ICANN

Moderator: Brenda Brewer
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12:45 pm CT

Becky Burr: Okay good morning everybody. It is 9:03 according to my computer. We've got nine folks here. We've got a lot of work to do today so I think we'll go ahead and get started.

What I'm planning to do is go through the comments on reconsideration. (Bernie) has helpfully prepared a sort of annotated markup of the document and I think we can go through that pretty quickly. Then we will go to independent review and then we will move to the final look on the mission and bylaws. So that's the agenda for today.

On the reconsideration process enhancements the questions are fairly limited. The first one is - whoops my tool bar went away - there we go. The first one comes up on Section - well ICANN's bylaws would be reviewed - oh and I'm supposed to say the meeting session is being recorded. Sorry.

There was considerable pushback on the change from material to relevant in both places here. Any comments on that change and whether we want to keep it or accept the community comments on this?

Greg Shatan: This is Greg Shatan. I'm sorry I'm not in Adobe Connect yet so...

Becky Burr: Okay.

Greg Shatan: So I'm not exactly sure what the - where the (unintelligible).

Becky Burr: Okay. The section is what can you bring reconsideration about and what are more actions or inactions of the ICANN board that have taken or refused to be taken without consideration of relevant information as opposed to material information?

Greg Shatan: I see, thanks.

Becky Burr: And I do think that to be consistent with the language that we've got, that what we want is one or more actions or inactions of ICANN so that, you know, staff inactions or actions could be the subject of reconsideration as well.

David McAuley: (Unintelligible)? Sorry Becky. It's David McAuley here. Is it okay for me to comment?

Becky Burr: Yes. It is okay for you to comment.

David McAuley: I would just personally state a preference for the benchmark term being material. Relevant to me is important but it's so very broad and encompasses perhaps a universe of information. To me what should be appealable is things that have some impact on the decision that's being appealed. And so that's why I say what I do. Thank you.

Becky Burr: Thank you. Greg?

Greg Shatan: Thanks. I would actually look at the two uses differently. I think in D the materiality threshold is the appropriate threshold. But in E where we're actually talking about decisions that are taken as a result of the board's reliance on false or inaccurate information, I would argue there that the lower threshold of relevance is appropriate since we're already establishing here that there's a result that relied on the information, that the information is in fact or at least allegedly false or inaccurate.

So I think we meet the standard of kind of parsing out the important from the unimportant by way of those two points before we get to it. And if there is in fact reliance and the information is false I think that's a problem on us. Thanks.

Becky Burr: Thank you. David?

David McAuley: Thanks Becky. I had spoken a little bit too quickly. I agree with what Greg just said - the distinction between D and E. Thank you.

Becky Burr: Thank you. Steve?

Steve DelBianco: Thanks Becky. The business constituency is full of lawyers that were very concerned about lowering the standards to just relevant because they had a hard time understanding how that would exclude anything from being considered. And the BC was very strong in wanting to keep it material for the purposes of reconsideration. Thanks.

Becky Burr: Thank you. Steve, what do you think about this leaving the term material for the consideration of information but when we're talking about a false or inaccurate statement the standard is relevant?

Steve DelBianco: Repeat that. That sounds attractive. Could you say it one more time?

Becky Burr: So the notion would be in D we would maintain the standard of materiality where the board has taken or refused to take action without considering material information. And then E where the board has acted based on false or inaccurate information the standard would be relevant.

So when you have affirmatively false or inaccurate information the standard is a little bit lower. But the consideration of information in general is materiality standards.

Steve DelBianco: That sounds like an interesting idea. I can't say for sure what the rest of the BC would say but it sounds like a good idea to me. Thank you.

Becky Burr: Okay. Others comfortable with that resolution? Okay Steve is that an old hand or a new hand? Okay, all right. I think for purposes of this we should proceed on that basis and see what the standard - what we get by way of comments.

Okay going further down on the goals the suggestion was that we would provide the board with reasonable right to dismiss frivolous requests but not on the grounds that one didn't participate in ICANN's public comments or on claims that the request is vexatious or querulous which is too subjective.

So apparently there was significant pushback on - and (Bernie) if you're on you can help me with this a little bit. The pushback was on the fact that we were excluding dismissal because one didn't participate in ICANN's public comments.

I have to say that this language as it is right now is quite consistent with the majority of input we're getting on the IRT and which most everybody that we're hearing from as part of (WP2) discussions is saying that we should not have this standard. (Bernie)?

(Bernie): Thank you Becky. Yes no if I remember the comments correctly there were - if you will, the best summary was something along the lines of someone trying to do an end run around the bottom up policy development process by not participating in it and then using the IRP after a policy is done to try and get in there.

And so people felt that not having participated in the public process would in a certain way game the process of the IRP.

Becky Burr: Thank you. Okay. Although in this case we're talking about reconsideration here. And there were a lot of comments about effect on the IRP as well, although I think in thinking about it further my sense is that the balance has sort of swung back. Anybody else have thoughts on this?

Steve DelBianco: Becky? Steve.

Becky Burr: Yes Steve.

Steve DelBianco: Yes thank you. The BC was - in that same section of our comment, went on about wanting to create some sort of an incentive for groups to participate in the public comment and not just wait, as you say, for reconsideration on (IRP). The BC didn't rise to the level of saying bar anyone from reconsideration if they haven't submitted a public comment.

And yet is there any creative way to provide an incentive to do public comments before reconsideration that can make its way into the bylaws?

Becky Burr: Well I mean I think that you know if we say frivolous request then, you know, one could presumably say that the bottom up policy development process that results in something that is outside of ICANN's mission is clearly fair game but the bottom up process that results in something that's consistent with ICANN's bylaws, you know, depending on the circumstances could be frivolous. But, you know, that you look at the specific facts of the specific appeal and think of it on that basis. Others? Thoughts?

