

ICANN

**Moderator: Brenda Brewer
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9:00 am CT**

Jonathan Robinson: Okay. So if we could fade out the background music. Wonderful. Hi everyone. Welcome to our afternoon session, our final session of the afternoon which I hope will be both engaging and interactive and interesting.

So we've obviously welcomed Holly Gregory and Sharon Flanagan from Sidley to present this session, providing us a legal overview of the issues to date. And I think I won't presume to make any more introductions. I'll hand it straight over to you, Holly and Sharon.

Holly Gregory: Well terrific. We're very pleased to be with you today and to serve as your independent consultants and advisors as you consider the issues that surround constructing a proposal for the transition of the IANA oversight functions.

I want to underscore for just a moment the independence notion. You all know that ICANN is paying our fees, but we have been instructed to take our directions solely from you and to provide our advice and consultation directly to you and without any third party communication.

Sidley - a little bit about us - we're a very large international law firm. We have about 1800 lawyers and about 18 offices spread over four continents. We're about 150 years old.

We have a wide range of very sophisticated practice areas - everything from anti-trust and intellectual property and government relations and litigation and arbitration, international dispute resolution, nonprofit organizations, corporate governance, on and on and on.

I say that because there are two of us here, but I want you to know we've got this really wonderful support team behind us so that when you raise questions that are not right in our immediate scope of expertise we can reach out very quickly and get that expertise.

I'm here with Sharon Flanagan. Sharon is the head of one of our California offices, our San Francisco office. She's an M&A lawyer and a corporate governance lawyer. She has a lot of expertise in corporate structuring. And that's really valuable to the issues that you're considering today.

I'm the co-head of our corporate governance and executive compensation practice. My work is with organizations of all kinds. I've worked with a lot of big public companies and a lot of not-for-profit companies and some international organizations on issues surrounding governance, both in good times and when things are going wrong.

So with that we've provided you with two sets of - you've provided us with two sets of legal questions. And we've provided you with written responses. We thought it would be helpful to go over the issues that you raised, although we're going to do it in a slightly different organizational structure than the

organization of the questions that you posed because we thought it would be helpful to align it more with sort of the structures that are under consideration.

And so with that said, we can go to the next slide. This is just a brief agenda. We can go next and skip to the next. Okay.

I'm not going to go through this. This is my preamble of qualifications and all the things. You know, we're lawyers so we have to sort of, you know, catch everything we do to say it's preliminary and don't rely on it and all that kind of stuff. If you're not our client don't rely on it. We can go on.

So these are the proposed structures that you've been considering. And we're going to talk about them in this order. I don't want you to think that the way we've ordered them is any indication of what we think the strengths or weaknesses are. I think that's a really important point.

We just organized the slides this way because we thought some of the legal scenes build upon one another. And we thought that this was a sensible way to organize that discussion for you. So again this is not any kind of priority of what we think works well or doesn't work.

That being said we can go to the next slide. So in considering the proposed options that you've sort of discovered and have been working with, I think it's really critical that you remember that corporate law and California corporate law, California nonprofit corporation law, is a very, very flexible thing.

And you can probably do pretty much anything that you set your mind to with a little work. What really should drive your decision is not so much what's the legal structure available but what are your goals and priorities and what are some of the mine fields that you might want to avoid.

We will find as we go through this that pretty much everything that you've been considering is possible. Some might require more of a squeeze of that square peg into a round hole than others. And so one thing to think about is how important is simplicity and clarity and ease with which things you want to do sort of fit with a particular structure. But it's all in the notion that you've got a lot of flexibility here.

Go to the next slide. One of the examples of the flexible nature that I just want to highlight at the outset is thinking about what is a stakeholder body in any of the structures you're considering? Is it simply an informal body? Should it be formed in some legal way to give it additional kinds of legal rights vis-à-vis whatever entity that you're talking about providing the oversight of the IANA function?

There are lots of ways to do it, and you may decide not to do it. Again you've got a menu choices but we just thought it was important to put that out there because you will hear as we go through some of your proposals some of the options have to do with what is the multi-stakeholder body.

So with that being said I'm going to turn over to my colleague Sharon and she's going to walk us through this discussion. And I invite you to, you know, certainly raise your hands. And I know that our good chair will recognize people so that you can ask questions and comment in (real time).

Sharon Flanagan: Thanks, Holly. So let's go to the next slide. So I'm going to walk through the various structures that you all have been thinking about iterating on - and starting with the external solutions. And I just also want to reiterate what Holly said, which is we really crafted this in response to the 12 questions we were given.

And so in addition to not ordering these in any sense of priority, also note that there's no priority in our minds in terms of the weighting of how many slides or how much discussion is given to one structure over another.

For example, we'll start with Contract Co. We got a lot of questions about Contract Co. And so we're going to answer those questions. But recognize that that's just a response to the questions.

And we also understand that in some respects the questions sort of lag your process. You're in some ways past those questions. And so we appreciate that as well, and we'll try to respond to that as we go.

So we've got the two external structures we want to talk about. The first is Contract Co. and then the second is the external trust.

So first is starting with Contract Co. And I will also say we're going to try to keep this - avoid legalese to the extent we can and make this, you know, more of a plain English conversation. As Holly said, if there are questions along the way please do ask them along the way.

We want to make sure people are on the same page and that you get your questions answered as we're talking about the structure rather than waiting till the end. So please feel free to chime in any time you like.

Jonathan Robinson: So thanks Sharon. So just to let you know then I myself or (Lisa) will monitor the queue. If you put yourself up in the queue we'll come to you as soon as reasonably possible within the presentation. Thanks.

Sharon Flanagan: Okay. So first starting with Contract Co. So a contract co. - if you wanted to go down that route - could be structured as a California nonprofit corporation similar to what ICANN is.

You could also consider doing it as an unincorporated association. That is recognized under California law and under the laws of other jurisdictions. But we'll talk about a little bit later we think there are some disadvantages to structuring as an unincorporated association.

So if you were to be a - or if the contract co. I should say - were to be a California public benefit corporation, you could have that be organized with or without members. That would be something to consider.

You would set forth your governance in your articles and your bylaws similar to the way ICANN is currently structured. Just a couple of notes about those governing documents. The articles would need to be approved by both the board and if Contract Co. had them, the members of Contract Co.

The bylaws you have a little more flexibility if you were to do Contract Co. the bylaws could be amended by the board or the members or exclusively the member or members.

Another feature of California nonprofit corporations that is unlike what you ought to see in a private corporation is the ability of a third party - you know, not a member, not a board member, a third party -- to have the right to veto certain bylaw and article changes. That's very powerful and we will talk about that a little bit more.

That could be the so-called I think you've been talking about the golden bylaw. We're calling that a constitutional bylaw or also I think CCWG talked

about it as a fundamental bylaw. Those would be the things that if you put those in place would not be easily changed. They would require very high threshold of voting either by a member or membership or by a third party organization that would be a multi-stakeholder organization.

And so that is something as I said that is unusual in a traditional private corporation but very, you know, quite powerful. (Chris) could you go to the next slide?

One of the questions that we were asked - just go up to the next slide - was could a contract co. be, you know, bare bones? You know, could it have a board and officers but not a lot much more than that? And the answer is yes it could. It could be bare bones. It doesn't need to have employees.

You could have a contract co. that's used third party contractors to the extent there was anything that needed to be administered. You would though have to consider -- if Contract Co. were formed - you'd have to consider a funding mechanism.

So there is some need to have funding in a contract co., even just for the basic remaining a corporation in good standing. You know, this needs to be - filings need to be made. A contract co. would need to have a board, so that board would want to be indemnified and you might have insurance. So you'd have to pay for the insurance. So funding is something that would need to be considered in a contract co.

And then one of the questions related to how would you prevent - if you had a contract co. - how would you prevent that from capture or acquisition? And there are a number of ways to do that. You could do it through the

membership if you had members of a contract co. And that could be multi-stakeholder members or a membership comprised of multi-stakeholders.

And then you could also think about a board that was diverse in terms of interest and geography.

And then the last thing that a lot of companies do -- and ICANN has the structure in place as well - is to consider a classified board or a staggered board, which just means that the directors are not all elected every year. You have let's say a third elected every year.

And that ensures that you wouldn't have - you wouldn't need to necessarily have a complete turnover every year. Now that is usually viewed as a stabilizing feature of a company, an anti-takeover provision if you will. But the other side of that coin is accountability; right?

Sometimes you want to have the ability to recall the full board all at once. And a staggered board is typically not that structured. It's meant to be - that it would take a couple cycles - two years for example - in order to change the majority. So it's just, you know, two sides of the coin.

Go to the next slide. The other thing that a membership in a contract co. could have is the right to bring lawsuits against directors if they were not exercising their fiduciary duties. That can be something that's quite powerful. And that leads to the question of okay well if we have directors and officers and agents of Contract Co., are they going to be exposed to liability for serving in that capacity?

The answer is technically legally yes. They would have liability. They would be fiduciaries. But those things can be dealt with through insurance and

exculpatory provisions - exculpatory just meaning that the corporation agrees to indemnify through its charter documents so long as the individual was not acting in that space or acting in his, her, or its self-interest.

Next topic, next slide, relates to the MRT. And so I wanted to just maybe make one comment about MRT as a threshold matter, which is that when we talk about an MRT it has different meanings in different structures.

So when we talk about MRT in a contract co. situation, we might be talking about MRT as, you know, the governance body. You'd have a board, but is there some other governance overlay? And that could be done through the MRT.

But that, you know, would be different for example in an internal structure where the MRT is not necessarily governance. The MRT might be just that periodic review team that you've been talking about. So that's just the context here. So in this context and talking about Contract Co. when I talk about MRT I'm talking about governance - MRT as the governing body.

So one question we were asked is does the MRT - an MRT - need to have any kind of legal form? And we think that it should if you want to give it power to do things like sue or be sued, to be able to exercise legal rights.

You'd want to have some entity status as I said before that can be an unincorporated association. It doesn't have to be terribly formal, but we do think it would need to have some type of recognized form.

So as I said the unincorporated association is one possibility. If you go to the next slide, you'll see that there are some disadvantages though to the unincorporated association. One of the disadvantages is there is not the clear

standard of care for directors that you get in a typical corporation. There's a lot of law, case law, around the duties of directors in corporations. It's very well understood.

Unincorporated association there's just not that same level of understanding. And so that could make directors feel uncomfortable serving on an MRT that was structured as an unincorporated entity because he or she may feel that, you know, they don't quite know what their duties are.

There's also some - at least in California - some unsettled law about the possibility of personal liability of a director or an agent or an officer in an unincorporated association. So in the area of tort there is a question, an open question. So again that could make people feel uncomfortable serving on that type of body.

There's also a reluctance at least on the part of courts in California to intervene in some matters relating to unincorporated associations. And then lastly and I think importantly there are a number of jurisdictions outside of the U.S. that would not recognize that as a legal entity.

