

**ICANN**

**Moderator: Brenda Brewer  
April 22, 2015  
10:00 am CT**

Coordinator: Speakers your recordings have started. Speakers you may begin.

Leon Sanchez: Thank you very much. Welcome everyone to these legal sub teams on the ICANN and have the ICANN Accountability Cross Community Working Group on the 21st of April 2015.

And this call is being recorded. I remind you to please state your name before speaking. And this is for the transcript record and of course to keep track of whose speaking. And I remind you to please raise your hand in the queue if you want to speak and also to mute your lines in case you are not speaking at the moment. That is most helpful.

And today we have many participants in the Adobe Connect room and I'd like to call for anyone that's in the phone bridge that is not present at the Adobe Connect room. If there's anyone in the phone bridge that's not connected to the Adobe Connect would you please state your name at this point so we can add you to the roll call?

Samantha Eisner: Hi Leon, this is Sam Eisner. I'm not able to be on the Adobe Connect room yet.

Leon Sanchez: Welcome Sam. Anyone else in the phone bridge? Okay. I didn't listen to anyone. So Sam's attendance is noted through the phone bridge. And well, welcome all. Let's deep dive into our agenda.

Our agenda of today we have of course the welcome roll call. Then I intend to (repeal) the draft answers to (Gloria)'s questions, which applies to their memorandum of April 17, which I believe it's so far pretty much finished. But of course I'd like to just confirm this with team members and then after we'll jump into discussion on the comparison chart.

I feel that we still have some doubts or some concerns about the different (comprised) models. And we can review of course Chris Disspain's questions and the answers to those questions that have already been addressed by the lawyers.

We'll go through the Working Party 2 document reviewed by the lawyers and then we'll have a discussion with both Sidley and Adler team, which I see that we already have here (holding), which is very useful of course. And well, without further delay, let's jump into the draft answers to the questions. Could we please have the draft document displayed on the screen?

As you are aware on the memorandum from April 17 that was attached to the comparison governance chart with - provided by the team. No. I think this is another - this is another memorandum that was have - in the screen this is the April 20. So I am referring to the draft questions that were attached to the email that I sent along with agenda. It's a Word document with some draft answers that have been draft by many of us in the team.

That is the one. Exactly. So they raised some questions that of course need to be addressed for them to better provide advice to our team. And so far the document I believe that most of us in the legal sub team have (combed) through it and have of course made some contributions to it.

And the intent of this document is of course to have this draft by us in the legal sub team. But I would also like to circulate it to the wider list - to the wider (work team). This is a matter that of course involves everyone at the working group.

So I just want to - for those who are not familiar with this document, of course you will have access to it as soon as we are able to circulate it. I see some comments on the chat by David McCauley including his suggestions. So yes we will add those. We will add those to the document. This is the red line document submitted by -- I'm sorry for that -- by Greg Shatan yesterday.

It is of course not a final - not a final draft. I just want to go through the questions to see if there is any concern that hasn't been raised so far and that we should be including.

So the first one is how important is it for the accountability mechanisms to be binding, enforceable in court if necessary versus reliant on (voluntary) plans as in current system.

I think the most important thing for this group is to have these mechanisms enforceable if I'm not mistaking. And while the draft answer by Greg Shatan and myself and I think that it also reflects some comments from Robin and David is that make it accountable mechanism binding is one of the most important decisions by the community.

And binding accountability mechanisms are not totally binding if there is no way to enforce compliance. If a court or an independent body is the only way to fully enforce compliance, then being able to enforce this in court is critical. I see Holly Gregory's had is up. Holly, could you please take the floor.

Holly Gregory: Thank you. That's a very clear answer and it's muchly appreciated. In our view and in some of the elements of what you currently have are very reliant on volunteer mechanisms. People are behaving under the bylaws as the bylaws state they should. But we have some questions about the decree to which some of the elements are truly enforceable.

So it's very good for us to have this understanding because we very much look at when you ask us a question about viability, we very much look at it as meaning could you ultimately enforce it. And therefore that's how we are reflecting our answers to you. So I appreciate that very clear direction.

Leon Sanchez: Thank you very much for this Holly. And yes, when we ask about viability, we concretely mean two things I believe. The first one being if it's something that can be implementable according to law in California at this point; and the second concern or the second point as to viability would of course be enforceable if you have (unintelligible).

So yes, you're right. And I believe that both Sidley and Adler teams have already been familiar to this draft since it's been circulated to the legal sub team list in an open manner of course. And well, if - I think we have many, many things to discuss in this call.

And if there is - rather than going one at a time, I mean through all of the questions, I would most likely for time sake and for practicality would like to

see if there's any objection to the answers so far included here. I see again Holly's hand and I also saw Kavouss hand up. But I don't know why Kavouss lowered his hand. So if you don't mind Holly, I'd like to go to Kavouss first. And Kavouss, you have the floor.

Holly Gregory: (Sure).

Kavouss Arasteh: Yes Leon, thank you very much allowing me to attend your meeting (unintelligible). I am a newcomer. I am not - I don't have sufficient familiarity with your text. I never - I have exact. And my question - humble question is could we at some time supply to the following matter - in the follow manner.

One, objectives. Removal of single Board member or Board members; recall of the whole Board. Then change the bylaw. Then approval of the budget. Approval - and when I say approval, approval (unintelligible) of the strategy. And any other decisions which is in the core vision.

Could we put them as a objectives in one side of this column and open the two other columns and mention member model and designator model? Which one could reply to these things? I understood removal of the one Board member we could do it in a designated (unintelligible) without any problem (unintelligible) and so on so forth.

In that case we would be in a position to better understand. Last night I just questioned to the distinguished lawyers. They didn't reply me. I said that if we send this approval of the budget for reconsideration and it comes back again, we send it back, he or she said that reconsideration, reconsideration, reconsideration, what does it mean?

I was understood that after two reconsiderations we (consequently) reject that. Then I go and have it recalling the whole Board. Can we do that? So my question is that to have a clear understanding that what of these models replay to what of these objectives?

And if it's not, how we could add something for instance to the designators to see whether some of them could be applied. I'm very sorry. This might be very, very elementary question but that is something that many people talk to me and they have the same problem that I have. Thank you.

Leon Sanchez: Thank you very much Kavouss for this question. And there is no such thing as an elementary question from my point of view. Every question is worth asking. And I think that your concerns will be answered when we get into Agenda Point Number 3, which is the discussion on the (comprised) and charts on (Governance) 12, which precisely addresses what you are asking at the moment.

It is a comparison chart between the two models being this - the designator and the membership model. And with regards to a single member of the Board removal, the whole Board removal and of course the budget approval and other mechanisms that have been put on the table for discussion.

So when we jump into the third point of the agenda, I think your questions will be answered. And of course this is something that I would like to once again ask our lawyers.

The only one present at this point is Holly and I would - I think that the group would really much appreciate that however complete and wonderful your answer had been, maybe having a summary chart in a very lean and clear language for those of us who are non-U.S. lawyers and most importantly those

of us who are not lawyers could have a really clear understanding and really clear guidance as to what the larger document refers.

So I see Holly, you want to react to this. Please take the floor.

Holly Gregory: Yes. We would be happy to go through that document and make big bold headline clarifying points throughout and resend it to you if that would be helpful.

Leon Sanchez: That would be very helpful. And if this bold headlines could be also maybe one (unintelligible) of course and when applied - when applicable put into some kind of chart so we can have a very quick reference chart to the whole document in a very simple language. That would be also very helpful.

So I see some comments on the chat. I see Robin is asking what is meant by reconsideration in the answer to A. Would you want to elaborate on that Robin?

Robin Gross: Was that to me? This is Robin.

Leon Sanchez: Yes. (What does it mean)?

Robin Gross: Okay. I'm just wondering what do we mean by that word reconsideration there. And it's just because, you know, these words have gotten us tripped up before in terms of thinking we meant one thing when somebody else meant - thought it meant something else.

And so I'm just - I want to be clear what exactly do we mean when we say reconsideration there. Because it seems like there are several different ways of

slicing this where we could maybe get to the same place. And so we find the right word.

Leon Sanchez: Oh, okay. So it kind of goes a little bit into what Kavouss was telling about having the budget back and forth indefinitely and getting nowhere. So this answer to Question 2A was drafted by Greg Shatan, which - who is of course with us in the call. And I'd like to hand it to him so he can - since he is the author of this sentence, I would like to call him to explain what he means be reconsideration this context. So Greg, could you please take the floor?

Greg Shatan: Thanks. I'll do that briefly and then - I see Holly has her hand up as well, so outranking me in the chat. But since you're the Chair, I will take the Chair's queue.

Holly Gregory: I lowered my hand.

Greg Shatan: Thank you Holly. In this case - and first I was responding to the question Number 2 and while the question was - looks like it was drafted by me, it was just a distillation of the question that Sidley and Adler posed to us, which used the question - used the term reconsideration.

