

**ICANN**

**Moderator: Brenda Brewer  
April 27, 2016  
7:50 am CT**

Coordinator: This call is now being recorded. You may begin.

Leon Sanchez: Thank you very much. Welcome, everyone, to the CCWG on Enhancing ICANN's Accountability call on April 27, 2016. And as before we will be having the roll call with those participants joining the Adobe Connect room. And if there is anyone at this point that is attending this call but is not in the Adobe Connect room we would like to kindly ask you to state your name so we can add you to the roll call.

Rosemary Fei: Rosemary Fei. I am only on the audio right now but I will be on the main line shortly.

Leon Sanchez: Thank you very much, Rosemary. And welcome to the call. Anyone else on the phone bridge that is not in the Adobe Connect room?

Tijani Ben Jemaa: Tijani Ben Jemaa.

Leon Sanchez: Thank you very much, Tijani.

Greg Shatan: Hi, it's Greg Shatan, I'm only on audio at the moment. But I will be in the Adobe room in a few minutes.

Leon Sanchez: Thank you, Greg. Anyone else? Okay so hearing no one else, as a reminder for you to fill in your statement of interest if you haven't done so by this time. We would urge to actually update or file your statement of interest. If you have been having problems you can approach anyone on the staff who will be glad to help you and assist you to filing your SOI.

So with no further delay I'd like to turn to my cochair, Mathieu, for the next agenda item.

Thomas Rickert: Leon. Leon, this is Thomas. I'm just in the process of getting into the Adobe Connect room. Just to let you know that I have updated my SOI. I have accepted an additional responsibility and managing director of a small DNS management software company in Bonn called DNS Experts UG. Thank you.

Leon Sanchez: Thank you very much, Thomas and thank you for updating your SOI. So I'll turn now to Mathieu.

Mathieu Weill: Thank you very much, Leon. And welcome, everyone, to this legally intensive call since we'll be reviewing with our lawyers as well as ICANN Legal the draft bylaws that were published for comment on April 21 for a period of 30 days as planned. The comment period is about whether the bylaws fit the report, our report, the ICG report also. And of course it's only about whether there is compliance between reports and bylaws and not to reopen any previous discussion.

We have certainly heard from the community that there is interest to hear from our group whether the group itself confirms compliance between the bylaws and the report and as such it would be useful as we had discussed previously to submit a CCWG comment to this public comment period. That's

going to be the focus of our effort in the next couple of weeks because it will be helpful that this comment is submitted in the first half of the public comment period so that others can also rely on this when finalizing their inputs.

Given that we have already reviewed a previous version of the bylaws our plan is to constitute whatever the comment is made of based on any issues being raised on our list or during this call or the call that we will hold next week on May 3, which will – main focus will be on finalizing a comment and this comment will then be submitted by May 10 so that's still in the first half of the public comment period.

So as – that would certainly be helpful to all. In order to achieve that our plan is also to set a deadline for raising any inconsistencies or gaps or issues with the bylaws when compared to the report. And this conversation has started on one item already. It would be – so we would set a deadline for that by the end of this – the end of this week, say Friday or maybe Saturday so that it's in time for our May 3 meeting.

So you have the main dates on the agenda already. Our meeting 93 will be focused on that as well as a target for submission on May 10. And before we turn into the question and answers and give the floor to lawyers I'd like to make sure that everyone is okay with this proposal to move forward with a comment from our group in the next couple of weeks.

I see Cheryl is ticking green. Appreciate it Cheryl. So currently everyone is impatient to hear from our lawyers and I fully understand that especially at this time of the day. So I will now turn back to Leon so that we get into the real substance of this meeting. Leon.

Leon Sanchez: Thank you very much, Mathieu. This is Leon Sanchez again. And well as you know there have been thorough discussion on the list on a few issues in regard to the draft bylaws. But who best than our lawyers to actually introduce us to the big amount of work that was carried not only by them but also in coordination with ICANN Legal. So I would like to hand over the floor to our lawyers, either Holly or Rosemary, whomever feels best to provide us with some (unintelligible) marks on the work that's been done. And of course after that we will go through a session of questions and answers. So Holly, I see your hand is up so you have the floor.

Holly Gregory: Well thank you. Thank you, Leon. And it's good to hear familiar voices of Mathieu and Thomas and to be with you all again. I'm just going to do a few introductory remarks and then see if Rosemary has anything she wants to add. You know, as you know, on February 23 the final supplemental proposal was submitted by the CCWG and then on March 10 after – in Marrakesh getting support from the chartering organizations the ICANN Board submitted the proposal to NTIA.

A day or two later we were informed of a rush timeframe to draft the bylaws. And ICANN Legal was ready and able to have a draft ready in about a week and so they held the pen on a first draft and then we all got together in LA with what was a rush draft to do some in-person drafting sessions with ICANN Legal.

As you know Becky Burr and Chris Disspain participated in those in-person sessions. And we held calls every day during those sessions with the bylaw coordinating group about questions that arose where we felt we needed some clarification or some further guidance. The questions that we posed to the bylaws coordinating group were in writing and so there is a record of those questions.

I want to say and emphasize that the working relationship that we had with ICANN Legal was very positive, collegial and collaborative and we greatly appreciated that. And we think that the quality of the draft bylaws that you have is a direct result of the ability of the legal teams to come together and work together in a positive spirit.

That positive tone continued into the next several weeks as we continued to review and edit and fine tune and seek clarification and guidance both from the bylaws coordinating group and the CCWG, again through the submission of written questions that were discussed on calls and in some instances were answered in writing.

During that process we shared with you a first draft on April 7. And I have to say it greatly benefited from the additional feedback. As you can imagine when we're drafting from the proposal or the final proposal there are areas where there at times need to be clarifications. There are areas where something can be read in several ways. And so the guidance that we received from the bylaws coordinating group and the CCWG were greatly valued.

