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TERRI AGNEW: Good morning, good afternoon and good evening. Welcome to the At-Large Ad Hoc Working Group on the IANA Transition and ICANN Accountability, taking place on Friday, December 4<sup>th</sup> 2015 at 13:00 UTC. On the English channel we have Jean-Jacques Subrenat, Alan Greenberg, Cheryl Langdon-Orr, Eduardo Diaz, Gordon Chillcott, Sébastien Bachollet, Christopher Wilkinson and Vanda Scartezini.

On the Spanish channel we have Harold Arcos. We show apologies from Olivier Crépin-Leblond and Tijani Ben Jemaa. From staff we have Heidi Ullrich and myself, Terri Agnew. Our Spanish interpreters today are Sabrina and David. I'd like to remind all participants to please state your name before speaking; not only for transcription purposes, but also for our interpreters. Thank you very much, and I'll turn it back over to you, Alan.

ALAN GREENBERG: Thank you very much. The first Item on our Agenda is review of Action Items. The only AI from the last meeting was to schedule this meeting, and I believe that was done. The first substantive Item is the CCWG. As of Monday a third proposal was issued in all its gory detail. We have a few weeks in which to create a response from the ALAC. The intent was we try to not make this our laundry list of everything we ever wanted to see, but to what extent do we think there are things in it we cannot support, and to what extent are there errors, problems in it, that we believe must be corrected to the extent possible in the time allowed.

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*Note: The following is the output resulting from transcribing an audio file into a word/text document. Although the transcription is largely accurate, in some cases may be incomplete or inaccurate due to inaudible passages and grammatical corrections. It is posted as an aid to the original audio file, but should not be treated as an authoritative record.*

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The report is structured as a basic report with a specific number of recommendations. For each recommendation there is an annex, which goes into more detail, and there are a number of appendices which add further information overall into the process. There's a lot to read and a lot to comprehend. There is a fair amount of duplication, so it's not quite as onerous as it might appear, but nevertheless there is a lot there, and not very much time in which to process it.

Now, there's been to some extent a misunderstanding from some people as to the impact of this. There are a number of people who've said something equivalent to, "The IANA transition is not likely to happen and therefore none of this really matters." There's a substantive error in the logic in that unless we cancel trying to do the IANA transition, part of the process is enacting the new Bylaws for this new version of ICANN, prior to getting US Government approval. We could well end up with no transition, but the new version of ICANN and accountability.

Anything we put into this proposal, if it gets accepted, may well happen regardless of transition. So I think it's really important to understand the order in which these kind of things might happen. Cheryl, you've been heavily involved. Leon, do you want to have a couple of wise words? Then I'll let Cheryl add in anything she wants to. Then we'll go over the specific items I've identified as not necessarily problems, but either issues I see as problems, or things we've raised in prior comments, which as far as I can tell are not addressed.

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We need to make a decision at some point with whether they're still issues, or whether we're satisfied with how they've turned out. Leon, you need a dial-out first. Cheryl, how about you?

CHERYL LANGDON-ORR:

Where to begin? I think you'll find anyone who's read the update that we produced earlier will agree that this particular format on the new sectioning of recommendations and associated annexes and supporting documentation will make our job easier. We can go section by section now. I'm particularly bias in such as with the exception of a few things that I'm sure Alan, you'll be raising, which are matters we've discussed, or Members of the ALAC have raised in concern, will be specifically picked up in this version. This version three is very readable, easy, and of course the translations will be out as well shortly.

Key thing to change, obviously, is the actual sole designator model. That's a specific change we need to look at in detail. So it's the associated pieces of support material. We have some particular changes I think we need to look at and sign off on, or otherwise. I'm thinking we should probably [unclear 00:06:19] over on matters of thresholds for decision making, associated to support that sole designator model. I think we'll all find that the IRP section is quite recently fleshed out, but I do think it's possible that there might be some words here or there that some of us might feel better changed, if the interpretation of them is not clear.

I certainly am satisfied that it meets all of the dependencies from the CWG, and the other thing Alan is if you look at the survey, it is a little bit

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annoying. One has to go through it to get the link, but correct me if I'm wrong Leon, but we will have a PDF or standalone download of the survey that we can use as an entity so that we can work ahead on the questions rather than having to answer a particular question and then click "next" and then have the following one come up. Is Leon on now? I've probably covered that enough.

ALAN GREENBERG: Leon is on. I did see a message somewhere saying there is a link to download a PDF of the survey.

CHERYL LANGDON-ORR: That's going to make our job, from an ALAC and At-Large point of view, much easier, to be able to work through that survey and give feedback that way.

ALAN GREENBERG: I was negligent. I should have given an overall summary of the proposal, and yes, the whole thing is much closer to something that we're going to feel comfortable accepting than any of the previous versions. The only issue was are there particular sticking points, and from my perspective I think there are still several that may be shared or not shared by the group. We'll see. Leon, any overall introductory comments?

