

ICANN

**Moderator: Brenda Brewer
April 29, 2015
10:00 am CT**

Coordinator: Excuse me, the recording are started. You may now begin.

Leon Sanchez: Thank you very much. Thank you very much and welcome to this Legal Sub Team call on April 29, 2015.

A suggested agenda has been circulated through the mailing list to - at this point is a discussion on the possible outcomes of the IRP process.

So staff, if you could be - if you could kindly update the agenda with this point. I don't see the agenda on the Adobe Connect room at this stage, but I will, however, paste it into the chat.

So we can have it pasted of course into the part into the notebook and have this addition that was asked by the lawyers included into our agenda.

So the roll call will be based as usual with those attending the Adobe Connect room. If we do have someone else in the phone bridge that is not connected to the Adobe Connect room at this stage could you please state your name so we can add you to the roll call?

Okay. I listened to no one stating their name as being only in the phone bridge. So with this I would like to continue to our agenda item number two which is the discussion on the - of the suggested text by Robin and Izumi.

And I am mindful that also Jordan Carter sent us draft text on this .6.6.1. And this document was circulated by Jordan himself and I forwarded it to the list just five minutes ago, ten minutes ago.

So if you would kindly check on your inbox when you received it, it would be very helpful. So we work on the latest version which is exactly what Jordan sent.

And I don't know if the staff has this document handy. We could use that also in the Adobe Connect room. If not I am forwarding as we speak to staff this document so you can have it in your inbox and we are able to display it on screen.

So you should have this document in no time or it will be displayed on our screens. So I see Sabine is asking that we focus on the highlighted sections.

And yes Sabine, that is my understanding as well. I believe that the highlighted sections are the ones that are still on the work and of course the ones that we should be discussing.

I also see that we got some feedback already from David McAuley which of course will be discussed in a moment.

I see that we are having this documents by Jordan uploaded to the Adobe Connect room and here it is.

So if we could go to the section in which we have the highlights. Thank you very much (Adam).

And I don't know if - excellent.

So I as I understand it and we don't have Jordan on the call but I - my understanding is that the previous text is the one that is not highlighted and the latest version of the proposed wording and text is the one that is highlighted in yellow.

So with regards to point number four the new text is that our legal advisers are clear that other California law through this structure and this structure means membership structure there would be no material increase in the risk and liabilities individual ICANN participants face today.

That is my understanding. I of course would like to open the floor for comments on different views on this and. And I don't know which would be the best way to go through the different proposed edits.

Maybe we can review them very quickly one by one and then after that we can jump into commenting on particular views.

I see Alan Greenberg's hand is up. So Alan could you please take the floor?

Alan Greenberg: Yes. Thank you. I'm not disputing the edit but I think we need more clarity on what are the risks. It has been suggested in the past -- and I won't go into details -- that there are some significant risks at least to some participants today that may or may not be covered by ICANN under their current processes.

And the question is if we become unincorporated associations or whatever that may highlight those risks that exist today. So it's not just how do they change but what are they? Thank you.

Leon Sanchez: Thank you very much Alan. And this would certainly be something that we should raise in the second hour of this call when we have counsel present.

So I would like to ask you if you could raise this exact question when we have counsel in the Adobe Connect room. I see Greg Satan hand is up. So Greg could you please floor?

Greg Shatan: Thanks Leon. I think - and this is Greg Shatan. I think from the point of view of getting the most out of counsel it would be good for us to think of what we think those risks are that might be increased or caused by a switch in form so that we're not acting counsel to both dream them up and opine on whether they are greater under the current model or greater under a membership model or under a explicit designator model.

Obviously I'm not asking that we think all of them up but if we have certain examples. Alan alludes to some but it would be good to kind of put them out on the table for counsel I think. Thanks.

Leon Sanchez: Thank you very much for this Greg. And I agree that the more information we provide to counsel the best advice we get from them and the best use of everyone's time we have.

And so far to my understanding and I believe that's something we are all able to conclude is that regardless of the way we go either membership or

designator the liability exposure on individuals wouldn't be greater than that in - I mean that one that we have at the present moment.

So if anything would happen by migrating to either model would be to my understanding that the liabilities would be less than we actually have at the moment.

But I do agree that if we maybe put some concerns in front of the lawyers and confirm whether this concerns would be greater or lesser while migrating to this new models then they would be able to provide us with their advice.

So the next point is .5. And you can see that we have also yes?

Sam Eisner: Leon. I'm sorry this is Sam. I'm not able to be in the Adobe Connect room yet. Could I make one point on before we move on?

Leon Sanchez: Of course you may.

Sam Eisner: Thank you. So on the (unintelligible) liabilities I think there's clearly the issue of financial risk that we're talking about.

But also there's the concern about what - there's a portion of it that we cannot have the attorneys opine on.

There's legal risk and then there's the internal risk of the balance between the communities and some of that internal to ICANN concern that we can't really ask the lawyers to opine on.

And so I'm wondering if there's a way to soften this statement to note that there's legal risks and liabilities but that we have to think about these internal risks also, the things that aren't legal.

Leon Sanchez: Thank you Sam. Well I would suggest that we also highlight those internal risks so we can of course guide the lawyers as to which kind of practices we would be expecting from them. So if we have a couple of examples I would certainly encourage you to raise them when we have counsel present in the call.

And I see some comments on the chat and Sabine has mentioned about mentions to insurance and maybe is also asking for examples in regards to the internal risks. And I think this would be very useful.

So would you like to elaborate on which kind of internal risks we would be thinking of asking about to the lawyers?

Sam Eisner: Was that to me, Leon?

Leon Sanchez: I'm sorry?

Sam Eisner: Was that to Sam?

Leon Sanchez: Yes Sam. Please if you could guide us to or walk through or give us a quick walk-through of what you have in mind as to which would be an example of an internal legal risk that you could be thinking of that we should ask the lawyers?

Sam Eisner: So I think that my concern is that there are different risks that may not be legal but there not things that asking lawyers who are not really familiar with

ICANN such as relationships between the groups and how the switch of the membership models move to that that aren't legal impediments but are the things that the community should be thinking of as we're evaluating a shift?

So I'm not sure that there are, some of the items that I'm concerned about are things that we would raise to the attorney.

But I do think -- and this is part of my conversation yesterday on the CCWG call. I'm concerned that as I've been looking at the membership statutes and how those work that there is a possibility that individual members are granted certain rights under the statute that are hard to change or modify.

So while clearly we have the ability to design through a membership model the ability for the consensus based collective action that we're talking about but, you know, community coming together and establishing thresholds in which to act and take certain decisions, you know, are statutorily granted like to individual members such as the individual member rights to bring their derivative actions or their lawsuits but don't require and aren't limited by and from my understanding have trouble being limited by a need to refer to a community action.

And so I'm concerned that there is a possibility that by moving to a membership model where your communities are clearly unable to take the action like that there may be some an intended facts that are housed within those statutorily protected ranks of members that are hard to modify.

So that's what I was talking about yesterday and that's what I'd like some more information from counsel.

Leon Sanchez: Thank you very much for this. And I see Greg's hand is up but I don't know is that an old hand a new hand. Then next on queue is David McAuley. So since Greg lowered his hand David your next in the queue. So please take the floor.

David McAuley: Thank you Leon, David McAuley for the transcript. I just you mentioned that I had made a submission and indeed I had. But I'd like to sort of take off the table anything I said about 6.6.1.1 in two respects simply because I did that before I saw Jordan's draft.

And I think Jordan's draft looks fine and I appreciate the work that Robin, Izumi and Greg did overnight for me that is on this.

I don't - I just have a slight preference in favor of Jordan's and so I would insofar as what I submitted those two bits can be sort of taken off the table. They don't need to be on the agenda or anything of concern right now. Thank you.

Leon Sanchez: Thank you very much for this David. So maybe our word forward would be to agree on whether we want to work of course on Jordan's document which I think would be the most logical thing to do as David said.

And we have come through Jordan's document. I think this update proposal in some way reflects the different feedback that has been discussed through the list and through our meetings.

And I think if we do agree that this is the text to work on then we can of course comment on it. And if we do agree that this is the text or the - an acceptable final version of the text that we can put it towards to the lawyers so they can validate that what we're saying here is in fact in line with what they have advised through all the different documents.

So I don't know if anyone has any other comments or questions with regards to Jordan's proposal?

Do we agree that this is the text that we will in fact be reviewing in this call and of course putting in front of the lawyers for their affirmation that or confirmation that what we're putting in this text is in fact aligned with their advice?