We were very pleased to be able to meet the deadline with the April 20 draft. I want to say it really has been a huge effort by Adler, by Sidley and by ICANN Legal. We had many all-night sessions and frankly, I think we're all just recovering a bit. I'd like to personally thank our Adler colleagues and especially Rosemary, Ingrid, Stephanie, Steve and Nancy and also the ICANN Legal colleagues, John, Sam, Amy and Dan, and I'm sure that there were more that we didn't get to meet personally. And also the core Sidley team of Mike, Ed, Sharon, Rebecca and Amy.

As you know, we provided a certification that we believe the proposed bylaws are consistent with the supplemental final proposal and therefore we recommended that they be posted to the community for review. We're continuing to go through the document for clarity, typos and may provide you with a markup of suggested edits that you may want to include in your public comment. For example, there's been discussion today around clarifying language that would be useful.

And so we look forward to our discussion today, the opportunity to explore any questions we may have. And with that I want to invite Rosemary, if you have anything that you'd like to add.

Rosemary Fei: I would just like to thank Sidley's team and especially Holly for the work and the help from the bylaws coordination group and from ICANN Legal to get this done. I think the time pressures were enormous and that – for some of that probably is what we're going to have to keep working with now to get little things that maybe didn't get quite perfectly done fixed. That's it.

Leon Sanchez: Well thank you very much, Holly. Thank you very much, Rosemary. I see a couple of comments in the chat box especially from Brett – I'm sorry, Brett – was asking that it's kind of awkward that the CCWG is commenting on its own work. I would say that rather than the CCWG commenting on its own work we are trying to comment on the implementation of our work so I don't find it that awkward but of course we may be fair on our views.

So now I would like to turn to my cochair, Thomas, for questions and answers on what we just heard from Holly and Rosemary and of course on the overall exercise on the draft bylaws. So Thomas.

Thomas Rickert: Thank you very much, Leon. And hello everyone. This is Thomas Rickert, the GNSO appointed cochair to the CCWG. And we would now like to do a Q&A so if there are questions from your side with respect to the implementation of our report and to the bylaws this is the opportunity to seek clarification or ask questions. Holly already mentioned one point that has been discussed vividly on the mailing list and that was an inconsistency spotted by Niels which has been discussed. And Rosemary had responded recommending that we put that point into a comment that we file in the public comment box.

That was with respect to the human rights FOI and the procedure of getting that framework adopted. And there was an email that Holly wrote the day before yesterday at 1951 if I'm calculating this correctly, UTC. And for the time being I would suggest that we keep that point, put some draft language into a draft public comment that we will file and then the group can review that language so that we can ensure that we are happy with the proposed comment.

And just to add to what Leon has said in response to Brett's comment, I think it is perfectly appropriate for us given the time pressure that we're working under that we share with the community our views on the parts that we think have been implemented accurately and those where we might have edits to suggest so that this whole discussion is happening fully transparently.

So with that I would like to open the floor. If you have questions or remarks for the drafters of the draft bylaws this is an ideal opportunity for you to speak up. I see Tatiana's hand is raised. Tatiana please.

Tatiana Tropina: Thanks a lot. Tatiana Tropina speaking for the record. I would like to clarify, on the lawyers who can suggest clarifications because I quite like the clarification to the human rights bylaws suggested by Greg so how this

process will go? I mean, should it be also vetted by lawyers, by the group, so we will not be in a deadlock. So which – what kind of clarification we can actually propose. Thanks.

Thomas Rickert: Thanks very much, Tatiana. And thanks also for using the word “clarification.” And I should say that Niels pointed out an alleged inconsistency which turned out to be a point worth clarifying, Holly or Rosemary, would you like to speak to that point again?

Holly Gregory: So this is holly. Look, I think that there’s no reason why only lawyers should suggest areas where there should be clarification. And we think that either the language that I proposed or the language that Greg proposed works. I don’t see a big difference between the two. I think there’s some redundancy. But, you know, I think it’s fine for the CCWG to weigh in on which language they think is better.

From a legal perspective I don’t see much difference between the two. The language that I propose tracks more directly the language of the proposal. But I understand Greg’s reason for wanting to expand on it and further clarify. From a legal perspective I think that the difference is minute.

Thomas Rickert: Thanks very much, holly. Next in line is Greg. And Greg, since I anticipate that you’re going to speak to the same point, can I suggest that we try not to go into wordsmithing exercise in this plenary discussion. We can I think better wait for the lawyers to come up with some concrete language and then review that. Greg, the floor is yours.

Greg Shatan: Thanks. I hope what I’m engaging in is substance-smithing and not wordsmithing. And I’ll try not to be excessive. In any case...



Thomas Rickert: You can't resist getting back to that, right? Thank you so much.

Greg Shatan: Of course not. In any case I think the difference between what I suggested and what holly suggested is that holly's language I think carries forward the ambiguity that's in the so-called draft bylaw language in our proposal which was meant to be a signifier of intent and not meant to be actual final draft language, that was the whole point of our process. It needs to be read together with the other – with the rest of our proposal on the point.

And as I've noted in the email list, proposal, you know, repeatedly says three times that the approval process for the human rights framework of interpretation will follow the same process as what's taken forward in Work Stream 1. So the issue is how to bring together those two strands of our proposal into the bylaws since once the bylaws are drafted they really – and approved they will need to stand on their own as clear and nonambiguous statements. I think the language I've suggested does that trick.

And I think that suggestions others have made that we somehow intended by a parenthetical to bring in a full consensus approval is rather kind of amusing given the months that we spent arguing about full consensus approval of things by the GAC and the amount of language expended in our proposal on that. The idea that we would do the same thing to an important part of our own proposal in a parenthetical kind of begs the imagination. And so therefore I think that's not a proper interpretation of the language so I suggest that we make it clear that the FOI's approval is just a business as usual process and not some sort of special process created by a single undiscussed and under-remarked on parenthetical. Thank you.

Thomas Rickert: Thanks very much, Greg. Rosemary.