Any event, as I understand and was using the term, reconsideration means a process by which a decision of the Board is turned back to the Board for them to in essence think harder about it. They are not required to change their result.

The details beyond that are variable. Whether reconsideration can be a perpetual loop or whether reconsideration can only take place once, whether reconsideration demands a particular process by the Board for reconsideration and how detailed that is set out is a second variable.



But most - the only constant is that a decision is turned back by another body with the power to turn it back but not the power to veto it for the Board to consider at least once more before making its decision final the decision of the Board.

The idea - in some of the WP1 discussions we've discussed what I would call worshipping at the church of our lady of perpetual reconsideration, which would demand an endless loop of reconsiderations that seems to have been intended to in essence tire the Board out or create essentially a filibuster.

I don't think that's a particularly viable solution nor is it a good way for entities to conduct business. The alternative is to have reconsideration be limited to a single term or perhaps a second term by some alternate process since one definition of insanity is doing the same thing over and over again and expecting different results.

And then, you know, if one doesn't like the result, perhaps there is at that point the power to spill the Board and say that if you're not going to give us the answer we want, we'll find a Board that will. That may or may not be the best result depending upon the decision.

It's power to the people or it's mob rule depending upon what one might think of what's happening at any given time. But that's - I think I've gone beyond the question of what reconsideration itself is at this point. But I think that the idea is that it's an advisory return for a second thought by the Board. Thanks.

Leon Sanchez: Thank you very much Greg. So if I understand well, of course the meaning of reconsideration in this context is reconsideration as we have it now and is of course what we don't want to have.

And we should be looking or we should be aiming to achieve reconsideration more in the context of the proposal that Robin has made through the working party and to have an effective reconsideration rather than just a reconsideration that would be of course up to the Board whether to take it or not.

Next in the queue I see Kavouss. Kavouss, could you please take the floor.

Kavouss Arasteh: Yes Leon. My understanding after the (unintelligible) that some lawyer - and I'm (never) this familiar of the legal aspects. I think reconsideration is a natural process. Never anywhere in the world would people use veto from the very beginning. It would be very radical and inappropriate. The people (unintelligible). If we are not happy with something just ask for reconsideration.

And then if their requirement is not met, then it have - they have the right to veto. We veto. But reconsideration is not an alternative for the veto. Reconsideration is a part of the process, which may end to veto in case the veto is foreseen.

So I don't think that's a (unintelligible) alternative for a veto. Reconsideration is a very natural (resources) and it would be ambiguous and even I would use this term in (unintelligible) that from very beginning somebody veto something without allowing the other party the opportunity to reconsider to see what are the comments have been made.

So this is problem that our distinguished lawyer could clarify that whether they think the term or process of reconsideration as an alternative to the veto or as a part of the veto - prerequisite to the veto. Thank you.

Leon Sanchez: Thank you very much Kavouss. And I can anticipate that our lawyers' answer to that will be that they will need our guidance to answer the question. So I'll go to Robin, who is next on the queue. And of course your question will of course be addressed in - later in the call. So Robin, could you please - do you have a reaction to this?

Robin Gross: Thank you. Yes. I just alluded to this a little bit in the chat also. But I think what we want to be thinking about really what is our ultimate goal here. And I think we want to make sure that the Board and the community are on the same page when it comes to the budget and the strategic plan.

So it seems to me that whichever, you know, whichever method we can achieve, that goal is probably the way to look at it rather than maybe backward to saying well can we do a reconsideration, can we do a veto, can we do an approval.

But how do we build a process in such that we don't have to do a veto, that we don't have to ask for a reconsideration such that it doesn't get that far along that the community and the Board are on such drastic ends of the spectrum in terms of thinking on these issues?

So I'm, you know, we already have a public comment period for the budget and the strategic plan. What if we just build something into that that said, you know, the - if the community approves of that budget and that process, then it goes to the Board for approval.

And maybe we could gate that issue on the other side of the decision a little bit more easily. I'm just wondering if, you know, we should be thinking just trying to figure out ways of how to get to where we want to go rather than

trying to sort of, you know, shoehorn things into specific words or specific proposals. But okay. So that's my thought on that. Thanks.

Leon Sanchez: Thank you very much Robin. And yes, we have to keep in mind that also any proposal that we want to put in place should be the simplest implementation and simplest (in form). And well, I'm close to the queue with Alan Greenberg. I'm mindful of the time. We're already five minutes past the time that was allocated for the discussion. So Alan, could you please take the floor and be as brief as possible.

Alan Greenberg: I will be. Thank you very much. I will be very brief. Kavouss is correct that a veto is not the same as reconsideration. The point I think some of us have made is that we have different - we can make different decisions on how much leverage we need.

And some people may consider reconsideration or forcing binding arbitration to be good enough. It's not the same as a veto. The Board can still override us perhaps or the external arbitrator may decide against us. But that might be sufficient in the minds of some of us. So just making that clear. Thank you.

Leon Sanchez: Thank you very much Alan. And I am pretty sure that Holly's taking note on this and also Ed McNicholas is taking note of this. So we still have an hour for the lawyers to provide feedback on what they're listening at this state.

So I'd like to close the discussion on the document. I believe we have pretty much quite complete draft document. I will make a last revision today to make sure that everyone's comments so far are incorporated into the document. And then if we all agree, I will release it to the larger group for them to review.

And of course if they are - if they agree with the answers that have been provided to the lawyers, then we would formally go back to the lawyers with these answers. And I see Thomas with your hands up. Thomas, can you please take the floor.

Thomas Rickert: Thank you very much Leon. I had sent in a question to the chat earlier. Holly, you were kind enough to indicate that you will - that you would send these overviews to us. And I'm not sure you've responded in the chat if the - this time tomorrow, was that an answer to my question?

Holly Gregory: Yes it was.

Thomas Rickert: Okay. Well that's (just interesting) for us to know for our (intense work days). Thank you so much for the clarification.

Holly Gregory: I will try to get it to you sooner. I will try to get to you by the end of the day today. The difficulty is that a number of us are traveling today. So we will do our best. But I will certainly have it to you no later than this time tomorrow.

Thomas Rickert: Excellent. If I may, you know, just briefly. I've heard some comments from group members of the CCWG who actually had difficulties going through the very lengthy memos.

So I think we - and I'm sure we'll get to that when we come to the Q&A. I think we need to find ways where we actually have short management abstracts highlighting the main information for them to be able to follow our discussion more easily. But thank you so much. That's much appreciated.

Leon Sanchez: Holly, I see your hand is raised. Can you please take the floor?

Holly Gregory: Yes. Yes. We will do our best to - we're all working on various short timeframes and we're having to try to really work hard to get our product to you in a timely fashion and also at the right level of detail.

We found that when we haven't been - that when we've tried to keep it very high level we simply have many more questions that are generated. When we try to go very detailed - to the detailed level that we think it's necessary for folks to really understand the complexities and the nuances, I'm concerned that people both don't fully understand it or maybe because it's so lengthy you're not fully reading it.

What we will do in the chart and going forward - in the chart we will try to put some headline conclusions in bold so that you can just draw your eyes to it. And in our memorandums in the future we will try to do the same kind of bold the major points so that you can - rather than provide an executive summary upfront, you can skim through it and essentially get your executive summary by having the bold points. Thank you.

Thomas Rickert: But this is a direct response to - so if I may - sorry Leon for cutting across you. But I think - I do understand that you need to work on all the detail and that you need to - need due diligence on your work product. But what I think we need at this stage is get very short and concise to the point answers in a relatively short period of time.

And I know that you're producing these memos and that the memos need to be reviewed before they go out. And I think that can take - that can take a little bit longer. So I think that we could pursue a phased approach whereby you provide the short answers first. You have your sort of rough version of the long version and you can really take longer to come up with that.

And if - and in case group members do not ask specific questions, we can just have the full memo on file for later as background information in case they do ask. Then we would need to ask group members for patience for you to come up with the paper.

But I think we need to go from general to detail. So I think we don't want you to rush to provide advice in a - and then would, which then might be sloppy. So you should do what you have to do. But I think we can work on your responses from general to detailed.

Leon Sanchez: Thanks Thomas. And I see next on the queue is David McAuley, then Kavouss, I don't know. Holly, is that an old hand or new hand? That's an old hand. So David, can you please take the floor.

David McAuley: Thank you Leon. I know you closed the queue but I just have a - I just want to make a real quick statement because I've seen some comments in the chat and some comments on the phone. I just want to confirm that the answer to 3B is the way that it's been drafted.

And the 3B was the question where the lawyers asked should this power define the Board go so far as being able to enforce community preference in court or should there be reliance instead on the Board's voluntary compliance after an arbitral ruling.

