

**ICANN**

**Moderator: Brenda Brewer  
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6:30 am CT**

Thomas Rickert: Okay let us please reconvene, please be seated and let me warn Holly and Rosemary that we will need you here for the caretaker discussion in a few moments so you can already come to the table if you wish.

Now you will have vivid memory of us having had a discussion on the community powers to remove and record individual directors or the entire board.

And we had promised to you that we would think of ways to move forward with this. Some of the concerns that you have voiced we think can be addressed relatively easily by putting the right words into our report.

Other concerns that you have raised are of a more fundamental nature and we can't resolve them in the next few days i.e. we can't resolve them before we have to publish our report.

And we have to work in the light of this predicament and scenario. So let's consider this. We need board removal so we can't put it on the back burner

because it's a CWG requirement. We can't escape it right. So we have to face the challenge of moving forward on that one.

The second thing is that for the more fundamental questions of what should a standard be for a board member to be removed we will not be able to do that immediately.

So I think the way to go for us is put high on our priority list for work stream two the elaboration on a definition of such standards for board members that we can then introduce into the process.

In the meantime and this is something that we can do now. We will establish our requirement for a consultation process prior to a decision being made on the removal or recall of board member, board members right.

So that there's no such risk of this just happening and highly unnoticed right. So again CWG requirement we have to do something now. Second, what we can do now is hard code a consultation requirement into our process and for the more long-term discussion and for the concerns about standards we will put that into work stream number two.

Also and I take note of your hand Tijani also there has been the constant theme of destabilization of the organization in case of the board removal which is why we changed our approach to the discussion slightly.

So we're not going to finish this now and ideally we would not reopen the queue now Tijani but here Rosemary and Holly about the options for a caretaker board to see whether we might find some answers or comfort in learning what the alternatives are in the hopefully unlikely case that the board needs to be let go.

And after that I suggest we continue with the conversation and hopefully reach agreement on a way forward. Tijani please.

Tijani Ben Jemaa: Thank you Thomas. From the beginning of this process I always said that we have a wonderful leadership. I said that previously with you, I said that on the list and I said that during the meetings.

It was because every time when we almost reached by you always try to find a way to get consensus and this is the beauty of your work. I don't recognize you today because the reason that you refuse that the community remove the directors was because it was comment.

I don't find it conversing at all. Somebody said it is legal. What I expected from you is that you say we will ask the lawyers if it is forbidden or not. If you have another reason tell it. I am really disappointed. Thank you.

Thomas Rickert: Tijani just a lapse for a moment because I have some difficulty understanding what conclusions we can draw from it. Maybe someone can ask.

Mathieu Weill: I think Tijani we haven't closed the discussion on this so I think it may be premature to be that disappointed but maybe you're right too early that's possible. He's suffering from premature disappointment.

But I don't think we're saying in any way either us as co-chairs or the repertoires or the working parties there is just a legal decision that is not what we're discussing here.

We're trying to balance different perspectives about the removal of the board and we're going to hear about the interim I mean the means after recall to get continuity of operations.

And then what Thomas was saying is that we'll come back to try and find some common ground to move forward. And I'm hopeful that everyone will try and do what we've been doing for the last two days which is move out of the initial positions so that we can find some common ground.

Thomas Rickert: Thanks Mathieu. Kavouss is that a new hand?

Kavouss Arasteh: Yes. I have never been disappointed and I will not be disappointed because my experience shows that for any issue no matter how difficult there is a solution of it.

I having been living this area where (unintelligible) during the Cold War, discussing, negotiating in a room of thousands of the people when they smoke cigarettes and so on and so forth. (Unintelligible) we were able to find a solution always.

Now the problem is that what are the middle grounds and so on and so forth? For the removal of individual board member if you accompany by that by some legal support involving community in one way or other I don't see a major problem.

I don't see a major problem for that. However you need to add those other things that there should be a limit on the number of removals. We could not remove one after the other and after six months eight directors are removed.

So we have to have something and so on and so forth. This could be worked out. The important issue we understand the problem and I'm sure that we can find a solution.

(Unintelligible) I assure at the end of this meeting we have a solution for this problem thank you.

Thomas Rickert: I don't bet against that. So I'm optimistic as well and Tijani I think I maybe misheard what you were saying but Mathieu made this very clear. We want to hear the lawyers on the caretaker board questions to complete the picture so that we have an informed discussion because to be quite honest I didn't anticipate a discussion of that broad range of issues when we came to this community part but we will get to that in a moment.

So the idea now is and we will try to keep this as concise as possible for Rosemary and Holly to present to us briefly the options for a caretaker board. There is the constant fear of the organization being stabilized or there being a vacuum that can't easily be mended in case this ultimate, this last resort mechanism is ever invoked right.

So let's understand this. I can promise to you that we have analyzed what they're going to present and we will try to propose or we will propose to you an option that we think might be a way forward and with that I'd like to hand it over to the two of you.

Mathieu Weill: Thomas can I just - sorry may I just ask just so we're clear. This is a discussion about the whole board removal we're talking about now that's right? Thanks.

Holly Gregory: Yes we call this full board recall. We have a set of slides and I don't know if you have them but we were hoping that you could put the slide 10 up and these slides I believe have been sent out to all of you earlier today.

Thomas Rickert: I think we're talking about the caretaker board slide pack that's been circulated.

Holly Gregory: So the goal here as was stated is to ensure that in the event of a board recall there is a process for replacing the board so that you have no period in which ICANN is without a board.

That would be really, really bad to ever have a moment without a board. And given that a full board recall is expected to be a highly unlikely event it's like that that highly unlikely event will be happening at a time of some dissension in the community and between the community and the board.

So all the more reason to have a fairly smooth well understood process at the outset. If we could go to slide 10 I want to show you an overview.

So we have been reading some very interesting email exchange that have lots of ideas, lots of good ideas on how to accomplish this. And what we've done is we've tried to distill those ideas into four options for how one might ensure that there is never a moment without a board and a board recall process.

Now, so we're going to describe four options and if you look way to the right hand side of the box you see the four options in the lower right hand corner. That's what we're going to be discussing.

What I want you to understand and why I wanted to show you this chart is we've sketched out in very broad brush strokes what a board recall process would look like.

The options I'm talking about only relate to that box in the little corner of what an interim board might look like. So in all four options the flow of the process is the same. I just wanted to put that out there.

So we're going to talk about four options. One is what we call option one the holdover model. In the holdover model the members of the recalled board hold over.

They essentially continue to serve after that recall vote in an interim capacity until an election of the replacement board that will go on can be put into place. That's one option.

Another option is to appoint alternates and this notion is that every group that has a right to select directors now or through the community mechanism at the same time that they selected their directors would select an alternate for each director position.

And these alternates would sort of sit out there and wait for that highly unusual instance in which you need an interim board. And then if the board was ever recalled you've got your interim board already established.

Now when you think about it that means every year we know a third of the board is up for reelection so every year you would be selecting some alternates.

Option three we call the (ExOfficio) model. And there through the bylaws you would establish that certain persons who fill certain positions in the ICANN community or in ICANN the corporation would constitute the interim board in an event of a board recall.

So you wouldn't be identifying the human individual you would be identifying the positions and whoever served in that position could be, would be so for example this is just an example and there are lots of different ways to do it and you all know the possibilities for who might do it better than I.

But you could say the chairs of the AC's and SO's become these positions. There are some reasons why that might not be a good idea but I'm just giving you the sense of the possibilities.

