Langdon-Orr: Great. Look he has - just for the record, Finn said, "Stress Test seems reasonable." And obviously, yes, further dialogue is needed with the GAC; absolutely.

And this is not unrelated to going back to (Theresa's) earlier point, of course, of looking with greater granularity at the accountability and transparency aspects of all the component parts to what we call community in ICANN.

Steve DelBianco: Right, and the dialogue that the GAC is potentially just continuing to explain, this does nothing to impair the GAC's policy decision-making.

Cheryl Langdon-Orr: Absolutely not.

Steve DelBianco: I mean I want to encourage the Chairs of the ccWG not to bail out on the stress tests because certain members of the GAC either misunderstand or don't agree with it. It's essential that we cover these risks in order to get the transition done.

Cheryl Langdon-Orr: And as they say, (unintelligible) it doesn't have to be probable; it just has to be possible to the stress test.

Steve DelBianco: Right. Okay we have five more to go.

Cheryl Langdon-Orr: Yahoo.

Steve DelBianco: Yes, number 22. Create some optimism here and see if we can get this done in 20 minutes.

Twenty-two is the next one and this was discussed in Singapore when we were all together. I'll give you folks a chance to read it.

The four measures under proposed are still alive today. I think that Work Party 2 and 1 continue to look at allowing substantive matters to be



challenged in a reconsideration so it's not just a process; the notion of forcing an AC RTP recommendation of limitation, independent review panel.

And there's a question as to whether the IRP decisions would be binding or not. And even in the case where they were binding, if the ICANN Board did not implement a binding IRP decision, I guess the ultimate is in the lower right-hand corner which is still the Board.

Cheryl, I'll let you manage any Q on this one or have we sufficiently exhausted #22.

Cheryl Langdon-Orr: Hopefully there won't be any Q on this one Steve.

Steve DelBianco: All right.

Cheryl Langdon-Orr: And nobody's looking like they're typing even so let's move.

Steve DelBianco: Good. Twenty-three, which I don't we've had a substantive conversation on this group yet.

Cheryl Langdon-Orr: We have not, yes.

Steve DelBianco: Okay. This is getting to the limited mission, and this came from Malcolm Hutty. And the stress test would be going outside the scope of ICANN's mission. Not to something like a net (mundial), we covered that earlier, or and new initiatives; we covered that earlier. But rather the use of ICANN's contracting authority to start to impose requirements on third parties -- which contracts are all about -- outside of the mission.

And when I asked Malcolm about the third parties involved, he said, “Well, you know, registrants and then users.” And today registrants and users have no standing to challenge ICANN on its proof (sic) policies or the implementation of a policy. And that the proposed measures would help ultimately to the extent that registrants and users are part of AC/SOs and SG; the ALAC or At Large, registrants and users. In the business constituency and the IPC, a lot of registrant and user interest in there.

And I would suggest to you that the GAC considers itself representing the citizens of each in the respected country. And the citizens are both end users and registrants.

So there’s quite a bit of attention given to giving affected third parties who aren’t actually contract parties a voice to challenge something if they can muster super-majority of the so-called community.

Sam, you have three comments on this one, so I'm going to give you a chance to walk us through what you think those comments would do to change the text of the stress tests.

Samantha Eisner: Well this is another stress test where I think we need some more clarity. I have highlighted within the stress test itself that I'm not really clear on what that sentence means that I highlighted in there, the contracted parties not being implicated by the requirements (unintelligible) mechanisms. I don't really understand what that strikes. I think we need to...

((Crosstalk))

Steve DelBianco: I could translate. I could translate for (Malcolm). (Malcolm) suggested that let's say registrars in the case of - and registrars themselves are simply passing

along some requirements to the underlying registrar. So the registrars themselves aren't affected to the point where they're going to challenge ICANN's position on a new policy. But it's the registrar's that has the bear the brunt of a policy.

Suppose it's a licensing requirement for registrars in .doctor. There may be registrars that object to that that they wouldn't have - they wouldn't have help from the registrar to challenge that.

So I think he's saying that the parties who can challenge the contract party itself that it passes through to registrars, they may not care. They may not challenge. I think that's a fair reading of what he said.

Samantha Eisner: Yes. I think we benefit by having the language in here a little bit clearer because that makes it a little bit easier (too). I guess that there's an issue of are we talking policy or policy? You know, are we talking registration policies that may be more through a contract versus implementing...

Steve DelBianco: Yes. Yes.

Samantha Eisner: ...ICANN policies? So I think we need...

Steve DelBianco: Yes.

Samantha Eisner: ...to be clear about that too because you can - some of my comments here go to the policy development process as opposed to registration policies that aren't necessarily ICANN, you know, the - developed through ICANN policy development processes.

