

ICANN

**Moderator: Brenda Brewer
October 9, 2015
8:00 am CT**

Woman: Grace Abuhamad: So I think this is everyone unless there are more from the - are we waiting for any other lawyers to join?

Man: I don't think so from Sydney.

Grace Abuhamad: **Woman:** We've got ~~(Holly)~~Holly and (Mike Clark).

Man: Right.

Woman: Yeah.

(Ed McNicholas): ~~(Ed)~~ is on as well. ~~(Ed McNicholas)~~ is on.

Man: Okay.

Woman: Hi ~~(Ed)~~.

~~(Ed McNicholas)~~: Hi.

~~Man:~~Steve DelBianco: All right, so our objective then is to discuss the parameters that are within the DelBianco Kavouss Plan, with sufficient detail so that our attorneys can begin to draft - I guess draft the next level of specify. I wouldn't call them (bylaws), but the next level of specificity as well as raise questions and concerns that would have to be worked out to gather the details to make this a reality.

Because ~~(Jonathan):~~Jonathan Zuck: started with four sentences and a flier and I made it into one page. Kavouss had one modification to the method of voting and that is about all we have, and none of the three of us are attorneys. So we are in desperate need to help to take this to the next level, so that's my understanding of it. However, what - you were certified to do this with us, so I would be interested to know ~~(Holly)~~ what is your understanding of what we need to accomplish on this call?

~~(Holly):~~Holly Gregory: So from my perspective, the best thing that we could have is have you walk through with us your understanding of what the proposal is to the extent that you know it, and then I take it that you've got some kind of written (document) and we will take it from there.

We will - so when they have questions on this call, if you walk us through it, but then what we are supposed to do is have - try to put it through in some kind of slide format and think about how it works. And again, iterate back with you if we think that there are big open questions that we need more guidance on to at least get it to a point where we've got something that can be discussed at a greater level of detail. Does that sound right?

~~Man:~~Steve DelBianco: That makes sense ~~(Holly)~~Holly. However ~~(Holly)~~Holly, you don't have a connectivity to Adobe do you.

~~(Holly):~~Holly Gregory: I don't, but I've got ~~(Mike)~~ on the line and is ~~(Doug)~~ and ~~(Mary)~~Rosemary on?

~~(Mary):~~Rosemary: Yes, we are on.

~~(Holly):~~Holly Gregory: Yay okay, so if you describe it I am pretty good to walk through it and then I think with this team we can raise any questions that we have so that - and I take it we've only got about a half an hour or so. And then, I think that if somebody on my team can grab a copy of the document that you are showing, we can refer to it.

~~Man:~~Steve DelBianco: All right, ~~(Jonathan):~~Jonathan Zuck: you good with that as well and Kavouss?.

~~(Jonathan):~~Kavouss Arasteh: Yes, (unintelligible) to the meeting. I think we are at the very critical moment or critical time. We have this problem that is before us. I have just finished a meeting with ICG. I have reported to them the difficult that we have, however that does not concern them at all except they are worried about the position.

And now, I would wish to request all of us without an exception to look into the Plan B from the total new point of view without any position taking, trying to kill it, or trying to push it on necessarily. So we have to look at the matter and I think it could be a way forward.

However, they might be a need that ~~(Steve)~~ will further explain the situation and seek the advice we need and the of our distinguished legal advisor to give us the way forward from the legal point of view as an option for the time being in order to be - in a way to be presented to the TCWG, thank you.

~~Man:~~Steve DelBianco: All right Kavouss we will dive right in. On the screen in front of you is the same email that I circulated on Saturday morning picking up on things that Bruce Tonkin and more importantly ~~Johnathan~~Jonathan Zuck had put it into the discussion in the three days before that. This is a one-page plan called To Dublin and beyond. (~~Holly~~)Holly, Rosemary, (~~Mike~~), everyone there you've all seen this I think. It was prominent on the list. But just in case you didn't, I've emailed it as well as displayed it in the Adobe.

There are two aspects of this that could use legal evaluation. The first is there are (~~spy-five powers~~) plus the mechanism of binding IRPs. They are in the center of the screen there.

Each of those are meant to refer to the existing efforts we have underway to define how the community would block a preferred op (~~auth~~)-plan; block a change to a bylaw, a mechanism for a binding IRP. We are describing that in each of the work parties right now and it is my understanding that when we describe it, we are often using the word the member.

And the challenge there is could it be possible that we took all of the work that we did and we substituted the word the designator. Yes, you probably could do that more easily, but what if you were to just substitute the phrase the ACs and SOs so we don't yet know whether they would be stepping up as members or designators. They are simply ACs and SOs. Again, emphasizing the fact that we are not restructuring ICANN in any way.

So wherever we can, think of those five powers plus the IRP as being exercised in some decision-making method and the decisions are made by the existing ACs and SOs. And I realize we haven't determined what the (quorum) requirement is and what the threshold is and what the decision-making method is, but it should apply to all six of them.

I am going to paste it into the chat but the one line that Kavouss added, but Kavouss looked at these six powers include the IRP and he added a line that said, “All of the above decisions would require consensus,” and then Kavouss adds his own personal definition of consensus where he says no more than two ACs and SOs advising against it.