LEON SANCHEZ: Well, it's hard to speak after you and Cheryl, but I think that the main focus from my point of view, from the ALAC, could be from a certain

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point of view the mission, commitments and core values section, and also the human rights commitment [unclear 00:09:12] due process. I would encourage everyone to go through those detailed sections, and as Alan pointed out, I believe that this third proposal is very close to actually addressing all of the concerns that were raised through the first two public comment periods by the ALAC.

There might still be some issues that haven't been fully addressed, but I'm speaking of course from myself here, but at least I believe I could live with what's being proposed so far. So that would be all I have to comment on, Alan.

ALAN GREENBERG:

Before we go on, I have a question for Leon on process. As I was going through the report, there are a number of things that clearly need to be fixed, if only the fact that the expression AC/SO, SO/AC, ACs/SOs are all used inconsistently. Clearly that's just an editing job – it's not a big problem. There are at least a few places where there are clear omissions and things. Do we have a process in place that we can try to fix these as we're going along, so we don't have to submit these things in comments?

LEON SANCHEZ:

Yes, we have a process for this. The writing team is reviewing the document again. We are aware there are some inconsistencies you've rightly pointed out, and of course the final version.... [audio cuts out].

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ALAN GREENBERG: Leon, are you still there?

LEON SANCHEZ: ...That I had. As I was saying, yes, there is a process, and the final version to be delivered to the ICANN Board hopefully will not have these inconsistencies in place.

ALAN GREENBERG: Okay, then I don't have anything else. I'm not going to attempt to go through the entire proposal. There have been two webinars. There has been offer of additional webinars, and I'm presuming anyone who's cared sufficiently within this group has availed themselves of the webinars or has otherwise gone through the document. Unless there's any specific issues you want to raise, I'd like to go through the things that I've identified as potential problems for the ALAC. I did create a document.

There's one thing missing from it, but I'll get to it as we go through the process. If we could have it in the pod please? It's also linked to in PDF and PowerPoint form within the Agenda. That's the last page. Perhaps we can go to the first one? The first item is a major concern. Page two is a very long section that's been added, which effectively restricts the mission. The section itself is not all that long. It says, "ICANN shall act strictly in accordance with and only as reasonably appropriate to achieve its mission." Makes complete sense. "ICANN shall not impose regulations on services that use the Internet unique identifiers or the content that such services carry or provide. ICANN shall have the ability

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to negotiate, enter into and enforce agreements with contracted parties in the service of its mission.”

There is then a relatively long note to the Bylaw drafters who are supposed to include a lot of subtle issues within the final version. The first is an issue that ALAC raised – essentially that the identifiers themselves, the domain names, are not deemed content from the point of view of this Bylaw. So there are some people who claimed that the identifiers were content, and in fact Milton Mueller says courts have claimed identifiers are content, and therefore we could not regulate those identifiers. So number one hopefully addresses that.

Number two says things that are within the picket fence – and we’ll get onto that in a minute – are explicitly allowed. Number three says existing registry and registrar agreements should be grandfathered. That normally means that no matter what the current rules are, the existing registry agreements are valid. The last one simply says the articles of incorporation might need to be modified. The problem I have is essentially in sections two and three of the note. I will make an announcement to begin with. I’ve identified these issues on the various CCWG calls multiple times.

The person who’s drafting these sections does not believe my comments have merit, essentially. I have a significant problem, and the reason I have a problem is the following: on number three, on the registry agreements, it’s not clear what happens, for instance, if we have these new Bylaws in place and there are new gTLDs whose contracts are not yet signed yet – and there are still some – will we be able to sign new

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contracts if the clauses... Those clauses will not be grandfathered, because all it says is “existing contracts”. That’s number one.

Number two is these contracts expire in ten years, and are renewable. It’s not clear if “renewable” is something we can go ahead with, and the crux of the problem is number two, in that it says things within the picket fence are within scope of ICANN’s mission. The implication is that things that are not within the picket fence are not within the mission. It doesn’t say that, but that’s the implication. If we can go to the next slide?

This is an extract from the Registry Agreement, and it’s Specification 1, which is the definition of what is within the picket fence. It describes, if you go through the detail, a number of things that ICANN is allowed to make consensus policy on – they’re allowed to have a PDP on. This is the registry. There is a comparable one in the Registrar Agreement. This is the problematic one though – that these are things that we can do PDPs on - for instance, if you look at section 1.3.2, prohibition of warehousing or speculation of domain names.

It’s something ICANN has never done, but there are clearly domain name speculators, but we could do a PDP and impose rules, and if we were to impose rules, these contracts would change immediately. There’s a whole section there that relates to WHOIS, and there are a number of other issues that are within this picket fence, but there are things that are not within the picket fence. The classic one in today’s world are PICs. If you look through this list, there is nothing there that relates to public interest commitments.