And I just suspect that at the end of the conversation that that may have been (thrown) at a doubt. I would like to state my personal opinion that there has to be a final say in this case. And the Board would be the corporate solution. The SOs and the ACs would be the multi stakeholder solution, which is the preferred one I believe. That's one of the key NTIA transition conditions, support and enhance the multi stakeholder model.

So my - what I'm saying is I think the answer that the power should go so far as to be able to enforce the community preference in court is the right answer and I think that's what I - what the new draft should come out with. That's my statement. Thank you.

Leon Sanchez: Thank you very much David. And last, Kavouss. Greg, I will ask you if you have a direct reaction. That's okay. But if not, I would ask you to lower your hand because the queue is closed. So Kavouss, do you have a reaction to this?

Kavouss Arasteh: Yes. My reaction is we want the answer given by the lawyers. I mean for the lawyer is quite simple. Not simple but it is more easy to write a lengthy document - complex document. But I suggest that was as he mentioned to have executive summary, not more than four or five pages, and a hyperlink to that - any detailed information for anyone that wants to have more information (who might need) that.

The executive summary is totally consistent with the detailed document. So detailed document is very, very difficult to read in particular when I told last night in CWG. In more than four days - less than four days we have whole bunch of documents. It's very, very complex. And some of the text are not consistent with each other. I'm very sorry to say that at least in my reading are not consistent.

So executive summary, hyperlink the detailed document, not more than four or five pages in clear language for the non-legal people or less legal or (unintelligible). Thank you.

Leon Sanchez: Thank you Kavouss. I think by now the lawyers have this very clear. And now I'll go to Greg Shatan.



Greg Shatan: Thank you Leon. I'll be brief. The question is whether we are going to finalize the document in front of us. So we've been working on it for several days now. I would think that we would want to finish it. But if not, what is the plan for finishing it?

Leon Sanchez: Well the plan for finishing it is that I will go through it today at the end of our call. I will review the different comments on the list to just make sure that all the comments have been incorporated to the document. And with that, I will circulate a final version for us to have a proofreading of the document and then after that we can just circulate it to the wider group. Are you okay with that?

Greg Shatan: I'm okay. But I guess the question is whether we have - everyone has reviewed the entire document and has no questions to raise on this call. I see Robin has a question to raise on this call.

Leon Sanchez: Okay. Well, if there are questions, we should definitely address them. So Robin, do you want to - do you want us - do you want us to address your concern?

Robin Gross: Hi. Yes. Thank you. If we're - I didn't know if we were going to go through this document sort of question by question or if we were going to do it later or what. But if now is the time to raise my contention with the (unintelligible) on 4A, I will do it.

So it says here that the membership model would be preferable. And I'm just - I'm still not there. I still think given there's so many - there are so many loose strings and concern particularly from members of the GAC and from members of the ccNSO about how that would - structure would work for them. And I

mean I just think that I wouldn't - I'm not comfortable saying that the membership model would be preferable at this point.

Leon Sanchez: Okay. So which (kind of answer) would you suggest instead? Robin.

Robin Gross: I think - as I look at the question, I just think - I just think I don't know that we could answer it. I don't think that we can say, you know, it just says which is preferable. And I think there are too many unanswered questions to be able to say which is preferable at this point in time.

Leon Sanchez: Because when I drafted this answer, I had in mind of course the goals we want to achieve and the powers we want to exercise. So from the reading of the different documents that the lawyers have posed on us, my feeling is that the most appropriate structure would be a membership model that could enable us to exercise those powers in a better or more enforceable way to my understanding. But of course I might be wrong with that.

Robin Gross: Well my reading was that it could be done either way and it might be a little bit trickier with the designator model but it could be done. And so I think that given these additional complexities of, you know, this is a global governance organization that we're trying to fit into a California corporation that we need some flexibility that - and the membership model might not provide that kind of flexibility. It might not work.

And so if we can in fact achieve those objectives under the other model - and my understanding was that we can but it's a little bit trickier and there's not a lot of precedent. Well there's no precedent for anything ICANN has done. I mean that's nothing new.

We are the cutting edge of corporate global public governance quasi-public quasi private. That's - it's always been that way. We're - it always will be that way. I don't think we can let that deter us. I think that we have to recognize that that's the way it is. That this is hard. This is complex. This is going to be tricky.

And, you know, that's why we retain some of these incredible legal minds is because - precisely because we do need to part through these legal complexities because I'm just not convinced that we can fit so easily given the multi stakeholder community and the geopolitical aspects of this. I don't think we can fit so easily under membership.

And so from what I've heard we can do it under designator. Yes, it's a little trickier but I think that, you know, it's worth exploring. That we - that's what we've got this great legal team to do is to help us work through these difficult questions. So that's why I'm not comfortable at this point saying membership model is preferable.

Leon Sanchez: Well we do say that there's, you know, an ongoing discussion and we haven't of course decided which way to go. But I think Greg has a reaction to this. So Greg, please take the floor.

Greg Shatan: Thanks. I think Robin is trying to answer more than the question that was posed if we want to reject the question. But I think the question was asked of us, not invented by you Leon. This is one of the ones that was asked by counsel.

It's really - it's an if X and Y, you know, which way do you go is where the question started. I kind of misphrased it. But it's really, you know, if under Model A you can have the power to bind the Board, but under Model B, you

can only force the board to reconsider with a spilling the Board as kind of the course of power, which model would you prefer?

Robin Gross: But can we? Because maybe we could build some process into the bylaws that should the approval is - the community approval is before the Board decision. So maybe we can gate that.

Greg Shatan: Well that's why I say you're not...

((Crosstalk))

Robin Gross: ...but it is a question. But if we could...

Greg Shatan: If we were going to rewrite the question, then we can answer a different question. But...

Robin Gross: But it's...

Greg Shatan: ...the answer to this question is - this question is are we willing to settle for a format in which we can only force the Board to reconsider and have...

Robin Gross: But what I...

((Crosstalk))

Greg Shatan: ...rewriting the question. That's kind of a different exercise.

Robin Gross: I don't think that's what it is though because...

Leon Sanchez: May I just jump in and make a suggestion. Would it be okay if we of course take this answer as it is and add another sentence or another paragraph in which we state that we would also or we would very much like to further explore this possibly that you're putting on the table on whether designator model could enable us to do such things by putting into the bylaws certain conditions that of course create the conditions for us to have a more enforceable way to deal with this issue.

Greg Shatan: Well, I would like to hear perhaps from Holly if this is a kind of a false postulate.

Leon Sanchez: Okay.

Greg Shatan: You know, I don't want this to be an if my mother had wheels, you know, she'd be a bus sort of proposition.

Leon Sanchez: Good. Okay. So Holly, could you please...

Holly Gregory: So - yes. I want to say to you all these kinds of discussions are very, very helpful for us lawyers. One of the difficulties that we're having a little bit in trying to make sure that we're giving you the best possible advice is usually we have opportunities to sit down with our clients and really dig down and understand their concerns and their goals.

And sometimes helps knowing their concerns helps to shape the goals and then the mechanisms to get there. So we really value these kinds of discussions and debates. And it's helping me get a lot more clarity.

I think the idea of having some ability for the community to have input into strategy and budget before it goes to the Board is a very good one. I understand you have some of those processes now.

And so I want to make sure and what about that currently isn't satisfactory? Because Robin, you're right. We could have some kind of mechanism by which the community comes up with an approval before something goes to the Board. But I don't know that that community decision can bind the Board in a non-membership model.

So I'd love to understand more about what in the current processes of sort of a pre, you know, of community input isn't working. And whether you would be satisfied with a model in which the community had some mechanism to provide its input to the Board on budget and strategy before the Board makes a decision and then the Board makes a decision.

Leon Sanchez: Okay Holly. Does anyone have an immediate reaction to what Holly has just said? I see some comments in the chat. And I do agree with Mathieu that maybe this question might be not something that we can answer at this point as a legal sub team group and which would of course take us to then turn the answer for this Question 4 into a placeholder for an answer at a later stage.

So we can keep this open at this point and provide with a more precise answer for the lawyers at a later stage. And from - for now keep things open as they are. And I see Kavouss hand is raised at this point. So Kavouss, can you please take the floor?

Kavouss Arasteh: Yes Leon, this one is (unintelligible). I think at this stage we should avoid to mention any preference for any of the models. We should just describe how

we achieve objectives. With member, this is the way to achieve. With designator, you may not achieve that.

However, as Robin mentioned, by adding some additional procedures, we may also achieve that. But we should not at this round of discussion put any bias in the mind of the public saying that this is preferable or not preferable. We leave it to them to come and maybe at the second round you say that based on the comments received from public we understood that to mean the (unintelligible) preferable to the other.

But not (unintelligible) should not say that. And now I tend to agree with Robin that I still would believe that with some designator additional procedure really achieve maybe not 100% but most of the things that we want to achieve.