Steve DelBianco: Becky what if you said - in that line it says, "They have the reasonable right to dismiss but not on the grounds that..." What if it said, "But not solely on the grounds," that one didn't participate in public comments - not solely?

Becky Burr: Okay David and then Greg and then Robin.

David McAuley: Thanks Becky. I liked the suggestion that Steve just made and I just wanted to weigh in and say I thought that Robin's comment in the chat was right. Not everybody participates.

However even with respect to some of the people that do participate, there may have been, you know, a policy development process or whatever going on that was overwhelmingly going towards a certain result and someone didn't participate simply because they didn't think it was useful. So I think that - I think not participating in the policy by itself should not be grounds for dismissing the case. Thank you.

Becky Burr: Okay, Greg?

Greg Shatan: Thanks, it's Greg Shatan for the record. I think that the - there's a little bit of a mish-mosh going on here because we're talking about the right to dismiss frivolous requests. So it seemed to me that frivolousness is a ground in itself. And it's really in essence unrelated to the issue of whether one didn't participate in ICANN's public comment period.

So it seems to me that if we are - I don't know that we've had situations where a board has dismissed a non-frivolous request for the right to - because somebody didn't participate in the public comment period. But you know it's certainly something we should prevent.

I'm looking - and if I'm looking at the wrong place - I'm looking at Paragraph 9, the third square bullet. There's a...

Becky Burr: Correct.

Greg Shatan: Yes so it's under - it is under frivolousness. We're given the reasonable right to dismiss frivolous requests. That seems to me to be an end in itself. It seems - and then there's a second ground which is - or a second - and then there's a vexatious or querulous. Here again this is - question is are these limitations to what frivolity might consist of? This bullet seems to have kind of drafting issues at this point, sorry to say.

Becky Burr: Okay.

Greg Shatan: But vexatious requests and a querulous request, which is a petulant or whiny request, are really different from frivolous requests which lack merit - at least under the U.S. kind of idea of frivolousness, which has nothing to do with having fun.

Becky Burr: Okay. Robin?

Robin Gross: Yes this is Robin. Can you hear me okay?

Becky Burr: Yes.

Robin Gross: Okay so I would be a little bit concerned about taking this part out about not participating in public comment because it just seems to me that that's - if somebody can meet all the other criteria -- if materially harmed, if there's been inaccurate information, all the other criteria that we've had up top -- then to say oh but you can't participate because you didn't file a comment, that just really sounds like a broken process because not everyone pays attention to these comment periods.

Not everyone knows that in order to pay attention to these comment periods you're going to forfeit your right to then complain about the policy later. And I really don't think that it is much of an incentive to allow a reconsideration request if you don't participate.

I don't think it's much of an incentive to not participate in a public comment as the concern was that was stated. I mean if somebody has an issue with the policy they're going to try whatever means at their disposal to get that policy changed. They're going to try the public comments. If that doesn't work they'll try the reconsideration.

So I don't think it's really going to create an incentive to discourage people's participation in public comment at all. But I worry that it would be, that it would kick off, at least that it would kick out at least half of the requests that are filed, simply on the grounds that somebody didn't participate in the public comment period when they can show all of the other criteria like being

materially harmed. So I think - I don't think we should take this part out. Thanks.

Becky Burr: Okay, can I just ask how you feel about Steve DelBianco's suggestion that we put solely on the grounds - that not solely on the grounds that one didn't participate in ICANN's comments?

Robin Gross: I think that's a good suggestion.

Becky Burr: Okay. Greg?

Greg Shatan: Thanks. Greg Shatan again. As I look at this further, I think this is more of a drafting problem than a substance problem because the way it's drafted it looks to me at least like these are limitations on the right to dismiss frivolous requests. And that's not the - I don't think that's the intention.

I think these are intended to be two separate grounds, essentially or rights. I think what we're saying is that the board has the right to dismiss a frivolous request but does not have the right to dismiss requests on the grounds that one didn't participate in public comment or on claims that the request is vexatious or querulous.

So I think it has to be clear that these two branches are not sub-branches of frivolity but rather that a non-frivolous request that can't be dismissed on the grounds that one didn't participate in public comments or that it's vexatious or querulous.

Becky Burr: Got it. That seems right. I agree with that reading. Are we agreed on the need for clarification? What I'll do is I'll - after this call I'll send around some proposed cleanup language that will do exactly what Greg said on this point.

Okay, going down to the composition that the first evaluation - it's this paragraph 12 - that requests would no longer go to ICANN's counsel for the first substantive evaluation. Instead the ombudsman would look at it and make the initial recommendation to BGC.

There was support for significant support for this, assuming that the ombudsman has the necessary independence. So, you know, we can note in here, note that in here and indicate that the independence of the ombudsman is a topic for Work Stream 2.

The question we have to decide is the request could or would go to ICANN's ombudsman. Any views on this? Greg?

Greg Shatan: I would just like to know if we've run this past the ombudsman, see what he thinks.

Becky Burr: The ombudsman did participate in the creation of this language before the initial draft.

Greg Shatan: I say if it's okay by the ombudsman it's okay by me.

Becky Burr: Okay.

Greg Shatan: As long as it fits his job description or their job descriptions.

Becky Burr: Okay. I'll take that as what we need to run it by the ombudsman, run it by (Chris).

Okay the final comment on this about the board determinations of final determination within 120 days from the request, a number of people said that seemed very generous.