Steve DelBianco: You have specific changes you propose to clarify that?

Samantha Eisner: I can come up with some. I guess I'm not - I feel like we're talking about two kinds of policies here, right. We're talking about, you know, approved policies that come through the PDP process where, you know, affected third parties actually have the ability to participate in the policy development process itself.

And so some of the wording around challenge, et cetera, doesn't quite make sense versus registration policies that come through a contract that don't hit the PDP level, right. They're registration requirements for a better word as opposed to policies. I think we need to separate the words that we're using. That makes a little bit clearer what we're trying to get to.

Steve DelBianco: We should put both then. So it's both the development through the PDPs and the implementation of contract requirements. I think we're talking about both.

Samantha Eisner: Yes. Agreed. Agreed.

Steve DelBianco: Okay. So if I put the word both in there then people will understand that we're covering both. And I'll put that into the stress test column.

Samantha Eisner: Yes.

Steve DelBianco: Okay.

Samantha Eisner: You know, my - I do have - I'm going to read this one very critically because of the consequences there and so I will keep reading it very critically as we iterate through it because...

Steve DelBianco: Okay.

Samantha Eisner: ...any suggestion - this isn't just at ICANN. This is about the contracted parties as well. Any suggestion that it's being used to leverage market power is a really serious suggestion that we have to look at carefully, not - and this is not just an issue about not affecting ICANN.

This is an issue about all the contracted parties as well. Because any of them who are seen as quote unquote acquiescing or just not caring about what's in their contract is a way to leverage their market power. It's a really serious thing.

And so I don't - it's hard for me or I understand how this consequence flows from this. But I don't know if that's what we're - if that's the only consequence. Because one of the other consequences seems to be that there's a group of people who feel like they have no ability to affect how contracts are put in place at ICANN. It's not even a market power issue. It's about just a general issue. So I think that there might be two consequences there.

Steve DelBianco: Yes. I don't think the way (Malcolm) wrote this I don't believe it had anything to do with the contract parties exerting market powers. The non-contract parties that are affected and what redress powers that they have.

Samantha Eisner: Right. But the...

((Crosstalk))

Steve DelBianco: ...does not get into the market power issue.

Samantha Eisner: Yes. So any time that there's the ability for ICANN to leverage power in a market you have to think about the fact that that actually has a complementary aspect. You can't just separate out this is only about ICANN. Because if it's -

if the words are about contracted parties just passing through things and not - and acting along with ICANN, that's a market power issue too.

Just because the words don't focus on it doesn't mean that in the legal reality it poses really big risks for contracted parties as well as ICANN. So we just have to really be aware of that as we're writing it. I'm not saying it's not...

Steve DelBianco: So really...

((Crosstalk))

Steve DelBianco: Okay. So help me out. The words really be aware of that. I get that. But where do we put that in this stress test?

Samantha Eisner: Well I think it goes with a bit of a rewriting of the stress test itself. And the...

((Crosstalk))

Steve DelBianco: ...if you do so, don't lose what (Malcolm) - please.

Samantha Eisner: Oh no. No. It's about the clarification.

Steve DelBianco: (But) (Malcolm) describing...

Samantha Eisner: I'm not saying that we should - I'm not suggesting that we take out the issue that he's raised. I'm saying we need to be really clear about what we're talking about when we're raising the issue.

Steve DelBianco: I'm not getting...

((Crosstalk))

Samantha Eisner: ...severity of the risk to everyone in the system.

((Crosstalk))

Samantha Eisner: I think we all...

Steve DelBianco: I'm not getting that.

((Crosstalk))

Cheryl Langdon-Orr: Yes. I think we all hear and understand that Sam. I also think that I guess you've got another piece of text to do while you're on a roll.

Samantha Eisner: Yes. Yes. And then within the second column, you know, we start looking at this between the ICANN policy development process and the approved registration...

Steve DelBianco: (The limitation).

Samantha Eisner: ...policy or the approved registration requirements. There's a little bit of difference there, right. So there's - the first existing accountability measures is affected third parties have (been stating) to challenge ICANN on its approved policy while the actual accountability measure that's there is the PDP process is (solved) if they have the opportunity to participate. And that's on the PDP side.

Steve DelBianco: Well I'll add that - I'll add that.

Samantha Eisner: There's also public comment requirements that go along with changes to contracts. So that's another place for influence so it doesn't go to challenge clearly but it's a place to influence what actually comes into a contract itself.

Steve DelBianco: I'll add that. Yes. Anyone can participate in a PDP and anyone can participate in a public comment period on things like contract changes. I get that. Yes. I've got it.

