

**ICANN**

**Moderator: Jordan Carter  
March 18, 2015  
4:00 pm CT**

Jordan Carter: We will kick off the meeting now. It's six minutes past. I hope those who are joining by various audio means will be able to get on soon. Thank you all for coming along to the fifth meeting of Working Party 1, the Accountability CCWG. This is our last meeting before our face to face meeting in Istanbul.

The agenda that I've proposed is a quick look at anything we need to focus on from the CCWG call yesterday that isn't on the agenda already. And then (unintelligible) through quite a lot of substantive content. We want to look again at something Mathieu send earlier this week, we want to look at the options that Malcolm Hutty circulated regarding removing the ICANN Board.

There's one that's coming from Steve DelBianco on 3a, which just at the moment escapes me. I'm suffering a bad cold so I apologize for that. But we'll leave that in the powers section. And then we need to look through the mechanism structures.

And I've circulated some drafts earlier today and I apologize for the lateness of those. And where (unintelligible) members have also been circulated and available so that'll be the bulk of this call. I'll spend a little bit of time at the

end thinking about what we want to do on Sunday in Istanbul for those who are able to attend. And then look at any other business.

Are there any items that we need to deal with in this call that aren't on that agenda? Kavouss, I see that your hand is up here. I think though that you don't have audio access from what's happening in the chat so I hope that you do soon. We can't delay the meeting for one person (unintelligible) unfortunately but I hope that we can get through to him soon.

So rising from the CCWG meeting are there any items that people would like to raise? I'm just trying to find the formal notes that were circulated on the 18th. The key point is to make sure that the circulated call for any other items at Istanbul is covered. And I think that all of our main items are covered. There are powers and mechanisms and incorporation of the AOC into the bylaws is all on the agenda already.

I raised and was asked at this last meeting (unintelligible) jurisdiction and will have some email traffic about that on the main CCWG list. And so I think we can chug through. I'm looking forward to hearing personal (unintelligible) lawyers appointed and working out a schedule today. I think it's also worth noting that the actual viability of the entire schedule of the Work Stream 1 work has been raised. And we will come to that at Istanbul so we don't need to discuss it here.

I think that everyone understands the need to (unintelligible) timetable and that is actually workable. So I don't think we'll have any problems arriving at a view about what that is after we've had our discussions in Istanbul, the point is to do as much work as we can there.

So are there other items to raise? I see a hand up from Malcolm. Malcolm, fire away.

Malcolm Hutty: Jordan, thank you. And I'm afraid this is a matter point and it's only a small thing but the Istanbul meeting was listed and advertised as being for Monday and Tuesday and it turns out that we're going to be having meetings on Sunday afternoon as well which means that I'm going to have to burn some flight tickets in order to make it for the Sunday afternoon meeting.

So I would ask the staff if they're aware that preliminary meetings are going to happen for such meetings that they also note those on calendars and announcements and so forth. Thank you.

Jordan Carter: Thanks, Malcolm. The way we've discussed this prior meeting, and in all communications, is there will be an informal one with no decision making so it just flags a couple of weeks ago. I think it would be very helpful if staff do flag that stuff in calendars in future. And we'll make sure that we if we need such a meeting in advance of our next face to face we sort that out earlier. And so it's a point well made.

But I wouldn't - I don't know if we'll be covering anything at that meeting that demands you burning up tickets and changing arrangements particularly. We might know more about that when we discuss it at the end of this call. But point well made, thank you.

Matthew, you've got your hand up as well.

Matthew Shears: Yes, thanks Jordan. Can you hear me all right?

Jordan Carter: I can hear you fine, yeah.

Matthew Shears: Okay great. So one issue that I raised on the list, and perhaps it's something that we may need to start considering relatively soon and perhaps we could start in Istanbul is assuming that these various accountability measures proceed what is the actual implementation timeline?

In other words, how do we ensure that we have the time to account for the various processes that they all need to go through to be approved by the target date of July or September or whatever it may be for the accountability submission to NTIA and what process is there - that was exciting. Anyway so what process is there for ensuring that we have the time and the mechanisms in place to do that? Thanks.

Jordan Carter: Thanks, Matthew. That's a good point. And I'm assuming that that will form part of the discussion in Istanbul when we come to scheduling as well because not only is there the timeframes for actually being able to establish a community and - an accountability process (unintelligible) appropriate level of community input and feedback, there's also the point that we have to be able to implement it and that has to be done with public (unintelligible) the names community proposal and also the (unintelligible) and parameters and numbers proposals.

So I'm reasonably confident that no one's expecting us to implement or Work Stream 1 stuff in time for July. But I know that in my mind at least we'll have to have a workable way to implement it all before the NTIA contract expires whenever that is. So it's a point, again, well made that will be definitely on the agenda in Istanbul. Thanks.

Kavouss, your hand is up.

Kavouss Arasteh: Yes, good time to everybody. I understand that we set this on July something (unintelligible) on the accountability NTIA. I think first of all if it is something that relates merely and solely for the work of stream 1 but not of the work of stream 2. This is number one.

Number 2, as I understand correctly from our charter CCWG would not send anything to NTIA, they would send something to the ICANN. Am I right or wrong?

Jordan Carter: You're right, Kavouss, on the second one. And you're wrong, I think on the first one. In respect of when we have to submit our Work Stream 1 proposal, I'm pretty confident that the timeline has it going to SOs and ACs to sign off in June in time for the ICANN board to receive it following that endorsement from SOs ACs for discussion prior to the Buenos Aires meeting at the end of June. So that's the schedule we will have to decide in Istanbul whether we can manage or not.

And you are right on the second point, our job is to submit our proposal to the ICANN Board which has given us some assurances that it will basically pass that on to NTIA, so thanks for raising those two issues. I hope that clarifies it.

Okay, are there any other matters to raise from the CCWG meeting? I don't want us to get bogged down in a discussion about timetables now, I think maybe we can come back to that at the end of the call in any other business.

I think that it's going to be challenging at best to do what we're doing given where we're at (unintelligible) so let's just hold back until we've dealt with our substantial stuff if we could, which I'd now like to run. This is Item 3 in the agenda.

And we've got two people in the agenda listed, Matthew Shears for the AOC incorporation and Malcolm Hutty to talk about removing the ICANN Board (unintelligible) and Steve DelBianco with his 3a that I keep forgetting the name of.

Just before we do that since we've got it in front of us we should look just quickly through the work the status chart. I'm going to assume that you all have navigation mode available for that so I'm not going to be essentially controlling what you see.

If you scroll down to the second page of that sheet you've got the powers list, you've got the green ones at the top, you've got yellow draft ones in (bar) 2. We have talked those through a number of times.

When you get down to the first red one, 3a, that's the one that Steve has started and we will be discussing later in this call (unintelligible) to require the implementation of the accountability Work Stream 2 issues plus transition.

We already said that the GAC stuff is a bit on hold and I don't doubt that will be a subject at the Istanbul meeting. I know that Keith Drasek has done some work on the obligations stuff and I, for the life of me, cannot remember whether we discussed it at the last meeting.

So, Keith, I think you're on the call, I think that you'll be ready to take us through it on this call if we could confirm that because you're - yes, so we will discuss that one as well so, Keith, and Steve as well as the two names that are already there on the agenda for powers matters.

We aren't starting the ombudsman stuff because it's Work Stream 2. And we have got a draft that's been quite well discussed on directors. So in my mind

despite the fact those are - there's the variety of colors there, it's green, yellow and red, they're actually - all of the ones that need to be green or yellow are - or can be green and yellow and we will get to that - sorry, in terms of the line being choppy when I'm talking I'll try and hold the microphone closer to my face and I'll try to speak a little bit more slowly.

Then if you scroll down to our Table 2, our mechanisms table, as of this morning we do have drafts for all of these mechanisms, SO AC structures, (unintelligible) CWG, delegates, members, advisory board and community veto. They will all have been discussed a first time at least by the end of this call.

So by my reckoning we're largely on track after this call. And if anyone has any other status items to raise could say either just do so briefly now or save them for the end of this section of the agenda. So I'll do another call about - if there's any other status updates at the end of this Item 3.

And in the meantime why don't we go in this order for the - we'll get Matthew to talk about AOC incorporation and we'll get Malcolm to talk about his variance of the board, we'll get Steve to talk about his 3a stuff and we'll get Keith to talk about his 5b stuff. So that's the order. And, Matthew, the floor is yours.

Matthew Shears: Thanks, Jordan. So just to remind everybody that this is to address the other articles in the Affirmation of Commitments beyond those that were dealt with by Steve previously relating to the various groups.

So the document you have on your screen at the moment is a revised - slightly revised version of the document that was circulated I think two weeks ago

now. I sent it out to the WP 1 list I think it was Monday and Jordan sent it again so you should have copies in your inboxes.