So that is no more than two ACs and SOs disagreeing, so Kavouss thanks for that. It is a part of the general dialogue we need to go through in the ccWG to define what consensus is. And unfortunately, it ends up counting how many of you object or how many of you support. So ~~(Holly)~~Holly and ~~(Peter)~~team we do not need in this exercise for you to tackle the decision-making method. We will call that generic.

The whole ccWGs needs a decision-making method whether we are member designator or ACs and SOs. Okay, so I parked Kavouss’ edit into the chat, and it is on email, and I already sent it to all of you before the call began, but it is not necessary for us to get into that on this call. I believe what we are here to focus on is the final two paragraphs. This is the essence of this proposal too.

The idea is one to add Plan B. The Plan B part says that let’s suppose we do the transition, we take all five powers, and the IRP, but the enforcement mechanism that we agree to is something short of membership. It might be designator which has some statutory power or it might just be bylaws and binding arbitration, which has no statutory power.

Whatever it is we come up with, let’s suppose that two years down the road it isn’t working the community discovers that we lack critical powers that we need or the community discovers that the board interpretation of its bylaws obligation is very different than the community’s. And there is a level of

dissatisfaction that provokes the community to say we need to take another look at our enforcement mechanism, not what the powers are, but what is our enforcement mechanism.

So the two paragraphs that are key to this was putting something into the bylaws today, allowing the community using consensus to undertake and launch another review.

A review called a governance review and the goal of the governance review would be for us to assess whether we might need a new governance model that could even include moving the membership.

And Bruce Tonkin's point was that we will need to demonstrate if we want to move to membership that we have improved the representativeness of our ACs and SOs, so that we have moved closer to being more representative of the global community and I understand that. It is hard to say for sure what that would be, but we would make a pass at doing that and it is important.

Then we would present it to the board of directors. Now if the board objected and they might well object, they would have to object on the grounds that this adoption of membership, the activation of the membership team I against the global public interest, then it is easy for them to justify that reasoning because it is quite subjective. If two-thirds of the board voted to object to the proposal, then we would undertake an AC, SO review team, board consolation unless we have to define what that is using a template from consolations like that that occur in ICANN dialogues today.

There is something just like that with regard to GAAC advice to the board. Then after the consolation, the community and SO leaders, might well amend the proposal in some important ways, presumably because the board had made

a request. And then we would submit it for the second board approval. This time around, the board would need to reach a three-quarter majority to object. Now what happens if the board objects a second time to our proposal to move to membership?

Well then we have to activate the so called nuclear option which is to (dispel) the entire board and then reelect or elect new directors who understand that after they get on the board and ICANN legal tells them about their fiduciary duty, they still understand that the community expects them as their elected board of directors that the way to exercise fiduciary duty is to give the global in that community the membership option it asks for.

So there has to be very explicit discussions with them, none of which needs to be reflected in the way legal would write this up. I just think that's what would happen in GNSO. We would have an election of two new board members and our election would be based on their promise that they would understand our interpretation of their fiduciary duty.

And then, they get in, and we consider, we present them the same proposal again, and then the board would not be able to muster a two-thirds majority to object. Remember it doesn't have to unanimous. We just need to pick off the board members who are standing in the way of the community's consensus proposal and then we would be a membership board.

It strikes me that you don't have to write what the new membership structure would look like. We've practically already done that anyway, but it wouldn't be a part of this. This would be a very minor bylaw addition specifying the conditions under which governance review, capital G, capital R. A governance review could be launched, we would make it a consensus, and then you put in brackets ccWG to define consensus, and the review would

have staff support like the AOC reviews do. They would be transparent, we would conduct the review.

All of our deliberations would be published, and at the end of the review, we would see if we can gather consensus for what we think the governance review recommendation is, and then you could describe the process by which it is put out for public comment. The process by which it is presented to the board, the board having to achieve a two-thirds majority for consultation, and then a three-quarter majority at which point you don't have to write anymore bylaws because we are relying on the power to (dispel) the board and that is power number five in the list above.

So provided that we can assure the community that the power is steal the board is enforceable, well then we would use that nuclear option in order to get to a different structure like this in the future. I will stop there and let Kavouss and ~~(Jonathan)~~ add anything or take questions. Go ahead Kavouss. Can't hear you. Still can't hear you. All right Kavouss in the chat asked, how would these five powers in the ccWG be enforced within the Plan B? And Kavouss I think you misunderstand.

The Plan B is the last two paragraphs. That's all. The last two paragraphs of the Plan B, because they say that the enforcement mechanism that we have decided to take now turns out not to be good enough and then you go to Plan B. Steps 1 through 5 plus the IRP above are already being planned by the ccWG and they include satisfying the ccWG requirements and let me add this.

We've been told over and over again that the board and the lawyers support 100% alignment on those five powers and a binding IRP. This would be no disagreement that those things can be done prior to transition, but we would back off of membership today and accept a designator or something less, but

we wouldn't back off of membership today without the ability to have Plan B stepping up to membership in the future with the enforcement powers (filling) the board.

Kavouss there is no restructuring of SOs and ACs. No restructuring whatsoever. ~~(Holly)~~Holly, Rosemary, attorneys, any questions.