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Therefore, it could be deemed that public interest commitments are not within ICANN's mission. I believe a reference, no matter how obscure, to this limited list of things that can be changed by a PDP ignore a much larger part of the contract, which was not developed by bottom-up going historically back to 1999, and even in more recent years was not necessarily developed by a bottom-up procedure, and therefore could be deemed to be invalid. I have some really significant problems that large and important parts from the user perspective of our agreements could be invalidated by this clause of the contract.

I'm going to take questions section by section, because going back may be harder. That's what I have to say on this one. It has been raised numerous times. This language has been hammered out by many people, some of whom we believe in fact want to be able to invalidate parts of contracts, so it's not an easy issue. By the way, in general, it's not necessarily the registries who have that belief. It may be very small groups within registries, or other groups. Jean-Jacques?

JEAN-JACQUES SUBRENAT: Thank you Alan. Yes, I have a question further to what you just said about [unclear 00:20:22] commitment. Was the opposition to putting that specifically in the registry specification part, or was it throughout? If it's just a question of placing, then would it still be possible to put it further up in the text under a general [catch all] effect?

ALAN GREENBERG: I'm using PICs as an example of something that could be vulnerable under this new part of the mission. It's not necessarily the only one.

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Now, why were PICs not in spec one? I think that was just an omission, but we have hundreds upon hundreds of contracts signed, and it's not going to change now. So for whatever reason, we have to live with it, regarding PICs in general. But there may well be other parts of the contract that are not eligible for consensus policy but are important. That's my real concern. I suspect there are similar things within the Registrar Agreement that follow those things.

I believe pointing to things that are eligible for consensus policy, which is what the specification one and four are, is not an adequate way to describe what is necessary for ICANN's mission. Becky Burr, who's been the rapporteur and drafter of these has a much wider scope, belief, of what the meaning of specifications one and four are, and we disagree on this. It's a matter of interpretation at this point. She believes that anything that came out of the new gTLD process implicitly is within spec one, because it was a PDP. I cannot make that leap of faith. Jean-Jacques, is that a new hand or an old hand?

JEAN-JACQUES SUBRENAT: If I may follow up on this. Thank you Alan. Under "mission", would it be possible under the first bullet point, right at the top, or perhaps to add another line, "ICANN shall act strictly in accordance with, and only as reasonably appropriate to achieve its mission" – so either include there the notion of the public interest commitment, or to add another line after that somewhere? Thanks.

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ALAN GREENBERG:

As I said, it's not just necessarily public interest commitments, so fixing that does not necessarily fix the overall problem – number one. Number two – yes, it's possible to do all sorts of things. This current mission statement has been hammered out with an infinite amount of hours and emails, and it says what it says right now. I'm sure we could craft something that might meet our particular needs better, but that's not the same as being in the proposal. Leon?

LEON SANCHEZ:

I completely agree with your concern, but from a legal point of view, at least in my legal system – I could not speak of course for the US legal system or otherwise – but I would think that we would have a problem with those contracts that were answered after the transition takes place. I mean, those would be the contracts that we should keep a very close eye on, because those would be the contracts that could be subject to disconcert, I think.

When we look at [TAC 00:24:31] contracts, I would say that a court would find it difficult to say that a contract that was entered into at a date in which there was no such provision in the Bylaws would be invalid, because of the change in the Bylaws afterwards. This is of course my legal opinion on the case, but that would definitely need to be checked with the CCWG Council. As I said, I think this concern would be very valid from the transition onwards, but not backwards, I think.

ALAN GREENBERG:

Yes, I was trying to be clear on that and I obviously wasn't. The grandfather clause I believe, assuming it's transformed into Bylaws

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property, covers us today. My concern is contracts for new gTLDs that have not yet been signed but are under the same current program. It covers our ability to have similar constructs under the next new gTLD process, but that's not a major problem, because presumably the next gTLD process can, in its consensus policy decision, recommend things like PICs.

I'm not sure it will, but it might. And renewals are definitely a potential problem, because I'm not sure whether courts will view a renewal as an existing contract. The grandfathering should address current issues today.

LEON SANCHEZ:

Thank you Alan.

ALAN GREENBERG:

You're right. When we mention this, the grandfathering is not the issue – it's the other aspects of it. No other hands, I'm going to go onto slide four. This is one of the core values. The original core value said – and the numbering changed – “Where feasible and appropriate, depending on market mechanisms to promote and sustain a competitive environment.” The new wording says, “Depending on market mechanisms to promote and sustain a healthy competitive environment in the DNS market.”

We had a problem going into this removing they were feasible and appropriate. The question is, is this something we can live with? This was presumably discussed to some extent within Work Party 2. The

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ending document didn't address it. It was raised in the summary a week or two ago and still has not addressed it. The question is, is this something we can live with? I did ask for the rationale of why it's included.

