TAF_At-Large Briefing on CCWG-Accountability Final Proposal in preparation for the ALAC final review and decision on ratification in Marrakesh (part 2) – 25 February 2016

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YESIM NAZLAR:	Good morning, good afternoon, and good evening. Welcome to the At-Large Briefing on CCWG-Accountability Final Proposal in Preparation for the ALAC Final Review and Decision on Ratification in Marrakech, Part II taking place on Thursday, 25 February 2016, at 12:00 UTTC
	We will not be doing the roll call as it's a briefing, but if I could please remind everyone on the comm bridge as well as computer to mute your speakers and microphones as well as state your name while speaking, not only for transcription purposes, but also to allow our interpreters to identify you on the other language channels. We have English, Spanish, and French interpretation.
	Thank you for joining, and I will now turn it back over to Alan Greenberg, Chair of the ALAC.
ALAN GREENBERG:	Thank you very much. Welcome to the second call in a series of two that we are reviewing the details of the CCWG-Accountability proposal that is currently on the table. Yesterday, hopefully most of you were there. We did Recommendations 1 to 4, which are essentially the core recommendations which give the community powers. There are now eight more recommendations that we'll be reviewing today.
	To refresh your memory on how we're treating this overall, we are reviewing these recommendations in some detail right now. We will have a good number of hours available when we get to Marrakech to

discuss these, to further decide how we are treating the individual recommendations and the proposal as a whole.

Clearly, the critical decision we have to make is: are we ratifying it? Are we ratifying the whole proposal and, indeed if not, then what recommendations are we ratifying and which not? If we are not ratifying, then we are obliged to provide reasons and rationales and preferably alternate text.

At this point, the intent is if the CCWG believes that there is sufficient ratification, it will be passed on to the ICANN Board. The ICANN Board will turn it over to the NTIA. I believe that is planned for Thursday, so our obligation is to ratify or make a decision – ratification or not – no later than Wednesday. We are hoping to be able to do that on the weekend if at all possible, but we might have to defer part of that until the Wednesday.

So this is not the final discussion, but this is an opportunity to try to raise awareness of what the proposal is about so everyone goes into Marrakech with a good understanding. We are assuming that certainly any ALAC members and preferably RALO leaders and others if they are not on these two calls, will have reviewed them prior to getting on a plane to Marrakech.

With that, if there are any questions on process, I will take them right now. And barring that, we will go on to start the review from where we left off yesterday. Olivier, go ahead.

OLIVIER CRÉPIN-LEBLOND: Thanks very much, Alan. I just wanted to mention that, yes, if you do have problems or questions on these, ask them as early as possible. The last position we want to be in is when we are in Marrakech and we only have ten minutes left and then somebody raises an important point. At that point, that would really put us in a very tight situation. So the earlier one has a concern about something, the more likely it is that we can then find a solution or propose something to go around it. That's it. Thank you.

ALAN GREENBERG: Thank you very much, Olivier. Anyone else have any comments? Questions? Concerns? Seeing nothing, then what we need to do now is to skip to slide 38. If staff could do that, I would appreciate it. That gets past Recommendations 1 to 4.

For those who weren't on the call yesterday, when you look at this slide deck, 1 to 4 are not in order. The order was changed slightly to try to make it a little bit more easy to understand. The first four recommendations are all, not circular, but each refer to each other. It's difficult to have the discussion on any of them without knowing what's coming in the ones afterwards. By changing the order to 1, 3, 4, 2, it just is a little bit more logical.

We're not quite at 38 yet. I see we're at 34 right now. Thank you very much. Alright, as I said, the first four recommendations essentially create the powers that the community has, but there are an awful lot of other things that this overall proposal is doing. One of the key things it's

doing is to make changes to Article 1 of the ICANN Bylaws. Article 1 of the ICANN Bylaws is currently its Mission and Core Values. To a large extent, Article 1 in addition to the Articles of Incorporation define what the organization is. They put limits on what we do, or at least attempt to, and are the guiding principles under which we do much of what we do.

Over the years, there have been both things identified where these clauses in the Bylaw have been less than clear. Definitions in some cases have changed, partly because the world has changed around us also. It's not necessarily we've wanted to change the definitions. And in many cases, there are places where people felt ICANN had perhaps more flexibility than it should if it's to keep to its narrow scope. So there was a lot interest in making changes to this recommendation.

Part of what we'll be talking about now is a little bit of history, not only the end product but how we got there. We seem to have a train passing. We'll wait for the train to pass perhaps. Can someone confirm I'm still online and you're still hearing me.

UNIDENTIFIED FEMALE: Still hearing you and the train.

UNIDENTIFIED FEMALE: Hi, Alan. Yes, we can hear you.

ALAN GREENBERG: Thank you very much. Okay, and I presume you can also hear the train.

UNIDENTIFIED MALE: It's not a train. [inaudible]

ALAN GREENBERG: I know, but it sounded like a train passing from my perspective.

UNIDENTIFIED MALE: That's a very nice train.

ALAN GREENBERG: I'm not asking for sympathy, but I've just gotten up and I haven't had my coffee yet, so you're going to have to accept my bad attempt at humor. Alright, the train has passed.

Okay, so there are a lot of changes made. Now we have tried in these presentations to make sure that you are presented with the core details of everything that the recommendation does. That is not happening for Recommendation 5. Recommendation 5 has just too much meat in it to try to present it in pretty slides.

So we will be talking about a significant number of the important changes, and for those who really want to understand exactly what changed word-for-word, you're going to have to go to the Annex 5 and actually go through it yourself. We may do a little bit more detail in Marrakech, but this is one where you really have to do your homework

if you want to understand the details. And to be honest, the details are important for reasons I'll be going into as we go forward.

Alright, so there's a large set of changes. One of the changes that was made quite late in the process was, and this really came up in spades at the IGF meeting in Brazil where many of us were present and it became obvious that a section in the Bylaws that we had been ignoring basically could not be ignored for a number of reasons. That in particular was in reference to ICANN's responsibility with regard to the protocol communities and the numbering communities.

The Bylaws read as if we had more of an active role, and indeed a seminal role, controlling things than in fact was true. So there are some extensive changes in Article 1 which refer to what ICANN does, what the other communities do, and how we relate to each other. That's the kind of thing that came up in this discussion where what we have always had in the Bylaws, what we have in the Bylaws today, just wasn't reflecting reality. And there was a concern in many circles that with the U.S. government out of the loop, this lack of precision could cause very significant problems and had to be fixed in this go-round. So that's the kind of thing we're seeing.

What were called Core Values have been split into Core Values and Commitments to better reflect what they're talking about and how they're treated. There is a large part of the change which talks about what happens when these Core Values conflict. They do overlap, and you will find situations where you cannot honor everything. How do you

go forward deciding which are the more important ones in any given instance? I think that's sort of the summary.

The last item on this slide is an interesting one. It says we're incorporating ICANN's obligation to operate for the benefit of the Internet community as a whole and carry out its activities in accordance with applicable law, international law, and conventions through open and transparent processes that enable competition. That, interestingly, was not in the Bylaws. It was in the Articles of Incorporation, which makes it sort of a stealth bylaw because, although it is in force, it's not something that people normally look at when they look at the Bylaws. So those words were moved into the Bylaws just for clarity. Next slide.

The ALAC and the At-Large participants in this process, and that includes both the five members in terms of how we have made our decisions and how we have worked within the CCWG. Leon, of course, was a co-chair, so much of what Leon did certainly he was acting as co-chair so he would not tend to speak on behalf of the ALAC within the CCWG. Although on occasion, there were times when he had to take off his co-chair's hat and do that but, of course, was very active in the prep role of what positions the rest of the ALAC people were taking in our various statements that we issued. There have been a number of other people – Olivier certainly one among them, Seun, also Avri – that have contributed heavily to the positions we took along the way.

Recommendation 5 was a very active one for us. Part of the reason why, as I alluded to, is there were a lot of motivations in making changes. Some of them, from our perspective, were overzealous and were trying

too much to control what ICANN was doing to the sense that it removed from ICANN's Mission things that we believed were very important. Therefore, we have been very vocal in our formal comments as to things that we believed should not be put in or, in some cases, things that were missing and should be put in. To a large extent, most of our concerns have been addressed, so I think that's an important thing to consider as we go forward. Next slide.

A couple of examples of changes that we're talking about. The current Bylaws imply that we have more responsibility with regard to parameters than we actually do, and that's what I alluded to before. We have now extensively rewritten those sections so they reflect much closer or actually exactly what the reality is.

For instance, we do not have direct responsibility with protocols and protocol parameters, but we interact with those groups because clearly they cannot act alone. So there are words like coordination that are in that apply to some of those things.

Addressing is yet a different one because we effectively pass on policy decisions that were made within the address community. So we have a stronger role there but not necessarily a controlling role within our own boundaries.

The second item on this page, this example, is "ICANN shall act strictly in accordance with and only as reasonably appreciate to achieve its Mission." In the key work we're doing, we can't go off and decide we're building Internets. Exactly how this is going to be interpreted is, of

course, one of the interesting things. Is this going to stop us from doing things which some people believe are not within its Mission? Well, that's an issue for interpretation, and there are always going to be issues like that. But the wording is closer to what people believe we should be saying.

