

ICANN

Moderator: Brenda Brewer

April 13, 2016

9:00 am CT

Leon Sanchez: Thank you very much. And welcome to the CCWG on Enhancing ICANN's Accountability Review of the Draft Bylaws meeting on April 12, 2016 at 1200 UTC. And the roll call, as usual, will be done based on those attending the AC room. And if we have someone that is not in the Adobe Connect room but is on the phone bridge we kindly ask that you state your name at this point so we can add you to the roll call.

Theresa Swinehart: Hi. It's Theresa Swinehart. I'm just logging onto the Adobe room.

Leon Sanchez: Thank you very much. That's been noted. Anyone else on the phone bridge that is not on the Adobe Connect room?

Sebastien Bachollet: Leon, it's Sebastien Bachollet. I'm just on the phone.

Leon Sanchez: Thank you. That was Sebastien Bachollet if I'm not mistaken, right?

Sebastien Bachollet: Right, Leon. Thank you.

Leon Sanchez: Thank you, Sebastien. Anyone else that is not in the Adobe Connect room? Okay hearing no one else I kindly remind you that if you haven't filed your Statement of Interest this is the right time to do so. Feel free to approach anyone on the staff if you have problems doing so or if you need any kind of help doing so. As a reminder, we will be going through the slides that the co-chairs had prepared and the staff had prepared for today's call.

And the intention of our call, as usual, is not to reopen issues but rather to try to better guide our lawyers in their work of drafting the finalization of the bylaws that we would be of course trying to implement as part of our continued work to implement the Work Stream 1 recommendations.

So with no further delay I would like to turn to my co-chair, Thomas, for next agenda item. Thomas.

Thomas Rickert: Thanks very much, Leon. And my only duty is to hand over to Mathieu because actually he is the one going to – who is going to go through the first couple of slides.

Leon Sanchez: Oh, you're right. I called you Thomas instead of Mathieu. Sorry.

Mathieu Weill: Thank you very much, Leon and Thomas. This is Mathieu Weill speaking, the ccNSO-appointed co-chair and welcome to this call Number 90. And I think by that time you must be totally confused about who is speaking in this session. And it's absolutely agreed as a role in the CCWG that you can call any co-chair by any of our first names and that's perfectly okay.

So the first item on the agenda is to confirm the answers we have provided to the different questions during the meeting yesterday. You have on the screen,

and the – I think we can provide you with scroll control on this one, the conclusions drawn from our notes – our meeting notes from yesterday in the document with the questions from our lawyers.

And this point – this agenda item is basically if anyone has a concern or problem with the conclusions that were circulated in the notes and that we are currently integrating again into this document, this is the opportunity to raise this concern as we are doing our second reading under the specs.

And so as a reminder, we made a lot of progress yesterday on many questions clarifying directions for the lawyers, making sure we stick to the report requirements and just the report requirements, no more and no less in many occasions. And we covered issues ranging from the mission statement to the human rights as well as the IRP and of course the GAC carve out discussions and many of your specific questions that you had highlighted over the weekend during our own reviews.

I am seeing no comment at this stage on this item so suggest we – oh I see Tijani's hand is up. Tijani. Tijani if you're speaking I cannot hear you.

Tijani Ben Jemaa: Yes, yes, yes, hello. How are you? Tijani speaking.

((Crosstalk))

Tijani Ben Jemaa: I don't see in those notes – I don't see in those notes the remark I made about the duration of the consideration of the IRP. And Thomas said that the lawyers will try to change the language so that they would – they will make a remark – not a remark but indication about the duration will be addressed in the rule of procedure. I don't see it here. Thank you.

Mathieu Weill: That's a very good point, Tijani. Thank you for your pointing that out. Indeed, we had discussed yesterday that on the IRP the provision in the bylaws that the process will take no more than six months will get an extra (unintelligible) that the rules of procedures might suggest that. We will add that to the document. Thank you very much. Any others?

Okay so we can now move on to the outstanding questions, we'll move on to a set of slides and I don't know if these slides have been circulated. Obviously they've been consolidated in during the few hours we had between our two meetings so apologies for not circulating them earlier. But it's like yesterday we'll go through this (unintelligible). I am hearing some noise so I'm not sure whether it's someone who is not on mute or anything.

So we'll go through each of the questions and we'll certainly try and address them as we have a deadline to respond to the lawyers by tomorrow. So without further ado let's move to the next slide. I'm hearing Rosemary's note that I'm hard to hear. Can you confirm you hear me all right?