Any objections? I see David's hands up. David could you please take the floor?

David McAuley: Thank you Leon, David McAuley here. No objection.

I think in addition to asking if it's in line with the lawyer's advice we might ask them if it reflects their advice by which I mean I thought that they came up fairly firmly in favor of the membership model but maybe I didn't hear that correctly.

I would like to know as between designator and membership does what we have on paper accurately reflect what their advice is? Thank you.

Leon Sanchez: Thank you very much David and we will surely ask this question to the lawyers. And I see next in the queue is Greg Shatan. I just want to point out that Izumi is agreeing to the text if the text is what we have on the screen.

And I can confirm Izumi that the text we are talking about is the one that we have on the screen. So Greg could you please take the floor?

Greg Shatan: Thanks. Greg Shatan for the record. I just I agree with David and would just add another facet which is that we should ask counsel if this reflects the strength of their device as well?

I'm concerned that we've - there may be some dilution that often happens as people draft and hedge their opinions. And to the extent that they've come out with strong opinions, you know, we should and we're discussing what their advice is we should reflect on what their advice is and the tenor of that advice. Thanks.

Leon Sanchez: Thanks Greg. And well, if I don't please make sure that we have counsel present. We do raise these questions and we ask that they review on the two facets not only that it is in line but it also that whether it reflects the strength of the advice properly.

So point number five has also two proposed wordings. I assume that we will be going through the past version of the proposed textbook rather the highlighted which is the actual proposal.

And in the case of .5 it says that because according legal counsel the membership model provides the tightest control of the ICANN Board by the committee regarding the six community powers exclusively sought by the CCWG. It has been suggested as the reference mechanism by the group.

I think we do agree that this is far as I understand reflects or properly reflects what's been discussed by the CCWG.

And I would think subject to confirmation by counsel that this also reflects the advice that we have been given by the lawyers.

Point 6 has no controversy on it. And I think see Alan Greenberg's hand is up.
Alan could you please take the floor?

Alan Greenberg: Yes thank you. It's on Number 5, not Number 6. Have we defined what a reference mechanism means? It's a term that is not one that I am familiar with in this context.

I think it means it's the one the working group thinks it's recommending. But have we defined as other people have some idea of what they're talking about?

Leon Sanchez: I don't think we have defined it. And it's pretty much kind of the work that we will be doing. But I think you're right. I think there is no hard definition as to what reference mechanism means at this point.

And I see Greg next in the queue. So Greg could you please take the floor?

Greg Shatan: I actually had the same concern that Alan did and tried, you know, Googling reference mechanism, really didn't find much of a definition for it.

I find some uses of it perhaps in the computation of language book. But I think it's - it seems to be a way of trying to with apologies I'm picking a word that's too strong, weaseling away from the fact that this is our recommendation.

I think if it is our recommendation or at least our primary and again too this is - it's too early in the sense to talk about recommendations. These are not consensus. This is not a consensus document.

But if this is our primary using a term that says kind of unmeaningful as reference mechanism is I would love to hear if anybody here looked at reference mechanism and immediately said oh I know exactly why it's being called a reference mechanism, that seems perfectly appropriate to call it that. My reaction was bafflement. Thank you.

Leon Sanchez: Thanks Greg. And just elaborate on this. I think that when we talk about a reference mechanism we are talking about a construction that we put into document of course that is let's say our primary hypothesis under which our work has been constructed upon.

So while we haven't defined what we mean by reference mechanism throughout the document so far I think that we would of course - or it would of course be useful to have this definition at some point in the document, may be in the summary, maybe in the glossary.

So I think we need to find a space in the document to define what we mean by reference mechanism so everyone has a clear idea that when we speak about reference mechanism it's just the basis for all the work that's been developed for the rest of the proposal.

So I see Alan's hand is up. So Alan could you please take the floor?

Alan Greenberg: Yes thank you. Yes I don't think is just a good idea I think it's mandatory. I think what we mean by reference mechanism it is something that we suspect might be our recommendation once we work through it.

And it's - and we are presuming that this recommendation will be followed when we're outlining some of the other things.

So, you know, it's sort of an assumption but it's one that we're actively questioning in parallel with using it.

So and I would suggest that yes it needs to be defined in the glossary but the - each of the two times that it's introduced - and I think it's twice it probably warrants a footnote at that point reiterating what the definition is. Thank you.

Leon Sanchez: Thank you very much for this Alan.

Any other comments on with regards to the reference mechanism definition or whether should be the primary or not?

I think that as just Alan said it should be something that would definitely need to be in the document. And I see Greg asking why do we come up with phrases that we haven't even defined yet and we need to do define.

And I would think that is because of the lack of better terms to define what we're doing. And we need to put in place some words that will help us guide the work we're doing.

So I see next on the queue is David McAuley and I would like to hand the author to him. So David you have the floor.

David McAuley: Thank you Leon. David McAuley here. So I think these are good points and I suspect that we all agree. So Leon will - is this something as a co-chair of the full CCWG that you'll take back to the drafters?

Leon Sanchez: I'm sorry David I missed that part. I'm sorry could you please repeat?

David McAuley: No I'm just wondering the outcome of this discussion on legal subteam I take it will be that you as one of the chairs of the full CCWG will mention this in - for purposes of the next draft.

I suspect we - I suspect there's large support here within this group for that kind of a change to that term, you know, with a footnote or as a glossary definition -- something like that.

Leon Sanchez: Absolutely David you're right. Actually I would ask staff to put an action item on me to go back to my co-chairs and the drafters so we can have a definition of reference mechanisms put into the document.

And yes I think that as the comments are in the chat we haven't had a final definition for what we're doing here so that's why we came up with the word or the phrase reference mechanism.

Because I think that if we think about a primary mechanism it could be misunderstood as the CCWG hasn't made a decision. And I think that's not accurate as well because the CCWG hasn't made any decisions.

And it will be the community that will be doing the decisions and instead they CCWG - what the CCWG is doing is only putting on the table different options being maybe the reference the one that we are most inclined for but not the primary as that could be misunderstood and provide an error signal to the larger community.

So with this then the next point would be point Number 7. And this of course deals with how we see or how we have this cost the designator structure with regards to California law and the ability to have two of the six hours enforced onto this structure.

So point number seven specifies of course the caveat that maybe adopting a designator model would have with regards to these two powers meaning approval of budget and a strategic plan.

And while there are some doubts to this option as we have received advice that we would have problems enforcing these two powers.

But I think that it's fair enough to put this in the document so the community can be aware that if we chose to go through a designator model structure then we would be maybe losing the chance of enforcing two out of six hours that we have envisioned to provide the community with.

And then I see Robin has a comment on Number 8. She's telling us that eight is a rewrite of two so we might be having some duplicate of language and we would be needing to remove either eight or two.

So Robin would you like to comment on this? And I see Greg's hand is up. Is that an old hand Greg or a new hand?

Greg Shatan: That's a new hand.

Robin Gross: (Unintelligible).

Leon Sanchez: Okay. Could you please take the floor?

Greg Shatan: Yes going back to Number 7 and I think this is why we need to have legal counsel review this carefully.

It was my impression that their advice with regard to the approval budget and strategic plan on the designator model was, you know, not merely a question of the ease and reliability with which it could be enforced by which an enforcement I think is a term that we gain some ambiguity in this document as to whether it is something that's valid in the first place and also whether and it could be enforced if exercised and the exercise was refused.

So I think that the question of whether a budget, whether designators or anybody other than members can have a, the last say on budget and strategy over and above a board was I think unfavorable to designators.

There - we also discussed mechanisms that were short of actual control but they - it was not just a matter of enforcement.

So I'm concerned throughout actually with a lot of very varied use of the word enforcement. I think sometimes when lawyers talk about whether something is enforceable. What they really mean is whether it would be found invalid if you try to enforce it.

And that's a different concept than whether you can find somebody with the right to enforce it which I guess, you know, might be called standing. So maybe we need to think about whether we're talking about validity and standing when we use the word enforcement just like jurisdiction.

It's one of these words that we use and mean different things by it. And I think we need to attain further clarity. But the bottom line is that the lawyers really need to look at this and see whether we've somehow gotten this right or not. Thanks.

Leon Sanchez: Thank you Greg. And you raise a very important and valid point. In this case I think enforceability would lead of course to validity of the option to begin with. So we don't have a valid option through the designator model than it would of course derive from not being able to be enforced.

So I see next on the queue is Robin Gross. Robin could you please take the floor?

