

**ICANN**

**Moderator: Brenda Brewer  
May 29, 2015  
2:00 am CT**

Coordinator: The recordings have been started; please go ahead.

Grace Abuhamad: Thank you. Hi, everyone, this is the fourth meeting of our high intensity session. It is the 29 of May at 702 UTC. And we will be discussing the PTI and PTI Board composition today. Turning it over to the chair.

Jonathan Robinson: Hi, everyone. This Jonathan Robinson. Welcome to our fourth of the high intensity meetings. We've been through a productive set of meetings yesterday including detail on the - a detailed systematic work through of the public comments.

We'll take a slightly different approach here now because we're going to deal with some substantial items including in this case the PTI Board and scope of PTI.

So I'd like to just make sure we level set. And first of all, thanks to everyone of you who's come at a particularly unsociable hour for anyone outside of Central Europe and east of that. It's a late call for the North Americans particularly.

So we are really trying to use these high intensity meetings to generate and finalize the substance for the input to the final proposal as completely as possible and in so doing support staff in their preparation of that document.

What we have to do is recognize where we've got prior agreement and then also deal with any modification of that as appropriate based on the public comment. And close out all of the necessary open issues. And as we highlighted yesterday, recognize where some items can be left for future implementation.

In any event our necessary outcomes are the sufficient closure on the key items and doing justice to the public comment period and providing a necessary level of detail.

This PTI structure and in particular the Board seems to have generated a lot of traffic. And there's a couple of important points that we'll come back to in a moment. But I think there's one - certainly one key theme for me is that we did significant work on this and received significant input on it after we prepared the draft for public comment. So it's a challenge to manage the work that we've done and mesh that with the public comment.

I also think that what we need to be mindful that a lot of the work that we did was based on the legal input we received. And it's important that we don't retain that in the front of - that we do retain that in the front of mind.

So very briefly, and I know we touched on this yesterday, but just to make sure we orient ourselves with this, you know, as of Singapore we had the four structures and we added some more. And in Singapore we got the criticism over the lack of operational specifics. We've done a lot of work via the design

teams and pulled together much of the operational detail. But we also had no legal advice in place in Singapore and so that was a critical objective coming out as was our plan to exit with the new working methods with respect to the design teams.

So as you know, we removed the RFP groups, got on with the design team work, and moved into a high intensity phase of working. And we were somewhat criticized for focusing overly on structure and less so on operational details. And so our decision was to put the structure into a separate track pending the legal advice.

As you know, we then went out and procured and secured the support of very able legal advice from Sidley Austin. And we took Sidley with us - or invited them to participate with us in our face to face meetings in March, which only two months ago now, in those intensive two day meetings were face to face.

We entered that with seven structures, the seven that were derived from prior to Singapore and added to during Singapore, and had substantial discussions within the group together with Sidley and worked through and exited with effectively two variants of a so called internal model. So we set aside the external model for a variety of reasons and that included both some very rationale reasons on all sides but a willingness to compromise and listen to some of the key points that were being made including that from the legal advisors.

Coming together in the middle of April we decided to really start to integrate and finalize wherever possible the work of the design teams. And we saw from Sidley at that - for the first time, a punch list of critical items that needed to be resolved, which has been very helpful in keeping us on track, and use

that to finalize the content of the proposal for public comment including focusing in on a single variant of the structural model.

And so I thought it would be useful to just remind ourselves exactly what we said in that document with respect to the PTI and the PTI Board. Thanks, Grace. So, Grace has put up in front of us in particular focusing on the PTI Board and it focuses - as you can see we were not particularly wordy.

And we based our input on I believe some work that we've done with Sidley in the run up to preparing the document for public comment including a visual representation that we - of the structural model that we received on or around the 20th of April right towards submitting the document.

And here we said as a separate legal entity PTI would have a Board of directors or managers. The PTI Board could be an ICANN-designated Board and have the minimum statutory required responsibilities. The CWG Stewardship expects that this would avoid the need to replicate the complexity of the multi stakeholder ICANN Board at the PTI level and maintain primary accountability at the ICANN level.

And of course you'll know that what the implicit reference there is to the work of the accountability group. Any issues that arise concerning the PTI and PTI Board would - and I will insert my own word here - would ultimately be addressed through overarching ICANN accountability mechanisms, since we as a group know that that is the ultimate recourse but we do have lower level, if you like, accountability mechanisms for the PTI such as the CSC and the opportunity to escalate through to special review and so on.

So we did significant work after having put that document out. And I think it's really important in considering the public comment and our own views of this

to remember that because what we then did after having put the document out to public comment we really - we picked up a revised legal structure summary from Sidley on the 3 of May, we continued to revise the punch list as we dealt with things.

But in particular we asked Sidley to prepare for a few key memos. One on the 7th of May on the PTI Board duties and the costs associated with it. There was some concern around costs and whether or not significant costs would be incurred and that's been followed up through a discussion with ICANN finance for other cost implications of PTI.

You'll remember that the costs associated with the legal side of things were more administrative than substantial but that was a focus of attention. There was also focus given to two key areas which were ultimately addressed on the 7 of May and the 13 of May.

On the 7 of May we had a table comparing a public benefit corporation for the PTI versus an LLC. And on the 13th of May we looked at two different memos; one was focused strongly on the public benefit corporation versus limited liability company, and the second was focused on the Board.

And there was - we essentially subjected in the - the public benefit corporation or limited liability company took us through a set of various steps and issues that we needed to consider. And the memo on the PTI Board took us through some stress tests for the Board and what the implications of that were.

My reading of it, and I said this to you at the time, was that - Sidley were essentially equivocal on the not - on the nature of the corporation but very firm and unequivocal on the nature of the Board in terms of whether or not it was a so called insider or outsider Board.

I think this is probably not a bad time to - I see we have got participation from Sidley. And I think this is not a bad time to probably give Sidley an opportunity to revisit and recapture probably significantly those May 13 memos and just have an opportunity to say a few words about that to make sure that we are on the same page on these.

So, Holly, is it possible to call on you to make some remarks about those two memos and any other thoughts you have in and around the - both the PTI structure and the Board?

Holly Gregory: Certainly. Certainly, Jonathan. And good morning, a very early good morning from the US to all of our international friends on the CWG. So, Jonathan, I was taken by the description that you had of how we've gotten to the place that we are.

And I think that we have to acknowledge that the discussion that we have around the PTI Board really at one extreme, and I'll describe that extreme in a minute, in some ways does threaten to unwind some of the work that's been done and the compromise in Istanbul around what we called at the time the internal accountability hybrid model and with a legal separation variant which is what the proposal ultimately centered on.

So let me walk through those May 13 memos. And I would also, you know, point you to the April 4 memo that talked - that was right after Istanbul that talked about the two variants that we looked at after Istanbul one of which was a true internal variant, an accountability internal variant but there was a lot of interest in that had no attempt at legal separation.

And then what we focused on which was this mechanism of in the, you know, near term having an entity that was a legally separate construct within ICANN that ICANN would be the sole member of which contemplates a degree of control over ICANN but that would allow for sort of a separation that would allow for there to be two parties to a contract and would also allow for the assets and people involved in IANA and the people in particular who are viewed as, you know, functioning well in this currently to be identified into a form that should things down the road go really, really, really wrong you would have an easier way to make the very formal separation by having already identified what that entity is so that you weren't trying to do that at a time of great crisis because if we ever get to a point where separation is necessary by definition that's coming out of some real, real serious problems in how things are operating.

So let's talk about what I mean when I talk about this continuum. So we centered on having a hybrid model that would have this entity internal, PTI internal but structural - legally separate. And it would rely heavily on accountability mechanisms that - hello? Can you hear me?

Grace Abuhamad: Yeah, we can still hear you.