Under the fourth option you have an interim appointment at the time of the recall. In this model at the time at which there has been a petition and the community is notified that there is going to be consideration of a recall the folks who get to make that vote am I going to recall the board have to come forward.

And at the same time they vote on the recall they must put forward the name of the person who would sit in every seat that they have whether or not they're voting yes or no they have to put forward that person.

And if the vote passes to recall the board you automatically at the same time have a new interim board. Again these are all interim boards who are only in place long enough to get a real replacement board in place through the usual kinds of mechanisms.

Now you might find ways to expedite that. You might want to speed up the process a little bit. So every one of these models assumes that there is a trigger for community consideration of the full board recall.



There are mechanisms in place so that this process happens. And under each model the interim board, this is important, the interim board would have the same powers and the fiduciary duties that the regular ICANN board does.

Now I know that that's causing some concern because we've been thinking that this board as a caretaker board they're going to be in place for a short period of time. We want them to do no harm.

At the same time from a legal perspective we don't know of a way to create a board for a short period of time and strip away its authority. And we think also in a time of crisis that could be a very dangerous thing because there may be some actions that you really need this board to take.

We don't know what the crisis is that has generated a point to which you need that recall. So the protection against the caretaker interim board doing something disastrous is first.

They know that it's a highly unusual circumstance. We would provide strict bylaw provisions around the timeframe to get to that real board selection process.

We would also provide that they're, you know, they had to act as fiduciary's and that absent sort of crisis situations it was the expectation of the community that they worked there as caretakers.

But we are constrained in our ability to limit in any significant way their ability to act as fiduciary's. So that is essentially the broad brush stroke outline of what we think the options are for the interim board.

And again these options are very much taken from what we saw in the dialogue that was shared in email on these kinds of issues.

Thomas Rickert: Thank you very much that's been very helpful as always. Now the way we should have this discussion and I hope you will join us in that. We have four options on the table.

We think that picking one of these options all these options would help bridge the gap between two boards. One option we've identified as potentially being preferred and I'll speak to that in a second.

Let's please not engage in a lengthy discussion of the pros and cons of all of that. If you think that our proposal is bearable let's just move on with it. We think this is pretty much an implementation detail of what needs to be done because it's a very unlikely case right.

So we will open it up for discussion in a second and maybe we can frame the discussion in a sense that we are still trying to find a solution for the removal of the board, recall of the board discussion right.

So we think it would be an extremely bad idea to sort of have a shadow board sitting in the back of the current board members all the time where there might be competition and there might be shadow board members that can't wait to replace the currently seated board member.

I think that wouldn't be good. At the same time for the (ExOfficio) model there is already burden and pressure on the SO, AC chairs encumbering with the additional duty of potentially being forced to step in might not be a good idea.

But and let's also bear in mind the messaging. We need to communicate this to the community. If we say well if this process ever needs to be invoked what we'll do is everybody that comes to the table to exercise the vote or cast a vote needs to bring names to the table.

We think that this option number four if the option that will cause least friction because we can still pick people up that we trust most and we don't need to make any appointment up front.

So with that I'd like to move to the queue. I would like to ask you to keep it as concise as you can. We have some wiggle room in terms of time because we are not going to do the second session on the (IRT).

We will deal with one topic of that in another slot so we've gained some time but let's try to move as expediently as we can Chris.

Chris Disspain: Thank you Thomas. Just a couple of questions. Holly we don't have to have an interim board the same size do we? We could have - you could just have one like each SO has one, just two board members they could just have one right?

Holly Gregory: That's correct you could go with a smaller if you wanted to.

Chris Disspain: So logistically that might be helpful whichever model we...

Holly Gregory: Yes it may cause concerns among some people around representation but yes you could.

Chris Disspain: Okay, the real reason I ask that question is actually because of the NomCom. So the NomCom appoints eight board members I think from memory. Now they have a fixed process that they go through in order to do that.

Depending on what time of the year this was to happen it may well be that the NomCom has already got a slate of people and they could pick from that slate. But equally it may be at a time when they don't and then they've got to forum and they've actually got to go to - and that takes a long time because you're taking applications from the outside, you've got to go through the process of due diligence et cetera, et cetera, et cetera.

These are not community appointees these are, you know, NomCom appointees. So I think we need to take that into account and it may be that we're better off with the interim model so perhaps not even worry about NomCom appointees but just have the SO's and the AC's who have appointment rights make the interim appointments and bring those names to the table.

And I'm not adverse to the interim appointment model I think that's probably fine but I do have a question for you to finish which is, in your assessment in the organizations where there is the power to recall the board what normally happens? What's the norm that occurs out there?

Holly Gregory: There is not a norm that I'm aware of. I haven't benchmarked. I don't even know what the organizations are. I haven't cataloged the ones that have a recall ability.

It's a fairly unusual provision in, you know, it's absolutely doable. Do you have experience okay?

Rosemary Fei: It's a typical member organization with a large membership unlike this particular sole member arrangement. The members always have the power to remove one or all the directors if there is only one class of members.

So in a sense every membership organization with one class of members can remove all of them if it chooses at any time. I've been in this area for 25 years and I have not seen it happen yet.

But because the threat of it happening is enough for the board to listen to...

Chris Disspain: I can't really understand that but for those organizations that do have that power which model did I have a tendency to use or isn't there a...

Rosemary Fei: ...maybe you're going to be horrified by this but the answer is they have the power with no provisions for a caretaker board.

Chris Disspain: Great idea let's do that.

Holly Gregory: That just expresses how unlikely it is in most in other organizations where they don't really fully contemplate that this would ever be used.

Thomas Rickert: Okay let's move back to the queue. We have Allen and then Tijani had indicated she wants to speak. After that the queue is closed please and then next in line is James.

James Bladel: Thanks James speaking and dangers of following Chris because I had very similar questions so I'll be brief. I do think that we're probably gravitating towards option four for some of the reasons that were articulated earlier.

My questions were very similar which was what is the minimum size of the board that we can legally proceed with as far as an interim board and, you know, and I think to (Chris') point would it be then the most feasible approach just to simply wait out until the next cycle of the NomCom appointment batch and go forward without that group on the interim board.

And I think that that's kind of the direction he was going in which is putting in something that's a little more lightweight. And I think the recognized vulnerability being that a smaller board concentrates greater influence and authority in a smaller number of people and presumably in a time of crisis which is why we spilled the board in the first place.

So I think, you know, that's probably the thing that we just have to be mindful of when we play out these scenarios.

Thomas Rickert: Thanks James.

Holly Gregory: You could have a board as small as one. So you have great flexibility here. We're not suggesting that one would be an acceptable answer to this group.

James Bladel: So the (Caesar) board. The Fadi board.

Thomas Rickert: Thanks James. Tijani.

Tijani Ben Jemaa: Thank you Thomas. Even if I disagree with you Thomas about the alternate board we think for removal of the board I would prefer the other solution of an alternate board appointed at the same time of the removal.

But I have two options. First, the first one if we can avoid the NomCom to appoint their boards yes we will have an alternate board and i.e. I wish it would be small.

If we cannot if we are obliged to have the NomCom appointees in this case it will not be an alternate board it would be a full board a normal board. Why is it not doing this?

Since it is appointed by the SO and AC's and by the NomCom. Thank you.

Holly Gregory: I think that the notion was that there was concern that some entities including the NomCom may not have the time to do the full vetting. And so they were putting forward people that they trusted enough to take care of the organization for a short period of time but wanted to make sure that they still had the time to have that thoughtful process for vetting.