~~(Holly)~~Holly Gregory: This is ~~(Holly)~~Holly. I do have a question. So we say no restructuring of SOs and ACs at all, but we weren't - I take it that we need some ability in the near term to have enforceability of these powers. How do we address the legal first input issues?

Man: Well that's sort of our question for you I think is that...

~~(Holly)~~Holly Gregory: Well and so there - it seems to me there are...

Man: Except there's a level...

~~(Holly)~~Holly Gregory: So there is - there are not a lot of options here. One option is the SOs and ACs become legal (persons), but somebody just replied to Kavouss that there is no restructuring of SOs and ACs. So it sounded like you were taking that off the table.

~~(Steve)~~Steve DelBianco: No sorry ~~(Holly)~~Holly. I am not a lawyer, and to me, the bylaws created ACs and SOs and we are not going to change which ACs and SOs there are.

~~(Holly)~~Holly Gregory: Okay I agree. Actually I understand now. Thanks for that clarification.

~~(Steve)~~:Steve DelBianco: All right but as you told me there needs to be the creation of legal personhood and some aspect of enforcement. I would agree to understand that, but I would never have called that restructuring and that is the tract we go to.

~~(Holly)~~:Holly Gregory: Okay.

~~(Steve)~~:Steve DelBianco: Because the board has been saying that our plan is restructuring at is not.

~~(Holly)~~:Holly Gregory: Right, it is not. It is absolutely not. I just wanted to make sure I understood what you were saying ~~(Steve)~~:Steve so I think we are on the same page. Okay, I mean it seems we can certainly come up with something to make this workable and the question for the ccWG will be does it provide enough certainty. There will be a little bit of (list) but I think we can certainly provide something.

We certainly take the direction and agree with it very much Kavouss that the goal here is to take our best stab at putting something forward that we think is workable and not to in any way be advocating for or against, but to put it out there. We will explain the pros and cons and you know take our best shot. And I hope that we can share it with you all before we share it more broadly with the group. Is that acceptable?

~~(Steve)~~:Steve DelBianco: ~~(Holly)~~:Holly you can't see this but on the screen I displayed a table that was suggested this morning at a meeting with some folks from (TDP). I don't know whether they are going to send it to the list or not, but it suggests that our attorneys have to tell the ccWG what is the means of enforcement if we only relied on bylaws with a binding arbitration.

What would be the means of enforcement if we went to designator. What would be the means of enforcement with membership. And we've done all of this work. It is only a matter of filling in the table on these six powers and then our community would say where on that spectrum from left to right - from bylaw to (loan) through membership and statutory power. Where on that spectrum are you guys willing to say is our minimum. I know we started with membership. The board wants to start a (unintelligible), so this is reality. We are probably going to end up somewhere in the middle.

And I am not concerned. (~~Steve Croft~~)Crocker's email on Monday night said that they would also object to designator. Let's wait and see what the community wants to do. Because if we end up compromising off of membership, but can go no lower than designator, then it is very important for us to document that and achieve a significant consensus for it.

(~~Holly~~)Holly Gregory: Well and (~~Steve~~)Steve if I may, I understood (Steve ~~Croft~~)Crocker was saying the sole designator. It may be that you know there is another way to do designator and in a way that is very close to what you have, especially as we look at it closer and maybe I should let Rosemary weigh in on this point.

Rosemary ~~Sinclair~~Fei: Well I mean I thought we did that. I thought we did the empowered SO/AC as designators model. I mean...

(~~Steve~~)Steve DelBianco: You did. We have to fill it in. We just have to fill it in so that people can compare.

(~~Holly~~)Holly Gregory: We need to do it as Plan B.

Rosemary ~~Sinclair~~Fei: You know so I think we have worked through again the SOs and you said -- and this is key (~~Steve~~)Steve -- that you are not telling us that we can't

require the SOs and ACs to assume personhood. If you tell us that that is okay, that at some point our plan can involve requiring us SOs and ACs to assume personhood, that's one step of options. And it is a whole lot simpler and higher enforceability than if the answer is nope you have to do with no personhood in the SOs and ACs. Then we are going to have to you know find chairs or...

((Crosstalk))

~~(Holly):~~Holly Gregory: That's why we went to ~~(sole)~~sole members and ~~(sole)~~sole designators and all of that.

Rosemary ~~Sinclair~~Fei: But it seems to me that the community kind of rejected that and so I want to be clear what our assignment is, what the parameters are. A key one is that you are saying yes we can reach a point where SOs and ACs have to get personhood for it to work. I don't want to then have everyone come back and say but we told you that wouldn't work. That's a stupid plan. That's all.

~~(Holly):~~Holly Gregory: So they might say that Rosemary but...

Rosemary ~~Sinclair~~Fei: But we'll say. It's ~~(Steve)~~Steve's fault. He told us to do that.

~~Man:~~Steve DelBianco: Here is the opening for that. The first column on this table says means of enforcement with bylaws alone and that's in the end. In the ~~(NEMMEM)~~ they assume this person is using SOs, agreed.

~~(Holly):~~Holly Gregory: Right, absolutely.