((Crosstalk))

Holly Gregory: Someone had dropped off. Oh there we go. So in any event I'm not going to go through the accountability mechanisms but you'll recall we came out calling this an accountability hybrid model because we were so focused on the need to make sure that the community had real powers to hold ICANN accountable and this was a key aspect.

And those are the things that CCWG has worked on to make sure that you can recall the Board, remove individual directors, have a say in budget and strategy decisions by having some ability to veto and hold the Board accountable there and your ability to also provide for strengthened independent review mechanisms.

So when you think about this separate legal entity that we call PTI, what makes it separate? Is that it has a formal legal construct, and we can either do that through the mechanism of a public benefit corporation, very similar to same kind of entity that ICANN is, or through an LLC.

And as Jonathan indicated, we covered that in detail in the May 13 memo that's entitled Non Prof Corporation versus Limited Liability Company. And we are a bit agnostic about which way you go. What I want to highlight though from that memo is it does discuss what a Board of a public benefit corporation would need to do.

And to get an idea of what this governance entity of PTI might need to do. And it's really fairly minimal at one extreme. It can be really kind of minimal to abiding by some legal formalities around keeping minutes, adhering to the articles of incorporation and bylaws by the PTI entity, selecting the officers, you know, meaning, you know, who's going to be the operational, you know, head of that entity, adopting a budget, issuing some reports, etcetera.

Where - so if - as you think about this hybrid, which is we - there was great pressure to think about how do we keep things in many ways very much the same in that IANA is internal, it continues to operate the way it does in large measure we maintain the benefits of the current system while figuring out how to improve and protect for the future.



The notion is you've got - ICANN as a member and then typically an affiliate or subsidiary situation like that that parent entity would select - would have the power to select the Board and through that would have the ability to help to continue to influence the operations of that subsidiary.

If you go to a wholly outside Board, meaning at the very extreme of outside Board, is some entity other than ICANN determines who the Board is, so for example the community would determine who the Board is, and the Board would be made up of people who are not ICANN staff, you really have gotten away from the hybrid nature of the - this internal accountability mechanism.

It really is in some ways no longer really internal at all, it's external because you have a group that's wholly separate from ICANN the corporation and the member controlling what the entity does. And in that situation, as we pointed out in our memo, and the more you go that way, the more it's - you cannot hold ICANN accountability for what happens at the PTI level and therefore you will need to build in a whole new set of the same kinds of accountability mechanisms that we're currently building in for ICANN the corporation.

So in our memo we didn't - I confess, in our memo we didn't discuss a truly outside Board meaning somebody other than ICANN selects a PTI Board and it's comprised of outsiders. We I think assumed to a degree that ICANN would have some say in what we called either an outside Board or an inside Board.

By insider Board we defined it to mean a PTI Board that was comprised of a majority of directors who were actually employed by ICANN including members of ICANN management who were responsible for the oversight of the IANA function. And these - we contemplated that these persons would be

appointed to the PTI Board by ICANN which would be the full member of PTI.

And we said, you know, you can vary just a little bit, you can have one or two outside persons on the Board so long as the majority was folks from ICANN management who are responsible for the oversight of the IANA functions, we would consider that an insider Board.

And we felt I think and cautioned - we felt that that was probably from an accountability perspective based on the mechanisms that you've been working so hard to design, that in some ways that was probably preferable and we cautioned, and I'm going to quote, we caution at the outset that with an outsider Board model for PTI the key advantages of maintaining PTI as an entity that's related to ICANN are undermined since ICANN would have no control of PTI other than those rights reserved to ICANN as the member of PTI.

And it seems to me that's in some way what we're discussing and debating, how much should ICANN as the member of PTI, have the ability to select the Board, determine the Board.

We also noted that additional accountability mechanisms would need to be developed to hold PTI accountable to the community since the accountability mechanisms currently under development for ICANN would be largely ineffectual, again, if you have a separate group of people who were not appointed by ICANN and who do not have - and are not members of ICANN management, if you will, then when they're making decisions around the IANA functions and the community is unhappy with those decisions you don't have the ability to use the ICANN accountability mechanisms to try to seek change, you would have to create other accountability mechanisms.

So I know I've gone on for a bit. And, Jonathan, if I haven't addressed something that you were hoping that I would address, please let me know. But I'm going to pause.

Jonathan Robinson: Thank you, Holly. I would say it's - I wasn't, in one sense, hoping you would address anything. It's been very helpful - my biggest concern is that this is complicated and work that we've worked on intensely over a sustained period.

Collectively, as a group and together with you we've built up a construct and also together with the work with the CCWG we've built up a - what in my view seems to be a broadly self consistent and logical construct. You've helped by reminding us of key elements of that.

And to my mind it's really important that as the group tests this and tests this against a less informed public comment, that we have this base knowledge in place.

And so - and also to me it seems that it's vital that we get these key elements of PTI and PTI Board discussed and commonly understood such that we are then in a position to say well if we ever go down the extreme route of wanting to deal with the separation, which is clearly the next topic that - or next major topic that we might need to discuss, it's what changes would need to be invoked then. But before we can even go there we need to get our modus operandi for the likely operation of this whole setup sorted out.

There is a question from Avri, let me hand over to Avri and take her question and take it from there.

Avri Doria: Thank you. This is Avri. And before I start please forgive me for being dense and having a slightly different understanding of the hybrid model and the compromise between internal and external that was intended there.

First of all, in a very large sense membership was indeed that hybrid point that by being members of it and such that we achieved that so it was completely internal. If we have a separation, legal albeit, and a completely - and I believe we're talking about one Board member here either way - if we have five, you know, I think we're talking about, though we've never been explicit, three to two one way or two to three the other and in terms of community choice versus staff members or at least something like that.

Let me see. So - and I've written most of this in the chat but I guess not everybody's on the chat so I am repeating myself. So one thing I have trouble is understanding why there's a compound requirement of both the Board picking. Because in the presentation that I was trying to give of a NomComm selected Board - but actually a NomComm where it was actually approved by the Board for the - by the ICANN Board for the PTI Board there was still Board picking.

Why the compound requirement of both the ICANN Board picking and that they must all be staff members or must be a majority staff members. And as I say I think we're not discussing a big difference, I think we're discussing the difference of one. And I guess I don't quite understand when it's a Board that has approved the members of that Board and, you know, that therefore it isn't a hybrid as opposed to somehow switching that one balance to the other all of a sudden makes it an outside Board.

And I guess I must admit as a member of the ICANN community I really have difficulty understanding a solution that defines the community as outsiders to

the solution. There's something fundamentally non-ICANN about that in my perception. So that's another concern that I have in this explanation.

So I do believe it's close but I believe that in that balance there's some very important considerations of what ICANN is, how the community is key to that entity and therefore how we need to structure the solution. Hope I didn't go on too long or wasn't too confusing. Thank you.

Jonathan Robinson: Thanks, Avri. I think we do need to get to the bottom of this and so I'm going to not pad the audio at all but hand straight over to Holly and come back in as necessary.

Holly Gregory: Thank you, Jonathan and thank you, Avri. I agree. I very much take your point about the troubling nature of calling a Board an outsider Board, you know, and equating that outsider being ICANN the community.

And so forgive me, I'm using terms of - that have sort of a legal meaning. And they're not meant to imply in any way that the ICANN community is, you know, somehow foreign to ICANN. I know that ICANN in many ways is very much a creature of both its own legal structure and employees and staff and officers, and the input of the community.

So, you know, if there's a way for you to accept my sort of, you know, not to get too wound up in that - in the nomenclature that I'm using. The notion here is that you have - let's say even though this term isn't quite a perfect term when we're talking about a public benefit corporation, if you think about ICANN as the sole member of - which is kind of like the sole owner of the PTI, typically what comes with membership is the ability to select the Board of the entity and to replace it when you want to.

