

**ICANN**

**Moderator: Becky Burr  
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4:00 pm CT**

Coordinator: The recording are now started.

Becky Burr: Thank you very much. Hey, everybody. I know that the comment period has just this instant closed on the independent - on the accountability stuff. But I wanted to get our group together just to talk about sort of the comments that have come in, what we're hearing, you know, sort of off of the comments in general and how we might want to go about dealing with them.

I think that - oh two more hours, Jonathan says. I know that there are likely to be a bunch more comments. The comments basically on the mission statement, core values and commitments have all been pretty positive.

We do have some questions from several groups regarding the balancing test, questions about why the existing balancing test is inadequate and whether the proposed balancing test is appropriate or not. So I think that's one key issue that we're going to need to pay attention to.

We also got a request from one commenter on more clarity with respect to certain terms so public, you know, community public interest, those kinds of

things. And I think those are kind of reasonable points that we, you know, might want to take into consideration as we're going through it.

But on the whole, you know, it seemed like comments were pretty positive. Has anybody heard, you know, gotten feedback on those that we need to take into account? Not so far. Yes, David.

David McAuley: Thanks, Becky. To be honest with you, I have only read through comments that were on the site as of, I don't know, nine o'clock this morning. And I see now that there's an awful lot that have come in since then, I just haven't read them.

But it seems to me that the principle comment to grapple with so far is the one from the auDA, Chris Disspain's organization, that was, I don't know, came in a week or so ago. I think that that's, you know, and there was one from AFRALO I believe that talked about the UAs and some of the confusion that it fought that they added to the process.

But other than that I thought the comments were fairly positive including on IRP. I thought that (Willie) - the advisor, (Willie Currens), suggested for a mutual accountability roundtable is a good idea to sort of grapple with the accountability of the guarding the guardians kind of issue. I think that issue can get out of hand and I thought it was a sensible solution.

So that's my take on things so far.

Becky Burr: Thanks. I actually also did think that Willie's accountability roundtable was an interesting idea and worth discussing in greater detail. Anybody else have a take on that? Okay, I'm going to take silence as agreement.

I think clearly the question of the structure, the designator model, the unincorporated association model, or, you know, a general reliance on the goodwill of the board or, you know, some combination of those that is clearly drawing the most - that is clearly drawing the most comment and focus throughout these.

That particular issue is a general issue and, you know, we need to talk about how we think about it. But for our purposes, for Work Party 2 purposes, it really comes up in the form of questions about are we making - are we sort of driving everything to litigation.

And are we creating a situation where, you know, courts in California are interfering with ICANN's internal operations? Now on the CCWG call yesterday I tried to provide some clarity about our options with respect to the IRP and litigation and the fact that, you know, we could indeed constrain people's ability to go to court rather than use the independent review process and the circumstances under which it might be appropriate to do that.

Interestingly enough some of the comments, particularly government comments, come out in a slightly different place. The French government's comments, which are, I think, were a little difficult to understand, pointed out that sovereign country, you know, governments can't necessarily sign up for binding arbitration.

And I suppose that that's true at least in this context. I mean, there are, you know, arbitration provisions for investor state disagreements but those wouldn't necessarily be pulled in here.

So there also were a bunch of comments about people shouldn't be able to game the system by sitting on the sidelines during a policy development

process and then swooping in at the last moment with an IRP even though they had an opportunity to develop - participate in a policy development process.

And interestingly enough that's actually something that even if we, you know, sort of didn't go with requiring everybody to go through the IRP the California public benefit corporation membership law actually prohibits members from bringing suit if they sit on the sidelines.

So clearly it seems to me that we're going to face some hard questions about balancing accessibility, binding, finality and abuse. And, you know, controlling abuses resort to the dispute resolution mechanisms.

Coming out of this, I mean, there have been - I've been through most of the comments that came in up until the call started, but I suspect there are more that have come in since then, but to me that sounds like that's going to be the bulk of our work sort of whether or not we go through, you know, whether it's a membership structure or not or a UA or designator model or whatever just sort of putting that aside we're going to have to do that.

For those of you who weren't on the call yesterday we've got the slides up and I will circulate them to the group that, you know, talk about what it is members of a California public benefits corporation have the right to enforce.