And it certainly does give them a lot of time to - in which delays could be made. Anybody - Greg is that a new hand you have to use on this? No. Any other views on 120 days? David.

David McAuley: Becky, hi. David McAuley again. It seems generous to me but maybe it should be a lesser period with, you know, wiggle room for unusual requests or something that, you know, demonstrably needs a little bit more time. But if we had a deadline and if we do run it past the ombudsman, we should have an ombudsman deadline that's somewhat reasonable too I would think. Thank you.

Becky Burr: Okay. We dealt with this in the IRP by saying that there was a deadline but if they were not able to make it they would provide a report and an estimated time table. That's an approach we could try here. Thoughts? Okay and if we shorten it, are we talking 90 days or 60 days? Mathieu?

Mathieu Weill: Yes Becky. I wondered whether we had any information about the current duration so that we could assess this 120 or 90 via current reality.

Becky Burr: I don't think we do. My sense is that most of them go faster but occasionally one takes forever. I think that's the issue. Greg and Robin if you have any information on that, it would be good to - we did ask specifically and I just think we didn't get too much by way of timing, just that that 120 days from a request was overly generous. Greg?

Greg Shatan: Thanks. Greg Shatan again. Unfortunately I don't have any information on typical timing. But I did like David's suggestion of perhaps having a shorter time period with a little bit of an out or wiggle room.

So we could say, you know, that they'll make, you know, all reasonable efforts to conclude within 60 days. But for, you know, specified reasons - or may extend it but in any case no further than to 120 days.

Becky Burr: Okay.

Greg Shatan: Something along those lines.

Becky Burr: Okay. David?

David McAuley: I think I was talking to myself. Sorry about that. Thanks, but David McAuley again. I think the current bylaw says the board will give its decision on reconsideration requests within 60 days of getting it from the Board Governance Committee or as soon thereafter as feasible. I believe that's the term that they use and so maybe that's good language. Thank you.

Becky Burr: Okay. (Bernie)? So I kind of like Greg's suggestion and we'll implement that. Okay the other question on - go down to accessibility where the deadline for filing was extended from 15 to 30 days. Several people suggested 45 days.

You know, this is the kind of double-edged sword because to the extent that somebody else is - you know, that their ability to move forward for example might be dependent on this, you know, we extend it in one way and it sort of puts a 45-day hold on any contentious decisions.

Views on that? Should we extend it or should we keep it at 30? No views so I'm going to take that as standing with the 30 days. Okay, Robin agrees 30 days. So we got the 30 days here.

Going down to this lots of questions about the document - transparency document and the information disclosure policy. And that I believe is specifically in Work Stream 2 so we will note that.

Okay then going down to the questions and answers, the most significant one is the scope of permissible requests while they're narrow enough for reconsideration.

And so ALAC's question was many recent consideration requests involve decisions of external panels. And the ALAC suggested that the proposal be explicit as to whether such decisions are eligible for reconsideration and if so, how they are to be carried out and whether they would go to the new IRP.

I have to say my assumption was that they would be, that one of the functions of the standing panel would be to reconcile conflicting decisions. So my inclination would be accept this and clarify that these would be permissible although obviously, you know, the standard is a little broader than it was, but it's not entirely broadened up. So any thoughts on that? Mathieu and then Greg.

Mathieu Weill: Yes thank you Becky. On that I would defer to (all this). My comment was on the question and open issue part of the document. The intent overall for the CCWG is to get a more narrow set of questions to the Public Comment Number 2. So while obviously we have to take into account the commentary through these questions I would encourage Work Party 2 to consider just

removing the whole section of questions and open issues if possible from this section, just asking the other documents by the (unintelligible).

Becky Burr: Yes.

Mathieu Weill: That was more of a general comment on (unintelligible).

Becky Burr: Yes that was my - that was my expectation Mathieu. We just kept them in here so that we could, you know, have all of the comments, the broad range of comments in front of us while we discussed it. Greg?

Greg Shatan: Thanks. Greg Shatan for the record. I think you hit on - or the ALAC comment hit on one of the significant shortcomings of the new gTLD process, which was the lack of an appeal or any reconciliation process for dealing with decisions by the objection panels such as the legal rights objection or the string infusion or any of those decisions that were made that allowed certain things to be viewed differently than many people in retrospect thought they should have been.

But I think it's - it had not been my assumption that independent panel decisions would be appealable to the IRP. I don't think it's necessarily a bad idea. But it was not to my mind any implicit assumption.

So I would think we'd need to make that extremely explicit because otherwise I would assume that it's not serving as a panel for the appeal of other essentially arbitral type decisions or decisions of independent - of other panels so that it's sitting almost as an appeals panel on panels.

That's kind of a second job description. Again I think that since we don't want to create too many new bodies this is an appropriate body to do so. It may be another reason why the discussion on the sides of the panel is relevant again.

But I am in favor of it but I think we need to make it expressly explicit and easily understood that this is a body for appealing decisions such as the various objections processes and panels that were set out in the new gTLD process. Thanks.

Becky Burr: Okay and I think that's a good point. Okay Malcolm? Oh Malcolm's hand is down. David?

David McAuley: Thank you Becky. David McAuley here. I agree with what Greg just said but I may have missed a transition but if we're still talking about reconsideration - and I think ALAC's comment sounds pretty sensible - if we're still talking reconsideration I would be of the view that panel decisions like legal rights objections, community objections, whatever they might be from a new TLD program should not be reviewable in a reconsideration request because the ultimate decider there is the board.

They've already been involved in the TLD process. I just don't think it would be useful. Thank you.