So given the importance of this being a body that would be internationally recognized we think that's a pretty significant shortcoming.

Okay so let's go to the next slide. So if as I said if an MRT were to serve in an oversight capacity with respect to Contract Co., how might the MRT do that? Well the MRT could do that by being the member or members of the contract co. And there is a lot of power in being a member.

And the biggest, you know, the greatest power is the ability to elect the board. And that's how -- if you think of a public corporation - that is how the

stockholders of a public corporation exercise their power, by voting in and out the board.

But, you know, you can go beyond that. Doesn't need to be limited to just the ability to elect directors. It could also be that you have as a member certain approval rights over key matters, whether that might be matters related to a potential transition in the future or other things. Those could be subject to a veto.

There's also the power not only to elect board members but the power to remove board members with or without cause.

Amendments to the governance documents - I talked about that a little bit. I wanted to make sure it's clear as we think about these governance documents the articles and the bylaws. That's a contract. That is a contract with the corporation, whatever entity we're talking about.

So to the extent that we're thinking about how do we make sure that the things that are being put in place that would ultimately kick in, in the event of a transition of the IANA function - how do we ensure that those things are binding?

Well by putting them into the governing documents, in effect it is a contract. And by providing that those things couldn't be amended without going back to some kind of multi-stakeholder group, you ensure that it is not purely a "trust me and hope for the best."

It is something that has teeth and that's enforceable. And that would be obviously very important to ensuring that there is some power in the ability to transfer the IANA function if that ever were needed.

Holly Gregory: And Sharon that relates to a discussion that was just had. This applies not only to a hypothetical contract co. but into the bylaws of ICANN as you're thinking about the transition.

Sharon Flanagan: Right. Okay. So MRT as members of a contract co. - next slide. Another way for MRT to exercise that oversight function would be the MRT as the board. You know we've been talking about a board of Contract Co. and then MRT above that, but really the board of Contract Co. has the ultimate authority in decision making.

So one way to address that would be for the MRT to be the board. The MRT could also be a committee of the board, but keep in mind that while the board can delegate, meaning it can give tasks to committees, it can't - ultimately the decision-making has to come back to the board. And so that would be a less powerful mechanism.

And then as I said before, the ability, at least in a California nonprofit corporation, for an independent third party -- that could be MRT -- to have approval rights over changes to fundamental constitutional bylaw provisions. That would be something to consider.

Okay so next slide. This is just a reminder to the, you know, just kind of a yes or no question - can the MRT override decisions of the board? Answer is generally no. The board has the ultimate decision making, but the caveat to that is the constitutional bylaw concept that we talked about.

And there is always can be built into those governing documents the ability of some group either as a member or as a third party with approval rights to come in and veto the budget or whatever the issue might be.

Holly Gregory: So just -- just to be clear on that, if the articles and bylaws provide the members with an approval right and don't give the board the ultimate approval right, then you have that mechanism. But there is not a mechanism where the board has say on an issue without member approval for the members then to override.

So we need to be very explicit about where you would want a membership body or a third party body to have a specific approval right.

Sharon Flanagan: Okay, so next slide I would just go through that quickly. Maybe let's move - this is kind of again reiterating the power of the MRT could be either through the board or through members.

Let's go to the next slide after that. And let's go one more. Okay. So that's Contract Co. in a nutshell. And so in short, is it a feasible structure? Yes, it is a feasible structure. MRT could have authority in a number of different ways through membership, through being on the board or through that third party veto right.

And so all of that is we think feasible legally. Now whether it's something that meets your goals and your priorities, that's really something for you all to decide. But from a legal standpoint it is definitely something that is feasible.

So I'm going to next move on to the external trust. Do we want to pause and have any questions on Contract Co. or should we continue to the next structure? Okay.

Jonathan Robinson: I don't see any questions Sharon so we can...You just used the chat room, and I know you - Alan Greenberg, go ahead.

Alan Greenberg: Thank you. Quick question - when we started this whole process many months ago we see the difficulty in ensuring that ICANN is a balanced multi-stakeholder operation. And we started off with the premise that we were not going to build another one where we then had to worry about overseeing that one.

I think what you're saying is if we wanted to make this structure work, the MRT has to really be part of Contract Co. and therefore implicitly is another multi-stakeholder body, albeit formed in a different way.

Sharon Flanagan: It doesn't have to be part of Contract Co. because we have that ability to have the third party veto right. But is it in some ways replicating what a governance structure that you might have at ICANN with the - whatever improvements come to the accountability group? Yes, possibly.

Holly Gregory: If I may, and whether it's MRT or not you would, if you had a Contract Co. it's got to have a board. So right there you've started to replicate if you will. And then the question is how do you keep that board accountable. And you can start to see how it sort of piles on.

Alan Greenberg: The logic was we have a board that doesn't make any decisions but listens to the external Contract Co...

Sharon Flanagan: And that...

Alan Greenberg: You've talked about that.

Sharon Flanagan: Right, and that's not really possible right? Because that by law the board must have decision making. That is the board's role. Okay so...

Jonathan Robinson: Greg, go ahead.

Greg Shatan: This is Greg Shatan, thanks. I just I think it's a little bit later in the PowerPoint we go to how limited purposes of a corporation can be, which I think goes to how you limit a board by having narrow purposes.

So the board can't necessarily be mindless but they can be very constrained. And there don't have to be 18 of them. The requirements for a board in California are pretty small. So you can still have a fairly constrained where you don't end up replicating ICANN just because you have a corporation.

Holly Gregory: Yes I agree with that. You can have one director. But choosing that one director is also a challenge. And then you have the issue of how do you keep the one director accountable? So you can't get away from that accountability problem, but you do replicate the accountability issue any way you slice it.

Jonathan Robinson: One question from Chris?

Sharon Flanagan: Okay so let's move to the external trust. So a question was asked could an external trust function as a - could a trust function as an external solution. The answer to that is yes and how that would work is the trust would serve as the party contracting with the IANA functions operator.

The trustee would be a board of trustees in one potential scenario. So again we're back to a notion of another board that could be comprised of members of a multi-stakeholder community.

There are a number of considerations about having a trust that I'm going to talk about when we get to the internal trust model. So why don't we just hold

even questions on that because it all goes together and we can talk about those holistically.

All right so let me turn now to the internal solutions. And there are two internal solutions that we looked at and answered questions on. One is a governance solution and the other is the internal trust solution.

So from a governance standpoint, so one alternative is to maintain the function and contract where it is, maintain it within ICANN, but change some of the accountability and governance features of ICANN. Holly, do you want to speak to this? Or I can continue but...

Holly Gregory: Sure. The notion here is that there are lots of mechanisms available to improve the accountability of an organization. And many of these are mechanisms that you've been talking about. You can certainly have requirements around transparency and the kind of information that a board or a corporation is required to provide to a multi-stakeholder community.

You can have as you already do have board selection mechanisms, but those could be changed and tightened. The directors, of course members of that board, have fiduciary duties. In a not-for-profit context those duties are to the mission, the stated mission of the organization that's stated in the articles.

And that can be emphasized and you can always help encourage that by having some director education around what that really means.

You can also have director removal provisions both individual director removal provisions and full board recall provisions. And we talked about that a bit. Sharon talked about it in the external solution. The same kind of mechanism through articles and bylaws that give some group - whether it's a

membership group or a designated kind of third party rights - can be used with ICANN.

You could also have the kinds of approval rights that we talked about with respect to a potential contract co. where you change the articles and bylaws of ICANN to provide very fundamental bylaws that had to be approved by some third party or membership body. You could have golden bylaws or fundamental bylaws, constitutional bylaws that have a very high threshold to change.

You could even provide that all bylaw changes have to be approved by some other body. You have to think about whether that's doable. All of these things you want to sort of balance out what's efficient and what's doable.

You could have certain key board decisions have to be approved by some other body as we talked about with the contract co.

And then of course you can embody through the articles and bylaws some independent review and appeal mechanism. And you could do that in a way where through a golden kind of bylaw or constitutional bylaw you could prevent the board from changing those kinds of things.

Sharon Flanagan: And in just talking about the approval rights on the fundamental bylaws just to note again that there would be bylaws that would exist and operate immediately at the transition time.

And then there could be a whole nother (sic) set of bylaws that would be within the bylaws that are adopted at the moment of transition but that don't go into effect until when and if there ever were a transition. But those would

be fully contemplated in the bylaws with the higher thresholds. So those could not be changed unilaterally.

Okay so next slide - so just talking a little bit more - this goes into a little more detail about how this governance solution, how that could look. And keep going back to it but it's because it's a powerful tool, and that is the constitutional bylaw.

Okay so that is the internal governance solution. Before I move on to the trust, are there questions people want to talk about at this point or rather wait until we finish the rest of the structures?

Okay, keep going, okay. All right, so let's talk about the internal trust on the next slide. So in the trust, the internal trust solution, there would be - the main difference is who is the trustee. So when we talked about the external trust solution, the trustee would be an independent board of trustees.

In the internal trust solution, it would be ICANN serving as trustee but then you could also have a trust protector or I think it's called a guardian in other jurisdictions that could regulate and have the power to remove a trustee. So it's sort of similar to the idea of a board removal right is the trustee removal right. And so that is how you could set that up as a trust.

If you go to the next slide, there is a little more detail of what is a trust and it's shown there on the slide. But in short it's when a trustee holds legal title to property, subject to an equitable title held by another. That's the beneficiary.

So threshold question is a trust reliable structure. It is, we believe, in both the internal solution a viable structure and in the external solution.

In the internal solution you would have ICANN holding the right to act as the IANA functions operator. That would be the property being held in the trust. In the external solution you would have an external trust that would have a board of trustees, and they would contract with the IANA functions operator. That would be the property right there. Yes.

Greg Shatan: Greg Shatan, thanks. In the external trust, would the board of trustees have to be incorporated to act as a party that can hold the assets?

Sharon Flanagan: No. The board of trustees, those could be individuals. Those could be associations. You'd have flexibility on how you would structure that. You could think of the board of trustees as in effect similar to a board of a corporation in that regard.

Greg Shatan: But they are holding property.

Holly Gregory: The trust is a legal entity holding the property.

Greg Shatan: So the trust itself is a legal entity in this case.

Holly Gregory: Correct.

Sharon Flanagan: Right and...

Greg Shatan: So the board doesn't have to be.

Holly Gregory: Correct.

Sharon Flanagan: Right, correct. Okay. Yes.

Eduardo Diaz: Thank you. This is Eduardo for the record. I may have a question for the previous slide where you mentioned that the internal solution where things stay the way they are but there are some changes in the (accountability) and bylaws.

My question is if worse comes to worse can you have something in the bylaws that allow to spinoff this operation outside of ICANN? Is that possible?

Sharon Flanagan: Yes I think that's exactly right, and that's what would have to be contemplated. So you would build in -- at the moment of transition -- you would build in the mechanism for that divestiture as part of the governing documents with that higher threshold.