I mean there will be issues around balancing for diversity, a whole host of issues. So right now you have requirements for certain diversity kinds of qualifications in your bylaws.

You may put those on hold during an interim period because you know it's just going to be a couple of months and you know that there's real work to be done. So that was the thought.

One other thing that we wanted to mention and this is a technicality but as you know your board every director is selected and serves for three years on a rolling basis. We call that a staggered board or a classified board.

And the notion is that rather than have to reset all of that the people that you select as interims would fill those slots. Then when they get removed because

you have the replacement, the replacement directors would be filling slots and would simply keep on that rolling basis.

So they'd be stepping into the seat of the person who had been recalled on the same term cycle.

Thomas Rickert: Thanks. I suggest we hear three interventions now and then respond to them on block to make some time. Kavouss is next.

Kavouss Arasteh: Yes I think the removal of the entire board member is very unlikely but it could happen. So it could happen therefore the issue is reversed.

Two, we should avoid not to put any alternative proposal to public comments. Alternative one, two and three (unintelligible).

Three, we should decide very easily that whether the treatment of the removal or sorry the replacement of the board for NomCom and for the others would be similar or should be different. I suggest that they be similar.

The last one is that we take the most lightweight approach. The most lightweight approach is it something that's been used in many organizations including government.

Executive power will be removed by various (reason). Executive power of any organization will be removed by council. What they do there must be something.

The most lightweight would be they ask them to continue for some time until they have a solution. The problem is the continuity and continuity is a very important element.



And we don't want during the removal period there should be some sort of a slowdown or disruption of the situation. Therefore I suggest that among other things we take the most lightweight approach and among that that would be asking this board who has been removed to continue for six months and so on so forth until you have new elections. Thank you.

Thomas Rickert: Thanks Kavouss. Next is Sebastien.

Sebastien Bachollet: Thank you. We'll try but I see all that as a (unintelligible). It seems that nobody knows really what is a board member is doing. You imagine that you can step up in the board and you will be director fully functional the next day you dream, you dream.

If you think about that let's go do all that but ICANN will close in the next few months even not in the next few weeks. It's just incredible the way because we want the power we are ready to do anything wrong or everything wrong and that's a big trouble for me.

And I still think that we are going in the wrong direction on that issue. Thank you.

Thomas Rickert: Thanks Sebastien. James.

James Gannon: Hi, so first of all I don't think that this is a power play I think it's an accountability mechanism and the two are very different things. And I agree with Kavouss we need known quantities at a time like this.

It's going to be a time of extreme crisis most likely and I think we need to be very careful no matter which model we go for. My preferences would be

either three or four but I think we need to be very careful on who we are bringing in at this point.

We cannot bring in people who are like some of our NomCom appointees and some others who only have - they are good people but they may not know the intricacies of ICANN.

We need people who are going to be very, very intimately familiar with what is going on at that time. They need to be people who know the state of the play from why they're being brought in as a interim board.

We don't need people who are going to need training or time to acclimatize. They may need to make very important decisions for the security and stability of the DNS in a very short period of time.

So regardless of what model we go with I would like to see if there is some way that we can I won't say put in selection criteria but if there is some way to guide the selection of who we are putting in to ensure that, you know, this is actually not going to be even further disabling.

And secondly with regards to the constraining of the board. So obviously we can't or it seems to be the opinion that we can't constrain the legal right the statutory right as directors.

However we have a lot of rights that are afforded to the board via the bylaws. Could those rights such as the biggest one would obviously be related to policy.

Could those be constrained or modified in some way as to what the interim board could do with regards to their bylaw (forwarded) rights. What options would we have in that matter?

Thomas Rickert: Thanks James. I think it would be unrealistic for us to establish those standards in the next four or five days so I think we need to be conscious of time there as well.

But I would like to turn to Jordan first to enlighten on some of the answers that the group might have had and then go to the legal.

Jordan Carter: Can we do that the other way around?

Thomas Rickert: Okay fine.

Holly Gregory: So I think we could provide in the bylaws a provision that says that the interim board must use all efforts to expedite the election process and also during that process not to undertake any material changes to ICANN's strategies, policies or management unless absolutely compelled by fiduciary necessity.

So something that really says you've got the power to act in a crisis but if it doesn't have to happen and I think we can do that.

Jordan Carter: The only other point I was going to make just to change the responses that the current board's removal power if you like doesn't have any constraints around it in the rules in the bylaws but the board I understand has got some protocols that would set out the kinds of behavior that would lead to that happening.

We've already talked about developing those standards for individual board member recall as part of work stream two. You could I presume apply the same sort of approach for the board a kind of agrees, caretaker protocol or something.

So it isn't legally disrupting the fiduciary responsibility or the need for the board to have full power but that could set very clear expectations about what is and isn't on the table.

The point Sebastien made to become fully cognizant of the ICANN board isn't a two week job. These people aren't going to be inclined to break anything that doesn't need to be dealt with in a crisis situation. Just saying that would be quite helpful I think.

Thomas Rickert: Thanks. James.

James Gannon: (Unintelligible) very, very quickly. My point too is about particularly to the selection of the interim board as well though. Not just in how the interim board will act but also in guiding the selection of those interim board members no matter what way we do it.

The (ExOfficio) would obviously be slightly exempt from that because they would obviously be already internal to ICANN but if we're going to go with any of the other models the selection of those new directors is very important.

Thomas Rickert: Okay thank you. We have Sam now.

Samantha Eisner: Thanks, I put into - there's a brief discussion on the work stream one list after the slides came out and I just wanted to make some of those statements to the broader group.

But I think if we get into a point within ICANN that there is recall consideration that's triggered by petition that we have to really look at the realities of the situation.

I haven't really had conversations with board members about this but I think you set back and you think about how rational actors act in situations. If you've had a petition put in that's essentially a no confidence vote just in the initiation of the petition many people aren't going to stay around just to see how it comes out.

I think that's a reality that we need to plan for and, you know, we need to consider that the very initiation of the petition is something that could cause major I'll use the word again, instability in the organization.

If we have the expectation that people are going to stay around until the board says, until the community says not it wasn't that bad you can stay around it's probably not going to happen.

So we do need to be careful in how we structure this. We have to make sure that we do focus it as James was talking about on maintaining the security and stability of the Internet.

This is not a typical member organization if that's where we go. It's not a typical charity based organization that deals with member's right. I mean we're not looking at planning balls and doing fundraising and those sorts of things.

I mean we're dealing with the security and stability of the Internet and I think that that requires us to come with a very clear mind as we're looking at how we're going to impact the governance standard.

And it makes me nervous when we talk about looking at something like how we're going to make sure the organization can keep functioning on a variability standard as opposed to does this actually do something to make sure that the organization not just operationally but in the eyes of the world is seen as a viable continuing organization to do the work that we do.

Thomas Rickert: Sam I have two questions for you to better understand. One, what keeps the board away from moving away now? So even in the absence of this power the relationship between the community and the board goes sour they could leave today. So we're not adding that in my view but you might convince me otherwise.

Secondly, what proposal are you bringing forward in order to reduce that risk?

Samantha Eisner: So for the first question there is the possibility at any time that any board member could resign. That is a stated purpose. Now it's a stated fact right. But if you think about the conversations we've been having within the accountability process and everything we know that there is tension between the board and the community.

But another one of the clear messages that's come out of the CCWG is that we are not necessarily talking about today's board. You don't have board members that are sitting here taking this conversation personally right.

