

ICANN

**Moderator: Cheryl Langdon-Orr
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Cheryl Langdon-Orr: Okay, just letting you know I did have some background at the moment. I've got a slightly noisy environment with a football game going on in the house and family watching it.

But I also am having trouble killing my sound so just bear with me for a minute and if I can just get Alice and Brenda to note who is in the Adobe Connect room to take that as our roll call. And if there's anyone on the audio that is not in the Adobe Connect please make yourself known now.

Okay. I think I've solved the problem with sound by plugging a headset into my computer therefore (unintelligible) mute it the alternate way. Okay, Brenda is assuring me that everyone is on the Adobe Connect. We have a small but nevertheless dedicated group turning up for today's Stress Test Working Group call.

And thanks to staff and - the excellent work. We have the updates as of 20th of June on our stress testing for CCWG documents on screen. And we will also be discussing the additional contributions that Malcolm Hutty contributed to our list regarding Stress Test 23.

So we don't have to listen to the background of the state of origin football match going on in my house with my family watching it. I might hand over to Steve to take us through the heydays and holidays of our stress test work and then we'll move into the discussion of Stress Test 23 based on Malcolm's work. Thanks very much. Steve, over to you.

Steve DelBianco: Thank you, Cheryl. Good morning, all. Can you hear me all right?

Malcolm Hutty: Yes.

Steve DelBianco: Great, thank you. Great, thanks a lot. And good morning, Malcolm. Cheryl if we see the agenda on this (unintelligible) that's in the screen it might take as much as 15 or 20 minutes to get through that and then in the remainder of the call I guess we could turn to Malcolm's Test 23, does that work for you? Okay great.

Cheryl Langdon-Orr: Yeah.

Steve DelBianco: So on the document in front of you - I circulated this just when we arrived in Buenos Aires. And it represented the state of play for us in the Stress Test Work Team for the work in front of us after the public comment period.

And there were several things that occurred even before we published for public comment that may mean that the Stress Test team has to do some extra work. On the screen in front of you the first two stress tests, the ones we devised - oh several weeks ago in response to Chris Disspain's concern about American courts making decisions on interpreting of bylaws and even those who proposed that scenario agreed that we really had that one handled.

Of course that assumes that binding arbitration can work; that assumes that courts around the world who recognize arbitration results can enforce it. And there's a lot of assumptions baked in there that may or may not be fulfilled by our second draft. So this highlights our dilemma that for us to reapply our stress tests we need to know a little bit more about the enforceability of the mechanisms that the community has in front of it.

Most of you on this call are going to be together with us next weekend in France as we try to come up with what that model needs to be and what degree of enforceability the model has. If things hold with where we're headed now we'll get enforceability through member or designator or even single member model. And so we'll be able to revisit the stress test without a lot of change involved. That would be my firm hope as well.

So the work to be done here is to simply convert these two stress tests on Page 1 into our table format which won't take any time at all. Are there any comments on these two from Chris Disspain?

Okay, let's go to the second page which was the (unintelligible) scandal that provoked one of our co-chairs to say how would we handle that? And we quickly trotted out Stress Test Number 9 and suggested that it would be adequate to address the kind of fraud that we had there. I don't think there's any more work to do on that one.

Speak up or raise your hand if anybody has anything they want to interject. On capture by insiders, which is on Page 3, we had suggested that there were two kinds - sorry, Cheryl, would you like me to scroll to 2 and speak to 2? Okay, 3, got it. And, Cheryl, I think each of us can control our own scroll. Yeah, exactly.

Now on the middle of this one we said that each AC, SO and SG needs accountability transparency rules to prevent capture from those outside that community. This is what some are calling internal AC and SO capture. And I think we are vulnerable to a challenge that perhaps we have not adequately stress tested whether an AC or an SO or even a subgroup like a CSG or NCSG or a constituency was vulnerable to capture by those who are outside of the community they're supposed to represent.

And all we said here was that we needed accountability and transparency rules to prevent capture from those outside that community. What does the Stress Test team think we need to do about that? Do we want to assess that there's inadequate rules or make recommendations that things be changed? I'll take a queue on that.

Hearing nothing we'll probably just leave this as it is and assume that maybe we'll hear something from the other work parties in the emerging issues group or WP3. There's a chance that they will address some of this inside capture. But it's probably beyond what it think the Stress Test team can do.

Now at the bottom of Page 3 we have two new stress tests that were thoughtfully recommended by David Post and Danielle Keel. They're part of an American civil society think tank here in Washington DC. They're among the many people that are very concerned that certain sections of the new RAA, the new gTLD RAA, section 3.17 and 3.18, which obligate registrars to investigate and respond when there are reports of abuse, which could include malware, it could include copyright infringement, trademark infringement, any kind of report of abuse, not necessarily from law enforcement, could trigger them to investigate and respond.

And as we've discussed many times, the community hasn't figured out what investigate and respond means yet. And ICANN's Compliance department is taking in on to figure that out. They're having a dialogue with member of the community but including registrars as well.

So we don't yet know what investigate and respond means. These two stress tests get to the fact that ICANN Compliance coming down sort of on the strict enforcement side of investigate and respond, and taking action to do that.

Now they acknowledge that the improved IRPs could give an aggrieved party an opportunity to challenge and then they talk about a scenario where you could have a potentially binding decision as well.

What would be the reaction of this group? Do we want to create these two scenarios and conclude that the IRP would be sufficient to address the stress tests? Well I think it's very similar to the scenario that Malcolm Hutty is going to take us through on Stress Test 23, which has to do with the RAA.

So Jonathan Zuck indicates in the chat that we can probably write these up and suggest that they are addressed by the stress test. Now those of you who read - I agree, Jonathan, it's more likely Compliance will not have a strict interpretation. But nonetheless, we'll probably play this through.

Do you think, Jonathan, that if Compliance took a lax approach to investigate and respond that it's just as likely that we get IRPs by the aggrieved party who's abuse reports were not being investigated and responded to? Maybe we should write it up that it could go either way.

Jonathan Zuck: Yeah, I mean, I guess that's what I was thinking. That's going to seem more rationale to the community that that's an issue. So I guess it's the question

about whether that represents, you know, standing to do an IRP and if it is then we're covered. Because I think being too lax is the more likely scenario.

Steve DelBianco: And, Malcolm, this is really on point to what you're going to take us through in a few minutes so we probably don't need to just spend too much time on this one because I think we're going to come right back to it as well. Okay so let's go to the next one.

This was back when we thought we needed representatives or individuals who stood between an AC and SO and their particular designator or member who exercised their voting power. I don't know - I have a feeling this one has been overcome by events. And we no longer need to worry about them. I'll give you all a moment to read it and let me know what you think.

So we had written this up on the understanding that the avatar or individual wouldn't listen to the instructed voting. But I believe we have eliminated that intermediate entity, that intermediate representative step. You think we can just dispose of this. Go ahead, Jonathan.

Jonathan Zuck: Yeah, I didn't know whether to type or speak. But I guess when this argument was coming up it felt like an endless argument of almost by necessity always being the case that there will be some representative that's in some meeting that's casting a vote even if that person is the, you know, the president or the chair of the stakeholder group. So, I mean, I guess I'm thinking it may be a question of just sort of rewording it but that there are those that are going to still wonder whether or not this is an issue even when the stakeholder organizations and advisory committees are their own member.

Steve DelBianco: So the - under a community power like voting on - I hate to use the examples of blocking of budget or - because we don't know for sure if that will be there but even so the community vote on...

Jonathan Zuck: Yes it will, damn it.

Steve DelBianco: What about a vote on a bylaw change if the vote is being cast by the chair of the ALAC, let's say it's Cheryl Langdon-Orr and Cheryl casts the vote according to whatever the ALAC's procedures were for determining how the ALAC puts their five votes into the mix.

I mean, inevitably a single individual has to hit the Send button and so you have this disconnect with a potential stress test that says that Cheryl may have acted without the proper authorization. When that happens suggesting that someone else in the management of the ALAC would have informed the other AC and SO chairs that, hey that vote is not right yet. They're going to suspend the voting.

You think we still need to keep this stress test then under that scenario?

Jonathan Zuck: I mean, I consider the scenario extremely unlikely but I also considered it unlikely when it was, you know, a literal avatar in a, you know, with a separate entity. I mean, I thought it was unlikely then too but I guess the degree to which it was possible then it's possible now, right? And I don't know that it costs us anything to have it in there and say that we have the ability, as Malcolm says, to get rid of that representative or whatever just to address that because, like I said, it felt like this came up when that argument was happening well what about them? What if they do it? What about, you know, and it just was - became endless so.