The last one is, again, an interesting one. It essentially says that people use domain names for things, but we're not going to control what they do and the content of what is on their domains is not up to us. That's an interesting one because, although it seems intuitively obvious, we found that if we're not client in how it's worded, we are going to be in violation of our own Bylaws because we do control to some great extent the content that is on certain services, particularly the services run by registrars and registries. They run services over the Internet, and we do control what they do in some cases. So this is one of those interesting things that you have to be client what you say, otherwise you may be in trouble and not be able to actually meet our Mission because we're prohibiting our own Mission in some cases. So it's an interesting situation. Next slide.

This one is, again, interesting. When I say "interesting," that means potentially dangerous. All sorts of things can happen. One of the things that comes up with new gTLDs, which many of you are probably aware of, is we asked prospective registries to make certain commitments. Some of the commitments are required by ICANN and some of them are voluntary. The voluntary ones can impact what goes on their Internet.

So they may commit to, as an example, only do things in a certain language. I'm not sure anyone has done that, but let's say they could. If they say they're going to do that and we're accepting the gTLD application because of it, then we have an obligation to make sure that they're honoring their commitments. But that affects content. So there's a subtle difference between things regarding content that we impose and things that are voluntarily imposed.

The bottom line is we don't want to be in a situation where suddenly half of our contracts are not valid anymore because of the changes we made in the Mission. Interesting examples. Next slide.

As I said, we've invented the concept "Commitments." Many of the terms that we're putting under that label of Commitments were already in the Bylaws but were under things called Core Values. If you read this one for yourself, "In performing its Mission, ICANN must operate consistent with its Bylaws for the benefit of the community," those are words we've seen before. And specifically, that's the lead-in sentence, but then there are examples. Next slide.

We have to preserve and enhance our neutral and judgment-free operation. That word "operation" should not be there. It should be "administration." That was a crossed-out word that didn't make the transition to this slide properly. So the judgment-free administration of the DNS and the operational stability, security, global interoperability, resilience, and openness of the DNS and the Internet.

That was a Commitment that was there before as a Core Value. It's now a Commitment, and the wording was clarified. Along the way, we had a version of that, just to give you a bit of the history, where it essentially said we were responsible for ensuring that every part of the DNS, including people's local DNS servers, were operated in certain ways. Clearly, there's not a lot we can do about the parts that are not under our control. But the parts that are under our control, we do have responsible of maintaining.

A new clause was, "Maintain the capacity and ability to coordinate the DNS at the overall level and to work for the maintenance of a single, interoperable Internet." Clearly, something we've always thought we were doing, but it was never in the Bylaws.

Lastly, the wording in the original Bylaws says ICANN will be led by the private sector. Now, the term "private sector" is defined differently by different people. The intent was that it said it is not government-led. But in certain parts of the world, the private sector is everything but government. In other parts, it is only the community parts of the world, and there is a whole public sector – often called a volunteer sector in some places – that is a complimentary part of it. So we have now clarified what we mean by "led by the private sector."

Along the way, we have – through not a small amount of discussion – inserted the term "end users" in the definition as one of the stakeholders. Major win for us. Next slide, please.

As I said, this overview does not adequately address the changes. We'd have to spend a good part of this session talking about it if we wanted to go into the details. The earlier versions, as you'll see from the actual Annex 5 because it does show the original Bylaws. It shows what it was in Proposal 3 and what it is today. There were a good number of changes, and we think it's in pretty good shape right now.

ALAC concerns. Next slide, please. No. We've gone too far, 45. Thank you.

The ALAC concerns are that we are making a large number of changes. We think each of them is a good change. Will there be interactions between the two? Will there be consequences that add some level of complexity or difficulty that we're not foreseeing? That's clearly a problem. Any time you make large numbers of changes, you have a potential for introducing things that weren't quite expected. So that's one concern.

Second of all, the language in Annex 5 largely reads like bylaws, but it is not the final Bylaws. The final Bylaws need to be drafted by legal counsel, both ICANN and external, ones that are working with the CCWG. The final wording is going to be critical. We are going to have to put a fair amount of effort into making sure that the final Bylaws actually say what we want them to say.

Open the floor to any questions or comments. I've spent much more time on this one than we're going to spend on some of the

recommendations, but it is a complex area and it needs to be reviewed. No comments? No questions?

Then we will go on to Number 6. Next slide, please. Okay. Human Rights. This was a highly contentious section. There is no one who will openly say, "I am against human rights." I don't think there was anyone in the working group that was against human rights. But the wording of what we were committing to when it would be inserted was very critical. Next slide.

Everyone agreed that we had to mention human rights somewhere. There was a great concern that, although we say we support human rights, we have no clue exactly what that means in the general case to what we do. Where does human rights kick in? Where do people believe we might be violating human rights, and exactly how should we be guided in doing our work to ensure that we are honoring human rights? There was a general acceptance that we were not going to define that in Work Stream 1. It was too specialized and too complex an issue. It would be done in Work Stream 2.

There were large concerns that if we mention human rights and not have a very close defined idea of what it means, we would have an opportunity for potentially large numbers of IRP cases and potentially court lawsuits claiming we are violating human rights. Those may or may not have merit, but even if they have no merit, would take a lot of resources to respond to. That was certainly a large concern.

There were some people who felt that we must not mention human rights in the Bylaws until we do the Work Stream 2 work. There were others who felt we must mention human rights in the Bylaws now. So coming up with wording that satisfied everybody, and even when you get down to the detailed wording, do we mention the various international accords? International accords are binding on governments, not individual corporations, but some of them might be binding based on local law.

Some parts of the human rights simply are not relevant to what we're doing. The claim was made in the CCWG that, for instance, antislavery rules do not apply. There are others in the CCWG who believed that the slavery rules did apply very much in regard to the work we were doing and the work flow that was imposed on us. A little bit of humor. So it certainly was a contentious issue. Next slide, please.

This is what we ended up with: "Within its Core Values, ICANN will commit to respect internationally recognized Human Rights as required by applicable law. This provision does not create any additional obligation for ICANN to respond to or consider any complaint, request, or demand seeking the enforcement of Human Rights by ICANN. This Bylaw provision will not enter into force until (1) a Framework of Interpretation for Human Rights is developed by the CCWG-Accountability as a consensus recommendation in Work Stream 2 (including Chartering Organizations' approval) and (2) the Framework of Interpretation for Human Rights is approved by the ICANN Board using the same process and criteria it has committed to use to consider the Work Stream 1 recommendations." More than a mouthful.

Again, this is not the final bylaw. It would be highly unusual for the bylaw to refer to a work stream within a working group which is not defined in the Bylaws. The legal people have a little bit of a task on their hands to translate this into real bylaw language, but this is the intent and this is what the endpoint is that we're looking for.

ALAC concerns. As I said, we have ongoing concern of consequences this language can have, and I'll give you an example. It says, "This bylaw shall not be enforceable," but let's say it takes us five years to come up with this Framework of Interpretation. It is conceivable that a court could decide that because we put the bylaw language in, even though we say it's not enforceable, it is because we have not responded in a timely manner to creating the Framework of Interpretation. That was a fear that was raised and, hopefully, it is not a large on because we are inserting the language and we do plan to have the Framework of Interpretation. The target was one year. Whether we'll make it or not is not clear. We are not stating what that target is but, certainly, the intent is to try to do it moderately quickly.

Lastly, there are some who feel that it shouldn't have said "Core Values." It should say "Mission." My personal position is that is not an important issue, but to some people it has been. And specifically, Tijani has filed a minority report saying that.

Questions on Recommendation 6? Sandra, go ahead.

SANDRA HOFERICHTER: Thank you, Alan. Can you hear me?

ALAN GREENBERG: Yes, we can.

SANDRA HOFERICHTER: I did follow the human rights discussion between ICANN only from a distance, but I wonder or I have a feeling people are talking about human rights that are not really experts in this very broad field. So I wonder to this extent [inaudible] organizations like Amnesty International, Human Rights Watch, or Reporters Without Borders have been already involved in this discussion or if it's specifically planned to involve such organizations in the discussion.

Which leads to a next question or a recommendation. As you all know, human rights might apply differently in different parts of the world. [inaudible] differently than the Chinese government [inaudible]. So I wonder if it would be [inaudible] way to move forward. My question is if this has been [inaudible] already or if this has been discussed, that ICANN puts itself on a voluntary basis in the position to be [inaudible] Amnesty International or Human Rights Watch or whatever organization is doing [inaudible]. I just remember here in the last two days, the German government has been evaluated by Amnesty International for the refugee's politics. And those organizations are [inaudible] but they do have the expertise to really judge the violation or the exercise of human rights [inaudible].

I wonder if this was on the table already or if this might be a new proposal which maybe the ALAC can bring forward. Thank you very much.

ALAN GREENBERG: Thank you very much. I must admit I had trouble hearing you part of the time. But the gist of what Sandra was saying there are organizations with significant involvement in human rights. Also organizations that tend to evaluate other organizations. Amnesty International is one of them. How will they be involved, if at all, going forward? And are we in a position where they may come in and evaluate our performance in human rights? The answer to all of that is: good questions.

Certainly, there has been a fear that if we're not client in the words we put in the Bylaws, we may well find ourselves with people claiming that we are violating human rights. That was one of the reasons we have put caveats in saying until the Framework of Interpretation is written and approved, this bylaw is a placeholder, essentially. Presumably, it will be replaced by something else at the time that the framework is complete.