Kavouss Arasteh: Mathieu, do you hear me?

Mathieu Weill: Yes we have you, Kavouss.

Kavouss Arasteh: Yes, I have asked to be informed you that I am only on audio. But I ask three times to Leon, perhaps he didn't hear my voice. I am on audio only, please.
Thank you.

Mathieu Weill: We will add you, Kavouss. We had not heard you before so this is well noted now. Thank you for pointing that out.

Kavouss Arasteh: Thank you. Thank you.

Greg Shatan: This is Greg Shatan. I'm on audio only as well.

Mathieu Weill: Okay Greg, welcome. Now let's get to the different questions. We had worked yesterday on one of the questions which was about the words "in the root zone." We have actually confirmed that we want these words in the bylaws because they're closer to our recommendation.

And there was a follow up question – clarification requested by our lawyers which is, do we need to define the root zone because it's not defined in the bylaws. And so it's a follow up question by the lawyers, our first discussion on this. It was part of their initial question and I think we overlooked that aspect of the question.

And so I'd like to hear from you whether you think there's a need to define root zone somewhere in the bylaws. Might be a little technical for bylaws but on the other hand having a definition is always useful. So I'd like to hear if there's any views on that.

Andrew says, "We're in deep trouble if we need to define that." That's a way to answer. So let's take Andrew as – Andrew's suggestion in the chat as a starting point for our CCWG answer. Is there any opposition to answering the lawyers that we don't want to define that because it's too troublesome, basically, but it's – it would lead to potential unintended consequences.

Alan.

Alan Greenberg: Thank you. Just to repeat something I've said several times in email and never gotten a real comment on, I have no problem not defining the root zone and not implying that it's higher levels than just the root. I want confirmation that

that does not alter ICANN's ability to contract with registries and in – by means of those contracts control what happens at higher levels.

Mathieu Weill: Okay so my understanding is that – and maybe we can have the lawyers confirm that whether – the question was open, it was not we recommend that you define; it's do you want to define? So I would assume that if it was – there was some unintended consequences of the thought you were referring to their suggestion would have been – would have been – their answer would have been different. But I'm certainly willing to hear from them on that.

Andrew.

Andrew Sullivan: Hi there. (Unintelligible) because I'm on the...

Alan Greenberg: Can't hear, Andrew.

Mathieu Weill: Andrew this is – your sound is very, very low. We cannot hear you...

((Crosstalk))

Andrew Sullivan: Okay. All right I'll try typing it instead because I'm using the mobile app and maybe it doesn't...

Mathieu Weill: Okay, Andrew, so you're going to – I understand you're going to type your answer. I'm seeing some discussion in the chat. So a suggested way forward based on Andrew and Alan's input so far, would be we'd rather not but would like confirmation that there is no significant issue on ICANN's ability to (unintelligible) due to that absence of definition. That be okay at this point? Anyway, it's an ongoing dialogue with the lawyers that we need to have. But it's, I think, perfectly okay to answer a question by another question.

Not seeing Andrew's typing submission yet. Okay so there's pros and cons so we probably – our response to the lawyers on that would be that it's an exercise we better not undertake but we'd like confirmation that it's not creating significant areas of risk. And Susan said something. Okay so I think that's still in line with the proposed way forward. Holly. Can you clarify if need be? Holly? We cannot hear you if you're speaking.

Holly Gregory: Can you hear me now?

Mathieu Weill: Yeah, now I can hear you.

Holly Gregory: Okay, I'm sorry. I think we'd like to have that confirmation come from ICANN Legal who has a much better understanding of the implications of this language. So if the group agrees we'd like to hear from ICANN legal on the implications of whether or not the term is defined.

Mathieu Weill: Good. So that would be our group is – inclines on the side of not defining but we'd like confirmation from ICANN Legal about potential implications of the absence of definition. Olivier, you're next. Welcome, Olivier.

Olivier Crépin-LeBlond: Thanks very much, Mathieu. Olivier Crépin-LeBlond speaking. I do note that at the moment the current bylaws define the roots – well, define the activities of the advisory committees and the Root Server System Advisory Committee is mentioned in there and it does make the reference in there. These matters include the processes and procedures for the production of the root zone file.

So unless the root zone has been defined, I don't know why it should start being defined if it hasn't been defined in the past and if it was working fine in

the previous version of the bylaws. Perhaps it was an oversight, I don't know. But I'd like to hear some response about this. Thank you. Okay, I think we are converging to common ground here about inclining not to define and asking for ICANN Legal confirmation of any implication of the absence of definition if need be.