And it really is sort of powers that are specifically enumerated in the bylaws so, for example, that would be the ability to enforce the power to reject either a strategic plan or the budget, the power to recall individual members or spill the board, etcetera and then sort of fundamental statutory rights relating to fiduciary obligations and misappropriation of trust assets. And there's not any

- there's not a, you know, you can enforce every jot and tittle of the bylaws provision.

Kim, do you want to go to the next - or I guess I probably have ability. You know, the answer was yes we clearly do have the ability to cause people to go to the dispute resolution, the independent forum on - the IRP as opposed to just running to court. And, you know, there are basically very few instances where a court would not uphold that whether that would be in California or any other place, obviously I'm not an international law expert so, you know, whether a court in France would enforce it or not I can't say.

We also found out that the courts in California will clearly defer to the IRP decisions. So unless we set up a process that deprives somebody of the fundamental right to get a hearing, the courts will defer to the findings of an independent review panel. And so, you know, to the extent that somebody resorts to court in California, it would be just to have the court enforce a holding of the independent review panel, not anything else.

And so the bottom line is that if we want to, you know, we can ensure that a court in California is not involved in resolving substantive disputes with among ICANN members and the board, but that it is in fact honoring, deferring to the results of the independent review process.

This is all pretty preliminary research the lawyers are doing, you know, final dotting Ts and crossing Is on it. But I think, you know, from the beginning the concern about excessive litigation, you know, we've gotten some answers to the questions which are, you know, this is not a - it's not a litigation machine unless we decide we want it to be a litigation machine. And that's kind of the bottom line on that particular issue.

There were some comments on the degree of the - of the deference that board action would get as opposed to a de novo review. I think the Business Constituency suggested as sort of abusive discretion a perspective on it.

And then, you know, there's an assertion in the comments that a clear error of judgment equals an abusive discretion. I mean, that's a standard that we might want to look at.

The Internet Association came up with something that is essentially, you know, if it's arbitrary or not based on a reasonable interpretation of the relevant documents and factors. And again they assert that ICANN's failure to follow its own processes would be both arbitrary and unreasonable. You know, I'm not sure what the legal standard there is and whether that's actually true or not.

David, I see your hand up.

David McAuley: Well thanks, Becky. It reverts back to a minute or so ago when you were talking - excuse me - talking about things that we might expect. And I would like to add two things that I think we might expect coming out of this in IRP.

One is the issue of precedential nature of a decision. And I've seen a couple of comments, in fact I made one myself somewhere, about whether precedence should issue from a one-panelist panel...

Becky Burr: Right.

David McAuley: And then another issue I think we might see some probing on is a potential gap between if there is a limitation on being able to go to court and the scope

of the IRP, will there be a gap if - and I just think we need to explore this more with the lawyers.

What is it that the IRP can't touch, you know, the fiduciary duties issue? I think might get pushed on what does that mean? What's the clarity here that an IRP panel can't address or can't issue a ruling on...

Becky Burr: I actually don't think that's true. I think that an IRP panel could issue a ruling on the breach of fiduciary duties. But I notice somebody raised that in one of the comments so we have to go back and clarify that. You can't deprive some - a member of their right to bring that case.

And frankly, we may well say with something so serious as that, we want to give, you know, we want to give people the right to either, you know, invoke an IRP or go to court. But I do think that the gap issue both precedent and gap issues will be things we need to deal with.

David McAuley: Okay. And maybe I misunderstood the fiduciary issue. I'll go back and look at the legal memorandum on those.

Becky Burr: Yeah.

David McAuley: Thank you.

Becky Burr: The - we clearly cannot preclude somebody's ability to bring a claim based on - a member's ability to bring a claim based on a breach of fiduciary duty, that we certainly cannot do. But I believe that there's some flexibility about whether it's in an IRP or not.

David McAuley: Well, Becky, can I just make one other comment? What I was meaning to say is I thought there had been a discussion from the lawyers that an IRP panel decision cannot impinge upon fundamental fiduciary duties - excuse me duties of the board. I need to go back and look at the memos; I may be wasting time here. So but I thought there was an issue and I'm going to go back and explore it before next week's call.

