
GISELLA GRUBER:

Good morning, good afternoon and good evening to everyone. Welcome to today's At-Large Ad Hoc Working Group on IANA Transition and ICANN Accountability on Wednesday, 20th January at 16:00 UTC. On today's call we have Olivier Crépin-Leblond, Jean-Jacques Subrenat, Barrack Otieno, Cheryl Langdon-Orr, Leon Sanchez, Gordon Chillcott and Sebastien Bachollet. Seun Ojedeji will be joining us in a bout five minutes.

No participants on the Spanish channel, and no apologies noted as of yet. From staff we have myself, Gisella Gruber, and our Spanish interpreters are Veronica and David. If I could please remind everyone to state your names when speaking for transcript purposes, and also to allow the interpreters to identify you on the Spanish channel. Thank you and over to you, Olivier.

OLIVIER CRÉPIN-LEBLOND:

Thank you. Have we missed anybody in the roll call? It appears not. Today we have our usual mix of CWG IANA and CCWG Accountability update, as well as a small update from the IANA Coordination Group. We first have to adopt the Agenda. Because there's so little to talk about in ICG and CWG IANA Stewardship, I thought perhaps we could move those Items #4 and #5 before Agenda Item #3. Are there any objections or any comments on this? I see a green tick from Jean-Jacques. The Agenda is adopted with Items #4 and #5 before Item #3.

Let's move swiftly to a review of our AIs from our last meeting. Our last meeting was not on the 13th of January. I think it was the 15th, the Friday

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call. There's a little error in the Agenda here, but needless to say, if you click on the Wednesday call you'll find out, and it says, "Next call will take place on Friday," and it did, and on Friday there were no AIs. That means we can move swiftly to Agenda Item #3. Now, that's the ICG, the IANA Coordination Group update. For this we have Jean-Jacques Subrenat. You have the floor.

JEAN-JACQUES SUBRENAT:

Thank you Olivier. I hesitate to mention anything, because I believe I've already reported to this group a few days ago. In any case, there was a call of the ICG. That was on the 13rd of January. The main decision taken there was that the ICG would not convene in the margins of ICANN 55 in Marrakech, and therefore although there may be several Members of the ICG attending ICANN 55 in another capacity, the ICG would not convene as such in the Moroccan city. We have though at least one call before that, and of course shortly afterwards.

For the rest, there have been several discussions that I've listened into, or at least made a few remarks at over the past few days, in the At-Large community – I don't think it's useful for me to go through the list of questions that some of the ICG Members asked themselves about global public interest, the ICANN mission, human rights, consumer trust, IRP and all that. That's been debated, and of course we've had very detailed accounts from Alan and others, for which we're grateful. I'm afraid that's all. It's been decided that ICG will not be meeting in Marrakech. Thanks.

OLIVIER CRÉPIN-LEBLOND: Thank you very much Jean-Jacques. Are there any questions or comments? No questions or comments. Thanks for this update. Next is Agenda Item #5, which is the CWG IANA Stewardship Transition update. To my knowledge, there hasn't been any real movement from the last call we had. I gather a lot of people are waiting for the discussions that are taking place in the CCWG Accountability.

There was a blog post that was published, "blog volume 12", an update on IANA Stewardship discussions, and that has full details of the full spiel of what happened and where we are. There is now some work going on when it comes down to the implementation work of things. Now, unfortunately the next CWG IANA call will take place tomorrow. If we have a call later on this week, perhaps on Friday, then we'll have more updates about this. I don't have anything else to report on that. Alan, or anyone else who's in CWG IANA, do you have anything else to add?

ALAN GREENBERG: Nothing that I'm aware of.

OLIVIER CRÉPIN-LEBLOND: Okay. I think we can move on and go to Agenda Item #3, CCWG Accountability. For this we have Alan, who I believe has a presentation with a current status.

ALAN GREENBERG: I'm afraid I can't present, since I'm not listed as a participant in this meeting! If we can put the presentation up please? I'll let people scroll for themselves, if they care. What I'm going to be doing is going over

the current status. Some of it repeats what was done last time, but I don't know to what extent we have any new people on this call. We seem to be losing the interest of the community on these calls. We're not having nearly as many people as we had in earlier ones. I'm not quite sure what that means. Maybe this is just becoming a boring topic now.

OLIVIER CRÉPIN-LEBLOND: It's because we're paid to do this, the community isn't. Or are we not paid? Okay. Sorry.

ALAN GREENBERG: You may be paid to do this. My check hasn't come yet! Going through it quickly, Recommendation 1, enhance community powers. Our position was we were okay. The only issue still left outstanding is there were comments by some groups that the waiting essentially of ACs should be lower than SOs. That's not yet been discussed. I think the chances of it being acted on are exceedingly small, but it's still an issue that's pending. As normal, if anyone has any issues to raise, raise your hand or call out.

Recommendation 2, the community powers. We had been concerned that the threshold under some conditions for removing the Board and possibly for rejecting budgets and IANA actions would be lowered from four AC/SOs to three. That's been addressed. We also had a minor concern over the potential wording in the Bylaw, which implied there was absolute certainty of 120 days for replacing Interim Board Members, if the whole Board was removed.

Since this is not something likely to happen, and not clear what the remedy would be if indeed we missed it, I'm not sure how important it is, but it's still an outstanding issue that hasn't been addressed.

OLIVIER CRÉPIN-LEBLOND: Alan, just wanting to jump in here – are you going to open the floor after each Recommendation to find out if there are any questions? Or do you want anyone to interrupt you?

ALAN GREENBERG: Yes, I said to please put up your hand or interrupt if you have comments.

OLIVIER CRÉPIN-LEBLOND: I have a question on Recommendation 1. You mentioned possible issues – effort to reduce AC waiting. Has this become a concrete element? Has this materialized significantly now?

ALAN GREENBERG: It's among the comments made that have not been addressed formally by the CCWG. Since I'm assuming the process is we must have some level of discussion on any substantive issues that have raised, I'm assuming it will still pop up eventually. That's my assumption. It may be wrong. That's what I'm presuming. If it never pops up then I'm happy, because we don't want the change made, but at this point I have to assume it might.