Robin Gross: Yes thank you. I think it's really important that we explain to the community why, exactly why we came to the conclusion that we came to.

And the specific word that we heard over and over and over again from our legal counsel for why we must choose the designator model is "enforceability of these two rights."

So I think we have to explain that. And it I'm fine with finding alternative words to explain that. But I think we have got to explain that it is these two issues, the enforceability of these two issues and we can nuance the words, that's fine.

But I think we got to explain what the issue is because otherwise they don't know what our priorities were, what the decision - how we were weighting the different factors.

At the end of the day my understanding is we're saying membership models because we can get these two rights enforced more easily.

So that's what we need to tell the people if that's what the answer is because maybe they might have a different formulation.

And so I think they need to understand what our thinking is and that we made this decision based upon the advice that we received.

I think we've got to be very clear about what the very specific issues is that would lead us to say we can get more tight control with one model over another. Thank you.

Leon Sanchez: Thanks Robin. Yes we should definitely look into providing the community with our rationale is to why we arrived to certain recommendation in our document.

I believe that would be something that could be put in Point Number 2 which describes why the status quo is not an option for us to go with if we want to provide the community with enhanced accountability options.

And maybe there we could expand a little bit that paragraph in order to state what you just said with regards to evaluating the different models.

This is of course the designator and the membership model and how we came into having the membership model as a preferred model with regards to its effectiveness us providing the community with the powers we're seeking to provide them.

So I think that this could be something that we could have some action item here to maybe have a draft pick up on these clarifications.

I don't know maybe since I believe Robin and Greg have a clear view of this on this topic would you be willing to take this action and provide us with a suggested wording for these clarifications?

Robin Gross: This is Robin. I'd be happy to.

Leon Sanchez: Thanks Robin. I see Greg's hand is up. Greg could you please take the floor?

Greg Shatan: This is Greg. I'd be happy to as well but I think we need input from counsel first so that we, you know, are reflecting, you know, their advice accurately.

I think that one of the key things to do as we go through this is every time the word of enforceability is used to consider what we're meeting by it so that we can be clear.

It doesn't necessarily mean the use of alternate words but to be able to use it in contexts or, you know, for the lay reader so that they can, you know, understand what we mean when we say these things.

So I think we need to kind of have that conversation with counsel and then we can go back in kind of get this polished up so that it's clear.

Also I think that there is an issue with, you know, the status quo. I think there are some who would advance the argument that the status quo is in fact a designator model and should be considered as such and that the current SOs and ACs have the powers of designators.

I think that our counsel has advised us that's not the case. But if we discuss why the status quo is not viable or is not preferable compared to either an empowered, an explicit designator model or a membership model I think we need to face up to those.

Also I think that same line of thinking is that the SO, ACs don't need to become unincorporated associations and they could just already exercise the

powers of designators or exercise additional powers given to them as designators or as third parties under the bylaws.

So if that's not the case and, you know, my view based on the advice of counsel that's not the case I think we need to deal with that or else we're just leaving open yet another ring for additional discussion.

And I agree I think that, you know, Robin's, the way I view Robin's point on explanation is that we want to in essence show our work, let the community see how we came to the conclusions we came to and kind of bring some along in our thinking so that when they get there it's at least clear why we ended up where we ended up if not persuasive that knowing what we know and thinking what we thought that they would end up in the same place as well. Thanks.

Leon Sanchez: Thank you very much Greg. And one thing I would like to - I would like for us to keep in mind when drafting this clarification text would be to provide a very clear and simple explanation on what we're trying to clarify.

By this I mean that maybe a suggestion to have in mind could be to not have a very extense - a very extent text on how we are clarifying things but rather very simple and can create.

Thanks for those that are not familiar with the whole discussion within the working group.

So the next point would be Point Number 8 which has already been addressed as something that we need to filter from maybe merging with Point Number 2 else it might be duplicated.

So I think this will also be something we should be looking in with drafters.

So are there any other comments with regards to 6.6.1.1?

I see I think Greg's hand is an old hand but I just want to double check. Is that an old hand Greg?

Greg Shatan: Yes.

Leon Sanchez: So Robin your hand is up. Robin...

Robin Gross: Yes.

Leon Sanchez: ...could you please take the floor?

Robin Gross: Yes thank you. I just wanted to point out there on Number 8 and I said this in the chat also I tried to rewrite Number 2 and that's what this Number 8.

But I actually like the way Jordan rewrote Number 2 so I'm not proposing that we sort of pick one of the other. I think that they kind of go into different directions at this point.

However there is a sentence in there that's duplicative because they started from the same place. And that's the bit about in preparing for the environment post NTIA we've got to strengthen and so this data (closed) not optional.

So I just think we need to take out from one of the two places either two or eight, the part that's duplicative.

But I would leave in the other parts because they go in two different directions and I think they're both can be helpful to explaining our rationale.

Leon Sanchez: Thank you very much for this Robin. So I'll make sure to let Jordan know these comments so he can of course review both points and put something that avoids duplication but keeps clarity into the documents.

I see some comments also from Sabine and Izumi in Greg on the chat. and I don't know if Sabine you would like to share your comments on audio?

Sabine, would you like to voice out your comments or should we just keep them on the chat?

Sabine Meyer: No. Thank you for giving me this opportunity. I was just trying to clarify that the status quo on the designator model because I'm not clear about it but that might just be me.

So I was a bit confused by this juxtaposition between as Greg pointed out comes closest to this data model and then the next sentence be if the designator structure is retained that's the thing that confuses me. That's all.

Leon Sanchez: Thanks Sabine. And yes I think that's we that have been very familiar with the discussion on (unintelligible) be they have been building through what the CCWG might have our options clear.

But I do think that we need to let the community have a look at both or at the different options that we are putting in and let them provide feedback of course.

I see Greg is asking that we need to clearly ask counsel what they met and of course I think is this is something we should definitely do.

So if there are no other comments with regards to this text suggested by Jordan we have a couple of action items one being for me to go back to our co-chairs and drafters to define what we mean by reference mechanism.

And the second action item for Robin and Greg depending of course on legal advice and the legal opinion of our lawyers to provide draft on clarifications that we have just discussed.

So with this in mind I would like to go into our next agenda item which would be Point Number 3. And it is the review of the pending answers.

There are some answers that have been already assigned to the lawyers but haven't been answered so far because of the prioritization of the fact that we have assigned lawyers to.

So I believe that to my mind and if I am not mistaken the questions that we have pending so far are mainly those relating to (unintelligible) issues being those submitted by (Federal) from Brazil and from Jorge Cancio, from Switzerland. And I don't recall having any other pending questions.

Does anyone else remind of any questions that have been assigned and so far not answered by the lawyers?

I see Sam Eisner. I recall maybe seeing some answers to your questions but I'm not sure of that. So we should definitely double check on whether your questions have been answered or not and if they haven't well they would of course be added to the outstanding questions that haven't been answered.

Does anyone else have any other outstanding issues?

I believe that there is also another issue that was commented upon when I was absent and it has to do with a question. I'm sorry I'm seeing David McAuley's hand is up. David could you please take the floor?

David McAuley: Thanks Leon. David McAuley here. To your question of polling for questions I think Dr. (Lissa) asked a question about the basis on which the NTIA has oversight.

I'm not stating his question correctly but he has a question pending I think that Becky took a stab at answering but I'm not sure that the question has been fully answered. I don't know but to the list of things that may be open I would say that may be one.

Leon Sanchez: Yes thank you David. I agree. I was about to jump into that issue as well.

As I said this was something that was discussed in the call of April 8 if I'm not mistaken. And I was absent into that call. That call was kindly chaired by Greg Shatan.

And the question that has been raised by Dr. (Everhart Lissa) is whether there is some legal foundation to the perceived claim by the US government on managing the root and whether that perceived by some claim if there's a way of putting it in those words if it has some legal standing or legal foundation and what would be that foundation?

I think that Becky provided a very comprehensible answer and reasoning to Dr. (Everhart)'s concern.

I don't know if you ask me my personal opinion speaking as a member and not as a co-chair nor as lead of this legal sub team but this is only my personal opinion I would think that this is a question that is out of our charters scope.

And it's also a question that to my mind staying out of scope doesn't also relate to Workstream 2 issues.

And I think I'd like - I would welcome comments on whether we agreed that this question as raised by Dr. (Lissa) is out of our chartered scope and therefore we wouldn't be able to forward it to counsel for answer as it doesn't relate to our work.

I see Greg Shatan's hand is up. Greg could you please take the floor?