~~Man:~~Steve DelBianco: So Rosemary they've already opened the door. So the first column is the board's (~~NEMMEM~~). They have already opened the door for personhood.

Rosemary ~~Sinclair~~Fei: I agree with you but I don't know that the community has accepted that.

~~(Holly):~~Holly Gregory: Well let's take our best shot it. Maybe we get the community to come through with a reasonable approach on this.

Rosemary ~~Sinclair~~Fei: Yeah okay so if we can make SOs and ACs be persons, but I think this is much - there is you know a real plan that is not incredibly byzantine where this could work.

~~(Holly):~~Holly Gregory: It's empowered.

Rosemary ~~Sinclair~~Fei: Yeah because we need that removal power and it is really hard to get that without designators. And we are in springing resignations.

~~(Holly):~~Holly Gregory: So the other thing I was thinking Rosemary was in terms of the enforceable commitment to revisit this in the future if something gets triggered. Are we able - would we be able to give to SOs and ACs some kind of power to create at that point some kind of special bylaw. We can talk about it offline, but I was just wondering..

((Crosstalk))

Rosemary ~~Sinclair~~Fei: The problem is the only power we can give with respect to bylaws without a member. The only power we can give with respect to bylaws is the power to reject.

~~(Holly)~~Holly Gregory: Okay, so that doesn't work. We can't give somebody like a golden bylaw.

Rosemary ~~Sinclair~~Fei: Who gets the power to reject if we don't have people.

~~(Holly)~~Holly Gregory: Right.

Rosemary ~~Sinclair~~Fei: But let's assume we have SOs and ACs who could reject. By then you know when we have a bunch of SOs and ACs and not the (sole) then we have this issue of sort of how do we get them. You know if any one of them objects and even if all the rest of them are fine, if that one objects, then we need some sort of contract among them.

~~(Holly)~~Holly Gregory: Okay, look. Yeah I think we probably have enough to go offline and start working on it. Do you agree Rosemary? Do we have any other questions that we need to ask of Kavouss, and ~~(Steve)~~Steve, and (unintelligible).

Rosemary ~~Sinclair~~Fei: No, I think...

~~(Steve)~~Steve DelBianco: Hands are up. Yeah something you said let me clarify. The six things on the screen are the powers we are all working on every day. All that we are asking to do is to give the community an opportunity to pick as if you took a slider and you slide from left to right. From the MEL on the left to membership on the right, and I realize that under designator membership you might have sub columns, one for single, one for individual and that's fine. And as they slide that thing left to right, where do we end up as our minimum for the transition to occur.

Rosemary ~~Sinelair~~Fei: But that is only half of what you are asking, because the other half is we have to make sure that we can make the (MB) piece work. It is one thing to say you know where is the MEM? How good can the MEM work? How good can that column work? Is it enough? Do we have to slide over to designator? But none of that matters if we can't get Plan B to be absolutely bullet proof. So I feel like this chart is half the story. The other half of the story is us coming up with a way that Plan B is bullet proof.

(~~Steve~~):Steve DelBianco: Right and those are - and I put up the Plan B paragraph before I brought the table up and I agree completely with what you said. It is that this is their half of the story and then you link it to the Plan B.

(~~Holly~~):Holly Gregory: Right.

Rosemary ~~Sinelair~~Fei: I am just saying that when you are - the work that you are asking us to do is to fill in this chart and then also to make sure that we can take the Plan B as described and turn it into something that works legally and is totally enforceable.

(~~Steve~~):Steve DelBianco: Exactly. Excellent. That is a good summary.

Man: That's exactly right.

(~~Holly~~):Holly Gregory: And we need to do this before our meeting in Dublin which is a lot of time. We are going to back burner all other projects, all Q&A responses, everything, and just focus on this. Is that correct?

Man: I would have to let the chairs make that determination.

Rosemary ~~Sinelair~~Fei: We don't have the co-chairs on this line so I'm not sure.

~~(Steve)~~:Steve DelBianco: Rosemary listen for a second. You should assess the level of effort it would take to do this two-part project. I was thinking you were pulling things off the shelf, but if you reactivate individual ACs and SOs as designator member then maybe you have to do - reach way back and do more work.

~~(Holly)~~:Holly Gregory: ~~(Steve)~~:Steve that's the easy part. That's not the hard part. The hard part is the Plan B lockdown and even populating the chart will take a little time, but you know so it is all very doable. We would like you to go to the chairs and let them tell us what is a priority so we can work on it first. It doesn't mean everything else will stop, but we really need a couple of days for just us lawyers to wrap our heads around this and come up with alternatives and play it out. Okay, but I agree. The stuff for the chart -that is not the hard stuff, okay.

~~(Steve)~~:Steve DelBianco: Okay excellent.

Kavouss Arasteh: Excuse me, I have a question.

Man: Go ahead Kavouss.

Kavouss Arasteh: Yes, my - hello can you hear me?

Man: Yes.

Steve DelBianco:~~Man~~: Yes Kavouss.

Kavouss Arasteh: Yeah my question is the first column is more or less - looks like a total Plan B...

Steve DelBianco: ~~Man~~ No.

Kavouss Arasteh: ...meaning bylaws. So wherever the Plan B is.