How we're going to do this in Work Stream 2 we have not focused on at all. Certainly, I have not focused on at all. There may well have been some work in the subgroup looking at human rights, but I don't believe there has been any substantive work at that point. So that's work to be done. If anyone is interested, there's going to be plenty to go around.

Any other questions? My understanding is – I'm not monitoring the chat, by the way. I'm presuming staff is monitoring and if there are any

questions that need to be raised, someone on staff will raise their hand. Yes, Sebastien, go ahead.

SEBASTIEN BACHOLLET: Thank you very much, Alan. Just to hit on the human rights will be on Work Stream 2, and it's written that it will be a subgroup of the CCWG. But in the same time, there is already a cross-community working group on human rights within ICANN, and we will have to figure out how we put that all together in the right line. But, yes, there is already work done on that issue outside of the CCWG, but we need to bring that inside the CCWG one way or the other. Thank you.

ALAN GREENBERG: Yes. Thank you. There was a substantive discussion on whether this work should be done in another group parallel to the CCWG or in the CCWG. In the end, we decided to put in essentially instructions to the bylaw drafters that it should be the CCWG. Clearly, the CCWG is controlled by its chartering organizations and should we decide some other vehicle is the better one in which to do the work, that is something the chartering organizations could agree to should they have some interest.

Olivier, I thought I saw your hand up, but it's down now. Are you withdrawing?

OLIVIER CRÉPIN-LEBLOND: Thanks, Alan. No, Sebastien said what I wanted to say, so that's all fine. Just one more thing though. I think keeping it within the CCWG is probably better as far as resources are concerned than having another group because we know the CCWG does have commitment already from ICANN as far as support is concerned, whilst the other group might not have the same level of support.

ALAN GREENBERG: We really don't want to have that discussion over again. It is currently in the CCWG. If action is taken to move it out, it will have to be action with the support of the chartering organizations. And presumably, we will only do that if it makes sense.

OLIVIER CRÉPIN-LEBLOND: Exactly.

ALAN GREENBERG: I'd like to attribute rationality to what we decide to do.

Alright, Recommendation 7 is on the Independent Review Process. I was hoping that Leon would be on the call in order to do this one, and he is not here. I would really like to take a break from talking. Is there anyone else who feels in a position they can carry on, on this particular recommendation? Olivier?

OLIVIER CRÉPIN-LEBLOND: Yes, thanks, Alan. I had volunteered if Leon was unavailable.

ALAN GREENBERG: That's correct. You did. So I'll turn it over to you.

OLIVIER CRÉPIN-LEBLOND: Okay, thanks. Right, 7. Recommendation 7 and 8 are somehow, well, quite linked together because they both deal with review of actions taken by the Board.

Starting with 7, this is about strengthening ICANN's Independent Review Process. The purpose of what we call the RIP is to ensure that ICANN does not actually take action or do things that exceed the scope of its actual Mission, which is defined in the Articles of Incorporation and also defined in its Bylaws and in the Mission that we've just spoken about a moment ago. Looking back at how the IRP has been running so far, it was agreed by everybody that the current process has some real problems. Let's go to the next page, please.

The problems are as follows. First thing, the idea of the revised IRP is to have a system, a process that is much more transparent than currently, that is efficient, that is accessible to everyone, whilst the current one was not doing this. And also the idea is to have an IRP that is designed to produce consistent and coherent results that would serve as a guide for future actions.

To give you an idea, a recent process using external counsel, so external organizations to make decisions on things, when we were looking at the visual similarity of new generic top-level domains, there were several

panels that were used to make such decisions. Some panels looking at exactly the same string as the other panel said, "Yes, there was visual similarity," and others said, "No, there is no visual similarity," or there's no confusion between those strings. So there was a real lack of consistency in the way that things were done. The revised IRP is basically being looked at to improve on all of these points. Let's first go to the next page, and then we'll give you an idea of what the plan is to move forward.

The IRP is there to effectively look if the Board of Directors or staff have acted in violation of the Articles of Incorporation. In addition to this, now that we are proposing in the IANA stewardship transition a post-transition IANA and some kind of a review process for actions that are taken in relation to the post-transition IANA, there needed to be language to be added so that if the Board of Directors of PTI (post-transition IANA) or the staff had acted in violation of the contract with ICANN and in violation of the requirements that were set by the CCWG stewardship – we're looking here at the overall quality management, etc. – if this had been breached, then the claim could be made using the IRP.

The expert panel decisions, for example, that I just spoke about, those being inconsistent with ICANN Bylaws could also be challenged using the new IRP.

The document disclosure decisions by ICANN being inconsistent with ICANN Bylaws, you ask for a document that is currently not disclosed, some internal accounts or something, and you say, "I want to have a

copy of this," you don't get it because the finance department decides that this is not something they want to release whilst at the same time the Bylaws say that, "Yes, there needs to be full transparency on this," that's something that can be challenged using an IRP.

Then finally also, any challenge that could be initiated by the Empowered Community (EC) that we've spoken about with regards to matters that are reserved to the Empowered Community in the Articles of Incorporation or Bylaws – so effectively the powers that we're now giving to the Empowered Community – so the EC could make use of this IRP. Next slide, please.

The way that the new panel is designed is to have a standing panel of seven members that would be chosen amongst people that are completely independent of ICANN, of ICANN's constituencies, etc., that would have a specific set of knowledge, depending on the type of review that is being required.

The escalation process to reach that level is actually, just like all of the other escalation processes, quite complex. The ICANN and aggrieved party – the people that are wanting to challenge – first need to try and get some cooperative agreement or cooperative engagement together. If there's a resolution beyond that, then it doesn't go any further.

If on the other hand, there is no resolution, then the aggrieved party can ask for a request for an independent review, and this panel of seven members is being put together. If the discussion is being placed on

there and the request is accepted, then an actual review panel is formed.

That's where you reach the three-member panel where you have a member of each [side], so the party that would be in favor of the point that is being reviewed and the party that would be against the point that would be reviewed, and a third person would be chosen amongst these two people to build that review panel. And the decision that would be given on the review by this review panel would be a binding decision that the Board would need to comply with. That's the process that is proposed to be used.

It's got the importance of having significant legal expertise, particularly in international law. There is also for the seven-person panel a wish to have a reflection of diversity – cultural, gender, linguistic, regional diversity – which is something that we have fought quite hard in At-Large to have. That's the way that the panel would be built, and that's the way that the panel would actually run. Next slide. Thank you.

Now, what would be the standing of this panel? Well, as I said, any group that would be materially affected by ICANN's actions or inactions and violations of the Articles of Incorporation and Bylaws, etc. If the Board fails to fully implement and impart community decisions, that's also grounds for launching an independent review. As I mentioned earlier as well, a big difference now with the review panel is that, before, the independent review might have had to be paid for partly at least by the aggrieved party, by the people calling for this review, and now the idea is for ICANN to bear all of the costs. Although, of course,

there are some provisions for a reversal of costs if it is deemed by the panel that the review was frivolous, in other words just trying to waste everybody's time or was actually malicious in one way or another. So the Devil goes into the details of how this would be implemented, but certainly all of the points have been seen on this.

Now the next slide is about our concerns on this. As far as the ALAC is concerned, we are particularly happy – and I'm saying, not the ALAC, but certainly the people that were involved in discussing this – were particularly happy that this IRP was being put together. The whole process of the IANA stewardship transition resides in having a good independent review process in place. So I think that as far as we were concerned, there was a lot of support for that. I might call right now, actually, on colleagues who were involved with this if there were any concerns that you would have voiced that were not addressed.

ALAN GREENBERG: I had [inaudible]. No concerns, but just to highlight a number of things. As you said, the Empowered Community has standing. That is a very different issue from currently. Right now, you essentially have to be one of the aggrieved parties to complain. We at this point now can say, "We don't believe what the Board did. We may not have been hurt by it, but we do not believe it's correct." So standing for the Empowered Community is a large thing.

One of the things that didn't come through in the slides – and that's my fault because I did put them together – is the outcome of an IRP is not

remedial. That is, the outcome can only be that ICANN has violated its Bylaws and it must fix whatever the problem is so that it is within its Bylaws. The IRP panel does not specify what the fix is, and that's very important because we do not want the decision made of how to run our business made by some external panel. That was one of the hot points within At-Large when we were building this. That is, we must keep inside of ICANN the decision on how to run ICANN, but this panel can say, "You didn't do it properly. Fix it."

I think that is the main issue I wanted to raise.

OLIVIER CRÉPIN-LEBLOND: Okay, thanks, Alan. In that case, we can move on then to the next recommendation if nobody else has any questions. I don't see anyone else putting their hand up, so the next one is about ICANN's Request for Reconsideration. Now prior to an independent review, the first step in disagreeing with an ICANN Board decision or the inaction of ICANN would be calling for a reconsideration process. The current procedure is accepted and thought of by all parties as being quite, well, just not up to the task at all. In fact, as far back as the second Accountability and Transparency Review Team, there were serious concerns about ICANN's reconsideration process. Let's go to the next slide.