Greg Shatan: Thank you Leon, Greg Satan for the record. And I'll will repeat my earlier concern that this is in fact out of scope for what we're doing that it really does not in any way relate to or change any of the things that we're looking at in terms of enhancing ICANN accountability.

Perhaps if we were the CWG and IANA stewardship the question might be germane in that group but quite frankly I don't think it's really germane there either.

In addition I don't think that this is really within Sidley's or Adler & Colvin's, you know, particular strengths although obviously, you know, lawyers can research anything, probably a six figure exercise if we were to assign it to the lawyers.

I think that frankly given that we have a number of people in and around this group who were present at and around the creation of ICANN this is more of a

historical scholarly question. In one sense I'm as interested as the next guy in the answer going back to kind of the dawn of ICANN and the root and how it - control of it shifted over time.

You know, maybe we can ask if we can have a distinguished panel of players and historians answer this. And I'm sure, you know, you know, Milton Mueller has written on it. We've had other things.

But I just think from a point of view of it being a legal question or a question that informs our changes our work based on, you know, what we're - where we're going I just think that it's off topic. Thanks.

Leon Sanchez: Thank you very much Greg. Does anyone else want to add to what has been discussed so far with regards to the question raised by Dr. (Everhart Lissa)?

It's a pity that we don't have him in to express his thoughts on this issue. It would have been a very constructive and very useful for larger group to have him in this call so he could voice out his rationale as to whether or why he sees this question not only as fundamental as he has stated but only in scope with what the work we are doing here.

So of course it would have been useful to have him here and we would have pretty much like to listen to what he had to tell us. I see Greg's hand is up again. Greg is that an old hand or a new hand?

Greg Shatan: It's a new hand. I see, you know, several supportive comments in the chat. I think that we need to bring this matter to a definitive close. Dr. (Lissa) has used the vocal transcript but not the chat transcript from the last meeting to attempt to prove that it wasn't properly dealt with in that meeting and to try to somehow keep this quest alive.

And I think that we need to have a definitive conclusion on the record as to what the viewing decision of this sub team is so that it can be there and be irrefutable. Thank you.

Leon Sanchez: Thank you very much Greg. So then in order to have as Greg suggested -- and I agree with him -- definitive conclusion of whether this question related to the perceived foundation with regards to any allegedly claim by the US government on managing the root zone would be out of scope and therefore not assigned or (added) to the lawyers.

Would those in favor of having this concluded an out of scope question with regards to the CCWG could signal with a green tick so we can account for agreement and have this issue closed definitely?

Okay I note that we have agreement from Athina Fragkouli, David McAuley, Greg Shatan, Izumi Okutani, myself Leon Sanchez, Par Brumark, Steve DelBianco. And I don't see green ticks on some of the attendants. I don't know if that means they are abstaining or they are against or what is the lack of green checks meaning or...

Cheryl Langdon-Orr: Leon, Cheryl here.

((Crosstalk))

Cheryl Langdon-Orr: Leon, Cheryl here. For example I have a network error so I am only an audio at the moment. So there may be technical issues that I think you've got your members capital M clearly voicing it and no objections from participants.

Leon Sanchez: Thank you very much for pointing this out Cheryl. So I see only green ticks. I don't see any red ticks opposing to closing this issue as a definitive position from the legal sub team?

And well with this I think we can have an agreement that Dr. (Everhart Lissa)'s question with regards to the alleged claim of the US government for managing the root zone is out of the scope of the work of the CCWG and therefore not to be assigned to the lawyers for the reasons stated.

So with that I would thank you and go to the next point in our agenda which is the discussion on the overall draft document for public comment.

And I think we have so far addressed many issues that were a concern or are a concern of the larger group with regards to our first draft documents for public comments.

And at this point I would like to open the floor to everyone's to signal any other concerns that you might have or that you would like to address from the legal point of view with regards to our first draft document for public comment?

Are there any comments or concerns from a legal point of view? And with regards to overall draft at this point that we should be looking at or that we should be posing to the lawyers?

I assume of course that any draft that we will be putting out for public comment will be sent to the lawyers for review and of course for advice to check on whether not only what we are stating is in line with the advice that we have received from them but as we stated early that it reflects the strength

and the content of the advice that the CCWG has received so far and incorporating into the document.

So are there any comments with regards to the general documents that are related to any legal issues?

Okay I see no one raising their hand. There is however one need for confirmation that it's a question that was raised by my co-chair Thomas Rickert on having a combination (unintelligible).

This has already answered by the lawyers but we would like to have a confirmation and this would of course be asked when the lawyers incorporate or join these meetings.

And the question is whether we can have SOs, ACs and the NonComs unincorporated in decisions with different voting powers either five by five, two by two and zero?

So this is something we need confirmation from the lawyers. I believe that has already been answered as I said but we would however only take a minute of their time to confirm whether this assumption is right or wrong.

So are there any other comments with regards to this point in the agenda?

Okay so the next one is a discussion and implementation. And for that I welcome counsel. I see that many from the legal team, many members of legal firms have joined us at this point.

I see Ed McNicholas already on the call, Michael Clark and Rosemary Fei and Sharon Flanagan, (Stephanie Petit) and Tyler Hilton. And I assume that Holly Gregory will join us in short.

So with this I would like to begin with a discussion on a wider perspective including the lawyers of course.

And the first point would be to put them up to speed with what we have discussed in this meeting. And we would need to or we would like to touch base with you with regards to some clarifications that we think are needed in the document being of course some language issues that need to be defined and clarified.

And Robin Gross and Greg Shatan will be putting some or providing some suggestive text for clarification on different issues.

But of course we want to get the lawyer's opinion and advice on different matters. So Greg would you be able to comment on this so the lawyers can get a better understanding what we're discussing here and of course provide their feedback so that Robin and you can provide the text on clarifying the different points that have been discussed?

Greg Shatan: Thanks Leon. I'll give it a shot and of course ask, you know, Robin, you, others to chime in.

I think we are primarily looking at Paragraph 7 in front of us. And the question is whether it accurately captures both the advice we've given in the level of certainty around that advice with regard to the powers that designators can have and how those rights can be enforced as well.

And, you know, underlying that is the question of whether we have a designator system currently or not and also the question of whether we need to turn the SOs and ACs into or create a unincorporated associations that take on certain of the characteristics of the SOs and ACs in order to have an effective designator or member model.

So I hope I haven't hacked that up too much.

Leon Sanchez: Thank you very much for this Greg. Does anyone want to add anything to what Greg just said? I don't know maybe Robin or anyone else that will raise concerns with the language so far used in the document. I see Robin raising her hand. Robin could you please take the floor?

Robin Gross: Thank you. Yes I just want to be sure that we are very clear with the community about our rationale for why we can't come to one decision or one model as a preference to the other.

And the word that we kept hearing over and over again was these two rights would be enforceable as easily enforceable.

So I think that's we need to convey that back to the community. And if there are better ways, if there are better words of doing that, you know, I'm more than happy to wordsmith and try to make it as clear and complete as possible.

But I think it's really important that we take the community along with us in our thinking and so they understands why we reached the decision that we reached, what were the factors that we were taking into account and how did we weight them?

And if it turns out that our goal was to have the tightest control possible and this was the advice of counsel that would give us the tightest control that's the reason why we're choosing this mechanism.

So I think we need to just walk them through that process. It doesn't have to be long just a few sentences so they understands that there were six very specific powers we're looking to achieve with this reform.

And two of them are going to be a little bit trickier under the designator model. And so I think we need to convey that. Thank you.

Leon Sanchez: Thank you very much for this Robin. And I would like now to turn to our lawyers for their feedback and their comments on what they've heard so far.

So I don't know who would like to take the lead on this, maybe Holly or...

Holly Gregory: Hi. This is Holly. Good morning everybody. You know, we're coming into the middle, a bit the middle of this discussion and we have sent you, I just sent a markup of the language.

I do think though that we may want to ask Rosemary to comment on the current system because I think it does deserve some clarification. Rosemary are you on?

Rosemary Fei: I am, sure.

((Crosstalk))

Rosemary Fei: And I just posted something on the chat as well. And I do think it's important because I understand why you want to understand what you have before you

decide what to change. But the problem is that frankly what you have doesn't fit under any existing corporate model very well.

It comes closest to a designator model except that our advice would always be that if you want to choose a robust designator model the designators need to be persons so that they can enforce their rights otherwise at best you would have a weak designator model.

You don't even have a weak designator model because a designators weren't given a lot of rights that they could have been given under the bylaws.