~~Man~~:Steve DelBianco: I will put it back up. Give me a moment and I will bring it back up.

Kavouss Arasteh: I didn't get the answer. The first answer is that we are talking about the enforcement of any of these six powers with bylaws alone with designator and the membership. And the column will be filled up by the - for the lawyer. Is that right number one?

~~Man~~:Jonathan Zuck: Yes.

Kavouss Arasteh: And number two, you've got in the first column. Is there any way go back to the multiple memberships. Because if you want to empower SOs and ACs individually you would go back to the multiple membership which was on the table and then you change it to the single membership. So is there any possibility or any likelihood that under the first column we go back to the multiple memberships. If it is not the case, how by bylaw you could enforce any of these six powers that needs for business you reject budget.

By bylaw only, you don't any person? So where is the person who is (unintelligible). How within the play - the personhood in order to implement or to enforce any of these powers.

~~(Steve)~~:Steve DelBianco: Kavouss this is ~~(Steve)~~Steve. In the table, the very first column called bio-lodge alone, let's call that the MEM model that the board has asked for, and that does require personhood. ~~(Holly)~~Holly and Rosemary may also show options for designator and membership that also might require

personhood. I will leave it to them. I don't want to make it too complex, but all of this has to do with stuff that we do at transition.

But Plan B is now on the screen because Plan B is not the table. Plan B is what if the enforcement that we pick from that table doesn't get the job done. Then we go to Plan B and Plan B is the governance review with the ability to impose membership in the future with the leverage of filling the board. And Rosemary gets that completely about the need to tie the board's power to be statutorily enforceable in order to have an iron clad ability to do Plan B. Does that help?

Kavouss Arasteh: The result is we don't enforce them at this time. We wait for the future how to enforce them? How we enforce the six powers now?

~~(Steve);~~Steve DelBianco: No Kavouss. If I put the table back up Kavouss, we have to pick from MEM on the left all the way to membership on the right as what we support. Whichever of those we pick as our enforcement mechanism, that gives some measure of enforceability. It may not be iron clad statutory enforceability, but it will be some level of enforceability, and the board wrote a long legal memo today that they circulated.

How they think MEM is enforceable through binding arbitration. We think we need statutory powers through single member. But in between there are four or five flavors of enforceability. We are going to let our community pick the level of enforceability we can live with today knowing that it could go to Plan B in the future and add - and push everything all the way to the right.

You can just push everything all the way to the right to get membership level and statutory enforcement in the future but only if we build in a Plan B where we have the power to impose it.

And I know it is a little bit complex and I am counting on the attorneys to help explain it better. ~~(Jonathan)~~Jonathan you are in the queue.

~~(Jonathan)~~Jonathan Zuck: Yeah, maybe I can explain it a little bit of - okay. Go ahead Kavouss.

Kavouss Arasteh: Excuse me, you said some degree of enforceability. Is that some degree sufficient to meet the requirement of ccWG for the transition or not?

~~(Steve)~~Steve DelBianco: Yeah that is a brilliant question and they are going to have to join us in making that assessment. You asked it exactly right. When ~~(Holly)~~Holly and Rosemary populate the table, we ought to be able to put it up on a screen in Dublin and working with ccWG take a look at that table and say we think if we put the slider right here, we could live with it knowing we had the ultimate power of Plan B, all right.

So we all assume we have to give ccWG sufficient enforceability for them to be comfortable we've met the requirements. And Kavouss I do want to mention to you that when you slide left to right across that table, you can't pick and choose a couple from the first column and a couple from the second column. You see we get it all. You get all of one column as you move left to right. ~~(Jonathan)~~Jonathan.

~~(Jonathan)~~Jonathan Zuck: Yeah thanks ~~(Steve)~~Steve. One thing I might be able to add just a little bit to is to take us out of the details and back into sort of the philosophical underpinning of this particular effort. And Kavouss as you know, the board's primary objection to the single member model or different variations of it is the level of uncertainty and the speed with which we would be creating that uncertainty.

And it is about taking more time whether it is Bruce's notion of making sure that the community is more representative or really working out the voting structures or whatever it might be. It is about taking time to do it. And that many of the board are okay with a member model with more time to work on it.

So in a sense, this gives us that kind of relief valve that says that if whatever model we end up choosing for the transition that the community settles upon isn't enough it may be that it is. But if it isn't, we have created a kind of relief valve that allows us to revisit this and potentially become a member organization down the road because we have created enough of a power for the community to bring about that reform.

That's really the issue. Remember Kavouss that the purpose of work stream one was always to sufficiently empower the community to implement reforms in the future, and this is just a more explicit structural reform that we may or may not want to implement in the future. Does that make sense?

Kavouss Arasteh: Yes it makes sense. In fact it makes sense that you reply directly to what (NGIA) said. Make it simple, make it minimum in order to facilitate the transition, and do anything otherwise. Is that right?

~~(Jonathan)~~Jonathan Zuck: That's right and so how we have defined the minimum Kavouss is enough power to do more later. The members have defined the minimum.

((Crosstalk))

Kavouss Arasteh: Exactly, yes.

~~(Jonathan):~~Jonathan Zuck: And so where we need the help from the attorneys on is to figure out what the minimum is that we can do the reforms that we decide on later.