And through that ability to select the Board and replace it as you want to that's one element through which a member exerts some control over the operations of the entity. Now much of that kind of influence happens at the Board level.

Currently the IANA functions operator is really think of - you can think of it as a division sort of within ICANN. And ICANN has a great deal of influence, ICANN the corporation, I mean, the members, the staff, the officers, the staff, have a great deal of influence in determining who that team is and the parameters through which they work, budgets, you know, resources, funding. And it really has control.

I think one of the compromises, one of the reasons why a pure external let's move the IANA function operator outside now was considered problematic to the people who were favoring a more inside model is they saw stability as being important and to the extent possible maintaining that which was considered to be working pretty well to the degree that we could.

And so having this kind of internal solution was viewed as continuing that. Now how do you continue to have that ICANN management and staff have influence in terms of the operations of the IANA functions operator? It needs to be able to have some level of control, if you will. And that was maintained through this notion of membership.

Once the member no longer picks the governing body, the Board, of the IANA functions operator, PTI, you have a new set of people who are making those decisions. And if it's the external - the community - shouldn't use the word external - if it's the community that's selecting that PTI Board and if that Board is made up of a majority of people who are not members of the ICANN employees then it's a group other than ICANN that has the immediate day to day control, if you will, of the IANA functions operator.

And therefore that leads us to the notion of once you go that direction you really are going back to an external model, it's no longer really internal to ICANN because ICANN doesn't have the same degree of control. And the accountability mechanisms that we've just created for ICANN, you know, certainly may work for other aspects of ICANN but won't have the same influence on PTI.

I may have gone too long in my explanation. And let me know if you'd like more guidance. Thank you.

Jonathan Robinson: Thanks, Holly. One of the things that I take from this - and that we all need to be careful of is it's very easy to focus in on the micro which in this particular instance is the Board. But in doing so - in focusing on an issue such as this it's critical that we all take a holistic view. You touched on that in a number of ways both in terms of the legal constraints, and the, if you like, political constraints where we've come to or from a compromise point of view but also the work that's been done with respect to the CCWG in addition.

So I think just if I could encourage everyone in thinking about this and debating this to try and take - and that's a horrible cliché but the sort of helicopter view of all of this, the massive, massive changes that are proposed at the ICANN Board and institutional level in terms of accountability changes, the requirement to give the impression of and to create operational stability and continuity with the past on the other hand.

There's a number of parameters that need to sort of feed into all of this and that got us to where we are. I guess Josh also points that out through highlighting the other institutions we are creating in this group which is the CSC and the IFR.

Paul, did you have a question, Paul Kane.

Paul Kane: So thank you and thank you, Holly, for your explanation. My concern is, one, this whole process is becoming exceptionally complicated. And it seems to be losing the service orientation that it should be delivering to the community. The intent of having the PTI accountable to the users of the IANA service was just that; what you have created by having effectively the Board of the PTI being comprised of ICANN staff is you're frustrating the users, the customers of IANA, to have recourse in the event of IANA failing to perform.

And what that really means is ICANN legal are determining the service levels that ICANN customers will and can obtain. That is not on unless ICANN specifically is going to be held liable in financial terms for their impact that they have on the registry's operation.

And bear in mind that the smallest registry, if I - I can only speak about CC's registries - have millions of dollars worth of transactions ongoing through them. Then ICANN's liability is significant. And the whole purpose of trying to have an external - or sorry, an internal yet accountable Board to the community, in other words, people that were not ICANN staff, was to make sure that there was a backstop, there was the opportunity to reassign the contract easily to another contractor.

Many parties can do the IANA job, it just happens we currently like the status quo which is where there is an external party, currently the NTIA, who awards the contract periodically to their contractor, namely ICANN. And that's what I was hoping would come about. But it's very clear that the work that you have done, Holly, doesn't give the community the structure that we need.



Bear in mind we've just had the CEO announce his resignation, we've had numerous IANA managers come and go. You know, many of us have been in this industry for a really long time and the fact that you have the ability to appoint a contractor by having an external body to making that determination is a helpful and constructive thing and builds stability, not undermines it.

Jonathan Robinson: Thanks, Paul. I do not that Chuck makes a good point in the chat that we need to be mindful of the function of - it's difficult to make - have a discussion about internal and external Board without the limited functions of PTI. The whole - the purpose of this is to create - as I said, I believe we've done some really good work to create a delicate compromise which both maintains the status quo but gives the opportunity to modify that status quo in the event that we need it.

And I'll remind you, Paul, and everyone else, that we have significant community and other accountability mechanisms through the CSC, through the IFR, through the CWG accountability mechanisms and so on. Avri.

Avri Doria: Thank you. Avri speaking. Yes, and I think what I'm - what Paul is saying and what I'm trying to say is that I think we lose that delicate balance when the Board is - the PTI Board is staff-controlled. And I guess is till have my question of not understanding if the Board - the ICANN Board, I got to be specific when I say Board, if the ICANN Board is in a position of approving the membership that of the PTI Board that has been presented to it by NomComm, and I know that's unusual for us to actually use the NomComm as a Nominating Committee, not a selection committee.

But if we properly use it as a Nominating Committee and the Board is approving these, Greg asks what control do they have? They have the control

to replace them, you know, at a future time. The Board is still in control. The ICANN Board is still in control of the PTI Board.

(Unintelligible) staff has the (unintelligible) of denigrating the ability of an IFR to do any sort of remediation of fixing things and making recommendations other than the so called nuclear option of just going out for bid. Because there's no reason why a staff-based - we have a long history that if it is staff-controlled it is almost impossible (unintelligible) community to have any affect on what the staff does unless the Board intercedes.

So we end up with a problem - we have the pretense of the hybrid at that point without actually having it. It has totally fallen to the status quo since the community's really got no ability to remediate anything. All they've got in the nuclear option stick. And I'm one that really prefers that while we have that option at the end of the road we have many things that we can do before we get to it.

So I guess coming back to I do not understand the binary consideration of both Boards selected and staff selected. And that in a sense is also a contradiction, as I understand things, because by (unintelligible) the Board only picks the CEO. So what we're saying is it's CEO-selected so it's not even Board-selected, it's just staff. And that (unintelligible).

Jonathan Robinson: Avri, you were clipping in and out a little there but I think we got the gist of it. I suppose what - there seems to be a fundamental axis around which we're working here and that is the perceived power and value of the Board. And in many ways the issue is - hinges around if you think there is recourse for the community or whomever through the Board you would seek to populate that Board.

If you don't, and with members who would assist with creating that recourse, if you don't and that is the sort of the insider view, if you like, you would seek to have that Board have a minimum of independence to such that the recourse is gained through the other mechanisms and those other mechanisms are in no way undermined by an independent Board.

So it's a really challenging conversation this. Holly, is that a new hand or is that - is that from previously? If not I'll go to Josh.

Holly Gregory: I'm sorry, that's an old hand. I will take it down.

Jonathan Robinson: Okay, let's go to Josh then. Josh, go ahead.

Josh Hofheimer: Thanks, Jonathan. This is Josh. I just wanted to respond to Avri's comment about that we have the status quo still if we don't have an independent PTI Board. Avri, I'm not sure that I would interpret it that way because when you look at what this group, the CWG, has created by way of accountability and couple that with what the CCWG is doing by way of accountability, you do have substantial community review mechanisms through CSC and then periodically through the IANA function review.

And if you recall we set this up so that when the IANA function - the IFRT makes a recommendation to the ICANN Board and that may be, you know, an instruction for some remediation action, for some replacement or change of direction of staff, etcetera, who knows. If the Board does not - if the ICANN Board does not adopt the IFRT recommendation then that recommendation goes to the community for review through the members and the membership of ICANN.