There was no effort to give them any say over bylaws whether it's enforceable or not for example.

So I think what you have is just hard to label under corporate law because it doesn't fit well under any - it's not really a membership model, it's not really a designator model. It's a (suey) generous.

So I think if you're going to stick with it with what you have you're going to have huge problems with enforceability.

And if you're going to stay as close to it as you can and you want to avoid creating legal entities to be - to hold these designator functions you're still going to have at best a very weak designator model with no enforceability.

Holly Gregory: Thank you, Rosemary.

Thank you very much for this. I'm sorry Holly.

Holly Gregory: I also while I have you on the line I do want to point out that in this section there's some language that we're uncomfortable with.

And it's not so much in section 7 but it appears in other places where you talk about legal counsel advising that the membership model provides the tightest control of the ICANN Board.

I think we really would prefer to talk about the membership model providing the clearest path to the accountability mechanisms that you want to put in place. And with that I will relinquish the microphone.

Leon Sanchez: Thanks Holly. I see Greg's hand is up. Greg would like to take the floor?

Greg Shatan: Thank you. It's Greg Shatan and I have a follow-up question for Rosemary which is whether you believe under the current construction whatever we call it, whether the SOs and ACs that, you know, are acting somewhat like designators would have the statutory power to remove the board member that they appointed?

Rosemary Fei: That's a great question and one that we've been considering even though the current bylaws are not really what we're trying to be working on.

And I would have to say that I don't think it's clear. If we could convince a court that this thing that doesn't look quite like anything and never labels these people as designators but gives them authority that looks like designators to appoint the board which would normally make them members but instead you said it's the nonmember corporation in the articles and in the bylaws so we know it's not members if we try and shoehorn that into designators and a court said yes we think you probably do have a designator

model therefore we are going to trigger the other rights that designators are given then I think they have the power to remove.

But it is not at all clear to me that that argument is so convincing that I would say oh, yes, if this were challenged the designators could remove their directors now because it is not given to them in the current bylaws.

It's a matter of statute which means you have to convince a court that what you've got which only looks like sort of like designators really makes these people designators for sure. And I just don't know if you can do that.

Greg Shatan: One more follow question when you say, you know, we would try to convince a court since the SOs and ACs are not legal persons, at least it looks like they're not legal persons, who with that we be that would go to court to try to enforce this right?

Rosemary Fei: A director, an officer are given standing. So if one - one of the existing directors went in and said wait our bylaws give these people designator authority therefore they should also have implicit - implicitly the designator authority to remove and they want to remove and someone else is objecting I in theory at least a director has that.

Greg Shatan: So we would have to convince at least one director to go to court to...

Rosemary Fei: Or an officer.

Greg Shatan: ...say that we have - or an officer to say that we have the right to remove another director?

Rosemary Fei: Because you have no people. There's no legal persons who can appear in court.

Greg Shatan: Right.

Rosemary Fei: ...other than ICANN itself and its officers and directors.

Greg Shatan: Thank you.

Leon Sanchez: Thank you very much to both. She and next in the queue is Izumi Okutani. Please Izumi could you please take the floor?

Izumi Okutani: Sure, so this is Izumi speaking. I have a follow-up question. I understand that the current ICANN constituency on the SO and AC is it's not clear.

If nothing on bylaw is state as it is they can be interpreted that we have to designate as model.

But the current thing that we revise the bylaws to clarify that the existing SOs and ACs is that would it be appropriate in understanding that we then on this would actually give clearly the designators the powers?

I'm sorry I suppose what I want to clarify is that the current situation as it is it's we need to be clearly recognized as designators.

But would revising the bylaws to clearly state that they existing SOs and ACs would give the designators the powers that have been listed except for the power to remove the entire board and except for this enforcement of our legal standing? I wonder if my question was clearly understood?

Leon Sanchez: Thank you very much Izumi. Council would you like to answer them back?

Rosemary Fei: I'm sorry. I don't think I understood the question. Are you asking about a scenario where you do not create unincorporated association persons...

Josh Hofheimer: Rosemary?

Rosemary Fei: ...so but you do change the bylaws to make clear that they are designators? Is that the scenario you're asking about?

((Crosstalk))

Josh Hofheimer: Hey Rosemary I think I understood the question. I don't think there was - going in that direction Izumi I think you were asking if we could amend the bylaws to make them more clearly designators. And the answer is yes.

But to give them the powers of designators we are saying you still have to put them into unincorporated associations. This is Josh speaking by the way.

You still have to make them unincorporated associations. And your reference to the particular powers you thought they could have was a little bit was slightly off.

They - we could organize things so that the four powers about proving changes to bylaws of fundamental bylaws would be achievable under the designator model.

And the power to remove individual directors would be achievable under the designator model. And the power to recall the whole board with some additional, you know, cooperation or some mechanisms that would be the

same under designator or member could be achievable under the designator model.

But what we clearly stated is that the power to approve a strategic plan, approve or reject a strategic - proposed strategic plan and to improve or reject a proposed budget could not be achieved.

We think there's great uncertainty in whether it could be achieved and we don't consider it to be viable under the designator model.

So those are the powers you're giving up under the designator model. And if you're comfortable giving those up then, you know, that's a potential route to be taken.

It does probably as Ed could say it does create some potential limitations in the IRP process. But because again you can't reserve certain powers to the designators beyond what the four we just described but you could go that route.

But everyone it has been made clear to us that the additional powers at least in this draft going out to the community are those powers that are desired in this proposal.

If (unintelligible) those powers by the strategic plan and budget then the member model as Holly said is the clearest path to achieving that because you have the greatest certainty in being able to enforce those powers on behalf of the community.

Leon Sanchez: Thank you very much for this. Before going to Alan and Izumi I'm following of course the discussion in the chat. And I do believe that the chart that was

provided to us with the comparison of the different analysis are really comprehensive too.

And maybe what Robin is asking here is to add some language to the document in which this chart is reflected so that the reader of course gets a grasp of what we're talking about when referring to the different rights.

That would be more likely able to be exercised by the community on either model. So that's fair enough. I think that could be added.

But I will remind you that also there will be appendices to the document. And I'm not sure I recall but I do believe that this chart is one of the appendices that will be added to the document so they larger community will of course have this tool in hand so they could have the greater picture in front of them.

So next in here I have Alan Greenberg assuming just that Izumi's hand is an old hand. Is that correct Izumi?

Thank you. So next in the queue is Alan Greenberg.

Alan Greenberg: Thank you very much. If I could follow a couple of chains of thought and make - to make sure I understand.

Under the current bylaws as written today the enforceability issue with regard to directors is if the GNSO names a director conceivably the board could say we refuse to accept that director. You don't really have the powers to name one.

So my question is, is that sort of the issue that could arise and we don't have any standing to really contest that or two is if we amended the bylaws all

everything else being the same but to say the appropriate ACs and SOs have the abilities to recall their director then similarly that director could refuse to stand down saying yes the bylaws say you have the ability but you don't really have standing under California law.

And if I am correct on these assumptions I think - and this is not a legal question but I think in the report we need to make - or proposal we need to make clear that our current model has these lack of enforce abilities in it.

And, you know, the community may well be willing to accept that level of lack of enforceability.

I'm not proposing they would but I think it's something that we have to be really clear on. Thank you. So I'd appreciate, you know, if my interpretation is correct and if not in what way are they not? Thank you.

Rosemary Fei: May I respond? It's Rosemary.

Leon Sanchez: Yes of course Rosemary. Please go ahead.

Rosemary Fei: So I think what you've given are two examples of ways that things could go wrong. But I think that there's obviously a lot of others.

And I think more likely what could happen is the board of ICANN which currently has the power to amend the bylaws and there's no one given, you know, these SOs and ACs don't have the power to oppose amendments that could just amend out a power that an SO or an AC currently is given.

And so they would be following sort of standard corporate practice in achieving a result as opposed to just saying oh we're not going to - we're

going to ignore what the bylaws say. What they could do is change what the bylaws say and no one could do anything about it.

Leon Sanchez: Thank you very much for this Rosemary. I don't know Alan did that address your concern, your question?

Alan Greenberg: Well yes, the first part addresses it. The second part is something we're all aware of and whether we're communities willing to accept that going forward or not is a different issue.

But I - but yes I think that was well understood that, you know, they - the board could at this point remove the, you know, say the NomCom doesn't exist and say ACs and SOs don't select board members and the board simply selects its successors going forward.