So what I've done here is I've tried to summarize our discussion that we had the last time around as well as incorporate comments and text at it from Steve and Robin. And what we're looking at here basically is a proposal for two new core values in the bylaws, and add it to one of the core values and a proposal for two new paragraphs in Article 3 on transparency. And this document - what can read in the document reflects those new proposals based upon, as I said, the input I've had so far.

What I will say is that it's very very important that those of you who have not commented on this document do so because these are pretty important changes that are being proposed here, and the more input the better.

So just to walk through, so Paragraph 3 of the Affirmation of Commitments includes text that talks about ensuring that decisions are made related to the global technical coordination of the DNS are made in the public interest and are accountable and transparent.

In this particular - in the core values of the bylaws this text - the idea and the intent behind this text is not explicit so the proposal including edit from Robin is that we ask or seek a new core value in the bylaws that would read, "Ensure that decision is made related to the global technical coordination of the DNS, are made in the global public interest and are accountable, transparent and bottom up in their formulation." So that's the first proposal in red that you can see on that page.

If you just scroll down a little bit you will see the second one which is an edit to the existing Core Value 5 where one of the things that's in the Affirmation

of Commitments talks about promoting competition, consumer trust and consumer choice in the DNS marketplace.

The notion of competition is in the bylaws but (unintelligible) the notions of consumer trust and choice. So the proposed edit that you see there is in bold red so the existing core value reads, "Where feasible and appropriate, depending on market mechanisms, to promote and sustain a competitive environment." And he suggested at it would be to add "that enhances consumer trust and choice."

If you go down a little bit further you will see that D from the Affirmation of Commitments talks about facilitating international participation in the DNS. There was a proposal from Robin to change the phrasing somewhat and to restate this as, "participate in international DNS ordination" but we didn't have a discussion as to where this might - this at it as a whole or this might be incorporated into the bylaws. And I would welcome additional thoughts and inputs on that.

If you go down to - go down to 4, yes, Steve, to your point, yes, that's correct, we did add global public interest - global to the public interest. You go down to 4 there are a couple of elements in the Affirmation of Commitments that relate to transparency and accountability.

And in particular there are two and the first one is in Article 4 which basically says that ICANN recognized that they must commit to performing and publishing analyses of the positive and negative effects of its decisions on the public including any financial impact on the public and positive or negative impact on the systemic security, stability and resiliency of the DNS.

This notion of performing impact assessment it does not seem to be accounted for anywhere. And if that is not the case, and I'd very much appreciate someone telling me if it accounted for somewhere, then proposing a new section in Article 3 of the bylaws on transparency which would effectively take the language I just read out and insert that as a new section of Article 3 which is there in that - which is the red text that you see there.

And continuing on to Affirmation of Commitments Article 7, again, a suggestion for a new insertion in the transparency in Article 3 and transparency in the bylaws. This is the Affirmation of Commitments paragraph for Article 7, its entirety, with a text suggestion by Robin.

It makes for rather a long paragraph or new article but it - and it contains quite a number of points. But all of those points are actually very key to transparency and accountability as a whole so that's the proposal for that section - that one that you can see on your screen at the top of Page 3, that large proposed insert.

If you carry on to Article 8, this deals with, again, A deals with maintaining capacity and ability to coordinate the Internet DNS at the overall level and to work for the maintenance of a single interoperable Internet. That language in various ways has already been incorporated into the bylaws. But Steve was suggesting that it might be valuable to incorporate it as a whole into the bylaws. But it's not clear to me where so I would certainly value further thoughts on where they should be - where that might be inserted.

The next one, B, 8b, is the issue of - it's a couple of issues here. One of which is remaining a not for profit corporation. And then you've got the second concept of headquartered in the United States of America with offices around the world to meet the needs of the global community. The bylaws do not

specify that ICANN should remain a not for profit corporation but the Articles of Incorporation do in a kind of indirect manner obviously.

So whether or not we need that incorporated somewhere I think this open for discussion. There was a suggestion in the group that the issue of jurisdiction be brought into the bylaws. From my recollection from our last discussion that we didn't really conclude on that but certainly there was a - this now is being brought up at the broader CCWG level. So - and Mathieu has kicked off the discussion there.

If you go to the next page, which is Part C of Article 8, it's to operate as a multistakeholder private-led organization with input from the public for whose benefit ICANN shall in all events act. This is interesting because the particular language there, multistakeholder and with input from the public for whose benefit ICANN shall in all event act, is not explicitly in the bylaws.

And so the proposal is, as you will see in the red there, to insert a new core value that would read, "As operating as a multistakeholder bottom up," thanks Robin, "private sector led organization with input from the public for whose benefit ICANN shall in all events act."

And that's the - that's where we are on that at the moment so, Jordan, that's pretty much my report. Again, I would very much welcome further input on this and also suggestions as to how we take this forward. Thanks.

Jordan Carter: Thank you, Matthew, that's very helpful. We've got a couple of hands up so we'll deal with those first. And I assume you're available for questions. The first one is Malcolm. Malcolm, your hand is up.

Malcolm Hutter: Thank you, Jordan. And thank you, Matthew, for that presentation. My comments and question is about the first change you propose here in 3a, the one about ensuring that the decisions made are made in the global public interest in an accountable, transparent and bottom up in their formulation.

When you presented this, Matthew, you described this or presented this as the key change being that adding the tests that they must be bottom up in their formulation. And I - I'll say in passing, I support that.

But it appears to me that the first bit has been changed as well. And I'd like you to confirm this. The "ensure that decisions made" related to the global technical coordination of the DNS are made in the global public interest and other things is - seems to me to be a broadening of how the term public interest is currently treated in the core values where it's only limited to specific questions at the moment.

So my question, first of all, is that the correct understanding? Secondly, is that intentional? And then thirdly, and perhaps most importantly, would you intend that the board would be invited to set aside decisions or proposed policies that are being provided to it by the policy making processes on the grounds that they viewed that a particular decision was not in the global public interest?

Matthew Shears: Malcolm, you're asking all the right questions. So just to be absolutely clear, the language that is in the document if you scroll up to 3a in black, is the language that exists at the moment in the Affirmation of Commitments. The proposed language...

Malcolm Hutter: But not in the core value statement.

((Crosstalk))

Matthew Shears: ...adds the word...

Malcolm Hutty: In the Affirmation of Commitments but not in the core values in the bylaws.

Matthew Shears: It's in the Affirmation of Commitments, that's correct.

Malcolm Hutty: Yes.

((Crosstalk))

Matthew Shears: The proposed text - the proposal is to move that text with the following two changes (unintelligible) global (unintelligible) public interest and add the words "and bottom up in their formulation" as you see it on the screen into the bylaws. So just - now as to your second question or third question which was how does this - does this mean that - is this an expanding of the scope?

I'm not sure whether or not it's expanding of the scope in terms of putting global in front of public interest. I think that's probably a debatable point. So I'm not...

((Crosstalk))

Malcolm Hutty: No, my question, Matthew, my question was about global in front of public interest. My question was more about moving it from the Affirmation of Commitments to the bylaws. Does that imply that the board would be invited or indeed required to prefer its view on the global public interest above, for example, the PDP?

Matthew Shears: That's a great question, Malcolm. I don't have an answer for you.

Malcolm Hutty: Thank you.

Jordan Carter: I just want to intervene on that point and suggest that it's one that's going to need to be raised in the discussion at Istanbul in a couple of cases, Malcolm. One is where this interacts with the kind of community charter that Becky's team is working on. I think that some of these issues will end up in that part of the bylaws.

I personally am pretty clear that we shouldn't be building a system where the board can use the excuse of the global public interest, quote, unquote, to undo policy making that is grass roots and bottom up.

And to do that so it's (unintelligible) ICANN started to use this language that it provides a window for a certain set of actors to decide that they know best which if we found our accountability task we'll have created a new monopoly that also thinks its knows best. But I'd be concerned if we were opening that up and so I'd ask you to make sure that you raise that in Istanbul.

Sorry for interrupting the speaking queue on that. The next speaker is Kavouss. Kavouss, we definitely can't hear you.

Kavouss Arasteh: Yes, can you hear me?

Jordan Carter: Oh now we can hear you, yeah.

Kavouss Arasteh: Yeah, is okay? May I talk?

((Crosstalk))

Kavouss Arasteh: Yeah, if you can hear me, thank you very much for all. Something that I have noted in the entire current existing bylaw and Affirmation of Commitment, in many places we said that ICANN will do this, ICANN will do that. I think because the bylaw is the highest level of the document basic instrument of ICANN, the use of the word (unintelligible) word "will" would seem not to be appropriate.

In other areas use the term "shall" but not "will." It is not up to the people to say I will do this, shall is obligations but not will. Will is (unintelligible) so I think this is something that I have raised several times and unfortunately neither (unintelligible) appeared in any of the record nor it has been taken into account. I don't think that we could say that ICANN will do that. ICANN is required to do something and the (unintelligible) shall do that. This is number one.