I was told I would get an email on it, but to the best of my knowledge I haven't seen any answers on this. Is this something that still sticks in the claw of the ALAC? Is it something we want to push, or is it one we want to drop? Simple question, I don't have the answer. Olivier was the one who first noticed it, but not the only one concerned with it. Is there any general feeling? If this group has a general feeling that it's not worth pushing that we can just drop it and it disappears... If we believe it's important... Christopher?

CHRISTOPHER WILKINSON: Hi. Good evening everybody, good morning. Yes, I think this is important, Alan. The first general point, as a previously practicing economist, would be to say that the market mechanisms are fine when they work, but when ICANN needs to intervene as a regulator it's precisely because market mechanisms have not been working, and the history particularly vis-à-vis .com has indeed been that price caps, structural separation and other regulatory means to correct a market failure have proved to be necessary.

Looking forward, first of all .com is still dominant in doing extremely well for itself, and if indeed, as one might hope, some of the new gTLDs would succeed in the market, far from being proven today, but I think that we all hope this will result in some new successful new gTLDs on a

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large scale, to my mind there is no assurance whatsoever that market mechanisms alone will create a healthy, competitive environment. I've already expressed, in the CCWG, my reservations about this. [unclear 00:30:17] still there, and it should not be read as a denial of the past necessary intervention by ICANN in the DNS market.

I fear – and I think listening to the debates in the CCWG –there are sufficient interested parties that wish to make sure that ICANN in the future will not intervene in the DNS market. I think from the point of view of users, whether it's in terms of prices, or consumer choice, this is a highly questionable tendency. I think it remains to be important, and I believe that it should be corrected in the text.

I would also say that if this text goes forward as such, then one might really question why ICANN is having a Review Team looking into competition and consumer choice, because the text effectively says that ICANN no longer has anything substantive to say about competition and consumer choice, except to rely on market mechanisms. So this is a problem for me.

ALAN GREENBERG:

Thank you. I'm told we have a hard stop for our interpretation, so if I can ask people to be relatively short so that we don't run out of time at the end of this meeting. I put my own hand up. The counter claim to that is number one, I don't believe it's appropriate to talk about .com and 1999 when ICANN was created. I think we've set up a very different marketplace than existed at that point, so that argument alone I don't think has really any merit.

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The second part is I don't know of any interventions since then that could really be deemed as not allowing the competitive market to exist, other than perhaps introducing new gTLDs, but that was always part of ICANN's intent. It's not a strong argument. The argument Christopher made on why we have a review if we believe the market mechanisms will cope is perhaps valid.

But to be clear, when I say, "Do we have a problem?" I'm talking about is this something that we're going to refuse to ratify the proposal because of. Let's be very clear about what we mean about this. Sébastien, do you want to speak? You said in the chat that you think it's important. I'm not sure you can speak.

SÉBASTIAN BACHOLLET:

Yes, I think for me it's a very important point. I will put it in blunt words, but are we just an organization supporting the market and for the economy of the market, or do we think that there are other mechanisms who can change the world? I really think it's very important, because we are not just a market intervention organization, and that's not the only way we want to regulate – even if we don't want to use the word "regulate" – and for me it's a very important point that we don't change the current core values by those [words 00:34:22] who are just saying it will only be depending on that. It's not possible. It must depend also on what we do or what other groups are doing. Thank you.

ALAN GREENBERG:

Thank you. Anyone else want to get in on this one? At this point we've had a few people that yes, say it's still important. Leon said he could live

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with it. Anyone else want to get in on this? I have a message from Harold saying we can't continue without interpretation. I understood we do have interpretation on this call?

TERRI AGNEW:

Correct, we do have interpretation but I'm checking to see if there's an issue now.

ALAN GREENBERG:

All right, next slide is number five, and it is within the commitments section of the core values. The original words were, "Preserving and enhancing the operational stability, reliability, security and global interoperability of the Internet." The new words say, "Preserve and enhance the neutral and judgment-free operation of the Internet and the operational stability, reliability, security, global interoperability, resilience of the DNS and the Internet." The concern was what does the meaning of a "neutral and judgment-free Internet" mean? And does this impose upon ICANN an obligation to ensure it?

In other words, is ICANN supposed to be taking action if some country restricts access to certain parts of the Internet? What is our responsibility here? How are we supposed to do this? What are the implications of this? At one point I was told the wording "neutral and judgment-free" is from the AOC and therefore it had to be added as part of incorporation of the AOC.

In fact, I couldn't find those words there, so unless I made a mistake in my search that that is not the rationale for why it was added, the



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question is are we sufficiently worried that this is something that we need to go ahead and keep within our list? I have another message from Harold saying I misinterpreted his words. He says we can continue without interpretation, but I thought we did have interpretation. If staff can look into that? But we don't need to discuss it. Go ahead, Eduardo.