Becky Burr: Okay so those things should be appealable to just the reconciliation of conflicting things. I mean we did see - the board did grant some reconsiderations from different processes. For example in the Dot PA case where there was material that had been - I think it was they claimed that there was inaccurate or misleading. So Malcolm?

Malcolm Hutty: Yes thank you. There's - I'm just responding to this discussion of whether decisions of panels are reviewable by this or by IRP. And I think that possibly the better approach is to say not that they or are not but to limit the grounds. Those panels make decisions according to essentially grounds of whatever the process they were handling was or what's good policy and so forth.

And excluding that from being changed by - through this process - is one thing. Certainly in regard to the IRP they exist there to say actually no we don't forget about, you know, the panel. It was - that panel shouldn't even exist at all or, you know, or that it's going about things fundamentally in conflict with the bylaws.

That requires a much higher threshold than simply I disagree with that decision. So that should still be available but it shouldn't - that doesn't imply reviewing the decision that the panel has made according to any set of criteria or just because we don't like it.

Becky Burr: Okay. Other views on this?

Malcolm Hutty: Just to bring in the IRP side of it, I think it's intended - and correct me if I'm wrong - but I think it's intended that before you initiate an IRP you would expect that people would normally do a reconsideration request first. Isn't that the case? And if that's the case then any grounds that could go to an IRP ought to be considered by this or to be open to this. Would that not be (unintelligible)?

Becky Burr: Yes I agree. That would be consistent. Other thoughts? So we'll try to clarify this both in this document and in the IRP document. So other thoughts on reconsideration?

Okay let's go to independent review and Brenda if you could bring up the independent review checklist document.

Steve DelBianco: Becky I had my hand up there.

Becky Burr: Oh I'm sorry, I don't see it.

Steve DelBianco: Becky I had one final question at the bottom of your reconsideration document. You still had four questions in there. And I'm wondering whether those four questions would be published in our second publication draft. Are we going to put questions at the end of each section like that asking our public commenters what they think about certain decisions?

Becky Burr: So my - I think that we briefly talked about this. We left the questions in so that we could get the full range of comments in front of WP2 for discussion. But the intention was not to have questions unless there were really truly unresolved things where we did not reach closure.

Steve DelBianco: Fantastic Becky. Thank you.

Becky Burr: Okay. All right an independent review - I sent around a list of questions of things that are sort of open and that we need to resolve. The first one is this whole question of overflow panel and the size of the panel.

And I have seen what I think is a very sensible solution to this essentially saying the panel should be - consist of at least seven members and then allowing some flexibility in the size of the panel going forward maybe in the Work Stream 2 work, but essentially just setting a minimum size for the panel and moving on from there.

Any views on this? Is that a sensible solution for us? Silence is I think going to be - unless somebody stands up and - oh Greg. Thank you.

Greg Shatan: I think a lot of it depends on how we allow for this flexibility. If we want to have a - you know we've been discussing this a little bit on the e-mail list and unfortunately some people that are discussing that are not on this call.

It's a little hard to figure out necessarily what the work load would be. I guess before the new gTLDs there was basically only one independent review. But now there are more. And if we give the independent review more - a wider brief, there will be still more on top of that.

So I think at least seven. There's a lot of detail around this that we haven't, you know, figured out -- whether these are going to be selected by an outside arbitral body or manager or whether they're going to be selected by the community, whether there's going to be any kind of arbitral group that's going to manage the panel after it exists or provide the rules as it currently happens with the ICRD.

So there's I think, you know, a number of kind of subsidiary issues here but I think that if we don't have a so-called, you know, overview panel or stand-by overflow panel or stand-by panel and the panelists are - you know, this is kind of one of several things that they cobbled together to make their living, they may not have the bandwidth to handle more than one or potentially two panels at a time.

So given how many - however many panels we expect to have - you know, we should have a sufficient number or the ability to have a sufficient number and consider that the process to get new panelists is not short. I think the pick-drip panel is the most recently assembled.

And the first time around I think they wanted seven but they only got four or three. And then they filled it out with the second round. And I think it took, you know, three or four months or more to get that panel selected. So I would tend to want to err on the side of slightly larger panels than a panel that's actually going to result in a lack of capacity to hear a case that's being requested. Thanks.

Becky Burr: Thank you Greg. Steve?

Steve DelBianco: Thank you. I got from the weekend e-mail discussion that size matters. And I appreciate the comment in here that the ability to expand or reduce based on experience. This is the top of Page 2.

But my question is who makes the judgment call that it's time to expand? And if in fact it's the board or ICANN the corporation that makes that decision, they would need the flexibility to do so based on anticipated workload, based on anticipated retirements. They might get word from a panelist that he or she is planning on retiring at the end of their contract and they want to ramp up and replace that person early.

So there's a broader question of whose discretion it is to put out calls for new panelists and to make sure that we provide flexibility for anticipated retirements, experienced work load or even anticipated work load. Could that be worked into the size section? Thank you.

Becky Burr: Thank you. David?

David McAuley: Thank you Becky. David McAuley here. I agree with what Greg and Steve just said. And I think it raises an important point and that is - and that's

especially so with respect to IRP - and that is there are many details that will necessarily be relegated to Work Stream 2.

And some of these details are going to have a real impact on the IRP. And so I think I like the idea of answering the seven questions that you posed on the list in this call. I think that's a great idea.

But I think at bottom in the IRP discussion or language in the proposal there must be sort of statements of principles - you know, these are the things that are agreed on IRP. Details will be worked out in Work Stream 2 but details as they're worked out cannot undermine the principles that we're agreeing or something like that. I'm just - I guess what I'm expressing is...

Becky Burr: (Unintelligible)

David McAuley: Sorry.

Becky Burr: No, no, no, go ahead.