And the community can decide to go along with the Board's decision or it could go along with the IFRT decision and would approve or reject the Board action. And it would be able to impose its will in that way.

And that is most efficiently carried out then if ICANN is controlling the PTI Board then it can effectuate the wishes of the community that have come down through the IFR review and the member review and approval of ICANN Board action.

But if the ICANN Board is not controlling - if the ICANN Board is not - I'm sorry, if ICANN is not controlling the PTI Board then it will not be able to bring about the change or impose the change that has been recommended by the IFRT. So you actually create a bottleneck and you can pinch off the control at that point if you don't have an ICANN controlled PTI Board.

So to your point, you may look to certain criteria for who you want to be on that Board. Chuck and others have made some very good comments about it's very much function-focused and should have appropriate representation as far as functional expertise and the like. And I think people generally agree to that.

But the important measure is that it be ICANN controlled so that the powers of and the wishes of the community as expressed through the IFRT review and CSC review, that could go to ICANN Board too, are actually most efficiently effectuated. Thank you.

Jonathan Robinson: Thanks, Josh. Lise.

Lise Fuhr: Thank you, Jonathan. I think there is two issues here that is very important to remember. First, as you state, Avri, if we have an internal Board, nothing has changed. I think a lot has changed because we actually have the CSC, the IFR,

we have those organizations that really having the oversight of part of what's been agreed upon.

So if you are not complying with the SLEs or if anything is not according to what's wanted by the customers this can be raised. This is a new possibility to act fast in a different way than we've had before.

The other is if we are not keeping this internal and bringing in outsiders there is the danger of this is becoming a political Board. And we have tried to actually separate the policy part and the operational part. So it's very important that - to have a lightweight Board that's not going to deal with policy issues, this is operational only. Thank you.

Jonathan Robinson: Thanks, Lise. I wonder if it's - it's perhaps early to suggest something but I'm going to try this with you and see how the group responds to this. There is - clearly we have an operational and functional entity. Lise just talked about separation of policy and operations.

One way in which I think, I mean, I don't think my personal view has been - I haven't strayed from - I'm very familiar with the subsidiary and once we've gone down the subsidiary route I'm very familiar with the subsidiary being populated by the parent. So it doesn't give me cold shivers, especially given everything else that's taken place that the subsidiary Board should be populated by employees of the parent. But just it's very natural and comfortable to me.

But I'm hearing a lot of discomfort from others and understand elements of that although I'm - also find some of that frustrating because we've been given some sort of logical legal reasons why we should closely couple the subsidiary

to the parent and in so doing rely on other accountability mechanisms that both this group has built and others.

But here's my thought for you for a potential - I don't think it's - some of you will view it as quite a compromise but it may give us a way forward. If we consider something like a five-person Board. By definition if we go down this route the insider Board has to be majority populated by ICANN. We can't avoid that, that's a sort of legal consideration.

So three out of that five is populated by ICANN insiders. In my view that's likely to be the managing director of the IANA function, the senior executive in the ICANN corporation responsible for the ICANN function and a another, maybe a finance or maybe a legal person.

When we talked about a legal person before some were concerned about that so let's assume for a moment it's a finance person. So you've got three people in there, three staff, senior finance person, senior operational manager, currently the most obvious person in that case would be Akram, who I believe is the executive responsible for the IANA function, and then the MD of the IANA function.

In addition, we might consider inserting two community representatives of some sort. So you still have your majority but you have some degree of oversight, a nucleus from which other activity may, you know, oversight and insight and transparency and elements of community concerns could be addressed.

I don't know who logically those two would be. I mean, at times I've thought about whether that could be perhaps the GNSO and ccNSO ICANN Board

members but I'm sure there'd be concerns and issues with that from various groups and so on.

Personally, Avri, I have concerns about roping the NomComm into this. It's another - it's another deviation, another complexity. So, as I say, my personal view is I'd stick to a three member Board comprised of ICANN staff and link the thing very tightly to the parent until such time as we are the extreme situation where we're considering separation. And then there's an entirely different conversation to be had but we're not having that now.

But given that the major focus of the subsidiary is functional, operational and our recourse is CSC, IFR, CWG accountability, that's - so how does - Olivier, you were asking in the chat why Akram not ICANN CTO. Well that's - you may well be right, it just happens that as I understand it Akram is the Operational Manager. But again you may say well it doesn't - it's no point in having a finance person, it might be the COO, the CTO of ICANN plus the MD.

And, again, this would be very familiar to me in a - as a corporate structure. So there's some thoughts for you to respond to try and see if we can break the log jam and move forward. Alan, go ahead.

Alan Greenberg: Thank you very much. I'm a supporter of the inside Board; I've made that clear. In my mind it is in ICANN's interest that this work and work well. To do that I think you need to structure in the corporation - you need to put in place the processes, the people, the wherewithal to allow PTI to be a good IANA function operator.

And to do that I - we talk about a minimalist Board with no powers, I don't support that at all. I think if this is going to be a Board it should be the Board

who has the normal capabilities the Board has over its - over the corporation that it oversees and you want to staff that Board with the people that will be necessary to do the job properly.

In a steady state where things are working well that Board does very little. It appoints auditors, it periodically sets remuneration but it doesn't do very much. In a situation where there are significant problems, and IANA may well need some restructuring or replacement of staff, that Board has to be able to kick in and do its job effectively and well and you want to put onto it not what are effectively political appointees but people who can do their job.

If they end up ultimately not being able to do their job then we have all of the ICANN accountability measures which we can use against it. And, you know, I think who is on the Board is really a lot less important than making sure that whoever it is at least on paper, have the ability, skills, wherewithal and mandate to manage a good PTI. Thank you. It's really a small business, it's not a political thing. The Board is not like ICANN balancing the political wills of different constituencies who have different aims, it's simply doing a good job. Thank you.

Jonathan Robinson: Thanks, Alan. I must say I'm just - I'm tempted to make one other remark. I mean, it's very tempting to say what we feel we would like or what we would or wouldn't want to happen. I mean, we went out and we've paid a fortune, in my view, for the best legal advice we could possibly get.

Part of - a significant part of where we are now is because we've gone down a route of various discussions and taking a whole range of inputs like continuity of existing operation, ability to separate in the future and a whole bunch of principles and compromises have been made in conjunction with technical legal advice.



And as a consequence we've got to a point. It's not necessarily about how one feels or doesn't feel, it's about what - where we've been, where we've got to via a process.

And I think Greg makes a good point, it's not - the fact is in order for the subsidiary to remain or the affiliate to remain connected the advice we've been given is that the Board must be majority appointed by ICANN. So that's a consequence of the construct which in my opinion happens to be logical, self consistent and contain significant accountability mechanisms in it.

Alan, that's an old hand so if you could take it down and I'll go to Greg.

Greg Shatan: Thanks. It's Greg Shatan for the record. I am not sure how much more I can add to what I've said in the chat. But I think that if we do not have what is being called an inside Board then we've essentially already spun off PTI and ICANN is no longer accountable for a PTI. And, you know, that is really taking us to a whole different place regardless what the exact role and purpose of the Board is.

And this is not just a nicety of composition, this is a question essentially of whether what we're talking about is a PTI that is still part of the ICANN corporate enterprise or a PTI that is outside the ICANN corporate enterprise. And I think the - as I've always seen it the hybrid was that this was still within the corporate enterprise.

So if the Board, you know, is not a majority of ICANN inside people then it's no longer an ICANN entity. It may be that it's controlled by ICANN the community but it's no longer part of the ICANN corporation. It's no longer a subsidiary, it's now an outside entity.