Steve DelBianco: All right. And, Malcolm, the disposing of the chair is beside the point because the first and most important step is to notify the others that the vote doesn't count and that we need to revote. Whether or not that involves replacing the chair is sort of neither here nor there. The most important thing is to understand...

((Crosstalk))

Cheryl Langdon-Orr: Cheryl here. I think what you just said is actually almost the antithesis of what some of the people who fear this scenario would want to hear. Because it is the ability to have that designation to cast an authorized vote attached not to an individual as a member but a person holding a role so that should that designate at what is a point in time, me in the example you just gave, go off the rails and not cast their vote as dictated by the mechanisms within your example, the ALAC and At Large community.

Then the person would be replaced and that replacement scenario in this stress test I think is fairly important. So I agree with Jonathan, I don't think that costs us anything at all to leave this stress test in the system. But I do think we don't need to underplay the importance of what Malcolm has outlined and that is the individual gets replaced by someone else who will hold that role.

And in fact it is the capacity to have the role or the office acting in the capacity which was absolutely vital for certainly a lot of the At Large community to feel more comfortable with its - these outcomes. Thanks.

Steve DelBianco: Thanks, Cheryl. So I take it from what you're saying that we should add a fourth paragraph to suggest that in addition to informing the rest of the community that the vote is invalid, and then recasting the votes there would be the additional possible step (unintelligible) the person who cast the vote.

((Crosstalk))

Cheryl Langdon-Orr: That the entity which they were - whose vote they were representing could deal with in their own internal mechanism with that office.

Steve DelBianco: So we would add that as a fourth paragraph. And it's sort of an exclamation point at the end of this little episode.

((Crosstalk))

Steve DelBianco: And this episode could be true - go ahead.

Cheryl Langdon-Orr: Yeah, I was going to say it actually brings us back rather nicely to ensure that we pick up on the fact that the AC and SO accountability also needs to be dealt with.

Steve DelBianco: Cheryl, so is it sufficient - I wrote - look at the second paragraph. If any elected AC and SO officer is aware that - and I'll change that to designator or member - it's just that their chair is not following policy or position. Whoever casts their vote - because it may not be a member or a designator under what we're likely to conclude next week. Remember, under our new empowered AC SO, there is no designator or member representative.

Cheryl Langdon-Orr: Yes, yes.

((Crosstalk))

Cheryl Langdon-Orr: ...certainly modifying that to pick up what we'll probably end up with in the empowered model.

Steve DelBianco: I mean, Cheryl, I mean, sometimes for the Business Constituency, I'm the Vice Chair for Policy, I might be the one who sends the BC position in for purposes of voting on things but usually it's the chair. And at the AC SO level it's probably going to be...

((Crosstalk))

Cheryl Langdon-Orr: I don't think we should tie it to a particular office. I think we should perhaps use the term delegator. You know, the person who is delegated to cast the vote on behalf of the AC or SO.

Steve DelBianco: We could put delegated representative and put in parentheses, usually the chair for purposes of clarity.

Cheryl Langdon-Orr: No, I wouldn't say usually the chair, I would say whoever is delegated because it really doesn't matter. And certainly for some of the - some of our regions there will be a situation where someone could very well aspire to and hold the office of chair but could never act in the capacity as the delegated authority to cast a vote.

Malcolm Hutty: Okay but - Cheryl, under the empowered SO AC model, we're not really having a person that is casting the vote? What we've really got is the SO is casting its vote. The fact that a human being actually sends the email that says it's - it doesn't change that, it's still not their vote the SO's vote.

((Crosstalk))

Malcolm Hutty: And if they have misrepresented what the SO's vote is then that is simply a misrepresentation. It is...

((Crosstalk))

Cheryl Langdon-Orr: Exactly, Malcolm. It's part of a continuum. It's part of a continuum.

Malcolm Hutty: Yeah, that's the point. And that's the essence of the empowered SO model that moves away from the essentially corrected or solves the problem identified within the UA model around this point.

Cheryl Langdon-Orr: Yeah.

Steve DelBianco: Yeah, the very last paragraph said, because I wrote this after we were well into the Buenos Aires meeting, I said that the empowered AC SO model would fully mitigate stress test since the elected officers of the AC SO would exercise their votes directly. But this conversation leads me to believe I had that wrong, that you'd still have a situation where the AC SO officer would be designated to cast the vote could still do so in a way, potentially, it would not follow the position or direction of the underlying AC and SO. So I guess we need to keep this.

Cheryl Langdon-Orr: We do. And I think we used the terms "delegate" and "designated" to cast more than necessarily terms like officer or specifically chair, etcetera, because in some processes, for example, we have designated penholders. And in the absence of counterpoint and disagreements for the particular direction that their documentation runs in one should normally expect in the case of the ALAC and the At Large community, that that would go through and after some minor modification in the internal review the actually transmitted on behalf of the ALAC as a ratified document.

But its transmission could very well be managed by staff, not by, you know, an officer at all. The fact that it would be transmitted is approved by the executive. But the actual transmission may very well be managed, you know, by almost a third party. So particularly when we're working in the empowered model I think we need to keep our flexibility pretty much out there.

Steve DelBianco: Cheryl, what about the text I put in the chat?

Cheryl Langdon-Orr: Well, that's where I was balking, AC SO officer designated to cast the AC SO vote. It maintains...

((Crosstalk))

Malcolm Hutton: How about the person that is authorized to communicate the vote of - I think it's not cast the vote, it's communicate the vote...

Cheryl Langdon-Orr: Yeah.

Malcolm Hutton: ...that has been authorized by the AC SO. So I'd say - I'd describe it in those terms, the authorized person to communicate the vote of the SO AC.

Cheryl Langdon-Orr: Yeah, I think that's much more flexible, Malcolm. Yeah.

Malcolm Hutton: That's the idea. And, Steve, in terms of do we need to keep this stress test? I would say actually I would prefer keeping stress test that are identified and then marking them with having been satisfied rather than abandoning them.

Cheryl Langdon-Orr: Here, here.

Steve DelBianco: Yeah, thank you. This one we hadn't created yet so it was a matter of creating it or perhaps not creating it. But I catch the consensus here...

((Crosstalk))

Malcolm Hutto: ...disposing of this point in a discussion and stopping this thing being a blocker, it will be useful to create this as a stress test and then for marks that we have identified as being satisfied so that then if somebody raises the point again in the future we can say oh well we had that as a stress test and the analysis can be found here and the outcome of that analysis can be found there. And now we can move the discussion on. And it helps to stop us moving around and around in circles.

Cheryl Langdon-Orr: Absolutely.

Steve DelBianco: Understood. So I put in the chat that I thought I heard which was the phrase the person designated by AC SO to communicate the AC SO vote.

Cheryl Langdon-Orr: Yeah.

Steve DelBianco: Any objection to that? Cheryl?

Cheryl Langdon-Orr: That works.

Steve DelBianco: Malcolm? Jonathan?

Malcolm Hutto: Yeah, happy.

Jonathan Zuck: Perfect.

Steve DelBianco: Great. Let me right that down. Person designated by AC SO communicate - to communicate...

Cheryl Langdon-Orr: Yeah.

((Crosstalk))

Steve DelBianco: It's even more clerical than the word "casts" the vote. Right?

Cheryl Langdon-Orr: Yeah.

Malcolm Hutto: Yeah, cast is essentially misleading; communicate makes it more clear that it is the AC SO's vote, not the vote of the person who happens to be emailing it in.

Steve DelBianco: Very good. Excellent. Thank you. There are two more phrases here in the middle, the revocation and reassignments of ccTLD in response to legislation. I put these in there because in the actual public comment period these things came up but I don't believe we should modify our stress tests in response to them.

Instead, I recommend that the stress tests team just contribute this phrasing to our response in the public comment tool. So the government of India, for instance, noted that Stress Test 21, despite our best efforts, decided to punt and not come up with anything on the revocation and reassignment of the CC (unintelligible). We simply said that the ccNSO has decided that they're going to handle it and they're going to develop policy pursuant to the most recent framework of interpretation. Any objections to just responding that way?

And the next one, Richard Hill said “Move ICANN to Switzerland and that that would cover all the jurisdiction problems.” I think we have been over that enough times that I’ll say that it does not address any jurisdictional problem because they have very little to do with where you’re located. Any disagreement?

Cheryl Langdon-Orr: No.

Steve DelBianco: Great, thank you. And then in the NTIA letter, the one that came over from Larry Strickling the day before - a week before we went to Buenos Aires, he had four stress tests identified and I extracted them from his letter because he used the word “stress tests” right so I put them in there. I numbered them NTIA 1, 2, 3 and 4.