David McAuley: It's just a sense of worry. And I don't know how to escape this. The level of detail which seems to me to be natural is such that we just have to sort of give some direction in a sense about that. Anyway, thank you.

Becky Burr: Okay thank you David. Malcolm?

Malcolm Hutty: Thank you. Yes I'd like to agree with David and Steve. The longer Greg went on speaking the more clear it seemed to me that we just don't know what levels to expect and how - and the unwisdom of being too inflexible in putting specific numbers in at this stage.

So yes I would support David's suggestion that we put in the principle that there should be a sufficiency that's able to meet the anticipated workload. And then we can provide for a mechanism to be created later to determine how much that is, whether that's - maybe it's just a bullet that has a responsibility to meet that obligation. Or maybe in WS2 we create some other mechanism for treating it but we establish the principle.

Becky Burr: Okay. Greg?

Greg Shatan: I'm against the idea of having no number at all. I think that there needs to be a target number. And if it turns out to be too few then you know we could ramp it up. I think that the current IRP language calls for six to nine to be appointed.

And so we could have a range like that. But I think that, you know, there should be at least enough panelists for two panels and enough panelists though that the person who's choosing the second panel doesn't just get stuck with the second three which I think is how you kind of get to the minimum of seven.

So I think we'd rather have some panel assembled from day one, even if - and if it turns out to be insufficient then we can revisit it. But I think just, you know, kind of kicking the can down the road will result in, you know, delays that shouldn't exist. Thanks.

Becky Burr: Thanks. So how about we go with a minimum of seven and the principle that it should be large enough to handle the work load in there?

Okay, all right, there were a lot of pushbacks on the single panel's decisions. And I think the weight of what I was hearing is that there shouldn't be a single

panel decision even if it's not binding. There doesn't seem to be - it really doesn't seem to make sense. Views on this? David?

David McAuley: Thank you Becky. David McAuley here. Prior to my current position I used to work at Bloomberg and write about Internet governance. And among my roles there was to write up case decisions in panels and things like that at ICANN.

And my experience indicated that single member panels, many of them are very well reasoned. But they're all over the lot and so I tend to come down on the side of saying a three-member panel is probably the best way to go at minimum. Thank you.

Becky Burr: Okay. Other thoughts on that? I see Mathieu agreeing. I certainly have heard a team agreement with this on the list. So unless there's an objection we'll go with we'll eliminate the single panel decisions.

The standard of appeal to the full panel I had put in there just as a straw man clear error of judgment or application of an incorrect legal standard. I think Malcolm had raised the, you know, question is this the right standard? Should there be more?

One way again to deal with this is to say that we have this standard and that as part of the Work Stream 2 other standards get considered. You know, obviously the point is to get a standard that is - that creates a relatively high bar for appeal to the full panel but does permit appeal where they're warranted. David and then Malcolm?

David McAuley: I hit mute twice. Sorry about that. David McAuley here. I was reading the mail over the weekend and very interesting insights on this, as a result of which I would say let's have no standard at all and maybe come up with the

idea that a certain number of the overall standing panel would have to agree to accept an appeal.

And that would put the onus on someone trying to make an appeal to persuade some number of panelists that this appeal has merit or is important or should be heard. I don't know what that number is. If we have a standing panel of seven, maybe it would be four. Maybe it would be three. I don't know but that's one way we might be able to skin this cat. Thank you.

Becky Burr: Thank you. Malcolm?

Malcolm Hutty: I'd like to suggest one additional grounds that I think should be in there at the start. And that consider the idea of there being multiple cases being heard. If a panel decides a case and knows that the decision it is rendering in that case is completely inconsistent with a previous case that a previous panel has heard then that should be a ground for appeal.

Becky Burr: Okay. Greg?

Greg Shatan: Greg Shatan for the record. I think we do need a standard because otherwise our panelists won't know what standard to apply in order to know how convinced they need to be.

Clear error is actually a highly - is a high bar as standards go. It's what would be called a highly deferential standard - in other words deferring to the decision made by the body or group that made the initial decision. It's also my recollection more often applied to errors of fact rather than errors of law but that's beside the point I think.

But I think if we want a standard, you know, we should set one. Otherwise, you know, we're really not going to know. I think we need to provide guidance so that there's consistency.

You know, if one panel figures that they can review things on a de novo basis giving no deference to the decision initially made and another panel thinks that they need to give a great deal of deference - I mean maybe these things will be worked out kind of in the next level of discussions. Maybe it's not a Work Stream 1 issue.

So this may need to be worked out in kind of the rules and procedures but it is a particularly important issue.

Becky Burr: I agree with that. I guess I would be inclined to leave this standard in but permit the consideration of additional standards. I mean this is a pretty high bar. You know, an incorrect legal standard or a clear error of judgment is a pretty high bar.

Greg Shatan: Right and I agree that it should be a high bar (unintelligible).

Becky Burr: And then we would - and then the panel itself working with the community to set up the rules and stuff would work out sort of details on this. Other views? I think Mathieu is saying to defer it altogether. And I hear at least some people uncomfortable with that.

Okay so any objections to retaining the clear error of judgment or applications of incorrect legal standard but permit refinement of this as part of Work Stream 2? Okay.

Now we come to the community override of boneheaded decisions. And on this one I have to say I have not identified a consensus or even a really sort of clear weight on where people are coming down. A lot of people on the list over the weekend said no, you know, we have the appeal and if there's a problem then you change the underlying rules to address it but you don't turn over decisions on a case-by-case basis.

Others have said, you know, you need to have some mechanism for reviewing this. And I'm again mindful of the fact that at least some of the governments expressed some concern with having this become binding immediately without a trial period. So views on this subject - community overrides? Malcolm?