Number 2, in many areas the text which has been proposed in that, for instance, in B - in Section - in C it says where feasible and appropriate, who will decide that it is feasible? And who will decide that it is appropriate? It is too weak language to use. We have to put it a different way otherwise it will not serve any purpose. (Unintelligible) we may put many things (unintelligible) but we should look into the implementation of that, something is good to put in that but this is not implementable at all.

How someone could ensure that something be done, there is no guarantee for (unintelligible) so you cannot ensure that that is something many international treaty is has been debated that the use of the verb "ensure" should be with a lot of caution because it is sometimes it is difficult to ensure something, it is out of control of the people.

(Unintelligible) anybody anything but I just give my experience that we have to be very careful and to make the use of the "ensure" to the minimum absolute necessary, otherwise it's a bit difficult. And in the bylaw we have to avoid using where visible, as soon as possible and so on so forth because all of them are qualifications and requires justification and a bit difficult for implement.

Please, can - if possible note that and this is the last one I have seen in the ICANN core mission. Some of these issues are there. Are we repeating them here or people dealing with the ICANN core mission they will submit to your group the result of their work. I have seen somewhere similar sentence and I hope that that would not be (unintelligible) and we have to take that into account. Thank you.

Jordan Carter: Thanks, Kavouss. Any response, Matthew?

Matthew Shears: Yes, I mean, I'm absolutely understood about the ambiguity and the weakness of the language. So just to be absolutely clear what I have not done in this process is try to change the language of the existing bylaws but merely to insert the key elements from the Affirmation of Commitments into the bylaws either as an - in one case an edit or alternatively as two new bylaws.

So just to be absolutely clear I have not tried to change the existing bylaws. Now maybe that's something we might want to do but the problem is then I kind of see this as moving into - correct me if I'm wrong - but kind of moving in to the Becky's work over in WP 2 where there is this whole discussion of the compact which - and bylaws in the same kind of vein.

So all I've done here is to try not to change the language but to try and bring in existing language from the AOC. Thanks.

Jordan Carter: Thanks, Matthew. The next hand up is Steve DelBianco.

Steve DelBianco: Thanks, Jordan. What Matthew's work has done, and the discussion we just had with Kavouss, indicates the confusion that gets created about the destination of these Affirmation of Commitments items. The fact that the destination in core values led Matthew to simply repeat verbatim what the core values in the bylaws already say, leads some of us to say, "Wow, what's that doing in there?"

But that is a - that is a bit beyond our scope for this particular exercise. Matthew's work, I think needs us, on Work Party 1 to examine the four paragraphs from the Affirmation, to potentially rephrase them a bit and then to recommend that rephrasing as well as the destination as to where it might live in the bylaws.

Now the discussion of where it might live in the bylaws is getting us a little bit confused because it requires you to cut and paste from the bylaws and that may generate questions about, well, I didn't know that was in the bylaws or that shouldn't be there.

And if we undertake to modify things that have been in the bylaws for 15 years, our task is going to be a lot harder. So I think we should try to focus on what the Affirmation said. And Matthew has that at the beginning of the section in black.

The second thing is the potential rephrasing, you know, insertion of the word "global" in front of public interest, adding some phrases that Robin has suggested. And we should debate those in Work Party 1 try to reach consensus within our work party about appropriate rephrasing or additional words and

the least of our worries should be where it goes in the bylaws, what section it goes. That could almost go later because it's clearly getting us off track right now.

And I wanted to finally say that Malcolm raised what we'll call the threshold question, we should probably put at the very top of the document. Threshold question is Does moving these from an Affirmation, which is a bilateral agreement, to the bylaws, does that create a higher priority for ICANN to follow it?

And in particular having it in the core values section of the bylaws, does that convey more importance? Because as Malcolm said, there may be elements of the bylaws that are already conflicting today between PDP and other elements in the bylaws. We don't want to make that problem worse but I'm pretty sure we didn't invent that problem Malcolm, there are plenty of inconsistencies between the PDP process and obligations that are already in ICANN's bylaws.

So I would just argue for us to stick to the rephrasing and don't worry so much about where it's going to go in the bylaws and raise Malcolm's question to the very top of the document as simply a threshold question. Thank you.

Jordan Carter: Thanks, Steve. With your (unintelligible) and Malcolm - Matthew we'll move straight on to Greg's comment now.

Greg Shatan: Thanks. Greg Shatan for the record. First, in responding directly to Malcolm's comment, or at least I think I am, in terms of PDP or rather in terms of a recommendation - policy recommendation that has been passed to the board after being developed in the PDP, the bylaws have specific voting thresholds for the board to reject those.

The board isn't really required to say, as far as I know, why it's rejecting them although there's usually, you know, rationales that the board publishes for its decision. And they could base those decisions on any core value that they want to or not even on a core value, on any sort of things they want. And if they can't muster that voting threshold then the - to vote it down then it becomes a rule and there's really no wiggle room around that as far as I see.

Second, with regard to the core values, the core values is kind of a weird section of these bylaws. And I'm not sure whether it's necessarily the right place for these things, although it may seem that it is the best place for them.

The core values begins by saying that the following core values should guide the decisions and actions of ICANN. Should is not shall. And I follow Kavouss's, you know, line of thinking that these types of words are important, should, shall, will, must, may, might. They all have different meanings. Should is not prescriptive. It's at best a recommendation.

Secondly the core values end with a paragraph that, you know, should be kept in mind of we're going to put anything in the core values. I'll read it kind of quickly and then post it in the chat.

"These core values are deliberately expressed in very general terms so that they may provide useful and relevant guidance in the broadest possible range of circumstances. Because they are not narrowly prescriptive the specific way in which they apply individually and collectively to each new situation will necessarily depend on many factors that cannot be fully anticipated or enumerated because they are statements of principle rather than practice."

"Situations will inevitably arise in which perfect fidelity to all 11 core values simultaneously is not possible. Any ICANN body making a recommendation

or decision shall exercise its judgment to determine which core values are most relevant and how they apply to the specific circumstances of the case at hand and is determined if necessary an appropriate and defensible balance among competing values."

So this is - in a sense even though the bylaws are more, you know, are kind of the apex of the commitments or rules by which ICANN must live by the core values themselves are kind of mush in terms of the extent to which they bind ICANN.

So we may be having the opposite effect that we expect by putting them in the core values. If we think we're binding ICANN to something putting it in the core values is actually putting it into a pile of values that may or may not be applied depending on the circumstances. Thanks.

Jordan Carter: Thanks, Greg. And that to me is why I said a couple of times in the chat the last thing we should be trying to do on this call today is work out exactly where these things should go to have the proper effect.

We've already taken close to 45 minutes of our call, or just over, and we've gotten through one of the eight docs we need to look at. So my proposal is that we - this is able to be forwarded to the Istanbul meeting.

But that what we're trying to get across to that, what we want people to focus on is that they should be included somewhere in the bylaws and to look - focus (unintelligible) on whether these ideas ought to be captured in some kind of binding way wherever it is and that the proposed changes from current text, wherever they end up getting reflected are ones that are worth us discussing.

I don't think we have time to go through and emerge to a consensus on every particular change. But as I look through it I think this might, you know, so let's not delay things by doing that. If anyone has a fundamental objection to this being an input to the discussion then - in Istanbul then they should say so now. But I'd like us to proceed on that basis.

And, Kavouss, I see that your hand is up.

Kavouss Arasteh: Yes, just (unintelligible) at all but just I want to make this statement that I understand that still we are influenced and biased by the existing prevalent situation that ICANN and the board has a lot of authority whereas in future their authorities are - and their mandate are in hand of the community. So I don't think that we should put board should reject that, board should accept that and so on so forth.

But this is - this is to be taken into account. I'm sure that particular still they are biased by the existing situations and we have to look into the future. But the board's authority will be diminished and will be (unintelligible) to the community, that is the community decision to reject or to accept but not the board.

So we always (unintelligible) board acceptance, board reject that we should look at that one to see to what extent we should emphasize that board has the authority or has the power to reject. They should be limited to the minimum and this authority should be given to the community. Thank you.

Jordan Carter: Thanks, Kavouss. That's the character of the whole set of (unintelligible). I should say the other reason (unintelligible) the timing is that even as we go out to community consultation we're still going to be doing work as a CCWG

and working parties presumably on the details, the workability, the interactions, the stress tests and so on.

So we'll have lots of time to pick up and the issues that are being raised here, that's not - so they're not being helpfully raised, they are. So thank you everyone for that input. And, Matthew, I think you've got a few suggestions out of this, just some caveats to our material and some guidance at the top of the doc for the CCWG's consideration. And so I will suggest that you do that and recirculate as soon as you can.

And on that basis I'm going to quickly push us along to the next item which is Malcolm's content on options in terms of removing the ICANN board. So if that doc could come up and if Malcolm could take the floor that would be handy

Malcolm Hutty: Okay, Jordan, if I have the floor? Okay allow me to introduce this as briefly as I can manage. Jordan, you had produced a very useful paper describing how a community council might have - be given the power to discharge the board as a whole and that that community council might be able to and only able to exercise that power when petitioned by two SOs or ACs, i.e. two - one SO plus another SO or another AC or two ACs. And that was your proposal.