The problem with the current process is that it considers whether a correct process was followed. In other words, you can only challenge the Board's actions or inactions on whether the Board has actually followed due process to reach decisions. There have been countless

number of times when the Board has decided something when the community and other parties that were concerned and so on did not agree, asked for a reconsideration request – and in fact you can see on the slide about 150 requests were made in ICANN's history – and a very large percentage of these, perhaps even all of them, sorry, a large percentage were dealing with the New gTLD Process, but nearly all of them resulted in a decision not to change anything because of the very narrow mandate of a reconsideration request.

So the Board might be taking a decision that was absolutely absurd, but as long as it actually followed procedures, it was not compelled to reconsider things and could not come up with a different decision upon second thought. There might have been a position where if there were significantly new information that was included in the discussion that might turn the Board over, but in the majority of the cases that was not the case at all.

Now the enhanced consideration, which is on the next slide please, provides an expansion of the scope of permissible requests. Those actually are based on, first, ICANN's Mission, Commitments, Core Values, and also looking at the reconciling of conflicting and inconsistent expert opinions, which I've alluded to earlier.

If you can actually get those decisions changed before having to go for an independent review process, that really is the recommendation that would help with the Board being able to change its point of view based on information that it actually has. In some way, it certainly enhances the accountability of the Board and of all of ICANN because it is able to

say, "Well, okay, we made a mistake. We can change our minds now and we can go back. The evidence is such-and-such."

There is one thing to note, and that's actually in relation to the Bylaws. Because we are looking at reconsideration on actions or inactions that contradict ICANN's Bylaws as well and now we are enumerating those – and I think we will go, the next few slides will be about the Bylaws – if we're enumerating the Bylaws, we really are now tightening up the range of things that ICANN can do, and therefore we're also going to be able to open up the ability to challenge some of ICANN's actions or we might be able to open up the challenging on ICANN's actions based on the narrower enumerated mandate. That's still something for discussion, and Alan might have a few things to say about this or others in the CCWG.

Are there any concerns? Because the next slide is about our ALAC concerns. One of the concerns is the tightening of the Bylaws and is the fact that you could then have more requests for reconsideration. But the way that this is, again, the process is some kind of an escalation procedure and we're not just saying anybody can just file a reconsideration without any proof or without any reason to do so. Certainly the concern about delaying ICANN actions by playing the game of asking for reconsideration consistently again and again was obviously also brought up. The details of the implementation will obviously take care of that.

Any questions, comments on this? Alan, any additional thoughts that you might have on this?

ALAN GREENBERG: No. Oh, I guess a couple. The point that I want to emphasize is, of the 150 reconsideration requests, I think none of them have been accepted. There may be one or two along the way. That clearly says there is a very large mismatch of what people were expecting from the reconsideration process compared to what it actually could do. Because it simply said that all we are obliged to do is follow our process properly – and I will be direct – no matter how stupid the outcome is, if we followed the process, then we're clean.

This new process has an obligation to look at it from a stronger position than that. That is, just because we had bad processes in place does not mean that we will reinforce them time and time again. That's number one.

Number two, one has to ask the question, in 150 cases, even if all we're looking at is, "Did we follow the process?" is it really likely that ICANN never made a mistake even in following its processes? Now, we know from personal experience that ICANN makes mistakes in setting up our travel arrangements. Do we really believe in the more substantive areas that we're talking about here they never make mistakes? The result of the reconsideration history implies they don't. That may mean that the standard for deciding whether a mistake was made is not quite as flexible and understanding of the client's point of view as opposed to the staff's point of view.

One of the things that is changed here is instead of ICANN legal making the first determination of whether there's a problem or not, they will be going to ombudsman. This is a very substantial change in the responsibilities for the office of the ombudsman, and it's going to be interesting to see how it works out. It's a really big change, and hopefully it will be a change for the better. Thank you.

OLIVIER CRÉPIN-LEBLOND: Thank you, Alan. Just to add, as opposed to the IRP which we heard about earlier, a reconsideration request will lead to an ICANN Board decision. Obviously, it's an appeal on an ICANN Board decision, and therefore once it goes through the ICANN ombudsman, once the Board Governance Committee considers the request for review and then the Board engages in the discussion again – and in a much more improved process of improved transparency and accessibility – then the Board will make another decision after that. Obviously, if the community and the people requesting the reconsideration are still unhappy, then a request for an independent review process can take place afterwards.

But that's really part of the way to challenge Board decisions and to make sure that if the Board does make a very stupid decision in the eyes of the community, the community is able to ask for a fair reconsideration on all of the grounds that we've mentioned.

That's all about Recommendation 8. Is there any other question or comment on this? I'm a bit surprised there's so much silence today on the call. Alan Greenberg?

ALAN GREENBERG: Yes. Thank you. Just a comment on both of these. There has been a lot of contention within the CCWG on some of the changes we're recommending. As many of you know, the Board, for instance, took some of the recommendations we were making along the way – not necessarily ones that are in this final proposal – and had very, very visceral strong objections to them. Although we had certainly been discussing the details of these two recommendations, the IRP and reconsideration, we went into this process with everyone, including the Board, believing that what we had was broken. I think this perhaps is one of the better examples of how different groups can work together to come up with an end product that does meet ICANN's needs better and not necessarily in a negative way balance the various competing needs and end up with something that really makes the organization better. So it's an interesting back story behind these two recommendations in particular. Thank you.

OLIVIER CRÉPIN-LEBLOND: Thanks, Alan. I note in the chat that it is mentioned, "The selection of the ombudsman will be absolutely key." I was going to add that the ombudsman is an independent professional, currently Chris LaHatte, who is mutual and as I said independent to ICANN. I think certainly that will put a lot more pressure on the position of the ICANN ombudsman, but so far I think that the process of the ombudsman has worked pretty well. Obviously, I don't think there is any idea that when we'll be having a different ombudsman in the future. But obviously it is important to

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have a mutual and independent ombudsman when it comes to this. Bearing in mind the ombudsman is indemnified. I might be saying something wrong, but I believe the ombudsman is indemnified if he has to take action against ICANN. Alan?

ALAN GREENBERG: Yes. Just to be clear, there is no intent at this point, at least none that I'm aware of, that we will be selecting a new ombudsman. It may well be that the current ombudsman and deputy ombudsman may be overloaded and we'll have to add people to it. Of course, we could replace people along the way as we have done before, but the intent at this point is not to rebuild the office from scratch.

So although the selection, yes, is key, there was no planned intent at this point that I'm aware of in any case to do a replacement. And Chris LaHatte, the current ombudsman, will be having a presentation in Marrakech on how his office will be changing because of these recommendations. And indeed when we get to Work Stream 2, you'll see there's another recommendation regarding the ombudsman which could have even farther ranging impact on the office.

OLIVIER CRÉPIN-LEBLOND: Thanks, Alan. Sebastien Bachollet? Sebastien, you might be muted. We cannot hear you at the moment.

SEBASTIEN BACHOLLET: Is it better now?

OLIVIER CRÉPIN-LEBLOND: Yes. Now we can hear you. Go ahead.

SEBASTIEN BACHOLLET: Okay, thank you. Yes. I just want to question you about what you said about the ombudsman. First of all, he is elected by the Board and he can be recalled by the Board and he has a certain time. I don't remember when, but if I am not mistaken too much, it will be to have renewal. It was already renewed one time, and I am not sure that it will be renewed a third time.

There's a way the ombudsman office is created or selected and when the deputy ombudsman is selected it's quite interesting [inaudible] within the Board, and I really think that one time and maybe in Work Stream 2 we will have to look at that, what is the position of the community on that. I will not tell you anything more who are inside the Board, but just we need to be client on how it's and how it's independent.

Today his link is with the Board Governance Committee. He is supposed to be under the chair decision and not the CO. That's the difference for all the other staff, but he is paid by ICANN. I think Work Stream 2 will be interesting in that regard. Thank you. And nothing against or for the current ombudsman or the previous one. It is the current situation where we are. Thank you.

OLIVIER CRÉPIN-LEBLOND: Thank you, Sebastien, for this additional information. That's always helpful. Obviously, yes, the great thing about this work is that there is a Work Stream 2 that will continue work on a whole number of points which were not contained in Work Stream 1.

Back to you, Alan. I believe the next one is Incorporating the Affirmation of Commitments in ICANN's Bylaws. I can't remember if it was you or if it was Cheryl that is to do that.

ALAN GREENBERG: No. I'll be doing that one.

OLIVIER CRÉPIN-LEBLOND: Okay. Over to you, Alan.

ALAN GREENBERG: I think, Cheryl, that is correct. Did you volunteer for that one?

CHERYL LANGDON-ORR: No, no. Go ahead.

ALAN GREENBERG: Okay, thank you. Alright. As many of you know, ICANN has had a variety of different forms of agreement with the U.S. government. Originally, other parts of the U.S. government then transferred to the U.S. Department of Commerce. Well, ICANN and its predecessor, parts of

the organization, IANA. And a number of years ago, the Memorandum of Understanding between the two organizations was replaced by something called the Affirmation of Commitments. The Affirmation of Commitments is a document that was drafted jointly by the U.S. government, the NTIA, and ICANN.

It essentially is a voluntary agreement, either party could cancel it, that commits ICANN to do a number of things. Among other things, it commits them to do a set of reviews. But perhaps more important, there were issues that functionally were related to what is in Article 1 of the Bylaws that we talked about earlier that were added.