Now maybe we're trying to be communards here and take over IANA, you know, by the community. And I can almost here, you know, themes from Les Miserable playing in the background. But that's a very different type of organization than the one that's contemplated in our documentation to date.

As a lawyer, you know, and you know, similar to Jonathan, I'm completely comfortable with the idea that a subsidiary Board is controlled by its parent, that's almost definitional or maybe it is definitional. So I think that we're getting hung up on this point and not moving past it. Clearly it's important that we're all moving past it comfortably and not scratching our heads. But I think we have to get past it.

As a practical matter, I like Jonathan's suggestion, a Board that is three insiders appointed by ICANN, ICANN management, ICANN staff, and two that are appointed by the community. It strikes the right legal balance. It also strikes the right ICANN community balance to my mind. Thanks.

Jonathan Robinson: Thanks, Greg. Chuck, go ahead.

Chuck Gomes: Thanks, Jonathan. I asked a question in the chat that I'd sure like an answer to. If we had 3/5 external PTI and directors, how would those three directors be accountable from a legal point of view?

Jonathan Robinson: I think we should give either Holly or Josh the opportunity to respond to that question. Holly, go ahead.

Holly Gregory: Hi. Hi, this is Holly. Well all of the directors of PTI will be fiduciaries no matter who they are to PTI. But I think Chuck's question is really how does - how are they - how is this Board now held accountable?

Because the accountability mechanisms we just created for ICANN the corporation don't - would no longer - don't have the same impact at this point and we need to create - we really will need to create a new set of those kinds of mechanisms, we'll have to make sure that however this outsider Board is created the - whoever is appointing them has the ability to do the recall, to do all of the same kinds of things, query whether the community is going to want to have some of the same kinds of inputs over budget and strategy in that kind of a construct.

So it's a good question without what I think is at the moment a really satisfactory answer. I guess the accountability mechanisms will be that the community or whoever is appointing them can remove them.

To me it adds a level of complexity and works against the kind of stability notion that was a driver of the compromise that was the hybrid. It's no longer a hybrid solution at that point.

Jonathan Robinson: So I wonder if it isn't - if there isn't an opportunity to push more on seeing - I mean, as we stand presently we have a public benefit corporation with a fallback of an LLC to mimic that public benefit corporation. We have an legal argument at least, if not supported by various members of the group, and I realize it's certainly not supported by all of you, for the inside Board.

I've proposed that we supplement that inside Board by a couple of community representatives. One option would be to derive those from community representatives from the ICANN Board itself. There may be others. So that's a question that remains if we go down this route is it three or five and if so how would we make up that five.

Another is do we start to test this against the public comments bearing in mind that the public comments are slightly out of sync with where we are because we've had the benefit of significant discussion and advice. Comments, questions? Alan, is that a new hand?

Alan Greenberg: It's a very new hand actually.

Jonathan Robinson: Please go ahead.

Alan Greenberg: Thank you. I guess I am sort of fascinated that we are building a huge and complex accountability structure to control the community members that are selected for the ICANN Board but community members selected for the PTI Board will be virginal and pure and we can trust them completely and not only that but they will be competent to do the job of running the small business. And these are essentially the same people coming from the same community.

I really think that we have to use the same set of rules across the Board. And ultimately if ICANN wants to keep IANA and keep it through the function of PTI, then it is in ICANN's interest to make sure that the Board is populated in the best possible operational way and if it can't then we get rid of the ICANN Board or do something other - something else horrendous at the ICANN level.

Other than that take these strings away from it and let it do its job properly. And with that I only come up with one conclusion.

Jonathan Robinson: So, Alan, can I just check that what - because I put on the table the possibility of extending a notional - and I accept it's notional - a notional three-member Board with some notional members that I suggested to five. Are you in fact advocating that we just go back to three and let the - it be it an

entirely operational management-oriented Board populated by the parent such that subsidiary...

((Crosstalk))

Alan Greenberg: I would certainly be happy with something like that. I believe the senior manager responsible for IANA within PTI, and I don't think that's an ICANN employee at that point but we may have a definition problem, must be on that Board, I don't much care whether it's voting or non voting.

Expanding it to a small number of other stakeholders created by the Board has to be, from my mind, has the risk and it's a risk at my side, to say oh well it obviously must be two registries, and I think that changes the tone of the organization. We're now looking at the PTI Board that for better or worse on the short term is not only looking at names but looking at parameters and addresses.

And I don't think it would be appropriate to select - put some preferential ICANN stakeholders on that Board over others. So I have a problem as soon as we start saying a few outside people then we go into the debate of how do we select them. And each of us start vying for our own communities and that I have a problem with. I have no problem with making it three or five or any number like that. You know, three plus the managing director non voting I would be quite happy on, for instance.

Jonathan Robinson: Okay. Thanks, Alan. Well you have - I mean, I'm going to leave you with my strawman which was partly influenced by Olivier and that's a CTO, senior executive normally the current president of the GDD, and the MD of the IANA function so three senior management people, two of which are in this instance employees of ICANN and one of which is an employee of IANA.

Chuck, go ahead.

Chuck Gomes: Thanks, Jonathan. And, Alan, I think you may have addressed my concern when you said the managing director of PTI would be non-voting. I would be opposed on a very small Board for the managing director of PTI to have a voting seat on the PTI Board. In a larger Board that might be okay but...

Jonathan Robinson: Sorry, Chuck, we muted the noise I think got that noise muted. But I think got the point that in a small Board normally a three member Board you'd be in favor of the MD being nonvoting. I wouldn't mind knowing why just so we understand why, what your concern is there. And, Chuck, you're on mute, I just wondered if you got the opportunity to answer why - but, Alan, you possibly started that so maybe you want to give your view.

Alan Greenberg: Sure. In any given corporation there's a good chance the managing director is the problem at any given time. I certainly have no problem with (unintelligible) today but, you know, we're looking for a future proof Board. And then you're left with a Board of two people and that I find is quite problematic. So if it's a very small Board I think the managing director should not be voting and should not be the swing vote and certainly not on a Board of only three.

Jonathan Robinson: I note...

Alan Greenberg: I look at the Board from the philosophy of in a steady state it's a piece of cake, anyone can do it, it's not an issue. Just don't do anything really stupid. But it's the disaster situation, the really, you know, the time when things really aren't working well that this Board has to be able to take control and make decisions and make changes. So you want to make sure to structure it for that.

Jonathan Robinson: Thanks. Again, I mean, the trouble with corporate governance and issues of this nature is that they vary around the world, there's different norms and cultures. From where I come from in UK companies it's very typical to have a minority of executives on a Board, it's very typical to have an MD have a vote and in this instance you'd have - the MD would be - there would be two others to balance that.

So, again, it wouldn't - and I see - and then Holly makes the point in support of one that Greg that if they're nonvoting they're not a Board member. So that's a slightly different perspective. If you invite one or more of your managing staff to attend the Board meetings that's slightly different to being a Board member as such. So, Chuck, would you like to see if you can come in just to see if you've got any audio there, just to test your audio?

Chuck Gomes: I will try. Can you hear me, Jonathan?

Jonathan Robinson: Yes, Chuck.

Chuck Gomes: Okay. So I don't know what was going on before but must have been muted by the operator, maybe it was my line that was causing the problems. Anyway, my concern is that I believe that the PTI Board would have a responsibility to direct the senior management of PTI and therefore on a very small Board giving the director of PTI a vote - a deciding vote on a Board of three or five seems to be problematic to me.

Jonathan Robinson: Just following the chat a little here. So Holly confirms in the US it would be typical to have senior operation executives on the Board with voting rights. Alan, can you either lower that hand or confirm it's a new hand?

Alan Greenberg: It's an old hand and as soon as I get back to my desk I'll lower it.