So let’s take a few minutes to go over those and decide whether we think they are covered by an existing stress test or it’s something we need to do that’s new.

First one, if ACs and SOs do not want to vote, and this is the situation where the SSAC and the RSAC have decided to notify us that as of now they choose not to have a vote in the community empowerment mechanisms. Is that become a stress test? If it’s just those two that’s probably not dispositive of our model. That takes us from 29 votes to 25 votes and the 25 votes, if they're still there, is still a pretty robust set of community representatives, the ccNSO, the GNSO, the ALAC, the GAC and the ASO. So that feel pretty robust.

But what if the GAC says they don’t want to vote? Right? Now we're down to 20 votes which is the GNSO, the ccNSO, the ASO and the ALAC. What are your views now? Let’s have a little bit of a discussion. And, Malcolm, it’s not

important why they're not, they're not. Given that SSAC and RSAC are not participating, given that...

((Crosstalk))

Malcolm Hutto: Actually, Steve, I disagree.

Steve DelBianco: Go ahead.

Malcolm Hutto: I think it is important as to why they're not. The question that is being posed by NTIA is does the non-participation or potential non-participation undermine the multistakeholder model? Is it - does the multistakeholder model still stand if certain groups are unable to participate or unwilling to participate?

And in that sense - and according to that I think it is different as to whether or not the groups that are not participating actually are - consider themselves to be stakeholders or not. If they - if a significant number of groups that are stakeholders are unable to participate it could be argued that you no longer have a full engagement of stakeholders and therefore the multistakeholder model isn't working.

But if you have mere experts that don't consider themselves stakeholders, not participating, then it's really not relevant to the question that the NTIA raises. So I would say that the SSAC decision I would think is really not relevant or is not a problem for the point that NTIA wants but GAC's non-participation probably deserves closer analysis because the governments do consider themselves stakeholders.

Steve DelBianco: Well, look, I'm persuaded. I'm persuaded. So we would write up a response to this to suggest that for instance RSAC and SSAC's decision does not take them out of the multistakeholder process; they still maintain their ability to give formal advice and they will, they've just chosen not to vote on matters outside of their narrow expertise on security.

But why not apply the same - the same analysis to the GAC that if the GAC, for whatever reason, should choose not to participate in the voting, they still preserve a formal AC on matters of public policy of giving formal advice to the ICANN board. That is not a detraction from the multistakeholder model if they decide they don't want to be voting on things like bylaws changes.

So we could apply the same analysis for the GAC and still say that the multistakeholder model is holding. Malcolm.

Malcolm Hutty: You could. And whether that will persuade everyone I don't know. But there is a further point that I would also make which is that - which I think is even - which is in (unintelligible) challenge which is that if the GAC are invited to participate in this is not undermining the stakeholder model that they choose not to because they have the ability. The multistakeholder model doesn't require that everybody talks on every subject, it just means that everyone has an opportunity to participate should they wish to.

And if that offer is being held out for the GAC the fact that the GAC choose not to take it up shouldn't be seen as compromising the multistakeholder model at all.

Cheryl Langdon-Orr: Here. Here.

Steve DelBianco: Yeah, I like that point too. I'm taking a lot of notes on that and we'll put those to good use. I do think though we probably need to address the numbers problem that if a vote on a bylaws change comes up and only four groups decide to vote is that itself a problem? Well your point is, no, the others have the opportunity to vote and they choose not to use it. But if they were invited to we've done all that we can in the multistakeholder mode.

So think about that for a minute. I'll go to...

((Crosstalk))

Malcolm Hutty: To be honest, small numbers, we shouldn't be too distracted by, you know, apparently small numbers like three or four or whatever because if those groups that are voting themselves are representative of a very wide range of stakeholders that before they cast that vote that - the process of deciding how to cast that vote was made to the highly multistakeholder process as for example it is in GNSO, I'm sure it is in ALAC as well; I'm less familiar there.

Then I would say that it would still be argued, even if there was just one that chose to do it you could still say the community as a whole has had an opportunity to engage. And a substantial chunk of the community has actively engaged. You could still say that.

Steve DelBianco: Yeah, the CC and the G cover virtually all supporting organizations for all the domain names on the planet and ALAC covers the earth-bound users and registrants so at least those three you really do have a pretty wide multistakeholder reach. Samantha, go ahead.

Samantha Eisner: Thank you. So I guess I see this a little bit differently from Malcolm...

Steve DelBianco: Not hearing you, Samantha.

Samantha Eisner: Can you hear me now?

Cheryl Langdon-Orr: Very faint, Sam.

Samantha Eisner: Okay. I'm having some technical issues. I'll type in my intervention. I can't improve my line right now.

Cheryl Langdon-Orr: Okay. Thanks, mate. While Sam is typing, Steve, I do think it is important that we articulate and therefore have it as a stress test that it is the opportunity and open ability for all stakeholders to be engaged which should be the critical test for the robustness of the multistakeholder model that we're running.

Steve DelBianco: Agreed, Cheryl. The opportunity, the invitation is open. Do we know at this point where our model, our anticipated model, we leave the invitation open that SSAC, RSAC and perhaps even GAC, could at any time decide, you know what, I think this is one item we're going to vote on.

So the bylaws would be to allow SSAC and RSAC to have those votes that we originally anticipated and they would be able to turn them on or off as needed. Do you think that's what we need to suggest?

Cheryl Langdon-Orr: My personal opinion is that that would certainly comfort the At Large Advisory Committee and the regional organizations of the At Large. So my answer there would be yes.

But I am very aware that in the strictness of the empowered AC SO model once one opts in one does not get to un-opt. Now it doesn't mean that you

have to opt in at the earliest possible stage. But once one does opt in then you are opted in; you can't opt in and out and in and out. So...

((Crosstalk))

Steve DelBianco: ...might have been the question of whether you were going to convert to a member or a designator...

Cheryl Langdon-Orr: Indeed.

Steve DelBianco: I don't think we ever said any of that with respect to the voting powers. If the bylaws are written with the ability to give five votes to the GAC, five to the ALAC, GNSO, ccNSO and ASO, then those are open and nobody has to opt in to anything. They simply cast a vote or they abstain. Right? So let's not confuse the voting powers to the designator member opt in.

Cheryl Langdon-Orr: That's very true. And in fact with the designator member opt in you actually only ever need one providing that one is trusted to act in the best interest of the whole based on those community votes. But I think the optics of only one might not be as good as only three or four.

Steve DelBianco: And anyone who moves to a member designator legal personhood is only doing so for the purposes of enforceability of a vote but the actual vote happens before that. So I don't think we want to confuse the opt-in.

((Crosstalk))

Steve DelBianco: But here's the key question. If the RSAC...

((Crosstalk))

Cheryl Langdon-Orr: One does step into that designator opt-in then one does not get to opt back out again.

Steve DelBianco: Understood and that has nothing to do with whether they vote, it really doesn't. The voting is a separate step.

((Crosstalk))

Cheryl Langdon-Orr: ...need to make it clear in this stress test that that is the case.

Steve DelBianco: Okay. Got it. Got it.

Malcolm Hutto: Yes so...

((Crosstalk))

Malcolm Hutto: Cheryl, is that something that maybe we should be suggesting as something that we might wish to consider whether that could be altered if that's a problem? If the stress test is highlighted...

((Crosstalk))

Cheryl Langdon-Orr: ...problem so much as it needs to be clear that it is not inhibiting the ability to vote and contribute to the consensus building. It is only an enforcement issue.

Malcolm Hutto: Okay.

((Crosstalk))

Cheryl Langdon-Orr: ...and that's why I think we do need the stress test to do that. Okay...

((Crosstalk))

Cheryl Langdon-Orr: ...what Sam put in?

Steve DelBianco: Before I do that, you guys still haven't addressed my key question, is the invitation to exercise your voting open to all permanently? And of that if we survey the members of the CCWG some of them believe that the bylaws don't even have to provide for voting by SSAC and RSAC because they've informed us well in advance that they intend not to use it. And if the bylaws don't give them the ability to vote that open invitation has been rescinded permanently.

So let's talk about that. Should we advocate that the invitations to exercise the votes are open permanently and are baked into the bylaws that we're going to update later this year?

Cheryl Langdon-Orr: I...

((Crosstalk))

Cheryl Langdon-Orr: ...my personal opinion would be yes it should be. Because I think it is the strength of our multistakeholder model argument is going to be founded upon the fact that that is an ongoing uninhibited open invitation to participate because in RSAC and SSAC in current management and in current thoughts may not wish to contribute via voting. But a future RSAC and SSAC may indeed have a different view especially if the security and stability of the system is being affected in any way.