This - following the discussion, and as part of the discussion that we had at our last meeting, I thought that it would be useful to set out three broad ideas for what this power would mean and how it would be used. And these became three straw men that I've got in this paper. And they envisaged three different concepts of what removing the board would be.

The first one is your proposal, your original proposal. And this is the idea that the community has the right to spill the board but it would need to reach a

very high standard of consensus to do so. And indeed a high level of consensus even to begin the process of doing so.

So in your proposal it says that even to start to put it to the community Council that the board should be spilled you would need a consensus from not one but two of the key stakeholder groups, the SOs, or ACs. And bearing in mind that most of the ACs would not be likely to do this because they're advisory.

And it struck me then, okay well that's one concept, the idea of spilling the board, that's a last resort power, a nuclear power, is one concept of how it might work.

A second concept would be to take the same structure and mechanism that you described and to say yes, the community council could do this and yes it would require a very high threshold to spill the board. But it could be something that would have a lower threshold to ask the community council to do that.

What would be the relevance of this change? It would be sort of to ensure that the discussion around spilling the board happened within that process, so that instead of having to get to a very high level community consensus to spill the board before we even initiate a process, you could have a lower level to initiate it and then you would have the discussion within the process as to whether or not that was appropriate.

Which would provide the elements of the community with a venue, this community Council, to have that discussion within rather than forcing the community to have that discussion precedent to initiating that process.

So here we've got - so there's the distinction between those two. On the one hand you've got a high level of consensus to start the process; on the other one you've got a significant element of the community being required but by no means a consensus amongst the whole community to start this process and at a high level you'd need to then persuade a high level in order to actually spill the board.

And the third straw man actually sets a lower boundary; it says the board ought to command the confidence of each element of the community to which it's responsible. And here this essentially means the three SOs. The board is accountable to those SOs, it serves those communities. And if any one of those communities cannot have confidence in the boards then maybe it's better to have - to just simply elect a new board.

And so the third straw man would allow any of the SOs to say actually you know what, it's just time for a new board. So these are three options. I'm not actually coming behind one of them, I'm identifying these as three different concepts for what this power might be that I think should be discussed so that we could think do we envisage this power to spill the board as a fundamental last resort?

Or, in the second place, as a broader mechanism to ensure that the community is able to - the board is responsive to the community; or in the third case a strict requirement that the board must have the confidence of the communities to which it's answerable. And that's the fundamental question I put really. And then there's three straw men provide a mechanism for implementing each of those three principles according to which is chosen. Thank you.

Jordan Carter: Thanks, Malcolm, that's a nice brief but comprehensive introduction to the topic. Just let me make a couple of comments before we open the queue. So if

you do want to make a comment or ask a question or anything do start putting your hands up.

I think that if we can - at some point we have to try and make the reading simple for the people who are going to be coming to the face-to-face especially if they're Work Party 2 people who haven't been following our work easily.

So I think it might be a good idea if we can try and send out or separate these three straw man proposals which I think are all worthy of discussion in Istanbul so that it's not so cluttered up with the mechanism (unintelligible).

I think that if we just focus on the power to remove the board and say that the mechanism used for straw man 1 and 2 would be the - would be the community council or a permanent CCWG or whatever comes out of the discussion later on in this call about ways to do stuff, about mechanisms. And then we can have (unintelligible) look at it.

And it might in fact be easiest to just describe your three alternatives in a table that has nothing to do with the template and Malcolm. I'm prepared to spend some time working with you directly to do that, not all to change the mechanisms but just to create a kind of two or three page document that's easier to digest for people. If you're amenable to that then we can just get on to do that after this call.

But you don't need to answer that now because first we'll take the speaking list and maybe we can come back to that comment. And the first person there is Kavouss. Fire away.

Kavouss Arasteh: May I talk?

Jordan Carter: Yes, in New Zealand English fire away means go ahead.

((Crosstalk))

Kavouss Arasteh: Yeah, I think the three options are good to maintain for the time being. Could I - did I understand the third option would be some sort similar to the vote of confidence? The first option is (unintelligible) 2, the major item, the constituency, AC or SO would initiate or would trigger the removal of the board.

And the second option is the (unintelligible) lower threshold and then it is agreed go to the higher threshold. And the third option is the vote of confidence, is that right? Or I misunderstood the third option. Thank you.

Jordan Carter: That sounds right to me. Malcolm, is that a way to represent the straw man 3?

Malcolm Hutty: Yes, straw man 3 was definitely a vote on the confidence by one of the SOs. And I would regard your original and the variant straw man Option 2 as both being that the community council was the body that had to have confidence in the board. In all cases it seems to be a confidence vote.

Jordan Carter: Okay thanks. Are there any other - are there any other comments here? And bearing in mind that we have yet to go on to our mechanisms so that may shape it. Personally I thought this was a very thoughtful contribution that will provide plenty of fodder for discussion next week.

A couple of comments in the chat, for the audio records, one is that if we (unintelligible) a membership organization under California law the members would automatically have the power to remove the board so that's useful to

know. And (unintelligible) need to specify the power per se. And we have a deficit of people in the speaking list which is fine. Malcolm, are you happy to work with me to try and create a shorter simpler version of this for people to read flying into Istanbul?

Malcolm Hutty: I'd be very happy to of course. I had understood that in order to have this considered I had to submit templates but actually if you look at the paper I included at the beginning an introduction section which described the differences between the three because I thought that templates were less legible. I'd be happy to work with you to turn that into tabular format. But whatever is most useful to people to digest it so that we can stimulate the discussion.

As I said in my introduction I think really we are - what we're talking about is what kind of outcome do we want and then the implementation will follow from that quite easily.

Jordan Carter: Absolutely. And your contribution is helpful because it gets us focused on the big picture question. Steve DelBianco, your hand is up.

Steve DelBianco: Yes, it's a question we need to think about but not answer today on the call. The question is about building the board, which the BC brought up in May. Folks who were uncomfortable with that idea would say things like, well if you spill the board, ICANN would be unable to execute contracts, would be powerless to take decisions, it would cripple the organization.

And I'd love to be able to respond to that by suggesting that the CCWG will, once we've got consensus that this power is going to be vested in some kind of community structure, that we would consult with legal experts to come up with continuing resolutions sustaining powers so that I can would still be able

to execute its legal duties while we waited on new board members to be elected and designated from their respective bodies within the ICANN community.

In other words I don't think we need to solve that now that just be aware when the question comes up let's call the answer that we believe that we can solve that, that the organization will not adopt new resolutions while the board is gone but it ought to be able to continue to honor its legal obligations, signed documents and contracts that are pursuant to resolutions that were approved previously. That's all, thanks.

Jordan Carter: Thanks, Steve. This is a readily solvable problem in every country that has democratic elections that involve a change of government has a good understanding of caretaker (unintelligible). And I filled out some of those in my original (unintelligible) the board matter. This is an easy problem to solve and isn't a sustainable opposition to this, the power that's proposed. But, you're right, we will have to answer it.

Okay, well sorry, I see Greg's hand up and then hopefully we'll be able to move on to the next power. Greg.

Greg Shatan: I was just going to follow on that point and say that this is a, you know, perfect item to ask our legal counsel once retained for advice on, you know, clearly, you know, boards don't get - if boards get spilled there's not just anarchy that results, there is clearly a, you know, there are systems in place for private - when private boards are spilled for how that's dealt with and if in fact there is even a period during which there is no board.

I think rather it's that a new general meeting gets called quickly and that the board is - the old board goes out and the new board, whoever it may be, comes

in. But in any case, you know, we're not - of all the things that we're discussing it's probably one of the things that has the least need for us to get creative ourselves and the most ability to draw on precedent from the real world out there. Thanks.

Jordan Carter: Thanks, Greg. And fair point. Okay I'm going to suggest then that we just - I think it's the case of adding a little summary table at the top where (unintelligible) rationale and the prose is good to explain, as Keith noted.

Now let us move on to the next item on our agenda. And I'm going to call on Steve to talk about 3a unless the staff tell me - tell us that they haven't been able to put a PDF of that email from Steve - oh no, here we go. Perfect. Okay, Steve, the floor is yours. And thank you, Malcolm, for that work.

Steve DelBianco: Thank you, Jordan. And again, thank you Malcolm, I appreciate that. Folks, apologies again for getting this is the late. It's something I committed to a week and a half ago and I'm sorry that I only got to it today.

So this will only take four minutes for this for me to introduce the topic and get guidance from those of you on the call for two topics, the two questions in here.

This was a task item called the community can require the implementation of all the accountability working groups Work Stream 2 accountability improvements. You may recall from Frankfurt when we really started to solidify a decision between Work Stream 1 and Work Stream 2 that we said that things that we had powers - if Work Stream 1 give us the power to force the board to follow the communities will, well then not everything had to be done in Work Stream 1.