CHERYL LANGDON-ORR: You are correct, Alan. Once things like the GNSO letter comes in, it will then get onto agendas. But there's a number of things that we really can't deal with in a fulsome way until we have both the GNSO and GAC input. So it's the intention, I assure you, for absolutely every comment to be dealt with.

ALAN GREENBERG: For those who participate in the CCWG Meetings, there will be pink comments if we don't discuss it. I will be cryptic and force you to come and join a meeting if you want to know what that means. Back to Item #3, because I believe #2 is addressed. Sebastien agrees on the pink comments, apparently. On Recommendation 3, dividing between fundamental and standard Bylaws, there's been no discussion on that. There was discussion on whether the fact that ICANN has its main office in California, whether that should become a fundamental Bylaw, and that was rejected at this point.

Number four, ensuring the community decision-making powers. We had expressed... Olivier? On number three, I presume

OLIVIER CRÉPIN-LEBLOND: Yes. You mentioned the Bylaw change for the office to be maintained in California or in the US. The GNSO, as you know, has been discussing this. I believe we're still waiting for a statement from the GNSO on whether this will make it into the GNSO statement. The question is if that is the case, since the discussion has already been had to reject this, is there a chance that the group will revisit it again? Or is that really now a done deal?

ALAN GREENBERG:

I would think anything is possible. Remember, although we're waiting for the formal GNSO position, we do have the positions of all the stakeholder and constituency groups within the GNSO. I'm presuming that's where, among perhaps other places, it was raised. The rationale was this Recommendation that it not be a fundamental Bylaw has been there since the very first report. To change it now does not seem to be warranted, given there were not strong comments before, or at least none that were addressed.

My own view is the whole thing is rather moot. It is a California corporation. You cannot change the Bylaws with words to change the fact that it's actually incorporated in California. You'd have to incorporate a new corporation somewhere else to alter that. Should ICANN ever move away and not have its headquarters in California, that's not something that's going to be done quietly in the middle of the night with no one noticing. I really don't think it's a major issue.

If the community believed it was so important, then they have the ability to reject the Bylaw – that would cause it being changed. I really think it's icing on a cake, and I don't think it's particularly relevant. I'm not very concerned with it. Could it come up again? Sure. Anything could be reopened.

Recommendation 4, we expressed concern with liability. That is if we take some action to remove a Board Member, is there a chance that the Board Member could sue ICANN the organization, or more important the individuals who made the statements, because they have been

harmed? Whether it's harm, simply defamation, harmed saying their ability to now seek employment is impacted because this action has been taken against them. The CCWG reaction was to recommend that there be pre-seating letters waiving the right to take such action, and possibly that ICANN indemnify certain individuals.

At one point there was talk of indemnifying only the Chairs. The current talk is all Members of the ACs or SO Councils. The Board has unilaterally rejected the waiver in a pre-seating letter. They have not come back yet and confirmed whether they are looking at indemnification. At some level, since our position originally was that it's not clear we really want to be able to remove Board Members, maybe it's okay that we'll never have the nerve to do it because of risk.

But I think it's rather inappropriate to put things in Bylaws that will then never be exercised, because of a "gotcha" like this. I think it really needs to be addressed. No comments? Seeing no hands. Then we'll go onto number five.

Five is changes to Article 1 of the Bylaws, the mission, core values and commitments. Here we've had substantial discussions. The first one is essentially on the wording of the mission of ICANN, and discussions on whether ICANN should have the ability to put certain restrictions on contracts – whether the contracted party should be able to add things, whether the clauses that are in the contracts that were not done through a bottom-up, multistakeholder process...

And there are many, because there are [vestidial 00:17:32] parts of the contract that have been around since the beginning of ICANN, there are

things in the various contracts that have been negotiated between parties, and all of those potentially could have been invalidated under various draft wording that we've seen certainly over the last number of months. We're still currently discussing it. There are widely differing views.

We even have the split now among those who were advocating very strong rules controlling ICANN now not necessarily agreeing with each other. They're both advocating strong rules, but not agreeing on the same rules. We seem to be getting farther apart – not closer together. The issue has been on the Board list as well – they didn't have particular words, but they basically said we should not be talking about things in detail. The whole playing field has changed now, because the lawyers came back with an interesting comment.

Up until now we've been regularly saying things like, "We'll simply give the lawyers instructions on how to draft the Bylaws, and then they'll come up with the words which 'magically' address all our concerns." The lawyers have come back and said we're dreaming – that if we can't come up with simple definitions of what we're talking about, the lawyers are not going to be able to either. The more details we go into, the more complex and un-user-friendly the Bylaws become, and the more subject they actually become to interpretation.

If we start putting in detailed lists, someone will find a loophole. They are recommending we put in general principles, which will then be subject to interpretation by the Board and by other bodies, such as the IRP. We have not really acted on that yet, but that comment I think is a

real changer of the whole discussion, but it's not clear where it's going to go at this point.

But it was refreshing to hear from the lawyers that they're not going to be able to do magic and come up with concise words to replicate what we could not describe in words ourselves. Comments, questions on that one? Seeing none.

The next one on slide seven is the change that the current Bylaws say were feasible and appropriate – we will depend on market mechanisms to promote and sustain a competitive environment. The lead-in phrase “where feasible and appropriate” was deleted – we have objected to this. It's not yet been discussed. This is an issue that Becky Burr has felt passionate about, and it's going to be a difficult discussion, so we'll see where that one goes. Olivier?

OLIVIER CRÉPIN-LEBLOND:

Two things: first, I happened to have received the input from the GNSO Council in my mailbox an hour ago. I'm going through it now, and I might have to come back to some of the Recommendations over time. First, just on looking at Recommendation 5, the mission and IRP, validating contract terms and so on – how advanced is the discussion now? I've noticed there is some discussion on the PICs now as well? Or are they not part of this?

ALAN GREENBERG:

Public interest commitments have been an example of terms and current contracts, which were not developed through a bottom-up

process and in some cases might be referring to things like content, which are outside of ICANN's formal mission. They are the poster child for the kinds of things that could be invalidated if we're not careful.