Samantha Eisner: And then we have discussed before on - I don't know if it was on this call or a CCWG call but ICANN changing its legal jurisdiction doesn't necessarily have a direct effect on where people can sue ICANN. So this is stated in a much more - I'll think about it. Maybe recommend a little bit of language to flesh out. But this isn't...

Steve DelBianco: Right. But Sam, it doesn't say changes its legal jurisdiction that would affect. It said could affect. And you used the necessarily and I understand that and that's why it's worded as could but not would. Does this need to change further?

Samantha Eisner: I need to think about that one.

Steve DelBianco: Okay.

Samantha Eisner: Yes.

Steve DelBianco: All right. So I'll definitely make the change to identify PDP and implementation of registration requirements. That'll be in Column 1. Column 2 I will add that anyone can participate in a PDP and anyone can participate in a public comment period. And so far those are the only two changes.



Samantha Eisner: And that there are public comment periods on contract changes.

Steve DelBianco: That's right. I'll put that in as well.

Samantha Eisner: All right.

Steve DelBianco: Okay.

Cheryl Langdon-Orr: Next.

Steve DelBianco: Next is Number 14. This was discussed in Singapore so it might be quick.

Under the Affirmation of Commitments this notion that it could be terminated and because of that the CCWG's made great strides in moving the reviews into the bylaws as well as the other commitments in Paragraphs 3, 4, 7 and 8. And Sam, I think that's great. Other provisions deemed essential, add that.

Cheryl Langdon-Orr: Yes.

Steve DelBianco: Cheryl, we've done this one many times. I don't think there's too much more needed.

Cheryl Langdon-Orr: I sincerely hope not. But speak now or forever hold your peace people on this call. Well, hold your peace till we do a final run through. Sounded a bit too autocratic even for me. Looks like it's solved Steve. Fifteen.

Steve DelBianco: Okay. Great. Okay. Number 15. Fifteen gets to the notion that if ICANN were to take actions to eliminate a legal presence in a place where users or registrars are seeking to hold ICANN accountable. It's almost creating a scenario where ICANN were deliberately trying to avoid legal jurisdiction in a particular place.

We discussed Paragraph 8 of the affirmation requires ICANN to remain headquartered in the U.S. But again, ICANN can terminate the affirmation at any time.

And the measures that are proposed here is the community would have standing to veto a Board decision if the Board made a public decision to change its legal presence or to vacate legal presence.

Another provision was to bring into the bylaws potentially Paragraph 8 in the Affirmation of Commitments and require maintain a legal presence. This became a hot topic at the U.S. Senate Commerce Committee hearing three weeks ago.

The CEO of ICANN sort of unilaterally said they're never going to change that requirement. Caught a lot of people off guard. And when he said it, there were a couple of Senators who picked up on it and said, "Great. Great. We're going to hold you to it." A lot of that's political theater but it's out there now. This is being discussed more openly.

And then finally if once Affirmation of Commitments were brought into the bylaws if ICANN attempted to then amend those bylaws after the transition, there are measures being considered to allow the community to block a bylaw's change that would maybe undo what the CCWG was able to do. I'll take a queue on this one. Cheryl.

Cheryl Langdon-Orr: Yes indeed we have a queue. There's a comment of course from Sam. So do you want to speak to that Sam?

Samantha Eisner: No. I think it's the same issue we just discussed before.

Cheryl Langdon-Orr: Yes. There is no queue Steve.

Steve DelBianco: All right. Five minutes to go with one left. I don't think we've discussed this one yet. So the idea here was subcontracting under future agreement. James Bladel added this one when we were in Frankfurt. Remember that Cheryl? It was the...

Cheryl Langdon-Orr: Yes.

Steve DelBianco: ...last one to come in.

Cheryl Langdon-Orr: That's right.

Steve DelBianco: And Cheryl, you and I wrote to James to ask whether we had explained this properly.

Cheryl Langdon-Orr: We haven't heard to the contrary.

Steve DelBianco: I don't think so. No. I think that James said we had it right.

Cheryl Langdon-Orr: Yes.

Steve DelBianco: So at least we captured what it was the author of this stress test had in mind. But James did write back -- I've got it here -- where he wants to add under the first column under consequences. He would add or no longer satisfied with NTIA's principles for IANA transition. No longer satisfied with the NTIA principles for the IANA transition.

What James is talking about is the four principles that were in the transition are something we're all aware of now. But once the transition is over, those principles disappear. I think that's worth noting. But James said the rest of it was fine. Now this was one of those stress tests Cheryl that speaks more to the CWG and ICG because it has to do with the IANA functions.

Cheryl Langdon-Orr: Yes.