That is something it could do. But I'm not sure. There's a lot of concern in the community that it will do that but yes we - I think I understand now.

Leon Sanchez: Thanks Alan. Next in queue I have Athina Fragkouli. Athina, could you please take the floor?

Athina Fragkouli: Yes. Thanks very much. Actually it's I would like to get some clarification on the response Izumi got. So let's say well currently okay ICANN does not charge designators per se.

So if we change the bylaws and we say that SOs ACs are designators are any of the suggested powers achievable or do we have to create unincorporated association in order to achieve any of these powers or all of these powers?

So are there any powers that can be - any powers that can be achieved without having SOs and ACs being established as an unincorporated association?

Thank you.

Leon Sanchez: Thank you very much Athina. Who would like to answer to that?

Rosemary Fei: May I take a stab? This is Rosemary again.

Leon Sanchez: Of course Rosemary, please do.

Rosemary Fei: Athina I think one concern what makes it hard for the lawyers to answer that is when you say established powers the lawyers immediately think enforce those powers.

But if what you're asking is as under your existing system where there are all kinds of powers given to all kinds of nonpersons and there's no enforceability but everybody follows those rules anyway you can - there are powers that it would be legal to give under the bylaws that would not violate the - and the main ones you can't give are anything that would take away from the board it's fiduciary duty to make decisions like on the budget, like on the strategic plan for example.

Other things can be put in your bylaws legally but there just won't be any way to enforce them if parties decide not to follow them.

So when you say can we put them in our - so I'm not - when you ask will it work or can we do it, yes you could put some of these in your bylaws but they won't be enforceable. And there are other things that you couldn't even put in your bylaws because they infringe too much on the board's fiduciary role.

Leon Sanchez: Thanks Rosemary. Anyone wants to add to what Rosemary just said?

Greg Shatan: Well, this is Greg...

Leon Sanchez: Greg.

Greg Shatan: ...if I can just add. I think in the earlier part of the conversation before outside counsel joined I was make it a similar distinction to Rosemary and, you know, said kind of using the term validity to talk about the first kind of thing that you couldn't even put in your board - put in your bylaws.

Sometimes people use the term unenforceable to refer to things like that. It usually means that if you get to court you're going to get kicked out.

And then the second kind of enforceability which is standing which is, you know, having nonpersons we have no way to enforce something that's even valid.

So I think we were kind of talking along the same lines and I think those are the same distinctions. You know, one case something is it is invalid or void (avinisio) and in the other case is fine, great you have that power but just try to enforce it, you know, with your ghostlike presence. Thank you.

Leon Sanchez: Thank you very much Greg. I see Ed McNicholas's hand is up. Ed could you please take the floor?

Ed McNicholas: Yes. Just to comment further a bit on that. I obviously agree that it would be easiest if the organizations became unincorporated associations. It would be the fastest, most effective way of having the rights enforced. That's certainly the recommendation.

The alternative if the - if that was just inconsistent with their cultures and they would refuse to do that or could not do that effectively would be to have a natural person designated to speak for that organization like the executive director personally.

And then the executive director would have the rights to go - of the entity would have the rights to go in and enforce it. But then there is the issue of the control of that group over that exec over that person.

But that would be, that is a possible middle ground to go with. It's not the recommended approach but it's a possible middle ground.

Leon Sanchez: Thinks for this Ed. So any of the comments so far to what we have discussed?

Excellent. So well, we discussed that we would like to have confirmation from the legal team on whether the text that we have discussed duly reflect the advice that they have provided us.

And I see that Holly has requested a very reasonable need to review the document before providing us the views on whether it really incorporates or reflects the strength of the advice they have provided us with.

And well as I said earlier I think that in any case we will be submitting our draft documents to the lawyers so they can go through it and validate that what we are putting into the document is not only in line with what they have advised us but also accurately reflects that advice that they have provided.

And I see Holly's hand is up. So Holly could you please take the floor?

Holly I believe you might be on mute.

We cannot listen to you Holly.

Okay she's dropped off so we'll wait for Holly to be back online. And meanwhile we'll go to Alan Greenberg. Alan, could you please take the floor?

Alan Greenberg: Thank you very much. Something that I think we need to have in the CCWG report -- I don't think it's there now but I could be mistaken -- I think we have gotten legal advice on it but I'll state it here.

The question is does a member of the SO implicitly will that entity implicitly be a member of the unincorporated association?

We've heard that for both the GAC and the ccNSO that government entities may well not be allowed to join an association even though they have joined the GAC or the ccNSO as a nebulous non-thing.

And I think we need to be clear in our report when we're asking for input exactly what the status of these organizations would be with respect to the unincorporated organization - unincorporated association. Thank you.

Leon Sanchez: Thank you very much Alan. Does anyone want to answer to answer to Alan's question?

Rosemary Fei: We've considered it and this is Rosemary. The unincorporated association law and now I am talking about California's unincorporated association law, but that would not necessarily have to be the law where the unincorporated associations were formed. California has a fairly robust one so it's not a bad choice.

The unincorporated association law requires that there be at least two persons who are associated.

Once you get past having at least two persons who associate -- and you can call the members, you can call them associates, you can call the something else -- than the law says that the entity can create its own rules for who are considered part of it in terms of whether you again you call them members or associates or participants, doesn't matter.

But conceptually they are the people who are part of this association having something to do with association. They do not have to be persons. So that's part I think of what you're asking.

I think another part has to do with what it means to join perhaps? Are you asking that?

Alan Greenberg: Yes I think so.

Rosemary Fei: So the Articles of Association, that's the governing document of an unincorporated association. The Articles of Association can provide for whatever mechanisms are desired for people to become a part of participate or whatever you want to call that relationship associate with the association or un-associate.

And those can be as relatively loose or relatively rigorous as the association wishes.

Our proposal was that you would basically use what you've already got in the ICANN bylaws.

Now again devil in the details but in general that we would take what you already have in ICANN bylaws and other existing governing documents that talk about how a particular SO or a particular AC operates how people can join it whatever join means to that entity, how they stop participating that we would just piggyback on all of that by having the Articles of Association point to the existing documents that tell the community how these entities are formed, who composes them, how those people come and go. So we weren't proposing to change any of that.

We will need at least two legal persons to be part of each unincorporated association. But beyond that the other participants don't have to be legal entities and how they come in or how they leave can be the way you have it now.

Leon Sanchez: Thank you very much for this Rosemary. I see Holly is back on the call.

Alan Greenberg: Yes and...

Leon Sanchez: So Holly...

Alan Greenberg: ...Leon can I have just...

Leon Sanchez: Yes?

Alan Greenberg: ...for clarity?

Leon Sanchez: Yes of course Alan.

Alan Greenberg: Yes. I guess the substance of what I'm asking is would it be possible to have - and I'll use the example of the ccNSO, a ccTLD participating in decisions of the ccNSO but not deemed to be a member of the association because that seems to be the critical stumbling block that we're at?

Rosemary Fei: So okay for me to answer Leon?

Leon Sanchez: Please do.

Rosemary Fei: So the unincorporated association can set its own rules again presumably piggybacking on all these existing highly developed rules that you already have for each SO and AC as to who can participate and on what basis.

That does not require that you call them or consider them a member. Is that the question? Have I got it now?

Alan Greenberg: I think so. I'm not the one objecting so I'm trying to put words in the mouths of people that I don't quite know but yes. I think so. Thank you.

Leon Sanchez: Thank you very much. So next in the queue is Holly Gregory. Holly could you please take the floor?

Holly Gregory: My apologies to everyone for falling off the phone line.

I just wanted to ask Leon when you expect the next draft to come out so that we can plan when we need to be ready to comment?

We've certainly been taking looks at the drafts that have come out and we started commenting. But it's moving so fast we haven't had a chance to sort of

mark it up and send it back to you. So we thought we would save our comments for the next draft.

Leon Sanchez: Thank you very much Holly. As you have rightly pointed we are going really fast in through our reviewing the different documents and incorporating changes to them.

So I believe that we have new draft versions as of now. And of course I will be forwarding it to you so you can have the latest version in your inbox shortly.

And I - since we need to come out for public comment on May 4 I would suggest that you begin reviewing this last draft that I will be sending you shortly.

And if there are any outstanding updates to this last version we would of course hand it to you on a redline and revised version so you can clearly see what the changes are in the subsequent versions.

Would that...

Holly Gregory: Leon?

Leon Sanchez: ...work for you?

Holly Gregory: Leon if I may as soon as you get us the revised draft we will start working on it and commit to having our comments back to you within 24 hours.