Malcolm Hutty: I'm not sure I quite share that view although I'm a bit content for it to go forward. But this is really the distinction I made at the beginning about the difference and the reason. Given that at least in SSAC's case the reason that they are giving for not wishing to participate isn't that they don't find it difficult or that they don't want to or so forth but they don't consider themselves stakeholders, they consider themselves experts.

And for that reason I would say that in their case if that invitation (unintelligible) to participate in the decision making they could still provide a technical advice, we're not abolishing their role. But if that were not open permanently I don't think that would compromise the multistakeholder nature of the proposal.

Whereas by contrast, for the GAC, where they do consider themselves stakeholders, and therefore are choosing not to participate in the decision making for other reasons, I think it arguably would compromise the proposal unless that invitation is held out for them permanently so that a future GAC may change its mind.

Cheryl Langdon-Orr: And, Malcolm, Cheryl for the record. I would argue that if one has that open invitation for one advisory committee one should have it for all.

Malcolm Hutty: Okay, fine. I'm willing to accept that.

Steve DelBianco: Of those expressing a preference it's four of us who believe we should inform the rest of the CCWG about that. And we may need to say that the bylaws should accommodate the open invitation to vote. And one of the concerns is how will that affect things like quorums, how will it affect the thresholds and voting thresholds that if somebody decides not to vote that that abstention

does not count as a no. And this has come up. We discussed it in Istanbul. So we'll return to that perhaps even next week when we're in Paris - return to that question of setting the thresholds appropriately.

((Crosstalk))

Cheryl Langdon-Orr: ...the issue of abstentions acting as a no even important ones, because that is of course the current norm for board voting, for example. And we certainly see it where that has shocked and horrified some of the community when they've discovered that that is the case. So I don't think the abstention acting as effectively a no vote would hold wide community support and carriage. And I think that's something that we do have the opportunity to deal with in our current work on accountability.

Steve DelBianco: Okay. Fantastic. Let's move to the second of Larry Strickling's stress tests, NTIA-2. This notion of the potential risk of capture. We did discuss this just 20 minutes ago with respect to Stress Tests 12 and 13, and I brought up the fact that we probably don't adequately speak to the capture by internal parties in an AC SO. So Sam Eisner put something into the chat right now say, do we need to ask for processes on transparency and openness within an AC and SO so that when voting occurs that tall members of a given AC SO are aware that the vote is happening and have participatory rights.

So if you recall on the previous page we had said that each AC SO needs accountability and transparency rules to prevent capture from those outside the community and we could add that they need transparency and participation rules for any voting (unintelligible) that would help to address that.

But as a stress test it's beyond us to dive into the internal rules and procedures of every AC and SO and suggest that the stress test team has looked them over and has concluded that they are or are not sufficiently open, transparent and participatory. We're not going to do that. I can't think of how we could so we'll just indicate that there's a need for them each to be that way.

Cheryl Langdon-Orr: Yeah.

Steve DelBianco: Any other comments on NTIA-2?

Cheryl Langdon-Orr: Sam is just noting that her comment was broader than the internal AC SO rules.

Steve DelBianco: I don't understand that. I don't understand (unintelligible).

Jonathan Zuck: I think I get what Sam is saying. This is Jonathan for the record. She's talking about the very way - the very same way we have some text in there now about the board having to give due consideration to the advice of the advisory committees that came from ATRT 2 does that same text apply to the community powers? In other words, do we have built into our accountability mechanisms the need to go out for public comment or to take advantage of - take into consideration advice from the advisory committees, that sort of thing. I think that's what Sam said.

Cheryl Langdon-Orr: Okay. Sam seems to be supporting your interpretation there with a thanks, Jonathan. This is Cheryl for the record. And I got to say we do have audio gremlins because it was very difficult to even hear you, Jonathan. So let's hope this hangs out for the next 15 minutes of the call.

Jonathan Zuck: That's probably ever the case.

Jonathan Zuck: All right, it's quieter now. Would you like me to go again? Would that be useful?

Cheryl Langdon-Orr: Yes, please.

Jonathan Zuck: Yeah...

((Crosstalk))

Steve DelBianco: This is Steve. I would ask - this is Steve. Would you try to articulate given that you think you understand what Sam is asking, what is the answer to that? Where does it fit in the stress test discussion?

Jonathan Zuck: Oh I think that I agree that it's not necessarily something that - as a question of policy can be dealt with in the stress test team. I agree with you on that. I was just trying to articulate Samantha's point which is have we built into our community empowerment mechanisms the same requirement to pay attention to advice to go out for public comment, etcetera? So, I mean, this probably isn't the forum to answer those questions.

But I guess she's raising it here because if the community chooses - the stress test could be the community choosing to ignore or, you know, passively choosing to ignore the advice of the SSAC or the GAC in its deliberations in voting. I mean, I think that's what she's getting at. But, I mean, actually changing policy for how...

((Crosstalk))

Jonathan Zuck: ...voting would happen elsewhere, right? I mean, and it might just be a note to pass to the people doing the drafting that there ought to be some similar requirement to at least take into consideration the advice of the advisory committee.

Steve DelBianco: Like the way that the board are required to consider the...

((Crosstalk))

Jonathan Zuck: Precisely.

Steve DelBianco: ...advice of the GAC and if it disagrees try and find a mutually agreeable solution? I hope you don't mean that.

Jonathan Zuck: No, I think I mean more the language that came out of the ATRT 2 about just giving due consideration to advisory committees, that language, that we're moving over...

Cheryl Langdon-Orr: Yeah.

Jonathan Zuck: ...into the bylaws for the board. So not the GAC specific stuff about giving preferential treatment to it but the due consideration language that came from ATRT 2. I think...

((Crosstalk))

Jonathan Zuck: I'm trying to speak for Samantha but, I mean, I think that would be the way to address that concern.

Steve DelBianco: So we're going to be telling the ALAC that before you vote you have to consider advice of SSAC, RSAC, GAC and others. Are you sure you want to go down this road? And you also used the word "public comment" so before ALAC casts a vote on a bylaws change are you saying that ALAC has to put that vote out for public comment? I'm pretty sure you didn't mean that.

Jonathan Zuck: I don't know what I meant. I was just trying to interpret Samantha's intervention. I guess the question is whether or not there's any - maybe due consideration - an opportunity for those organizations to provide input that they're not voting do they have the ability - is there - do they receive notice. Maybe it's not public comment but do we provide notice to the SSAC, for example, that - or the ALAC even if they decide not to be voting members, to provide notice to them to provide advice prior to a community vote taking place on a bylaw, for example.

Cheryl Langdon-Orr: Okay.

Steve DelBianco: Would that mean that we'd have to write voting procedures that first find out who's voting, who intends to vote and who doesn't and then a notification, a delay as we wait for them to provide advice and then consider their advice before the ALAC gets to vote? Remember, this was supposed to be a rather quickly engendered if we're going to consider a bylaws change or a budget we're going to vote on whether to approve a budget. We don't want to make the voting to be so slow and cumbersome that it would get in the way of budgeting and strategic and operating plan process. So...

((Crosstalk))

Jonathan Zuck: ...fair point. And the budget is an interesting example because there's already so much opportunity for input, right? I mean, so that - that particular case is a

very bad example of this. And everyone will have received lots of notice that there's a new strat plan, new budget, there will already have been a public comment process so everyone that wants to participate will have had the opportunity to do so. I wonder if there's other instances.

And I guess that's true of bylaw changes as well. They're going to go out for public comment. So I don't know, Samantha, can you think of an example or she's going to write something up she says - think of an example of which there isn't already sufficient time prior to a community vote where everyone would have had the opportunity to be alerted. I think that's probably a good - that's probably a good point is that we may not need anything because most of these processes already have public comment periods built in before they'd even get to the community vote.

Steve DelBianco: Yeah, and all of us are taking turns trying to interpret what Sam is saying. Because I had interpreted it the opposite. I thought she was worried about the internal, whether everyone inside of the ALAC was adequately informed and able to participate before the ALAC took its position and communicated its vote. I thought it was an internal (unintelligible). So I'm confused.

((Crosstalk))

Jonathan Zuck: Yeah, no I didn't think...

Cheryl Langdon-Orr: ...what Avri wants to say then, shall we?

Steve DelBianco: Go ahead, Avri. Avri, go ahead.

Avri Doria: Told my line is noisy but I can't get on the phone.

Cheryl Langdon-Orr: Go ahead.

Avri Doria: Can you hear me?