And you would theoretically in that provision you would deal with some of the things that were being talked about by the design teams. How are the rights transferred out? What's the obligation to transfer out know-how for example or data, things like that? So you would want that.

We would want that all contemplated now and it would be something that would apply potentially to successors, not just to the first successor but to successors in perpetuity, that any successor would have to be willing to abide by the governance and accountability mechanisms that ultimately come out of the CCWG and the other processes.

Holly Gregory: And I think that's for point of clarification when Sharon says you must do that. That is if you want sort of that - if the decision is to have an ability to preserve an opportunity to transition the function at some point out in the future. We don't know if you're going to go that way or not, but if you decided to do that.

Sharon Flanagan: That's a good point. It's not a must in the legal sense. It's a must in a more practical sense where if you want that mechanism to be enforceable and to have teeth, it needs to be contemplated now.

So let's go to the next slide. One more. Okay. We talked a little bit about the difference between the two trust solutions is really who is the trustee. If the board of trustee and the external it's ICANN. In the internal we talked about the need to have trust property in order to have a trust.

And we talked about our belief that in either scenario - the internal or the external - we believe there is a property right that could be moved into a trust. We think that would be feasible. If you go to the next...

One of the more challenging questions for a trust is that need to understand who are the beneficiaries of the trust. That needs to be set out in the trust documents. And so defining the beneficiaries of this trust, that could be challenging; right? That's not - there's no obvious answer there.

And there are scenarios where you could have a charitable trust that has a very general group of beneficiaries. For example, the community, the worldwide community, could be beneficiaries.

But what's important is once you define that universe of beneficiaries, the trustee then owes duties to those beneficiaries. So the trustee - whether it's a board or it's ICANN - needs to understand to whom they owe these duties so that they can ensure that they're meeting those obligations.

And then another feature importantly about a trust is at least in California and many other states in the U.S. there is a local official that has authority over that entity. And so a question is whether that is something that would be okay,

the idea that there is a state attorney general for example who could come in and enforce the rights of a trust. And you may not have complete control over what the agenda might be in that circumstance.

In terms of features of the trust I think probably the most important thing - maybe I should have started with this - is the last point, which is that trusts are not legally recognized in all jurisdictions.

So if you were to go the route of a trust, whether internal or external, you'd have to understand that in certain countries it will not be recognized. It will be as if it didn't exist. And so as you look at implementing something that makes sense on a global basis, that seems to us to be a pretty significant maybe fatal disadvantage.

Okay so next slide. Yes a trust could contract, could sue, be sued, all of those things would exist in terms of liability. There are ways to (ring sense) the liability of the trustee so long as there's not any willful misconduct.

Holly Gregory: And again this is so long as we're talking about operations in the United States. So we don't know that you'd be able to sue externally or do any of those other things, depending on the jurisdiction and whether the trust is recognized as legal or not.

Sharon Flanagan: Next slide. We were asked about this notion of a guardian. And there is a concept of trust protectors in some U.S. states. Doesn't exist by statute in California although there are trust protectors that are used in California trusts.

And that would be the place where you could have an MRT appointed if not as the board of trustees you could have in an internal solution you could have

ICANN as the trustee and the MRT as the trust protector that would have that power to remove the trustee.

Okay, next slide. We were also asked about whether you could structure some kind of a community organization. And we were asked about an Internet community association. Is that something that could be done? And the answer to that is yes. You could organize an ICA as an unincorporated association.

As I mentioned earlier, an unincorporated association does have the ability to enter into contracts. It does have the power to sue. Also could be sued in turn. We talked about the disadvantages of an unincorporated association, which is some uncertainty around the individual - the liability of the individual serving in roles as directors or officers or agents. That's a significant disadvantage.

Holly Gregory: Isn't the other disadvantage that you may not be recognized in all jurisdictions as a legal entity?

Sharon Flanagan: That's right, yes. We were also asked about MOUs and so just very quickly from a lawyer's standpoint when we think of an MOU - a memorandum of understanding - we think of that as not a contract. It is just an understanding. It's just a document but it is not binding.

And so to an extent that there's a desire to have a contract that is binding on those parties, we think of that not as an MOU but as a contract.

And then there was a question of would this type of organization be any less of a legal target than a contract co. and maybe presumably any of the other structures. And the answer there is no. We don't see any difference in terms of legal - likelihood of lawsuits.

Okay, let's turn now to (created) model and whether that is feasible. And there are variance of the integrated model as well. So there I think the three variances. There is the truly free standing PTI - post-transition IANA - so truly free standing.

There is the wholly owned subsidiary of ICANN. And then there is something in between which would be a multi-party owned subsidiary. Now I'm using the term subsidiary. That is not a concept that exists in the sense of a nonprofit corporation because a nonprofit doesn't have owners.

And so when we talk about subsidiaries we're thinking parent subsidiary where there is ownership. So really it would be an affiliate relationship but I think we can - we'll use that term because it's, you know, but understand that when we say subsidiary we don't mean a legal subsidiary.

So from a structural standpoint you could have this PTI. Again, could be an unincorporated association. That is certainly a possibility but we've talked about some of the disadvantages of that.

You could have a community board that would be the board of directors of a PTI, for example, if it were a nonprofit corporation. If you go to the next slide, one of the questions was independence and accountability and which kind of had the most independence and the most accountability.

And I think our view is the true stand-alone has no ownership, you know, by ICANN at all, probably has the most perceived independence. But as with other of these structures in some regards you move the potential for capture just into a new place. And there's a new potential for capture but by different stakeholders.

Okay so move to the next slide. So the other structure is the idea - yes. So the other variance where the variance where PTI would be a wholly owned subsidiary -- owned again not quite the right concept - but a wholly owned subsidiary of ICANN or owned by a group. Let's say it's ICANN IATF and the RIRs.

And that is - those again are legally feasible. The question whether they meet your priorities and goals. That's really more of a question for you all to think about.

I think in terms of complexity I think the scenario where you have the three owners, that is probably the most complex legally. I think of that as like in terms of a structure we work with like a joint venture. Any time you've got three owners, more than one owner, you have to negotiate all of the rights among the owners. And that can be very complex as to what happens if one wants out.

You know, how do you manage a lack of unanimity? So having multiple owners is always more challenging. That doesn't mean it's not the right answer. It just means I'm just telling you from a complexity standpoint it is in my view the most complex of the three hybrid or integrated models.

Jonathan Robinson: Paul would you like to talk now? Paul go ahead.

Paul Kane: Thank you very much. I have to say a really good presentation, really useful. But I am not a lawyer, and I have to say I'm somewhat confused by the various models. And I always find it helpful to mention to a lawyer and describe to a lawyer what the goal is.

And you've done a great job answering the questions that were posed. And I don't know if they were the right questions but thank you for answering the questions that were posed.

So just taking the last point you raised, the IANA does service three distinct communities - the IATF, the RIRs, and the naming group. Now the IATF and the RIRs wish to have a mechanism whereby they can walk away.

When we this group met in Frankfurt we wanted to have a mechanism whereby we as the naming community could identify the technical contractor to deliver the IANA service. We all agree unanimously that today that should be IANA ICANN staff.

But if they failed to deliver we want the mechanism to choose the technical operator we wish. And that would be through an RFP type process most likely. But it could be ICANN IANA would win the contract again.

But by virtue of having a process you can call to account the technical operator. The processes you went through are admirable, very complicated, and we do not wish to replicate what ICANN is all about. We all support the ICANN mechanism. It does a useful job to the community.

The issue is one of authority. And you would have heard debate this morning about the gTLDs wanting one set of criteria and the ccTLDs splitting more or less into two groups - those that want to empower ICANN to do stuff and those that most certainly don't.

So what I would like to learn - and I'm sure some of my colleagues in the room would like to learn - is which mechanism will achieve the goal of

stability as in let's have today a situation where ICANN IANA do deliver the service.

But if they fail to deliver the service we have a mechanism whereby we can run an RFP. We can effectively select the best operator - it might be ICANN IANA; it might be another party - as a technical functions operator.

The (CSC) and the policy parts could remain in ICANN. That's not a big deal. But the actual who do we as registry operators send our requests to - could be anyone. There are many people in this room and many people in the community that could do the IANA function. That's a given. It's a technical function.

There are many people in this room that don't want anything to do with the policy side. And so we have to try and come up with a simple mechanism that preferably would remain in the U.S. We don't want to have a jurisdictional fight. We want it to be solid.

We appreciate the U.S. government's role in this. They've given a very stable foundation going forward. But what would you recommend?

Holly Gregory: Paul I think you're approaching it exactly right, to state the goals, the priorities and give us direction and ask us to go back and think of a solution. And we have not yet done that. We haven't had the opportunity to talk with you and others around the goals and priorities. And we're hoping that we'll have some opportunity for that today.

But we absolutely agree that that's probably the best approach. We did want to respond to the questions that have been posed as part of sort of an education

around what's possible. But we need to be better informed before - I would not want to sit here and jump to a conclusion around what's best.

Now with that said I will let Sharon - because maybe Sharon has an idea. I don't know yet.

Jonathan Robinson: I would just hold off on that idea for the moment because I think Paul makes a really good point from the point of view of a client. But Paul isn't the client. This group is the client, so it's really important to make sure we get that right. I mean to the extent that he was, he should ask you as his lawyers that question.

And structurally it's a very good question. In terms of the content I'm a little worried that it may not reflect the view of the group although it's interesting if that does start to become the view. So I would put a pin in it. And certainly from my point of view it's exactly where I'd like to get to.

You've provided us - and are providing us - the landscape of possibility. We have a certain requirement. Paul has a set of requirements which may or may not coincide. And I don't mean that flippantly actually. They may - it's entirely possible they could coincide, but I don't want to presume that.

And then - and Paul actually to some extent conflated the requirements and the constraints because let's be realistic. There are some constraints. We've got a bunch of constraints on how we work.

So I would like us within today and tomorrow to get through that process as much as we possibly can but probably not in the next five minutes because I think we do have a presentation and we've got a bunch of other people who'd like to ask either questions or points.

So it's absolutely the right set of things. What are the requirements? What are the constraints? And how do we deal with this meat in the sandwich which the lawyers are giving us now positioned between those requirements and constraints?

I'm hopeful that we'll get somewhere with all of that, but let's just deal with the other questions and make a note that that's the right structural point that we just learned about. That's right now for the reasons I said.

Holly Gregory: Jonathan I wonder if we should just get through the hybrid integrated model and then pick up questions.

Jonathan Robinson: Okay.

Holly Gregory: Because we're almost done with the presentation.

Jonathan Robinson: That's no problem at all. That seems to be the sense of the room so I'm very happy to let Sharon continue. And then we'll come back.

Sharon Flanagan: Well I think that's all I wanted to cover in terms of that structure. So it's actually a good transition. There are some other legal considerations I wanted to talk about. And maybe - why don't I do those quickly. I don't think they're going to take long and most of them are self-explanatory.