Jonathan Robinson: Well I wonder where we take this from here. I mean, we've - there seems to be an issue over - I mean, what would be an appropriate size, what - whether or not the MD - I mean, I think we should put this whether the MD is on the Board or not, I mean, whether they attend is a different question. And noting that Avri, you remain unconvinced about this or have the dissent, that's understood.

So yeah and Martin notes that for an operational Board not having the MD seems peculiar. I just wonder if there isn't a way of fixing that. The trouble is if we had a four-member Board we then end up with a - it's more - I must say I don't see this Board as having a lot of - spending a lot of time voting and doing this.

This Board is intended to be an operational Board. If it becomes dysfunctional I would expect the parent to deal with that, to intervene and deal with that. If it becomes so dysfunctional and the parent doesn't deal with it the community has the recourse mechanisms.

So I just - I mean, I must say notwithstanding trying to listen to Chuck and others who have concerns about the MD voting I'll put it to you that it doesn't strike me that that's - yeah, that's a good point, Chuck, it's small and there's little flexibility. But, again, it's a - the parent could easily put someone else in there.

Do we want to push it to a larger size then? Would people feel comfortable assuming for - would - should we - you know, the way I've seen this done in the past is that you build in the company documents that the Board can be up



to five members and no less than three. That's the way in which you can handle that sort of thing. And maybe that's the way to handle it.

Chuck says he's comfortable with five. And I'll propose to you that maybe you put a bit of flexibility into it and you - I mean, I'm sure the lawyers will say they are familiar with that kind of construct as well. But Holly or Josh, I mean, is that something you see on a relatively regular basis or what about that?

Holly Gregory: Hi, this is Holly. I mean, I just want to make sure I get the question, Jonathan, because I was trying to follow the chat. A five-person Board for a subsidiary is not an unusual size. I would think bigger than that would start to get unusual. But am I missing the question?

Jonathan Robinson: Yeah, Holly, what I proposed or suggested that we could consider is that - is that instead of constraining it absolutely to being a three or a five member Board that we put some parameters on it and say the Board should be up to five and no less than three and we could say in any even contain X or Y, you know, some sort of small...

((Crosstalk))

Holly Gregory: Jonathan, that's a very, very typical way that Board size is stated in a charter for an organization. I would expect to see it stated in that kind of a range. It is actually fairly rare for it be stated as a single number. So the fact that you wouldn't want the - to have a noncompliant Board if for some reason somebody, you know, fell over and died. So, yes a range is typical. And exactly the way you stated it is the way I would expect to see language in a charter.

Jonathan Robinson: How do we - how do others feel we could - should take - thank you, Holly.  
How do others feel we should now take the call? Because we could sit with that Board range with the understanding at this point that it's an insider and at least Avri is a dissenter on that position. And that we have the underlying structure of the corporation to be fully defined.

But I mean, the one option is to start to test this now against the public comments. How do people feel about going on to look at the public comments now and start to build up a picture against those which is after all a key purpose of this meeting. Is there support for that or has somebody got another area they'd like to cover?

Alan Greenberg: Jonathan, that's a new hand from Alan.

Jonathan Robinson: Oh go ahead, Alan.

Alan Greenberg: Yeah, my only caveat there is the report was not particularly definitive on what the Board would look like. And some groups, and I know ALAC was one of those, basically said we're still discussing it, you didn't give us a yes, you know, A, B, C, pick one. And we're still discussing it so although we have moved a lot since the time of that comment was written, the comment alone does not reflect, I think, where we - even where we stood then, never mind where we stand now.

Jonathan Robinson: I...

((Crosstalk))

Jonathan Robinson: Thanks, Alan. That's a really good point. And so that's the conundrum, how do we deal with the fact that we - as I said in the sort of preamble to this

call we took significant advice and did significant work in the course of building up the detail on this out of sync with the public comments.

It was a known risk. It is a consequence of the way in which we have worked and have had to work. So, you know, with that caveat I wonder how we deal with the public comments. You know, we do need to - and I suspect we - it may not be as difficult but I take your point, in certain instances it may be challenging.

So I'm just wondering how best to take the conversation forward and I'm open to guidance. But it strikes me that we've got a bunch of public comments and given the contentious nature of this topic and the challenging nature of it I'm not sure it's totally fair to just hand it over to staff so - but that - it may be that that's what we - Holly go ahead.

Holly Gregory: So, Jonathan, just from a process point I'm wondering if, you know, I know that there is some dissent in the group but I wonder if you're able to get an overall sense of our people relatively in favor of sort of the insider Board, that's what I'm sensing, although there is some dissent.

And if so, maybe, you know, taking as a test taking that thesis that that's the direction and looking at the comments through that lens and thinking about how you might respond. I think in looking at the comments it would give people a sense of to what degree the main concerns around the Board are. Is it to, you know, is it - is the concern that it needs to be, you know, sort of more separate, less separate. We may get some guidance from the comments and from a walk through. It may help up crisp up people's views.

Jonathan Robinson: Holly, we had a break up of the line again. I'm going to have to ask you - come back to me on that. I'm sorry, it's - I wasn't able to follow that properly.

Holly Gregory: Okay. Let me try again. What I was suggesting is, as I'm listening to the conversation and reading the chat I certainly sense that there continues to be some disagreement about the point whether we should have a majority inside or a majority outside Board for PTI.

But my sense is that the distinct leaning is toward the insider model from the discussion and the comments I'm seeing. My question was whether you think it might be helpful with using that as our test construct to walk through the comments and see if by doing that things crisp up as a continued discussion now. I don't know whether we have the time to do that and I leave that to your good judgment as the chair but it was just a suggestion.

Jonathan Robinson: Yeah, thanks, Holly. And I think that was where I was tempted to go because it feels to me like we have to do the public comments some more justice. And whilst there is - it's clear that there is some dissent on this it's no bad idea to start to test it and see how it stacks up against the public comments. But I just - going down that route I'd ask everyone to bear in mind that of course there is some risk of the lack of synchronization due to the timing.

Eduardo, would you like to make a comment before we switch into that mode?

Eduardo Diaz: Yes, Jonathan, I just wanted to say that I mean, that's what Holly was saying is what's something similar to what I was saying that we just have to make sure that we (unintelligible), you know, an outside or an inside Board and then we look at the comments from that perspective even though we are out of sync as you mentioned.

And I also wanted to add that, you know, within that respect, you know, when we say that we get stuck with three directors and going to five, we have to put a caveat in that sense that the majority has to be outsiders or insider, a caveat - that caveat if we decide one way or another. Thanks.

Jonathan Robinson: Thanks, Eduardo. And I'd just respond to Avri's point about the lack of sync on the issue versus insider. I agree, Avri, that it wasn't out of sync in that sense. The synchronicity I was referring to was in sort of - in terms of timing and knowledge. We didn't put a lot of detail or explanation.

For example, the explanatory memos that we had from Sidley on the 13th of May were not - it didn't inform our prior proposal and nor did they inform the public commenters. So that's what I mean by out of sync, but I take your point that they were still up for public comment.

So we've got half an hour. Let's try and switch into that testing this construct of the insider Board with a range of three to five and see how that structure stacks up against the public comment.

Avri, you make the point about the LLC, the advice we've given on the LLC was more equivocal but there are issues - there were issues around that in that it opens up a whole - the public benefit corporation locks down a whole lot of considerations; the LLC opens them wide open. We have an outstanding question to ICANN, in fact, to ask what concerns, if any, they have over the structure of PBC versus LLC.

And to the extent and the currents of the proposal on the table is that if depending on where they come back from that will influence whether we try and create an LLC structured along the lines of a PBC to mimic a PBC if you like. Greg, go ahead.