Malcolm Hutty: Okay I'm clearly in the first category that you described. Though we don't like to use the language of Constitutional courts and so forth, but community here if we see the IRP has some sort of court deciding whether the rules have been broken, to me it obviously sits in the role of legislature. It has the power to fix the rules if it doesn't like the outcome of some cases but shouldn't really be intervening in the individual cases.

Becky Burr: Mathieu?

Mathieu Weill: Yes thank you Becky. I'm (unintelligible).

Becky Burr: Mathieu we can't hear you. Mathieu we seem to have lost you. While we're trying to get Mathieu back let's go to Steve.

Steve DelBianco: Becky this is on the boneheaded decision override, right?

Becky Burr: Correct.

Steve DelBianco: Great, thank you. None of the CSG folks had something in their comments about it. But I wanted to ask a few clarifying questions. An IRP panel can only do two things. It can affirm, abort action or inaction as being in compliance with the bylaws. Or it can set aside that action or inaction saying they violated the bylaws. In either case - in either case...

Becky Burr: So I just want to make one clarification. It's not board action. It's ICANN action or inaction.

Steve DelBianco: Thank you - corporation, which includes ICANN board, management and staff. Good. So the corporation's actions or inactions are either affirmed or overturned.

And at that point it is right back in the community's hands in the sense of the community could - if an IRP decision set aside a corporation action or inaction - the corporation, the community, has to decide what to do next because what they just did has to be set aside.

On the other hand if something were affirmed and the community is still upset about it, the community can file a second IRP which is a little bit - but we haven't discussed that - whether you get a second bite of the apple on the same decision.

We could begin policy development so that the policy development gets in the way of these arbitrary corporate management decisions. So in many cases the result of an IRP is back in the community's hands again. So I don't understand the need for a community to veto a boneheaded IRP decision because even then it puts it right back in the community's hands to decide what to do next.

So if we gain this out a little bit it may be that it's less necessary than it seems. Thank you.

Becky Burr: Thank you. Good point Steve. Greg?

Greg Shatan: I do agree. I think Steve made some good points. I think that the idea of a direct community override as kind of a super appeals court has some appeal but it also has huge risks I think that if this were sent to the community mechanism in essence to override the IRP as such on that particular decision.

And I think that may be a bridge too far for me at least personally. I'm not speaking for the IPC in that sense but rather that I think that taking one of the routes that Steve described really seems more kind of - more appropriate governance method for dealing with a decision at this level after it's been dealt with not only by a panel of three but by the full panel affirming the decision.

At that point I think we need to have kind of more of a legislative solution or another type of governance solution and not just kind of a super Supreme Court of the community sitting in judgment. Thanks.

Becky Burr: Thank you. Steve?

Steve DelBianco: Thank you. One quick follow-up. I just re-read the proposal for IRP and we said that an IRP decision properly rendered would go immediately - could go, could to - to any court that recognizes international arbitration (unintelligible) for implementation, which I guess is an injunction to implement.

So the party that prevailed in an IRP might well go straight to court to get an implementation. I'm not talking about California courts. We're not talking about members. This is just the party brought the IRP. So that would really clash with this separate parallel process where the community tries to question a boneheaded decision.

Brings me back to the first point. This is the community is empowered to begin policy development if it wishes. And that bottom up policy development is the way to resolve a poorly implemented decision on the part of the corporation or poorly unimplemented decision. Thanks.

Becky Burr: Thank you. Okay so in this call we're hearing no, the community has tools and authorities for developing a policy development process initiating that, expressing a view on how ICANN deals with the decision of the IRP and that the potential for mischief in an override outweighs the potential for good thinking.

Robin is suggesting in a chat that this is something that could be considered again as part of Work Stream 2 and I think we can, you know, consider all of the details in Work Stream 2. Greg, is your hand an old hand or a new hand? David?

David McAuley: Thank you Becky. David McAuley here. I just agree with Steve that we have to be careful about clashing appeals. I just wanted to note that they're different appeals in a sense. In other words if someone takes an IRP decision into a court they're looking for enforcement.

Courts generally don't look at these decisions on the merits whereas a review in the community would be on the merits. But I think it's still a potential

clash. It could be problematic and I like the idea of saying we should look at this in Work Stream 2. Thank you.

Becky Burr: Thank you. Okay so I'm going to take that as a decision of the group. Next going on to Question 5 and 6, the length of the term and whether there should be renewal or not. I am - I think that the weight of what we've heard is no renewals and a somewhat longer term, with you know the range being four to seven years.

Is - you know, I don't have a view on, you know, five, six, or seven years. Seven years - the only concern I have about that is that it might scare people away because it's so long although obviously as Malcolm has said, that doesn't prevent them from, you know, resigning earlier than that.

It does have a nice kind of ring of independence -- the longer the term the more the independence you're likely to get. Okay so Ed Morris is saying five years non-renewable. David is saying three years renewable once. Mathieu is saying four plus three or three plus three.

I guess the question is whether we want to preserve - I mean the non-renewable gets you a kind of independence that's valuable. So I am hearing a great mix. Greg is saying four plus four. (Malcom) is saying he's not keen on renewals. So it's just something that we just have so many views on that this would be a question for the community.

So we go out and then that would be a very pointed question on this. David McAuley says he can live with the five non-renewable. And I have to say I do think the non-renewable is attractive. Malcolm?

Malcolm Hutty: I want to raise the issue of who decides on renewals. If we're going to put out the question - and I don't think we need to but I think we should go with non-renewable - but if we are going to put out the question in our public comments that opens up the question of renewable we need to ask who would be renewing it. And if that's ICANN how would you avoid that being used as a means of compromise seeing the independents of the panelists?