Becky Burr: Okay, yeah, do that. I think you might be talking about sort of what the scope of the holding could be. And I think that so far we've been talking about essentially the IRP could say, "No, ICANN, you did it wrong," but not, "You must do it this way."

David McAuley: Okay doke. I'm going to go back and take a look so thank you.

Becky Burr: The other thing that Steve DelBianco and I heard from one person was, you know, we had sort of suggest in the document that the independent panel itself draw up the rules for arbitration. And a person that we were talking to expressed some concern about, you know, having no idea about what the rules would be before, you know, before Work Stream 2 kicks off.

And one of the things that we were thinking about is basically canvassing various independent arbitration - international arbitration associations, getting a sort of template for arbitration rules and then saying that the, you know, once elected the panel would, you know, go through these and propose adjustments and whatever and then submit those to the community for comment before they were finally adopted. But I think that's one other hole that people may be concerned about.

Anybody hearing anything else? And I do think, by the way, that, you know, some of the issues about governments not being able to submit to binding



arbitration or that's in fact factual in some cases but we do have to think about that and, you know, make sure that we're not attempting to cut - we couldn't cut off individual government's rights to do something but we did need to take into account any of the sort of sovereignty issues that arise in this. And I was really thinking more of sort of non-governmental disputes up until this point.

Steve.

Steve DelBianco: Thanks, Becky. And Slide 4 of your presentation you discussed this earlier, this idea that we can implement the IRP with bylaws provisions that require members to use the IRP rather than short circuiting and going to court. And as you start to craft that language, of course we want to keep it simple so it looks as if we are trying to actually make it a better process as opposed to fixing a flaw because I don't believe it's a flaw that we have created since these same entities, the ACs and SOs can sue anytime anyway.

But let's - while we're making the members let's constrain what they can do so that we're making it better. I wanted to also add that while we're writing that text to the bylaws the Business Constituency put in a recommendation today that one's access to the IRP might be further constrained if they had sat out the entire process and hadn't submitted any comments during the public comment periods if there had been one and that that might also constrain their access to the IRP.

So we all thought that was a brilliant idea in the BC. But it's not so brilliant if it ends up telling that AC or SO that they should go directly to court because the IRP is being closed off to them. So...

((Crosstalk))

Becky Burr: Well yes and that's an interesting question although, I mean, you know, even the - as I said, even the California law says members cannot bring derivative suits if they've sat out the discussion on the issue. So I don't think - I do think that that's part of the sort of collection of constraints and safeguards against abuse and gaming that we need to put together.

And I think it is something that we need to carefully think about because I would not think we would want, you know, an SO or an AC to sit on their hands and then swoop in at the last minute whether it's to court or anyplace else.

Steve DelBianco: No, that's great. And we should clarify as we put this together, this response to the comments together, we're not going to leak answers, you know, right, the answers will be a package of answers so that the BC comment would come in here, other comments about worrying about going to court, they might come in but they'll all be packaged together.

And whenever possible we should clarify that we're doing this to be responsive to comments but they're not necessarily fixing problems that the member structure or the designator structure suddenly created. They are in fact inherent - inherent risks in the ICANN model and therefore while we're doing this transition we are not only putting in place some new powers but we're going to try to mitigate some of the inherent risks that are already there. Thanks.

Becky Burr: Yeah, that makes sense. David.

David McAuley: I agree with what Steve just said so it's - I should have taken my hand down. Let me just say that we do, though, Becky, as you said, have to be careful how we craft this. If the standard for standing is materially affected we have to be -

we have to keep in mind people like registrants that aren't going to be there for the policy development process. But otherwise I agree with what Steve just said so should have taken the hand down. Thank you.

Becky Burr: Right, okay. Those would probably come up really mostly in the sort of members - the rights to as opposed to individual direct - materially affected parties.

David McAuley: Agreed. Thanks.

Becky Burr: And obviously the other piece of this is we have to think carefully about sometimes the disputes are not about policy but they're actually about commercial interactions. And we, you know, have to think very carefully to ensure that, you know, the parties to a transaction can resolve - that we're not, you know, that we're not imposing some limitations on, you know, commercial interactions and the ability to resolve disputes on commercial interactions.