Now, it's not clear that if there were a second or new round of new gTLDs to come, it's not clear we could use PICs, unless they were recommended by the future GNSO PDP Recommendations, the ones we're just starting out on. That's going to be an interesting discussion within that PDP group, on whether things like PICs should be allowed or not. Clearly we'll have some input into that process, but that's up for grabs. Right now you ask how far is the discussion?

As I said, I think we're getting further apart, not closer together, but the lawyers input I think will have some substantive impact on how we go forward. But it's not at all clear right now. Does that address what you were asking?

OLIVIER CRÉPIN-LEBLOND: Yes, thank you very much. I'm reading the GNSO Recommendation as we speak, and it seems to be saying here "qualified support with divergent positions and conditions". So we might see a lot more discussion coming out of that. The GNSO Council seems to be wishing they have divergent opinions within the stakeholder groups and constituencies. That might land again on the CCWG.

ALAN GREENBERG: All right. Slide number eight – this is one where we called them out on the Recommendation that we use the terms that, "ICANN must preserve

and enhance the neutral and judgment-free operation of the DNS.” Since the operation of the DNS is a worldwide effort with millions of incarnations, it was not clear how ICANN could do that, especially since we know many of those incarnations are not neutral and judgment-free.

The wording that the NTIA had requested was quite different – that is, “Neutral and judgment-free administration of the technical DNS and IANA functions,” and I believe there’s been a general acceptance to revert to the IANA words and not the new ones that were invented. Questions, comments?

Seeing none, onto Item #8. This is the one on consumer trust. We had claimed that the Section 3 of the AOC, which mentions consumer trust, was a general reference and not restricted to new gTLDs. The action of the CCWG was to ask the NTIA, “What did you mean when those words were inserted?” and they came back and said it was just in reference to new gTLDs. My personal position has always been the words should stand on their own, and I believe it was a wider inclusion.

In the face of almost everyone else in the CCWG disagreeing with us, and the NTIA saying, “That’s not what we meant,” I don’t think we have any real grounds to demand the words be inserted, given that that’s an expansion of the mandate of ICANN, which is not currently in the Bylaws. It’s something that’s currently accepted as a responsibility of ICANN, but not backed up by words in the Bylaws, as such. There is also the ability of the Consumer Trust Review Team for saying there’s reason this should be added to the Bylaws, but that may or may not happen in the future.

But at this point I don't think we're on strong grounds, given that there's never been an intent to really change the Bylaws, to add new things to it. Now, of course the people that believe we have to add terms to restrict ICANN's ability to go rogue and to have mission creep will have no qualms about adding things to the Bylaws. But we're fighting them tooth and nail on those issues, so I don't think we can take the reverse position on this one. Sebastien?

SEBASTIEN BACHOLLET: Just a comment is that it's quite interesting that we asked NTIA, but we didn't ask the ones from ICANN who write these documents. There [unclear 00:27:04] by two organizations. It was very interesting to see the process. We asked NTIA. I'd like very much to have the position of the ones from ICANN who wrote these documents. It could have been different in the progression.

ALAN GREENBERG: True. He's not involved in these processes and not necessarily readily accessible, so...

CHERYL LANGDON-ORR: He's no longer with ICANN.

ALAN GREENBERG: That's what I just said, I thought.

CHERYL LANGDON-ORR: You said “these processes”, which could have been interpreted as not in the CCWG.

ALAN GREENBERG: He’s not with ICANN and not involved in any of these accountability discussions. Besides, I would have a high degree of certainty that those clauses were pretty well dictated by the NTIA and not things that ICANN volunteered, but I could be wrong on that. In any case, I don’t think we’re in a strong position to defend a change in the Bylaws in light of our strong statements that we do not believe other things should be changed in similar ways. I think this is one we’re going to have to eat, but clearly there can be more discussion over it. Seun, go ahead.

SEUN OJEDEJI: Thank you Alan. You mentioned something about the [unclear 00:26:41] come back later to propose a change to the Bylaws. Am I right to assume that this proposal will actually go through whatever process is [subject] within the CCWG to complete the Bylaws? Is that correct?

ALAN GREENBERG: I’m sorry, you’ll have to say that again. I didn’t understand what you were asking.

SEUN OJEDEJI: You mentioned something about the CCT doesn’t [unclear 00:29:09] come back to recommend a change in relation to the consumer trust topic. My question then is, is there any connection between the CCT

and the current CWG effort? Then if it recommends any change to the Bylaws, am I right to conclude that that change will actually go through the Bylaw changing process that's been recommended by the CWG?

ALAN GREENBERG:

Well, there is no connection between them directly. Whether a Bylaw change recommended by the CCT Review Team would go through the processes we're talking about depends on whether the processes we're talking about are implemented by that time. The CCT Team, I'm presuming, will work for somewhere around a year. They will deliver their recommendations perhaps at the end of this calendar year. The Board will think about them for a while and will start implementing the recommendations, should they choose to go ahead with them, some time around the middle of 2017.

So if the accountability work goes ahead – and that's an if – then chances are the new Bylaws would be in place, and whatever process the new Bylaws have for changing Bylaws would be in place. The processes for changing non-fundamental Bylaws are not changing. They are staying unchanged, although the community would have the ability of rejecting them after the Board approves them.

So there's really no change being recommended in non-fundamental Bylaws, and of course whether the new processes, whatever they are, are followed, will depend on the timing. But there is no direct connection between a RT recommendation and our work. Hopefully I'd like to think we're going to be long gone by then. Any other questions?

Then we're onto Recommendation 6, confirming/reaffirming ICANN's commitment to human rights.

The ALAC position was we were okay, but we had some concern with the hard deadline that was in the draft motion. I think there's been general acceptance that we should not put hard deadlines in Bylaws. I think our concern was addressed, but the current wording is still under significant discussion.

There are proposals at this point. The Board has basically said, if I can summarize, that there should be no Bylaw, regardless of the words, until we have the framework. It's been suggested we could have a Bylaw that's not put into place until the framework is approved, which would mean the Bylaw becomes active without having to change the Bylaws. That's not an uncommon thing. We've seen similar things; that certain Bylaws are put in place and triggered by external events.