Once the powers were obtained by the community it could use those powers to implement some of the other accountability improvements that might take longer to do, be more complex and move those over to Work Stream 2.

We were all pretty comfortable with that. And I documented in the email today what is on the screen for you now. I documented the definition that we had arrived at as a consensus for Work Stream 1 versus Work Stream 2. This was in late December.

The discussion on this is that in Work Stream 1, it's possible that we as the CCWG could come up with a list of all the Work Stream 2 items. It's one thing to come up with them on a list like a mind map, but it's quite another thing to have implementation details all fleshed out at the time of transition. And I think the chances of that are relatively remote.

So what I've written here on the second page is that at the time of transition not all of (unintelligible) will be defined in sufficient detail to begin implementation so more work is needed.

Now if some of the items for Work Stream 2, which is the post transition accountability improvement, if some of those items are pretty well fleshed out in great detail we can write all of that down, put them on a piece of paper and show it to ICANN board, and have them adopt a resolution committing the organization to implement those items within a specified time period subsequent to the transition because we party done our work and we're handing it to the board and saying, "Commit to this under a certain timeframe."

Now that commitment would need to be signed while we have the leverage of the transition hanging over ICANN. And the commitments could include a

means by which we could enforce that commitment. If we didn't have the means to enforce that commitment then two years after the transition, they haven't implemented half of the Work Stream 2 items we could use the powers that Malcolm has just presented for spilling the board. That's one example.

The second and final part of this is what about items on Work Stream 2 where the implementation details - and again most of these calls have been about the details, the details are tough to work out.

So if Work Stream 2 details aren't done or the community has to finish its work, so it's not as if you can put those on the list and have ICANN's board commit to implement because we're not done with the bottom-up, consensus-based process of working out how these Work Stream 2 mechanisms would work.

So it would be in our hands to do the work, the community itself, all of us on this call, all the groups we work with would have to finish the work of implementing - sorry of specifying the details for some of these Work Stream 2 accountability improvements. And when we finish - and that's on our clock, right, we control that clock.

When we finish we'd have something that was ready to be put for public comment and then handed to the board to say here is, implement it now. We may need a separate mechanism to force the board to implement a Work Stream 2 accountability mechanism a year or two years from now after we've finished all the hard work of laying it out.

Now this is not a problem in isolation. We deal with this now - and Avri is on the line, she knows how this works. The ATRT - the Accountability

Transparency Review Team - comes up with reports and recommendations that get approved by the board. We've done two ATRTs already. And then it takes a great deal of time for the board to implement some of those items.

Now we rely on the next ATRT to point out what hasn't been implemented and tell ICANN "work harder." But we don't have a general-purpose mechanism of forcing the implementation of bottom-up consensus recommendations whether they arose from an AOC review or maybe even at PDP or other processes that satisfy the bottom-up multistakeholder process.

So the question I pose there at the very final part of my document is that should we come up with a new community power that is strictly confined to just the Work Stream 2 items that are fleshed out after transition, or do we need a more permanent and general community power that forces the implementation of consensus items outside of that which is already sort of covered in a PDP and other kind of a process.

So I'll stop there and take a queue. I see Avri first.

Avri Doria: Hi. Avri speaking. One question about this, in other words, I assumed that relying on this stuff being implemented relies on the Work Stream 1 stuff having been implemented. And if the work streams stuff - Work Stream 1 stuff, as has been described, has been implemented in terms of community vetoes and spilling boards, and any other mechanisms that we are putting in place, doesn't that cover this issue that they community makes a recommendation? The board doesn't do it, and we go into the other mechanisms?

I'm not quite sure I understand why the mechanisms that we are inventing for guaranteed community oversight at Work Stream 1 don't cover the advance of these issues. I had always thought that that was sort of connected. Thanks.

Steve DelBianco: May I respond, Jordan?

Jordan Carter: Yeah.

Steve DelBianco: Avri, the community powers that we've been discussing so far mostly have to do with challenging or vetoing things like a budget, a board decision, a management decision. What happens when we need to motivate action as opposed to challenge or veto a board action?

We haven't talked very much about how one forces the board to take an action short of the nuclear option where the community sends a letter to the board that says please implement what you promised to implement. And if the board refuses well we go to spill the board. And all of us are attempting to find intermediate ways that are short of, say, the nuclear option.

Alan Greenberg, while we were in Frankfurt, suggested that for instance there is a specific power on the Work Party 1 community power list that says that recommendations that came through an Affirmation of Commitments review team our special and thereby deserve a new community power whereby the community with a super majority could force the board to implement something that it had not yet implemented.

And I think that comes close, Avri. So what about items that have nothing to do with an AOC review team? For instance a Work Stream 2 item that we spent months developing, we put it in Work Stream 2 and then a year from now ICANN hasn't begun the implementation of a particular item. I don't

know what power, short of spilling the board, enables us to force them to take action.

Jordan Carter: Thanks, Steve. I think that - if I could insert myself in the particular (unintelligible) mine was the next hand up wasn't it?

Steve DelBianco: It is.

Jordan Carter: Okay yeah, sorry, I just lost Adobe room connectivity. But it's back. So I got - excuse me - I've got three thoughts here. One is that depending on the timing of our processes and whether we really are going to send the final proposal through in June or whether we're going to have to do a round of consultation over the ICANN meeting, we may have more stuff specified for Work Stream 2 that allows us to be more determinative and given a more comprehensive list to get ICANN to commit to its power of transition.

The second point is I really think that we should almost treat this as a stress test. I can't remember whether it is one or not. And I apologize if I haven't absorbed that, Steve, from what you said. We need to test our set of mechanisms once we've kind of settled down on them to see whether they can do as Avri suggested, guarantee the implementation.

If they can't I do think that one option that we should consider is the creation of a (unintelligible) limited purpose and PDP and for the accountability Work Stream 2 that kind of empowers this CCWG to make that set of recommendations once the chartering organizations have adopted the board would have to implement it unless there was a very high super majority (unintelligible). So there's a ready kind of option that's already clear in what we're doing here.

And I don't think this would ever become a board spilling thing but I'm not keeping up with the chat. So I think we should test whether this is necessary once we've got a better picture of the recommendations. And if further steps are necessary we should design them. That's my view.

Steve DelBianco: Jordan, if I may ask a little bit of clarification?

Jordan Carter: Yeah.

Steve DelBianco: I propose two steps here. The first step was that for anything that we as the CCWG have consensus and community support for that falls into Work Stream 2 we would write it all down and obtain a commitment prior to transition with at least a deadline in it where ICANN would commit the resources and the management activities to implement.

And you're suggesting that if it takes us a little longer to get the transition we'll have more time to put together the implementation details. So that could be an extensive list of Work Stream 2 items.

But are you suggesting everything has to make it to that commitment list because...

((Crosstalk))

Steve DelBianco: ...couple of items that won't. Yeah, go ahead.

Jordan Carter: I think that it's unlikely to because the Work Stream 2 stuff is going to take a much broader look at ICANN's overall accountability. And so I don't think even - I don't think the difference of a month or two would give us an answer that we could write down a detailed list.

Steve DelBianco: So you do think we need two steps? We need a commitment list as well as some other power to compel or likely Avri, do you believe that the ultimate power to compel is to spill the board and that ought to suffice?

Jordan Carter: No I don't believe that spilling the board is the ultimate power. I think that we will have some things we can write down and seek a commitment to implementing. I think there will be some other things that we end up developing in Work Stream 2. And I think it's a stress test of our Work Stream 1 work to work out whether we're going to be able to require it to be implemented or not.

If we think - and our best judgment that we can't require Work Stream 2 to be seriously considered and implemented, then I think we might have to look at designing another mechanism. But certainly I do not think that removal of the ICANN board for quibbling with details around a second round of enhancements, is a viable way to treat them. I just don't think the community would go there.

((Crosstalk))

Steve DelBianco: Then, Jordan...

Jordan Carter: ...not an objective one.

Steve DelBianco: Got it. So, Jordan, with respect to the second half of what you said, as I noted in the second to last paragraph, one of the Work Party 1 items is called 2c and that was the one that Alan mentioned in Frankfurt, the notion that the community could have the power to force management and the board to implement an AOC recommendation.

And if that were expanded that might be the easiest place to say not only to require the implementation of an AOC recommendation but to require the implementation of an accountability improvement that was under the consensus of a Work Stream 2 item as part of the transition.

By adding that phrase in there we would be able to piggyback off of an existing community power called WP 1-2c. And I haven't read the text for that yet. I don't know that that's been discussed.

Jordan Carter: It would be helpful if in the terms of simplicity if we were building on something that we've already done so, yes. I also just (unintelligible) I don't think we need to discuss this any further right at this point. I think the material that you've prepared provides a sound basis for a conversation at the Istanbul meeting.