It was felt that with the U.S. government getting out of the IANA business, so to speak, and given that the Affirmation of Commitments could be cancelled in theory by a future Board, that we should be putting the Affirmation into the Bylaws and make it a formal part of the ICANN organization, essentially. Next slide, please.

The Affirmation of Commitments as part of this process essentially has been imported into the Bylaws, largely in Article 1. There are a number of issues that are little things that were cleared up but which will make a large difference.

For instance, the ATRT (the Accountability and Transparency Review Team) in the past has had some difficulty accessing ICANN documents. It now makes it clear that, even if the group has to sign nondisclosure agreements, that the group should have access to documents and,

therefore, it can assess fully what ICANN's accountability and transparency is and make recommendations. This is no small thing.

The Affirmation of Commitments called for these reviews to be every three years. Now, given that the review tends to take a year (although some reviews have taken considerably longer than a year) and it called for a new review to be started three years after the last one started, that gave sometimes well under two years to implement it. And we found that when we go into the second round of a review, we haven't even implemented the things that came under the first one.

So it was thought to be a bit aggressive, and the scheduling now says it must be every five years. It could be sooner, but it allows us to extend the reviews, which is in line with what is really happening right now. Even though the current Affirmation of Commitments said three years, we in fact have by Board action increased the amount to something a little bit more reasonable.

Holly, I see your hand is up. Was that an old hand, or do you want to talk about the AoC, or are you just getting in line to talk about it? Holly doesn't want to answer or can't answer, so I'll assume it will be a hand that we'll use at the end of this section.

There was a lot of discussion on the details. For instance, the reference – well, just on a general sense, there's a lot of stuff in the AoC which would not normally be in Bylaws. There was a lot of discussion about what should be in the Bylaws and what should not be in the Bylaws. To a large extent, the AoC in total was imported into the Bylaws, and many

things were unchanged. Although, there were a couple of things that were changed along the way. Next slide.

The first thing that was changed is one of the AoC reviews is a WHOIS review. There was some feeling within the CCWG that we could not make wholesale changes to the description of the review.

The Board, and Steve Crocker in particular, made an impassioned plea to say the words that were in the AoC review were ill-conceived at the time they were written. They never should have been there, but ICANN didn't have a lot of flexibility at that point to demand that they be changed. And we should not go forward with words that, number one, didn't apply to the current environment we're in, in some cases implied we should be doing illegal things. That is, demanding certain things be done which are counter to national law in some cases. So that one was revised reflect what we should be doing going forward.

There were new reviews associated with Review Teams and how they were selected that were quite a vast change from the ones before. I'll talk about that a little bit as we go ahead. Next slide.

Specifically, the Review Teams were, according to the AoC, the ATRT (the Accountability and Transparency Review Team) the team members were selected by the Board chair and the GAC chair jointly. So the process for those who aren't familiar is people apply and say they want to be on the team. They will typically say, "I want to be on the team representing the ALAC or representing the GNSO," and they have to be endorsed. Well, they don't have to be, but the practice has been that if

someone is going to be representing the ALAC, the ALAC has to agree. Now that may seem like a no-brainer, but we have had people apply to represent a group who have never been heard of by that group before. So there is a process that does have to be followed.

The other reviews are selected by the CEO and the chair of the GAC. Again, you'll notice the chair of the GAC has a major role to play because this is one of those areas where governments do not control things but should have significant influence. I will say that the chair of the GAC, even though the selectors have complete discretion as to the size of the group, the number of people from each organization, there has never been any indication that the chair of the GAC has misused his or her prerogative to stack the group with GAC members. That is an issue as we go forward.

The new process is that the Review Teams may be up to 21 members from ACs and SOs, plus Board, plus experts. Every AC and SO can select up to 7 people to represent them. And the actual selection is done by the AC/SO chairs. Next slide, please.

The ALAC, and certainly I, have very many concerns with this. Just for clarity, I was a member of the ATRT 2, so I think I have some understanding of how these Review Teams work. I believe the size of the Review Team is way overloaded. The wording that is in the report says that we based the 21 number based on past history, which I believe was incorrect. Past Review Teams have always between 11 and 13 AC/SO members, never anything near the 21.

As much as I like bottom-up organizations, I have a real concern with the chairs doing the selection. Chairs are going to be under extreme pressure to meet the needs and desires of their own group.

For instance, the ALAC chair could well be under pressure to say, "There must be five ALAC members on this group because we must have regional representation." Now it's not clear that the differences per region are significant, but that could be an aim.

The GNSO chair is going to be under severe pressure to make sure that all of the current seven constituencies and stakeholder groups are represented instead of just perhaps the four stakeholder groups. And as that number grows, that number is going to increase also.

I believe that we're going to find that the next Review Teams created using this new process are somewhat unwieldy, and we'll have to react to that.

I also don't believe that the detailed processes of how the people are selected and the operational characteristics of these groups really should have been imbedded in the Bylaws. I think they should have been in an ancillary document which can be changed a lot more nimbly than a bylaw change.

And I'll open the floor. Oliver, go ahead.

OLIVIER CRÉPIN-LEBLOND: Thanks very much, Alan. I totally agree with all the points you've made here. Having also been in the ATRT 2, I just don't see how this is going to work out, but we'll see, assuming it does work out.

I wanted to bring another thing to everyone's attention, and that's the fact that the line that has been taken for some reason is that the majority of the contents of the Affirmation of Commitments is solely based on review, is only to do with reviews.

I and several others had a different point of view on this, believing that some parts of the AoC actually affect ICANN as a whole and should not just be related to reviews. The point, for example, relating to consumer trust and consumer choice was not something that we felt worked in the context of the New gTLD Process only, but actually across all of ICANN.

That's a real concern if we have now a no consumer trust bylaw per se and the mandate of consumer choice. This sort of thing is a concern because what it, therefore, could mean is that ICANN, if it does detect monopolistic procedures in the industry of domain names, might end up with a monopoly facing it as far as the industry is concerned. It's an extreme scenario. It could be seen as "fear, uncertainty, and doubt," otherwise known as "FUD," but it's a concern. That's one thing which I feel the ALAC might wish to say something about if it was to make a statement. I would, of course, be volunteering to hold the pen or help be in the team that would write such a statement along with any ratification, if we decide to ratify it. Maybe we don't. Thanks.

ALAN GREENBERG: Thank you, Olivier, and I raised my own hand on this to comment on it. Yes, the consumer trust was an interesting, I guess, story in how this process has worked. There is a clause in the AoC, in the preamble – it's Clause 3 if you choose to look it up – that says ICANN will focus on a bunch of things. One of them is consumer trust. There are no words in that statement that limits it to consumer trust associated with the New gTLD Process. But the sections of Section 3, in fact, do happen to map to that AoC reviews that are later mandated.

Many people read this as implying that since it was there as a preamble to the reviews, it was focusing on consumer trust in new gTLDs and, by incorporating the new gTLD consumer trust review – which does more than just trust; it's competition in a number of other things – that the AoC was being met. We were the only ones who interpreted it in that wider sense and, ultimately, the CCWG went back to the NTIA person who authored the request and asked, "What did you mean by it?" and the answer was, "This was a preamble to the reviews and was focusing purely on the consumer trust associated with the new gTLDs." So we didn't have a strong position.

There was an overall, not mandate, but decision that we were not trying to widen the Mission of ICANN and, therefore, new things that were completely unrelated to what we were talking about should probably not be there. There were restrictions put on, but not widening. And as I said, there was literally no support, and it's an exercise in compromise, and that's not one that we won.

Now, I'll note the Compliance Department does have as the as the Compliance Department Mission includes consumer trust in the wider sense, not just new gTLDs. So there is an established precedent that consumer trust is something that ICANN cares about, but it is troublesome that there was so much pushback in trying to include it in the core Bylaws, and the ALAC will be following up on this.

Ariel, you had your hand up. Did you want to talk about something that was in the chat?

ARIEL LIANG: Holly just asked a question, but I think you already answered it. It's about including consumer trust to attach the wording.

ALAN GREENBERG: Okay. Olivier, I think that's a new hand?

OLIVIER CRÉPIN-LEBLOND: Yes, Alan. Thank you. You mentioned that the paragraph about consumer trust, paragraph 3, was in the preamble. I'm not disagreeing, but I'm saying I disagree it's in the preamble. These are 11 paragraphs.

SEUN OJEDEJI: Hello?

OLIVIER CRÉPIN-LEBLOND: Hello. Yes?

ALAN GREENBERG: Yes, Seun. I hear you. If you want to speak, we'll call on you later.

OLIVIER CRÉPIN-LEBLOND: These are 11 paragraphs, and none of them are labeled as being the preamble of another paragraph and [inaudible].

ALAN GREENBERG: Olivier, I retract the word "preamble." It's early in the AoC.

OLIVIER CRÉPIN-LEBLOND: It's earlier in the AoC, yes. Paragraph 3, and there are 11 of them. Paragraph 9 is the one that deals with all of the reviews, and the others are – Yes?