EDUARDO DIAZ:

If we further down, where it says "the openness of the DNS and the Internet" isn't that supporting neutral and judgment-free operations? What does openness mean? Openness for everyone, right?

ALAN GREENBERG:

I'm not trying to craft language here. The problem is do we have a problem with this wording, not whether it's redundant. If it's redundant I can live with it. If it introduces a problem, I have a concern. This is not one of my personal largest concerns, but it is something that we said, and the question is do we keep it there or not. Eduardo lost communication. Is there anyone else who wants to speak or type on this? Eduardo says he's okay with it. Leon says he can live with it. It sounds like this is one that is not going to be something we're going to die in the ditch over.

We have multiple people typing. Let's let them finish and see if we can go on with this item. Jean-Jacques is suggesting how we should modify the sentence. This is not up to us to modify. The question is, do we say we have a problem with it? If we say we have a problem with it, we can propose a change, but we're not in an editing session right now. We're saying, is this something we can live with, or not? Jean-Jacques?

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JEAN-JACQUES SUBRENAT: I think that here again it's ambiguous, for the reasons you pointed out when presenting these commitments a few minutes ago. What does "neutral and judgment-free" mean? I would suggest two steps, Alan. The first one would be to suggest taking out the "neutral and judgment-free" and if that is challenged, then perhaps you could suggest, or ALAC could suggest, wording to be included at the end of the sentence rather than there – something along the lines of what I've just written down, ideology and judgment values, et cetera, but that we can come back to later. Thanks.

ALAN GREENBERG: All right. I'm hearing one voice saying that the wording is critical, and at least it needs to be explained if nothing else. My concern, like everything else, is with the IPR, with the Review Panel, what might someone use this clause for to claim ICANN is not following its Bylaws? That is the crux of the matter. All right, we still have some concern that it stay there. It's not a strong one amongst the people on this call however.

If we go onto number six, this is an issue on the phrase "consumer trust". Consumer trust is mentioned in the AOC, largely with regard to a review associated with the new gTLDs, but there is also a more generic reference to consumer trust in Article 3 of the AOC. In an earlier version there was a reference to consumer trust in one of the Bylaw core values, which was removed in proposal two. The response I did get on this one

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is that it's not a really major part of the AOC, and it's implied because of our concern for consumer trust and new gTLDs.

I think for that very same reason it's a small thing that could have been added, but that is the response. Again, is this one that we are going to go to the wire on? Or is this one that we'd think is not a critical issue? I know if Garth was on this call he'd say it was a critical issue. What are other feelings on it? Harold says it's important to him. Leon? If people can speak up please. We don't need to raise hands if we're looking to comment at this point. There are several comments still on the previous one, that "judgment-free" is not in the current AOC.

As I said, that was given to me as the reason it was included. I could never find it. No one today is claiming it's out from the AOC. Eduardo, go ahead.

EDUARDO DIAZ:

Having no explicit reference in the CCWG document about consumer trust, what would be the implications of not having that in there? I just want to understand that it can happen.

ALAN GREENBERG:

For instance, consumer trust is within the mission of Compliance, and presumably one of the reasons it's there is because it was highlighted in the ASOC. I cannot tell you the lineage of those words in a mission statement. If consumer trust in the overall DNS marketplace is an issue – and in fact that is one of the reasons that ALAC and At-Large exist – then should it not warrant some words in the Bylaws? This is not one I

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feel exceedingly strongly on, but it is one of the issues that we've raised before that was not addressed, which is why it's in this list.

EDUARDO DIAZ: If this is something that is part of what ALAC is all about and At-Large, then I think it should be important to have at least one line there.

ALAN GREENBERG: So you're saying at this point we keep it in? Again, I would have a hard time refusing to ratify the whole proposal on this single one.

EDUARDO DIAZ: It would be very hard not to... That's why I'm asking what happens if it's not there. Is it something that will...? To me, I don't know what to say about this, but I wouldn't...

ALAN GREENBERG: Remember, anything that's going to be added at this point is going to have to be added after the comment period is over, and there's going to be a lot of inertia to not make changes that are not widely demanded. We're going to have a hard push on any of these that didn't make it into this cut. I'm just serving notice on that. Sébastian?

SÉBASTIAN BACHOLLET: If we take each one of them it's maybe there's not such a hard stop for us to [sign 00:46:45] but the question is, at the end, if we add all of them... I only feel [strange] that we talk about consumers in the Bylaws

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of ICANN, and I really think that one way or another it may be included, but that's not such a big deal, because we will fight for them anyhow. But let's see the sum of all the detail we have here, and see what is the position we can have at the end.

ALAN GREENBERG:

Thank you Sébastien. Let's go onto the next one. We don't have a lot of discussion here. The next issue – and it may or may not be an issue, and I'm hoping Cheryl will be able to illuminate us a little bit – the overall model that we're talking about, I think, is acceptable. We are looking at the three SOs and two ACs that will be included in the Bylaws as “decisional participants”. This is an expression that's used only once in the whole report, but it describes what the participants are. They participate in decisions.