The wording that was proposed, and the example I have on slide 10, is one of the things that has concerned some people. If you read that it says, "Adopt adjusted Bylaws as part of Work Stream 1 to clarify that it can be enforced or used in an IRP once the FOI is approved." Parenthetically it says it becomes effective after. Those are two different things. It's not clear that you can put in Bylaws that something is in place but cannot be used by a court or an IRP. It's not clear they'd have to follow those.

Therefore there was concern that the parenthetical is saying something different than the main text. That can easily be fixed. From my perspective, putting in place a Bylaw that does not kick in until the FOI is

approved by the Board sounds a lot like not inserting the Bylaw until then.

The Board seems to feel that having it there has some onus on it, and this is still in discussion. We've recommended that our lawyers approach their lawyers and try and understand what the difference is. That's where we stand right now. Tijani has his hand up.

TIJANI BEN JEMAA:

Thank you very much. If you remember, I raised in this very group the issue that the Board expresses now. I said that we agreed inside the group to address the human rights issue at the very high level, in Work Stream 1. In the beginning we decided not to address it in Work Stream 1 at all, but under the insistence of some we finished by accepting to address it and to have a very high-level mention of human rights without more detail, and we decided to address the human rights issue completely in Work Stream 2.

Because we were not sure that everyone has the same interpretation of how human rights can rely on the mission of ICANN. My personal big fear is that it will be used to prevent some TLDs being delegated, because they can say, "Oh, they come from the bad people, from Korea, so they're against human rights, we'll not give them the TLD" – if we put it in the Bylaw like this without explaining clearly how the human rights commitment can be applied. We arrived in a situation where we decided to form a group to study and to come up with the language that we can use in our Final Report.

Since inside the group they decided not to insert it in the Final Report, to insert it in the Bylaw, so it will be a commitment in the Bylaws without defining the rules. You say we'll play football, and there are no rules, so you can do whatever you want, which is not acceptable – for me, at least. I made a comment as a person on this point. AFRALO also made the same comment. I saw on the public comment there are other people who commented that. In my point of view, the CCWG acted [our 00:37:21] lawyers.

If we go on with the transition without doing anything about what I see in the Bylaw, there will be consequences. The lawyers, after studying that, said, "No consequences." It is documented. So now we want to include in the Bylaw a commitment to human rights without having the right interpretation, which in my point of view is very bad. That's the point that the Board also raised, and I think that right now we haven't reached any consensus on that, and I don't see how we'll finish with the consensus.

The [three C 00:38:09] that Alan just mentioned, the insertion in the Bylaw of this language, and saying that this will not be applied until the FOI will be available [unclear] is as Alan explained. I agree with him 100 per cent. If it isn't in the Bylaws, you cannot say it is not applicable. This is my fear, this is my problem. I [unclear 00:38:47] and I wrote it in the comments. Thank you.

ALAN GREENBERG:

Thank you Tijani. To be clear, what I said was the Section 3c, which is the example I have on slide ten, I said the two parts of the statement

conflict with each other. It is possible to have a Bylaw that's not effective – that is it does not become effective until a certain date, or until an external action happens. That is something that I believe is possible. It's not possible to say the Bylaw is effective but cannot be used in an IRP or a Report. That's the distinction between the first half and the second half of the sentence.

My understanding is it is possible to have a Bylaw that's not effective until some event happens. ICANN has used Bylaws like that in the past. Now, at this point the Board is saying that they do not believe that that is acceptable, that it must be nothing present at all. There's currently a discussion between the lawyers going on to try and identify just what the subtle differences are. In terms of the position taken by the ALAC, our formal position in the third proposal was the draft words were acceptable.

You'll notice there's a red question mark there, because we did have some people – and Tijani was one of them – who believed that that was not the best solution. But we did have general agreement that it was an acceptable solution. The concern about a human rights Bylaw without understanding what it implies has been discussed since the very start of the discussion.

Certainly I was one of the people who raised that, among others. But at this point I'm not sure we should be debating whether it's right or wrong. We can all participate within the CCWG, and CCWG Members certainly have the ability of saying they don't agree. But I'm not sure this is the forum that we should be using to try to decide which is the right answer right now, unless there's an overwhelming belief that our

answer was incorrect in the formal reply we gave, at which point we need to correct that public record.

But I haven't heard that as a widespread comment at this point. Anything else on the human rights issue?

SEUN OJEDEJI:

The first question to you is you mentioned something about the two differences between putting this [unclear 00:42:00] in the Bylaw... There was something that you said, that it can't be used by IRP or court, and it's ineffective. Is there a difference between whether something is said to be effective subject to [B 00:42:18] or something is said to be effective [unclear]. It seems to me that it means that it cannot be used in the court of law, in the IRP. That's what the [unclear 00:42:38] – at least to get action [unclear] it means that the particular [unclear] cannot be used. You seem to be saying there's a difference between that. I'd like to know what the difference is.

The second comment I have is that if perhaps ALAC... Two, three options have been made now – A, B, C – ALAC want to actually, particularly in the case of which options they prefer, I don't think we particularly said that in our comment that was submitted. I think now that option three is also listed. [unclear 00:43:27] my view, or opinion, that the Members of ALAC don't know [unclear] generally. Thank you.

ALAN GREENBERG:

Okay, thank you. I'll try to clarify. On the last point, whether we prefer A, B or C, I and several other people at the last call said that the question

is wrong. The wording in the A, B, C, as had been pointed out... C had conflicts within itself. It was not clear what people meant by the wording in the proposal. There were a number of people from different constituencies and areas that said, "If you're going to ask us to pick among different options, show us the options. Don't make indirect references to it, because people are interpreting things differently."

That's where we stand right now, and we're waiting for specific wording to come back from the CCWG, from the Chairs or whoever's authoring this section, to say, "Choose among the following, but be really clear and not have indirect references." I didn't see the purpose of asking this group, "Do you prefer A, B or C?" when I and other people have already said that those are confusing, conflicting answers that people are interpreting differently. We will talk about which we prefer, but only when we have some concrete words to look at.