So if people are happy with that, and I don't see any more hands up, can we move on to the next item on the agenda? Which we will do which is the work that Keith has been doing on 5b(1) and (2). Keith, are you ready to present that to us?

Keith Drasek: Yeah, I am, Jordan. Can you hear me okay?

Jordan Carter: I can, yeah. Could you just bear in mind I'm trying to do it if we can speak a little bit slow and (unintelligible) that would be helpful for the non-first English speakers on the call.

Keith Drasek: Yes, thank you Jordan. And I noted Kavouss's comments in the chat as well so I will attempt to do so. So if we could put the table for WP 1 5b(1) on the screen, the first one. And I don't think we need to go through both of these

templates, Jordan, because they're very, very similar. In effect they're - these are two possible solutions for securing the same thing. And I can talk to the differences but I think we only need to go through one of the templates in the interest of time.

So the first - well 5b(1) both of these - the goal is to prevent ICANN from imposing obligations - new obligations that are outside the scope of a traditional policy development process. And I will also note that in the ICANN community today we are, you know, there's already a working group focused on sort of the distinction between policy and implementation.

So this - I think this whole subject is not only about policy but it's about ICANN's ability to interpret policy recommendations and to make determinations on the implementation and really what those impacts are to the community.

So let me just tee this up I think at a high level and then we can go through the table. At a high level, you know, the bylaws that we've been discussing have several components in the early sections, mission, values, powers and restrictions.

And I think what we are talking about here in 5b, whether it's 1 or 2, is a restriction. And it's probably a nontriggered restriction. So the two choices that we have for restricting ICANN's ability to impose new obligations would be through either an accountability contract, so some sort of contractual mechanism, presumably with the contracted parties, registries, registrars and as they flow down, the registrants who also have to accept the terms of the registration agreement.

Or the possibility of having a bylaw provision that accomplishes the same thing. So we are really looking at two options to try to restrict ICANN's ability to impose new obligations.

So let me stop there and see if anybody has any questions before we get into the detail. Kavouss, I see your hand, please.

Kavouss Arasteh: Yes, thank you very much. That is a good point but it would be - I would be very happy if we introduce two more words, directly or indirectly impose obligations because they may be directly imposing or maybe indirectly. Indirect imposition is the way that you mentioned by interpretation. We should remove any power of interpretation of anything from the board, the interpretation is the community but not the board. So we should say directly or indirectly impose obligations. Thank you.

Keith Drasek: Yes, thank you very much, Kavouss, I agree. I think that's a very important distinction thank you for that recommendation. You know, and I think perhaps we can talk in a little bit of detail about sort of how this could be impacted or how it could be affected.

So for example, let's just use one example with the accountability compact or contract, is that that could be accomplished through amendments to the existing registry agreement, registrar accreditation agreement or registration agreement, which is the one that registrants expect when they register a domain name.

And the idea is that if there is not something - if something does not come through an established community process, a policy development process, then, you know, this would be a new restriction that explicitly prevents

ICANN both staff and board, from imposing new obligations on, in a sense the contracted parties.

But I think this has a bigger scope than just the contracted parties. In a sense the contracted parties would be the mechanism that I can we choose to introduce new obligations, potentially on end-users, potentially on the entire community.

And I think that's something that we need to be very careful about and so I think what we are seeking to prohibit. So the question is do we restrict ICANN's ability to do so through new contractual language that clearly prevents them from doing things outside of a PDP, or outside of an existing process. Or do we look to incorporate something into the bylaws?

So I see Kavouss has asked, "Could someone (unintelligible) describe or mention what do we mean by compact?"

Yeah, Kavouss, thank you. I think it's a contractual document. And that's a good question and I've noted this in some of the later part of the template, is how would you enforce such a thing? If it's outside of the existing registry, registrar and registrant agreement how would it be enforced? And if it's a bylaw amendment who is in the position of being counterparty to that, you know, where is the restriction? Where are the teeth? And I think those are very, very good questions.

So Jordan, if I may, why don't we go through the template fairly quickly and then I'll be more than happy to take questions. So let me go on, so if we look at the template before us, and I assume everybody has scroll control, the top line is a question, what's the description? And this would be a new restriction

to prevent ICANN from expanding its mandate through the unilateral addition of new obligations and requirements on registries, registrars and registrants.

And there is some language in the existing registry agreements, for example, and the registrar agreements, for the gTLDs, and this is an important distinction as we talk this through is that, you know, gTLD registries and registrars have agreements in place but many ccTLDs do not.

And so that's another consideration for us as we look ahead to figuring out exactly how we would implement such a thing and why it may make more sense to have a bylaw provision rather than trying to rely on contractual relationships. But let's hold that for later.

And again, you know, I don't want people to think that this is only impactful on contracted parties, registries, registrars and registrants. As I said before, the registries and registrars and registrants might be the mechanism through which ICANN, potentially abused power down the road, that it could be very impactful to others in the community, the users and those that rely on, you know, the use of the domain names.

And so I think this is a check and balance. You know, this new restriction would ensure that ICANN cannot use its position to unilaterally impose new requirements on its contracted counterparties, including registrants. It ensures that ICANN must rely on established processes to develop and implement new or amended policies that are necessary for the secure and stable operation of the DNS.

And it ensures multistakeholder community is responsible for developing consensus policies within predictable and transparent bottom-up processes.

And that role cannot be circumvented by ICANN management, you know, staff or board.

Okay, I think, again, there's the question, "Is the mechanism triggered or non-triggered?" I think it's non-triggered, although it would probably need to have some sort of a trigger or a connection if it were violated, you know, for enforcement, for penalty.

So I think through a new accountability contract with registries, registrars and registrants, this would be a new non-triggered mechanism. It could be a new standalone agreement or it could be incorporated into existing agreements.

Okay, possible outcomes, a new accountability contract would give the community powers to constrain that ICANN staff or board that attempted to expand its mandate beyond acceptable (unintelligible) through the addition of new requirements on contracted parties and registrants, in breach of the accountability contract or by law provision depending on which way we go, by ICANN would constitute grounds for reconsideration and redress.

And again we would need to make sure that the hooks where there into the other things that are being developed in our community work to make sure that, you know, that things are connected in such a way that if there was a violation of something like this that other mechanisms would be in place to handle that.

Let's see, conditions of standing, this is an important question. The contracted parties, if we're looking at an agreement, you know, as part of a contract it would have to be the counterparty, right, most likely anyway that would have the power to trigger the mechanism if needed.

And I think clear and concise language would be very important and potentially act as a deterrent on ICANN unilaterally imposing new obligations either through, you know, sort of edicts or interpretation or, you know, importantly it's - you could imagine two parties to a contract, ICANN and a registry, for example, negotiating terms in a bilateral way and moving forward with implementation that doesn't necessarily have the consensus support of the community.

So again I think this, for people who are not contracted parties, it's important to make sure that there is a prohibition about things that really are grounded in policy or should be considered a policy issue, not being able to simply bilaterally negotiate something without the input of the multistakeholder community. Again this is balanced, and this is making sure that there is accountability throughout the community.

So let me stop there, I don't want to drone on. There is more that we can go through and we will but I want to stop and see if there's any questions at this point.

Jordan Carter: Okay thank you.

Keith Drasek: Anyone?

Jordan Carter: Any questions? We've got a hand up from Steve so if you don't mind, Keith, I'll get you to do this round of questions...

Keith Drasek: Sure.

Jordan Carter: ...then I'll hand it over to you.

Keith Drasek: Yeah, happy to do it, Jordan, thanks. Steve, go ahead.

Steve DelBianco: Hi, Keith. I've put this into the chat because a lot of times we react to what's been going on in the new gTLD program where we as that community approved a guidebook or commented on a guidebook, we didn't actually vote on it, on a guidebook that created these sort of bilateral negotiations that resulted in obligations showing up on a lapse of registrars, registrants, etcetera, that never had a basis in policy. And I understand that.

In some cases my group, the Business Constituency, was in favor of some of those obligations. So I asked in the chat this key question is that if the next round developed another guidebook and the guidebook contained mechanisms for these bilateral negotiations between state government objectors and aspiring registries, that party might agree to a contract that required them to impose obligations that had no basis in developed policy.

What's your feeling about whether guidebook could go outside and beyond the bylaws or the contract, as you say? Or did this contract govern everything such that guidebooks could not grant new powers - guidebooks could not go beyond what the contract says is the limit. Thanks.

Keith Drasek: Yeah, thank you, Steve. And that's a good question. And I think this raises the point about, you know, do you have to set limits? Are there parameters or are there borders or limits to what such a, you know, a contract or a bylaw amendment would allow for? And I think that's definitely - I don't know that I necessarily have the answer for that today. I think it is something worth discussing further.

I mean, my sense - my feeling here is that we have a structure where policies are developed in the gTLD space and if there's a consensus policy that comes

out of that process then contracted parties to ICANN are required to implement them. And I think that's a very healthy thing. It has largely served the community well. It provides some predictability to contracted parties who are primarily businesses that need some level of predictability.