This isn't about the board members in the room. This isn't about the board members that are being talked about. As soon as the recall trigger is done and the petition is started it becomes personal, it becomes about them.

And to find it, to take it out of a place where any individual director may feel the need to leave that's one thing but as soon as you have essentially a no

confidence vote being initiated among the whole board that really changes things in my perspective.

In terms of the suggestions I really don't know. I don't know I need to think about it more, you know, I think that there are major risks in the holdover model because I think that there is a risk that there might not be anyone to hold over so that one is off the table.

The alternate having a shadow board seems like a very risky prospect. The (ExOfficio) model makes some sense but I would imagine that instability in the board would also create instability in the organization itself.

So I don't know if you'd have the right people or if you'd have the same confidence issues in those people. So I don't know if that really makes full sense in the end so I don't know.

Thomas Rickert: Yes but that's the predicament that we're in. We need to have it as a CWG requirement and Holly is eager to respond to that point further.

Holly Gregory: So we gave consideration to this and we agree Sam that what you want to make sure is that you have something that will protect in a situation that you had an en masse resignation of the board.

And I think some of these models address that better than others. I think that there are some bells and whistles we could add to item four in that instance. I think you also have to recognize that while individually directors each have a right to resign an organized en masse resignation could be seen as a breach of fiduciary duty.

And for that reason alone I work with highly dysfunctional boards every day. I mean I really do that's my practice. I also work with good boards that aren't. So I don't want to taint all my clients as highly dysfunctional.

Thomas Rickert: Do you want to take a stab at which one we are. You're not the client.

Holly Gregory: And what we find is that when things really go wrong boards understand that not only could it be a breach of their duty to simply leave en masse but they also harm their reputations in really fundamental ways in communities that matter and so those pressures help.

Now I'm not saying that's the end of the story. I agree that you raise an issue that we have to make sure we protect for. There is also a backstop under California law that I just want to mention.

I don't think it's sufficient, it's not a sufficient thing but in a resignation if you ever get to a point where you only have one director left on a board that director is required to reach out to the California Attorney General before they resign so that the California Attorney General can appoint a board or have or provide the membership to.

Rosemary Fei: I just want to say very briefly that like Holly I also am advising boards in a crisis and very often those boards have actually been accused of major breaches of fiduciary duties.

So we're talking about real crisis situations for those organizations. It is actually unusual for those directors to want to resign. They usually want to stay with the organization and prove to the world that they didn't do anything wrong or, you know, they want to clean it up.



They've committed a huge amount of time and passion to the organization, the Internet stability in this case, the safety, security and stability of the Internet and it's actually unusual I would say for someone to suddenly say I'd rather pick up my marbles and go home than no, this is really why I joined the board in the first place I'm not going to walk out now.

Holly Gregory: Now we know that that's not a sufficient answer Sam and I agree that we have to make sure that we address this but we can build on what's here as a starting point.

Under any one of these models if you said that's the model we think we want to build on I think we could build onto it the bells and whistles for that extremely rare I mean we talked recall is going to be highly unusual recall that triggers mouth resignation I think is going to be in that, you know, sort of manosphere but we can certainly work on mechanisms around that.

So being conscious of time I think we really need to move on. I will close the queue as I had indicated earlier but if it turns out to be true that the board members seem to be glued to their chairs we might rather buy a bottle of solvent to get rid of them rather than discussing these mechanisms.

So next in line is...

Mathieu Weill: Not meant to be having new ideas Thomas.

Holly Gregory: ...next is Alan please and then Cheryl.

Alan Greenberg: Thank you very much. I'm not sure how to follow that. A couple of things, nothing I want to discuss right now but I think we're going to have to think

about whether there's any prescriptions about who can be named as the replacement.

In other words can I name the same person that is being removed or one of the other people? Do we want to waive the term requirement so we can name someone who previously we thought was a competent director we may find out differently now?

So things like that I think we're going to have to think about or for that matter could we name the chair of the AC or SO which is who is the instigator? Remember the chairs are going to be basically pushing this.

If you didn't trust your own chair you probably would have gotten rid of them already. So I think it's something we need to think about and I don't have any strong opinions on it.

The concept of restricting what the board can do scares me a little bit. If you think about why are we doing this, we are in crisis mode. There is a chance that there are in addition to some mess up internally there's external pressures on us.

We may be removing the board because they did something horrible. We may be removing the board and I think more likely because they let something horrible happen in which case is a good chance that some of the senior managers either may leave, be put in jail or be let go almost immediately.

So we're not only talking about working with a new board we're perhaps talking about working with senior management that may be crippled. So the concept is saying let's be very careful and restrict what you can do.

That scares me it really does. I think that was all.

Thomas Rickert: Thank you. Cheryl.

Cheryl Langdon-Orr: Thank you, Cheryl Langdon-Orr for the record and I am very pleased to actually be wrapping up this because what we've heard a lot of is a general compass with the single model number four to go ahead and that is personally where I would be coming from as well. So that's to be declared.

And a lot of implementation still needs to be done and the devil is going to be in the data but we need to take the appropriate time but leave enough space to get that to happen.

Why I put my hand up is I wanted to just have a word very briefly about what was being said about the nominating committee because what has happened in NomCom's past and NomCom's present to future is frequently dynamic and changing.

And the dynamic and change that is going on right now is meeting what has been a somewhat irregular challenge of the casual vacancy. And in our methods of dealing with the casual vacancy we are coming up with protocols and we trust usable practices to have alternates.

So that would at least give you not eight but a subset that could in fact be drawn on. In the amount of time it takes to do the due diligence between when the last due diligence was done.

So there are ways to work this is what I'm saying and I think the devil is in the data but it's certainly a good implementation under number four has made not at all discomfited.

Thomas Rickert: Thanks very much Cheryl and I would like to suggest that we take stock of this by me presenting to you some of the things that I think I've heard got traction in the room.

And you please indicate by waving your hand if you're in the room or showing the disagreement button in the AC room if you're participating remotely.

So that we just get a little bit of the atmosphere in the room, get some guidance for the sub team to then refine a package to be presented at the earliest convenience probably next Tuesday's call right.

So what I've heard is that prior to any spill be it removal or recall there needs to be some sort of consultation process. Nobody doesn't like it right. Just indicate if you don't like it.

If you are against the requirement of a consultation process prior to a board spill let me know. I heard that people want that to be in place right. Not a public comment but there needs to be a process whereby there's a discussion out there between the affected party so that everybody's heard so no rush decisions are being made.

Mathieu Weill: So petition and then consultation is that what you're talking about?

Thomas Rickert: Yes.

Mathieu Weill: Okay.

Thomas Rickert: Then there's the notion I think Kavouss mentioned that what we're looking or is a lightweight approach. Also there seems to be lot of traction for the option number four.

Four seems to be the preferred model out of the four models that we've heard about. There has been the idea of we notice Sebastien's objection to number four and certainly we take note of (Abad's) constant objection for all this.

So I'm not going to be repetitive on that. There has been the notion of not requiring the NomCom to immediately seat replacements. Cheryl has indicated some bright light that it might be feasible.

The proposal that I've heard is let's spare the NomCom. Anyone against sparing the NomCom from allocating interim board members?

Alan Greenberg: It's Alan. I wouldn't spare them but I'm not sure I would require them given any given particular point in time.

Thomas Rickert: Then let me phrase this differently. Anyone against not making it a requirement for the NomCom to bring names to the table when it comes to the decision because in number four in option number four those that seek board members need to bring names to the table when the decision is made and we would make that optional for NomCom.