Rosemary Fei: Thank you, Mathieu. This is rosemary. I would suggest that the ambiguity that is of concern to Greg is actually introduced by including the parenthetical phrase in the first place. As you've all noted it says three times, follow the same process. The problem I think – where the ambiguity comes in in my mind, and I do think there is ambiguity, is that the process that you're referring to does not require chartering organization approval. It allows – it requires chartering organizations to review and take a position but it does not require that they approve.

The parenthetical could certainly be read, in fact I think it's likely to be read, as implying that the chartering organizations actually need to approve. And so I actually would suggest that perhaps you want to take out the phrase entirely so that all it says is follow the Work Stream 1 protocols and don't add the including chartering organization approval because then it raises the question of well but wait a minute, our existing – the Work Stream 1 protocols don't include that so that looks like you're trying to introduce a change.

Thomas Rickert: Thanks very much, Rosemary. I think that's very helpful. Since no one is populating the queue at this point I see that Mathieu shares – agrees with rosemary. Greg says this is elegant. Avri is supporting this. Are there any concerns to proceed on the basis of what rosemary has proposed? Tatiana is agreeing and supporting. That's great. Andrew is supporting this. Cheryl does. Brett would like to see it. And maybe we can have some language prepared and presented to the – or at least include the proposed language from rosemary in the note section. I think we all need to see the text anyway.

Okay. Do we have any further questions? I see my fellow cochair, Leon, in the queue. Leon.

Leon Sanchez: Thank you very much, Thomas. This is Leon Sanchez. There is a slight concern in regard to the Whois review. As you may be aware this has been deferred constantly. And this has come to the point in which if we – as the current draft bylaws state there is no flexibility in scheduling future AOC reviews. And there is no chance that the committee would be able to alter the start date of any of these reviews.

And as things stand, our draft bylaws state that the directory service review shall be conducted no less frequently than every five years measured from the date the previous directory service review team was convened. And this review team, the last Whois review team, was convened in 2010. So that would mean that we would be already late if we actually implement the bylaws as they are at this point.

I think this is something that no one really caught in time but since the purpose of this public comment period is to actually fine tune those issues that might be identified in this space I would like to ask our lawyers on how we could fix this problem. In my mind maybe it's just a matter of adding a footnote to the draft bylaws that would allow this review to actually take place in a convenient timeframe that would not only be flexible but also in line with the expectation of having convened a team in 2010 and not being able to of course carrying this task as soon as these new bylaws are implemented. So that would be the question. Thank you.

Thomas Rickert: Thanks very much, Leon. Rosemary, I'm not sure whether that's an old hand but you've – you have still raised it conveniently so I'd like to give you the opportunity to respond to Leon's point if you'd like to.

Rosemary Fei: Sorry, it was an old hand. I want to make sure – but since I have the floor I'll take it. I want to make sure I understand, Leon, whether is the issue just

essentially about when the new bylaws become effective with respect to one particular review as opposed to – we know there's going to be an effective date for the document as a whole. Is that the problem that we need one of these to become effective later so that we don't trample on what's already being done? I'm not sure I – I was having a little trouble hearing...

Leon Sanchez: Yes, thanks, rosemary. Yes, the issue is that if we actually implement the bylaws in the way that they are drafted right now we will already be late when these bylaws are enacted. So the question is how can we find an easy fix for this so that there is flexibility enough for the community to allow for this review to begin at a later time with not being already late when these bylaws are enacted. I'm not sure if I'm being clear.

Rosemary Fei: I think you are. I think I understand. And so it would be fair to say that the CCWG proposal never intended and no one thought that it intended to create a situation where when the new bylaws came into effect anybody would already be tardy. So if that – if...

Thomas Rickert: Rosemary, I think your line has dropped? Rosemary? Rosemary, we can't hear you anymore. But while you're getting back on the audio let's move to Alan then holly. But before we do so let me just remind everyone that what we're doing here is just ensuring that there is consistency between our report and the implementation of the draft bylaws.

And this seems to be a point that is unfortunate but that has never been discussed on the CCWG. So we might be stepping over a little bit if we tried to put in new things or new language that wasn't in our report to fix historic issues that the community has in fulfilling the tasks that are not related to our report. Alan.

Alan Greenberg: Thank you very much. You're correct, we are stepping over the line. On the other hand, we also have a responsibility as does the board when they approve the bylaws to not do anything really stupid. So we're stuck in an interesting place. In this particular case, the AOC called for a review every three years. But it was within the board's jurisdiction to override or at least no one has claimed it isn't, and certainly the NTIA did not call them on it.

The bylaws are written in a more stringent way and that does not give the board easily anyway, the wiggle room to violate its own bylaws. And that's the problem. Even if it was deferred six months until January 1 of next year, it would still be really stupid to do a Whois review right now. It would be a horrendous waste of resources and community time to do it. So the issue is, is there a way to get around it?

I suspect a transition bylaw or something would say, you know, the five years is waived or replaced by something for the Whois for the first might well do it. But, yes, we are over the line and the alternative is to be doing really dumb things. Thank you.

Thomas Rickert: Thanks, Alan. And I'm sure we will all agree that we're not about to do dumb things if we can avoid them. Holly.

Holly Gregory: Hi. I was just going to say, look, any time that – you've written a massive proposal with lots of twists and turns. And one of the things that's going to happen as we're setting it into bylaws is that we come across things, things become apparent where there needs to be a tweak, a fix. This to me doesn't sound like it's a huge issue but something that does need to be addressed.

One thing to suggest is that now you've raised it for us you give us a day or two to think about, talk with ICANN Legal. We could come back with a

proposal for you to consider at your next call. We may be able to do it in writing so that you can consider it in the email in the meantime. But it doesn't sound to me like this is a huge deal that we couldn't come up with some kind of transitional approach that makes this workable. You know, this is a pragmatic search for what works.

Thomas Rickert: Thanks very much, holly. And rosemary, since you've been cut off I see that holly has said at least part of what you were about to say but I would like to give you the opportunity to speak now due to the technical issues and then we'll move to Greg.