ALAN GREENBERG: For clarity, the sections of paragraph 3 do happen to map to the reviews. So it's not completely coincidental. In any case, yes, we fervently fought that one. We lost. The whole concept of multi-stakeholderism is we have to find a balance between various different views, and that was not one that we came out ahead. We did come out ahead on a very significant number of them; this wasn't one of them. Given that it is already in the Compliance Mission in the general sense, I don't think we have an immediate threat.

Rinalia has suggested that maybe we want to raise this with the Board, and it already is on our list of things to raise with the Board. Thank you.

Any other comments?

Although I certainly have concern and many other people in ALAC have concern, these are not debilitating ones. These are not enough to reject the transition to the accountability Bylaws. But we expect that things are not going to work quite as well, and hopefully the Review Teams themselves will make some recommendations which will result in the bylaw changes to make this more rational, hopefully.

Next one is Recommendation 10, and I believe Cheryl was doing this one. I'm sorry. I see a hand up. Aida in the Spanish channel. And, Seun, I think you wanted to speak, and you'll be next.

AIDA NOBLIA: Can you hear me?

ALAN GREENBERG: Yes, we can.

AIDA NOBLIA: Just a brief comment or a brief question, taking into account all the issues and comments that you are presenting right now. Since we are talking about bylaws, there is a complex, a new situation. It is difficult to prove all the situations in the future. What I have seen so far at the legal level, if you will, is that there are interpretation principles for the

Bylaws. We know bylaws will not cover all the situations, so we need to take into account how to manage all the threats that we will face and all the situations that will come up and the consequences that we may have due to the different wording.

In some other aspects, we can see certain interpretation roles. I mean not bylaw principles, but principles that have to do with interpretation of bylaws. For example, proportionality principle that might be applied to all the provisions set forth in the bylaws. I mean the proportion of the sanctions, proportion of responsibility or accountability as the one that we have. We also have the rationality.

And we need to pay attention to this because we have a relationship among different situations and different principles. For example, we have the transparency principles that can be applied to data escrow or this principle can be applied to other situations.

Perhaps we have to take into account interpretation principles. This is my idea. This is something I wanted to share with you. Thank you.

ALAN GREENBERG: Thank you very much. The issue is of interpretation and how specific are bylaws and how do they get interpreted was one that was focused on a lot by the CCWG. There were certainly some parties within the CCWG who felt strongly that we had to be very, very precise and proscriptive in some of the clause, particularly related to ICANN's Mission and things like control of content.

It's quite interesting. We went to a point where we had drafts that were very, very specific, and there were some of us who felt very uncomfortable with that. It was our lawyer's comment that came back and said, "Be client what you do. If you are too specific, you will probably open loopholes that you didn't expect. Even though you're trying to close the loopholes by being specific, once you have a very detailed list, you almost invariably open details. Bylaws are written, like national laws, to be subject to interpretation, and you're going to have to trust the Board and the external bodies – things like the IRP and perhaps the courts – to do that interpretation as you go forward.

In terms of – I think I mentioned this earlier under the Mission and Core Values recommendation – there are going to be conflicts. You can't always do everything, and you have to make decisions. In a simpler case, there was a statement in the IRP that the panel of seven people should reflect diversity in gender and race and geography and language and culture. Well, seven people are not going to reflect all of those. Obviously, there are decisions that have to be made.

So, yes, as we go forward, there are interpretations and decisions that will be made, and they could end up resulting in bylaw changes because of how we are forced to interpret them. But we do have a lot of flexibility, and the kind of interpretation you're talking about is part of what we do and that is part of the responsibility at the first level of the Board.

Seun, you wanted to get in, I believe. Can you speak?

AIDA NOBLIA: Alan, if I may, may I have the floor?

ALAN GREENBERG: Yes. If we could hear from Seun first, and then go back. Is Seun on the line? If you are speaking, we cannot hear you.

SEUN OJEDEJI: Hello. Can you hear me?

ALAN GREENBERG: Yes, we can hear you now.

SEUN OJEDEJI: Yes, actually I was not asking for the floor, but since I have it, let me just ask this question. [inaudible] to the [inaudible] does the [inaudible] actually have – I don't think the [inaudible] was actually got any power to recommend a change to the Bylaws, do we? Was that proposed in the CCWG proposal?

ALAN GREENBERG: I'm sorry. I didn't understand. Can you say that again?

SEUN OJEDEJI: Yes. There's just a discussion in the chat, and then there was a discussion about the opportunity to actually change things in the dialogue later after the transition. And I'm asking, does the EC actually have the power to actually recommend that [inaudible] part of the bylaw should be changed, or it has to come from the Board?

ALAN GREENBERG: Okay. The question is, does the EC have the ability to recommend bylaws? No. The Empowered Community has to ratify and approve fundamental changes and can reject other changes. However, the Board is here working with the rest of the community, and many bylaw changes over the past years are there as a result of things that are done or recommended by parts of the community.

                      So the Board is not disjoined from the rest of us. Every group in ICANN either has a liaison or a Board member sitting there, and that's a vehicle by which things can be brought up to the Board. But the Empowered Community specifically does not have the ability to unilaterally impose bylaws or even initiate them unless there is also support from the Board.

                      Okay, back to Aida and then Sebastien.

AIDA NOBLIA: The idea was just to clear out certain situations because we are now seeing specific situations that are coming. So perhaps we can add a provision in the Bylaws regarding interpretation rules for the Bylaws or

interpretation rules for principles. Since we have bylaw principles, we may have also interpretation principles for bylaws. There is a set of principles that have to do with legal matters. For example, goals, transparency, I mean, different principles that are being used at a legal level. Since we are facing a very changing reality. So that was my idea. Thank you very much.

ALAN GREENBERG: Thank you. A lot of that is in the Bylaws right now. If you read the new proposed Bylaws, there are parts about interpretation. But to be quite straightforward, we have spent 15-18 months on this. This is the proposal going forward. There is no opportunity at this particular interval to make new changes. So unless someone finds something which is a fatal flaw which we need to identify, we are not going to see more changes at this stage unless we are willing to defer the acceptance of this proposal and, implicitly, the IANA transition. But I think I can say with some confidence that a lot of what you're talking about is indeed in the Bylaws as we stand and going forward.

Sebastien?

SEBASTIEN BACHOLLET: Yes, thank you very much. I think we are touching some very important issue here. In the chat, there is discussion about the second Board member, but it was already in the first review of the ALAC and the question of how the Board engage. The situation today is that even if we have the agreement of the Board, we may have the disagreement of

the other community as some of them were very, very active against the AC in general, the ALAC in particular, and we have to be very client on what we are signing here.

But just a question of interpretation, Alan. You talk about a document about diversity talking about IRP people, but it was never meant to be. The document I wrote was about diversity in general. It was not to say that each body needs to [embedded] all the diversity, but it's that the ICANN needs to take into account all types of diversity and not just one or two, but one, essentially, the original one. We take sometimes some, we were a little bit interested in the gender, but the other points are not taken into account at all within ICANN. It's why it's so important the question of diversity in the next phase of the work during the Work Stream 2. Thank you very much.

ALAN GREENBERG: Thank you. Just for clarification, my reference to diversity in terms of the IRP panel is the text in the proposal does list all of those kinds of diversities as things that we should focus on when filling the seven panelist. And I was simply pointing out that, clearly, compromises are going to be made. You are going to have to decide which diversity you're honoring at any given time because you can't meet all of those in seven people. It was just an example.

We have about 20 minutes left, and we have three recommendations. And we'd like to leave at least a few minutes, so I'm going to turn the floor over to Cheryl now for Recommendation 10. It will then come back

to me for 11 and back to Cheryl for 12. I'll ask staff if we can verify just how much time we can go over if necessary, but it would be really good if we could finish the actual recommendations themselves within the window of the two hours. Cheryl, over to you.

CHERYL LANGDON-ORR: Thanks, Alan. Okay, now, you've got on your screens Recommendation 10, which is Enhancing Accountability of Supporting Organizations and Advisory Committees. This, of course, is the mutually desirable part of ensuring that the whole of ICANN as a community becomes more accountable.

Much of what we've focused on with the Empowered Community and the recommendations that were covered so far have been focused very much on pretty much Board actions or inactions and specific ratification that things have happened in line with agreed values within Core Values and Mission and within the Bylaws. But, of course, the Empowered Community also needs to be fully accountable. This is a game of balance, and it's critical that – in my very biased view at least – that we look at Recommendation 10 as an essential part of the whole package.

If the Advisory Committees and Supporting Organizations are to be given power, then their accountability needs to be considered for exactly the same reasons as all of this effort and energy has been put into Board accountability.

The matters of accountability within the Advisory Committees and the Supporting Organizations is, however, not as simple as it may first seem.

There is a considerable diversity between the different Advisory Committees and Supporting Organizations in their operational procedures. We've had discussion, for example, in the previous briefing call for our earlier recommendations where one of the things that was highlighted was the rather different way to the rest of the existing ICANN Advisory Committees that the Government Advisory Committee operates.

So there is a number of different starting points from our practices and principles between all of the Advisory Committees and Supporting Organizations. And, of course, a model that has good predictable and highly accountable practices throughout the whole of ICANN the entity and the community would mean that we all need to at least have full knowledge and understanding of how each of the component parts and practices are carried out within ICANN.