Avri is shaking her head.

Avri Doria: No I don't think it should be optional. I think we should either require them to do it or require them to sit it out but the optional just adds and extra set of confusability.

Thomas Rickert: Okay so I see a lot of hands going up. I think can't we enter in that discussion? Let the sub team try to make a version out of that, you know, there could be some wiggle room.

If we don't need everyone we could make it a requirement for everyone but still if not offer further that we can say that it must not hold up the vote so it wouldn't be optional but we could still proceed.

They will work on it. We can't afford time wise to spend more time on that. Then there was the notion of limiting the board's competence to exercising fiduciary duties.

Anyone objecting to limiting that mission for the...

((Crosstalk))

Thomas Rickert: ...I think there's sufficient opposition for us not to pursue it. We dropped the idea it's off the table right. So I'm just trying to get, you know, this there are points that get, where there are points that get traction we take note of them.

This got quite some opposition we drop it so they just need some guidance for refining the proposal. And then we need to - there's been the proposal by the lawyers to specify the timespan in which a new board must be seated.

I don't see any objection to that.

Alan Greenberg: A practical timespan it's not arbitrary somebody that's practical.

Thomas Rickert: They would suggest bylaw language requiring a timetable for that to take place.

Alan Greenberg: But I also heard that we might just let the normal replacement cycle take place.

Thomas Rickert: No.

Holly Gregory: I'm sorry, look if you were within two or three months of the regular election cycle and you might be able to do it. I don't know enough I'd want to talk with you all and understand the election process better, we have to look at it.

What I was saying though Alan I think was in terms of the staggered board and instead of rejiggering everything we're going to have these people fill old time slots so you immediately have a staggering that continues.

So I think that that may be what you heard me say.

Alan Greenberg: Can I just - I think what you're saying all together is if the whole board is removed we have whatever the agreed formula is for the interim board and then the reappointments that follow after that fit back into the staggering.

That's what you're saying right. So it isn't just that those interim people might be there for three years. Just clarifying that so everyone is on the same page yes.

Thomas Rickert: Okay there should be a foreseeable timespan but let's leave it there they take care of that. Final point we will in work stream two work on a set of standards for board members so that we have something to put our head around when it comes to these questions.

So there's no opposition to that and with that I think we've given what we can to Jordan and team to come up with a refined proposal for the next call. So good luck guys with that.

Jordan Carter: That's been a very helpful discussion thank you. What we will try to do besides looking at Alan and what we'll try to do is we'll try and get a revised draft text that takes kind of all this for Tuesday's call is it on Tuesday?

And I think we have to assume that it's going to need more than one discussion. So then there's another call on Thursday and then there's another call the following Tuesday.

So it would be two discussions. We'll do our damndest to get it ready for the first one. My own preference is that if we sink we haven't got something that's coherent by Tuesday we have the first reading on the Thursday.

If we're not certain that if it's coherent it might waste a lot of our time and upset a lot of us to discuss it when it's not ready.

Thomas Rickert: So thank you for that. Last word Tijani I hope that you're not too disappointed now otherwise let's both drown our sorrows in a glass of wine. I'm afraid we need to close this now really.

We're so much over time. Mathieu will take over for the next session?

Mathieu Weill: Kavouss just I think we're closing the item and moving to the others.

Kavouss Arasteh: Just one question. We will discuss that at what level working party one or at the CCWG? I suggest CCWG the entire group should approve that.



Jordan Carter: Yes the first CCWG call after this and that's before the first WP1 call anyway. So the WP1 can follow it on and do some more elaboration.

Mathieu Weill: Thank you very much Kavouss. Sebastien. I mean no one is leaving until we're finished. We're going to close the doors. Becky can you please join the table meanwhile?]

Sebastien Bachollet: Yes I didn't hear in your resume that but I think it's important it's like a (risk) capture in all those constricts but I think it's a very important element when you will bring the solution to the group that you look after the possible of capture when the group is about to elect half of the board.

Mathieu Weill: I understand. So I think for Jordan in work party one that's an additional requirement that we need to make sure we look at the risk capture when designing this solution. Thank you.

And with that we'll move into - yes I would like to say thank you to Jordan, Alan all the work party one crowd they did outstanding work. They have a hard task because it's a lot about votes and thresholds and everything and we are all very aware of this. That's always difficult conversations.

And they're doing it in listening mode to everyone and I think living up to everyone's expectations on this is often very hard.

So we're moving to our last outstanding items I would say and the number one item that we wanted to address is the mission in core values. We won't go through all of it but I will turn to Becky to introduce the outstanding discussion points that work party two has been discussing.

And which we need to provide directions on so the timelines of public comment two. So Becky I'm turning to you.

Becky Burr: Okay and I just want to just remind us that we have one IRP issue that we need to close off on. Okay, can we get rid of the formatting on the side? I guess not okay apologies.

So we got great comments on the mission commitments and core values, very detailed, very substantive comments and they were extremely useful. We're going to go through those as quickly as we can and then I'm going to highlight ones that we are going to come back to and discuss a little bit.

We got some substantive comments for change from the IETF or IAB regarding the coordination language that appears throughout the mission commitments and core values.

The group determined on balance that coordinates was actually a better word than supports for most of these things. So we elected to keep that. There's one discussion point which is in the provisions relating to the name function there was some a thought that actually coordinating the development and implementation of policies was a more accurate description.

In...

Man 1: I'm (unintelligible) you.

Becky Burr: ...no that's what freaked me out the fact that nothing is being shared. We've done some modification of the provisions in relating to naming not substantive but just great - intended for clarification. And do I have scrolling ability on this one? Okay hold on can you scroll for me for a little bit?

So what we want to do is go down to the - keep going down to ICANN shall not undertake you'll see blue and red print there. Yes for some reason I'm not in the Adobe room I got kicked out of the Adobe room. So I need you to scroll down, keep going, keep going. Okay thanks.

What we want is the one up there thanks. Okay so we had some very specific comments regarding the way in which we had phrased this particular provision regarding the limitation on powers not enumerated.

And on review of this we determined it was quite important to say both that ICANN shall not undertake any other mission not specifically authorized by the bylaws and should have no power to ask other than in accordance with the bylaws or the mission.

The rest of the language is standard and has been there for quite a while but that's been modified. Okay now can you give Thomas scrolling authority because I have (Thomas') computer now? Interim capture okay.

Okay great, okay the other area in which we got an enormous amount of comment was on the balancing test and the notion that we heard from the community was that the balancing test for commitments was too complicated and too U.S. law centric.

In going through these we looked carefully at the commitment and our inclination was and we were able to confirm that the core values are sufficiently narrow that they ought to be able to be met in all cases that they're quite fundamental.

So we have replaced the lengthy language about no, you know, narrowly tailored and no broader than necessary to achieve a legitimate end and put in

that the commitments reflect ICANN's fundamental compact with the global Internet community and are intended to apply consistently and comprehensively.

With respect to the core values we have returned or retained essentially a very broad balancing test that the ways in which they will apply will vary from situation to situation and in any situation where core values must be reconciled with another.

The potentially competing core values however the balance works out it has to further an important public interest goal within ICANN's mission, identified for the bottom up multi-stakeholder process.

So then as you'll see we've got - where did it go? We got rid of a lot of language here. Going to the commitments one of the things that we haven't addressed here and that we will talk about is that several commenters suggested that we need to include an affirmative statement that in carrying out ICANN's mission it should not act in a manner that's contrary to globally accepted human rights standards.