Rosemary Fei: Thank you. I did miss a little bit of the conversation so I hope I'm not saying something that's not helpful given what's been said that I missed. What I was trying to say is that I think all we need as the lawyers now is clear direction from the CCWG that the intent was never to put anyone in violation when the new bylaws went in. And that's not what the proposal is supposed to do therefore the bylaws we've drafted don't do that and we can just tweak them. And we should just propose some language once you tell us exactly how much more time we need to give to which exact reviews.

Thomas Rickert: Thanks very much, Rosemary. Greg.

Greg Shatan: Thanks. It's Greg Shatan for the record. I think holly and rosemary have said a lot of what I would say. I think transitional bylaw narrowly crafted to deal with this specific identified situation would make sense. What I don't want to do is open the door to some sort of wholesale reordering and delays of reviews beyond what was contemplated. And that's – so I think the specific solution to a very specific problem is all that we should do. Thanks.

Thomas Rickert: Thanks very much, Greg. Just food for thought. I personally do not know whether there are any other topics that would require action as would this one. Certainly we don't want to have bylaws put in place and then ICANN be in default with its obligations.

But at the same time if there were more areas where ICANN is late with its tasks and there's only one minute item that we – that we sort out in the bylaws I'm not sure whether that would be technically the right thing to do or whether maybe the board can just indicate with the adoption of the bylaws when the next Whois review is going to be kicked off so that there is a statement from ICANN on the record that this is not – this hasn't been forgotten but that we're late and I think you can be transparent about that. And ICANN is going to work on it. Just an idea.

But I would suggest that we will let the legal teams put their head together and maybe talk to ICANN so that we can go on record with some sort of announcement or solution for this issue. Holly, is that a new hand?

Holly Gregory: No, my apologies. But since I got you, just a note that whatever we come up with should then become part of the public comment.

Thomas Rickert: Understood. And that's the way we should be doing it. Thank you so much. Any more comments, questions. Okay so not having questions is not a bad thing just the opposite, I think it's a good thing because that again shows that our lawyers and ICANN Legal have done a sterling job in translating our proposal into draft bylaws. And let me pause for another couple of seconds to see whether we get more questions or comments in. And if not we might be able to give some time back to all of you.

Okay so looks like we don't have any further questions. Thank you again. And with that we can move to the next agenda item. And I would like to hand over to Mathieu for that point.

Mathieu Weill: Thank you very much, Thomas. This is just a continuation of the Q&A sessions but focused on the provisions of Section 1.1 d, those provisions that are qualified as grandfathering or a number of agreements. If you remember on previous calls we had several discussions and some concerns were expressed about the rationale and the scope of those provisions.

And we – it's a very good thing that we have ICANN Legal in the call. I think I spotted in addition to Sam, John Jeffrey, because the conclusion of our previous call was that we would hold a Q&A session about these provisions in a plenary so that everyone can benefit from the full context of the addition of these provisions.

We have received a memo from our lawyers that provides quite clear inputs on the rationale and why they had agreed to those provisions. But now that everyone is in the room certainly we need to make sure we have clarified any concern that will be remaining. And maybe we could start this by providing ICANN Legal an opportunity to give some context on this.

And I seize the opportunity to thank Sam, who has been our staff liaison all along the CCWG effort. And John for the tremendous work they've been doing in this implementation phase and the drafting of these bylaws. And I think holly and rosemary already testified of the very collaborative spirit that has been demonstrated all across and that's certainly something we've been seeing in the bylaws drafting group as well.



So I don't know if Sam or John, you would like to say a word before we go into the Q&A session on this?

Sam Eisner: Thanks, Mathieu. This is Sam Eisner from ICANN Legal. And just wanted to echo some of the thanks – we at ICANN really want to extend our thanks to the Sidley and Adler teams for really intensive and very collegial work and also for the support and all the constructive work that we did with the community members who are participating through the bylaws coordination group, the CWG and the CCWG along this path.

So we do – we provided to the bylaws coordination group last week, and I know that Grace circulated earlier today or yesterday depending on your time zone, an explanation document on the – some of the grandfathering provisions that were put in that section 1.1 d (2) of the mission statement.

And so there were a few different areas of grandfathering that we put into the document including the grandfathering of registry agreements and registrar accreditation agreements that were the subject of substantial conversation within the CCWG. And then we had another set of documents that were incorporated into the grandfathering provision. And those relate to ICANN's performance of the IANA function either through contracting with PTI or the direct contracts that it might hold that relate to the performance of that function.

Though these areas were not specifically identified in the CCWG proposal, as things it needed grandfathering, we thought that it was important particularly in light of the CCWG statement that the work that the CCWG did on the mission statement was not intended to alter ICANN's historic mission. And then also as a complement to the work that the entire community did on developing the ICG proposal, that would allow ICANN to continue

performing all the different parts of the IANA function as well as working with the root zone maintainer to keep that root zone work up to date.

So we thought it was really important that those items were – had a home in the bylaws in a way that third parties couldn't come in and challenge those really necessary parts of ICANN performing that work as being outside of mission.

We don't think that this adds anything to ICANN's mission or results in any change of the mission but it really is a way to solidify for the ICANN community and for the customers of the IANA functions those contracts that are necessary for ICANN to do the work, and indeed the contracts that are called for within the ICG proposal, are held up as things that cannot be challenged by other people as being outside of mission.

Those contracts – some of them are still in development, though all of them will be provided publicly prior to them being signed and prior to the bylaws going into effect. Those contracts are not intended to cover other areas of work, they're not intended to incorporate other things into ICANN's mission just to sneak it in.

This is really about making sure that the IANA functions at ICANN has been tasked with – and is continuing to be tasked with performing through the ICG proposal are held as something that cannot be challenged as outside of the mission by someone who would want to come in and challenge that regime, right?

We have ways of – if ICANN is deemed not to be – or, you know, PTI shouldn't be performing or if separation needs to happen so there are mechanisms that will be available to the community to challenge but we

wanted to make sure that this core part of ICANN's mission was not being challenged. And we thought that that was in service to the community.

John, did you have anything that you wanted to add to that?