Kavouss Arasteh: Okay could we get some advice from the legal advisors what that minimum would be legally.

~~(Jonathan):~~Jonathan Zuck: And that's the purpose of this call and their homework assignment.

~~(Steve):~~Steve DelBianco: I have one final item to mention. I have one final item I want to tell you, the Plan B part. The description of that that you give us, there is a huge risk that it will look complex and scary. I wrote it in two paragraphs. I realized it will be longer than that once you guys are done.

And if it looks really scary, it can frighten any opponent of what we are doing including the board and (unintelligible) today and say if we accept this proposal, they've baked into the bylaws a very frightening specter of being able to completely restructure ICANN.

Of being able to dissolve the corporations. In other words, all of the scare tactics that have been used against our single member model will be used against the Plan B write-up. So please do your best to make it feel minimum, make it feel comfortable, this idea of a review.

The idea of public comment, but you do have to be rather specific that we don't have the power to (dispel) the board because you have covered that in the table already. Simply refer back to the table.

But after the second consolation, a three-quarter board objection if the community continues and really wants to oppose it. You could (dispel) the board and elect directors. I understand there is fiduciary duty included giving

the community the ability to have membership statutory power. How does that sound?

Kavouss Arasteh: Yes it sounds well. What you are doing now is you taking all of the workable elements from anything mention up to now has been discussed and put them together in order to have this transition be implemented. That's fine. The only question is that you said changing the bylaw. When that change should be done and how should we implement it. Is it to be done before the transition or when it should be done. Thank you.

~~(Holly)~~:Holly Gregory: We would have to create the bylaws now that would provide for this. So but I think it is very doable Kavouss. We just need to go and put our heads down and work on it. And ~~(Steve)~~:Steve we absolutely understand your point.

We cannot come back with something that is highly legalize although we have to have done the work behind it so that we can talk about it and speak to the many questions that might be raised. But we understand your point about simple fear and you know the more we can make this you know not look like a huge change the better.

~~(Steve)~~:Steve DelBianco: I have a suggestion to make it simpler. On your first pass on this assignment please do not - please use single member and single designator only. And the board MEM in the first column of the table. In other words don't blow it out into individual ACs and SOs becoming members or designators. I would like you to save that for the second pass.

So if we have time, we do that next Tuesday or Wednesday on the way to Dublin. But if you come back, I know Rosemary you were doing back flips

about being happy to revisit individual AC and SO chairs (unintelligible). I get that, but if you put that in here, I am afraid that (unintelligible).

Rosemary ~~Sinclair~~Fei: I'm sorry, I am losing you. Hello.

~~(Steve):~~Steve DelBianco: I am here.

Rosemary ~~Sinclair~~Fei: Sorry, it sounded like a jet went overhead or something.

~~(Steve):~~Steve DelBianco: Rosemary I was appreciating the enthusiasm that you showed to revisit our idea that individual ACs and SOs could have personhood, and I am going to ask you to just hold back on that and stick to the more simple case first, which includes single designator and single member along with what the board did. And the board means of enforcement with bylaws alone does require personhood in each AC and SO, and I would just note that parenthetically out there in the top of the column.

And then if it turns out that we get resistance on the single designator, then we add a new column in between them calling for individual designators. But I don't want to go there first because it will make it feel too complex. Would you agree ~~(Jonathan):~~Jonathan, Kavouss.

Kavouss Arasteh: Yes, I agree.

~~(Jonathan):~~Jonathan Zuck: Yeah I agree. We can make it possible - go ahead Kavouss.

Kavouss Arasteh: Yes, I think ~~(Holly):~~Holly made a question that whether we are doing this to help to put aside all of the questions and so on and so forth. I think that responsibility is that we ask the co-chairs to defend it. I am sure that they will

consider that because the lawyers could not work on several issues at the same time.

So perhaps the Plan B or whatever is - approach has full priority. Nevertheless, we need to have a confirmation of the co-chair to put aside for the time being all of the - some of those question which are vital and perhaps we should not be criticized that few people like ~~(Steve)~~Steve, and ~~(Jonathan)~~Jonathan, and Kavouss and so on and so forth put aside all of the important questions and concentrate. We need to have the backup of the culture.

~~(Jonathan)~~Jonathan Zuck: Right, I mean this has to be boiled down to something fairly simple and one of the problems - the challenges we have always faced in this is how much time we spend disagreeing about the facts each time these issues come up. You know what level of importance can we get with this versus that and it is amazing how much that ends up getting debated by the group rather than just what it is that they want.

And so the more reduction in this can be, the more easier it is for the group to focus less on trying to out lawyer each other and more on understanding their own priorities and speaking to those priorities.

Rosemary ~~Simclair~~Fei: So ~~(Steve)~~Steve this is Rosemary. I am wondering if we could relabel the three columns on your chart from what you just said. The first one would be means of enforcement with bylaws alone and then (parenthesis) assuming SLAC personhood. Because I think that you are telling us that. You think that that is the assumption we can make.

Then label the second column means of enforcement with sole designator and the third means of enforcement with sole member. Because you are saying

you don't want us to look at the multiple members, multiple designator structure, and I kind of agree actually.