Excellent. So that's our first question of the day. We can move to the next one now. The next one is one we have viewed a few times already but we received yesterday during our meeting a clarification about the question itself by the lawyers that we had requested.

And actually there is two questions – two sub-questions. Both of them are related to the removal of NomComm board members and the – I have forwarded detailed explanation from lawyers in the slide on the captured – basically the conclusion.

Twenty-nine A is that lawyers recommend to confirm that the NomComm board members' removal is beyond the scope of the GAC carve out and the argument is that the removal of a single director does not constitute a challenge to a board's implementation of GAC consensus advice.

I think that this is consistent with our discussions from the meeting yesterday and actually the meetings last week as well. But I suggest we stop on that 29a first, and then we'll go to 29b. I'm seeing Brett doing long interventions in the chat which I would summarize: "I am opposed."

And Brett, I certainly noted that you were already opposed when we had the previous discussions, is there any new thing – new arguments that would lead us to reconsider that position, Brett?

Brett Schaefer: As I mentioned before, I am opposed to this because the GAC does not vote for NomComm directors and should not have a vote in their removal. I'm also opposed because it's inconsistent with how the CCWG draft treats individual SOs and ACs with respect to their appointed directors. And I believe that the SOs/ACs voting on NomComm directors should have similar exclusive authority over their removal.

And I oppose because the CCW draft proposal – actually the final proposal – is silent on this matter. It does not specifically address it and we should not be inserting new powers for the GAC into the bylaws when they are not explicitly included in the CCWG draft.

I'm also opposed procedurally because as we mentioned yesterday and last week, the board removal of directors requires EC consent legally. We were told that the removal – that the EC approval cannot be affirmative and because it was not included in the CCWG draft. Therefore the approval had to be rubber stamp.

Here the CCWG proposal is silent on whether the GAC should have a vote in removing NomComm directors. The current bylaws specifically do not grant them any such power. But we're told we need to now grant them that power even though there's no legal requirement. And we know there is no legal requirement because individual SO and ACs have the power to appoint their – or remove their own appointed directors.

In my opinion procedurally, this is entirely inconsistent. Either we stick strictly to the CCWG draft as we put it forward, or we do not. And either we give the EC powers over the removal of directors in affirmative way, or we don't grant the GAC powers in this regard in ways that the CCWG draft does not discuss at all.

So those are my objections both on the specific recommendation and on the procedural measures that are being used to justify it. Thank you.

Alan Greenberg: Have we lost our chair?

Thomas Rickert: Mathieu, are you still with us?

Mathieu Weill: I think I was talking to a muted microphone. Thank you very much, Thomas, for reminding me. Just I was thanking Brett for restating his position which has been discussed in the previous meeting. And I think it was important to do that. I'll now turn to the other speakers in the line but would note that I think we need to focus on any other arguments that we have not previously discussed and not rediscuss an issue that we've been through in our previous meetings.

So, Alan, you're next.

Alan Greenberg: Yes, thank you. I'll be very concise. Number 1, the report was not silent on this. The report said that NomComm directors were to be removed by decision of the empowered community and the GAC is defined as part of the empowered community, Number 1.

Number 2, notwithstanding that, if we decided that NomComm directors could only be removed by those who voted for their selection, as in the NomComm, then the IETF would have to be included as part of the group that makes a decision to remove. Clearly that is not viable and nothing we've ever discussed before. Thank you.

Mathieu Weill: Thank you, Alan. Tijani.

Tijani Ben Jemaa: Thank you very much. Tijani speaking. I feel that we are reopening things here because the – our report was very clear. So let's keep to what is in our report. The carve out apply only in the conditions described in our report. So don't try to tell us they didn't participate in the selection so they don't have the right to remove it. This is something that it's not in our report. If you want to change the report this is another thing. Thank you.

Mathieu Weill: Thank you, Tijani. I'm sensing traction. Let's – we're probably going to confirm our view here so unless you want to speak in objection to that, let's make our interventions quite brief. Roelof.

Roelof Meijer: Okay thank you, Mathieu. This is Roelof Meijer. Can you hear me?

Mathieu Weill: It's a bit faint, Roelof. But we can hear you if we hear – if we listen very intently.