John Jeffrey: No, I think that as probably a good start. And I also just wanted to echo the thanks to all the lawyers and all the participants in the bylaws coordination group for the persistence that we had in understanding some of the intents within the proposal. So I just wanted to add that. But happy to take questions on this.

The one thing I might just go to because I think Andrew is probably going to address it but I think the one thing that Andrew points out that is really important to us too is to know what these documents actually are, the ones that aren't created yet before they become a part of the bylaws.

For example was the creation of the PTI agreement. No one knows exactly what that's going to say because that's going to be something that's produced, put out for public comment and become an essential part of the public discussion and the community's discussion before it becomes a document that is actually referenced in the bylaws.

So we do recognize that a document like that is not created yet and that creates concern for all of us that it's going to be a document that's very much transparently vetted in the community. And with that I'll pause.

Mathieu Weill: Thank you, John. Thank you, Sam. I'm seeing a queue forming and so I will turn to Andrew.

Andrew Sullivan: Hi. Thank you very much for calling on me. Can you hear me?

Mathieu Weill: Yes, very well Andrew.

Andrew Sullivan: Oh okay. Unusually I – normally I get a lot of feedback from the Adobe Connect and I wasn't. So I think what John just said is part of what I am a little concerned about. That first thing is indeed that there are provisions in this grandfathering clause that refer to documents that haven't been written yet. And not only have they not been written but they haven't been written with counterparties who don't even exist yet. And so that is a little worrisome.

There is an additional concern that I have though. And it's the more general – the more general problem of this entire subsection. When you start to introduce this sort of thing into the bylaws, particularly as part of the mission, which is effectively what this is, it is a way of introducing external agreements into fundamental bylaws for ICANN.

And I just don't understand why this is okay. I've heard, you know, and I understand the argument that this is a special case where what it's really trying to do is say just for the purposes of getting all this started we are including these things that have already been agreed to. But an enormous number of these have not been agreed to indeed even the thing – even the agreement with the IETF is not agreed to despite the fact that everybody involved has agreed that, you know, more than a year ago that it would be okay, it hasn't been signed.

And so I'm very concerned about this section because it seems to me to be a truck sized hole in this bylaw provision. I'm most concerned about two provisions, one of which is the ICANN PTI agreement, and the other of which is the five year plan. But the whole package is what is really troublesome. And the reason it's troublesome it boils down to this problem that, you know, these

things are not already agreed. If they're not already agreed then you shouldn't include them as a fundamental bylaw. And that seems to me to be very dodgy.

Mathieu Weill: Thanks, Andrew. Would one of the lawyers care to respond to this particular concern from Andrew about the fact that some of the contracts are not being – have not been finalized yet? Rosemary? Alissa, I would turn to you after we've had this discussion on this point. Rosemary, would you like to answer to Andrew?

Rosemary Fei: Yes. I think that while I understand why it's disconcerting to have this reference in the bylaws to documents that aren't yet in existence, I think it's important that the point is that they must be in existence on the effective date of the transition. So there's a reference in here to those documents on October 1, 2016. Now there's a square bracket around that date, because we don't really know for sure that's the right date.

You could move that date sooner if you wanted to nail down an agreement so it couldn't change after a certain date. You could push it further. But the point is that it has to be – this is a timing issue that arises because we're trying to put in place bylaws, while we're also trying to put in place a lot of other things. But when these go into effect, when these bylaws go into effect, at that point these agreements are supposed to be in existence and agreed.

So I understand it's disconcerting to approve something now that refers to a document that doesn't yet exist. But by the time these become effective they will exist. They have to exist. And then I think the real question – the focus should be or the discomfort should be around how do we know what they're going to say.

And I think that has to be about who are the parties and how transparent is it and how comfortable are you that when these agreements come into force – or not into force but come into existence, sometime before the transition that they are going to be appropriate documents as a result of the process that creates them so that whatever they say you want that to be not challengeable on a mission basis.

Mathieu Weill: Thank you, rosemary. We have a significant queue so let's go to Alissa now.

Alissa Cooper: Thank you, Mathieu. Is my audio okay?

Mathieu Weill: Yeah, your audio is good. Thank you, Alissa. Welcome.

Alissa Cooper: Great, thank you. So I think this conversation points at exactly what the problem is which is of the timing. So the issue is that as Andrew said, not only is the ICANN PTI contract not in existence yet, there is no draft of it. PTI itself does not exist yet and will not exist for some considerable amount of time. And there are about five months left before the NTIA contract is due to expire.

So it is quite likely that there will not really be sufficient time to have a full public airing of the ICANN PTI contract in the way that we would all ideally want to have it if there were more time. We are going to have to, I think, in the same way that we've made at other points in this process make some concessions as far as the thoroughness of everybody's ability to analyze and provide input into that based on trying to meet a particular deadline. And those are, you know, choices that we've made all along and that we've accepted for the sake of achieving the transition.

But this provision in the bylaws is actually not necessary for achieving the transition. And what it does is because there's no guarantee that there will be an ability for the community actually have all the input that it needs to have into that contract, what it does is it creates a giant loophole that allows all of the work that was done to more precisely define the mission statement of ICANN in these bylaws it creates a giant loophole that allows that to be completely contravened by whatever gets written into the ICANN PTI contract because what this is says is that no one in the future will ever be able to challenge that contract on the basis that it contravenes the mission.

So it basically gives, you know, with waning time it gives the ability for the parties who will be in control of the words that go into that contract and the main party there I think is ICANN, it gives those parties the ability to potentially, you know, expand or contravene or violate this nicely, newly defined, narrowly defined (unintelligible) of ICANN in that process. And so that is I think the key issue with letter D here.

I could understand this provision, the whole grandfathering section, if people wanted to have it apply, you know, if the concern was that these agreements were signed under a different mission statement and the concern is that the mission statement is changing and we don't want people to be able to challenge the existing agreements because there's a different mission. I could maybe understand that. I still think there's some wordsmithing that would have to go on here.