Three of the powers require for them to be acted on – following the long escalation process – require three of the ACs/SOs mentioned above to support an action and not more than one objection. So that says a single AC/SO cannot veto, but you need a significant amount of support. That's to reject a Bylaw change to remove a NomCom Director, or to initiate an IRP. There are several powers that require four supports and no more than one objection. These are specifically to reject the plan or budget approval of the fundamental Bylaws, and AOC, recall the entire Board, and reject Board decisions related to IANA.

A proposal was made, specifically written by Jordan Carter – I'm not sure where the original idea came from – that within the five participating groups if one of them chooses to abstain, to not put a support or an

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objection in, on a power that requires four supports, that would allow the one who does object to have an effective veto, because the four could not be obtained. You only have three left, and that in these cases we'd lower the number to three.

I have a particular problem with that, because that says – and particularly for the recall of the entire Board – that says three of the ACs/SOs could recall the entire Board, and I find that rather problematic. The reason it was put in is because the process to get support – and particularly for a fundamental Bylaw change it's so complex that there is a worry that we might not be able to make important changes to fundamental Bylaws because of this. I'll address that particular issue later, but at this point, if this thing that's in italics at the bottom of the page is there, I believe I have a problem with it specifically with regard to removal of the entire Board.

Now, I say "if" because the author of it, Jordan Carter, as recently as December 1<sup>st</sup> in email, which was after the report was issued, was defending exactly why this was important. He specifically was responding to Tijani who raised the issue. However, I cannot find any reference to this modification within the actual report or annexes. So the question is, and I'm asking Cheryl particularly if she knows, is it really there?

Jordan was acting as if it was, because he was defending it after the report was published, but I cannot actually find the words there. I don't know if I'm afraid of something that doesn't exist, or I simply cannot find the words. Maybe either Leon or Cheryl has some insight into is this something that was put into the draft report, or was it discussed and

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never made it into the text? Either of them or anyone else? Or do we take this discussion offline and I can pursue it? Eduardo?

EDUARDO DIAZ: I just wanted to say a modification of isn't an abstention basically an objection?

ALAN GREENBERG: No. It could be, if one defined it that way. In the current context it implies the AC makes a formal decision to not support. Leon, are you still with us?

LEON SANCHEZ: Yes, but I'm doubtful of what the question is.

ALAN GREENBERG: The question is, the proposal that Jordan made towards the end of the process that if we have a situation where only four of the five are submitting an objection of a support for a power that normally requires four, that it should only require three.

LEON SANCHEZ: I believe that was the proposal, yes.

ALAN GREENBERG: Okay, but the question is, where is it in the document? At this point, if it's not in the document, it's not part of the proposal.

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LEON SANCHEZ: I would definitely need to go back and check.

ALAN GREENBERG: Could we task you with that please?

LEON SANCHEZ: Yes, you can.

ALAN GREENBERG: Thank you very much. Next Item I have, this is something we've never discussed within the CCWG, but when the issue was raised with regard to the previous discussion, and the case was being made that if the approval of fundamental Bylaws that brought it up, I looked again at the process, and from my perspective, the process we're proposing makes no sense. Almost all of the powers that we're proposing in these, to give the community, are things where the community is taking an initiative to stop something from happening, or taking an initiative to take unusual action, such as an IRP.

The fundamental Bylaws and AOC changes are substantively different in this case, because these are things initiated by the Board. The initiation may originally come from the community, but at this point the Board is saying, "We are approving them, are you approving them too?" I have no idea why we need the complex petitioning process that several ACs or SOs must petition it, then we have a community forum, to get to the



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point where the ACs and SOs are simply answering the Board's question, "Are you supporting it or not?"

So I think because we wrap this one in, we have ended up making it far more complex, and therefore making it more difficult [to made 00:55:33] fundamental Bylaws, even if everyone agrees in concept that just the mechanism to start the process of answering the Board is... I can't see any reason for it, other than no one thought that we should treat it differently. It's not a die in the ditch one for me, but it seems like it's complete overkill in this case. Comments? Anyone else care? Nobody cares?

SÉBASTIAN BACHOLLET:

Is it because the difference is that the fundamental Bylaw must be a decision and an action by the community, and not coming from the Board, reversed to the other Bylaw where they're decided by the Board and then we can disagree with them, or the community can disagree with those Bylaws? But for the fundamental, it's neither a positive position of the community, and maybe we can start a new Bylaws [unclear 00:56:55] and it's [unclear]. It's a question mark. Thank you for raising it.

ALAN GREENBERG:

Thank you. You're suggesting that a new fundamental Bylaw would gel in the community and then go to the Board. I guess I see the process as coming together in a different way and needing ratification by the community. Where the original idea originally came from doesn't really matter. If it doesn't have the support of the Board, it's not going to go

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anywhere. I see this as at one point, regardless of where the internationalized email address came from, the Board has to basically say, “Yes, we support it.” At that point, we’re asking for ratification by the SOs and ACs, which is why I thought what we have is overkill.