Leon Sanchez: That is perfect. I think that would definitely work for us. And as I said I just want to be clear of whether this method would work for you as well?

Holly Gregory: Yes, absolutely. Thank you.

Leon Sanchez: Excellent. So next on the queue I have great Shatan. Greg please take the floor.

Greg Shatan: Thanks it's Greg Shatan. I think if we finish the previous topics I wanted to bring up another topic that has come up in the chat which is whether unincorporated associations or at least California unincorporated association, you know, could it be disregarded in litigation outside the state of California or outside the United States?

I'm not looking for 50 state survey or 170 country survey but the question has been raised that because unincorporated associations are somewhat, I wouldn't say novel but they vary a lot from jurisdiction to jurisdiction even within the US that they could be disregarded both in their attempts to bring litigation or in their attempts to invoke limited liability if they were defendants in a litigation. You know, I'm clearly aware that we in US courts we see all sorts of foreign entities -- GMBHes, ICANN gazelle shops, SPAs, SAs.

I don't - I'm not a litigator but I don't recall seeing cases where they've been disregarded but that doesn't mean that they don't exist by any stretch of the imagination. And plus I'm not counsel here. I'm just a participant.

So I'm wondering what the thoughts of counsel are on kind of the dangers of, you know, in - especially in a global setting that we're in of using the California unincorporated association structure rather than say the California public benefit corporation structure which at least would be more recognizable.

I don't know whether it mean to be less likely or more likely to be disregarded but there's a question of that that has been raised so I wanted to kind of put that to counsel. Thanks.

Leon Sanchez: Thanks Greg. I don't know counsel do you want to react to this or should we go to Mike Clark who's next in the queue?

Michael Clark: What I actually put my hand up to react to this and others can chime in obviously.

But in all 50 states of the United States I think it is fair to say that unincorporated associations are not novel creatures and so that it would be very surprising to find a state where they aren't allowed to be sued or to sue.

What is different is that California actually has a pretty robust statute providing protection from liability from members of unincorporated associations form for public benefit purposes like ICANN would be.

So I think in the United States you could have pretty good assurance that an unincorporated association would indeed be able to be sued and to sue in pretty much any court in the country.

Outside of the United States, you know, it's that would be a rather substantial job to inquire about all of that. And Ed McNicholas is actually is probably better equipped to answer that.

But here in the United States I don't think that would be an issue.

Leon Sanchez: Thank you very much for this Mike. Next in the queue I have Robin Gross. Robin could you please take the floor?

Rosemary Fei: Thank you. Can you hear me?

Leon Sanchez: We do hear you.

Rosemary Fei: Okay great. Yes I think when it's really important to recognize that the vast majority of people who would need to rely apply upon these protections are never going to step foot in the United States ever.

So I think we need to have that as our framework for when we start thinking about what kind of protections do these statutes actually create to the people that we're trying to create them for.

So if you're thinking about this from the perspective of okay somebody who never set foot in the United States what kind of legal protection does this actually provide to them, that's really the question.

Not, you know, does one state within the US recognize protections and another state with the US. This is global.

And so we actually had some legal memos on this very issue of unincorporated association very early on in our work.

So if you look at the March 18 legal memo from Sidley Page 7 it talks about this. And it said benefits of an unincorporated association are that there are very few statutory requirements that they can be more formally operated.

However there are a number of disadvantages to structuring as an unincorporated association including the following.

Number of non-US jurisdictions do not recognize the existence of an unincorporated association. As a result these jurisdictions may look through the association and hold the individual members of such association liable.

So I think that we need to bring this issue out. I don't think we can just pretend like everyone's going to be in the United States and we're done, no problem.

We're talking about people who, most people are going to be outside of the United States and never going to step foot into the United States.

And what is this in fact mean for them? Thank you.

Leon Sanchez: Thanks Robin. I think that to have a more clear view on this maybe an example would be useful. So I believe that I don't know if that was Rosemary or Holly that wanted to react to this?

Holly Gregory: Yes, this is Holly. So first of all that advice within the context of thinking about how to organize the potential transition on the CWG side of things.

It doesn't speak to the specific issue here which is how do you give powers to the community to enforce vis-à-vis the board and rights under the bylaws?

While it may be true that unincorporated associations may not be recognized in other jurisdictions any time that members or designators are trying to force their rights under the articles or bylaws vis-a-vis ICANN that issue will be governed by California law.

And if California law doesn't recognize an entity I would think that even in a foreign jurisdiction that entity would have difficulty enforcing its rights.

The truth of it is if there was ever a problem where one of these unincorporated associations wanted or needed to enforce their rights they would very likely come into a California court or into a court that would recognize the law of California as governing the internal affairs of the organization.

And so Robin I don't quite understand the concern. If someone has a right that they want to enforce that they're free to go to find a court in which they can enforce that right and yes they can go to a court in which they can't enforce that right and not be recognized but it doesn't make a lot of sense.

What we're saying is we're giving a mechanism so that there's a fair degree of certainty that there is a forum in which these rights can be enforced.

Now in addition to that we are, you know, and I will let Ed weigh in there is consideration of what could happen through international arbitration.

In international arbitration though the arbitrator is also going to look at one of the rights under the law of the jurisdiction in which the rights are created. And therefore this issue around unincorporated association is critical no matter where in the world we are talking about potentially enforcing these rights.

Leon Sanchez: Thank you very much for this Holly. I'm mindful of the time. We still need to go through the IRP issues which were added to our agenda. And Becky has a hard stop at the top of the hour.

And I see many hands up. So I would kindly ask you to keep it as short as possible. So Sam Eisner you're next on the queue.

Sam are you on mute?

Sam Eisner: Yes. Sorry about that. Can you hear me now?

Leon Sanchez: We do hear you.

Sam Eisner: Okay great. I wanted to raise a point that we mentioned briefly on the CCWG call yesterday and that we were feeding back into the stress test point.

And that was getting some further information about what rights - what are the statutorily given rights to individual members within a membership organization and how are those balanced with the community rights?

So for example if there's a statutory given right for members to bring derivative action for individual members is there - are they able to be constrained through the model that we're identifying for ICANN such that that right would only be able to be exercised when there has been a community threshold reached to take such action? Or is that some for example one of the rights that would continue to (unintelligible) individual members such that we need to think about, you know, are we giving additional rights that unintended effects and have the ability for individual members to have the individual level of "control over the affairs of ICANN" as well?

Leon Sanchez: Thanks Sam. Any reactions to this? I see Ed McNicholas hand is up then Josh Hofheimer.

Ed McNicholas: Yes. I just wanted to follow up briefly on what Holly was saying about the potential exposure in other countries.

I mean fundamentally if you wanted to bring an action against ICANN you would need to be in one of the jurisdictions where it has an office so that she could be - you could actually enforce it and assure yourself that there was jurisdiction of those courts over ICANN.

And so as opposed to looking at the issue of about whether unincorporated associations would generally be acknowledged internationally if we want to do a middle ground we could look at the seven countries US in addition to the US I mean by Turkey, Singapore, China, Belgium, Switzerland, Uruguay and South Korea, look at those countries and see how they would resolve the choice of law question because as the initial choice of law question whose law applies?

Is it the law of California or the law of the forum and then the ultimate question about whether they would look through an unincorporated association or not.

That may be one way of resolving that issue if CCWG wanted us to take a look at that. So I just offer that as a possible middle ground.

Leon Sanchez: Thanks. So if we - I'm mindful of the time and as I said Becky has a hard stop at the top of the hour. So maybe we could jump directly into the IRT process.

That was also suggested by the lawyers to be added to the agenda. So Becky could you please give us a really quick view on this so we can have the lawyers react to this?

Becky Burr: I think that the lawyers maybe had questions that they wanted to ask. I mean the basic notion would be that the IRP has the authority to say no ICANN you did this wrong or it's not in your scope, not in your mission or it's not

consistent with an existing policy. But then it would be left to ICANN to figure out how to fix it.

So it's not, you know, they can't mandate the outcome other than to say in a binding way that what ICANN did was violated mission commitments core values and/or an established policy.

Leon Sanchez: Thanks Becky. So for our lawyers do you have any questions on the IRP? I assume that you have you since you suggested that we added this to the agenda. Could you please post your questions at this stage?

Ed McNicholas: This is Ed McNicholas. It's my hand is up.

I would - so the question was...

Leon Sanchez: Yes, Ed, please.