Roelof Meijer: Just bear with me – well I agree with the two previous speakers. But I also want to – I think it was Greg who spoke first on this issue. I wonder – because (unintelligible) argument of the lawyers that the removal of a single director does not constitute a challenge in the board's implementation of GAC consensus (unintelligible). I would just like to note for Brett, does he agree with this assessment or does he disagree with the assessment?

Mathieu Weill: So I'm not sure, Brett, if you captured Roelof's question quite well.

Brett Schaefer: I'm sorry, I didn't even hear his question.

Mathieu Weill: Okay so, Roelof, we'll need to try to find a way to capture your question precisely. I'm afraid, given the very low volume of your comment I'm not

sure I could reformulate accurately. It was hard to hear. So maybe we can just confirm that in the chat or something or if you manage to fix your sound issue you can speak again after James and then we'll close this item. James, meanwhile, can you make your intervention?

James Gannon: Yes, just very briefly (unintelligible) I want to speak to (unintelligible) whether this is (unintelligible) or not. But on the issue of part of the community which does not elect the NomComm (unintelligible) NomComm process (unintelligible). If the GAC (unintelligible) starts to make the NomComm seats that's available, start using that, then I believe it'd be a different decision. But given that they currently do not participate in that process I think procedurally it doesn't (unintelligible).

Mathieu Weill: Thank you, James. Once again, sound quality is not our – not at its best today in our call. But I think we got the general direction of your comment and taking into account the various interventions and the discussion in the chat, I think we can provide a positive answer to 29a.

And move to 29b which is a related one where the lawyers recommend that in the decision to remove a NomComm-nominated director, there would be all decisional participants that will have the opportunity to participate without reference to excluding decisional participants who do not hold the right to appoint.

So basically what they're saying is it's – the designator model is a single designator model so it's the EC as a whole who designate formally the board members. And as a consequence all decisional participants participate to these decisions. It's a related one obviously and so I think it's pretty straightforward as a conclusion of our previous discussions that we should confirm and if

there's any other objections or other grounds of objections to that of course there is – now is the time to mention them.

And I think it's pretty logical that both go side by side so I think we have a clear conclusion that we can confirm on 29a and 29b and with that we can move to the next slide.

Next slide is also a follow clarification requested by the legal team. You will remember that last week we discussed how the interim board, after a board recall, would consult with the SO/AC leaders and/or the community forum. We actually answered the question but probably did not fully respond to the question that was raised. It was a little bit of a misunderstanding.

The lawyers are asking us to confirm the process and the procedure by which as discussed in our report the interim board would consult with the SO/AC leaders and while relevant with the ICANN community forum. And the suggestion from our lawyers is that we should use the same procedures as a rejection action, so rejection of a bylaw change, for instance, as a reference to follow by the interim board in terms of consultation.

I think it makes sense but would like to hear any objection to that which is obviously a clear direction we need to provide the legal team as they draft the bylaws in that important matter. I am seeing some support from Cheryl in the – who is ticking green. I am seeing no objection at this point so considering this as an agreement at this point. Roelof, I assume your – this is still your old hand from the previous point? Thank you for raising your point in the chat, by the way.

Roelof Meijer: Sorry, old hand.

Mathieu Weill: Okay, thanks. So Question 7 I think is – we have an answer which is pretty stable at this point. We can move to the next slide. Next slide is a point that was raised during review, we received an additional question. And it's related to the fact that during drafting, and it had been foreseen in the preliminary work of our group by the lawyers, they have introduced a concept of the empowered community chairs council.

This was needed to allow the bylaws to be clearly drafted and has a – basically ministerial role which is described in Section 6.3 of the bylaws. And some have asked that we maybe confirm that this is something we can – we are comfortable with. And I'm going to turn to Holly to provide a little bit more context maybe on that before we engage in the discussion. Holly.

Holly Gregory: Thank you very much. While in some respect the EC's chair council is a concept that we've needed to expand to implement the EC powers and rights, we have kept it purely ministerial. And you will recall that it's not really a new concept, it is noted in connection with enforcement of an IRP in the draft proposal. So it's really not a wholly new concept.

We also had provided the CCWG some months ago a memo about the construct and how, you know, who would help drive ministerial decisions of the EC. So really all it is is a way to make sure the notice requirements are met and it can only act as the decisional participant instruct it to act.

We're very aware of the concerns that what we don't want to do is create in any way another sort of center of power that would then need to be constrained. So we have – to the extent we think possible – drafted into the draft bylaws a mechanism to make sure that it has no ability to act except as directed by the decisional participants.