I’m not sure it matters, but it’s going to make it much more difficult, just because of the mechanism, some ACs and SOs will have to issue a petition for something everyone in the community wants, and it just seems like overkill. I’m not seeing a huge amount of caring about this. All right, the last Item that’s not here is the one that we’ve raised multiple times on the IRP. The IRP can be used in general to allow someone to claim that ICANN isn’t following its Bylaws. The only ruling that can come out of an IRP is ICANN didn’t follow its Bylaws and needs to do something about it.

However, we also have another subject of an IRP, and that is conflicting panel decisions that can be taken to an IRP, but there is still no outcome from the IRP that can address it. So we’ve given the panelists no way to answer the question, even though we can bring the question to the panelists. It sounds like an omission to me, but it’s being raised multiple times and hasn’t been addressed. I’m a little bit at a loss to know why this is the case. I’m wondering again maybe Leon or Cheryl has some insight and can enlighten me? Hearing neither from either...

LEON SANCHEZ:

I’m sorry, I didn’t hear the last part, Alan.

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ALAN GREENBERG: One of the things you can go to an IRP with is conflicting panel decisions, but the only outcome of an IRP is a ruling that ICANN didn't follow its Bylaws. When we added in the conflicting panel decisions we never added in a corresponding outcome. This seems like a discontinuity to me.

LEON SANCHEZ: I can check that with Becky as well.

ALAN GREENBERG: I can check it with Becky also. She was supposed to answer me. I'll ask the question. But again, it's one of the items we've raised before that was not addressed, and nor have we gotten any logic coming out of it. I'm presuming at some point we are going to have a document that addresses the various comments that came in on proposal two and how they were resolved. I haven't heard about any action to create the document, so I don't really know what state that's in.

LEON SANCHEZ: There should be a document containing those... Addressing those public comments.

ALAN GREENBERG: Yes. Then we go to slide ten, and that says I'm finished. The font I picked was deliberate. That says the state of my nerves, and how tired I am of working on this overall proposal. I hope someone sees the humor in that. Maybe I'm the only one. I open the floor up to anyone else. I

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will admit I've not gone over the whole proposal with a fine-toothed comb at this point. I will, but I have not. These are the issues that seem to be the largest ones sticking up that have mattered to the ALAC before and that we have to make a decision on. Christopher, go ahead. Cannot hear you yet.

CHRISTOPHER WILKINSON: Interested parties in this affair who've been fishing for the opportunity to separate IANA from ICANN right from the first step...

ALAN GREENBERG: Christopher, we lost the first part of your statement. It started at "interested parties".

CHRISTOPHER WILKINSON: I don't want to take a lot of time of this conference call, but I do want to highlight what I perceive as a significant bias in the voting structure of the so-called SCWG, which is the final instance dealing with petitions for separation. I believe this voting structure is too-much biased to the interests of the registries and registrars, and particularly GNSO, who would, if it ever reaches that stage, it will be because of a commercial and interest in separation. I think this should be looked at again.

In other respects, elsewhere in the report, the voting structure seems to be more balanced, to the point that if you've noticed the NCUC – the so-called civil society group in GNSO – are complaining that the balance of the voting has been shifted in favor of, notably, the advisory committees. But on this one, on separation, I'm not comfortable with

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this proposal from CWG, insofar as it will become part of the CCWG and the ICG final statement in this affair. I think there's a problem, but I don't expect us to be able to resolve this problem on this call, I just wanted to draw this to your attention.

ALAN GREENBERG:

Thank you Christopher. Two points – my recollection is that the ccNSO and GNSO have to ratify the recommendation out of the Separation Working Group, which is a cross-community Working Group, so they essentially can veto it, they can kill it, but they cannot force it. So the decision to do something does come out of something that is more cross-community, although they can't stop it from happening. That's number one. So I don't think the threat is as large as you're envisioning. Second of all, this is in the CWG report, which is signed, sealed and delivered at this point, so there really is no opportunity to change that at this level. As frustrating as it might be...

CHRISTOPHER WILKINSON:

I take note of that, but as I've pointed out before from the advisory point of view, and certainly from an At-Large point of view, eventual separation of all or part of the IANA functions would create extraordinary practical difficulties for any meaningful oversight or participation by user interests.

ALAN GREENBERG:

Acknowledged, but also acknowledge the fact that if the Board refuses to honor it, the community power to overrule the Board is of a four plus

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one power. So again, even if it goes forward and the Board, in its wisdom, says, “No, we’re not going to do it,” then a community power does get invoked at that point. But at that point I think we’re lost, but nevertheless, that’s so far gone. There’s no way we can change the CWG report right now.