Ed McNicholas: ...this. On the rule of decision issue there's a question about whether the rule decision should be limited to the ICANN bylaws guarantees core values or should it extend to any other applicable laws such as breach of fiduciary duty or tort duties or such or is it envisioned that the IRP would be deciding based solely on reference solely with reference to the bylaws?

Becky Burr: It's an interesting question. I don't think that we have really discussed the breach of fiduciary duty and other issues there. And it was sort of intended to be, you know, a kind of quasi-constitutional court in a sense.

I'm curious as to what people, other people on the call who have been participating in the discussions have to say about that. But the bottom line is we actually haven't discussed them.

Leon Sanchez: Thanks Becky. Ed back to you.

Ed McNicholas: Okay. Another issue there was an open issue pointed out about outsourcing operations of the standing panel. Do you - would it be helpful for us to add in our comments a kind of sketch out what that might look like such as the International Chamber of Commerce under the International Court of Arbitration, that sort of rule and clause or you just want to leave it as a general reference to it might be outsourced as a secretary function?

Becky Burr: I think that that is something that ICANN certainly wants to be able to consider but, you know, probably would be useful to have, you know, a bit more meat on the bones.

Ed McNicholas: Okay. We can suggest some language for consideration certainly.

We did want to add in or we were going to suggest adding in on the standing section that one of the standing elements would be the party invoking the process would agree to be bound by the process.

And I think we need to add that in for to make the arbitration clause binding on both sides but...

Becky Burr: Right.

Ed McNicholas: ...I wanted to make sure that was an acceptable thing to add in.

Becky Burr: That yes, that's intended.

Ed McNicholas: And the other issue is the - what - there's a question about geographic diversity and obviously that's a significant value.

There is not a position here on the location of the arbitration and that's usually specified. Were there - was there a preference to do it in a given location such as where those offices are? Are we only in Los Angeles or would it be a virtual panel meeting by email like a lot of WIPO panels meet?

Becky Burr: No. I think it's not limited to being virtual but, you know, to the extent that ICANN has - I mean again I actually think that's a question.

I suspect ICANN would prefer to be that it be in Los Angeles where the legal staff is but, you know, it might be a reasonable thing to say where they have, you know, offices. So that would be Brussels and LA and perhaps other places. I don't know.

Ed McNicholas: Okay.

Becky Burr: So, yes.

Ed McNicholas: We could - we'll suggest language either way. That...

Becky Burr: Right.

Ed McNicholas: ...was fine. So those are the questions I have. Thank you very much.

Becky Burr: Great.

Leon Sanchez: Thank you very much for this Ed. Thank you Becky. I think that if there are no other questions in regards to IRP we can go back to the discussion we were having.

But I would also like to get confirmation from lawyers on an item that was suggested by (Michael) (unintelligible).

And I am mindful and aware that you have already provided an answer for this question. It's just a confirmation to double check on whether we are understanding well.

And the question is whether we can have SOs, ACs and the NonCom being unincorporated institutions with different voting powers as seen five by five, two by two and zero structure.

Is this something that is right? I mean I - the reply we had is that this was in fact feasible. We would only like to confirm that this is in fact viable.

Rosemary Fei: This is Rosemary. I think the question is, is it okay for some to elect just two and others to elect five? Is that the question?

Leon Sanchez: No. I think the question is that whether the SOs, ACs, NonComs being unincorporated can have different voting powers.

For example having the SOs having five members into the community council then the ACs may be having two and then maybe the NonCom having zero votes so this would be the question.

Rosemary Fei: Votes on what? I'm sorry I am not quite understanding. Our - so one concept that we've raised is the idea that there could be a trigger for board I - think I just lost my connection.

Holly Gregory: Rosemary?

Rosemary Fei: Sorry, no I...

Ed McNicholas: No, you're still here.

Rosemary Fei: Yes sorry my phone made a noise. I'm going to ignore it. So we've - we keep hearing this idea that there might be a community vote which would be broader than the members or the designators. In other words broader than the SOs and ACs.

And we don't know quite what that would look like. And of course it raises all kinds of issues. But is that the vote you're talking about Rosemary...

Leon Sanchez: Yes. Holly.

Holly Gregory: So as I understand it Rosemary, you know, I'm going to try to clarify as I understand the question.

You're - the question is whether or not the different groups could have the right to appoint a different number of members to have a different number of membership seats on this membership body. And if that's the question I think the answer is yes.

That's also a way to look at differential voting power because if you have more seats on that body you have differential voting power. Is that Leon what you're getting at?

Leon Sanchez: That is exactly the question Holly.

Holly Gregory: Okay. So as I understand it and I think I've learned this from Rosemary, Rosemary can you just confirm that different groups could have different numbers of seats that they are allowed to have on this membership body and therefore by their nature if all individuals on the membership body then have the same rights there would be differential voting?

Rosemary Fei: Well what we've proposed is actually that each member would be its own class of membership, would be in it - would be a sole member in a class of membership which is what allows us to have some - one member elects these four seats or six seats or two seats. I know these are real numbers.

And another member elect different seats and not have to worry - each member doesn't have to consult any other member about it seats tickets to elect its own. And we do that by making each member in a class.

There are very - there are only a very few occasions where I could imagine the membership as a whole coming together to vote on something.

Mostly they're electing their directors. So then they don't have to come together to do that because a single SO decides internally through its own procedures who it as the SO member is going to put on the board.

So I'm not quite sure what decisions you're thinking about as having sort of the whole membership collectively doing anything. That's why I was thinking about those community votes to recall the full board.

And because those are not official membership actions those are more like no-confidence votes it's not as though that vote itself is actually going to remove anyone because the full membership cannot remove the directors that are elected by one class of members.

So that's why we would have the either springing resignations or some sort of a contract among the members so that you could run through the entire - sorry recall the entire board.

But the triggering of event would not be a membership vote necessarily. It could be if you wanted to be in which case each entity that's a member would get one vote and they would not be weighted.

But you don't have to use a membership vote as the triggering event. The triggering event could be some sort of community poll of the entire all the users of the Internet.

Now I'm not suggesting that you want to do that by any means. But my point is that the triggering event could - doesn't have to be tied to who the members are or what weight they would have in a membership vote.

Leon Sanchez: Thanks Rosemary. Thanks Holly. So I see the discussion is ongoing on the chat with regards to the unincorporated situations, the liability, the many issues that this - the many concerns that this issue raises.

And while of course I think this is something that we must keep discussing off-line I mean of this call in the list. And with regards to implementation we have discussed that there would be of course a timeline involved.

And I don't know if that's all the questions that could be answered is which would be their requirements for having this unincorporated associations established and which would be the rough and the timeframe for the (unintelligible) OACs to have them organized as unincorporated decisions.

So I don't know if you could provide us with a little light on this subject.

Does anyone want to comment on that?

Michael Clark: Leon if I could, this is Michael Clark again.

Leon Sanchez: Yes Mike please.

Michael Clark: In terms of the time it takes to form an unincorporated association I think if we use the methodology that Rosemary was speaking about that we just use the existing mechanism as a base it's a fairly simple filing requirement with the state of California to essentially acknowledge that you're claiming it unincorporated association status.

So I think we gave an estimate of helping people draft some of those documents of a couple of weeks or so. But in terms of once the documents are drafted as a fairly quick process if people would like to file in California.

If they want to file somewhere else while then that would be a different question.

Leon Sanchez: Thanks for that Mike. So yes Rosemary you want to add to this?

Rosemary Fei: Just a minor clarification which is that the creation of the unincorporated association arises once the Articles of Association have been drafted and executed.

The filing is an optional formality to kind of confirm that your operating as an unincorporated association in California. But you aren't legally required to make it. We would recommend it but you don't have to do it.

Leon Sanchez: That is a very important point. Thank you Rosemary.

So I'm mindful that we have passed the top of the hour already. So are there any other business that we should be looking at this call? Does anyone have any other comments?

I assume that with the feedback that we have received through this call then Greg and Robin who volunteered to provide with clarification text on what we discussed on this call would be on the position to provide with this suggested text. Am I right Greg and Robin?

Okay I see Greg agreeing and I would assume Robin would be also in a position to provide the feedback.

So if there are no any other business to raise at this point we could have this call adjourned. So I thank everyone again for joining us today attending this call and we will talk to you soon.

Thank you very much to the lawyers as usual. We have a very fruitful discussion with you and are really grateful for your thoughts and insights.

So thank you very much everyone. Talk to you very soon. And this call is now adjourned.

Woman: Thanks everyone. Bye.

Leon Sanchez: Bye-bye.

END