Greg Shatan: Thanks. This is Greg Shatan. I am extremely loathed to put words in Avri's mouth. But what I see in the Chat is that the idea being stated that PTI would be controlled by the community, which is what it seems to me, you know, has been a thrust of Avri's comments with regard to having a non-insider Board.

I think that the idea the PTI would be controlled by the community and not by ICANN seems to me still to be foreign to the idea that being a subsidiary, and foreign to the thrust of what we had been discussing as the construct. Maybe there are some who thought that somehow we were going to have our cake and eat it too - that it would be technical subsidiary, but in practice actually controlled directly by the community and not by ICANN.

But that was never what I thought - never what I thought we were driving at. So I mean the only way that a LLC could be controlled by the community is if there was a Board of managers that was controlled by the community and not by the member, which is the - would be ICANN. And that if a member isn't in charge of the management, it really is taking it out of the hands of the member. And again you've created kind of a purple cow at this point - not just a black swan, not just a rare occurrence, but something that is kind of functionally impossible and is at war with itself conceptually.

Either PTI is a controlled entity of ICANN or it isn't, whether it's an LLC or another thing or a public benefit corporation. So I think, you know, that is kind of at the most fundamental, maybe the question on which we seem to be choking which is that there seems to be a desire to not have PTI be controlled by ICANN by some. That was never where I thought we were going. And a dissent that says that PTI should not be controlled by ICANN I think is kind of taking us off on another way.

The we are ICANN thing is true in a sense, but it's also not true in the sense that the corporation is still the corporation, are controlled by the community - has to kind of come through certain corporate constructs such as membership as being discussed in the accountability group. Once we take PTI away from ICANN the corporation and give it to ICANN the community, it's no longer controlled by ICANN the corporation. So that's just a fundamental dichotomy. Thank you.

Jonathan Robinson: Well Greg, I think - I mean the second point's clearly an interesting one because the response to the we are ICANN point. And to that extent, providing the accountability measures are implemented, which we have every intention of reinforcing the likelihood of them being implemented as best as we possibly can and likely with Sidley's help, and providing that is the case, we are much more ICANN in the future than we were in the past, whether that is through membership or any other structures that are being built in.

So I do think that's a - in a sense like I say, one has to have a holistic view of this. It's not simply focusing in one facet of the whole intricate interconnected structure. Let's do as we intended and test against these comments and see what we can do here.

So the mission of PTI should be strictly contained to the operation of the IANA registries. ICANN designates its Board with minimum statutory requirement - required responsibilities and powers is acceptable - NRO. Well I guess we could say that appears consistent with what we've just discussed unless I'm misunderstanding it. If we test that against the construct as we said we would, an inside Board with three to five people in - yes. Greg, could you lower your hand if it's no longer current.

PTI Board should have limited agreement, only focused on implementation and technical expertise, and should be a key criteria for Board membership. I think that there's an addition to that that you might make in terms of being consistent is that it's the point that Olivier made earlier where you might seek to put someone like the - so I think we could say something like CWG will consider making recommendations as to the skill set of Board directors. You know this is Olivier's point about the CTO perhaps. Avri?

Avri Doria: Thank you - this is Avri. If we have your insider Board and the staff is picking who sits on the Board, then what do we have to say about this? The CEO will define who sits on that Board, or we're picking people up front based on a title and saying, you know, that this particular - but, you know, for us to pretend that we'll have any degree of selection over the technical competence of the Board when it is completely selected by a CEO who could be doing it for any number of reasons - let alone technical capability - is something - isn't a claim we can make.

So I think the insider Board failed this criteria because there's no way to insure it. Thank you.

Jonathan Robinson: Thanks Avri. Any other comments or points in relation to that or in response to Avri's point? Martin?

Martin Boyle: Thanks Jonathan - Martin Boyle here. Yes, I've got a direct response to Avri's point. If the CEO of ICANN stuffs the Board with - the Board of PTI with people who are not the right people for the job, then we will very quickly see the service in the PTI starting to fail because it hasn't got the right level of leadership.



Right away through this discussion I've had a concern that we are talking about the form of a Board. We haven't had a proper discussion on what we see as the functions of the Board, which is actually quite crucial for defining the Board membership.

And it also seems to me that we end up with having a risk of the same issue being addressed in the different forum - the ICANN Board, the PTI Board, the various mechanisms for keeping the PTI Board as ICANN in account. And it seems to me that we risk ending up with some sort of log jam when all of these different mechanisms come up with different recommendations or start pulling in different directions. And that really worries me quite a lot. Thanks.

Jonathan Robinson: Thanks Martin. I think you make a really good point. And maybe in my mind it's been implicit or at least consistent with the constructed date on the function. I'm going to give you a thought as to what I think is the function which is perhaps why for me the form is less challenging. But let's see where this goes.

In my mind the function is - it's a subsidiary, right? First and most important, it's a subsidiary formed by the parent to perform an operational and technical function. As a subsidiary however, because it's a corporate entity, it will have to perform the minimum statutory requirements. We will get legal advice and we will have - and ICANN will have ongoing legal advice to meet those minimum statutory requirements.

In addition it will have to insure that the subsidiary performs to meet the conditions of the contract. And in a way that to me is possibly the limit of it because in the contract we will encapsulate all of the performance and requirements that we expect the subsidiary to fulfill, including that really critical point that came out of Singapore that's been worked on very diligently

by DTA which is the requirement to perform to the SLEs and meet the requirements of the community because ultimately this is a technical and operational function.

And the subsidiary is a construct that we put in place to achieve a couple of key points, which is to insure we have an entity with which to contract, to enhance the functional separation but not to further separate at this point, and to create ultimately a vehicle for separation should that be required, and so that we weren't creating such a vehicle at the point of crisis. But in the steady state normal operation, it's minimum statutory requirements and performance of subsidiary contract.

So that would be my take on it. I hope that helps. So yes, and maybe you're right Martin. Maybe in articulating that, we can then test against that as well. So let's hear from you Alan whose hand has come up.

Alan Greenberg: Thank you, Jonathan. I think you've captured it exactly. The minimum statutory parts have to be done all the time. The Board kicks in if there is indeed any reason to believe that it is not performing the way the community needs it to perform.

And some models I've heard say well we'll immediately revert to the ICANN Board to fix the problems. But, you know, it should be fixed at home to start with. And if you can't, the ICANN Board has to take action to replace the home. So I think you've got - you captured it exactly. Thank you.

Jonathan Robinson: Thanks Alan. And remember we have the CSC. The CSC is monitoring the SLEs. The CSC is monitoring and watching the performance of what the direct customers get out of this function on a regular basis. If the CSC ends up with serious concerns, the CSC escalates and makes its concerns known.

If that escalation is sufficiently severe, we kick in a special review. The special review is not constrained in the recommendations it can make. The special review could recommend replacing the Board. If that replacement doesn't take place according to the special review, we kick in another layer of mechanisms.

Now I accept there's one concern about that, and that might be the timeliness of all of this. But believe me, if the wheels start falling off and the noise starts getting loud enough, things will change. And we have a whole series of mechanisms that I'm really proud of what we've built here. And I hope the rest of you are as well because I think we've done an excellent job of building something coherent, logical and almost complete.

Okay. Let's continue with the testing. PTI should be - (Marika), your mouse is just - thank you very much. PTI should be responsible for operational decisions of PTI, resource management and forward planning. PTI should be small, with limited and targeted role - clear definitions of roles and responsibilities of the two Boards needed.

Well I won't answer for Martin. And I see Chuck, you have your hand up. So go ahead.

Chuck Gomes: Thanks Jonathan. And I think - I doubt that (Nominant) meant what could be meant by responsible for operational decisions. I just want to clarify that. Certainly I don't think they meant that the PTI Board should be involved in regular operational decisions. But they are - that's where the buck stops if operational decisions are made incorrectly.