Cheryl Langdon-Orr: Yes, go ahead.

Avri Doria: Okay I thought you couldn't hear me. Okay, I've gotten confused in this last discussion you've got. I put my hand up before just on the issue of the internal transparency of the mechanism inside the various AC SO. While I think that it is absurd for us to go and say that we are verifying it now I do think that we need to have something that deals with this issue. And we don't. We have rules about transparency within stakeholder (unintelligible).

Now we also have specific ones like SSAC that keep themselves closed for their defined security reasons. But I do think that that internal anti-capture and transparency mechanism has to be dealt with somehow. We can't just sort of say no, those are internal to them, that's too hard. We're not doing it. So I'm not quite sure how we deal with it. And it's not stress tests. And I know my audio is breaking but I can't get on the phone.

Steve DelBianco: Thank you, Avri. We're going to have to wait until we can address this internal accountability issue. Until Sam puts it in writing let's not speculate further on what it is that Sam means. We'll wait until we've received that.

There are two more...

((Crosstalk))

Avri Doria: I was not speaking of what Sam meant, I was speaking of what I meant.

Cheryl Langdon-Orr: Yeah, I think that was clear certainly to me, Avri, thanks. Cheryl for the record. And I'm wondering, Avri, if you would like to just type up to help us capture what we may have lost with some of the audio break up there as well.

Steve, I'm noting the time and this is only a 60-minute call. And I'm aware that we have the NTIA Stress Tests 3 and 4 to look at. And I wondered whether we wanted to either extend today's call slightly or agree to deal with Stress Test 23 in our next call or how did you want to all proceed? Malcolm, particularly, if you could give your reaction to do we finish off the NTIA stuff now or do we break and - oh this was scheduled for 90 minutes. Thanks, Alice. That makes me feel much better. Okay we can continue on. I was just getting nervous with such a little amount of time left.

Okay. So let's not worry about extending until closer to the 90 minute mark. Sorry for that intervention. Back on to the NTIA stuff then.

Steve DelBianco: All right so back to NTIA 2 which was the internal capture. And there we have to look at transparency, availability of voting, proper participation of voting inside an AC SO before it casts its five votes on a particular decision.

NTIA 3 and 4, let's get these done before the top of the hour, we'll leave the last 30 minutes - and I have a hard stop at 90 minutes as well so we'll add 30 minutes, Malcolm will turn to 23.

NTIA Number 3 is where Larry Strickling asks, what about barriers to new participants? And let's talk about that a minute. It's come up before, this notion of whether a new participant is not an ICANN insider, wants to begin to participate. I mean, they try to find a home in the GNSO or the ccNSO or maybe they'd find a home in the ALAC. Are there - do we do a stress test that

says new participants are finding it too difficult to be able to participate meaningfully in an existing AC and SO?

When we write stress tests we typically write them as if the bad thing is happening. And then we say what would the - what would our response be under this new accountability mechanism? So let's talk that through. What would our response be if we got reports that new entrants - participants cannot find a home in the AC SO structure?

Malcolm, you said...

Malcolm Hutty: Steve?

Steve DelBianco: Go ahead.

((Crosstalk))

Malcolm Hutty: Paragraph 89 of the proposal adds, say, or extends an existing core value, it boosts it to the level of a commitment, which is the highest level of policy objectives that we have. And it states that it is our objective to employ open, transparent and bottom up policy development processes that seeks input from the public for whose benefit ICANN shall in all event (unintelligible) but promotes well informed decisions based on expert advice; and, three, ensure that those entities most affected can assist in the policy development process.

I think this addresses this in two ways. Firstly, if there were some specific decisions that was acting first to exclude new participants, for example, I don't know, maybe GNSO constituencies were closing themselves to new members or if there was a new stakeholder group that was identified the

source of constituency basis and was not getting it this commitment would give a basis for challenge.

It would give a basis for ultimate challenge through the IRP process to say that this - that decision is inconsistent with the objective of having that open transparent and bottom up policy development process and that it was therefore failing to ensure that it was well informed decisions based on expert advice and failing to ensure that those entities more affected were able to assist in the policy development process. So that would give a direct challenge on that.

The second way in which this commitment addresses this problem is it also sets out a policy objective for the broader work. So when we look at future ATRTs and so forth it will be one of the things in which - against which we measure whether we are achieving the things that we want and what new reforms should be proposed as WS2 or as ATRT 3 or so forth will have reference to this as one of its guiding policy principles to see whether or not that is being achieved. And those things are essentially a hard and a soft way of addressing this issue.

So I believe that we could say that this stress test that NTIA 3 that's been identified is a good stress test. It's one that we should document but that we can be confident as being able to say that we've satisfied it.

Steve DelBianco: Thanks, Malcolm. And as you were speaking I pasted Paragraph 89, which is in the core values, but I pasted that into the chat. As you indicate that core value becomes part of the standard review for an IRP. But let's play that scenario. The member of the community who could not - who was encountering a barrier to participation - to use Larry Strickling's words - would that individual or group be the one who has standing to file an IRP?

We'd want to be sure that they will not be denied standing if they were a sort of not part of any AC or SO. What are your thoughts on that?

Malcolm Hutty: Under our current proposal if they qualified as a materially affected party by the decision to implement that barrier, then they will be entitled to seek the IRP.

Steve DelBianco: And if we write it up that way in our stress test it'll make it clear that we're assuming that's the case and we'll want to emphasize that to Work Party 2 to be sure that their standing rules for the IRP would accommodate this outsider who's encountering a barrier. It's rather expensive, right, so another barrier could be the expense. We'll have to acknowledge that.

Malcolm Hutty: Good point.

Steve DelBianco: All right...

((Crosstalk))

Cheryl Langdon-Orr: As a stress test - Cheryl for the record - as a stress test I think we should run it and we can probably satisfy it with those writers. I note in the chat Avri has managed to dial in and when we've dealt with Stress Test 3 - NTIA 3 - we need to go back into NTIA 2 because there's some comments on our not being able to have a remedy for it.

Avri Doria: I also have a point on 3.

Cheryl Langdon-Orr: Go ahead.

Steve DelBianco: Go ahead, Avri.

Avri Doria: Yeah, I think that you're not dealing with it. To say that they can go to IRP, our second highest level of mechanism, and as you say the expense, you know, just think of it. You know, we're hearing those voices already from various folks. Now they may be misguided, they may not but that's beside the point. They're saying they cannot gain access. And our answer is going to be, that's okay, you can go to IRP.

And also, the - what happens then? Let's say there is an IRP. Now IRP is set up for making decisions that are binding on the board. And not binding on AC SOs. So are we now saying that the IRP mechanism is a viable mechanism for appealing against AC SO problems, issues, etcetera? Because that's giving it a new ability.

And - or are we saying somehow that the board has the ability to force on an AC SO various conditions of internal operations to make sure that they are letting in people they should be letting in.

Now the issue might be just there is no AC SO for this and it is a board issue because that means they got to create some new mechanism. But it could also be that, you know, one is the wrong kind of something and is not being allowed into a particular AC SO.

And at that point I don't see, A, how the IRP deals with it; and, B, I just do not see it as an adequate answer as, oh, let them eat cake. Let them go to the IRP. I don't see how that works. Thanks.

Steve DelBianco: That's a great point, Avri. What about the second point that Malcolm brought up which is the notion that the ATRT, the Accountability Transparency

Review Team, when it conducts its review would its review include examination of problems with barriers to entry? Should we write that in to the suggested criteria for the ATRT?

Avri Doria: If you're asking me, and I'll answer also Malcolm's indication that I misunderstand the IRP, I think it makes sense but then you're also saying you might have to wait five years as another. You could go to an IRP or the ATRT will look at your case and, oops, you know, one of them just finished so, you know, we'll get to your case in five years. I don't see that being an adequate answer either. So we may have to work a little harder.

On Malcolm's it's that the IRP is findable on ICANN is he really understanding it to mean that the IRP can reach into any of the AC SOs with its ruling and enforceably correct their behavior? And then I'd also ask that does it mean to enforce something on an AC SO? That's not a concept that we have developed anywhere. We have developed perhaps some contrast in IRP of what it means to be binding on ICANN which indeed is binding on board, staff, etcetera.

But to say that the IRP is binding on an AC SO, is something that I do not understand at all because we have absolutely no mechanism for that other than the board telling them what to do. Thanks.

Steve DelBianco: Malcolm, let me try to reply to you. That the ATRT already have two sections on it for reviews, C and D. And I put them in the chat. So we think it's already going to be appropriate for the ATRT to look at whether the general Internet public is participating. But it's only once every five years as Avri says.