So this is not an obligation that ICANN has an obligation to affirmatively further human rights but that its actions must be consistent with the globally established and accepted human rights principles and that's something that we will come back to.

In the next section we have several comments and I had some back and forth with the Government of Spain. The way in which I had translated this from the articles of incorporation eliminated the reference to local law which was not intended. So we have put that back in. The other changes were just clarifications and not substantive.

In core values number 2 the language there is intended to clarify the previous language it is not a substantive change. In 3 and 4 the UK Government suggested that to the extent feasible an appropriate language was not particularly precise and didn't add much.

In light of the balancing test that is incorporated sort of overall we thought that that was a good comment that those caveats were unnecessary and we took them out.

As we discussed earlier this morning we had imperfectly moved over the commitment from the affirmation of commitments regarding expansion of the top level domain name space.

Based on the discussion this morning we've had some preliminary comments that perhaps the best thing to do here is actually to move it into the review section and I'm going to ask Steve DelBianco to speak to that issue when we come back to this.

And then finally we have the language that we also discussed this morning regarding the advice of governments and public policies. We did get several comments that suggested we should change governments in public authorities to the GAC but we rejected this because we do get input from other public authorities.

For example we noted that we had gotten input from the Article 29 working party, not the GAC but certainly a public authority that we need to pay attention to and so we declined to make that change.

And then finally we had a sort of bracket for some language about capture and we proposed language that says striving to achieve a (unintelligible) balance between the interests of different stakeholders. So those are the issues.

So the issues that I think it's important for us to talk about are the human rights issues that have come up. The revised balancing test and the section five or the new core value five and the language that we touched on this morning regarding the advice of governments and public authorities.

If I could what I'd like to do is call on Avri first to discuss the human rights issue.

Mathieu Weill: Yes, Avri.

Avri Doria: Avri speaking. So one of the core values that I and I believe several other people felt was missing and were also mentioned in several of the comments. So this was really in service of the comments is a commitment to adhering to human rights.

Now to make it quite clear up front this is not talking about taking on human rights challenges or any of the things that people bring up does this mean we now have to go out and fight for human rights?

No, this is a commitment a commitment that is sort of becoming more and more widespread of making sure that what we do does not impact negatively on human rights.

It's basically - and s that's why it was a very simple wording to work to ensure that ICANN respects human rights obligations within its mission,

accounts for impact on human rights and policy creation and adheres to respect, protect and remedy framework.

Now I understand that some people were a little nervous about that adhering to that framework at the end. So, you know, a little able to drop that but that was also recommended in one of the comments and therefore it's there.

So this doesn't impose anything on us that isn't already imposed on us by a general commitment but it does put it in black and white so that it is there as a core value.

Becky Burr: Thanks, if I could ask could we have comments on that issue? Tijani's hand, others who want to get in this too.

Tijani Ben Jemaa: Yes Tijani speaking. I support what Avri said since she said inside the mission of ICANN I fully agree with her, thank you.

Mathieu Weill: Thank you Tijani. We're taking, we'll start with taking short queue on this to see whether we can proceed with the requirement that we would add something, some wording on human rights as described by Avri, which means the how and the negative potential impact and definitely not in expanding ICANN's mission to check whether we can give direction to the group to move forward on that or not.

Malcolm was that what you were planning to speak to? Okay Kavouss was that your planned intervention?

Kavouss Arasteh: Yes, this is what we have intervened several times, we intervene it again. We have serious difficulty with why private routing or route. We have always

suggested to the place that while a multi-stakeholder bottom up inclusive approach private routing is not supported.

It is number 8, it is number 11 somewhere else and we still have discussed that the details in elsewhere in any call and also we have discussed that in the GAC.

So private routing does not support the inclusiveness of the process. If you say private routing you give a preference of a particular category of the society rather than the inclusiveness and treating everybody almost equally.

So this is something that appeared in other parts and we should keep consistent in entire core value to talk about multi-stakeholder bottom up inclusive approach. Thank you.

Mathieu Weill: Thank you Kavouss. The next is Greg, remote Greg Shatan.

Greg Shatan: Thank you Greg Shatan for the record. While I'm certainly supportive of the concept of human rights the reality is we need to support human rights overall. I think it is a more complex set of considerations and circumstances and can be dealt with in a kind of last minute intervention with language that we have not tested that has numerous implications that we have not even begun to try to understand.

You know, for instance talk to that accounting first impact on human rights. This is calling for some sort of impact process to be established and there is a standard or framework that's being cited that I would doubt that many have read in full if at all.



Clearly there are people who are spending a lot of time on human rights issues and probably read it many times but for the rest of us that is not the case. I think this has potential significant impacts on how policy work takes place at ICANN.

I'm not discouraging this as a long-term topic for the ICANN community. As a matter fact I am encouraging it and I think there should be appropriate dedicated group multi-stakeholder that that is fit for the purpose and selected for the purpose of looking at this fully.

But I think rushing in just because it's a, you know, a topic like rainbows and puppies that, you know, one can never be again is really inappropriate for this group and especially at this time.

So I hope to be from, I hope to be part of that effort when it takes place but I don't think this is the time but I don't think this is the time. Thanks.

Mathieu Weill: Thank you Greg. Sam is next.

Samantha Eisner: Thank you. I agree largely with what Greg Shatan just said. I think that there are some with the language that's been put in particularly as it goes to accounting for impact on human rights and policy creation.

As we all know policy isn't developed by the board policy is developed within communities and then the communities provide that policy to the board to consider.

And so this creates cascading obligations within ICANN and yet this would be embodied in the core values and could be something that ICANN could be subject to an (ISP) upon or a challenge within court if it got that far.

And so if it got that far and so we need to make sure that the language that we're putting in particularly so we get to the core values and things that will be in the fundamental bylaws that these are things that we can actually know that we can meet and have a way to do that.

And I think this language at this point particularly in reference to external documentation that we haven't considered it probably is not the right time to do that.

Mathieu Weill: Thank you Sam. I will close the queue after (Willie Currie) and the next in the queue is Jonathan who would require a mike.

Jonathan Zuck: I thought Sebastien had claimed the microphone I was just going to borrow it from him. So I wanted just to say that I wonder if it's the kind of thing that in order to better understand the role that we play given Sam's comments and Greg's comments is should we look at a couple of examples of where this might come into play in a practical level because I think it's very easy to agree with it at a philosophical level and I know often that's where we start is with this aspirational core values.

But what would be an example is an IRP that might be brought, whether I mean maybe we need to think about where there is instances of how something might have been treated differently in the past if it were part of our core values and sort of stress test that out as part of a conversation and maybe that's done in a work party.

But I mean I think just making this philosophical statement and not really looking and exploring what the scenarios might be in which it was used in a practical level I think would be a mistake.

Mathieu Weill: Thank you Jonathan. Robin you're next.

Robin Gross: Hi this is Robin Gross for the record. Yes I think there's a bit of misunderstanding about this proposal to include respect for human rights. I don't think that we're talking about delving into new areas or new materials we're talking about the policies that we're already working on that we're already doing and making sure that those policies don't undermine fundamental human rights.

And I mean we do this already for other rights, we do this for trademarks why can't we do this for human rights? I mean we talk about ICANN being devoted to the global public interests yet we're not willing to commit to human rights but we will commit to trademarks.