~~(Jonathan):~~Jonathan Zuck: Yeah for now at least, yeah.

Rosemary ~~Sinclair~~Fei: Would that work as a way to what you want as the output for this half of the work?

~~(Steve):~~Steve DelBianco: that's right and keep in mind that the first column - they have to be arranged left to right with left being the lowest enforceability and the right being the statutory enforceability. And it is my understanding that the board's MEM proposal assumes there needs to be legal personhood at the AC and SO level. Am I right?

Rosemary ~~Sinclair~~Fei: Well they kind of danced around it. When they get to the enforceability issue which is where you need personhood, what they say is well the MEM issues group might be an unincorporated association or it might be one of the SO's or AC's or it might be that you know everything else failing. It could be the individuals who are the chairs of the SOs and the ACs for sure their people

That is how I read their description of what their proposal is and the problem is it is like that is a big issue who is going to enforce. And they act like that's just an implementation detail. It is enforceable because somebody will be there to enforce it. Yeah, but who you know. And I think the group has rejected having four individual chairs having to be plaintiffs in a lawsuit. You know I think that was not deemed workable and I can see why.

You know I've got a wife, I've got a family, and I don't really want the risk. I don't want to spend the time. My term ends and the lawsuit isn't going to go

away just because my term ends. I am going to be the individually named plaintiff, so that didn't sound so hot to me.

And then the other one is well maybe the SOs and the ACs are people, but then they are not right now or at least they don't want to be. Who is going to enforce...

~~(Holly):~~Holly Gregory: ...this MEM issue...

Rosemary ~~Sinclair~~Fei:...and then you are back to the MEM issues group being an unincorporated association. I think that is what they are relying on.

And the concern that we have about that which they dismissed although they didn't give us any sites, but they dismissed it in their last memo. It was our concern is I don't think an entity that didn't exist at the time the claim arose is going to be able to sue for that claim. But I haven't done the legal research. They say flat out it can be done. I would like to see their legal research.

But so my fear is that if we do this the way you described it, the way I just described it to you, which is that the first column says assume SO and AC personhood is available. That when that fails, when the SOs and ACs say no, we are not going to be people. We don't want to be called people. We don't want to have that, then your enforceability suddenly drops from probably pretty decent to zero.

That's my fear. I've got to have (unintelligible).

((Crosstalk))

Rosemary ~~Sinclair~~Fei: And so then I think probably makes more sense is we try and work their MEM issues group on the unincorporated association idea as far as it can go. But frankly, I have concerns about it and they seem to not have concerns. They think it works.

Kavouss Arasteh: I have a comment. If you amend the first column, say that the empowering the community only in bylaw assuming that SO and AC have personhood do you mean that have personhood wait for or without unincorporated associations or there is a need to have unincorporated associations unless the chair of the SO and AC is that personhood. So that is a question.

There are two alternatives. If the whole SO, AC, one of them should be empowered to that personhood means that there is a need of unincorporated associations among the members of that SO and AC. On this, it is the chair only so that chair has a personhood. Whether or not the chairs accept other responsibility is legal hood. Moreover then you have all of this.

When at the later stage you want to have full power to some things collectively. Do you need a second unincorporated association to combine those SOs and ACs that they have among themselves they aren't incorporated (acquisition). These are the questions that I want to make it understandable to the people.

Rosemary ~~Sinclair~~Fei: Well you know those are very good questions Kavouss. I mean I think that is exactly the issue. That the enforceability requires personhood somewhere and the board's model I think ultimately comes down to relying on the MEM issues group somehow becoming an unincorporated association. And the other models that we have put on the table either rely on the sole designator or the sole member for personhood for enforcement.

~~(Steve)~~:Steve DelBianco: Please look at the screen and at the updated table. We can do it this way.

Rosemary ~~Sinclair~~Fei: Okay I think we can certainly work with this chart. I just - and I think the harder issue is actually going to be the other one. What is the mechanism for enforcing Plan B if you need to.

~~(Steve)~~:Steve DelBianco: Wait, I understand that, but I just wanted to get closer about how important it is.

Rosemary ~~Sinclair~~Fei: Yeah, I am with this chart. Are you fine with this chart ~~(Holly)~~Holly?

~~(Holly)~~:Holly Gregory: Yeah I think we can work with this chart and let's see what we can come up with as ways of explaining it in simple and straightforward terms. I think we all agree that at the end of the day, we are going to have to come up with some kind of legal personhood. And so let's start by populating the chart and thinking about how to best express that.

Kavouss Arasteh: ~~(Holly)~~Holly I have additional comments. I think that the MEM does not require to have personhood at the level of SO and AC. What they do at the level of the issue group or issue MEM group because the people should decide it together. That's something that was missing in the MEM in which I raise the question in LA. That at that level of the issue group, they need to have some sort of unincorporated association. But if you want to put under the Column A that with each SO and AC should have unincorporated associations, we inject a degree of complexity which will (unintelligible) the situation.

Why we need that degree of personhood at the level of SO and AC, because the end issue is coming after the (unintelligible) to a higher level to decide and

that higher level we need some personhood. Why do we need personhood at the level of SO and AC?