I understood that our main issue is budget and the services. I have not seen any of them (by the rule) of the Board or the (unintelligible) or decisions relating to the change of the bylaws and have the same problem. All of the difficulty around the budget and the service is the only two issues we have difficulty. Thank you.

Leon Sanchez: Thank you very much Kavouss. Next in the queue is Alan Greenberg. Alan, could you please take the floor?

Alan Greenberg: Thank you. I'll be brief. I think from a purely legal point of view of what is implementable, what do we know how to do, the membership model is preferable. But factoring all the other considerations we have to look at, it may not be the one that we end up wanting to choose.

So it's a matter of semantics. You know, does preferable mean we're going to go down that path or simply from the pure legal issues it is the easiest one or perhaps the only one that would give us exactly what we have asked for. So it's a matter of how we're using the word preferable. If preferable means this is an instruction to lawyers to not look at any other methods right now, then no it isn't preferable. Thank you.

Leon Sanchez: Thank you very much for this Alan. That is a very good point. And I don't think that the meaning got preferable at this stage would mean to instruct the lawyers to avoid looking into other models of course. And I agree with you. Next in the queue I have Holly. Holly, could you please take the floor.

Holly Gregory: I'm sorry Leon. I was bad and I didn't get my hand down in time. I'm still learning.

Leon Sanchez: No, you're next (for a raise). So next in queue is Mathieu. Mathieu, could you take the floor?

Mathieu Weill: Thank you very much Leon. This is Mathieu Weill speaking. And I think I want to really use this discussion as a platform to really set the stage of how we can best interact with the lawyers - independent lawyers.

And I really think it's important that the notion of preference of the group is a notion that can only be handled at the CWG level and not in any subgroup. And that's very, very important.

Yet at the same time there is a lot of value in exchanging with the lawyers on why we're asking questions, what we have in mind. And on the other side answering the questions as they come from the lawyers to help be more effective in producing the documents.



So what I'm seeing here is Number 1 it's good to have questions from the lawyers. Number 2, sometimes we cannot answer at the legal subgroup level or even at the CCWG level until we reach a decision. And I think that's a valuable answer if we say we don't know. That's useful.

And third, I think there needs to be this kind of discussion upfront as much as possible on most of the questions that we are directing, channeling to the lawyers because that's going to spare us a lot of back and forth and a lot of time to be (built) as well.

And finally, I think it's important to - and I'm giving my perception as co-Chair of where we are in terms of the community mechanism options. It's important not to put aside any of the options on the table right now. And I think there are four.

There are the member model, the designator model; there is the model - the what I call the Roelof model, which is the model where all SO/ACs would create a single member for ICANN. And I think it's important that we address this because it's been repeatedly asked and we need to be discussing the pros and cons of this one.

And there's the model that's been the subject of several questions by Chris Disspain, which is basically the status quo where we don't create anything new. And it's important that we can provide visibility on the pros and cons of the various options. And then hand this back to the CCWG as a whole for discussion.

And I think that's some place where (unintelligible) group as well as the lawyers. We need to be very careful to be in the position to inform the CCWG

about the pros and cons and admit that there are currently different views and let the CCWG decide based on the tradeoffs that we'll have to do. And I mean highlighting the tradeoffs is going to be key. I think that's really what I'm seeing in this discussion. Thank you.

Thomas Rickert: Mathieu, I think you've been asked to explain again the third option that you mentioned.

Mathieu Weill: Thank you Thomas. I did not hear that answer. The third answer, the Roelof option, is - I will try to find Roelof's description. But I think from what my understanding was that he was considering an option where the SOs and ACs of ICANN would join into one unincorporated association, which would become a member of ICANN and would be the single member. And that would (create) the community council and everything.

I think that was the idea. I know Roelof's not on the call. And I can dig for the email messages where he's trying to describe this. So we'll do that right away if it's not clear enough so far.

Thomas Rickert: So this is Thomas Mathieu. Sorry, Leon just wrote that his power dropped out and his line - he's not on the line. He will be back with us shortly. So next in queue is Greg, please.

Greg Shatan: Thanks. His timing solicitous as I was - wanted to say that I just pasted Roelof's description into the chat with - that begins this whole membership construction.

Thomas Rickert: Thanks Greg.

Greg Shatan: Since that was not the main point for having my hand up. But I will let this go to Holly so we can keep that thread moving. Thank you.

Thomas Rickert: Thank you Greg. Holly is next.

Holly Gregory: Thank you Greg and I appreciate the written comment that you pasted in and I will review it and read it. But as I understand it then the third option is a variation on - it is a membership model but it's a variation on a membership model because it's a single member.

Thomas Rickert: Yes. That is correct. Would you like to speak to that a little further now Holly or will you get back on that option to us in writing?

Holly Gregory: Well certainly. I mean so in as much as it's the membership that's important to be able to bind the Board in a way that you can whether the members are multiple members or a single member you should be able to do the things that you need to do.

And so to me this is the kind of variation that you could certainly work on if you believe that this will help make it more implementable from a community standpoint. And I think that there's a whole probably a variety of things we could look out to solve concerns around implementation.

But I believe - I have to double check with my California counsel, the Adler folks but I believe you can have a single member. And in that case, you would be able to do the things that we're talking about.

But we will get back to you. We will do a more precise analysis. But to me that, you know, you're taking it into that clearer membership model. And from

a legal perspective, and I want to make it just clear I'm talking legally, that adds some clarity and some certainty around enforcement. Thank you.

Thomas Rickert: Thanks Holly. This is Thomas Rickert again and I'm just stepping in as long as Leon is trying to get back on the call. But just for your information, we had couple of views and some input on this single member model.

There were questions asked surrounding the membership model where group members were concerned that if ICANN was to restructure its SOs and ACs as it has done in the past that the membership model would potentially be less flexible if the different SOs and ACs were a member and we had for example the DNSO a couple years - or like more than ten years back, which was then split into the ccNSO and the GNSO.

And so the question would be what is the destiny of these member organizations and how flexible are we restructuring the community? Another concern was raised by Ed by email asking if we go for the single member option, can individual SOs and ACs still exercise statutory rights for example with respect to inspecting documents and such?

So I think, you know, this is just to set the scene a little bit. A single member might be less complex for restructuring but there are some follow up questions surrounding that. So I would suggest that you can maybe take this input from the transcript of this call and - or Leon can provide you with an update on what the specific questions were so that you can maybe provide feedback on that. Greg, you're next.

Greg Shatan: Thanks. I think that the single member point deserves probably some discussion but frankly it seems like it actually cuts off the individual members

from exercising individual member rights directly as they relate to the Board.  
For instance, recalling their Board member.

That may be incorrect. Maybe there's a way around that too but I'm not sure whether the single member model actually solves any of the perceived problems of the multiple member model.

But again, I think we can look to - and since (Rosemary)'s saying in the chat you must be a legal person to be a member is - I guess the question is whether you need to be - if we have a single member, does it - do the members of that member or the participants in that member have to be legal persons as well or what would - how would that single member entity be constructed.

There's some people who are insistent that certain SO/ACs at least - SO/ACs cannot - could not convert to members. But that's again an implementation question.

The main point I actually put my hand around is - hand up for is the issue whether we're going to make a decision or not or come out with a solution on the mechanism or structure level as opposed to just a list of powers with no way - with no indication of a preference as to how those powers are actually put in place in a structure.

I for one am very concerned that coming out with no decision even a straw man decision since this is a non-consensus document, you know, makes us look like we didn't get anywhere.

At the least obviously we'd have to express every alternative but acting as if all the alternatives are equal after all the time we spent discussing them would seem to indicate a level of ineffectiveness that I don't think we actually have.

I think we need to work on convergence or at least having a sense of the room. And the fact that we have a few people who talk a lot and have certain opinions and I may or may not be one of them doesn't necessarily mean that the room as a whole, which includes some who don't speak but whose opinions are as valuable as those who do how everyone feels about that. Whether it's the members or the participants. Thanks.

Thomas Rickert: Thanks Greg. Two points in response to what you said. I think that a decision on the specific model can't be made in the legal sub team. So we need to bring that out to the (unintelligible). And that regard the legal sub team is doing preparatory work to inform the CCWG if not the wider community. So I think it's not - it doesn't do any harm if we maybe short list two options and put those in front of the community and let the community weigh in.

There's another point that I'd like to make and that doesn't go specifically to you but I think it's a general point that I observed on the list. Sometimes when we raise questions, group members make an attempt to answer the question. But that sometimes goes into the area of speculation.

So I would suggest that in order to streamline our conversation if we have questions, let's put them in front of the lawyers and let's not make our own attempt to answer them because that might not be completely accurate and actually add to confusion.

I know that we're one hour into the call. So I think that Leon is back on the call so I will check our shortly. But before I do, let's hear Kavouss and then Holly and then I think we should close the queue and move on to the next subject. Kavouss.

Kavouss Arasteh: I raised down my hand.