But I truly don't understand how anybody on – in June or July of this year can say we put our stamp of approval on these bylaws when the PTI will not even exist yet. So I think that is a major concern.

I will also say that just from the implication of this memo that we are looking at it seems to imply that, you know, the most important thing out of all of this is that ICANN can continue to perform the IANA function. And I think what we all learned in (unintelligible) in terms of what the ICG proposal says is that in fact that is not the most important thing.

The most important thing is that the IANA functions can continue to be performed by some operator who's capable of performing them according to the service level agreements that the community – the service level expectations that the community has. And those two things are not the same. And I certainly – I will put my IETF hat on here for a second and say that I think from an IETF perspective the important thing is that a protocol parameters functions can continue to be performed, not that they can only continue to be performed by ICANN.

That's why all three of the communities have well defined separation mechanisms. And this provision looks much more like putting the emphasis on the importance for ICANN to be able to continue to perform the functions as opposed to the function to be able to continue to be performed. Thanks.

Mathieu Weill: Thank you, Alissa. Rosemary, I don't know whether that's an old or new hand. If there's anything new to add? No? Okay so I'm turning to Jordan now.

Jordan Carter: Thanks, Mathieu. Can you hear me?

Mathieu Weill: Yes, very well Jordan.

Jordan Carter: Great hi, everyone. Jordan Carter here, dotNZ for the record. Look, I just wanted to offer a slight counterpoint. I'm a bit more relaxed about things being mentioned in the context of what we're talking about than in some other



areas because we know these are going to have to be done, we know that the subject matter that's in them needs to be referred to. And we know that there is community control and comments in terms of what the content will be.

So while I think it isn't ideal, I haven't been able to think of a better way to do it. And so if the lawyers have got a better way to do the same effect of incorporating stuff that needs to be incorporated but isn't yet written down, I'd love to hear it. Otherwise this seems like a pretty straightforward way to do it. Thanks.

Mathieu Weill: Thank you, Jordan. And I'm certain Greg has a very straightforward way to do it and he's about to offer it. Greg.

Greg Shatan: I wish I did but I'm going to have to disappoint you, I'm sorry. Greg Shatan for the record. I just wanted to kind of come in with my day job hat on as a lawyer who works on a lot of transactions where there are multiple documents being prepared simultaneously that make reference to each other is common in our world.

And I guess what I would call it as kind of convergent drafting so that everything will come together appropriately. I think that's the idea of citing two documents that are, you know, don't exist yet but will exist at the time of closing so to speak or at the time of the effective date of the bylaws. I think the Dan's point, you know, Daniel Halloran's point in the chat is worth noting on that.

So I think the idea that we shouldn't make reference to the – it would only make sense if we think that we do want to allow particular documents to be challenged. And the general concept of grandfathering (unintelligible) RA and RAA (unintelligible), you know, hopefully that's not even, you know, on the

table for discussion here; we're just talking about the IANA naming function contract I guess, maybe the RZM contract.

But again I think the point is that this is all supposed to come together in kind of a steady state and sometimes you have to kick a few balls in the air moving in a convergent fashion to get to that steady state. Thanks.

Mathieu Weill: Thank you, Greg. Sam, you're next.

Sam Eisner: Thank you. This is Sam Eisner again from ICANN Legal. Just wanted to respond to a few different points that I heard. On the PTI contract development and the fact that PTI doesn't exist yet, you know, there – we've been working and I know some of you have been involved in an implementation oversight group working closely with Trang Nguyen from ICANN.

You know, we're really trying to work closely with the community and to develop some careful timeframes that will allow times for the community to have input into the PTI contract and also it's one of the things that we understand while in ICANN that PTI has a limited purpose.

And so there's not really a lot that we can just throw into there to exceed purpose because PTI has the limited purpose of performing the naming function and then if it then is subcontracted to perform the numbering related function or the protocol parameters work that can also happen. But there's not a lot that we can just put into that.

You'll also see with the ICANN bylaws themselves that there's a whole community process of review and amendment to that contract if for some reason it's not deemed to be the perfect contract, which it might not be, and it

might need cycles to go through in the future to amend it to continue meeting community's needs.

And in terms of this being put into preserve ICANN's role in performing the IANA function, it's not really – that's not really the intent of putting it in. I think that the comment that Dan Halloran put into the chat really more so expresses the concern that we had that led us to thinking that maybe this was a good thing to put in.

It's not that ICANN needs to have within the mission statement that it must always be the place that the IANA functions or all three of the IANA functions are performed, but to the extent that the community and each of the operation communities believe that it's ICANN who should be performing that role we think that it's important that ICANN be able to serve in that capacity and for third parties to not come in and challenge whether or not that's outside of ICANN's mission against the wishes of those operating communities.

And that's why we have it there. So for as long as the protocol parameters community does not invoke the separation clause then ICANN will perform under that agreement and we should all have some level of certainty that while it may be it's able to be attacked from other ways, or whatever, but it's not going to be attacked on the basis of being outside of ICANN's mission. And that's the reason that it's there. So if that helps with the perspective of how we've put this in, maybe that can be helpful.

Also I know going back to the PTI agreement I know one of the things that we'll be working through IOTF will be considering how exactly Sidley, who has been working with the CWG as well on the PTI stuff, Sidley hasn't just been here with the CCWG, will have cycles to help weigh in on that and

review it because really that also is about how it serves the proposals and how it meets the expectation of the community. So there will be public cycles of review on that so we'll be looking forward to having all of you weigh in at the appropriate times on the PTI contracts.

Mathieu Weill: Thank you, Sam. I note that there's a number of comments from lawyers in the chat asking whether basically we can solve this with greater clarity about the process by which these contracts – these documents will be reviewed and subject to community comment including the CCWG and CWG.

And I think that's probably the direction that I think is – has the greater chance of mitigating some of the concerns we are hearing. And so I'm raising this point because Andrew is next in line so I'd like to hear your view about this, Andrew.