But it provides the community the ability to make changes. And I know I am telling these things that you already know. But it provides the community the ability, if needed and provided there's community consents, to make changes to the contracts.

Thick Whois is a perfect example in today's world where the community came together and said we want everybody to be thick, and the policy was approved and it will be implemented.

So - but I think what we're seeing and what we've seen in the last couple of years is an increasing gray or and expanding grey area as it relates to contract interpretation and policy interpretation and how that impacts the implementation of policies and where things may be approved or implemented in ways that are different from what the community expected.

So I think it makes sense for us to try to be as specific and concise and clear as possible as to what exactly we're talking about. And I think that work is still ahead of us. And I think that is something that we will need to do.

But, you know, whether it's - this would be an overriding document that would forever prevent, you know, the ability to be - to have, you know, variation in the future, I don't know that it necessarily needs that but I think the key is the community to be in a position of saying, you know, you can't simply go off and interpret something unilaterally, you ICANN staff or board, you can't interpret something unilaterally; you can't implement something

unilaterally through imposing new contractual interpretations on contracted parties.

And again this flows down - I think the impact of this flows down to other participants of the community. Sorry, I rambled on. I hope that answered the question and if not I'm happy to take other questions. So I see Malcolm and then Kavouss.

((Crosstalk))

Jordan Carter: ...can I just interrupt? Sorry. We've got 25 minutes left on the call and another four or five templates to get through so we really need to kind of speed up if we can. Thanks for that concise questions, quick answers.

Keith Drasek: Yeah, thanks, Jordan. And, you know, what I would suggest is rather than going through this and, you know, the rest of the template, there's not a lot left, let's just - let's have the last couple of questions, encourage people to read this and then we can talk about it in more detail in Istanbul.

So Malcolm, over to you.

Malcolm Huty: Keith, thank you very much. This is a very important point and it's a very useful contribution. I'm going to make my point as quickly as possible given the time. I'd say this looks very good but speaking as a non-contracted party, I would wonder if a contract mechanism is the best mechanism for bringing this about rather than for example, something in a scope statement in the bylaws that would be capable of one of the review and redress mechanisms we're looking at in the other WP.

Or maybe it would be both, maybe it would be doing that and then also implementing it in the contract so that the contracted parties could implemented through the mechanism that you're envisaging while non-contracted parties would have another mechanism for implementing the same sort of - or exercising the same concerns.

So I think we need to look at that side of it but this is a great discussion to be having, and I'd like to look at what the best mechanism for carrying this forward is. Thank you.

Keith Drasek: Yeah, thanks very much, Malcolm. This is Keith for the record. Yeah, I agree completely. I certainly had not - I don't have a strong opinion on which, the option to use or to rely upon or, as you said maybe a hybrid. And I do think it's important to make sure that any impacted party has the ability to weigh in. So, yeah, I take your point and I welcome that. Thanks.

Kavouss, over to you.

Kavouss Arasteh: Yes maybe is a point for yourself here, Jordan or any other colleagues, how we could ensure that no provisions in the bylaw is subordinated by any item of the guidebook. Unfortunately sometimes we subordinate (unintelligible) to the guidebook provisions which is not correct, guidebook is the guidebook, that's all. It's quite lower case (unintelligible) hierarchical steps with respect to the provisions of the bylaw. How we could manage and how could clarify that in the bylaw. Thank you.

Keith Drasek: Yeah, thank you, Kavouss.

((Crosstalk))

Jordan Carter: I'll just say that's an important implementation question that we need to make sure we cover.

Keith Drasek: Yeah.

Jordan Carter: And just leave it at that if we could, Keith.

Keith Drasek: Yeah, I'm done. Thanks, Jordan.

Jordan Carter: Thank you for your wonderful work here. Sorry, all, that I lost sort of focus, I had a couple of distractions in the room here and I fear I've let us get well behind in the time we need. So I'm not aware of any other work items that we need to discuss in terms of the powers.

I'd like us to move on to the mechanisms if we could. And I would like us - I'm determined that we finish on time. I've certainly got another meeting in 22 minutes. I'd like us to go through stuff that we're probably least familiar with which would be the statutory delegates and members content from Edward first if we can? And then I'd like to lapse into the CCWG and existing SO AC structures.

But given that we're all familiar with those mechanisms already I personally would be a little bit more relaxed if we haven't discussed them on this call and we'll do an email round of comments if we don't get to them. So the first question is, Edward, are you on the call? And are you available to present the statutory...

((Crosstalk))

Edward Morris: I'm here, Jordan. I'm here, Jordan, and perfectly happy to go forward. Can we get the template on the screen?

Jordan Carter: I would think so, yes.

Edward Morris: Okay, that would be helpful.

Jordan Carter: Alice, is that on the way?

Alice Jansen: Yes, I'm working on it. Sorry.

Edward Morris: Well I can actually start with delegates because - well first of all the templates themselves a lot of boilerplate language that Roelof imported from stuff he's done before so we'll sort of ignore that in the interest of time.

Let me start with delegates because delegates are fairly simple. And I'll actually just quote the first line of the California statute that creates delegates. "A corporation may provide in its bylaws for delegates having some or all of the authority of members."

So basically what that means is delegates are sort of like a cafeteria-style membership scheme. We can pick and choose the powers granted to membership, members, under the membership scheme and call them delegates and work it that way. If we go membership we have to take everything, good and bad.

What's up there now? Okay. Alice, if you could get to the membership scheme, because as you can see, actually keep the delegates up there, is the mechanism triggered or non-triggered? You can see where we have put - oh I'm sorry, it's the first one, description. The California corporation code allows

for the designation of delegates which have some or all of the powers of members.

So if we go with the delegate scheme we can pick and choose the powers that the statutes give members but we don't have to take all of them. If we choose membership we have to take the whole kit and caboodle.

So if we could get the membership template up please, Alice, I'd appreciate that. The one thing that you need to realize about these two mechanisms compared to others we've looked at is these are based in the California corporate code.

We don't have the flexibility to be as creative in designing exactly what we want. And that's technically true in terms of membership. A lot of what we've been debating, thresholds for spilling the board, for example, if we choose a membership scheme those are in the statute.

We don't have the option of saying we want a super majority to spill the board, we want to do X, Y and Z. these are all creations of statute and we have to take it as it given to us.

Now in terms of what powers members have first, what are members? Members can be designated in the bylaws. They can be natural or legal people, they can be - Keith, you can be a member; the IPC can be a member. You don't have to be incorporated, and we just - again we have to designate that in the statute.

Members have the ability to adopt, amend and repeal bylaws under 5150 and 5812 of the California corporate code. Members can remove any and all

members of the board of directors however, we can't set the threshold ourselves. The threshold comes with the statute.

So for example, if we have less than 50 members, board of director members are removed by a simple vote of the majority of the membership, we cannot have any other threshold; it comes with the statute.

I should also note that under a different part of the corporate code (unintelligible) specific subgroup of members can only be removed by that specific subgroup. So we cannot have a spill the board type thing, we can have a spill the board that providing that the member - that the board of directors member that has been elected by a specific subgroup is also spilled by that subgroup.

There is a, AGM requirement. Members do have the ability to inspect records. If you recall (unintelligible) lawsuit a decade or so ago, members don't have the power of a member of the board to inspect records that we can take a look at the financial records, for example, that in the statute.

Members elect a Board of Directors. And there's some flexibility in how we design the elections, but it's generally a majority vote. You can't have subgroups electing members of the board.

The final power, which to me - we talked about the nuclear option about spilling the board, disagree. The nuclear option, were we to go to a membership or delegate scheme, and included this in the delegate, for example, in the delegate - powers of the delegate, we went that way - is the power of the derivative lawsuit.

And what a derivative lawsuit is if it gives each member the ability to sue the corporation, specifically the board or member of the board, on behalf of the corporation for failure to act for the benefit of the corporation.

So it would allow each and every member, if the board were to be captured, for example, it would allow members to file a suit and regain control of the board in that way, and not only spill the board but to hold the board or individual members thereof liable for their actions.

The costs, I do want to point out the cost. If we go to a membership scheme I would suggest it would be the interest of members to have some sort of liability insurance, that probably should be provided by ICANN.

They are not liable for what the corporation does, there are liabilities in corporation. But particularly in the States there are things called slap lawsuits which are basically frivolous suits that members could be exposed to them. And we have to make sure that there is no out-of-pocket there.

And also if we're going to have derivative lawsuits, the state of California would require up to a \$50,000 bond in order to file the suit. And we have to deal with that as well. So that's basically what the membership scheme would entail.

On the good side it solves our problems, a lot of the issues we've been debating we're given the solution. On the bad side it solves our problems, that we may not want the solutions they provide. Thanks.

Jordan Carter: Thank you, Edward. This is a good run through. I appreciate it. Thank you to you and Roelof for doing the work. Are there any comments or questions regarding this? I see no hands up. I see typing.