Steve DelBianco: Specifically within the CCWG. So we're not attempting to apply the stress test yet because we haven't seen what the CCWG proposes.

Cheryl Langdon-Orr: Has come up with. Yes.

Steve DelBianco: Yes. So this is one of the four that we offered in a helpful way to the CWG and ICG.

Cheryl Langdon-Orr: So we do need to sanity check it and this is where the thought of (well) this reading, which is the first reading, is very important. So if you can all just take a couple of minutes to look and see does it pass properly. Do you believe that what we're aiming at is going to be clearly understood when it's read, et cetera.

Steve DelBianco: And I don't think James was getting at anything too sophisticated here. It's getting to the notion that as the contractor for the IANA namings function ICANN might subcontract a piece of that to a third party. And it could do so without community approval. Or could it do so and then ignore the community's objection to that subcontract?

And currently under the IANA contract with NTIA, NTIA that has to get consent for outsourcing and subcontracting. While NTIA disappears, who's

the counter party? We may or may not have an entity that's the counter party to ICANN. Somebody may...

Cheryl Langdon-Orr: Yes.

Steve DelBianco: ...step into NTIA's shoes. And if that's the case, this highlights the need to be sure the community has something to say before ICANN were to subcontract or outsource. Pretty straightforward.

Cheryl Langdon-Orr: Hopefully straightforward enough that the lack of queue indicates that we can take that as a first reading. And then we can now take this list with the proposed modifications and edits coming in from a few of you. Steve, do you want a deadline on the language from Eberhard and Sam? What's going to work for you on that?

Steve DelBianco: I would so greatly appreciate having it by close of business Thursday. That's tomorrow. Close of business tomorrow. Whatever text you can get me, I'll put it in there. So Eberhard for instance, I know you've got plenty of professional responsibilities. If you can't get it further, I'll just put in what you have and indicate that it's work in process. But by close of business Thursday. (Unintelligible).

Cheryl Langdon-Orr: Yes. Obviously this doesn't close off. This is a living document and it's still got a lot of life in it. But it would be good to have Version 8 out in good time so able to read before they travel or while they're traveling perhaps to Frankfurt. Eberhard, I see your hand up. Go ahead.

Eberhard Lisse: What close of business are you talking about?

Cheryl Langdon-Orr: He's talking UTC (you nasty) American (UC).

Eberhard Lisse: So I will try and work today and tomorrow and tomorrow evening and before if I'm finished at midnight my time that's about two hours behind. At the moment it's 3 o'clock my time. That's 9 o'clock UTC. So if I'm finished at 10 o'clock in the evening, that would be 8 o'clock UTC. That is even enough time.

Cheryl Langdon-Orr: Sounds like a plan.

Steve DelBianco: Great. Thanks Eberhard.

Eberhard Lisse: But if I'm not finished, I'll send you - I'll send you what I have.

Steve DelBianco: That'll be fine.

Cheryl Langdon-Orr: That's absolutely perfect. Well the top of the hour. I think it's a great place to...

((Crosstalk))

Eberhard Lisse: I have to run now.

Cheryl Langdon-Orr: Thank you very much Eberhard. Appreciate it.

Eberhard Lisse: Okay. Bye.

Cheryl Langdon-Orr: Bye bye. So Steve, I think we're in pretty good position now to look shortly after those texts coming in to have a Version 8 out. And then having that as this Stress Test Work Party's contribution as a document for discussion at the Frankfurt meeting.

Steve DelBianco: Okay. So the Version 8 will go out on this Friday after I receive any final edits.  
I'll send around a doc, a PDF and a red line...

Cheryl Langdon-Orr: Great.

Steve DelBianco: ...of Version 7 so people will see the changes that are made. Okay?

Cheryl Langdon-Orr: Terrific.

Steve DelBianco: All right. Fantastic.

Cheryl Langdon-Orr: Did I say something other than Istanbul (Jonathan)? I may very well have.  
I think I might have done - I apologize. It's Istanbul I think we're all going to.  
But anyway. Okay. Thank you very much and thank you for putting up with  
my lack of presence at the beginning of the call. Unfortunately the  
telecommunications was not - the gremlins weren't playing nicely or perhaps  
they were playing nicely just not letting me in.

Thank you one and all. Steve, thank you in particular as I know you're doing  
so much heavy lifting on that. But I think we're a - we're in a good position to  
now move to our discussions in Istanbul. Thank you (Jonathan). Thank you  
one and all. And for those of you who are traveling, travel safe and look  
forward to seeing you face-to-face or on the Adobe Connect room. Bye for  
now. You can stop the...

Jonathan Zuck: Bye Cheryl.

END