(Holly):Holly Gregory: Kavouss you are correct. We could do this and say we are assuming that the MEM issue group is established at the outset with legal personhood and then you've solved the problem.

Kavouss Arasteh: Yes.

(Holly):Holly Gregory: Instead of their idea that MEM issue group does not arrive until you want to bring the claim. So we could set it up in advance and then I think - I mean let's let us work through it okay.

Kavouss Arasteh: Yes but please do not amend the Column 1 saying that assuming that SO and AC have the personhood.

(Holly):Holly Gregory: We understand.

Kavouss Arasteh: You get the second degree or another degree complexity, so could you please not amend the first column.

(Holly):Holly Gregory: We will work with that Kavouss.

Kavouss Arasteh: Thank you.

(Holly):Holly Gregory: We will work with it for now.

Rosemary ~~Simelair~~Fei: We got you.

(Holly):Holly Gregory: We understand.

~~(Steve)~~:Steve DelBianco: All right team fantastic. I will follow up with an email to each of you with the revised chart and I will put the words Plan B in bold above the last two paragraphs. Is everybody cool?

~~(Holly)~~:Holly Gregory: Yes, I also want to...

((Crosstalk))

Rosemary ~~Sinclair~~Fei: Yes, can you also check in with the co-chairs about priorities for the council work.

~~(Steve)~~:Steve DelBianco: Take a look at the action items. The ten items on the right hand side written by staff. Please take a look at that and see if it is okay.

Woman: ~~(Steve)~~Steve just to note, (Ed McNicholas) has his hand up and then I also wanted to confirm that the chairs would give certification prior to the lawyers launching into any new projects.

~~(Steve)~~:Steve DelBianco: And that is what is in the action plan I was referring Rosemary to. Go ahead (Ed).

~~(Ed McNicholas)~~: So it is a question on the item 6 on the chart where it says mechanisms for binding IRP were a panel's decision and is enforceable in any court recognizing international arbitration results.

That last phrase about any court recognizing international arbitration results is a point where the ccWGs IRP and the MEM differ and that MEM is designed only for California and the IRP is designed for any country anywhere.

So is that your - how do you want us to read that? Do you want us to read it as any court anywhere or just California courts or does that matter?

~~(Steve)~~:Steve DelBianco: Yeah, great question. Why don't you just say enforceable in - I will let you work that out. Because if there is a difference and you need a difference in the text of...

((Crosstalk))

~~(Holly)~~:Holly Gregory: The only difference...

Kavouss Arasteh: ...that would be a problem. If you put only California that would be difficult.

~~(Holly)~~:Holly Gregory: Right

Kavouss Arasteh: Any court anywhere. If you put only California people will object to that.

~~(Holly)~~:Holly Gregory: Okay, so I just want to be clear. We will do that for any court and we will indicate that that would be change that would be needed to - that that is a change to the MEM as described but there is no reason why we can't change the MEM that way. (Ed) do you agree?

(Ed McNicholas): No, that's absolutely fine.

Rosemary ~~Simclair~~Fei: So we are going to be improving the MEM with what we are doing.

~~(Holly)~~:Holly Gregory: This is an improved MEM.

Rosemary ~~Sinclair~~Fei: Yes, just so long as we are clear. We are not just taking the board's proposal. Part of what we are going to do is try and make the MEM the best it can be.

Kavouss Arasteh: You know to take advantage of the time. Who is going to share the - to take the issue of the priority of this issue with the co-chair? ~~(Steve)~~Steve do you write something to the co-chairs or Rosemary and ~~(Holly)~~Holly write them as a result of tonight's discussion. So we should take immediate action.

We should not postpone it for Monday or Tuesday perhaps we should write a short note to the co-chairs indicating that the results of this meeting it is considered that this issue has a priority.

~~(Holly)~~Holly Gregory: May I suggest that that should come from ~~(Steve)~~Steve or Kavouss.

((Crosstalk))

Kavouss Arasteh: I think ~~(Steve)~~Steve can do that on behalf of the team.

~~(Steve)~~Steve DelBianco: I will do that and I will copy you all on it, and I will include the attached document and the action plan from the right. I will include that. I've got it.

Kavouss Arasteh: Anything else we have to discuss?

~~(Steve)~~Steve DelBianco: I think we have...

~~(Holly)~~Holly Gregory: I think we have a plan. I think we are ready to move forward. As soon as we get the go ahead.

Kavouss Arasteh: ~~(Holly)~~Holly and Rosemary I think on behalf of the team and (unintelligible) I really appreciate your very positive reflection and assistance that you have provided and you continue to provide, which is very promising and it is very objectively done tonight. Thank you very much.

~~(Holly)~~Holly Gregory: You are welcome.

Rosemary ~~Sinelair~~Fei: You are welcome.

~~(Jonathan)~~Jonathan Zuck: Thanks guys. And thanks Grace and Brenda for organizing the call.

Brenda Brewer: You are welcome. Operator you can end the recording. Bye-bye everyone.

Kavouss Arasteh: Bye-bye. To the (unintelligible) again for the second time. Thank you.

~~(Ed McNicholas)~~: ~~Bye-bye~~

~~(Steve)~~: ~~Bye.~~

END