I mean, if you have a contract as the registrar or registry with ICANN there are additional dispute resolution provisions that are binding but there are instances where we're not talking about, you know, sort of a policy issue but we're really just talking about a straight old commercial transaction that we have to, you know, make sure that we're not cutting off the ability to resolve those disputes as well.

Jonathan. Are you talking? On mute? Can't hear you, Jonathan. Okay, Kim- could you give Jonathan a call out? Okay, in the meanwhile - thanks, Kim, any other comments or observations? Avri, welcome, Avri. We're just waiting for - to get connected. So, you know, just to reiterate - okay, David, you've got your hand up.

David McAuley: Well, Becky, in response to other comments and questions, I would suggest we spend a little bit of time just talking about plans for the call next week and how we're going to divide up the comments and plans for Buenos Aires just to make, you know, make sure we can rope a few more folks into the call next week.

Becky Burr: Yeah, excellent - I think that's a good point. So next week we have this three hour mega-call with the entire group to go through comments. I know that staff is going to be putting together some, you know, synthesis of the comments. I was going to go through and sort of pull out the issues that fall into the Work Party 2 work stream and then I think, you know, send those around in advance of our call which is at this time next week.

And ask for folks who are willing to, you know, start working on those different issues. I agree with - don't know if you're able to speak yet but I definitely think we need to do, you know, a combination of, you know, just some - here are the comments that we heard and received about this aspect of them, some FAQs about sort of, you know, the basic facts.

Obviously, you know, we'll need to spend time in Buenos Aires with the entire group talking about - talking about our, you know, our approaches and where we're going to go next from here. But I think at least with respect to the IRP and the - the mission statement, commitments and core values, we've got a fairly clear set of questions and comments, although some of them are in tension with each other so the, you know, permit free access to courts, don't permit free access to courts, those kinds of things we're going to have to be resolving.

John, are you audible yet? Apparently not.

And I will be reaching out to all of the folks to make sure that we get a better turnout for next week. I think there may be some comment wariness but by then hopefully people will have had a chance to read them. I find them - that they're quite interesting.

Jonathan Zuck: (Unintelligible).

Becky Burr: Oh, there you are, I hear you.

Jonathan Zuck: Sorry about that. I don't know why - microphone's just not working anymore.

Becky Burr: But there you are.

Jonathan Zuck: Here I am. So I did I posted my comments into the chat but I guess part of what made the last CCWG meeting frustrating I think was that there were three conversations going on at once for one thing. But the other was that there was a lot of factual disputes. And I feel like if we could clear up the factual disputes then we could actually get to the - what might be considered ideological disputes and really hammer those out.

But this undercurrent of people just pitching in their ideas of what they thought the facts were I think it made it a bit more difficult to get to the essence of the sort of philosophical discussion that may really need to take place.

So that's what I was trying to get to was this idea of trying to go through some of the factual issues and build them into an FAQ so that we know that what rights there are to sue now versus will be later, etcetera, so that we really

understand what the delta is so that we can then engage, you know, in a more educated way in a philosophical discussion.

Becky Burr: Right. And I think - I think that's definitely right. But I also think that, you know, there's a fair suggestion that we sort of gave short shrift to alternatives and that, you know, maybe we need to do a better job of sort of laying out the alternatives and the consequences of, you know, one choice over another which some people may look at as a pro and other, you know, somebody's pro might be another person's con.

But at least we need to sort of have a - it's clear we need to have a level playing field discussion about the various options because to the extent that there was, you know, seeming consensus about memberships and unincorporated associations, I think - I think it's safe to say that we really don't have consensus on that point anymore. If we ever did, maybe we didn't and just thought we did.

Jonathan Zuck: Well and right. And so something objective that kind of compares - I mean, I know Robin, for example, was suggesting on the last call that four of the six things were enforceable under a designator model but it seemed to be that the - our legal advisors were suggesting that really fundamentally nothing would be truly enforceable under a designator model.

And it's just sort of clearing those things up...

Becky Burr: Right.