LEON SANCHEZ:

Can I please say a word? Thank you Alan. Yes, you are right that language will be coming today. I am responsible for drafting that language. Just to give you a heads-up on what it will look like, it will be exactly the same text as in the third draft proposal, but the difference is that in the transitional Bylaws that's being proposed, it will be clarified that the suggested Bylaw on human rights will remain dormant until the FOI is actually developed.

That way, it will not be in effect until the FOI is actually developed, and therefore it could not be used to initiate any kind of faction or IRP based on the dormant Bylaw on human rights. Thank you.

ALAN GREENBERG:

Thank you Leon. That alluded to Seun's first question, but I'll try to be specific. The difference between the two halves of the 3c, the part that's given as an example, is the text says, "Adopt the Bylaw, but it cannot be used for enforcement." That still means it's a Bylaw, ICANN has an obligation to address human rights, but until there's a FOI it cannot be used in a court or an IRP. That's the part that I think – and I'm not a lawyer – is the really strong point. You cannot say, "This Bylaw is in effect, it is an obligation on ICANN's books," but say, "It can't be used in a court."

That's the part that's the conflict. Either the Bylaw is in effect and is a regular Bylaw, or it's not in effect until some trigger option happens to cause it to be correct. Leon has clarified that this next version we look at will say something like that. That still doesn't address the Board's concern, and Tijani's I think, that it should not even be a Bylaw written in the Bylaws until we have the FOI. That's where it stands. I'm not sure we should be debating the specific subject here, but I will honor the hands up. Tijani, you're next.

TIJANI BEN JEMAA:

Thank you Alan. I will give another rationale, another reason why I believe we don't have to have the Interim Bylaw. You remember very well that when we transferred, more or less, another power from the Board to the community in our proposal, the question was raised, "Yes, we want the Board to be accountable, but to whom are you accountable? Where are the [unclear 00:48:38] of accountability of the

community. We said, “You are right, we’ll reverse it in Work Stream 2.” We said that in our report.

But we didn’t make an Interim Bylaw. One can explain to me why? I believe it’s much more important than the human rights obligation, because the whole issue is about accountability, and if we give power to people or to a group who’s not accountable, or for him there is no accountability mechanism, the whole system will be down. So I think that there is something behind trying to put a commitment to human rights in the Bylaw now. I don’t know what it is, but I have a real fear about it.

That’s why I don’t like to have anything in the Bylaw. If we are obliged – of course, the forces will be those who will [mean 00:49:51], and perhaps I don’t have the right force – but if we are obliged to include something, we have to do it as Leon now says, or as you explained Alan. The whole Bylaw will be dormant, [unclear 00:50:07] the interpretation. Thank you.

ALAN GREENBERG:

Thank you Tijani. First of all, I’ll caution people not to presume a motivation for people saying things. I personally object strenuously when someone tells me I said something “because” and gives me the reason why they think I said it, when that had nothing to do with it. I would not attribute motivations to why people feel strongly that there should be a human rights Bylaw. Are there people in the CCWG right now who are probably doing things for ulterior motives that they don’t want to talk about? Sure, but I think we need an agreement that we

don't talk about them, because they're not something that we can demonstrate or prove. My personal position is...

TIJANI BEN JEMAA: I'm not talking about that either.

ALAN GREENBERG: I understand, but I'm saying even among us I think we need to be very careful. I personally would object to a Bylaw that is in effect before the FOI. I don't think we're talking about that now, but we'll wait to see what Leon's words are when they're published. Then we can have the substantive discussion on whether we agree or not. Avri, go ahead.

AVRI DORIA: Thank you. I couldn't disagree more with Tijani. I don't think [unclear 00:51:45]. I'm not even totally comfortable with the wording. I think [unclear]...

ALAN GREENBERG: Avri, you're breaking up badly.

AVRI DORIA: ...For IRP. I'll try again, but otherwise I guess we can ignore what I have to say. The difference between saying that ICANN has respect for human rights, and thus considers them in creating a FOI, considers them and their implications when doing PDPs – that's very different than saying they've now become a clause for action in an IRP or a court. So I

think it's absolutely essential, given a loss of governmental oversight, because only governments have obligations to human rights.

ICANN hasn't. I think it would be an incredible mistake, and something that I and many of us would fight tooth and nail of going out with an accountability solution that's not based on a respect for human rights. It's fine for Tijani to say I have ulterior motives. I do! I want ICANN to respect human rights in its discussions, in its behavior, and such. I want human rights to not be something that every time it's brought up people say, "But ICANN doesn't do human rights. You're talking about the right for clean water?"

I think that if we're going to be creating a FOI we have to do it from the basis of respect for human rights. Yes, we have to understand how they fit with our mission. I'm not arguing the specifics of it. I'm find with Tijani indicating that I have ulterior motives, because I do – respect for human rights is fundamental to accountability, and without it we have none. Thanks.

ALAN GREENBERG:

Thank you. Olivier, I'm going to ask you as Chair, I would really like to stop the discussion on the substance of human rights issues. This was an update on where the CWG is. We have a half-hour left in our call, and some really other substantive issues to talk about. With your agreement I'll say that we'll not entertain more comments on the human rights issue; on the substance of it.

When we have something specifically to answer on behalf of the CCWG then we can have that discussion and we can take a vote if necessary.

Ultimately it would have to go to the ALAC for that vote, however. I'd like to go onto the next Item. The next Item is strengthening ICANN's IRP. We expressed concerns about conflicting panel decisions. That's now removed from the IRP, and I think there's general acceptance. I know Sebastien would like to raise the issue of the IRP in general, and that's an item that's added after the review is complete.

#8 is improving the request for reconsideration process. We had no concerns on that, nor has virtually anyone. Affirmation of Commitments in the Bylaws – there was basically no complaint about that. There was a request from the Board and other people that the reviews not be incorporated in the Bylaws. I could certainly have lived with that. I don't think we've ever discussed it formally. At this point that was rejected, I believe, by the CCWG, so it's off the table. It might come back again, of course.