One of the protections that we've included is full transparency around decisional participant decisions so that the instructions to the EC from decisional participants are very transparent and then full transparency about how the EC chairs council then acts on those decisions. And those things, once fully transparent, should match up so you will be very aware if this group ever tried to do something that was outside of its powers. I hope that provides clarification.

Mathieu Weill: Thank you, Holly. This is very clear. And I think very consistent with the expectations from the group even before we concluded our supplemental draft. And Rosemary, is there anything you want to add?

Rosemary Fei: I think the section that's being quoted on the screen right now is the – related to how the decisional participants give notice to – or provide input to, I should say, to the chairs council. There is additional language for when the chairs council – essentially any time the EC has to do something, some person has to do it and that's what the EC chairs – not legal person but a warm-blooded person who can push keys on a keyboard.

And so there's also another section of 6.3 that deals with when the EC is supposed to tell someone else that it's made a decision. And, again, Holly, you mentioned all the transparency so that any time a decision is made it should be evident to the entire community.

This particular part of the bylaws is – you will see some edits that we are making for clarification now on the draft. We're trying to make this a little clearer than it was even at the stage that you're looking at on the screen.

Mathieu Weill: Thank you, Rosemary. I see a question from David McAuley in the chat. Are the EC council – EC chairs – the members of this council, are they covered in

the indemnification language actually or should that be added? Maybe we can just put the note on that in our response and we can check.

Holly Gregory: Yeah, this is Holly. I would say that we'll double check it but it should be there. We will double check.

Mathieu Weill: Okay so we'll make a side note on that so it's covered. Certainly compared to the – what was on the screen I would certainly make a reference in our CCWG response on that or comment that we welcome the full transparency on everything the EC chairs council is doing. And certainly a welcome provision.

Alan, you're next.

Alan Greenberg: Thank you. A question – well first a question. Can our lawyers clarify whether the members of the unincorporated association, the empowered community unincorporated association, are the AC/SOs or the chairs of the AC/SOs?

Holly Gregory: I can answer that. They are the ACs and SOs and not the chairs.

Alan Greenberg: Thank you. Therefore I presume the chairs are essentially acting as the warm bodies representing – and I use that term in quotes – to actually take the actions of the empowered community, not in any other role.

Holly Gregory: That's correct.

Alan Greenberg: Okay, thank you.

Mathieu Weill: Thank you, Alan, Holly and Rosemary for these clarifications.

Kavouss Arasteh: Mathieu, do you hear me, please? Hello? Do you hear me?

Mathieu Weill: Kavouss, would you like to speak now?

Kavouss Arasteh: Yes, I want to speak now. With the risk that some private sector lining up one after the other and opposing to me, which I know they always oppose, I am not comfortable with the term “council.” Legally council has some connotations, an entity. We don’t have EC chair entity at all. If you want to have a focal point, if you want to have a secretariat, so far so good.

But the term “council” if somebody does not say in accordance with the US law, I don’t agree with the term “council.” Create something else. Focal point, secretariat, something but not council. Council has a very particular meaning administrative council of an entity and so on so forth. So please kindly ask the distinguished lawyer avoid to use council. That is one.

And second, distinguished Mathieu, please kindly ensure that this call is cross community call, is not a private sector call. It should not be dominated, imposed, biased by private sector. People should be allowed to talk. People should be allowed to express their views and not always saying that this view is not consistent with the US law. We are not dealing with that. Council, I disagree. Please kindly consider. And your duty as the chair is kindly to ensure that the views of us is taken into account. So I disagree with the creation of something which is called council. Thank you.

Mathieu Weill: Thank you very much, Kavouss. Holly, would you like to answer to the council wording point?

Holly Gregory: Yeah, we don’t have a strong feeling about this. We don’t need to use the word “council” nor do we have a problem with the use of the word “council”

from a legal perspective. We feel that it's a neutral term legally. Happy to use secretariat or any other word that you come up with as a group to define this group. We do think that, you know, so, you know, we're not going to fall on our sword on this one. It really doesn't have any legal implication to us. What we call this EC chairs thing-a-ma-bob.

Mathieu Weill: I'm all in favor of EC chairs party but I'm not sure it doesn't have any implication (unintelligible). Let's try and find words that everyone is comfortable with bearing in mind that it needs to be clear also but your point is well noted, Kavouss, I think.

Holly Gregory: Yeah, if I may – I mean, if the group does not object to secretariat that it does have a very administrative and ministerial feel to it. So, you know, that would be a fine word from our perspective. We just want you all to agree on it so that we don't spend several days arguing and reading emails about what word to use to define this thing.