CHRISTOPHER WILKINSON: I just wanted to warn everybody about my concern of that aspect.

ALAN GREENBERG: Thank you Christopher.

CHRISTOPHER WILKINSON: Okay, thank you very much Alan for an excellent call. I apologize but I have to...

ALAN GREENBERG: Any other comments on the CCWG? Going once, twice... Nothing. Any comments on either the ICG or the CWG that have come up recently? Jean-Jacques, go ahead.

JEAN-JACQUES SUBRENAT: Do you want me to say a few words to present the ICG summary report on the public comments received?

ALAN GREENBERG: You certainly can.

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JEAN-JACQUES SUBRENAT: Well, during the process, after the ICG had written its draft proposal for transition, it was put out for public comment and we received 157 comments. Just a quick word about the number of contributors. Since the creation of the ICG, I find that there has been a steady rise in the number of substantive interventions on the part of community members. I remember at the beginning it was more like a couple of dozen, but towards the end of the operation it was, as I said, closer to 200. They were very detailed, some of them.

What's interesting to point out is that there are several features. One is that if the majority of comments were supportive of the proposed transition plan, some of it was only qualified to the point, and also interesting was the fact that amongst those who were not supportive, there was a proportion that was opposed to the very idea of transition. In other words, they were opposed not so much to our proposal or the way it was formulated, but rather opposed to the very notion of transition. For instance, several commenters from the North American side, or from the United States, thought that because the Internet is a US- national interest tool, it should not be given away to anyone.

That being said, the respondents were fairly widely distributed, with however the largest proportion coming from North America – 28 per cent -, Asia Pacific 18 per cent, Europe 14 per cent, Africa six per cent, Latin America three per cent, and interestingly nine per cent global, meaning comments that did not put forward their country or region as their main identification. Now, if you go into detail of the comments, I

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think there are several points I would point out here for the Members of our Working Group here. One is jurisdiction.

It was recognized that at this stage it was not possible for us in the ICG, at least, to settle this [concern 01:10:20] of jurisdiction, but – and I quote – a number of comments also suggested that “CCWG Work Stream 2 might be a space to address some of the continued concerns about jurisdiction. The majority of overall comments did not find jurisdiction as a limiting factor to the consideration of the proposal. Another item that was commented on by quite a few was the proposed post-transition IANA and related bodies. There were many comments on the fact that the way of populating the PTI and its related organizations should not be left only to the ICANN Board, for instance.

Then, going further down, I can see that as you know the only outstanding element that’s not for the time-being included in our proposed transition plan is of course the part that we’re expecting from CCWG accountability. When we receive that, in its final form, then we will include it as such in our proposed plan, and send it off to the NTIA administrator via the Chair of the ICANN Board. As you remember, it was agreed early on that the ICANN Board would not change or comment to our plan, but would simply forward it to the administrator of the NTIA.

If the ICANN Board does have some objections or comments, then it would put them in the accompanying letter, but that would not change in any way the proposed transition plan. A final pair of comments is on number 11, the institutionalization of NTIA criteria. There is a suggestion that what the NTIA set out for the ICG as indispensable



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criteria, there is some talk of institutionalizing those criteria. One last comment is that in several parts of the proposed transition plan, there are such notions as – not the public good – but freedom of expression, and related things, which are accounted for.

In other words, when commenters did touch those questions, the ICG, although it could have considered that to be outside its remit, did report on those aspects in its summary report on comments received. Thank you Alan. Any questions?

ALAN GREENBERG: I don't have any. Does anyone else have comments or questions for Jean-Jacques? Christopher, I assume that's an old hand?

JEAN-JACQUES SUBRENAT: I see that Carlton makes a remark, a slight correction. The wording is, "The Internet is in the national security interest. It's the word 'security' that makes all the difference." I agree. In any case, there was the sense on the part of some commenters that it was a US resource and should not be given to some other jurisdiction or oversight.

ALAN GREENBERG: Quite a natural statement for someone in the US to make.

JEAN-JACQUES SUBRENAT: Well, if a neighbor from Canada says so, I can believe it, yes.

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ALAN GREENBERG: Anything else? Next question is, when do we need another meeting? Do we want another one next week? I'm assuming at some point we're going to start working on the response document, and I would think this is a logical group. The response is due the 22<sup>nd</sup>, I believe, which is two and a half weeks from now. We really don't want to let this one go down to the wire if we can avoid it. I'd think we will need to schedule another call next week. Let's try to do it on Friday again, unless there's any objection. It may be a short call, it may be substantive, depending how far we've gotten. With no objection, I'll ask staff to try to do that. Next Thursday or Friday, I guess.

JEAN-JACQUES SUBRENAT: A Doodle poll, I suppose?

ALAN GREENBERG: Yes, as normal. All right, then I thank you for your attendance, and this call is adjourned. Thank you.

**[END OF TRANSCRIPTION]**