Recommendation 10 is enhancing accountability. The comment is in the wrong place. This was a comment on the AOC, in fact. There was a request from certain parties within the GNSO to increase the allocation of Members on review committees to the GNSO for any review committee associated with GNSO policy. That would be the CCT one, the WHOIS one. In particular that was rejected, but I will note that effectively that is already there. The typical RT size that we've seen in the past has been 11-13 members.

The current process allows 21, and that's before experts are added, and the provisions now allow for participants, similar to the CCWG, who will be on an equal footing, although not travel funded. I believe the RTs

have become exceedingly bloated and will not be effective vehicles for doing the work. But, be that as it may, that is in the recommendation.

With the decision being made on who to select by the Chairs of the ACs and SOs, I cannot see a Chair of the GNSO, if there are slots possibly available within the 21, not pushing hard for every one of their groups to be represented. I think they already have that. In any case, it is what it is right now. I think we're going to have significant problems with the AOC reviews in the future because of the composition of the members. Sebastien?

SEBASTIEN BACHOLLET:

I agree with you Alan. I really think that we are making things more and more complicated in this organization. I know that people were hating having the Chair of the Board and the Chair of the GAC for the ATRT, and the CEO and Chair of the GAC for the other review, doing the final selection, but at the level of the SO and ACs, some SOs and ACs were not doing their job to select the people, and then to leave the choice for the final decision to have a balanced group. We are really answering into politics.

Yes, you will, as Chair, be part of the decision, and you will not be independent in making the final selection. That's really the wrong way to go. Unfortunately, there are so many things in this report that are complicating everything that I am very, very sorry that it's going in that direction. Thank you.

ALAN GREENBERG:

Thank you. I agree. I may not be Chair of the ALAC when this Bylaw goes into effect, so I'm not sure I'll have the decision. Some ALAC Chair will. Certainly past ALAC Chairs – and I think I count myself among them – would make hard decisions and tell the ALAC, “No, we're not having five Members just because we could. We don't really need five Members.” I find it very hard to believe a GNSO Chair would be able to do that. GNSO Chairs explicitly have very little discretion, but we'll see what happens. I try to fight that, and there weren't a lot of other people supporting it, so it died, but we'll see where it goes.

Okay, #11 is what was called Stress Test 18. It's still under discussion. The GAC has not formally spoken. There was a decision to tentatively add a Bylaw saying, “Any AC,” – and that's not specific to the GAC, “If they provide formal advice to the Board, must provide a rationale.” I certainly have no trouble with that. Questions? Comments? Olivier, go ahead.

OLIVIER CRÉPIN-LEBLOND:

It's worth noting that the proposed response of the GNSO for Recommendation #11 is actually strong opposition to this. That might be a deal-breaker for the GNSO Council. The GNSO overall does not support this recommendation. Most stakeholder groups and constituencies do not support the proposal to raise the threshold for a Board vote to reject GAC advice. There's more explanation underneath that, but that could be something that comes back in the face of the Working Group.

ALAN GREENBERG:

Yes. That is indeed correct. If the GNSO votes on this recommendation by recommendation, and they are the only AC/SO to reject that particular one, then the Charter of the CCWG says things can go forward. So that may not be as bad as it sounds. The GNSO objection was on two counts – number one, changing the threshold to thirds, which is similar to rejecting a GNSO PDP recommendation, but on a GAC advice people were saying that there is not the community input into the advice as there is on GNSO recommendations. They were also objecting strenuously, some groups, to the concept that we're introducing voting.

That, personally, I believe, is a red herring. Chair of the Board has confirmed that the only time GAC advice is ever rejected, it was by a formal vote. The Bylaw did not say "vote" but the Bylaw said the Board had to act, and the only way the Board can formally act is through a vote. So I think that's a red herring. Olivier is right, and it may well turn out the GNSO reject that recommendation. I think we'll just have to wait and see where the world goes.

OLIVIER CRÉPIN-LEBLOND:

If I can just add to this? What I'm referring to is really a response that the GNSO is going to send to the Working Group. I don't quite know how that will be dealt with, because this doesn't look to me like this is a final response in voting and whatever. This is a comment, very much like the kind of comments the ALAC sent during the public commenting period a month ago.

ALAN GREENBERG:

You're correct, Olivier.

OLIVIER CRÉPIN-LEBLOND: So would something like this get the Working Group to get to look at it again?

ALAN GREENBERG: I don't believe so. I'm giving an opinion. We can spend 20 minutes debating it, if you wish, but I don't think so. Seun, go ahead, but briefly because we have other issues to discuss.

SEUN OJEDEJI: Thank you. I'd just like to get clarification on what you said about the Charter. You just said that if one of the recommendations is not approved by [unclear 01:04:39] one of the SO or AC organizations, that the [unclear] recommendation [unclear] goes to the next level. You said the recommendation would be part of the proposal. [That was it? 01:04:53]. I thought the Charter was actually referring to the old proposal itself, and not the recommendation [by recommendation]. Thank you.

ALAN GREENBERG: We talked about that at the last meeting. My belief, and it's supported by some people, is that the Charter will be liberally interpreted – that, just as the proposal right now, listed as recommendations one by one, and just as the GNSO in PDPs approves recommendations one by one, at times, that we'll judge them one by one. I agree that it's not exactly what the Charter says – and I may be proved to be wrong – that the

CCWG, as a group, does not agree to do that. But my current belief is it will. If I'm wrong, I will admit I'm wrong. So be it.

Just one more quick comment. Avri, in the discussion, with regard to the AOC reviews, said GNSO Chairs have almost no discretion. That's correct, as the Chair, but if the person occupying the Chair is given a role, that person can exercise discretion – not on behalf of the GNSO, but as the person who happens to occupy the Chair. So there's a subtle difference there. A GNSO Chair might choose to interpret it that way, but that would be up to the GNSO Chair to interpret it that way. In any case, Stress Test 18 is under discussion, and where it exactly will be going is not clear.

It's clear the NTIA will not accept anything without something comparable to what they're requesting. The last recommendation is on Work Stream 2. This is still under discussion. The Board has suggested that perhaps the CCWG, as such, may not be the vehicle for doing things. That resulted in responses from a number of CCWG Members saying, "Yes, but the CCWG has certain authority to do things. Another follow on group might not, and clearly another follow on group would have to be given the appropriate authority to take some of these actions."