Thomas Ricker: Oh, thank you Kavouss. Holly.

Holly Gregory: Thank you very much. I just wanted to mention that from the lawyer's perspective we have found it somewhat helpful when members of the community do comment on questions.

We don't get swayed by those comments. But it often provides us with greater insight around what the issue is. And we can find some greater clarity in trying to understand what the question really (works on) and what it means.

So from our perspective, I think it's, you know, we don't mind that. It doesn't obstruct things from our point of view and does help provide some greater clarity at times. Now with that said, we will defer to whatever processes you choose.

Thomas Rickert: Thank you Holly. Now I'm not sure. Kavouss, is that an old hand or have you raised your hand again?

Kavouss Arasteh: No, it is not me. No, no. I did (unintelligible). Sorry.

Thomas Rickert: Not to worry.

Kavouss Arasteh: No. No. Please go ahead with others.

Thomas Rickert: Okay. So I think that Leon is back on the call. So Leon, can you confirm that you're back and I'm more than happy for you to take back over?

Leon Sanchez: Yes. I'm back on the call. I'm sorry for that hiccup. I run through a power outage suddenly here where I am. And also have some kind of emergency here, so. But I'm back. So I really appreciate you taking the lead Thomas. I thank you for that. And well of course I tried to catch up with this. I think we were speaking about the (sole) membership issue. And so let's say (unintelligible) or any hands.

Robin Gross: I'm taking it down as no hands.

Leon Sanchez: Okay so are there any other questions, concerns or comments in regards to the issue that was discussed? And of course with the document being displayed, which is the draft answers.

Or could we close the subject in the agenda besides this agenda item and jump into the third point of the agenda, which is the discussion - the (present) charter governance roles? And which will of course be linked to what we've been discussing so far.

And we'll also provide some answers to many questions that have been asked during the call in during our general calls and of course through the list.

So just to summarize, as I was saying I will go through a (last) review of the draft answers. Consolidate any comments. Change the things that need to be changed as per our call at this stage. And circulated first to the legal subgroup for proofreading. And after having a proofreading, I will circulate it to the larger group. Do we have an agreement on that?

Okay, I see no objections so I assume that we have an agreement. I see (Greg) is signaling with a (crème cake). So yes. Well now I see (Ed Morris)'s hand is up, so Ed could you please take the floor. Ed? Ed do you want to speak? Okay



I don't know if (Ed Morris) wanted to speak or not. I just saw his hand up and down. But of course, feel free to jump in if you want to raise any concerns here.

Well, going to the third point of the agenda. This is the memo that of course rate to the questions that we were just discussing moments ago. And this is a document that reflects in the chart a comparison between the two models, the designator and the membership model.

We have in the first light, the whole board to recall that on the second the individual director recall. Then the third point would be the approve of regular mandates to articles of reincorporation for bylaws.

And then the fourth point would be approving changes to fundamental rather than call them fundamental bylaws or articles of permissions. And then the fifth one, the approval of the strategic plan. And the sixth one, the approval of budget.

So I think these are the points that Kavouss was raising. The points that he felt that haven't had an answer so far. But I believe that the answers for those concerns and questions do lie in this document.

And I think we will have the chance to go through the document at this stage and, as I said with the previous document, rather than going through all of the points in the document. I would encourage the discussion on any points or any issues that you see problematic or that still encompass any doubts.

I believe that for example if we take a look at the full report recall, the answer for the lawyers is that in both models it (can) be done. It of course involves different types of approaches, but this is something that can, in fact, be done.

So maybe we could go through the document in a very quick way. I would like, Holly if you agree, I would like to provide us with a walk through of the document in a very quick way and a very summarized way as just an intent to - for those who are non-US lawyers and not lawyers to understand the big picture that you are putting in front of us.

Like for example when we are speaking about full board recall, is this possible or not in may be which kind of challenges this carries with each of the (unintelligible). So Holly, could you please take us through the document?

Holly Gregory: Yes. Thank you (Ian). If it's okay with everyone, I'm going to turn to my colleague, (Josh Hofheimer) who has joined us on the call and ask that he walk us through at the high level. Is that okay with you Josh?

Josh Hofheimer: Sure. Sure, I can do it. And I assume that with everybody - is everybody that was (unintelligible) was on this call. Were you all on the call yesterday where we did - where Rosemary and I came at this at a very high level?

Leon Sanchez: Most people were present. And I think we can of course save the details. Rather than going for details, have this high-level walk through the document. And of course I encourage those who have questions to raise them.

Kavouss, we will pay special attention to your questions if you have some issues that you need clarification after going through the document. So Josh please, could you walk us through?

Josh Hofheimer: Sure. Okay. And well Rosemary, why don't we do what we did yesterday where I'll start and you can come in behind it.

Rosemary Fei: That's great.

Josh Hofheimer: Just to - and to make it clear. So from the way we look at these bundle of rights, the first four which deal with the full board recall and did the individual director recall, approving regular amendments to the articles or bylaws and improving fundamental amendments to the articles or bylaws.

In short, those are powers that we believe are achievable in principle under either of the two models, the designator model and the membership model. It is easier - well it may be slightly easier under the membership model, but in general we agree that those are powers that are achievable.

With both of them, you would need, or ICANN or CCWG is going to need some work done on the organizations, you know, the SO's, AC's and the like that will be selecting directors because to do that you need to be some sort of legal person. And under the membership model, a member has to be a legal person. So we would - there will be some upfront work required in both scenarios.

And for something like the full board recall, there will probably be some additional implementation steps that would be required because there will need to be some sort of a mechanism for triggering obligations amongst the members or designators to exercise their right and remove that their individual directors so that the full board is recalled.

The details of that I think are really for a next phase. It could be done by contract or it could be done through some sort of arrangement in the bylaws themselves. But there will need to be some sort of arrangement in that regard.

So that our view because I do want to give people the chance to ask us questions of these things. But that's our view, and somebody has said in an effort to keep it, you know, simple, that's our view of the first four powers that have been articulated.

And let me pause there and see if Rosemary has anything she wants to add to that. And then we can either - what I'd like to do is to continue - I see there's a number of hands up. (Ian) tell me if you feel differently, but what I would suggest is that we continue with a discussion of the fifth and sixth power. And then we take questions on the whole thing.

Robin Gross: Josh this is...

((Crosstalk))

Robin Gross: Just walk through it quickly. And then if we walk through the whole thing, and then if Rosemary has things that she feels she needs to clarify, that's fine. But if we go back and forth, we're not going to get through this and then get to questions.

Josh Hofheimer: Okay. So with the fourth and fifth, and those are basically the same thing, I mean sorry, the fifth and six -- approving of the strategic plan or approving of the budget. This is going to be different. And the ability to execute on these powers is different in the member model versus the designator model.

You all - and the reason it's different relates primarily to what is articulated, you know, under corporate law. The members, by law, have the power to reserve I don't want to say any decision. But they basically have the power to reserve decisions to themselves in the bylaws.

And the kinds of issues here that are articulated. This approval of a strategic plan or approval of the budget our decisions that the members can reserve to themselves. So that means that the board would approve the bylaw and present it - I mean approve the budget, as an example.

Or approve the strategic plan and present it to the members for their approval. And it wouldn't be effective until it was approved by both the member constituency and by the board. That is very clear in corporate law. And the members can reserve those rights to themselves.

With the designators however, there is less clarity. And that is because there is no - the designators under law are treated, you know, differently than members.

And the designators have enumerated they do have the - enumerated the powers that are reserved to - that are reserved up above, one through four. But they don't have a general ability to reserve a certain decisions to their approval in the same way that members do.

And did the other weakness or vulnerability I should say to achieving these powers for the community in a truly binding manner is that the designators, under corporate law, don't have standing, or don't have the ability to bring a suit against the company or the board for violation of fiduciary duties or for the board exceeding its authority. Members do have that standing, but designators themselves do not.

So those are the two principal vulnerabilities. And the way that we would try because, you know, you've hired us to help you try to figure out paths to resolution.

If, you know, for other reasons a member model were simply not acceptable to ICANN or CCWG, what we would look to try to do would be to create some contracts between the designators and the board or the company really, but some contracts between the designator and the company.

(That gave) where the board agreed, the company and the board through the company agreed to defer certain decisions to the designators or for their approval. But the risk there is that we've explained and I think you all have heard at nauseam, the risk there is that you can't do something.

And for that contract to be enforceable, it can't cause the board to advocate its statutory obligations and responsibilities to manage the affairs of the company and its fiduciary duty in that regard.

So if the contract goes too far in placing control of the affairs of the company in the hands of these, you know, the designators then that contract would not be enforceable.

Now certainly we can, and we've talked about if we can devise some methods for internal review. And it's part of the second document that was proposed or that was sent back to you all from (Adler and Sibley) that talks about, you know, reconsideration and independent review panels and the like.