One of the things, of course, which is important here – and this is work to continue – is that it really isn't terribly clear where the specifics of the accountability need to lie. The question of accountability to the local community – and by that, we mean the part that's bounded within the term ICANN – or whether or not it is the wider Internet community does need to be discussed. And there's going to be some [inaudible] discussions on that. That's something that, of course, Work Stream 2 needs to go through.

The ALAC, however, and I think the Advisory Committees themselves are probably more clear in their understanding of how they see who they are accountable to. Those of us – the Government Advisory

Committee and the At-Large Advisory Committee immediately come to mind here – have always stated that their role is far more to represent and act in the best interests of the wider community. The global public interest is something they are particularly focused on.

Now that said, the Supporting Organizations need to have a good discussion and, more importantly, help other parts of the ICANN community understand and agree that they have an accountability to, for example, if you're looking at the Generic Names Supporting Organization, does a stakeholder group within the GNSO only have accountability to the actual subset of members of, for example, business of intellectual property or whatever? It doesn't matter. You can insert whichever category of stakeholder there. Or do they need to as, for example, the Advisory Committee that they do, act in the best interest of the wider set of that interest group?

There's work to be done here, but the principles, however, I think need to be agreed to and, of course, go under a state of continuous improvement as we go on making ICANN the entity and all its component parts predictably accountable.

Of course, it's also pointed out on the last bullet point on this slide that how one measures this is a little bit of a [inaudible], but I think if we get things at a point of mutual understanding, that will be step one. It will be a continuous improvement process. If I could have the next slide, please.

Thank you. The reviews that we all go through – and, of course, the ALAC and the At-Large community is about to go through its second independent review process – is a vital part of ensuring we have accountability for the Advisory Committees and Supporting Organizations.

It may very well be that in our ongoing discussions the way the periodic reviews go in the future may need to be tweaked or established particular ground rules so that a very clear focus on the accountability and to whom is a feature of those reviews. We have had reviews that are particularly structural in nature, for example. Hopefully, it will be easy (she says with her fingers crossed) to establish across the Empowered Community actors, the Advisory Committees and Supporting Organizations, that a certain level of harmonization or equivalency of accountability standards can be wrought through our periodic reviews.

Obviously, as I've mentioned earlier, Work Stream 2 is going to be important refocus for getting all these gory details put together. One of the things that we do need to recognize is as relatively new aspect of all of this, and this is where some of our recommendations affect each other, currently the GAC is not subject, for example, to these external independent periodic reviews. With the AoC coming into the Bylaws with our plan here for accountability, this means that the assessment of the effectiveness of the role of GAC and its role as an Advisory Committee will be better focused upon.

[inaudible] however to remind you all that within the existing system of ATRT (the Accountability and Transparency Review Team) that has gone on in the past, and we've had two of those to date, particularly in the first one the effectiveness and mechanisms and structures that were to allow for interaction specifically between the GAC and the Board was a lot of the focus. And a lot of the changes that those of you have seen in the last few years in how the Government Advisory Committee is interacting not only with the ICANN Board but also with the broader ICANN community, specifically the Supporting Organizations, has been borne out of what happened with the ATRT review. So this is, I think, a proven mechanism and it's one that, once we establish the ground rules and the requirements, we should be confident will work. If I could have the next slide, please.

We really have only one concern out of our deliberations regarding Recommendation 10, and that of course we do agree – and wholeheartedly agree – that the accountability of the Advisory Committees and Supporting Organizations is an essential issue and has to be dealt with. But we don't see, and remember in Work Stream 1, we need to focus on things that relate to being a requirement for IANA transition. And so as laudable and desirable as getting all of our accountability houses in order would be and getting it done sooner rather than later, this work really does belong [inaudible].

UNIDENTIFIED FEMALE: [speaking in German] Please hold the line.

CHERYL LANGDON-ORR: Well, I won't hold the line, and I'm sure staff will fix that. Somebody has obviously reached their maximum time.

UNIDENTIFIED FEMALE: [speaking in German] Please hold the line.

CHERYL LANGDON-ORR: We do agree, however, that this will be a focus for Work Stream 2. Now if I can have the next slide.

UNIDENTIFIED FEMALE: [speaking in German] Please hold the line.

CHERYL LANGDON-ORR: Stop our interruptions. Next slide, thank you. I'm not seeing the next slide.

ALAN GREENBERG: The next slide is not yours.

CHERYL LANGDON-ORR: Yes, I know. Can I just say as one of the rapporteurs that have, shall I say, put a considerable amount of time into what at one point was the stress test that we would not name (Stress Test 18), I am delighted to have this particular one.

ALAN GREENBERG: Thank you very much, Cheryl. I did request that I do this one, and I'll be honest why. I love a good, long, complex story. It's sort of like a mystery that unrolls before you, and that's what this one is. We're going to do a somewhat switch in how we're presenting it. For most of this proposal, we presented what the result was, a little bit of history when it was applicable. This one, we're going into storytelling mode because it is impossible to understand the outcome without understanding how we got there. We only have six minutes left, and I'm going to try to do this well within the time and allow a few minutes for Cheryl to do Recommendation 12, which is both a very large and a very short one. But this one is important, and I'll try to go through it.

Currently, when the GAC gives its advice to the Board, they develop their advice based on their definition of consensus, which is embodied in GAC Principle 47. This says, "The GAC works on the basis of seeking consensus among its membership. Consistent with United Nations practice, consensus is understood to mean the practice of adopting decisions by general agreement in the absence of any formal objection." And it goes on to say what happens if they don't reach consensus, but generally they do.

What this means in reality is if someone says, "We should give the Board advice to (to use an example from a previous recommendation) only where purple pants," as long as that recommendation comes from within the GAC and nobody say, "I object." If somebody says they object to recommending purple pants, then the GAC does not make that

recommendation. So it's not as if everyone has to vote for it, but nobody can vote against it. That's the definition that has been used since the GAC was created. Next slide, please.

Now, if the GAC gives Advice – and notice I'm using the word capital A, this is formal GAC Advice – it may be intuitive, but for the longest time the GAC would issue communiques after each meeting which they deemed to be Advice. The Board did not necessarily treat it as Advice under the definition. So there has been some work done, including within ATRT 1, that we now understand what GAC Advice means and the Board understands what GAC Advice means.

If the GAC gives formal Advice, the Board is obliged to either implement that Advice or enter into discussions with the GAC as to how they can find a compromise position. And barring that, the Board can refuse to take the Advice. And right now, all it needs is a majority vote of the Board, a majority decision of the Board, to refuse to take that Advice.

Now as I said, currently the GAC uses its current Principle 47. Principle 47 could be changed. And interestingly, when you change a GAC principle, you don't do it by consensus, but you do it by majority rules. So if the majority of countries insisted changing GAC Principle 47, Advice could be given in theory based on some different principle, some different methodology, perhaps majority voting. Next slide.

We have gotten many statements from the NTIA since March 2014, almost two years ago, when they announced that the IANA transition would be going forward. Much of it can be read in multiple ways, and

much of it was not the clearest of statements. There is, I believe, only one very clear statement that the NTIA made. They made it very recently. That is, they believe that the GAC must commit to for formal Advice, which is treated preferentially by the Board, they must use the current definition. That is, the GAC loses the ability to change how they do things.

Now that is very different from today, and it's very different from how the other ACs an SOs are treated. For SOs developing policy, the Board does have oversight over how decisions are made. For ACs, we are completely free agents, and the Board does not tell us that we must use a majority rule or the GAC consensus rule or a supermajority for our advice. We choose the method. Now we're saying that's not going to apply for the GAC. As you could imagine, to a number of GAC members, this was highly objectionable. Next slide.

This conversation has been going on, as Cheryl implied, for a long time. It was only moderately recently that the NTIA made their clear statement, but we had less clear statements in the past. The "Dublin Compromise" was a significant number of GAC members, not necessarily all, agreed that they could lock in the definition of consensus, but the Board could not reject GAC Advice with a simple majority. It required a supermajority.

Now this is largely a symbolic issue because if the Board is likely to reject GAC Advice, it's likely to happen with close to unanimity. So the subtle difference between 51% and 67% is not meaningful, but it is symbolic. And governments, and many of us, find symbols rather

important. So that was agreed to, and we thought we had a way forward. Next slide, please.

The response from many of the communities in the GNSO was that this is simply not acceptable. Increasing the threshold to reject increases the power of the GAC. It's harder to overrule them, even if it was symbolic. And to a large extent, virtually all parts of the GNSO said, "We will not ratify as it stands."

Now every group does not have to ratify. But, clearly, the GNSO, a very crucial part of this overall environment, if it doesn't ratify, that is sending a very strong message not only to the NTIA but also to the GAC that a significant part of this community basically doesn't want them to be satisfied and is willing for them to be not satisfied.

That has implications on whether we indeed will keep government support in the long-term within ICANN, and to be honest without government support, we are not in a very strong position. If governments decide they really want to deal with the ITU and not ICANN, it's going to be hard for us to exist and have any power.

Alright, a compromise to the compromise was worked out. That in instead of doing 50% as it is now or two-thirds as was projected, they would compromise and do a 60% split. Now again, I find the number completely meaningless, but this was an opportunity for people to say, "We are finding common ground." It allowed people to save face and agree to something.