And I think Avri has a good point in that the IRP today is really about board decisions and not about the micromanaging of who was or was not able to

have a voice. Are there other means, other than IRP, like the ombudsman, and Adam just put that in the chat as well, and Cheryl mentions as well the organizational review.

So I think we're going to have to say all of the above and not lead with IRP since it doesn't really directly go to the AC's and SO's behavior but more to the board. So we can list all of these as multiple means of addressing the stress test and then our job is to see whether taken as a whole do we think that this whole collection of four mechanisms is adequate to address the stress test? And if it's not we're going to have to come up with some more.

So we're going to run out of time on this so what I would encourage us to do is to quickly move, it's 8:05, we have 25 minutes left. Let's spend just five more minutes on the NTIA stress tests and then we'll get the full 20 minutes for Malcolm on Stress Test 23.

And this is barriers to entry so the barriers to entry we said we have the ATRT, we have the ombudsman, and we have the structural reviews which are periodic. And you have ATRT ending in the IRP. So we have four means and taken as a whole they may or may not be adequate. And Avri and Malcolm, great exchange on that. It's great for us to dive into who it is an IRP would target.

Okay let's go to the last NTIA item in just four minutes here, which is really about the GAC, about whether we are operationalizing a group like the GAC so that they suddenly get to vote on things that are outside of their tight little public policy playpen that they're in today.

And Larry doesn't object to that but he simply says, "Do a stress test on unintended consequences of something like having the GAC vote on bylaws and budget and being part of a community that can launch an IRP."

So we're going to need some creativity on the part of the Stress Test team to come up with, well, scenarios or unintended consequences of having the GAC participate as a voting body. And when we do so we take the risk of saying provocative things to the GAC. We've done that plenty of times in this process. But does anybody have any ideas for the unintended consequences of the GAC exercising its votes on things like the community powers? I'll take a queue on that.

Cheryl Langdon-Orr: Avri - Cheryl here. Did you want to just speak rather than type now - oh there we go, you've hit the send button. Do you want to speak to your chat anyway?

Avri Doria: I didn't speak because it was to Point 2 and we were beyond that and not going back. And I believe on 4 - speaking at the moment, that no, we have not thought about it all. We don't know anything about the unintended consequences. We have not given that any consideration. I don't see that we have any stress tests that deals with unintended consequences of operationalizing the GAC.

And I don't, you know, and as for example, the GAC, I don't think it's just the GAC that we have to deal with because none of the - none of the AC SO have an operational role. Now GNSO is starting to creep its way to it with its implementation review teams. But still that's not an operational role. So I really don't think we've actually looked at that question for any of them and it's something - it's work that still needs to be done because I don't see how it's been dealt with.

We have not dealt with these issues especially as we elevate them, as I was saying in my notes, to that membership level where they are supreme and the board can really no longer tell them what to do. You know, now we have a situation where the board can reorganize us, where the board can, you know, have these operational reviews where it tells to fix this, to fix the other thing and we have to do it.

Once - we are members and we are the supreme entity then I'm not quite sure how that happens. And I think that's what these questions really come into their own. I think - and we have to distinguish between the models in terms of the responses because I think today we have an answer; the board reorganizes it, the board fixes it, you know, the board deals with the problem because they are subordinate to the board in terms of how they function to a certain degree.

But once we enter a membership type of role of the SOs ACs, Malcolm's notion of individual membership, but the broader, you know, the ACs and SOs are the members, they have the - they overrule the board in a very large sense and therefore there is no check against it. And I don't think we could say that there is. Thanks.

Steve DelBianco: All right, Avri, we're coming up on the time we promised to allocate for Stress Test 23. I wanted to remind you that Larry Strickling's NTIA-4 is about groups that were previously advisory in nature so I took that literally to mean ALAC, SSAC, RSAC and GAC. Those are the AC or advisory committees. He wasn't asking about GNSO, ccNSO or ASO.

So you're right, we shouldn't focus only on the GAC, it should be GAC, ALAC, SSAC and RSAC. But we have no - there's no reticence of putting the stress tests together. The only question I raised was do any of you have

scenarios of unintended consequences that we can write up in the stress tests so that we can then get to the point of addressing them? Okay?

And let's cut it off there. I'll ask staff to load Malcolm's document on Stress Test 23. And then Malcolm, give us a little bit of context and background and then take us through what you believe is the concern you have on Stress Test 23.

Malcolm Hutty: Okay. Well walking quickly through the document, the document first lists how Stress Test 23 was originally described which was talking about the ICANN using the RAA or agreement to impose requirements on registries and registrars that would require them to impose conditions on end user registrants with end user domains so as to implement an ICANN policy and potentially so to implement an ICANN policy that ICANN should not have.

And that would be then be seen as ICANN leveraging a monopoly power in one market, in domain names, so as to regulate adjacent markets such as the users of domain names, so as to regulate their businesses or their content. And this relates certainly to the core value that's been addressed about - that ICANN should not be seeking to regulate the content and behavior of the users of those domain names, it relates to that.

Anyway, that was the original stress test. And then below that I identified the things that are relevant in the proposal that helps the team to address this. And there are changes to the bylaws that more clearly specify the mission, changes to the bylaws to make the IRP open to all materially affected parties, expanding the role of the IRP so that it can consider (expansive) complaints as well as procedural ones, the provisions in the bylaws that we are - that change the IRP from an advisory function to a form of binding arbitration and

potentially the ability to provide for the enforceability of the bylaws which is still under discussion.

These are the things in the proposal that are relevant to this (sector). This paper then goes on to analyze how those things that are in our proposal that are relevant to the stress test would work in practice to see whether or not they satisfy the stress tests.

And the first thing we do is we come up with a scenario because the stress test was originally worded was talking about some undesirable outcome but not a scenario that actually shows how that comes about.

So I'm proposing a clear specific scenario that we can all understand, an example of how this might happen and then we would work - we can work through those circumstances, work through that scenario and see how that scenario would be handled by our proposal so as to see whether it's achieved accountability or not.

And the scenario that I've written up is where a registrant in a gTLD registry, so I'm focusing this scenario is an example, it's not all the issues that might come up but this scenario proposes that where a registrant in a gTLD registry has their domain canceled or suspended or otherwise rendered inoperable as a sanction for failure to comply with ICANN policy, that's what's happened.

And the registrant wishes to hold ICANN accountable for that. They wish to challenge the validity of the policy that resulted in their domain cancellation. This is not an appeal against the cancellation of their domain, it is not saying you misapplied this policy in my case. It is a challenge to the policy itself, a challenge that says, I wish to argue that this policy should not exist, cannot exist within ICANN's mission and core values and its bylaws. It's

inappropriately adopted policy. And therefore that nobody should lose their domain in application of this policy. That's the nature of the challenge.

And a challenge can be made to the policy on either procedural grounds or substantive grounds. A procedural grounds challenge would be one that says, this is not really an ICANN policy. It just something that was never properly adopted as a policy at all. An example of that would be if it were something that the staff were requiring the registries and registrants to implement without it ever having been adopted by a policy development process or by the board. If somebody were to allege this is something that the staff has done then that would be a challenge to that policy on procedural grounds.

But there could also be a challenge on substantive grounds which even if it has been properly adopted through a policy development process, nonetheless saying that it's inconsistent with our fundamental commitments in the bylaws. For example, the fundamental commitment that ICANN must not seek to regulate the content or behavior of services that are supported by, for example, domain names.

So those challenges are the challenges that a affected party might wish to make and we are creating the IRP so as to ensure that there is an independent mechanism to hear that complaint and to adjudicate on it.

And for the purposes of this analysis, therefore, we are going to assume that the domain registrant in that scenario is somebody who qualifies a materially affected party and we'll analyze whether - we'll analyze Stress Test 23 by seeing whether or not this person who wishes to make this complaint has had an opportunity to be heard by an impartial and independent body and if ICANN will comply with the ruling against it by that body if that body does give a ruling in the complainant's favor.

So that's what's being questioned. It's not whether they actually get what they want out of it, it's whether they've had - whether the bylaws' promise of an independent review process will actually work and be available. And so we then look at this essentially in a diagrammatic form. We follow the process through.

So if you turn to the page - I think it's Page 4 with the diagram on it. And you start - there's a start point. And the first question that a person who wishes to raise a complaint reaches is there an IRP? It exists in the bylaws. Does it exist in practice? Have there been panelists appointed? Are they willing and ready and willing to accept complaints and to hear complaints and adjudicate from them? Has this process been implicated?