Andrew Sullivan: Well I haven't – I was listening carefully to the discussion on the phone and therefore I wasn't following carefully what's going on in the chat. But I think that there may be a deeper and more fundamental issue that what we really need to do is make sure that all the communities are convinced by any provision and let me put it this way.

The entire grandfathering section makes an argument or sets up a transition in which there's no way to question the agreements under that – that are covered by that section. I'm sorry, I'm tired. I'm not being as coherent as I would like.

But I don't understand why it is ultimately that this needs to be a piece of the fundamental bylaws. Why is it that we need to make sure that these are – that this is a carve out of the thing that we think ICANN should be able to do? Because if we believe that all the things that ICANN has been doing forever

are the things that it can do then presumably we've written the fundamental bylaws correctly. And if we haven't then we've got a bigger problem.

And that's ultimately I think what it is that is so troubling about this carve out, about this attempt in the subsection to set a bunch of rules. Because what it really does is include external contracts into – into the mission of ICANN whereas we've argued all along that what we really need is a mission that is clear and concise and completely understandable by people so that they know whether ICANN is stepping inside or outside of its boundaries.

If ICANN is already doing things that are outside of its boundaries we've got a bigger problem. We need to rewrite the mission. We don't need to rewrite the – this bylaw that says oh no, but all this stuff is cool. We need to make those things not cool. Thank you.

Mathieu Weill: Thank you, Andrew. So it's good that we have this exchange of arguments and discussions here. And I'm – what strikes me is that we have argument being provided in favor of this grandfathering agreements to avoid any challenge that would affect the operational communities, including obviously the numbering communities and the protocol parameters community. And on the other hand we have Andrew and Alissa, who are extremely well recognized representatives from these communities, and they seem very concerned by this addition of the provisions.

And I'm not a specialist of this. I'm not a specialist of the future PTI contract or root zone maintainer contract. But what I would agree with Andrew and Alissa about is I haven't really heard what type of we might have with the current mission statement that might not be fully consistent with the future PTI contract or root zone maintainer contracts. I think our group spent a lot of time crafting this mission statement wording, and this – the arguments I've

heard are on both sides quite theoretical that in case something would be fit into these contracts or in case the contracts would not fit the mission statement.

So it's a little bit surprising the situation we're in here. And I'm lacking a little bit of requirements or concrete aspects to make sure we have everything clear but certainly no clear way forward being highlighted. I heard – I read Alissa saying that additional process guarantees would not address the concern as was suggested by our lawyers. So it's difficult to see a way – a way forward.

I'm just looking at the chat right now trying to catch up. Andrew, it's a new hand so go ahead.

Andrew Sullivan: So there was this question in the chat that was, you know, what new text, you know, would help and so on. And I guess I'm – I guess I'm trying to (unintelligible) that the real problem is that the subsection D is just not – it isn't clear that it's needed at all. And if it is needed then we have a big problem, we're opening an enormous legal drafting problem. If we can just get rid of subsection D then we don't have a problem at all.

But subsection D is really problematic. It has that – it has all of the – all of this inclusion of agreements that have never been written down anywhere. It even has the problems of agreements that have been written down but nobody has agreed to and so they're all secret. It has possibly the worst possible problem which is an agreement between one entity and another entity that doesn't even exist yet and that agreement also has not been written down.

How can anybody possibly evaluate that? That entire section is just terrible. And my suggestion is we just throw it away. I get why it's there but it's too dangerous.

Mathieu Weill: Thanks, Andrew. Alissa.

Alissa Cooper: Thank you. So I – maybe I will try just one more time on the contracts that aren't written yet part which is to sort of flip around something that I think someone either posted in the chat or said earlier which is that (unintelligible) this process to narrowly and in a focused manner define the mission.

And now there's another contract between ICANN and PTI that doesn't exist yet and needs to be written and everybody says, well, you know, they could also be finished at the same time and we all know what we're supposed to do so of course they're going to be consistent with each other and the ICANN PTI contract with not do anything to expand or contradict the mission statement that we wrote.

Well if that's the case then capital letter D in this section is completely unnecessary. If there is no possibility that the ICANN PTI contract will be written such that it violates or contradicts the mission statement then capital letter D is completely unnecessary because no one would be able to challenge it on that basis because it wouldn't – there would be no possibility that it would expand or violate or contradict the mission.

Therefore, however this got into the bylaws document indicates to me that it is opening a possibility through the process of drafting the ICANN PTI contract to expand or contradict or violate the mission. If that wasn't a possibility it would not be need to be in there. And I think that is a key question for all of the documents referenced in here that don't exist yet or haven't been agreed yet.

I do think there are two different issues between agreements, as I said, that already exist if people are worried about them suddenly becoming inconsistent with the new mission because they were agreed under an old mission, that's a separate issue.

But for the issue of agreements that don't exist yet, if they don't exist yet and they're supposed to come into existence before the end of the transition period and everybody is agreeing in good faith that we're all going to work on this together and keep them such that they are fully in line with this newly written mission statement then you don't need these provisions. Thanks.

Mathieu Weill: Thank you, Alissa. So this – we need to be clear what we are focusing on here. Section 1.1.d includes several subsections. Some are related to the registry agreements and registrar accreditation agreements and we've discussed that intensively – extensively in this group. And I think it is not – they're not the focus of the issue.

There is a paragraph capital B on the memorandum of understanding between ICANN and the ASO, (DNRO), the IETF and I think those are already existing. The capital C and capital D are the focus because capital C is the root zone maintainer contract that's supposed to be reviewed. And the capital D is the PTI contract.

And I think the challenge – the issue is how we ensure that these documents that will be – that are not existing yet will not escape the mission which we took great care at defining even in terms of what ICANN does and does not do with the root zone management of names but also the – in the case of PTI. So that's probably the aspect we need to work on.



I'm not sure we're going to be able to make a lot more progress today. But certainly there's a challenge for lawyers to find a way that these external documents do not escape the recommendations that our group made in the supplemental report about the scope of ICANN's mission.