The first one though I wanted to cover because it came up in one of the earlier conversations on the chat board, which is related to the (CSC) and potentially an MRT, which is do we have a cartel issue that would prevent your using those types of structures.

And this is very preliminary at this point but our preliminary view is that there should not be a cartel issue. A cartel if you look at the first point on the slide is when competitors come together to fix prices, restrict output, rig bids or allocate market customers or territories.

As we understand, the goals and roles of a (CSC) and an MRT, that would not be what it would be seeking to do. It would be having a legitimate pro-competitive goal which is to ensure that the IANA function is operating well and efficiently and that the needs of the community at large are being met.

So we do think that to the extent that you use one of these types of groups you would want to have some anti-trust competition guidelines in place. And typically it's considered best practice that when competitors are getting together with legitimate non-prohibited purposes that you have some kind of anti-trust or competition counsel present in the meetings to ensure and guide the conversations in a direction that is lawful.

So we don't think the anti-trust considerations would prevent these structures from being used.

And then there were some other questions that I think - as I say - I think the slides are relatively self-explanatory. But they went to issues around bankruptcy, financial liability, litigation, all of those things. And the short answer is that there really is no way to completely ensure against a bankruptcy being a possibility whether in a contract co. or in a trust or in a different structure. And...

Holly Gregory: Or in ICANN.

Sharon Flanagan: Or in ICANN, yeah. There is no silver bullet for that. You can - if Contract Co. were to be used - you can reduce the potential for one of those outcomes by ensuring that Contract Co. is adequately funded and that it has limited operations that are focused solely on the very limited purpose it would need to serve in order to be the counter party to the contract.

So you can do it through more operationally but not really so much legally. And the same is true in terms of protection from litigation. We think there's a scenario - in all of the structures there's potential for litigation. There's nothing that would prevent one of those entities from being sued.

You do want to protect the individuals. To the extent those individuals serving are exercising fiduciary duties using good faith they should be protected. You know I think most people would agree that people in those roles should have the benefit of indemnification and protection.

So those were the general legal questions that are overarching and apply to a number of different structures.

Holly Gregory: I want to address just one question that I've seen in the chat room, which is why have we focused on California law. And I know that one of the - it's a very good question. And we saw one of the questions that was posed in the set of 12 questions related to other jurisdictions.

We could rapidly run up a huge legal bill by doing surveys of the 50 states and all of the countries in the world to find an appropriate jurisdiction. We do think that when we look at U.S. state corporate law and the law of not-for-profits in the U.S. we're not aware of anything, and we have a big not-for-profit practice that practices in a variety of jurisdictions.

We're not aware of anything that's significantly different from what we've just explained to you under the California law. There is some variation in the not-for-profit law of various states, but it's not significant around these kinds of fairly straightforward issues.

I can't speak to foreign jurisdictions. When as the number of options on the table starts to narrow, if you would like us to look at particular structures in a wider range of jurisdictions we're happy to do that. But we just thought it was premature to go into that kind of analysis at this point.

Jonathan Robinson: We built a queue up of other questions to let's start with the top of the queue, which is led by Avri.

Avri Doria: Thank you. Thank you for the presentation. And I actually raised my hand to ask a clarifying question on 34, though afterwards I got all kinds of stuff that I was going to ask Paul once we got to the free-for-all.

But to go back to the question on 34, I wanted to ask a question on the last bullet, which was the perceptions of capture may be greater but practical protections can be established.

And I was wondering what those perceptions of greater capture were with this - the association model where I thought because it was anchored in three different organizations and their multi-stakeholder accountability mechanisms it would have less chance of capture. And so I'm really curious as to how it is perceived as being more likely to capture.

Sharon Flanagan: I think more likely compared to the true stand-alone because you're still concentrating ownership. And again I say that not in the legal sense. But you're still concentrating in these three groups.

And so either you're concentrating in one. You know, maybe one would say more accountability if you've got three. But is it the best scenario where there's no kind of concentration of power at all? You would have something - if you're truly across all stakeholders. So that was our initial reaction to that.

But it's not - it doesn't mean that we don't think it's a mechanism that would have accountability and could avoid capture. We were just saying compared to a true stand-alone, which is I think your third variance. It was just by comparison to that.

Man: ...very much. My question's about members. What has often been suggested in our discussions is that the advisory committees and supporting organizations be members or perhaps their chairs or a representative of them be the members of ICANN.

The ACs and SOs are essentially creatures of the bylaws of ICANN. My understanding from past lives is the members had to be essentially outside things controlling ICANN or controlling that particular corporation and couldn't really be entities that only exist by the merits of ICANN.

Sharon Flanagan: Yes so that's a good question. So to - at least in a California nonprofit - a member has to be a person within the statute, meaning either a human being but not only human being, or a legal entity. So you're right in the sense that if these groups have no legal status they could still appoint a person.

That person could be the member for that group. But if the group is the member that group needs some legal identity to do that.

I just want to go back to one point on the hybrid model that I didn't touch on, and that is that if you look at the model that is the wholly owned subsidiary of ICANN, one way to think about that is to couple that with - you could couple that with accountability, the greater accountability, and put those two - maybe they already are in that sense a hybrid.

But you could structurally, legally (ring sense) the IANA function and create a subsidiary and put all of the IANA rights into that subsidiary. You don't need to do that but you could do that.

And there is a possibility that if you ever needed to move to the Phase 2, if it were ever to pass, that you wanted to transfer, then you have an entity that is already legally segregated and then thus easier to move out if that were ever an option that would be considered.

Man: Follow-on question from that then because Paul highlighted a point of subcontracting so presumably then that legally separate entity could choose to continue to operate or could outsource the technical function, that could be outsourced to...

Sharon Flanagan: If it were given that right, yes. It would have to be given that right.

Man: So it's consistent with just checking whether these things are self-consistent or not.

Sharon Flanagan: And then if you had that subsidiary within ICANN, that subsidiary could have its own board -- if it were a true entity would have its own board. And then those directors would have a fiduciary duty to the IANA subsidiary.

And going back to the comment that was made earlier, is there a benefit - maybe an indirect comment - is there a benefit to being a member when you already have the right to appoint a director? Is there any benefit to that?

There's one legal benefit which is as a director you owe fiduciary duties to the organization and to the mission as Holly said. As a member you owe duties to yourself or your organization; right? You don't have this concept of needing to serve something larger necessarily than yourself.

So it allows a member to - and this could be a good thing or a bad thing - but it allows a member to act in the member's - as a representative of a group in the group's best interest and not where that fiduciary hat as a director of the entire organization where he or she needs to consider what's in the best interest of the entire organization.

So something to consider is there is a difference between wearing a member hat and wearing a director hat. And fiduciary duties exist or don't exist depending on which hat you're wearing.

Jonathan Robinson: Thank you. That's added a couple more to the queue. But let's work our way through it. (James).

(James): Thanks. And so going back to the multi-party owned hybrid services, hybrid model, question, I suppose two parts. So understandably it would be the most complex to form. So would that legal complexity also move over to the operational running of that model?

So would that be a complex model to run legally? And then a kind of follow-on from that would be excluding any errors or loopholes in the formation

documents of that model, would it be a - would it have a larger legal tax surface due to its complexity?

Holly Gregory: I don't see any reason why it should add to operational complexity from a legal standpoint. From a practical standpoint you may have more people who are interested in meddling, you know, or trying to get involved in seeing themselves as having a role. But not from a legal perspective certainly. As to the second question I'm not sure.

Sharon Flanagan: Is it whether it would be more expensive to operate - is that the question? No.

(James): No sorry, whether it would be open it up to additional legal challenges or if there would be any additional...

Sharon Flanagan: No. I think the only thing - if you think about this as joint venture like, the thing that you think about with joint ventures is deadlock situations. That's always the biggest challenge of a joint venture is what if the parties simply can't agree?

Now here as we proposed initially you have three members. That helps better than two where you're truly deadlocked. So in a three-party situation, you know, you would hope that you would end up with - you know, you'd always have sort of two to one or hopefully unanimity.

But you need to consider - you would need to just consider what things are going to require approval of the bodies and is - of the three - and is it a majority? Is it unanimous in some cases? And so there is some ongoing governance that would need to be considered but the complexity I'm thinking of is the up-front complexity.

(James): Just a very quick follow-up. So speaking about a deadlock situation between three parties, could the formation documents and governance address that issue?

Holly Gregory: Yes you would - as Sharon said - you would decide in advance in your articles and bylaws what type of decisions. I mean you would provide for most decisions to be made on a majority basis probably, simply to avoid deadlock, although there might be some kinds of things where you have certain actions that you don't want to have taken unless everyone is in agreement.

You have to be very careful because those are the ones that are potential for deadlock. And so you have to be willing to live with status quo unless you could get full agreement in those circumstances.

Jonathan Robinson: Thanks (James). Jordan.

Jordan Carter: Thank you. Jordan Carter here for the record. I've got five questions or comments just to quickly give you as some input - hopefully issues that other people are thinking about.

The first one is kind of a process question about the advice. I think one of the biggest things that you're going to be able to help us with is structuring our needs and objectives in a way that can deliver responsible questions for advice to be given on.

And I can only warn you that that's going to be a very political and difficult process to be seen to be fair (and have) getting through. So good luck with that one because there's a lot of implicitness about the goals that people are pursuing. And we do need to kind of surface and structure all that. So it's just something to take home, but I'm sure you're already aware.

Holly Gregory: We appreciate the warning.

Jordan Carter: I'm sure you've already had it.

Sharon Flanagan: The one thing I would say is that we are agnostic on structure. And so we came to these questions with absolutely no background in terms of history and approaches people had in their minds. And so in some ways we were unfettered by that. We just were looking at it, just looking at it and saying does it work? Does it not? What are the advantages? What are the disadvantages?

But appreciate that we will need - as we pull out the objectives we will need to understand how to balance all the objectives.

Jordan Carter: Yes, yes. I'm sure you've had the warning about how awkward this is going to be at points already. So I'll carry on.

The second point is that you mentioned the possible fatal problem with trust models being that civil law jurisdictions might not accept the validity of the trust control over the relative property.

I just wonder what impact that practically would have in the case of a company that's operating in California where the trust is also based on California. But that's just - it's just something I don't know the answer to. I don't know if that's an important question to take on board.

The third question I had was the distinction - four of these models, the internal and external trusts, the contract co. and the bylaws model - seem to me to be dealing with a particular problem which is how to assign the IANA function.

And the integrated model seems to be dealing with who operates the IANA functions. So I just wonder if it's worth keeping that distinction in mind as we consider these models because as far as I can tell the integrated model doesn't necessarily answer that question of who has the right to assign these functions. So that's something to tease out.

The fourth point was you in your discussion talked about members needing to be a legal person, which is clear. And you mentioned the idea of the internal bodies within ICANN appointing a member and to exercise the membership powers within the vehicle like a contract co. or a trust or whatever structure.