I mean that just doesn't make sense to me so I think we need to recognize this isn't about expanding ICANN's mission but just making sure that within the mission that we currently have we make sure that our policies are in line with fundamental human rights. Thank you.

Mathieu Weill: Willie and the queue is closed but (Jorge) is sort of trying to negotiate out a last intervention but Willie I'm seeing you here.

Willie Currie: Yes right thanks. As far as I can see the value here is to global accountability for ICANN through adherence to an international standard. And looking at it ICANN is already seized with human rights issues.

If you look at Article 2, 7 and 10 they also deal with non-discrimination, equality before the law, full equality to a fair and public hearing by an independent and impartial tribunal in the determination of a person's rights and obligations.

That seems to me to fit with the whole issue of fairness in ICANN's decision making and the IRP review of those decisions. Article 12, no arbitrary interference with privacy. It seems that that is an issue that ICANN is already seized with around the Whois issues.

Article 17, protection of property rights, well tread marks the reform of property, domain names et cetera. Article 19, freedom of expression there are already issues around that in the new gTLD process.

It doesn't imply content regulation but it does involve issues such as is any string possible in terms of a freedom of expression situation or are there limits on that.

And then finally Article 23, the association really deals with the issue of how does one maintain an open and secure Internet that's accessible to everyone. So the way I see it here is that here is a standard that is internationally recognized in this moment of transition where one form of external accountability to the U.S. Government is being removed.

There is value in a form of accountability to a normative standard that is global. So that there may well be a distinct value for ICANN to make this kind of a commitment in a simply bylaw change.

And then what Greg and others are saying, investigate what it would take to implement it inside ICANN rather than debate whether this is a good idea or not. It's quite clear that ICANN is already caught up in this.

There are values to legitimacy questions. The optics of adherence to an international human right standard are valuable and here is an opportunity to do something quite simple that can enhance ICANN's global accountability.

Mathieu Weill: Thank you Willie. So (Jorge).

Jorge Cancio: Thank you very much for your flexibility, Jorge Cancio of Switzerland for the record. I just would like to support the voices which have been advocating for incorporating the human rights perspective in the core values and I think it's important to really embed, to streamline this perspective in any policy creation implementation or review process.

And I think it's pretty compatible with what the organization is already trying and it should be only asked that more in that direction. Thank you.

Mathieu Weill: Thank you very much. Did you want to summarize Becky but the first thing I would like to say is no one spoke against this everyone seems to be in agreement that there is a general direction that needs to be taken and we're having discussion about the process to get there and I think that's useful. Becky.

Becky Burr: So I actually did hear people express concerns about inclusion of this and certainly the current, the language in this. I don't think that there's consensus in the room so I think we will need to have further discussion about it.

Mathieu Weill: So yes I would actually follow some of the lead that was provided by Willie that there needs to be proper assessments of where we are, where we stand and how we can proceed and what other gaps that we are facing.

So probably we need another discussion on this. Definitely not, we're not in a position right now to make a full decision on this. I would note that also we need to take into account the overarching work stream one, work stream two criteria which will have to be part of this discussion.

Whether that fits into work stream one criteria that it is necessary to be implemented or committed to before their transition or whether it can once the work stream one proposal are in place then it could be implemented if the community found consensus on this.

So I think that's also something that will have to be part of this conversation. And I see Chris has a follow-up.

Chris Disspain: I just wanted to add one tiny thing thank you Mathieu. My concern on the detail is the legal jurisdiction. So when we talk about intellectual property rights, you know, it's clear law that we can follow et cetera.

So my question on the human rights one is if you assume it's in the bylaws then you can assume that people will claim that we're acting outside of it. And what are we going to use as our standard for deciding that we're acting outside of it or inside of it?

I'm sure that if we took some real examples around this room there are things that we have done that some people would say are perfectly fine and others would say are not.

So my concern is what are we going to use if we're going to do this what is our standard of interpretation going to be and whose interpretation of the clause X of whatever human rights charter are we going to use because the creative ambiguity that exists in the human rights charter is that it enables

governments of all different colors to say we sign onto this but we interpret it in our own way.

Well that's okay within their own sovereignty but how are we going to do that in the ICANN arena I think is an extremely hard ask. Thanks.

Becky Burr: Okay I think we're going to move onto the next issue which is the language in core value five and (Adam) you've taken scroll control away from me again.

(Man): Well perhaps we could do the bit that's on the screen.

Becky Burr: Okay it's right here at the top. So we carried this over last week when work party two was talking about it. We moved this in and we had the discussion this morning and there was some concern about putting something so specific and so sort of, you know, single identifier specific in the affirmative, in the core values and commitments.

So one alternative is to keep the language in the review section and modify it to say in any expansion of the top level domain space ICANN - sorry that's missing, will address issues et cetera.

Steve do you want to give us a brief intro to that?

Steve DelBianco: Thanks it's Steve DelBianco and a lot of this was motivated by stress test 14 which said ICANN or NTIA could quit the affirmation of commitments with 120 days' notice and acknowledge the fact that the affirmation of commitments was a bilateral agreement and because of that it became a target.

It would become the next target for elimination after you get rid of the U.S. Government's unique role on IANA. So because of that we endeavored to

move the affirmation of commitments into the bylaws and there is two things in the affirmation commitments that were commitments on the part of ICANN and there were reviews which was a commitment to perform a review and criteria.

So there were several commitments from the first eight sections of the affirmation and those were brought over in the notes that work party two (Becky's) party, work party did.

And those have been reflected mostly in the core value section of the bylaws and that's not really what's at issue here. Of the four reviews all four of the reviews start with a statement such as the board shall cause a periodic review to assess et cetera, et cetera.

They all have that in there and that was brought over as well. But two of the reviews, two of the four reviews start with a different sentence. They start with a sentence where they are commitment ICANN to something before they lead to the second sentence where ICANN commits to perform a review.

And that left us with a little bit of a dilemma as where is that ICANN commitment reflected. And the two commitments I'm speaking of are the one from review number three.

Review number three was the review of expanded gTLD's where ICANN commits to adequately address the issues of competition, consumer protection, security stability and resiliency, malicious abuse sovereignty concerns and rights protection.



And then the last was the Whois directory services review where ICANN commits to enforcing its existing policy relating to Whois. So the dilemma became where to put those commitments.

Since we were in the mode of putting commitments into core values there was some discussion of moving them there and then there was another discussion of leaving them in the review section.

And what we have done is a little bit of both frankly. We put the Whois stuff in the review section and then in our first publication in May we promised that we would reflect the new gTLD expansion commitment in the core values and then forgot to do so.

So the BC where I am part of the business constituency was among the groups that spotted that forgotten promise that said get it in the core values. But I'm very confident that it would be sufficient to reflect these two commitments in the reviews section and not necessarily in the core values.

The core values have plenty of commitments from the affirmation and these two commitments could live in the review section but they are in fact commitments on the part of ICANN.

And because they would be in the bylaws that makes them subject to things like an independent review process challenge. So they're commitments nonetheless but they could be kept within the context of the two reviews that gave birth to them.

And if we do that I think we will have faithfully carried over the commitments made by ICANN in the affirmation and reflect them in the bylaws. And I for one looking at the language that Becky put up earlier I think that that would

be an appropriate way to phrase it and to leave it in the review section of the new bylaws, thank you.

Mathieu Weill: Thank you Steve. I see a queue forming and we'll have to keep it short so please be concise. I think it was important to note this change. Malcolm.

Malcolm Hutty: I'm still waiting to talk about the point that remained on the screen for a long time while the human rights discussion was happening but it's not this point. Please call me when you're ready.