I mean certainly to my mind if you say that it's renewable and it's renewed by ICANN then why wouldn't you get ICANN selecting those panelists whether actually it was comfortable and rejecting those panelists that it found inconvenient and even (unintelligible) that or the possibility of that would be a signal that less independence and more deference was expected from the panelists.

So non-renewable seems to be an important thing if we want independence of the panelists.

Becky Burr: Thank you. Greg?

Greg Shatan: I think Malcolm's question actually raises a bigger question, which is who decides (unintelligible) panel in the first place and who decides on the next set of panelists in the second place when the first panel leaves whether or not they have a renewal clause or not?

I think the answers to all of those questions really need to be resolved as one because now we're not even sure who it is who's picking these panelists in the first place. I would expect that whoever picks the panel in the first place should also decide on whether to renew any panelists and then to find their successors. May also need to consider whether a panelist should be removed before the end of their term.

I don't think it's a good idea if ICANN by itself is the arbiter so to speak of such things. They're clearly kind of an engaged party. I think we had discussed more generally having at least community input into picking the panelists. And I think that when I attempted to change around the bylaws I had made it a process that would be community driven with the coordination of an outside arbitration provider as essentially a facilitator of such things.

But in any case this is a bigger question than just a question of renewal. And the main reason I think renewal is a good thing is because it does give a chance to get rid of those that are not performing well or that seem to be kind of out of - I wouldn't say out of step but that are just not providing the services that were required at the level that they're required and that there's some dissatisfaction.

I just don't want to hear people saying in year 2, "What? We're stuck with this guy or gal or Martian for five more years and that's it?" There's no, you know, kind of time when we can stop and think in the middle of that term? So you know four plus three or four plus four or even three plus three gives us that chance.

I agree to some extent it may limit independence. This is always a balancing act. And, you know, this is a decision that doesn't have to be perfect. But I think it does - and it also goes to the question of whether we can remove panelists or whether we're just stuck with them for seven years, in which case that seems like a long time.

But on the other hand we want to have panelists that will be around long enough to actually gain some wisdom, some knowledge from having heard repeated cases. If there's one thing that the objection processes showed us in

the new gTLD space, it's that you can - you know, wandering in here from outside leads to some pretty bizarre results. Thanks.

Becky Burr: Thanks. Okay so I - quite a sort of I think a gut check on the things on the table seem to be five years non-renewable or four and three. So can we have checks for five-year non-renewables just to generate that check sense? Not seeing (unintelligible).

Okay those in favor of the four plus three, would you give us a check? Greg said (unintelligible) both. Okay my gut is that we should go with five non-renewable.

Okay then the one thing I wanted to come back to is Greg I actually did think that the way you drafted the - you know the sample bylaws was reflected - the decision that we had come to before which was that we would have a provider who would be, you know, based on a tender, would help us coordinate the process and that a panel would be assembled, the board would essentially nominate it and the community would confirm it.

That - so oh Greg only checked for four plus three, sorry. So I actually thought that that was what we had arrived at. So if people - I know I saw some comments on the list about whether that was practical or not but that did seem to be where the community was as well.

So the exhaustion requirement - yes or no or where applicable - although I don't really know how to implement that. I'm pretty sure that the weight of the comments on the list were supportive of getting rid of the exhaustion requirement as something that would disenfranchise people who are not deeply involved in ICANN and may never find out about things. Any views on that?

Okay so I'm inclined to get rid of it, which is consistent with our other conversations. Okay if we could quickly go Brenda to the mission, commitment and core values. We have two open issues although I think one I think we have consensus on.

And so we'll start with that one. And this is the infamous Core Value 11 in the existing bylaws, Core Value 7 here. So I think that the solution that we came to was to simply state expressly that the independent review process applied to all evaluations of the ICANN bylaws including violations resulting from ICANN's actions or inaction based on input from advisory committees or supporting organizations.

That - I wanted the red-lined comparison Brenda, sorry. And then implement (HERT 2)'s recommendation that the GAC would provide a rationale for its advice with references to relevant applicable national or international law that was a suggestion that (Bruce) came up with. So do we have any comments on that? It essentially leaves the status quo with respect to Core Value 11, now 7.

Okay one, it was just a different - the third document, I'm sorry Brenda. It is a side-by-side but it has red line on it. Okay I'm particularly interested in any views. So essentially we are accepting the views that we heard from the Government Advisory Committee participants to completely remove the change in this language and to clarify the availability of IRP for action or inaction that violates the bylaws no matter how it's constituted.

Any concerns about the implementation of (HERT 2) recommendation for publishing a rationale? Robin?

Robin Gross: Yes this is Robin. Yes I'm concerned about removing the requirement to publish a rationale. I think that it's part of ICANN's overall commitment to transparency and how it is governed that we would have that kind of a requirement. It is something that the other SOs do when their recommendations go to the board.

When the NSO recommendations go for example there's a whole report that explained the entire policy development process and the different positions taken and the compromises made. And that becomes part of the public record so we can show what issue we were working on. So maybe I'm misunderstanding what the proposal is but if the proposal is just to remove that then I would be concerned.

Becky Burr: Okay so my proposal is to remove it from Core Value 11/7 but to put it in the general section on advisory committees, requiring advisory committees to publish a rationale.

Robin Gross: Okay so it would no longer be a core value. It would be in the section dealing with the advisory committee? Is that right?

Becky Burr: Yes.

Robin Gross: Okay. Okay that sounds reasonable to me. Thanks.