But that's still under discussion, and we'll see where that goes. That's where it stands in the review. The timeline is unclear. We are still waiting for the formal responses from the GNSO, as we hear that may be coming soon, and the GAC. There is clearly an impact on transition, if we cannot deliver something soon. Perhaps it's already too late. We expect to have something for the ALAC to consider, either prior to Marrakech or

in Marrakech. At the request of a number of people, a new frantic font – or frazzled font. Any questions? Comments?

SEUN OJEDEJI:

Yes. You just mentioned the timeline is not clear yet. I'm really concerned about this process, about the fact that just a few SOs [unclear 01:06:38] part of this process. If I got it correctly, I think it was said that the GNSO [unclear] by the 14th of this month. Was there any follow up from GNSO on that particular statement, on why their statement was not out by the 14th? And when are we expecting their statement? If their statement does not come in in time, it will be the CCWG [unclear 01:09:04] what you actually do to move forward.

These are [unclear] concerns that this statement, that we didn't [unclear 01:09:17] process itself, and with all the energy of the other SOs that are actually spending their time making their own solutions. Thank you.

ALAN GREENBERG:

Thank you Seun. We have all expressed our concern regarding the GNSO. You've heard Olivier say that he has received a draft version – I presume it's a draft version, Olivier, of the draft document. Is this a draft, or the version to be sent to the CCWG?

OLIVIER CRÉPIN-LEBLOND:

Thank you Alan. This is a draft, which has been sent so as to be able to discuss it on tomorrow's GNSO Council call.

ALAN GREENBERG: Thank you. So Seun, you've heard there is a draft, it will be discussed on the council call. Presumably something will be sent afterwards, sometime soon afterwards, to the CCWG. I'm not going to have a discussion on this call as to why the GNSO couldn't act quicker. They clearly haven't, and that's the reality we have to deal with today. I'd like to bring this summary to a close at this point and go onto the other items. Sebastien has made a specific request, and we're down now to 15 minutes. Yes, Olivier?

OLIVIER CRÉPIN-LEBLOND: It is worth noting the GAC has not responded either, so it's not just the GNSO.

ALAN GREENBERG: That is clear. All right, there are a number of items... On human rights, I think we've had about as much discussion as we're going to have on this call. Consumer trust and confidence, I think we've also closed that. Should we be having a face-to-face meeting, I think we discussed that at length in our last meeting, until we have something to discuss at the face-to-face meeting and know when that is, there's no point in us requesting and starting to do travel arrangements for a face-to-face meeting.

I find it highly unlikely that when we do have something to discuss there will be enough time to arrange a face-to-face meeting before Marrakech. I think that one is a dead issue at this point. We can discuss it more, but we have no credibility to ask for a meeting of the ALAC until we have something to discuss, and at this point we don't know when

that's coming out. So I'd like to say that there's nothing we can do there.

Work Stream 2, organization and budget, I think we've already discussed at this point that if there is a separation from the CCWG then clearly we have to consider things like who does it, and is there budget to handle face-to-face meetings and provide staff support for them, and things like that. I think that is an implicit part of a decision to handle it, other than the CCWG. Personally I think the CCWG is going to have to be revitalized in a number of ways, if it's going to go ahead at all. The amount of burnout at this point is substantial, I think.

Lastly, there is an Item on IRP versus multistakeholderism. That's an issue introduced by Sebastien, and I'd like to turn it over to Sebastian to state what he believes is his concern.

TIJANI BEN JEMAA:

Thank you Alan. In fact, the last Item, I asked for this discussion last time. I was not available to be with you during the discussion. I just want to give a few words on the first one, and then to the last one. A face-to-face, you remember, I am very in favor of that. I know that we don't have the document yet, but I didn't put any trouble for the Board to have a face-to-face meeting at the beginning of February, and I guess they will discuss that at length.

As I have written in the private email, because it was asked to be [unclear 01:13:50] that yes, I am ready to have a face-to-face meeting, and I would suggest to do it nearby the Board. If we do that, we can show some leading to the rest of the community, because I really think

that, at the end of the day, we'll have to have a final negotiation with the Board. I hope that we can wait for Marrakech, but I think that Marrakech – in case we ask that the US election be postponed! – will already be very late.

Work Stream 2 – I really think the proposal by the Board to split Work Stream 2 into different sub groups with less power, less budget, less possibility to work, we need to have as a community the choice for the organization of what we want to do. Work Stream 2 must be organized as a global topic. One of the reasons is that when we discuss about one subject we can be convinced to change another subject. I would say it could lead to some bargaining. If we are in different groups, we'll not be able to do anything like that, and it will be difficult to have our voices taken into account, if we split too much work into different streams.

IRP versus multistakeholder – I know it was quite difficult to understand the title. My question and trouble is that if we need to have an IRP against Bylaw changes by the Board, after a decision by an SO on the policy issue, if we need to have this SO participating, that means that they need to disagree with themselves. In fact, my thinking is that the multistakeholder, the organization of ICANN, should show it can be done in one organization, and the other [I disagree 01:16:30] with, then those organizations need to have some weapons.

One of the weapons is the IRP. I really don't see why the GNSO, the ccNSO, or the ASO, need to be part of this IRP if some others want to change the decision by the Board taken after the policy decision of those SOs. I hope that's clear. If not, I'll try to do my best to change my wording, but that's my comment and question. Thank you.

ALAN GREENBERG:

Let me try and address my understanding of the last Item, and then we can open the discussion. The issue came up that if we allow an IRP effectively... Remember, IRPs can only rule on that we are in violation of our Bylaws. They cannot rule on anything more specific, and they cannot say what the solution is. They can simply say we have a problem. That's equivalent to what the US Supreme Court does.

The problem was that if there are Bylaw changes, as a result of a PDP, which there rarely are, then if we allow the community to overrule the recommendations, then we are essentially saying the bottom-up process is not sacred, and we have essentially a constitutional crisis of which process is more important. I don't think it's a major issue from my point of view, because the situation doesn't happen very often that there are in fact Bylaw changes due to a PDP – maybe it's never happened, I'm not sure.