Mathieu Weill: Okay we'll try not to forget. Jonathan if you can get to - no it's an old hand thank you. Sam is that an old hand as well? It's a new one are you sure?

Samantha Eisner: Yes it's on this point I'm sure, I'm sorry. Actually I'm not sorry. So this goes to the core value five and the discussion of moving it into the review section. I support if we were to have this in the bylaws moving it out of the core values into the review section.

I had some intervention on this earlier. I do have a question though. There are a few words left out of the words that are within the affirmation of commitments.

There's a pretty lively chat going on about rights in which rights are recognized within the bylaws and not - one of the things that are left out is will address issues and I believe that there are a parenthesis including issues such as.

It leaves it a little bit more open so I would imagine that we might want to have a little bit of discussion and I don't know if that happens now, if it happens in email or what.

But to make sure that we have the right grouping of issues or at least the right ability to get other issues if they are appropriate in there to be reflected in there.

Mathieu Weill: Email would be the right channel. Thank you very much Sam. Chris.

Chris Disspain: Thank you I may be slightly confused. I thought Steve was talking about the AOC stuff. That's not up there it doesn't seem to me.

Steve DelBianco: You could scroll to that because core value five was the section that Becky had displayed and she had pasted in the affirmation of commitments text there.

Chris Disspain: Right.

Steve DelBianco: But we're saying that it can go to the bylaws but it can stay right next to the review section instead of being (there).

Chris Disspain: Sorry I misunderstood I thought you - I had a point about the AOC which I'll just make and then we can leave it alone but it struck me that it's great that we're putting stuff from the AOC into the bylaws.

But I would encourage us to - we're not putting everything that's in the AOC into the bylaws. We're not putting in that ICANN will remain based in the U.S. are we?

Mathieu Weill: It's already in the bylaws.

Chris Disspain: Right so cool. So is everything in the AOC going into the bylaws? I'm asking solely because if stuff isn't I think we should in our explanations explain why it isn't that's all.

Mathieu Weill: Steve is going to answer.

Chris Disspain: Yes.

Steve DelBianco: I will take it on point to do an audit of that Chris but I can assure you that commitments that ICANN makes both in terms of its mission, core values and to do reviews those have been brought over.

Where they were already reflected close in the bylaws we didn't bring it over and explain that. And then there are commitments on the part of the U.S. Government to be involved at ICANN and Chris we left that stuff out.

Mathieu Weill: So I think with that we can move to (Malcolm's) point.

Malcolm Hutty: Thank you, if you'd move back to the new power clause please Becky.

Becky Burr: Which?

Malcolm Hutty: The bit you had on the screen while we were having the human rights discussion the ones that says that ICANN shall not undertake anything outside their mission. Thank you.

Right it's worth noting at this point that this was something that a great many people replied to in the comments and I believe universally in support of this concept and that it's important to get the language on this right.

We did have a comment by someone else that I agree with that the use of the term authorized in these bylaws was potentially confusing or ambiguous. And so we went from the red text to the light blue text to resolve that.

And then somehow we got back to the dark blue text I don't know when. So the point that I am identifying is this and I think we can leave the objective as something that the lawyers can achieve for us.

It is our intent and I believe this is a generally supported position it is our intent that the extent of the mission should be fully described in the section of the bylaws that describes the mission and that you should not have to go hunting around elsewhere in the bylaws to discover implicitly authorized parts of the mission.

It's our intent that this language reflects that and perhaps our counsel could assist in the language.

Becky Burr: Sure it is our intent. I was not aware that there was a debate about whether it encapsulates that but we can certainly talk about it.

Malcolm Hutter: The debate is the use of the term specifically ICANN should not undertake any other mission not specifically authorized in these bylaws it is suggested to be pointing to a general search through the entire bylaws.

Whereas what is meant is...

((Crosstalk))

Malcolm Hutter: ...that ICANN cannot undertake any other mission not specifically authorized in this mission statement.

Becky Burr: Okay got you. I think that's not controversial.

Malcolm Hutty: Thank you.

Becky Burr: Okay and then if I can just set up the next issue.

Mathieu Weill: I know Steve raised his hand.

Becky Burr: Okay.

Steve DelBianco: Steve DelBianco. With respect to the paragraph that's up there the business constituency was very concerned that the way it was written that it might prevent ICANN's compliance department from enforcing registry, registrar contracts that included causes that were placed there voluntarily by the registry.

And for that think about the public interest commitments which many registries placed into their pic specs P-I-C specs because they needed to do so, so that ICANN could enforce those promises that may have been unilateral promises that a registry made to the plan like I'm going to run dot bank and only allow banks to be chartered financial institutions to be in the dot bank domain.

There were other safeguard specs that registry applicants offered in order to overcome objections from the GAC and from governments. So the BC was a big one to say that somebody needed to enforce that stuff and if a registry asked for that to be in its contract ICANN compliance needs to be able to enforce it even if it's outside of the narrow mission.

And so I would just ask the lawyers on the panel to clarify that as written would this text allow ICANN to do contract enforcement even if it doesn't fit within the mission, thank you.

Becky Burr: So just to be very clear, voluntary contractual, voluntary contracting is not regulation and this provision limits regulation. So I don't think that it would be a reasonable construction of this language to prohibit ICANN from enforcing voluntarily negotiated contract provisions.

And in fact I think that to the extent that the contract provisions are in furtherance of ICANN's mission in terms of they are part of expanding the name space and somebody has come to the table and applied to operate a registry under the following terms and conditions.

Then ICANN is undertaking that contractual compliance obligation consistent with the voluntary provision. I will note that, you know, to the extent that we're talking about contracts as adhesion that gets forced down people's throat that are outside ICANN's mission that's a different question.

But I understood all of the comments from all of the commenters here to be talking about truly, you know, truly negotiated contract agreements.

Steve DelBianco: And coming from you that's very reassuring however do you believe that the text has to be modified in any way to allow enforcement?

Becky Burr: No because I don't think that contracting is regulation and regulation and the only prohibition here is on ICANN's regulatory actions. There are other people in the room who might have different views.

Mathieu Weill: Just I am very conscious of time and we still have other items to discuss. So Jonathan I think it's an old hand. Okay and I see Greg's hand has been raised probably as a follow-up to this last item. Can you keep it very brief Greg?

Greg Shatan: Yes I'll keep it brief. I just first off I think these are complex concepts. I think regulation can often be complex in the self-regulatory bodies such as this and that one could easily say that to implement this policy is a form of regulation.

And therefore I think we're throwing around a term that we haven't fully analyzed. I think it was another case of that and I think making broad pronouncements now about content is also highly inappropriate in this time in this level because I think that this clearly again in an attempt to while clearly there are content issues that are outside the mission I think this is an attempt to ring fence the mission well inside the actual limits of that mission for particular purposes. I disagree with it thank you.

Mathieu Weill: Thank you Greg and I think we will keep this agenda item and bring it to a close. I think the group has clear directions about how to proceed. We are going to break for coffee because I'm sensing a little drop of attention in focus and energy right now.

But after coffee we have still two items to discuss that we want direction on. One is a particular stress test related to implementation of work stream two and I'm looking at Malcolm here.

And the second is a recap of the work party three discussion that we had yesterday and we still have to make it clear, give clear directions to this group. And then we'll move into the CWG requirement cross check and the next steps.

So we reconvene at 4:00 pm sharp. Thank you and well done Becky.



END