One of the key questions you'll have to tackle is under what conditions can that member suddenly stop being a member if its appointing organization decides that it must be stopped because it's doing something they don't like and then can be replaced by another member. That's important - accountability consideration.

The first one I wanted to ask you was between the two trust models. I'm not expecting answers to all these questions today. And it's about the fiduciary duty of a trustee. To me it seems that there's a big difference between the two models and that and the external trust model.

And the trustee isn't ICANN the operator. In the internal trust model the trustee is ICANN the operator. Fiduciary duties are stringent duties. So is there an impact in terms of where they are allocated, either to ICANN or to an external trust board in terms of the reliability of the service and in terms of the assignability of these functions at a later point?

I don't know if you want to respond to any or all of those. It's designed to add things into the mix if you're thinking.

Sharon Flanagan: Yes let me take the last one first. The way in a trust to think about fiduciary duties is it's about - the duties are owed to the beneficiary. And so the beneficiary could be articulated to be the same in both. And in the end they could be the same. That would be a choice but...

So if it's the community at large, the worldwide community, that could be done. So I think...

Holly Gregory: I think there was an underlying implication in your question though, which is, is one model - would we have more trust in the trustee in one model than the other.

Jordan Carter: No it was what is the impact of those fiduciary duties being owed to the beneficiaries who are the same, by the same entity that's operating this function...

Holly Gregory: Right.

Jordan Carter: ...ICANN, versus the trustees. And there are two dimensions if I can just ask them. One is how difficult is it going to be to fill those trustee roles if they owe the fiduciary duties and they're individuals outside?

And the other is does it provide a new layer of accountability for ICANN the operator if it owes these fiduciary duties to the beneficiaries which it doesn't today? So it's teasing out the impact of those fiduciary duties and where they lie.

Sharon Flanagan: So I think on the - let me take the other one. You mentioned on the models in terms of the focus shifting. I think that is inherent in the hybrid model is you sort of shift your focus away from the contracting role into the actual IANA operation, the functioning of it.

But my sense was that you achieve your ultimate objectives that way because that is the value you're trying to protect and maintain. You know, you've got a function that's working and you want to ensure that it continues to work. And you can do that lots of different ways.

You can ensure that it continues to work by having an outside contract co. or outside trust that has the power to pull that contract away. Or you have the ability to ensure it's still working by having the ability to pull out the IANA function out of ICANN or grant it to a new, you know, third party.

So my sense was you were still getting to the same place. You were just coming at it from a different direction. But...

Jonathan Robinson: Okay, let's keep moving through the questions and see if it's - (James) that's a new hand if you could be brief because I think you've had not - (unintelligible) (Lise).

Lise Fuhr: I have more a remark that's political because the hybrid model that implicates IATF and RIRs the chairs received a letter earlier this week and it's been sent to the group that the RIRs really - they would like to be involved and ask if this is going to be a solution.

And you might say it's slightly out of scope to have this setup within the naming group. So we need to rethink if this is going to be the way forward.

And anyway we had this e-mail from the RIRs regarding their wish to be involved and asked if this was going to be a proposal for the ICT. Thank you.

Jonathan Robinson: Yes there's two points there that strike me. One is whether we go out of our own scope and whether we tread on someone else's nose in doing so. That's really the nutshell. Avri, did you want to respond to that directly?

Avri Doria: If I could, and I'll myself in the queue for my other question. But in response to that, that was specifically why we put in options that sort of said we could do the single member notion leaving the other - and this is one that I - I mean I would appreciate an - the opt in notion that we could go ahead with this as a model that had ICANN as the only member or whatever term we use, the only affiliate or what have you - and leaving within its bylaws the notion for them to opt in at another point so that at this immediate point it doesn't involve them yet it gives them an opportunity.

Lise Fuhr: Yes and I agree that's a good option to have. It's just that I just want to raise that there's been some concern regarding this and I'm just addressing this to the group. Thank you.

Jonathan Robinson: Thanks (Lise). I'll move on to (Chris) then.

Chris Disspain: Thank you Jonathan. And Sharon and Holly thank you very much indeed. I've got some comments and questions. I think I'm - so I think first of all I should say that given that I was the person who originally put the sort of internal trust model on the table that I hereby acknowledge the fatality of it.

And actually to be honest with you, based on what you've said, I can't personally - speaking entirely personally - can't see much to be gained by

spending any more time analyzing it. I think it has challenges. The others may disagree with me but I'm just speaking for myself.

I think I agree with Jordan that Avri's - the hybrid model - has more characteristics in it that are to do with - not so much to do with what I consider to be the focused goal. And that's what I wanted to comment on and ask you some questions because Paul Kane made some statements which I think are relevant.

Unless I've misunderstood the first goal, the top goal for this work is the ability to move the operations of the IANA function somewhere else, which I think is basically what Paul said.

So what I'd like you to speak to is am I correct from what you've said that it would be possible to do that, to guarantee that that could happen using the internal mechanisms of golden bylaws and all the other things you talked about, the internal structures?

So I think that's the key question is, is it possible to do it? If it's possible to do it and you then start asking yourself the question if that's the key goal then - and simplicity is also important, etcetera, then where do you go from there? So that's my first question is, is it - am I right in that you've said it's possible to do that?

Sharon Flanagan: Yes we do think it's possible. There are different ways of coming at it, but we do think it's possible.

Chris Disspain: Right. Okay I think actually that's enough for me right now. So I'll stop there, thank you.

Jonathan Robinson: Erick.

Erick Iriarte: Thanks. Only a couple of questions. The first is about the laws and I agree with California law is not a problem that. But when we're talking about ccTLDs in (unintelligible) or (unintelligible) a lot of people talking, "Maybe I'll take off of roles to put in the (NAV), to put in some place that could be more international.

So I suppose in the future you will show us how comparative (unintelligible) with our laws and how it could affect (unintelligible).

And the second is about the number of (feet) in California law. I want to understand how is this ccTLD and this gTLD all TLDs. We were members of these instructor of the number of (feet). If you need to register as a member of this as TLD or you need to be part of the structure because you are a TLD.

I want to be clear with that though some of the members, some of the TLDs, don't want to have a relation with the United States government rightly or inrightly (sic). And they are related with IANA by contract.

Seeing a special gTLDs and now related by contract, special gTLDS. And I want to understand the difference. Maybe it's not the scope but your model. If give a part to that way I want to be clear what will be the role of each member of each TLD.

Jonathan Robinson: Yes (Lise).

Lise Fuhr: I'll just give you a quick answer to the jurisdiction and the comparative law because we all agree that ICANN is going to be having the IANA function.

And we want this to stay within ICANN. ICANN's placed within California, so this is California law.

So I don't see any need to go into the analysis of different laws because this has all been built into the setup that it's going to be California where it's located or...

Erick Iriarte: I am completely agree with you and thanks for the answer. But again we are not all the community, and some part of the community said (unintelligible).

Holly Gregory: If I may...

Erick Iriarte: I understand your answer.

Holly Gregory: If it may, if you were thinking on the Contract Co. grounds, you could look at other jurisdictions. And if you directed us to look at other jurisdictions and what was possible internationally we certainly would. But we would need that to be a clear direction because as I said there is added expense.

So if that's the direction at some point we'll take it. We do recommend that you take this a little further before you start looking at those issues.

Sharon Flanagan: And on the question of membership there could be - you could think of this as a sole single member. That is there is one member and that member though is determined through a multi-stakeholder group that makes that decision. Or you could have different numbers of members across the stakeholder groups. That would be something you could consider. Either was possible.

Jonathan Robinson: (Lise) are you out of the Adobe? Okay so I'm going to come to you then after Erick and then we'll continue with the queue. Go ahead Elise?

Elise Lindeberg: Thank you. The more I listen in to this - and thank you for telling us how flexible the law is and the California law is because I think the way we worked in this group is that we started with a process of we need to secure the possibility to remove it if everything goes wrong as a nuclear option.

And what structures do we need? That is when the contract co. and the external mechanisms were looked at because we thought that was needed. What you are saying now is that you state that this can be solved in an internal process.

And I think that what we are looking at is everyone in this group wants to keep it as it is today. We want to keep it, so we don't want to rock the boat at all because it functions. And I think we're then heading in the direction of what can we possibly do? What kind of mechanism or what kind of community decisions do we need if you know possible within the community if it is possible?

So without constructing any (unintelligible) it's something within the community, within the structures today - if that is possible - to have the nuclear option of removing it. That's the only thing we're actually looking at because we all - as (Lisa) said - we don't want to move it as it is now.

And we don't want to quit anything to be seen as being already separated now for the future. We don't need anything to be separated now for the future. We need to have it as a nuclear option.

So if you could look into the internal processes what kind of processes - as (Chris) said - what kind of golden bylaw, whatever do you need within the community today to force a separation if needed. Thank you.

Sharon Flanagan: Yes I think there's two - and we'd be very happy to explore that more. I think there's going to be two critical issues. The first is - and maybe there's three - what triggers the ability to move out the IANA functions?

And two, who the right and how? You know, who's voting on that? Who's making that decision beyond ICANN? And so that's something that we would have to also consider.

And then the third is - as I mentioned before - it is building in now the precise mechanisms for the ultimate nuclear option because you have to have a structure that is in effect once you've decided to trigger it, made the decision, that it can be automatic in that sense.

And so you need to be able to sufficiently flesh out now what would be anticipated and articulate that and then put that into some kind of constitutional bylaw that could not be readily amended.

But my point is that even if it is unlikely that you would ever move the function out - in order for it to actually work - considerations would need to be made now as to how that would look.

Jonathan Robinson: Avri thanks.

Avri Doria: I've already had several turns at the microphone. And actually I want to ask a question that builds on the one. So in that model you had mentioned before some notion of building a ring around it of - and is that creating some sort of organizational separation at the beginning?

So in other words we establish an organization or separation now but leaving it internal and then it's basically cut along the dotted line if one needed to later.

Sharon Flanagan: Yes that's right Avri. That's exactly right. So you could keep it functional like that. You could make it functionally separate now, separate budget. You could do all that without a legal structure around it.

Or you could actually implement a new entity within ICANN and put it all into that entity because one of the biggest challenges is if you were in a normal kind of private company situation, when you're seeking to divest something, it's how do you cut it out? How do you actually - are the lines clear?

And so by putting into an entity you know what it is, and you move the entity out. You don't have to go and figure out where do all those components fit. So that's the benefit of the work up front is that it would facilitate the work on the back end. But it does add more work up front.

Avri Doria: Fair enough. So that would be kind of like a separability solution would be doing that work.

Sharon Flanagan: That's right. It's doing some up-front work on separability.

Jonathan Robinson: Yes and I suppose just thinking about that, if you went that far, that preliminary structural - preliminary work on structural separation - that still doesn't preclude at any point technical outsourcing from within that (ring sense) entity within the corporation.