I can half agree that we should not be able to reverse this process by the community without the consent. The consent of the SO that recommended the changes is essentially saying they either have rethought things, because the situation has changed, or they believe the implementation was so ill-advised that it's mangled their recommendation. I don't think it's a big issue, and I can see the rationale for it. I could go both ways on it. I don't find it a really big issue, but that's just me. Tijani?

TIJANI BEN JEMAA:

Thank you Alan. I would like to remind you that the CCWG is started, as per its Charter, to work on the whole issue of accountability, including Work Stream 1 and Work Stream 2. In fact, the CCWG has worked, and it decided to split it into two parts, Work Stream 1, and Work Stream 2. So now we cannot change this unless the chartering organization agrees to change the Charter of the CCWG.

If the CCWG feels that it does not have the necessary bandwidth or the necessary energy to continue on Work Stream 2, they can propose to a chartering organization to change its Charter, so that they [unclear 01:20:22] by other things. The sub-division of the CCWG into several groups is not a good idea, from my point of view. A lot of complication on that. It will more or less weaken the group. But I believe that we have to stand by the Charter and we have to make it clear that if there is a need to change that, we need to go through the chartering organization. Thank you.

ALAN GREENBERG:

Thank you Tijani. I don't think anyone's disagreeing with you on that. When we've talked about dividing the work, I don't think there's been any discussion on the process we'd need to go through to do that. I tend to agree. If the chartering organizations are against it then we have a problem. Whether that's a reasonable thing to do or not is a different discussion from the process to be followed if it is to be done. I think we're all in agreement on that part. Whether we're in agreement on should we divide the task or not, following some due process – that we may disagree on.

Any discussion on the substantive issue that Sebastien has raised, on should there be a carve-out on PDP recommendations being subject to an IRP? Does no comment mean you're agreeing with Sebastien or disagreeing with him? It really would be useful to have some feedback, maybe at least from the people on this call, a tick saying you agree with Sebastien, and a cross saying you don't agree with him? Seun, go ahead. I note we're out of time in five minutes and we have to turn this back to Olivier at some point, so please be brief.

SEUN OJEDEJI: Yes. I don't agree with [un clear 01:22:33] subject to IRP. Thank you.

ALAN GREENBERG: You don't agree that they should be subject to it, or that there should be a carve-out?

SEUN OJEDEJI: What does a "carve-out" mean?

ALAN GREENBERG: Sorry, you're not clear. Are you agreeing with Sebastien that there is a problem, or are you agreeing with the CCWG that there should be a carve-out?

SEBASTIEN BACHOLLET: He's asking what "carve-out" means.

ALAN GREENBERG: “Carve-out” means that there are certain types of Bylaw changes, which are not going to be subject to an IRP.

SEUN OJEDEJI: Okay. So I agree that they should not be subject to being carved out.

ALAN GREENBERG: Okay, so you’re disagreeing with Sebastien. I think we’re somewhat mixed on this, so I think we’re each going to have to present our own cases and see where it goes at this point. Olivier, seeing no hands at this point, before anyone puts one up, I’m going to turn it back over to you.

OLIVIER CRÉPIN-LEBLOND: Thank you Alan. Thanks for going through this. Now, we have four minutes until the end of the call. We have finished the main Agenda. We have now just Any Other Business. As per usual, in the Any Other Business part of the call, we need to check whether we need another call later on this week. I believe there is a date that’s been earmarked, which is on Friday. It’s held at the moment. Do we require a call on Friday, 17:00 UTC. We need another call. Sebastien?

SEBASTIEN BACHOLLET: My question is what will happen in-between? I have the impression we have a CCWG tomorrow, and you’ll have some GNSO discussion. Maybe

at least it would be good to have feedback on those two calls and see where we are at that moment. I suggest we have it.

OLIVIER CRÉPIN-LEBLOND: Thanks. We have a CWG IANA Meeting at 16:00 UTC tomorrow. There is also a GNSO Council monthly call at 21:00 UTC. Did you say there was also a CCWG Accountability call as well?

ALAN GREENBERG: There is one tomorrow, yes.

OLIVIER CRÉPIN-LEBLOND: Okay Alan. I gather we need to have that call then on Friday. So our next call will be Friday, 17:00 UTC, for 90 minutes. Should we already set a Doodle for next week?

ALAN GREENBERG: Leon, are you still on the call? Okay. Cheryl has her hand up. What I was going to ask Leon was are there CCWG calls scheduled for the week after? I think this week's ones were the last ones that had been scheduled. Cheryl, maybe you know the answer to that. Go ahead.

CHERYL LANGDON-ORR: We will be having calls in the following week, because of the timing of the GNSO letter. We hope [unclear 01:26:27] processes, [unclear] CCWG, and also that... Our intention is to have things wrapped up by the 28th, so we can then move to the next phase. But we will see how

we go on that. I just wanted to say, for particular timings for that, it may be that Leon and I will not be able to join for the first hour, because we have a meeting for the CCWG administrations at that same time. That's all.

ALAN GREENBERG: Would you prefer if we try and change the time?

CHERYL LANGDON-ORR: Not necessarily.

ALAN GREENBERG: We'll talk before. Are there meetings scheduled for next week at this point?

SEUN OJEDEJI: Yes.

ALAN GREENBERG: I hadn't seen them, but that's fine. So the meeting for Friday is on, and on Friday we'll discuss what we do. We'll probably schedule one again, put a Doodle out for another meeting on the following Wednesday and Friday. This time we'll try and avoid administration meetings, if we can.

SEBASTIEN BACHOLLET: It's scheduled at 19:00 UTC on Tuesday and Thursday next week, the CCWG.

OLIVIER CRÉPIN-LEBLOND: Thank you very much everyone. We know where we're going, and we'll all continue on Friday this week. Until then, have some rest, get ready for more conference calls, and speak to you all soon. This call is now adjourned. Goodbye.

ALAN GREENBERG: Thank you Olivier.

[END OF TRANSCRIPTION]