But most of the GNSO people who were the vocal ones in this would only accept that if indeed the GAC could not object formally to the community objecting. Are you all following me? So if the GAC gives Advice, the Board implements something, the rest of the community is up in arms and wants to use one of the community actions to reverse what the Board has done – or kick the Board out for that matter because we think it's so outrageous that they listened to the GAC – the GAC cannot use its objection to try to counter it. They already got preferential treatment. They shouldn't be able to object to the community action trying to turn the situation around. Clearly, the GAC did not like that. They're saying, "You're taking the one power you're now giving us, but taking it away when it really matters to us." Next slide.

So following more negotiations, this "GAC Carve Out" had an implication. If the GAC cannot participate in a community action, there are only four left: the three SOs and the At-Large Advisory Committee. There are some powers – removal of the Board, rejecting budgets, rejecting IANA actions – that require four communities to support something.

We've had a principle in the background saying we would never require unanimity because unanimity means that a single AC or SO can veto, and we didn't want a single AC or SO to be able to veto. So that would require lowering the threshold of four to three. That is, allowing three to support, one to say no, but the power still gets exercised. That was acceptable to most people with the exception of the power to remove

the Board. That was so crucial that it was felt that that power should not be reduced. Next slide.

The Board came up with a compromise to the compromise to the compromise. That was if the GAC had Advice, if the Board follows it, if the community comes up and raises an IRP against it, if the IRP finds the Board had violated the Bylaws, and if we decide we are either going to punish the Board by removing them or because they refuse to honor the IRP, we can then reject them with only three. So we can recall the whole Board with three in the situation of GAC Advice, community action against it, IRP, and the IRP finds the Board violated the Bylaws. In all other cases, the Board can only be removed with four, which means unanimity among the remaining four.

That was the last point that was settled last Tuesday, and we now have a compromise which all parties signed off on with a note, however, that there are many in the GAC who are not happy with the overall carve out and the overall process. I think there actually was a compromise to a compromise to a compromise to the compromise. If you're accurate, but I didn't quite reflect it. Next slide. And I note we are six minutes over, and I apologize.

There are some people within At-Large who worry that the carve out itself was not right. We should not have disadvantaged the GAC. It is going to upset government relations, and we don't know what's going to happen because of it. And they may be right. There is a high-level meeting of ministers in Marrakech on the Monday, and there are some people who predict that we're going to see interesting communiques

out of that meeting because of this. Other people think that everything will be okay. There is a minority view that the carve out, that is the lowering from four to three for removing the Board even in the extreme case that was mentioned, is something that should have not been done. In fact, Tijani has filed a minority statement on that one. And that's where we sit.

We are over, but I will take any brief questions. It's a saga in the true sense of the term, but we did get through it and we'll see what the results are. Seeing no hands, no questions, I'll turn it back over to Cheryl. Oh, we have Olivier who is going to make a very brief comment.

OLIVIER CRÉPIN-LEBLOND: Thanks, Alan. Very brief, indeed. Just to make sure it's clear in everyone's mind, the GAC carve out would only be when it comes down to the rejection or the acceptance of GAC Advice by the Board, something that relates to the GAC directly. The GAC would not be carved out of other decisions that have nothing to do with any action by the GAC or any request by the GAC. That's my understanding. Is that correct?

ALAN GREENBERG: That is correct. But those who object to it claim, "But these are the issues that really matter to us." We're not going to win on this one. There is a question from Siva in the chat. Ariel, I'm not sure if that's what you had your hand up for, but I'll cover it. The question is: "How does one file minority statements?" Minority statements can be filed

only by the formal members of the CCWG, and the window has passed. So you cannot file a minority statement at this point. And I turn it over to Cheryl for Recommendation 12. I beg the forgiveness of the overall community and the flexibility of our interpreters to continue for a few more minutes. Cheryl?

CHERYL LANGDON-ORR: Thank you, Alan. We're queuing up the next slide here. We do have a lot of text in these slides, but seriously it really is just a matter of getting this on the record. Recommendation 12 is a vital recommendation because, as you are well aware, a great deal of essential and important work has been allocated throughout all of our process to going to Work Stream 2. Work Stream 2 is where we capture and start to work on things that cannot be classified as required for the IANA transition. Work Stream 2 is where many of us will be spending a considerable amount of our lives in the future.

Work Stream 2 needs to be committed to, and the commitment should include the support in Work Stream 1 so that any group within ICANN, and there are some groups and individuals within the ICANN community, can rest assured that things will not end with Work Stream 1 and in a post-transition of ICANN world the pressure to continually improve and indeed finalize a number of these recommendations would be somehow lifted and for whatever reason some of the people in our community – not our At-Large community as such, although there probably is some – will fear that without that pressure of the IANA transition, where would we necessarily get the commitment?

Recommendation 12 is important because it's the piece that says [hand-on-heart] and we will be continually improving our accountability and focusing on a number of key issues that we have committed to what we call Work Stream 2.

We've covered a number of those points during the last, what is it? Three hours I guess now over two 90-minute calls where we've said, "And this will go into Work Stream 2." Recommendation 12 is a way of making sure that happens.

You can see here, and I don't need to read it out because I'm sure you can all read it, there are a number of things about the documentation and the disclosure of policies. It's a requirement for improving transparency of ICANN's interactions with government.

It's very important that Work Stream 2 looks at what's called a Whistleblower policy, and that is something that has been brought up from the very first Accountability and Transparency Review Team work and, of course, something that is extremely important if you're going to be raising review processes or IRPs, etc., and that is the access rights that the community has to look at certain documents that ICANN could hold and state as confidential. So it is important work, and it's work that has to be committed to, and that's what Recommendation 12 does.

The matter of diversity, which you've heard Sebastien speak to, is another critical piece of work which needs to be looked at and community agreement and commitments wrought. These will not be

easy pieces of work, but they are pieces of work that are committed to under Recommendation 12.

And of course there is also matters of jurisdiction which keep coming up and have done for many years, and that one also is hopefully not going to be as exciting as the conversation about Recommendation 11 and Stress Test 18, but I'm quite sure there will be equally entrenched and deeply held views which may not necessarily be seen as rational by everyone else when we go through that discussion. If I could have the next slide, please.

Thank you. We've used something, as we've mentioned with the human rights, a terminology called the Framework of Interpretation. Framework of Interpretation work is used elsewhere in ICANN, in particular in the country codes support community. It is a term of art where agreed understandings and interpretations of terminology can be worked through.

That is a process that will be being applied to the very important matters of human rights. There's going to be a particularly large and important piece of work, as was discussed earlier, regarding ombudsman's role and function. The matter of staff accountability comes into this listing as well. Staff accountability is a very important issue, just as the Supporting Organizations and Advisory Committees need to have a clear and predictable set of accountability measures and a certain requirement for transparency and the Board does. So does the staff that works in ICANN the entity. And, of course, as we did mention,

the accountability from the SOs and ACs is another piece of work, which takes me back to Recommendation 10. Next slide, please.

I was hoping to be [inaudible] 15 past the hour. I do like Alan's little emoticon here. I think I would have even had a more frazzled and explosive one next to it. I probably would have gone for three. This is a huge amount of work, and it probably needs to be carved up into clearly predictable and properly supported streams. It's one of those we simply have to do it.

Thank you, Alan. I believe that's it from me unless there are questions.

ALAN GREENBERG: Thank you very much, Cheryl. There is one more slide saying "Questions," and we do get the "frazzled" part in there. We don't have a lot of time for questions. I don't know if the interpreters can stay on or not. I am willing to stay on the call if there is…

CHERYL LANGDON-ORR: Hopefully, we've been very clear.

ALAN GREENBERG: I'm sorry, Cheryl?

CHERYL LANGDON-ORR: Hopefully, we've been very clear.

ALAN GREENBERG: Hopefully. I am certainly willing to stay on. I suspect a few other people are if anyone does have any questions, although I suspect we have to let the interpreters go. But people are willing to dial into the English channel if you wish and can handle that. But I don't see any hands up. Was there anything in the chat?

UNIDENTIFIED FEMALE: I'm not seeing anything we haven't covered.

ALAN GREENBERG: Then I think the people who have been presenting with me. I think people for having paid attention and stayed awake. I look forward to continuing this discussion, both online and in Marrakech. The presentation will be updated somewhat, and there will be a version that we will be distributing widely or make it available. I ask you all to refer to it. If you have any further questions, then please ask them. Please make your questions known.

Any of you who have the stamina, early in the slide I do have a pointer to the full set of documents. Take a look at it. The summary document is not very long. It doesn't go into the same level of detail as some of these presentations, but it will give you an overall feeling for what it is we're trying to do in this accountability process.

With that, I thank you all for being here. I thank the interpreters for putting up with both the complexity and the weird language that we're

using in these presentations. I wish you all a good rest of the day, rest of the week. See you soon.

UNIDENTIFIED FEMALE: Rest of the night.

ALAN GREENBERG: Rest of the night for those at night. Some of us are going back to bed because we didn't actually have night.

CHERYL LANGDON-ORR: Thank you, everybody. And thank you, Alan. You've put a huge amount of work in the preparation of those slides, and I'd like it to go on the final record here that it has been heroic but, I trust, greatly appreciated by your ALAC and the At-Large community. I certainly appreciate it.

ALAN GREENBERG: Thank you very much, Cheryl. Bye, all.

[END OF TRANSCRIPTION]