So one can see these - and I think we need to have these two concepts understood because one is a structural separation and one is a form of - you can have functional separation internally or you could have functional separation externally which we might call outsourcing.

So just trying to make sure I've got the concepts clear and various of us are working with similar terminology and thoughts. Eduardo?

Eduardo Diaz: Just Eduardo for the record. I want to go back to this membership. So we have this - we stay with ICANN the way it is and then we start talking about members and coming back to Alan's - what he said about now we are - most of these groups are created by a bylaw (unintelligible). We are entities within there.

And to become a member you need to be a legal entity. So the question is has to do with that. When you say that it has to become a legal entity, one person or a group, does that mean that we need to be incorporated? Or how is that done? Thank you.

Holly Gregory: Make it really clear the current committees that are functioning - this could be very simple. They could simply appoint, have the right to appoint one or more persons who are by definition humans, legal persons, to serve as representatives, to be the members. That's the easy thing.

The other thing is if you actually want the bodies, these entities, to be the members they would have to do something to become legally cognizable -- either incorporate in some form or become unincorporated associations. That's the other mechanism. That would be a legally cognizable entity that could be a member. But yes, there would have to be some legal formation.

Eduardo Diaz: So just to follow up on that if a composition like we have been talking before like an MRT could be that member...

Holly Gregory: Correct.

Eduardo Diaz: That has all the people.

Holly Gregory: Yes. The MRT could be the sole member and become an unincorporated association or some kind of other legal body. Or you could simply take the members of the MRT and have them be the members of the entity. So you have identity between whoever's on the MRT is by definition as an individual a member of the other entity. It sounds complex. I think it's very doable to work through.

Jonathan Robinson: Thanks. Alan?

Alan Greenberg: Thank you. My questions are also as a follow-on to my previous question on membership. I'm a little bit confused -- or maybe my lack of sleep - how for instance the GNSO, a part of ICANN, can be identified as the group that names the member. So that's the first half of the question.

And the second half is I presume once Jonathan Robinson is named as the member perhaps with a specific limited term, he is the member. And he acts unilaterally on his own volition. And if he happens to be kicked out as chair of the GNSO he's still the member.

Sharon Flanagan: Well...

Holly Gregory: But you can draft around that. I mean yes we have to address those issues, but you can come up with a solution. And you can say the right to select the

member belongs to some entity, whatever entity, the right to select and the right to remove and select somebody else as a member.

Becoming a member doesn't give you rights forever. It's just like a director. Somebody has the right to appoint them and to remove them. So you can do the same with the members.

Alan Greenberg: So the member cannot be an integral part of the organization but...

Holly Gregory: The member can. The member could be an employee of the organization.

Alan Greenberg: No, no, no, but I mean in our case, the unincorporated, the ACs and SOs because they're not legal people. But you could designate this group to name the person.

Holly Gregory: That's right, absolutely.

Alan Greenberg: There's no problem there. Thank you.

Holly Gregory: And they could be - they could have the right to name them, to remove them, all of the above.

Jonathan Robinson: And just for the context it would be useful to have a reminder of the context in which a member may - because a member doesn't exist across all of the models, and so just to remind us that's where we are, just to reorient us...

Holly Gregory: Okay, the member concept can actually apply to almost any of the models you've been talking about. When you talk about Contract Co. which we said could be organized as a not-for-profit public benefit corporation under California law, it could be an organization with members or without members.

If it has members that's an opportunity for the multi-stakeholder body to sort of have an ability to influence directly what some of the board does through bylaws that would reflect back up.

You could also have - you could - frankly ICANN could be changed into an organization with members. And that's a place where, again, when you're thinking about these golden bylaws and the rights to have some approval rights over decisions that the Board is currently making, you could do that through a membership body that again was constructed in some way to reflect the multi stakeholder community, and select directors and remove directors.

Sharon Flanagan: I think also in the hybrid integrated model that you're talking about, you could have a member of - again of ICANN - the owner of the subsidiary. And then ICANN would be the member of the affiliate. But you could do things with the Board there. Did I get it right?

Holly Gregory: Yes. Well and then there's also the variant to the hybrid model where there are multiple members of the IANA entity. And so then the choice would be who are those members and how are those appointed? It's just another item in the toolkit. And it can be used in lots of the different models.

Sharon Flanagan: And the way I think of it is - to just boil it back down again - is there are different ways to exercise that approval right through membership by being on the Board of one of these entities, or through the ability in a non-profit to - as a third party - to exercise a veto right.

So and those can - you can look at all the models and sort of apply those three to each of the models and find what is the easiest or what accomplishes your objectives in the best way.

Man: Okay. Thank you. Olivier?

Olivier Crepin-LeBlond: Okay. I have three questions, if you'll allow me. Thanks, great.

So the first one is to do with bankruptcy. In the event that ICANN goes bankrupt for whatever reason, the wholly owned subsidiary being wholly owned subsidiary. Would that be seen as an asset of ICANN and therefore fall under bankruptcy? Or could that be divested automatically in certain cases?

Sharon Flanagan: Yes. So I will caveat this with this is something we would want a bankruptcy expert to weigh in on, but let me say this. When I made the comment that a non-profit is not owned - remember we're using ownership, but that's not really what it is.

In a bankruptcy context, that's actually helpful because ICANN doesn't own that entity; right? So, you know, I think we would want to do more research on whether you can insure that that entity is bankruptcy remote, in the event that ICANN were to have a bankruptcy event. But I do think it's helpful that it is not actually a subsidiary in that context.

Holly Gregory: And it's certainly more bankruptcy remote by having it organized as a separate entity than currently is the case.

Sharon Flanagan: Absolutely.

Olivier Crepin-LeBlond: Okay, thank you. Second question is to do with insurance requirements. I mean as far as members of that - whatever group, entity and so on is concerned - in which scenario would insurance requirement - actually insurance of the members and so on - be more - what do you call it? Well cost

wise and so on be more of a thing - for example, let me rephrase this. I got totally tongue twisted on this one.

You've got a system where you can have the internal option with the members being within part of that subsidiary. Would the members be covered by the ICANN insurance - liability insurance, etc. - as opposed to having an external entity where there would need to be additional contracting of an external insurance?

Holly Gregory: Oh, okay. It's rare for members really to have liability. They're not fiduciaries, and they act in their own self-interest. So if they do something like criminal, they could go to jail or something because they're acting as individuals.

But they don't - their duty doesn't run to the corporation. It runs to their own interest. So I have never seen an organization that indemnifies members acting as members. Now sometimes a member will wear another hat. A member could also be a director. And as a director, you can, you know, you indemnify director.

A member could be a volunteer in the organization. And you can indemnify volunteers. But it's rare, and Sharon, I don't know if you know of a situation. I'm trying to think of a situation that I've ever come across where members have been indemnified. Like you wouldn't indemnify a shareholder of a corporation - they're acting in their own capacity.

Olivier Crepin-LeBlond: So as long as there are no directors involved, there is no need for a liability insurance because members themselves are not liable.

Holly Gregory: Well, all of the structures we're talking about have directors. And so you always have that notion of how does the entity protect the directors and some - in some fashion. And so for example if you had a contract co, as Sharon said, you would need some funding mechanisms because even as a bare bones, you'd be a fool to serve as a director and not have some protection from liability in the form of D&O insurance and indemnification.

Olivier Crepin-LeBlond: Thank you for this. I think that's where I was going at, in finding out what is the leanest option forward as an ongoing basis, rather than - setting up is going to cost something anyway. But ongoing, the internal option seems to be less costly than the contracting option or the outside contracting co, because you would need additional things to be set up.

Sharon Flanagan: I think in the internal version though where it's an internal plus subsidiary - where there is legal separation within - you know, I don't know what the ICANN insurance policies provide for. But given that this would not technically be a subsidiary, the policy may not cover, you know, those individuals serving on that entity's board. So there might be a need for insurance at that new level. The subsidiary level is something that would have to be explored.

Holly Gregory: My sense is though that we're not talking about huge expense in that circumstance. I mean D&O insurance is not hugely expensive, especially in the not for profit world.

Sharon Flanagan: Well and the other thing in terms of if you're thinking about the insurance, in the contract co scenario we said well where is the funding coming from? In the internal model - internal with subsidiary - there's still - ICANN is still funding, and so presumably would cover, you know, the insurance.

Olivier Crepin-LeBlond: My third question, if I could.

Man: Briefly please.

Olivier Crepin-LeBlond: Briefly, yes. There was a question which was asked from you. I think it's question number 12 - can one party indemnify the other relating to the costs of litigation between the parties? And I read the answer - not in your presentation, but your preliminary answers that you had sent a few weeks or was it days ago?

And I wasn't quite convinced by the answer that you provided there because I felt that you might have not answered the question itself - been answered by it. I think that the gist of the question was - and let's be pretty frank - if ICANN loses the contract and the entity - whatever it is - the committee decides to allocate it to someone else - so the subsidiary decides to divest itself, can ICANN sue its own subsidiary?

And if that's the case, if it does, can it be then told that it also has to pay for the subsidiary's legal costs in order to defend itself against itself? Does that make sense?

Sharon Flanagan: Well again, this is where the distinction between subsidiary and affiliate also probably makes a difference because it's not itself really. It's a different entity - just happens to be that ICANN is the member of the entity. So I don't see why you couldn't have a binding indemnification provision that would and could be a loser pays, you know, type of, you know, in litigation a loser pays type provision as well. Does that answer the question?

Olivier Crepin-LeBlond: I wouldn't - yes, thanks. I don't know if the loser - if the loser was the subsidiary - whether the loser would have any money to...

Sharon Flanagan: Well it would be funded by ICANN.

Woman: I mean you could certainly...

Holly Gregory: Separate and apart from any kind of loser pay, the answer to your question on indemnification is yes. You could probably - if we created this affiliate, it's a separate organization. It's just that ICANN is the member of it.

Then you could have a contract between the two, and you could have ICANN be obligated to indemnify, or even you could have some promises about hold harmless in certain, you know, to certain circumstances to the extent that the law allows.

And that would mean that you could have a situation where ICANN would have to pay the legal fees if it decided to sue, which would mean that it would probably - and potentially any settlements. So it would probably be a foolish decision to sue itself - to sue the entity.

Jonathan Robinson: So let's - we must be careful we don't get into the realm of too hypothetical a conversation. All right. So it's - I mean it's very - it's clearly very helpful. And from some of the comments I see in the Chat, it's extremely useful to have this kind of elucidation of the options from an objective and independent third party.

So let's keep going and make sure we work our way through this queue, and then think about what we might do after that. (Chris)?

Chris Disspain: Thank you. I'm back because I've been thinking about some things. But I did have one question, but I've added a second one because of something Olivier said if you'll bear with me.

He talked about members not having - not needing to be indemnified on insurance because they don't have any liability. Now I get that in the normal course of events, because in the normal course of events all a member or shareholder can do is actually vote the board off fundamentally. There's other things that they might be required to do like approve the accounts and so on.