That can, you know, where designators for other organizations or groups can ask for reconsideration of a board decision. And can do some things to strengthen that and to in some ways like the GAC already has, to strengthen the persuasive power of the community's view on the board.

But ultimately in the designator model, things like the budget and the strategic plan, those decisions are - there is - those decisions are going to be ultimately

reserved to the board to decide on behalf of ICANN. And not - there is no absolute or certain blocking power in the same way that there would be, you know, for members.

So it does, you know, we can do what we can to try to help get there. But there is risk of a lack of enforceability that you don't have - a lack of enforceability of the right that the community would be seeking through designators that you don't have if you establish those rights through members.

And that's not to say that you have to be members. What it's meant to say is that you have to be cognizant of these of vulnerabilities if in weighing how important it is for you to have these powers five and six. And how important it is for your rights to be absolute with respect to these powers. And when I say absolute, I mean that the board and the company can go forward without the community approval.

Now of course we've also talked about another way that the designators can express their desire and influence the decisions of the board is to replace those board members that are not adhering to the views of the community or the designators as expressed through the designators.

And, you know, we talked about having special meetings and the like. But you can do that. I know there is a reluctance by some to have to resort to that. But to me, you know, and to those of us, you know, that is not an uncommon tool in the toolkit.

It is very rarely, you know, having - at very rarely has to be exercised. But it is an effective tool because it is there and it is available. And board members know that it is available. And so they have to, you know, balance and approach their decision-making with the interest of ICANN, you know, in

acting in their fiduciaries, but also the interests of those members - those community groups that are vested in ICANN's success. And bring their own interest to that equation as well.

So with that, let me pause and see Rosemary if you've got anything you want to add. And then we can open this up for questions.

Rosemary Fei: Thank you Josh. Well I'd like to just be totally clear. If you want those two powers, the last two. And you want them in a way that is solidly, robustly enforceable and straightforward, simple, you've mentioned simple several times in various emails as well, you're going to have to use the member model.

If you are willing to either not have them be quite as enforceable or you just, you know, some sort of reconsideration right that would expire. Not one that would be a reconsideration and a reconsideration at a reconsideration that amounts to a veto of a board decision, then you can look at the designator model.

I want to add one more caveat about what we're doing, as Josh said, as we are working against the legal form when we use contracts. So the legal form being a corporate law matter.

And now we're taking contracts and kind of working against the legal norms and the way the law was meant to be set up. You know, the kind of arrangements it contemplates.

And one problem with the contractual arrangements is not only that they might not be enforceable, but if they were enforceable, if under these contracts



someone could force the board to do something that was not arguably in its fiduciary duty, the other possibility is the contract can be enforced.

And your individual directors could then be sued by people who didn't like that result for breaching that their fiduciary duties, which I think put those directors in a pretty impossible position. They either have to breach the contract or they have to breach their duties. And breaching the contract would be an ICANN issue of ICANN breach. And breaching the - their duties is a personal liability issue.

So I just don't - I can't be any clearer that we - I think we've tried to tell you again and again that these certain powers are designed to be exercised by members in a corporate structure and not by designators.

And so it's all a work around to try and get you as much as we can under the designator model, which I think many of you have been interested in. And so we've really pushed it to its limit. But I do think there are limits.

And I think at the end of the day, if you really want truly enforceable power and those last two and you want it to be straightforward, you're stuck with the member model. It's not perfect. It has other downsides. But it - for those two powers, that's where you should go.

Leon Sanchez: Thank you very much Josh and Rosemary for your pretty clear answers. I think it's just to take some stock on this. It's pretty clear to me that, you know, it comes down to how much influence or how much power budget and strategic plans does the community want.

And since for other powers are achievable by either model. And as you said, and I really appreciate the clearness of your statement that if we want

enforceability with regards to budget and strategic planning, the way to achieve that would be a membership organization.

Although I note that of course (unintelligible) or is it (Jeff) that adding some provisions to the bylaws under the designator model could also do the trick for this.

But since your answer has been very clear, you probably don't think that would be achievable since it's a very clear to me that the way to go would be the membership model with regards to how enforceable we can have this.

So I'd like to of course open the floor for discussion. I see Kavouss has been waiting for a long time as well as (unintelligible). So Kavouss could you please take the floor.

Kavouss Arasteh: A very, very grateful to Josh and Rosemary that this time we are more than clear -- very crystal clear. But first, could I ask them to kindly put what they said, which I understood correctly and without any problem, put it on a paper.

I think it would fit not more than a page. Not more than a single page then post in the core first group we can achieve our object (gross) model with either of the two models.

In the two others, we could achieve it with member model, but we could not achieve it with a designator model. On that so we can get additional arrangement, contractual arrangements.

And then providing the disadvantage of (unintelligible) of the contractual arrangement in a way that was mentioned. Again, putting that in a (worthy).

Now, I come to my last important point/question. Did the issue of a strategy, the strategy plan as a part of the mission and core value, to what extent the board could have departed from that?

I don't think that we could have a major maneuver to get out of that because they have to remain within the core mandate or mission and core value. So the only thing remaining it is now on discussion is the issue of strategy, sorry budget.

So then we have to say that to what extent this is so important and critical that we're achieving that. You have to make a model investment in either of the two models, either membership or in the designator. And it is so critical and so important, these budgetary issues, and how much is the budget and so on and so forth.

And the last point that I have to make is is it possible that are distinguished legal firms, for the first four also indicate the extent to which the bylaw could or needs to be changed for model of member and model of designator?

And for the last two groups (unintelligible) and so on and so forth, but not the (contractual) part of (unintelligible). So we have to know the extent to which the bylaw should be changed. And then we have the opportunity to the implementation and complexity of the implementation. We would be in a better position to comment on that.

Would it be possible that they need such a thing? One thing and I'm very, very grateful for both of them is the explanation was quite clear and very, very appreciated. Thank you.

Leon Sanchez: Thank you very much Kavouss. I'm pretty sure that they will provide us with the information. And as for your second question with regards to, if I understood well, the bylaw implementation that would be required to the designator model in the membership model.

I think it would be a little bit premature to put the lawyers to work into it since we haven't really decided which model we would like to propose. And that this is something that we'll definitely come to at a later stage. But I would ask for you to be a little bit patient until the CCWG weighs all the alternatives in the table and we set up our proposal for public comment.

Next in the queue is Alan Greenberg.

Alan Greenberg: Thank you very much. From my personal point of view, and that really doesn't matter but I'll state it because it will explain why my question is important to me.

I believe that it's sufficient enough to have the first four enshrined in bylaws. And the last two enforceable only by ensuring that we have goodwill of the board to listen to the community or they get removed.

Certainly with the current board and recent boards, I believe that would be sufficient. And I think ultimately the threat says listen to the community or we will remove the directors who are not willing to listen to the community.

Sold my personal point of view says that sufficient. However, something I heard when we were talking about the ability to remove the board in the designator model bothers me.

I think I heard that it would probably require contracts for bylaws or something to ensure that each of the parts of the - each of the designators remove their board members.

That's fine for the AC's and SO's. But over half the board right now is selected by the nominating committee. And I believe in any viable model they could not - we could not bind the nominating committee to make a decision to remove directors.

Therefore it comes down to can the rest of the community remove those selected by the nominating committee? And if we can't do that, we may have a real problem with this model.

So I'd like some clarity on is it possible for the AC's and SO's to remove any or all board directors or only the ones that they themselves have appointed?  
Thank you.

Leon Sanchez: Thank you very much Alan. You raise some very valid questions and comments. Something we need to consider in the equation. And it next in the queue is (David McCauley). But he has agreed to be bypassed to go to (Josh Hofheimer).

So Josh could you please take the floor and of course provide some reactions to what (Robin) was saying on the chat. And if you could also address the question that has been raised by Alan at this point. It would be appreciated.  
Thank you.

Josh Hofheimer: Sure. And let me start with Alan's since that was most recently asked. So Alan, the way I understand the nominating committee today effectively, as a practical matter to replicate the work, the direct selection of members by the

SO's and AC's because the nominating committee is organized to reflect certain constituencies as well.

So I agree under either the member or designator model, we have to take a look at the nominating committee and how we organize that going forward so that because at the end of the day, you do want the ability of whoever is putting a board member on, to have the ability to remove that board member.

I mean you want to have both sides for that coin. So we may need to look at the nominating committee and how that's organized in order to bring that about. But that's more an aspect of implementation from our perspective, and one that we would solve under either model. And we don't see that as an impediment. It's something to work through, but not an impediment.

So, but your general question as well that you asked at the end, do the SO's or AC's have the ability to remove any or all directors? And the answer to that is no.

They - whether you have designators or members, they can remove the board - the director that they select. But if you and I were each designators, I don't have the ability to remove your designator and you don't have the ability to remove my designator.