I think that's – that's something that would probably – that is not an option that the scope of the mission we've discussed in the CCWG, including in terms of the management of the IANA functions and same in the ICG, should not be overruled in any way by these provisions. I don't think it's the intent in any way of anyone in this group or in the legal teams.

But we would need to find a refinement, a clarification, something in the text to void – to reaffirm that the way we've scoped the mission cannot be escaped through these discussions that are yet to take place. So we should probably take that on the list at this point. And try to find an appropriate way forward on this because I am pretty sure that Andrew, if Andrew and Alissa are speaking up they're not the only ones who have this concern. And I know that's important for us to have everyone on board on these bylaws.

Rosemary, I think it's a new hand so probably I was speaking while not being aware you were in line. Go ahead.

Rosemary Fei: Thank you. I'm hearing a concern that one of the reasons for having this protection, let's get away from grandfathering, but protection from a claim of being out of mission for these future agreements is to allow these agreements to somehow be out of mission, to be negotiated and signed in a way that violates the mission.

I just want to point out that at least from my perspective in discussing this and agreeing to this, that was not my intent or understanding of what they would

do. For me I'm assuming these agreements will be negotiated in a way that's entirely consistent. But I also am well aware – I have become more aware – that there is a – often disagreement within the community.

And so what the grandfathering provisions would do, these protective provisions would do in my mind, is take an agreement that the community through the process through which it's approved, believes is in mission, and not allow it to be challenged as out of mission by people who didn't agree with the consensus.

I don't know if that helps. But there seems to be a fear that the purpose of the protection is to allow them to be out of mission. In my view the purpose of the protection is to say once an agreement is developed, which the community agrees is within mission, it cannot now be challenged by people who didn't agree. That's all.

Mathieu Weill: Thanks, rosemary. I see Andrew is back in line. Andrew.

Andrew Sullivan: Sorry to be so blathery. Look, there is a basic problem here and that is that the IETF considers the relationship with ICANN to be one of a service provider. And so I don't have very much difficulty imagining a community divide in which people on, you know, in different communities line up on different sides and then we have a consensus problem. And that's part of what we're trying to arrange here.

I am concerned that we're trying to do in, you know, in sort of large scale, political movements, the detailed work of making sure that people get along. And that may be part of my worry.

Mathieu Weill: Thanks, Andrew. I think the – we will need to try and summarize this discussion and refer to the requirements of the CCWG report, which once again are a clear description of what the mission of ICANN should be. It's clear that the root zone maintainer contract, and I'm not sure about the PTI contract because that's more in the remit of the CWG Stewardship, but they're not going to be following the same type of consensus assessment as our reports went through.

They're not going to be going for positive approval of any of the chartering organizations of our group. And because we simply have no time and that's not the process. And it's going to go through public comment but public comment is far from the type of consensus assessment requirement that we've had in our report.

So I think that's where some of the concerns from Alissa and Andrew may stem from. And we need to find a way once again to make sure we have consistency with the bylaws between the bylaws and our report and there's no way to create a loophole or whatever even unintended step away from our requirements.

So my suggestion would be to try and recap this, ask – make sure we have agreement on the requirements and then ask our lawyers to maybe confer about this and see how we can address this concern adequately. Because that's an area where I think we have substantial areas of concern and we need to treat this very seriously.

We have very little time but I can say I'm coming out of this particular section of the discussion with anything else than agreement that there's two different views on the issue at the moment and we haven't really managed to bring them together at this point. So I'd like to avoid that we get in the public

comment in the end a number of people from the operational communities commenting that they don't like a specific section of the bylaws. I think that would be a bad thing for the overall process. So we really need to try very hard and find a solution that meets everyone's needs and concerns and particularly the requirements from our report.

Andrew, I see you're back up in the line.

Andrew Sullivan: Yeah, I guess in the interest of being as blathery as possible today, look, nobody – in any community where I participate nobody wants this transition to fail. So the really key thing from my point of view is that we figure out how we can write this all down so that it works really well for everybody. And I think there is a – I think that perhaps people are not just stating outright the concern they have which is that there is some worry that some of the bylaws are being written in favor of some of the incumbents and one of those incumbents perhaps has a names monopoly.

And I think that that is what a lot of people are being influenced by. And so if we can find a way to ensure that that influence doesn't dominate in these continued discussions, that would be, I think, very valuable. Thank you.

Mathieu Weill: Thank you, Andrew. I think you made allusions that maybe not everyone has been following, at least I would not claim to be following everything you've been alluding to. But that's why I'm speaking about requirements and being very clear about what we are wanting to achieve or not or avoid. And it's part of this process that we need to put out on the table.

So let's try and put that on the list. We have a few days for that. I think there's – this is serious enough so that also all lawyers try and think a way to address this. And we'll certainly have to reconvene on this issue during our next

week's meeting. Hopefully seeing some progress being made on the list in the meantime.

I certainly encourage you, Alissa, and Andrew, to reframe – not re-frame but re-explain – explain again on the list what the requirements you think are not met right now and I think you've made that clear in this call so that we can try and advance that on the list. And with that I'd like to thank everyone for this important conversation. And I will turn back to Leon for any other business.

Leon Sanchez: Thank you very much, Mathieu. And at this point I would like to call for any other business. I see rosemary and Andrew's hands up. I assume those are old hands. Andrew, your hand is still – oh thank you. So are there any other business that we should be taking care of at this call? Okay seeing no hands up and hearing no one raising any other business I would like to thank everyone for attending.

And I see Brett Schaefer's hand is up so, Brett, you have the floor. Brett, might you be on mute? Okay so Brett is typing his question in the chat. Or is it already in the chat? "Will we be able to raise concerns on the May 3 as well as today?" My understanding is that, yes, Brett – oh actually Mathieu is clarifying that for you. And concerns can be raised until Friday 2359 UTC.

And are there any other business at this point? Okay so seeing no more hands up and hearing no more voices I'd like to thank you for attending this call. And we'll talk to you soon. Thanks, everyone. Bye-bye.

Cheryl Langdon-Orr: Thanks, everybody. Bye.

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