I just want to confirm - I'm sure they don't mean the PTI Board should be micromanaging operational decisions, but they are ultimately responsible. I just want to confirm that.

Jonathan Robinson: Thanks, Chuck. I know that Martin commented that it's sloppy wording in the Chat. As I read that it's PTI. Well I won't read it. But I think it's what - the current working proposal is consistent with what has been stated there by the commenter.

Next comment - should PTI be agreed to? In other words the commenter wasn't convinced that PTI was necessary. PTI Board must be corporate in nature, holding relevant expertise. I think that's consistent with what is the construct.

Next point - PTI should have limited remit. And PTI Board members should be drawn from the ICANN Board. Alan, your hand is up.

Alan Greenberg: No, it was on the previous one. I was just going to point out that the opposite is that it becomes almost laughable - that we should make sure the PTI Board does not have the relevant skills on it. So I think the outer comment isn't noted.

Jonathan Robinson: Thanks Alan. Avri?

Avri Doria: I want to just check on this on. I'm assuming that the Board members would also be outsiders, and that therefore this would not meet Sidley's requirements for an insider Board. Is that correct?

Jonathan Robinson: That's a really interesting question. I've never been 100% sure on that, so that's a good question. So I'll just reiterate the question to make sure I

understand it. Would an ICANN Board member qualify as an insider for the purposes of the PTI Board? And that's a question to you Holly or (Josh) I think.

Holly Gregory: It is a very interesting question. And I think that it would be an outsider. But I'd just like to give it a little bit more thought if I could.

Jonathan Robinson: No problem Holly. You can even - you can address that back via the client committee. But it's - it flushes out an important point. So we can hear that back from you in non-real time.

Holly Gregory: I've seen different corporations view it in different ways. And it's not a strict legal definition. So let me come back to you. I think in most Boards it would be considered an outsider, but I want to come back to you.

Jonathan Robinson: Thanks. Avri, could you just explain your point if they are insiders that may be a compromised point just to make sure it's understood?

Avri Doria: Sure. This is Avri speaking again. So they are people who are selected by the community. And therefore one could argue - I could argue perhaps adequately, perhaps not adequately within NCSG that indeed that Board is getting populated by people picked by the community - not picked by the CEO.

And that therefore could be seen as a compromise - that they are insiders but they are outsiders. They are people with a dual existence in this legal dichotomy. Thanks.

Jonathan Robinson: Thanks Avri. There's a couple of points to bear in mind when thinking that through and as you continue to do. One is the operational expertise and

the requirement perhaps to have operational expertise on the PTI Board. And the second is whether or not that fits with the three plus two suggestion I made earlier.

The challenge with that was a point made by Alan, is let's say for argument sake we went down that route. It's a question of you start getting into all sorts of points about representation and who actually gets to be represented. Martin, you hand's up?

Martin Boyle: Thanks Jonathan. Yes, Martin Boyle here. I go back really to Alan's comment on the outer point by saying - well let's put it as the opposite. But I really think that the outer point shouldn't be dismissed in quite that way.

I think what outer really are asking for is that if you're creating a Board, you're trying to make sure that you get the right skill set for the function of that Board that shows a relevant expertise. And that's where the relevant expertise - the relevant ability to influence the discussion and the decisions start coming in here. So I put my hand up for that.

But I think that also then comes in to that sort of wider discussion of the Board - of making sure that we populate that Board in such a way that the Board itself is able to carry out its job. And at the moment I think we're sort of talking away from what that job actually is. Thank you.

Jonathan Robinson: Thanks Martin. Alan?

Alan Greenberg: Thank you. I was answering the last question of a Board member being - from the parent Board being insider or outsider. Certainly in the cases I'm familiar with, that person is there representing the interests of the parent

Board, and attempting to guide the subsidiary Board in the direction which the parent would like to see it go.

And from that perspective it's very much an outsider. So I support what Sidley has said or what they think they're going to say. But it's an outsider that presumably has some knowledge of where the overall organization wants to see PTI going. So it's an outsider with inside knowledge?

Jonathan Robinson: Okay, thanks Alan. I note Andrew's point in the Chat which is this critical one of how much we insert a form of representation or other facets into the subsidiary Board when - and the concerns over that. And I see Martin and Chuck agreeing with that. So it does start to move against the construct of the ICANN Board, notwithstanding whatever legal advice we receive which is a different point. But it's the insertion of the concept of representation is the point.

Yes, there's a proposal which Holly suggests which could be - and I'd like - I think that's worth noting because there's the possibility of the ICANN Board picking the PTI Board based on advice and consensus of, and also ICANN Board members. So you end up with a five member Board, essentially picked by the ICANN Board but with qualified advice from the executive management - in this case the CEO. That may work. Where we are now is a three to five member Board, insider, predominantly executive and operationally focused.

All right, let's continue with that test against the - a couple more public comments, then we're going to have wrap this up. ICANN should play a facilitating role in PTI Board selection, but should not be primarily comprised of ICANN staff who are not associated with the IANA department. That's

interesting. Proposed composition - a majority from current IANA function staff, while a limited portion selected by communities.

I think we could reasonably say that this - I mean I would say our conversation considered these exact features of the comment. I mean these have been considered in coming to the proposed solution.

PTI Board must be a Board of directors. Existing ICANN mechanisms should be used to populate PTI Board. If other operational communities join, they should also select a member of the PTI Board - needs narrow operational focus.

I'll tell you what's elegant about the three to five. In principle you could find a way that the three to five created seats for - the three to five construct creates an opening for such a possibility if the other operational communities chose to join. And that's kind of - I know there's all sorts of what you might - I don't know if this is an offensive word - but sort of bastardization of the original concept. But indeed that was something that was suggested very early on in the hybrid model was trying to find a way in for the other operational communities. So it's interesting.

I think - have we got any more bullets in this particular section? Yes, it does. I'll see if we can get through a couple more. PTI Board should be public - PTI should be public benefit corporation and comprised of representatives' names, numbers and protocols communities. Well we can - CWG is not in a position to - CWG is not in a position I guess to appoint representatives.

I'm not quite sure how we handle this. PTI's Board should be small in operation and focus. Well that's consistent with what we've said. PTI Board should be composed of a limited number of representatives from each of the



supported policy making organizations and the PTI itself. Selection removal should occur according to process by respective organizations.

Well I think we can say with some strength and clarity that the CWG considers the IANA function to be operational and not policy in nature, and would be mindful of that in any - and has been mindful of that throughout. Okay. We may want to just that we've considered all of the facets of this comment - I mean in coming to the route we have. Because when I read it, I think all of those have been discussed or considered in some way.

All right. It's a horrible time in the morning for some of you. I think given the time and the need for a break, we should probably try and wrap things up at this stage.

I think it's clearly inaccurate to say we have a consensus. But we have worked with a construct, and tested that construct against some of the public comments. And that construct that we've tested has been based on our prior work and the legal advice we've received.

And it includes what Sidley have termed an insider Board - a Board majority appointed by ICANN with a range of Board members from three to five. And we have made some progress in agreeing on the definition of the scope of the subsidiary for which that Board is responsible. So I think that's tolerable progress.

I think, you know, we've - it's a tough time of day to be working. And so thank you for those of you for whom it is. And we'll look forward to picking up with you. We've got another couple of challenging topics to still deal with. And that includes the issues in and around what might change in the event of some form of separation exercise.

So thank you. We'll look forward to picking up with you only in an hour from now I'm afraid to say. I hope you get a cat nap or a cup of coffee or whatever relevant break you need. Thanks very much everyone, and we'll talk to you in an hour.

Man: Thanks, Jonathan.

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