Edward Morris: While we are waiting, Jordan, one thing I did want to mention something that has come out of the legal subgroup in talking to the law firms we are thinking about engaging, there may be other mechanisms that we are not considering as a community right now.

And we need to leave ourselves open to the advice from the attorneys because they may lead us into a different direction than anything we've ever thought of. And one firm in particular have sort of stimulated thought in this regard, but we have to wait until we see who we go with.

Jordan Carter: Thanks, Ed. And I agree, this is one of the issues that the timing concerned that Robin and others have raised that we don't know what we don't know yet, and it's going to take a lot of advice and thinking to get there. So we are...

((Crosstalk))

Edward Morris: I noticed - I do notice these questions. And I actually rushed through delegates. And (unintelligible) you think of delegates as cafeteria style membership that we can pick and choose which powers in the statutes that apply to membership and we call them delegates but we don't have to take all the powers that are given to members in the statute.

But I should also note there is the question raised by the Jones Day attorney in Singapore as to whether you can have members - excuse me, delegates without first having members. He thinks you can; I think you can but it's certainly something we will need to clear with counsel if we're going to try to go down the delegate route.

Jordan Carter: Yeah.

((Crosstalk))

Edward Morris: Steve has written, "So delegates can be just as powerful as members but only for powers we choose to allow. And we can specify the rules." You can specify the rules in terms of which powers you give delegates but for example you can't change the threshold issue as I understand it. But again, we want to clear that with counsel.

Jordan Carter: And for...

((Crosstalk))

Jordan Carter: ...we can incorporate other powers that are beyond the statutory ones (unintelligible) members were delegates as long as they're not inconsistent with the statutory powers, right?

Edward Morris: Yes, true.

Jordan Carter: Yeah. Okay I - my instinct is that this is important and useful advice to get to for the Istanbul meeting as part of our portfolio of mechanisms. And, no, Steve, you're wrong, we couldn't have a spill the board threshold that was different to the one set out in the statute. My understanding anyway is that if there is a powers set out in the statute you can't modify it by means of bylaws.

((Crosstalk))

Edward Morris: Actually, Jordan, we could if we didn't - if we chose not to give delegates the power...

((Crosstalk))

Edward Morris: I actually believe you can they would have to be formulated properly. We just wouldn't import that portion of the membership scheme and had to create one of our own I believe that's possible. But again it's hard. I did a Westlaw search, I cannot find a delegate-based corporation, nonprofit corporation in California. It's not a common form of organization.

Jordan Carter: Okay. That leads to another question to the legal advisers which of course is, if there isn't, you know, what's the stability of the California nonprofit corporate code. Is it (unintelligible) from us at any point. But these are lawyer questions and implementation ones.

Can I assume then that people are happy with this as an interesting discussion starter and the conversation we had was useful, got people thinking. And we should agree that this is going to be available to the CCWG for the meeting, and move into the next template.

Are people okay with that approach? Bearing in mind the time that we've got. I don't see any hands. I too would love to discuss this for a full hour but we just have to get a little (unintelligible) the chance to just review at a high level the other things here.

So I actually - this one will be really quick on my part. This is the community council mechanism that had been set out in the bylaws for - that have been set out in the template (unintelligible) board of directors. It was never my intention that that community council would only be used for removing the board, that it could provide a general purpose mechanism.

So all this template does is take out the references to board of directors (unintelligible) specific powers, and that's why there's a lot of not applicable's here because all the stuff about specific powers is not relevant at this point.

If you scroll through the template you see that. I've kept the options in terms of competition as the same. And the diversity stuff the same on page 2. On page 3 I've suggested the same independence requirements. I've adjusted the appointments and elector appointment process lightly - I think I've just abbreviated it and kept the one-year term.

And in terms of accountability I just added a bullet point, this is on the bottom of Page 4, previously it had been suggested that we could give a warning - a formal warning to a member that you'd appointed and then presume to remove them after 30 days.

If we went to this model it would probably be important to make sure that in each power there was some specification that a member could vote on various decisions if they're in receipt of the formal warning and that 30 days' notice period.

And because otherwise you're creating a situation where for exceptional powers like removing the board if an SO has decided that an (unintelligible) representative (unintelligible) so that's just an amendment to cover this. And the rest is pretty much the same, not applicable.

Steve asked a very sensible question in the chat which is, "What is the difference between this and a (unintelligible) CCWG?" And my answer to that is that I don't know because there's no such thing as an (unintelligible) permanent CCWG.

And a CCWG is established by chartering entity and can be disestablished by them. It's usually (unintelligible) for a specific task. I have other - so I think in practical terms this community council might be the same thing as a CCWG - a permanent CCWG.

But my suggestion would be that we just quickly - because what we've just looked through existing material that you've seen before, why don't we go through Work Party 1 Item B, the permanent CCWG (unintelligible) what I suggested there? And (unintelligible).

Kavouss Arasteh: Hello?

Jordan Carter: I'm just - sorry, yes I shouldn't be waiting because it's obviously not happening. I was hoping that staff would put up the document for 1b, but we're running out of time. So I think, Steve, your question is very different, the difference seems to me to be in the way that such groups are constituted. Here we go. So here's the - here's the permanent cross community working group model.

Standing by the - chartered by the SOs and ACs (unintelligible) the powers that were granted to this would need to given to it in the bylaws, I think, because otherwise it doesn't count as permanent.

If it's just a chartered organization like a normal CCWG is then it can unchartered and removed. And then there would be no community vehicles (unintelligible) powers and we would have failed to solve any accountability issues.

So if you scroll down this template on Page 2 I proposed a default because the same size, the same composition as the previous document, as the previous

model of the community council just (unintelligible). I'm not trying to prejudge that decision, I'm just trying to not double think it. We'll have the debate about it in Istanbul.

I did have a (unintelligible) alternate that like our current CCWG on Accountability we could just (unintelligible) chartering organization to a point between two and five members. If we did that we'd have to be very clear what the voting procedures were for each power but we'd still have the collection of people available to discuss these issues.

I also left in the notion that a current office holder in the SOs and ACs shouldn't be a member but I've highlighted it because that might be a different point in the CCWG.

And I've changed the election and appointment process to say that as with all other CCWGs it's up to the discretion of the SOs and ACs but I'm proposing this should be an active reappointment or appointment of a new person on an annual basis just to prevent this turning into a group of old hands too familiar with each other and with the corporation. That wouldn't be helpful.

There's nothing new there other than an implementation point that was already made that it would need to be in the bylaws. And I don't know (unintelligible) the CCWG or whether it turns it into the community council.

And Robin suggests that a CCWG is a specific (unintelligible) delegate. In the end it's my hope - I've got - I don't know about the rest of you but I've got 22 hours of plane time between here and Istanbul. And there's the suggestion of a table that looks at some characteristics of these members (unintelligible) of these mechanisms and sets them out sides by side for easier comparison.

I'm happy to undertake to spend some time on the plane preparing such a table. And that would hit your email lists on Saturday the 21st and in the afternoon UTC.

Now that's too late, in theory, for us to formally consider the CCWG but given it will be an organization of existing materials I think that the co-chairs might (unintelligible). So I see one hand up which is Kavouss but if I could just take Kavouss's call and then we'll wrap this up. Kavouss, please go ahead.

Kavouss Arasteh: Yes, I'm sorry to raise this question, we refer to the ICANN regional distribution, this is not a balanced distributions. If you take one region as only two or three countries then the other region is (unintelligible) countries so I don't think that issue (unintelligible) ICANN regional distribution on this we redefine the region.

It is something very, very old and based on some other non-technical issues and (unintelligible) had some other reason I don't want to get to that because that - I don't think it is advisable to go ahead with the regional - ICANN regional distributions because there is totally imbalance. Thank you.

Jordan Carter: Okay, yeah, that's a fair point to make. And it's one that we'll no doubt be talking about in Istanbul. Look, I'm really sorry that we've run out of time, folks, but we have. We've had a very useful set of discussions I think on this call but given everyone who has been drafting some final thoughts. And I personally, as rapporteur, am going to be...

Kavouss Arasteh: Hello? Hello?

Greg Shatan: I think we lost Jordan.

Matthew Shears: Well it sounded it like he was closing the call out anyway.

Greg Shatan: I guess we can all say goodbye to each other without Jordan's help.

Jordan Carter: Hi, all. Can you hear me again? Sorry. Just point to wrap up and I think my audio is working now. We just need to wrap the call. Thank you all for the work and if you've got any amendments to make it would be very helpful if they can be sent through in the next 18 hours or so.

And I will undertake to get - to make sure that with staff all the information is on the wiki and to prepare a kind of reading list for people that identify the specific documents that they need to see.

And thanks, everyone, for the good work. And any remaining issues please raise them on the list or with me straight away. Thank you, everyone.

Steve DelBianco: Okay, thanks Jordan.

END