The board can remove anyone for cause. But I only have the ability to remove mine without cause, which is what we're really talking about here. It may be - obviously in your mind it can be that there's a reason, there's cause, or there's a reason for doing it. But I'm talking about the legal distinction between, you know, cause and without cause.

So we don't get to remove each other's. And that's why we talk about having a contract or some sort of a no-confidence mechanism in the bylaws where those organizations that are given the ability to select directors, whether they be members or designators, would also enter into a contract that basically says - or, you know, they'd be signing up for, you know, amendment or for the language in the bylaws that basically says, you know, if there is effectively a vote of no-confidence in the board in more than you know, 50%, 60%, whatever the threshold.

But more than X percent of the designators or members desire to remove their board members and remove that the whole board, then everyone agrees that they will have to remove their members. That's what we talked about with contract.

And you're really going to have to have it in either scenario as well because you don't want to be in a situation where let's say it's 60% or 70% to remove the full board. You don't want to be in a situation where the 70% do it, but the 30% who didn't want to just say fine, but I'm leaving my board members in place.

You know, you'd want to an agreement that says that even those 30% will be in effect dragged along and will go a long with that that decision. And will select new board members so that you can get a fresh start.

That's the first - that's the answer to the first part. And then (Robin), to quickly answer your second part because I don't want to dominate things. And I think the chat has gone into it.

But the bylaws themselves as pointed out have to be valid. And if the bylaw were to say that the board has to accept the budget that's approved by the

members, then that's also, you know, causing the board to advocate it's, you know, responsibilities under law and its fiduciary obligations.

And so that's why something like that is problematic if you're outside of the member scenario. Where even in the member scenario, it's not that the members get to dictate the budget, but they do get to approve the budget that's presented by the board. And I'll stop there.

Leon Sanchez: Thanks for your answers Josh. I see that David's answer - David's question has been answered. And then next in the queue, I used to have Greg Shatan. I now only see Alan Greenberg and (David McCauley). So well if you did lower your hand Greg, that's okay. So next on the queue will be Alan Greenberg.

Alan Greenberg: Thank you. I just wanted to highlight in the chat that the concept of binding the NomCom or the NomCom delegates to follow the orders of other parts of the community I think would essentially question there are very existence and did the independents that we associate with the NomCom. And I think that would be a nonstarter. I'm speaking of a purely on my own. But I think that it would just kill the whole process.

Samantha and Sam Eisner in the chat said could we buy - could board members agree through a pre-service letter to resign if some other circumstances are satisfied. That is the AC's and SO's remove their members. And assuming that's possible, that might well solve the problem.

But the concept of binding that the NomCom to take action in certain circumstances I think is a non-starter. Thank you.

Leon Sanchez: Thanks Alan. Next on the queue I have (David McCauley).



David McAuley: Thank you Leon. (David McCauley) here. I have a question for Rosemary.

Rosemary, you mentioned that with respect to the fifth and sixth powers that we are looking for to use contracts, we would push them to the limits.

My question is what would the contract be like that would supplement the statutory rates for under the membership model? Would it be different? And I'm talking about full board recall here. Is that not pushing it to limit? I'm just wondering if that has the same disability. Thank you.

Rosemary Fei: It's an excellent question. We thought about that. We would obviously like to not have to resort to contract in an ideal world. But contracts are a perfectly valid way of getting things done. And I didn't mean if it came out that way to somehow be, you know, disingenuous contracts as a way of getting something done.

The contract among the members could - first of all, there's a couple of ways it could be done. We've been mentioning on the chat that one possibility is that it's not even a contract among the members. It might be a contract where, a sort of contract where the directors essentially would submit, when they become directors, a resignation conditioned on the occurrence of a recall vote reaching a certain threshold.

And so then it's just a voluntary resignation that each director has it's a voluntary except in the sense that in order to become a director, you had to provide it. It's a condition of it being a director. And you can put qualifications on directors.

So when we talk about a contract solution there, because it's just one triggering event, whatever that contract looks like, whether it's an advanced resignation from the various directors or whether it is some sort of an

agreement among the members or between the members and ICANN to remove their directors, to take that particular action in the event that the community votes for a recall at a high threshold.

It's a relatively simple contract and causes me less heartburn than the kinds of things we'd be trying to do where we're really working against the fact that the board is supposed to have these rights. And the designators are not supposed to have them. And we're trying to give the designators these rights by contract.

I don't think we run against that same kind of working against a public policy almost that's inherent in the law when we talk about having all the members just decide that, you know, under certain conditions they all want to remove their directors, or again as I said, possibly the directors are resigning on that.

We'd have to work through details because you can't have all the directors residing without notifying the California Attorney General. And, you know, so there's a lot - I think Holly said this probably a dozen times, the Devils in the detail.

But we are much less concerned, and I'm not concerned about the contract among the members to recall the way I am about the contract among the designators to exercise powers over the board to decisions.

Leon Sanchez: Thank you very much. Next on queue I see Josh is that no-hand or a hand? It's a no one. So next in the queue is Greg Shatan.

Greg Shatan: Thanks, Greg Shatan. Just to pick up on something that Alan was saying about that he believes that the NomCom would not enter into any kind of joint spill the board arrangement.

That would seem to me to mean that we could not achieve the full spill the board goal that we're talking about unless we change the NomCom, or Alan's just wrong about that.

But it would seem to me that we - and then we'd be only spilling these non-NomCom-related board members. Technical the NomCom, you know, may have the right to recall its own board members.

But I guess if it's going to be so independent that it, you know, can't even enter into such an agreement, then we have a flaw that exists currently and would exist across every model that we could possibly imagine. Thanks.

Leon Sanchez: Thanks Greg. Does - did the lawyers want to react to Greg's comment?

Josh Hofheimer: Yes this is Josh. I mean I think to Greg's point, you'd have to have a nominating committee. If you had your nominating committee, if you didn't make any changes to what you had today with regard to the nominating committee, then I think you would have to have a nominating committee, you know.

And whether it was individual designators - designators as individuals that comprise the nominating committee or that the committee itself becomes some sort of unincorporated association, they would it need to enter into the same agreement with the rest of the designators and with the company.

Or having their designators be, you know, agree to sign the resignation letter in advance. Because it would be just as they might want, you know, the other selectors of the board might want to recall the whole board. The nominating

committee selectors might want to recall the whole board. So it goes both ways.

And then if we're talking about redoing so much of the bylaws as part of this overall process in transition, I'm not sure why that wouldn't to be an exercise that would be undertaken.

And again, that's without making any other changes to the nominating committee. But it may be that the structure of the nominating committee is it revisited as well.

Leon Sanchez: Thanks Josh. Next in the queue I have Alan Greenberg. Alan could you please take the floor.

Alan Greenberg: Thank you. What I said about the NomCom is as I said, is purely my opinion. But it's based on a fair amount of experience at ICANN. And implying in any way that the NomCom is not completely independent, even if it's only to remove directors I think would taint the concept. And I'm willing to be wrong, but that's my personal opinion.

But I thought in the chat we determined that a pre-service letter could cover that. The pre-service letter would not allow the community to selectively remove directors including NomCom directors who are reticent to follow community advice. But from what I saw, it would allow us to remove the whole board on this. Thank you.

Leon Sanchez: Thanks Alan. Next on the queue I see Ed McNicholas. Ed could you please take the floor.

Ed McNicholas: Yes, I just wanted to add into it the discussion that it's going to be a lot easier to solve out the issues of approval of a budget and such on the side of it because it the other side, and I don't want to move to the other discussion too much.

But if we tried to use the IRP process for that on the backend, as we tried to lay out our memo that there are complexities about having core board functions subject to binding arbitration.

And frankly there's an issue about whether you make the IRP into potentially a credible body on that site. So I think we're going to get much more accountability if we solve out the power of the members to approve the budget on the front end here by saying if we go to a membership model they have the rights, they have the powers are reserved to them up front.

That's going to work much more effectively than trying to solve it on the backend after a disputed during an IRP process.

Leon Sanchez: Thanks Ed. Next on the line I see Sam Eisner. Sam could you please take the floor. Sam are you mute? Okay we'll wait for Sam.

Sam Eisner: Hi there, sorry about that. This is Sam Eisner. On the NomCom, I mean some of this is a broader conversation to the CCWG than the lawyers. But I know we've been having a bit of a chat in the chat about it.

And, you know, there - I stated one of my concerns about making the NomCom a member and that the NomCom itself is a collection of basically all part of the ICANN community.

And then if you make the NomCom a member, you then also have part of that membership being represented by other entities that would be members. So how does that impact the different balances?

You know there are some groups in the NomCom that aren't members, some that are because it's still not clear to me if only our designating NT's are members versus every AC and SO across ICANN. How are these types of issues considered?

And then separately on the NomCom issue is (it's going for) a exercising - a removal requirement. So if there was an agreement among the ICANN community through whatever process that will be developed that the full board should be recalled.