If it has, yes, then you move down to the next diamond. And the question then is, "Does ICANN enter into the IRP when the complaint is raised?" The IRP is not something that can summon ICANN to submit to it. ICANN has to choose to submit to it in each case. And it's possible that ICANN might not; it might, for example, say we don't think this is a serious complaint so we're not going to enter into the IRP and be heard.

But provided that ICANN - the IRP does exist and ICANN accepts that it must enter into the IRP in response to this complaint, the next question then is how the IRP rules. Does it support the applicant or does it support ICANN? And if the IRP supports ICANN then it's been a successful process.

The complainant has had a fair opportunity to be heard and they've had a ruling against them so that's been success. If the IRP rules in favor of ICANN we then ask the question, "Does ICANN comply with the IRP's ruling?" And provided that ICANN complies with the IRP's ruling then we've also had an

accountability success. The complainant had the opportunity to be heard by an independent body and they obtained effective redress.

So that's what happens when it works well. But that requires three things to happen. First, the IRP process must actually be implemented. Secondly, ICANN must submit itself to the IRP process. And, thirdly, ICANN must accept the outcome of the IRP process.

The rest of the chart then models what happens if one of those things doesn't happen. What happens if ICANN doesn't implement the IRP or what happens if ICANN refuses to enter into it? Or what happens if ICANN disregards the outcome of the IRP? What can the complainant do next?

And we then examine what the - what happens next in the proposal - in the accountability process how is ICANN (unintelligible) to account for that failure? And does that result in a satisfactory outcome or not? And we follow through what happens.

Now in this analysis we have shown that complaint (unintelligible) the complainant who's had their domain in a gTLD is going to be at least has the potential to be either a member of one of the GNSO's constituent bodies or could be a member of one of ALAC's constituent bodies.

And therefore - and if they are a member, if they're a member of some sort of business constituency or they're a member of a RALO and they are faced with ICANN, for example, failing to implement the IRP and when they wished to they could have access to it, they'll be able to go to that body and say as a member I would like to table, this is something this group should consider.

We wish to get this ICANN community structure to seek to persuade ICANN to uphold the commitments that it's made to make the IRP available to consider these sorts of questions.

And then the question then is, okay, well does that community structure manage to persuade ICANN to amend its ways? And if it does then it sees back towards the left hand side of the chart where we get the nice green happy outcome.

And if it doesn't, if the ICANN (unintelligible), if the community organizations, the - for example the GNSO or ALAC we're expecting cannot persuade ICANN to implement the IRP or cannot persuade ICANN to enter into the IRP or to abide by its ruling voluntarily, then we look at what the community can do. What is provided for in our accountability proposals to require ICANN to abide by those commitments. And this differs according to which of the models we choose.

In the voluntary model there is nothing more that you can do. The only process is to persuade ICANN voluntarily. So in the voluntary model if there is failure to persuade ICANN to abide by this commitment in the bylaws voluntarily, and it fails then that is an accountability failure and we mark it as such.

In the designator model, the approach, first of all, the only route that (unintelligible) to correcting ICANN when it refuses to comply to the bylaws is a board spill. So the steps that would have to be taken is, first of all, the GNSO or ALAC, whichever body was the one that the complainant was part of, would have to consider whether it wishes to pass a motion to spill the board.

And if it decided not to then there is nothing more that the complainant can do to get access to the IRP to get ICANN to implement the IRP as promised. The complainants at that point will have exhausted all their options for holding ICANN to account. And will not have had an opportunity to be heard as promised before an independent body.

So if that's the outcome we mark matters and accountability failure because ICANN has disregarded its own bylaws, it has disregarded the process for making available an accountability correction. And there is no means of holding it to account for that decision, no further means.

If the SO or AC decides to pass the motion to spill the board, that is not sufficient to achieve board spill. It also needs then to be supported by other SOs and ACs sufficient - pass the threshold for spilling the board. So even if the SO AC does pass a motion to spill the board if an insufficient number of fellow SOs and ACs are willing to do so then there is, again, nothing further that the complainant can do, no further place that the complainant may go to seek to require ICANN to abide by its commitments in the bylaws.

So at that point if the other SOs and ACs refuse to pass the board spill motion, we then must mark that as an accountability failure as well because there has been - there is - the complainant has exhausted the process and not achieved what has been promised to them. If they do vote for a board spill then there is a board spill and we do the process from the start under a new board.

Finally, under the membership model, it works a little differently and a rather, I think, more simply. Obviously you start by seeing whether the community can voluntarily persuade ICANN to change - to amend its ways voluntarily. But if it's unable to do so the next step then is for the - under the membership model is for the representative SO or AC, ALAC or the GNSO, to petition the

court for a court order to compel ICANN to implement the IRP or to abide by its ruling.

Now that's a choice by GNSO or the ALAC as to whether or not they wish to petition that for court order. If they're unwilling to do so, again, the complainant has exhausted all their options; there is no one left for them to go to seek redress, to seek what they have been promised in terms of the availability of an independent hearing.

But if the court - if the GNSO or ALAC does petition the court and obtain the court order then that's in fact where ICANN changes its mind. ICANN has been forced to change its mind by that court order, and will then feed back to the left hand side of the chart where ICANN abides by the bylaws and we result in good, nice green accountability success outcome.

So that is how the flow works. And we - and then the notes to it explain each of those boxes and particularly how those boxes may come about. And then finally on the last page we therefore looked at the evaluation there and we say that while cooperative model leads directly to an accountability failure mark because the cooperative model adds no accountability beyond what exists already of hoping to persuade ICANN voluntarily to amend its ways.

The empowered SO AC designator model, the only approach that that offers is a board spill. And this CCWG doesn't want a board spill to happen in anything except the most extreme outcomes so that could well be considered to be a reason to mark it as a failure in itself. But more particularly, it also depends - getting that board spill - depends on people that are the support of other SOs and ACs that are not invested in this process, they're not invested in the policy for gTLDs. And the GNSO and the ALAC, who are, are not sufficient in themselves to achieve a board spill.

So for that reason we mark the designator model as not satisfying Stress Test 23 because it does not provide a credible means by which that complainant could work through an in order to achieve a redress and in order to achieve the independent hearing that they've been promised.

The membership model still requires the complainant to work through either the ALAC or the GNSO so as to secure the promise that they've been given of access to the IRP. Now people may have a different - are entitled to different views as to whether or not that is acceptable.

Some people might think that actually it really only counts as a solid guarantee for satisfying Stress Test 23 if the complainant has the right to go to court themselves to force this to happen. But on the other hand it could also be said that the complainant is a member of a stakeholder group that has - is invested in this process, that considers whether it's appropriate to go to court in this instance and therefore they've had the opportunity to be heard as to the - as to whether or not this is necessary to make the IRP available to them in this case.

So some people might, for that reason, say that Stress Test 23 is satisfied in the empowered SO AC membership model. And certainly we can improve the likelihood that that could be considered a satisfactory outcome by providing further reforms that could be part of Work Stream 2 so as to make it easier and more likely for the SO ACs that are to be able to bring - to seek that court order should a court order be necessary.

And that could include things like, I don't know, there might be all sorts of things but including, for example, making funds available. But that's the sort of stuff that we can address later in Work Stream 2 I believe.

But in terms of the analysis for the process what we show here is where the complainant exhausts the options that are made available to them under this proposal. And how they get back from what this route by which they may get back to the green outcomes where they have had their case heard and either received - been told well I'm sorry but you're in the wrong here, ICANN is correct which is a perfectly good satisfactory outcome; or else to be told that they're in the right and that ICANN has to change its ways and ICANN does indeed do so.

So the chart there identifies where the problems could lie and under what circumstances they will arise. And it helps to identify these differences between the proposals as to how they apply, how they implicate the outcome in this scenario. Thank you.

Cheryl Langdon-Orr: Thank you, Malcolm. Cheryl for the record. And that's an extensive piece of work and indeed an analysis that I think merits a great deal more mulling over and particularly I think needs to be addressed to Work Stream 2 early in this program because of the nature of their work on the IRP.

Steve, with time creeping away from us, I note your hand is up.

Steve DelBianco: Thank you. If the implication - the implications are much broader than Stress Test 23. Most of our stress tests suggest the IRP as one of the ways in which the community can challenge a board decision or a staff action. And most of them therefore assume that they're enforceable in order to satisfy the stress test. And the enforceability option is off the table because of a selection of something other than the member model then we would have to reevaluate whether those stress tests would pass so it's broader implications.