Are we - would we be creating an issue if we gave those members the power to force the board to do things that would have a fiduciary affect? Surely we would.

Holly Gregory: You're right. There is a concept in law that if you give too much power to - so much power to someone that they are effectively acting as the director, they could become fiduciary. So you're going to have to look - it's a great issue - and we'd have to look at it and make some assessment.

Chris Disspain: It's a great issue from a lawyer's point of view.

Holly Gregory: I mean...

Chris Disspain: Speaking as a lawyer, so...

Holly Gregory: It's a great issue spotting that absolutely, yes. So for example if you had a board of directors and you tried to take as much power as possible and give it to the members, you can see a situation in which a court would say those members aren't really members - they're really directors.

Chris Disspain: Correct.

Holly Gregory: So again, it's something to be aware of. It would be a fairly extreme situation I would think. But you're right. You have to have a body that has a fiduciary obligation that people can hold accountable. And that is the Board of Directors.

Chris Disspain: Okay, thank you. My actual reason for putting my hand up was different, so bear with me. I'm going to go back to the simple again because we seem to be getting ourselves tied up in all sorts of knots with internal and external companies.

So what we said - what I said earlier on and you said to is that if you use internal mechanisms like bylaws, etc. to create a circumstance where the operational aspects of IANA can be removed from ICANN. Okay. So now I want to be very specific.

I'm going to introduce a slightly different aspect to it. A number of people have expressed concerns about having the - one of the difficulties with moving it is that the accountability mechanisms then get lost. And the US government or rather Larry Strickling has asked some questions about that.

How would you guarantee and insure that the new entity itself had - so I'm wondering if there is a solution to that. And I'm wondering if it's possible that you would be able to create a situation where you allow - through whatever mechanisms we decide, and let's put it on a par with board spilling, which I know you two weren't here.

But the CTWG talked about how you would spill the board, and the number of SOs and ACs that would need to vote in favor of that and all that. So let's

put it on that - on a par with that. You could build a mechanism where under - having gone through all of that stuff, you've required ICANN to subcontract the operations of IANA to an external entity through some RFP or something.

By doing that, you've then effectively maintained all of the accountability mechanisms in place because ICANN is the contractor. And you've solved - question - have you then solved the gap identified of having to then build a whole heap of new accountability mechanisms?

Sharon Flanagan: Yes. I mean we talked about. And I think, you know, the way we were looking at it is the mechanism you would build in now into the governing documents would potentially contemplate that to the extent that the IANA functions were ever transitioned, that they would need to be transitioned to an entity that had accountability mechanisms that were at least as good as whatever the ICANN accountability mechanisms look like at the point of this first phase of the transition.

And so that could be built in - this idea of accountability. Now could instead you just provide that ICANN has to contract out to an entity? I suppose you could do that. Would you then say that ICANN can only contract out to - would you replicate the accountability with a counter party? I don't know.

How do you control...

Chris Disspain: Well with - if I can respond.

Sharon Flanagan: Yes.

Chris Disspain: So two things - one is my personal view is that the issue with - you would have to replicate all of the things with a new body is what you're effectively doing is creating a new ICANN.

Sharon Flanagan: Right.

Chris Disspain: And what I think some of the politicians are saying is that doesn't make sense to us. ICANN's either fit for purpose or it isn't. However as a ccTLD manager, I get that there might be operational reasons why you need to shift - you want to shift the operations out to a technical expert entity.

If you had a contract in place that insured that that technical expert entity operated on the instructions of its contract, then what that means - doesn't it - is that all of the internal mechanisms you've built in place like the ability to block bylaw changes of the board, the ability to instruct the Board to do things and so on, the customer services committee that we've been talking about today. All of that stuff is there.

And as the contractor ICANN brings all of that to the party. Does that make...

Sharon Flanagan: Yes, I think it does. I think it's really talking about - it's more of a formality which is either ICANN with the accountability mechanisms in place, either ICANN is managing an internal group, or it's outsourcing to another group. But it's still ICANN subject to accountability responsible for either employees or contractors.

And it sort of doesn't matter who the - whether...

Chris Disspain: That's exactly my point. It doesn't matter whether it's employees or contractors.

Sharon Flanagan: I think that's right.

Chris Disspain: But it does matter that it's operationally now run by someone else, which I thought - which I think is the goal that we're trying to achieve. At least that's my understanding of it. Thank you.

Jonathan Robinson: Okay, Chris - I'm just going to keep moving us though then. I've got Eric next. Okay, that's an old hand then Eric. So I'll go to Greg.

Greg Shatan: I put my hand down as well.

Jonathan Robinson: Chuck?

Chuck Gomes: You caught me off guard. It came up really fast. I think there's a couple tracks I want to do. And one of them I'll be glad to defer because it's more the next steps. But I'm trying to get my weak brain to handle - put all this stuff together.

And so first of all, I'm kind of hearing that there's maybe some advantages to creating an internal - maybe subsidiary. Then if - and that would in turn - if I understand it correctly - probably make it easier if enough homework is done up front to move the entity out if there were conditions that were met to do that.

Am I correct then if that happened, that the entity - assuming it was structured properly - could just - could function, assuming we built in the accountability and everything else, however that's going to happen. Would any other oversight bodies be needed for that entity once it was separated?

And I'll stop there before I go to my other comments or questions. But is that enough to respond?

Sharon Flanagan: Yes, it would. It would need its own governing body; right? If you moved - let's say you have it in a subsidiary, you move that subsidiary out. Who governs that subsidiary? You'd need a new board to govern that entity.

Chuck Gomes: Okay. So you'd still have the challenge of creating that board for the subsidiary...

Sharon Flanagan: Right.

Chuck Gomes: ...once it was moved out.

Holly Gregory You can't escape the accountability problem; right? I mean...

Olivier Crepin-LeBlond: Yes, could I...

Holly Gregory This is the issue. And it follows along with any entity that you set up.

Olivier Crepin-LeBlond: If I could just come in with a response here. Because - and maybe this is something which you've thought about. Because, you know, it is very common for an entity - a commercial entity which is what I'm most familiar with - to have one or more subsidiaries.

The companies on which I have sat on the board typically have one or more subsidiaries. It is also equally common to ask the directors of Topco and/or the executives to sit on the board of that subsidiary. And therefore, although they are, that doesn't absolve those directors of their directorial responsibilities - their fiduciary duties. They are nevertheless under the

umbrella of Topco, and typically therefore, you know, to the extent that they can be protected by Topco's insurance policies and so on.

So there's a kind of variance in all of that. And maybe you just - I think that links to the point you're making Jeff. I think that's...

Holly Gregory: That's absolutely true. But then also at the point at which you've decided it's still not working - that you want to move this thing out - you may not be at a point where you want those same directors. You know you probably want to have a freshness in terms of who those folks are who are making some of those decisions.

Sharon Flanagan: I mean, you know, I know it's difficult to talk about this because there are so many like variations on the theme. But the point is that if you do ultimately move it out, now you have the new question of how do you keep this entity accountable - the same kinds of issues.

You have the same issue with a contract company, where you're layering something on. Then you have the question of how do you keep that accountable?

Jonathan Robinson: Thanks. There's a queue now that Chuck's got - you've got one or more additional points, right. Then I'll just make a comment.

Chuck Gomes: Thanks Jonathan - Chuck again. And I'm willing to come back because I'm going to talk about next steps. So if you'd rather me wait on that, I'd be happy to.

Jonathan Robinson: I'd love to talk about next steps. So Chuck, if you could put yourself back in the queue then to come on to next steps, and then we'll deal with the next -

because it feels to me like - I mean I'm not going to preempt the discussion on next steps.

But certainly there may be an opportunity to eliminate some things - to think about narrowing. We're in a position where we could possibly do that. We've got a wonderful landscape of advice. And what we're being told is that there are myriad options. It's kind of up to you. And it's now perhaps time to put some boundaries on those options.

But let's - let me not preempt that discussion because others were in the queue prior to that. So Elise, Jordan, Greg, and then that's the end of the line for exploring the landscape. And we can maybe just start to make some tentative views of what the next steps and narrowing its options might be. Elise.

Elise Lindeberg: Thank you. Just a question of clarification - let's say then in what we can call an all internal model so to speak. You talked about what kind of preparation you need - that needs to be done today, upfront, to secure the possibility of getting this to a third party in the future if needed.

Did you say that it was enough to have functional separability?

Sharon Flanagan: Yes, I think...

Elise Lindeberg: And so you don't have to go into this IANA thing as the entity? Functional separability will be enough if you combine it with a (unintelligible)? So that's a much easier solution than trying to create something - a new legal identity around IANA as it is today. Will that be a possibility?

Sharon Flanagan: I think it is a possibility to just have functional separation today. And then - but you would need to build in to the constitutional or fundamental bylaws

enough detail around what does it mean to move it out so that it could be implemented; right?

So you either have to draw the lines in terms of what's in and what's out in terms of when you think of the IANA function. You can do it now or you can do it in a detailed way. Or you can do it with a principles based way. But then later there would be some work in actually allocating those - the components.

Elise Lindeberg: Just to see in the timeline we have now, I think that going into a structural separation is another (unintelligible) kind of a key if we can keep it to (unintelligible).

Holly Gregory: The difficulty - I think if there's thinking though that one of the risks is that at the point at which the dysfunction is happening enough that you want to separate, it may be more difficult to try to figure out and get agreement around what moves and what's not. So this is a risk reward balance.

Elise Lindeberg: But you need an agreement now. I see that. But I just see how you can...

Sharon Flanagan: But to answer your question - could it be done that way? Yes, it could. It just will leave more of the line drawing to later, essentially at a time where it's difficult.

Jonathan Robinson: Okay. Go ahead.

Jordan Carter: I don't have five questions this time. I think it's really important - there are three roles that are being talked about here at the moment. There's the entire - there's the stewardship role which is who decides who operates the IANA function.

There's the policy role - who makes policy for the IANA functions? And there's the operations - who operates the IANA function? And in what I'm going to call the Chris model, he just proposed that ICANN did all three of those things. And that at some point if the operational bit wasn't working, ICANN as steward would contract out the - ICANN would have a contract with the IANA functions operator. That's one model.

The Frankfurt model that this group came up with had the stewardship outside, though it was the entity that decides would be outside ICANN which would be the policy body and the operator. And the integrated model as far as I can see has ICANN as the steward and the policy body, but the new IANA as a separate entity.

Now I think that in part of the thinking that we need to do, we need to just analyze those layers and decide where is the biggest problem that we're trying to present? I haven't heard anyone suggest that the problem lies with the actual operation of the IANA functions. So it seems to me that that isn't the thing.

And I haven't heard anyone say that for the naming related functions, that ICANN shouldn't be the policy body. So I just start to wonder again whether it's going to come back to this fundamental question of who's in charge. Who's the steward?