Becky Burr: Okay thank you Robin. All right so the last question - unless there are any more comments on this - the last question we have to deal with is the human rights issue. And that is one in which I certainly have heard strong feelings on both sides of this. The question is in no - I don't hear anybody saying this isn't a serious issue that we shouldn't deal with but some folks are saying it should be a Work Stream 2 issue.

And others are saying it's fine to make it a Work Stream 2 issue so long as there is a reference in the commitments section to fundamental human rights. We spent a lot of time talking about it. It would be great if we came to some consensus on this although I note that Avri - I don't think Avri's on the phone and she certainly has strong feelings about this.

So this is the one issue in which I think it might make sense to leave it a topic for discussion in the second public comment. I know we are trying very hard to avoid that but given the lack of consensus that I hear in this group, it seems to me to be a legitimate area of inquiry. I'm seeing Ed suggest that - an approach. Mathieu. Greg?

Greg Shatan: Thanks. Greg Shatan for the record. I think that could be a good approach. I think a lot of it is in how it's framed though because I think that, you know, what has been suggested - or I believe say the competing concepts are to make a statement now in Work Stream 1 and get it into the bylaws or to make this a priority item or an important item for Work Stream 2 which could end up same result.

So it seems to me that what we're talking about it is a question of timing more than anything else and also that, you know, to do it now requires a lot of study and discussion to be (unintelligible) or, you know, for us to leap before we look.

And I know that some people have been looking at this for years and that's great but that's not true across these multi-stakeholder spectrums. So this is not an up and down vote on human rights but it's a now or then vote, now or later, and later being later in our process which is a very important part of our process so it's not, you know, relegation to some sort of limbo phase.

Becky Burr: Okay than you. David?

David McAuley: Thanks Becky. David McAuley here. I agree with Greg that how this would be framed would be important. And just to make sure I understand it, it might be that the question would be posed to the community as to how this should be treated. And if in fact that's the case when you - the framing effort will probably go down very much like the discussion has in the last couple of weeks - that is Avri very eloquently stated the position for putting in such a commitment.

And there were others and myself - I was included in that group - that spoke. Here are what we think are sound reasons for putting this all into Work Stream 2. All of that discussion I think would have to come into the framing, I'm guessing. So I agree with Greg that it's how it's framed. Thank you.

Becky Burr: Thank you. Malcolm?

Malcolm Hutty: Yes I agree that if this is going to go out into the public commenting on the discussion points it's important how we frame it. I think we should be careful we should frame this as being just a question of timing because it is more than that.

If it were just a question of timing we either do this now - we either put this language in now or we put this language in later. Then why not just get on with it and do it now? But it isn't that. So we either put this language in now or we think about it more carefully and maybe put some more carefully developed language in later, once we've had the opportunity to do that. That's something quite different.

And certainly I'm in the camp that thinks that that would be a better way to go about it. But I can see that those that think that they would like it in now are fearful that they might not get what they want later if we go through that process.

So we would need - if we out to comment on this - to express clearly arguments on both sides and the reasons supporting those arguments. I think we need to be a bit careful, lest what we put out - if we do put it out to public comment - comes across as essentially a straight up and down on human rights. You like this don't you?

Becky Burr: Okay, and I agree. I think the framing is extremely, extremely important. So we'll have to work on that. Robin?

Robin Gross: Yes this is Robin for the record. I'm firmly in the camp of someone who thinks we need to have a commitment in Work Stream 1 into the bylaws for fundamental human rights in ICANN's operations and policies. However I recognize that there is not consensus for that position.

So I do think that perhaps the appropriate response is to - rather than taking a view one way or the other in this report - is putting it out for public comment in this report and really trying to get some feedback from the community about the way that the issue should be framed within ICANN - the scope and the restrictions and the concerns and all of the different issues - because I think we're all in agreement that it is remarkably complex.

And we could make - there could be unintended consequences to some of the decisions that we make now. So I like the sort of compromise proposal of putting this out for public comments rather than sort of taking a position one way or the other at this stage. Thanks.

Becky Burr: Thank you Robin. Okay I think that there is consensus from the group that we don't have consensus on this point and that there are strong feelings on both sides. So we should have a carefully framed open issue. And if that's the only open issue that we're going to the community with, that's pretty good.

Oka we've gotten an enormous amount of work done in this call and we're approaching the 90-minute mark. Any other general comments - or specific comments? Okay thank you guys, everybody, so much for all of the hard work we've done.

I do have one question. I found Greg's draft bylaws language extremely helpful. And so I'd like to hear views on putting that out not as specific language but as a sort of, you know, something that hasn't been reviewed by counsel but something that helps people understand the concern. So unless there are objections I would sort of suggest we need to work on cleaning up that language a little bit.

And then I see Mark Carvell from the U.K. has raised an issue in the chat that if we could just take a minute to talk about the GAC is not against providing rationale for decisions. The purpose of this amendment while there is concern that its advice will be rejected outright on the basis of contesting the rationale. And this leaves no scope for finding a mutually acceptable solution.

Thanks Mark. I think that the way that we propose to do this, it would not - this would have no implication whatsoever for the obligation to find a mutually acceptable solution.

It would basically just say advisory communities should provide a rationale for their recommendations. But it would not touch the GAC's specific bylaws'

provisions and it would not affect the - it would not affect the obligation to work to find a mutually acceptable solution.

And Malcolm did offer some polishing of Greg's language which I will reflect. Okay so Mark Carvell I hope that's helped. I think we have found a sort of careful solution here.

Okay 10:30 it is. I will be sending around revised documents so that we can get this put to bed and we will go through these decisions on the CCWG call tomorrow. Thanks very much everybody for all of your hard work.

END