Jonathan Zuck: ...as question (unintelligible) fact I think would allow us to then have a conversation that there are folks that really want to have about, you know, what it's worth doing to get enforceability, etcetera. But I feel like there's so

much disagreement on the facts themselves is something that we ought to try to get past.

Becky Burr: Right. I agree with that. And, Steve, I agree with your comments that, you know, no enforceability provisions at all, that's an option that that folks are considering and talking about so that has to be one of the options that is out there. We just have to pull together the documents that allow us to agree on the facts and then have a discussion, as Jonathan said, about the sort of underlying fundamentals and principles that are driving people, you know, to one approach or another.

A matrix of enforceability, that's good. But as Steve points out there is a problem with the stress tests and I think that is an issue that we have to contemplate. I don't, you know, I - just for those who were on the call yesterday I think, you know, there are legitimate questions about the stress tests and congress but I do not find discussions about that at this point to be particularly constructive; they tend to be divisive as opposed to clarifying.

So I mean, it'll just be a fact on the enforceability. And I don't even think it's really, Jonathan, I don't think it's a matrix of enforceability because I think that it's really different approaches...

Jonathan Zuck: Well the only reason I - I'm sorry to interrupt you - is that one of the very specific debates that was going back and forth was, well, if we have the power to remove the board isn't that enough? And others were saying, but without the membership model we don't have that power.

Becky Burr: Right.

Jonathan Zuck: And so, I mean, that's kind of what I mean by a matrix of enforceability is that if we took the community powers as listed and made it a matrix against the - against just, you know, three different mechanisms or frameworks, one of which was membership, one was designators and one was kind of like what we have now, but with more mechanisms that have been put in place and better standing to initiate them, etcetera.

I mean, I don't want to speak for Avri but this is sort of what she was talking about on the stress test call this morning is that there is a version of this that isn't the status quo but that improved mechanisms for IRP and standing, etcetera, within it but that don't ultimately resolve themselves out, you know, to a legal system.

And so like those could be three different columns and there could be some designation about which of the powers would be enforceable under each. Because I do know that was one of the things that kept popping up in the chat yesterday.

Becky Burr: Right. I think that - I definitely think we need to - it was clear from the call yesterday that we need to really - we need to come to agreements about just the consequences, the facts associated with one approach or another and then talk about the - the more fundamental and sort of principled issues why we might pursue one or another.

All right, any other comments? Any other thoughts? David, you mentioned sort of how are we going to get to do - get to doing our work? I mean, just to reiterate, I'm hoping that, you know, we will have some, you know, pretty clearly here are the comments that we received on, for example, the balancing test in the commitments and core values; here are the comments that we received on this aspect of the IRP, that aspect of the IRP, etcetera.



And have those clearly laid out so we can begin thinking about to what extent that they're just factual issues that need to be answered and to what extent people are, you know, raising points that we haven't thought through. And then there's a third category of work which is sort of details that we haven't yet really addressed but might want to think about.

And then I guess in Buenos Aires so I think, you know, the goal is to, you know, get people in a room and really talk through some of these things and, you know, try to understand where we are. And I presume what we need to talk about with the community in the course of the Buenos Aires meeting and the issues that we need to try to get input and feedback to be in a position to resolve afterwards.

David McAuley: Becky, will we have a meeting Work Party 2 meeting in Buenos Aires?

Becky Burr: You know, I'm hoping that on the work day - the intensive work day we'll get at least some time for the work groups to sit down and do a little - because at least I found that to be very useful to, you know, the face to face meeting.

David McAuley: I agree. And if we do we should make sure that staff can help arrange some remote participation for that if people are not there.

Becky Burr: Right. Right. Yeah, I will take that as a - as a item on my list to sort of get - put into play earlier rather than later.

David McAuley: Thanks.

Becky Burr: All righty, well I guess I'm going to give you back an hour and 15 minutes of your life only to take it away at another time.

Jonathan Zuck: You defer your demands to later.

Becky Burr: Yeah, I'm just reserving the remainder of my time as they say in your part of the world. Okay.

((Crosstalk))

Becky Burr: Thanks, everybody. Talk to you soon.

David McAuley: Thanks, Becky.

Becky Burr: Bye-bye.

Steve DelBianco: Thanks, Becky.

END