But I have a couple of questions I want to put to you for follow up because Page 34 of our proposal is very much in conflict with your analysis. Page 34 of the proposal under Work Party 2, not Work Stream 2 but Work Party 2, says that it's expected that the judgments of the IRP panel are enforceable in the court; any court that accepts international arbitration results. So the aggrieved party could enforce an IRP panel decision. They wouldn't have to have been a member or a designator.

Now I understand your point so I'm saying that if the decision is made we don't get accountability failure. But your point is what if the board decides that we don't want to enter into an IRP on this particular topic. We don't want to enter a binding IRP. And that is a fantastic question. We're not going to resolve it here on this call. So I would ask you this, could you please check to see whether the decisions are enforceable by anyone regardless of the model? And could you also be sure that your entire analysis goes to Becky and Work Party 2? And I believe they even have a call today. Thank you.

Malcolm Hutty: I can certainly make sure it goes to Becky in Party 2. I have seen competing clarifications of that statement that you refer to about the enforceability of an IRP. (Unintelligible)...

Cheryl Langdon-Orr: Malcolm, it's hard to hear you.

Malcolm Hutty: Sorry. If it is an IRP about the contractual dispute, it is an IRP about something which the IRP applicant could have otherwise sued ICANN then it's pretty much universally accepted that the outcome of that IRP will be directly enforceable as a binding arbitration, be directly enforceable in the courts at the suit of the applicant.

However, that's not - doesn't necessarily relate to the scenario that's being looked at here in Stress Test 23 because the applicant here, an end user registrant, may not have the right to sue ICANN and therefore it does not - counts as a binding arbitration because there's no binding arbitration on a legal dispute - a legal dispute that the courts will recognize as such.

So it may be that that doesn't provide the level of comfort that you think it does. But even if that's wrong, as you say, there is - that is only one of the routes to potential failure, the failure of ICANN to abide by an IRP ruling against it. There is also the question of whether ICANN actually makes the IRP available and whether ICANN voluntarily submits to binding arbitration in that particular instance.

And they are both things that - routes where if it chooses to go the wrong way we need to analyze how ICANN can be held accountable for that decision.

Cheryl Langdon-Orr: Always helps if I'm off mute while I'm trying to talk. Cheryl for the record. I was, again, about to suggest that this is a great deal of food for thought, Malcolm, and certainly something that I would like not only for either have passed on to Work Party 2 with Becky as soon as possible in case it can be put into their agenda or even as an awareness-raising for their call today.

But also I would like to have this as a reference document on the wiki page which we've been using for our stress tests because I think it's important thought piece that, as Steve said, has wider reaching ramifications in its analysis even than Stress Test 23.

Malcolm Huty: Yeah, Cheryl...

((Crosstalk))

Malcolm Hutty: ...on that last point, Cheryl, I actually think that Stress Test 22 and 24 are likely to follow exactly the same analysis.

Cheryl Langdon-Orr: Yes.

((Crosstalk))

Malcolm Hutty: The scenarios are different and therefore they could be different but because of the nature of how we're proposing to solve each of those problems because it's largely focused on the IRP as the route for solving each of those stress tests, I suspect that if - when we come back to that we could actually just change the scenario and get exactly the same analysis coming out of it.

Cheryl Langdon-Orr: Indeed and therefore I think we all need to think quite deeply on this analysis and also perhaps get a little bit more background information. For example, in chat some of the questions that Avri is raising needs to be answered.

Now mindful of time and noting that a number of you already had a hard stop come up to meet your availability, then what I would like to do is suggest that this - this is a topic that we need to come back to in our next call. And I'd also like to propose that our next call should probably be another 90-minute call. I also recognize that we do have a little bit more work on the document dated 20-June to do and that we certainly need to go back and revisit some of our discussions on the - what is nomenclatured currently as Stress Test NTIAs 1, 2, 4.

It has been our habit to take not one but at least two readings on any sort of discussion before we start to settle on some sort of outcome on any of these stress tests. And I think it'd be good practice with these relatively new stress tests being discussed to do and continue to do that in the same thing.

Thanks, Steve, I think if we can rely on you to, again, turn the, in inverted commas, new stress tests into the table form for the next call that would be greatly appreciated.

And regarding the next call, I need to let you know that I in fact will be in the air traveling at the allocated time for the call so I'm going to hope that there's no problem making the call and he won't be traveling and that we don't have to cancel the call through lack of leadership. But I do think it's important that we continue on - excuse me - recognizing that by the date of our next call we will have moved past the frozen document time and so it would be the new stress test table with these provisional albeit not necessarily going to be passing with flying color stress tests including the NTIA ones that would be going ahead in the frozen document.

But I also don't expect the Stress Test Working Party to take any particular part of our cross community working group face to face agenda so Avri is just suggesting perhaps we need to have the call sooner. That could be fine, Avri, excepting of course we are getting into very busy work scheduling for Work Party 3 before the 15th as well. So I'm very aware that resources are going to be very, very, very (keen) indeed between now and this time next week.

So that said, note my apologies for next week's call. If the group does wish to bring it back a little bit earlier then that's all fine and dandy.

Malcolm Hutter: Cheryl, hand up.

Cheryl Langdon-Orr: Yes, I'm not ignoring you yet. And I think the other thing is we also need to probably request that at least this analysis for our stress tests regarding IRP is brought to the attention, not only of Work Party 2 but of the wider cross community working group. And now, Malcolm, I note your hand is up. Over to you.

Malcolm Hutton: So my apologies for butting in there.

((Crosstalk))

Malcolm Hutton: You've just said that this analysis paper that I've submitted should be made available to WP2 for their consideration and added to - added to the wiki area for - so that it can get more eyes on it.

Cheryl Langdon-Orr: Yeah.

Malcolm Hutton: One of the key things in it is that it identifies that the way that the different models between empowered SO membership and empowered SO designator treat this scenario very noticeably...

Cheryl Langdon-Orr: Yeah.

Malcolm Hutton: ...and that seems to me to be relevant input given that Paris - the aim of Paris we've been told by our chairs is to fix on something that the CCWG can agree on as a new reference model, you know, between those two. So not to have it open now that we're still looking at both of them but to have a preferred reference model.

Now this seems to me - that treatment seems to me to be very relevant input for that decision. So my question...

((Crosstalk))

Cheryl Langdon-Orr: Absolutely, Malcolm...

Malcolm Hutton: ...what is the appropriate means and how do we get that so that...

Cheryl Langdon-Orr: Cheryl for the record...

((Crosstalk))

Cheryl Langdon-Orr: Certainly. Cheryl for the record. When I was just saying before I went to you that we need to bring this analysis document to the attention of the whole cross community working group that is how we would be getting it on the agenda. We would also be - I would suggest proposing that it becomes part of the reading list and background materials for the Paris document. And of course it would become an integral part of the documents from the Stress Test Working Party, in the inverted commas, frozen documentation as of the 14th that would go on to Paris.

And as Steve and I will be contributing to some extent to the specific planning of the agenda, as it does have (unintelligible) outlined very clearly direct relevance to discussion and deliberation on the choice of model, it certainly needs to be reference material and pre-read before we gather in Paris, I would say. So if you're happy with that way forward staff will take that as an action item to make sure that the document now becomes part of the package of reading materials. And Steve and I will do our best to make sure it gets appropriate exposure on the agenda.

Malcolm Hutty: Thank you very much. Very happy.

Cheryl Langdon-Orr: Not a problem. And thank you all for stretching almost 15 minutes past our 90 minute time. I do thank you all for allowing the extension to today's call. I also note that there was some delay on some of you joining the call probably for various technical reasons. And just as we close now I just want to note that Steve was saying in the chat that he suggests the document depends upon two assumptions that should be tested with counsel.

Can ICANN decline to accept binding IRP? And can anyone enforce a binding IRP decision in courts that recognize by binding arbitration? And those questions have been supported by Avri as worthwhile pursuing as well. Avri's noted that these should be asked today in the Work Party 2 call.

So a very I think worthwhile exercise in today's call. I hope our next call, with or without me, is going to be equally fruitful. And more importantly, I think the timeliness of these discussions as we move towards our Paris deliberations is very much essential to be recognized. And thank you, Malcolm, in particular for the effort that's gone into this analysis document.

Last call for any further comments? And just noting Steve's plea to get the answer to those questions before walking through the entire analysis, Malcolm. And I'm not quite sure - Avri, yes, that occasionally happens to me too that the operators mute you in such a what that you can't take yourself off mute. It is extremely annoying.

But audio issues aside thank you very much for everyone who's contributed to today's call. And with that I'd like to wrap it up and thank you one and all for

joining us and staff, if you've got any questions as to any of the action items just get onto Steve and I and we'll hopefully help you sort it all.

So bye for now and until next week. Thank you.

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