Only in that instance couldn't we've done say to the NomCom okay, we're going to pull back your members if you're (unintelligible) designator or a member. Or because you have the right to appoint - you are the people that have to exercise this right to take down.

Or conversely, could you then tell the board that this is a situation where it should consider using its removable requirement under the - or removal under the bylaws for those NomCom directors, but establish a committee process for those?

Are there other ways to address this other than trying to figure out how we go in and re-figure the NomCom because that is one of the places where we say that there is accountability because the NomCom itself gets to appoint the directors outside of the other appointing community processes?

Leon Sanchez: Thanks Sam. I'd like to point to one common basis by (Matthew) on the chat. And it is we don't mean to confuse, but why not make the NomCom board nominations to community approval? That's a regular process for directors in many organizations.

So someone from the legal team, I mean the lawyers give us a quick reaction on this suggestion made by (Matthew)? I don't know if maybe Josh, Holly or Rosemary?

Holly Gregory: This is Holly. I'm happy. Yes, I think you could do that. I mean we'd have to figure out what the mechanism is. As I understood it the NomCom is already formed to reflect some community input. But maybe that's not done sufficiently.

There are certainly processes that we could build to have a greater community input into a NomCom selection of director candidates. Definitely a possibility. So we can certainly look at how you do that. And I can think of a number of mechanisms.

The question is, you know, if you want to try to find them or not? I mean and we always have this question of who is the community? Are we talking about the community working through various groups who are organized?

So, you know, we just have to figure that all out. But yes, we could have a mechanism for greater community involvement in the NomCom through providing suggested candidates, or providing ideas of around what kinds of qualifications should be looked for. And we're happy to think about that.

Rosemary Fei: May I follow up? It's Rosemary.

Leon Sanchez: Yes please do. Please do Rosemary.

Rosemary Fei: So right now it's called the nominating committee. And one of the ironies is that it's not nominating anybody. It's actually appointing them. And following up on what Holly is saying, it could in fact nominate for election.

I think this is where (Matthew) was going, for election by either the members or by the directors - by the board. The board consisting of the directors appointed by the members. So that those are at least two ways you could build that in.

I still think the pre-service resignation is going to be the easiest way to achieve the full board recall in terms of whether you're in a membership structure or a designator structure. It's probably the easiest.

And I share Holly's question about when we talk about a recall vote, I've never assumed, although it may have appeared that way from what we've given you because I don't think we've ever teased it out.

I've never assumed that that community vote had to be a vote of the same people who are members or designators or whatever. That community could be defined through - defined however you want.

And the resignations or the agreement to remove directors would be triggered by whatever this defined community's very, very high threshold vote would be.

So I guess the point of that we haven't teased that out because I think as Josh said earlier, we see these as issues for a later phase. We can't - I don't think it's realistic to fully flush out both the designator model and the membership



model all the way down to the level of actually one of the bylaws would say what the contracts would.

Like drafting it all out. I don't think we have time for that. And I also think, you know, there's some - such basic differences between them that you probably ought to pick one or the other. And then let us flush that out and wrestle with some of these problems within that model knowing that in the big picture you got the powers you really needed from one versus - or decided you didn't really need them and you wanted the other model.

Leon Sanchez: Thank you for this Rosemary. Sam is that an old hand or is that a new hand? Okay, so next on the queue is Kavouss. Kavouss could you please take the floor?

Kavouss Arasteh: Yes, I still, I am not very clear on the how we recall the entire board with (unintelligible) discussing in a half an hour - since about half an hour about nominating committee and so on and so forth.

I suppose that SO and AC decides for the recall of the entire board member and the nominating committee does not. So what would happen in that case? Who on the board will be removed or there will be no removal at all? Thank you.

Leon Sanchez: Thanks Kavouss. Remember, we were making an analogy to a cookbook and the recipes, of course one of these recipes would be how to remove the board either as a whole or individual members.

So I think this would be jumping to the next phase that Rosemary was just commenting. And while we already have a template on that I believe and that

has been commented, of course this would be something that would need to be clarified by the lawyers at some stage.

And just I'm mindful of the time. We're almost reaching the top of the hour. And before I go to Alan, I would like to just state clear that the document that we expect to get from the lawyers at this stage, meaning the simple feedback on the headlines, et cetera, are not only expected to come for this comparative chart, but also for the rest of the document that so far has been worked.

So I do have in mind that the documents for this chart would be in place by this time tomorrow. And I don't mean to have the lawyers rush of course to have all the documents ready by this time tomorrow. But of course if you could have a similar document with a very simple explanation as a brief overview of the document for the other documents as well, that would be excellent.

And I will go to Holly who I think has the (unintelligible). So Holly could you please take the floor. And after that I will go to Alan Greenberg.

Holly Gregory: Thank you very much Leon. Look, we can certainly get the - do the revision that I spoke of of the document that's up on the chart. And with a summary that gives you what Josh and Rosemary so crisply provided. And also has some headline conclusions through the chart that you could look at quickly so that you'll see what each - sort of the conclusions that you might want to draw from it are.

I think going back to old the documents, given that this chart summarizes an awful lot of information that we've already provided, I would like the opportunity, I'd like your permission Leon for us lawyers to go back and look

at those other documents and to only provide those summaries if we believe that the information hasn't been crisply summarized in this document.

Otherwise I think we're spinning wheels. And I know you've got a lot going on and are going to need a lot of our attention in the next several days. So I'm trying to find a way to streamline. Is that acceptable?

Leon Sanchez: Thank you very much Holly. That is perfectly acceptable, and not only acceptable but desirable. We don't want to duplicate the work that has already been done. So yes, we would definitely like you to proceed as suggested. Only go into the permission task of course been address and (unintelligible) documents. And there is no need to duplicate.

Someone is in the kitchen I think. And we would like - we would really appreciate them to mute their line. And so next on the queue I have Alan Greenberg. Alan could you please take the floor.

Alan Greenberg: Thank you very much. As I said before, the concept if we're trying to remove a whole board, I believe the pre-service letter or irrevocable letter of resignation will cover that.

However, I'm assuming that this letter of recommendation - letter of resignation can refer to some action of the community, not necessarily the action to remove the board and all of their members.

I'd like confirmation from the community because if that's the case, we can word that letter carefully, which in fact could give the community the ability to remove design - certain specific members, NomCom members and not necessarily all of them.

Which would be a far more practical process and that if you have part of the board refusing to listen to the community and the other part voting in favor of a listening to the community, we can only remove those who are reticent.

And that might be a more granular way of addressing problems and not nearly as nuclear. So I guess I'd like confirmation that the pre-service letter of resignation could reference some action of the community, and be very specific about what that action is. And did not necessarily be related solely to removal of their own directors. Thank you.

Leon Sanchez: Thanks Alan. I'm mindful of the time. We have reached the top of the hour. And we can go through other working party to document. Let's have this - this is - if you have a short answer for this, this is the time to provide it.

And if this would be a more elaborate answer, maybe we could take this off-line so we can adjourn this call on time. So Holly, do you have a short answer for this?

Holly Gregory: I apologize. I would need you to restate the question.

Rosemary Fei: Leon it's Rosemary.

Leon Sanchez: Yes Rosemary. Go ahead.

Rosemary Fei: I think that it is possible to get fancier with the pre-service resignation letter so that a particular directors letter would be triggered, not all of the NomCom directors.

We're talking about all the directors having these letters, by the way. But you could draft them to contemplate other votes. I would have thought that -

maybe I'm really miss understanding Alan's comments. But I thought the NomCom sought its independence.

And it seems to me that being able to pick off NomCom directors individually is in some ways more offensive to the NomCom's independence than a situation where the only circumstance under which the NomCom named directors are taken off the board or would resign is when every director of everybody is resigning.

That seems the least offensive to NomCom and independence. They're being treated no differently, no better than all the other directors. If you start being able to pick off individual ones, then you're really second-guessing the NomCom. And so I'm a little confused about which way we were going.

Leon Sanchez: Thanks Rosemary. So I think this kind of answers your question Alan. And well, we have reached - we have passed the top of the hour. And so just to make a really fast recap.

The next up is of course to get a summary chart from the lawyers and really plain and simple language for everyone to understand. And we'll have our intent sessions tomorrow and Friday.

And as we discussed on the (lease) we would expect to have at least one of the lawyers present in every call. And we will have a legal sub-team call in between both days of the intent session so we can address things that need to be taken care of on the fly.

And well with nothing else to add, if there's someone that wants to add something, now is the time. So if I don't see any hands or comments, then I would call - I would have this call adjourned.

I think you very, very much for your clearness, for your efforts and all of the team members and the CCWG team members for your efforts and the contributions. It's been a very fruitful meeting. And I'll talk to you very, very soon. So thank you very much everyone.

Man: Thanks Leon. Bye.

END