Holly Gregory: I think that's a very elegant way to look at the issues.

Jonathan Robinson: Chris wants to respond. I wouldn't mind a quick response as well because I too think that's a very elegant way of partitioning the issues. I just happen to disagree slightly on where - on which one. I mean I think what we have teased out here is that there is a difference between stewardship and technical.

And I think I'll leave it at that for the moment. But I'm not sure we're in - okay, let me say it clearly. I think that I have heard some examples where there are concerns about the technical function - the prospective technical functioning.

It also occurs to me that ICANN by choice might at some point down the road choose to shrink down its operational side of things and draw back, and might need the ability to outsource technically. It might choose like any organization would. So I just wouldn't - I think your structure, your concept is elegant. I just wouldn't presuppose that we're talking about any one of those at any one time.

Chris, I don't know if you wanted to say more than that.

Chris Disspain: If I could, just a little - not much, just a little bit. I think you're right. And Jordan, I think - thank you for putting it the way that you did. I suppose my point is this - my point was predicated on an assumption that for most of us, the ability to move the technical operations is what we were talking about.

You know the CCWG chairs and our chairs here have been telling us, let's concentrate on what I've got and what the focus is and what do we actually want to have happen. My view is very simply this. Taking your model, I believe the stewardship and the policy belong in ICANN.

I believe that for now so does the technical operation. But I believe that the community - the technical community, the naming community should have the opportunity if they wish to do so - subject to all of the checks and balances we've talked about - to move that technical function if necessary.

I do not see that there is a problem with having all three of them in the same place right now, especially given all of the work we've been doing the last three or four days on building accountability mechanisms that don't currently exist including things, up to and including spilling the board.

So that's my view. And yes, you're right. It's three things and I agree.

Jonathan Robinson: Thanks. That's flushed out an interesting point there. Okay. So Greg -
Greg Shatan?

Greg Shatan: Greg Shatan - just one follow up question as we're talking about subsidiaries. I'm wondering how much would have to change in terms of day to day governance and management of a subsidiary. Would you just kind of - is it all kind of a little paper exercise? Or do you actually have to have more management independence even of a wholly owned subsidiary?

There are certain, you know, separations already between the IANA function and the rest of ICANN. But I'm wondering if it has to be operated more separately, or if it's just kind of a distinction without a difference.

Sharon Flanagan: Yes. I think you would have to have a separately constituted board at the subsidiary that's not really a subsidiary level. And maybe that's another level of complexity that is difficult to try to deal with on the front end. But I don't think we can consider that it's really in paper only because it is not a truly a 100% owned entity. It's an affiliate. It's not a subsidiary.

So I do think that board would need to be acting. And that board would be acting in the best interests of the entity it's serving and its mission. And I don't know if that would be different from the mission of ICANN more generally.

Greg Shatan: And putting the board aside for a second, in terms of management between the managers of - the people in IANA don't operate in a complete vacuum. They have managers who manage them. And they have various people who provide them various services.

So could they be managed day to day by the current - their current boss so to speak?

Holly Gregory: Sure. You could have a shared services agreement. There are all kinds of ways that you can structure it.

Greg Shatan: I'm thinking more about the management than the services.

Holly Gregory: Well you could...

Greg Shatan: Could the boss...

Holly Gregory: ...provide management through a shared services agreement.

Greg Shatan: Oh, okay.

Holly Gregory: I mean it is done. So there are contractual mechanisms.

Greg Shatan: Thank you.

Jonathan Robinson: Okay. So those points - I mean that's been a tremendous exploration of - first of all, we got some very high quality input, you know, on the slides and so on. That has been expanded on. And we had the opportunity to interrogate that with some very high quality discussion. That's useful.

It feels like we have a pretty good grasp of the options. My sense is also that we may have a feeling for some of the areas we can eliminate, and start to think about some way forward. I did say to Chuck - I defer to him now. But let me give you an opportunity to speak Chuck, and then we'll see where we take that from there.

Chuck Gomes: Thank you Jonathan. And we're clearly thinking in the same direction. So let me first of all compliment both of you for the way you have worked in this effort so far. This has been very helpful, and all the work you put in before coming here.

I know I'm not saying anything that's new to anybody here. But we're at a point if we want to make progress and accomplish the work plan that we have on the table now, that we're going to have to narrow down these options very quickly - in very short order - in order to do this.

And so I've been racking my brain saying okay, how can we do that? I think you're right Jonathan. There may be some things that we can already weed out. And one way maybe of doing that - and I'm not stuck to my ideas. I'm just going to throw one out.

If we were to identify disadvantages of the different models - now first of all I don't think any model is clearly ruled out just on its own. But I do think there's some disadvantages of some of the models that you have identified that might rule it out in our minds.

For example one that comes to mind is, some of the implications with regard to international jurisdictions being unclear what the result is. It seems to me

because we're an international organization that that might be a factor where we can eliminate some options.

So I'm wondering if that's a reasonable approach, if it would helpful going into tomorrow if we had a list of the different options and the main disadvantage - possible disadvantages of those. I know there's a lot of factors involve. So it's not quite that simple as maybe I'm saying it.

But if we were to have those, then we could then as a group pick out those that we think kind of eliminate that in our mind. And that would be one step of narrowing it down. Obviously we're going to have to do more steps than that. But I'll leave it at that and throw that out as just one idea.

Jonathan Robinson: So Chuck, I think that that's a great suggestion in many ways. What it does is allows us to, to the extent that we find one or more models have a sufficiently obvious set of disadvantages, I think they may fall away quite easily. My concern with pushing that too hard is we'll end up with entrenched positions around models that we believe in.

So that's, you know, there will be proponents of the external who are locked into the hybrid or whatever the case is. So there's another way of viewing this that I've been trying to think about is - which I think is not inconsistent with that. I think we can do perhaps both, is we could possibly get some low hanging fruit by knocking out a couple of the most disadvantaged models, and then start to say right, what are our requirements? And really get on the table - go back to requirements and constraints.

Because it's evident that we can't - we certainly - the requirements we might be able to get quite far quite fast on. I think we probably have to start being honest about some of the constraints as well, whether that's the, you know, the

- there's all sorts of examples about groups or whether it's NTIA, the ICANN board, the direct customers.

Various groups or parties or there may be others that I'm not think there. There's financial. A normal constraint might be what's the cost? You know which is the most costly? Now, you know, a typical decision - business or not - might be well I'm prepared to accept - I wouldn't necessarily go for the least cost option. But it's a constraint nevertheless.

So I think if we can do it in that way - now I don't know how much we want to cover now. It's the end of a long day. It might be that there's some other suggestions in and around those for ways. And if people could think about, are there any thoughts that people have got about we can eliminate and reduce at this point?

What we plan to do - what Lisa and I plan to do - is get together this evening and spend some time thinking about and planning out the day tomorrow, based on, you know, rework the agenda based on the kind of thoughts that we had already and we might develop in the last few minutes.

So I've seen a couple of hands shoot up from Chris and Greg at least. So Chris, go ahead.

Chris Disspain: Just to say Jonathan that my personal preference would be to actually stop and have some time to digest and think, rather than pursuing - I mean - at the end of a long day. So my preference would be that we actually kind of wind down now and come back in the morning.

I would very much like to have - I don't know what you're planning to do in the morning. But I think we might have a bit more to talk to (Helene) and...

Jonathan Robinson: Okay. So that's really, really helpful because where I imagined we would go with this is - I felt we would get a lot of new information, and there'd be a lot to think about and process. And that's kind of what we had talked about was this was an opportunity to get everything out, and then to stop and think.

So but that suggestion which says actually we might want to meet with at least first thing - as our first session as a continuity - is a helpful suggestion. So perhaps around that, you know, there's some really - a couple more suggestions in the portal or, you know, that kind of thing that would be helpful, and I agree.

We'll call it a day. We're all tired. And we'll sleep on it and come back fresh tomorrow. So Greg?

Greg Shatan: Thanks - Greg Shatan. I agree with the suggestion. I think it might be helpful to leave with some kind of thinking assignments. I think Chuck started us off with that. I think that a more specific thinking assignment might be, does anybody, you know, is there any kind of coherent support for either trust model anymore?

If we can get those off the table - if we can - I'm not prejudicing it but I've heard, you know, some things in that area. Yes, exactly. They've been - somebody is busy in the corner carving a tombstone. Yes - in the seventh seal. It's being visited by death right now.

In any case, if we can kind of discard that, we've already got rid of two models. And then we could kind of think about some of these things. I can't say it as well as Bart does in his Bart voice. But what would you die in a ditch for?

Jonathan Robinson: No. Again, a very helpful suggestion. But it is important that I don't want us dying in a ditch for a model. It's really important that we think about, you know, the motivations and all the requirements and constraints rather than the bit in the middle of the model.

Greg Shatan: I wasn't thinking about the model as a whole, but, you know, bits and pieces.

Jonathan Robinson: Yes, thanks Greg. Eduardo?

Eduardo Diaz: Thank you. This is Eduardo. I just want to give my thoughts about what I have taken from the conversation. And if I look at this from the complexity and stability of this transition, you know, I see it as internal solution. I'm not talking about specific solution here that we decide. But I just wanted to give you my personal opinions of what I've taken from today which is an excellent presentation by the way.

You know the internal solution, to me it's less complex in some (unintelligible) and provides the stability of not introducing big changes in what's happening now. But those are my thoughts. And I think you talk about all the proposals in (unintelligible). Thank you so much.

Jonathan Robinson: All right. Great. With that comment I think we'll wrap things up at this point. I mean it's been a tremendously productive day. And I think we've achieved exactly what we set out to do. We got the comprehensive update from the CCWG, and talked that through, and I think absorbed and understood their thinking which sets a real platform for the work that we're doing because of what's on offer in work stream one and the connectivity of that.

We've obviously then concentrated on the operational components. In an ideal world we would have been further along with the design teams. But as it happens, given where we started with them relative to this meeting, we did a fantastic job of getting to where we did. And we brought them to a great point here. So that's excellent.

That feels like we've got some real meat to feed into the sandwich of this proposal that we're building. And then finally this has been clearly a very instructive and very helpful session. So and it was intended that we really capture the landscape of opportunity for structures.

If you like the art of the possible, we very much clearly got the art of the possible - hopefully even got a sense of what's not that sensible perhaps with respect to the trust or otherwise, and are in a good position to start to work on that tomorrow.

So Lise, I'll hand over to you and then we'll bring the session to a wrap up.

Lise Fuhr: I just have a very quick comment, and that is we started out today asking you all to be open, calm and constructive. And I think you all did a very good job. I'm really amazed how great this has been. No, but I know too much good telling about you might make you feel bad. But I think it's been very, very good.

So thank you a lot for joining and contributing. And well, have a nice evening.

Jonathan Robinson: Yes, great. Have a nice evening. 9:00 tomorrow morning. Thanks very much.

END