Mathieu Weill: Good. Secretariat is our candidate now.

Greg Shatan: This is Greg. Can I get in the queue, please?

Mathieu Weill: Okay, Greg, you'll speak after Andrew. Andrew. Okay, Andrew, I cannot hear you right now. Okay. Greg, please take the floor and while we fix the issue with Andrew. Greg. Greg? Okay, I think we're trying to do a call where everyone is allowed to speak and I want to assure you there is...

((Crosstalk))

Mathieu Weill: ...from the chairs or secretariat. Is Andrew (unintelligible) to speak?

Greg Shatan: This is Greg. I'm back online.

Mathieu Weill: Okay, Greg. You have the floor.

Greg Shatan: Just briefly, first, in ICANN secretariat does have an extremely – it's a term that's used in a number of places and always for a ministerial, clerical, readily important but not the kind of function at all we're talking about here where council, to the extent that it's used, is used as, you know, a group of leaders of some sort. I disagree with Kavouss that there's any legal meaning to the term council under US law. But I'm only a US lawyer so what do I know?

So I think that there's no reason to stay away from the term council, and the term secretariat in the ICANN (unintelligible) will be very likely to be confused. Lastly, there is of course no private sector conspiracy going on here or back channel conversations so I resent any implications made here or on the list to the contrary. Thank you.

Mathieu Weill: Thank you, Greg. I think we should not waste too much time on the naming itself in the call. That's – I think we can definitely launch a very entertaining thread on this item but certainly not the best use of our time here. We can flag the issue. It's an easy one to fix once the bylaws are drafted anyway so I don't think it's on the critical path. We have understood that is a question here.

James and then we'll certainly move on to the next item. James.

James Gannon: (Unintelligible) for secretariat (unintelligible) just move on, you know, gather together what people think and, you know, choose one of those like (unintelligible).

Mathieu Weill: Thank you, James. Once again the sound was a bit tricky to hear but I think I got the spirit and we can certainly move on to discussing options on the list and then we'll see whether there's a need for a converging towards a consensus position on that. But I think in terms of principle on the EC chairs council we can confirm that and move to the next item.

Next item, which has been raised by I think Andrew was the first to raise it and it's been raised on the CWG list as well, it's about Section 11d that was added to deal with some of the capturing the previous agreements and several questions were raised. And I'm quoting Andrew here.

One is, "Is it okay to have the references to external agreements in the mission?" The article currently refers to agreements including the root zone maintainer agreement, I think the NRO contract and a few others. Some of them – the PTI, so that's not necessarily finished or fully agreed on. And certainly the question was whether this would be – would not be a lot broader than the CCWG proposal Annex 5 especially by the inclusion of the strategic plan and operating plan, which are explicitly referenced.

I suspect that this question has already been discussed in the CWG and would welcome any input from the outcome of this discussion in the CWG. It would appear somehow logical that we ask our lawyers to review the alignment between this specific close and the recommendations that we made in Annex 5.

And that any extra inclusion would require a very clear justification about why it was strictly necessary to add to that. So that was our starting point for this discussion. I hope Andrew, I did not misrepresent your question. And I'm turning to Rosemary maybe for a little bit of context here on this clause of the draft bylaws.

Rosemary Fei: Did you just call on me? I was trying to unmute my line.

Mathieu Weill: Yes, I did, Rosemary. Sorry.

Rosemary Fei: Thank you. So this was discussed in the – at the Los Angeles meeting where the CCWG’s counsel met with ICANN Legal. And there is – there are indeed a short list of agreements that were added to the – what’s called the grandfathering clause or grand parenting, whatever you want to call it. And I can speak to some of it, not all of it, but it is also pretty much the case that several of these were raised by ICANN Legal as concerns for – with which we agreed, by the way, I should say, when we listened to the arguments.

Your CCWG counsel agreed that because they were already in place and we didn’t want to throw ICANN into breach, we wanted to make sure that anything that was in these agreements or in the case of the operating plan and the strategic plan in the plans, was covered. I do note that there’s been a misunderstanding about whether renewals of the strategic plan and the operating plan are covered. They are not.

If you look at the section that talks about renewals, it leaves out the subsection, it doesn’t cross reference to the subsection where the strategic plan and the operating plan are covered. So specifically starting with that, the strategic plan and the operating plan were covered because they are already in place and they are already community, as I understand it, documents on which the community has had input.

And so to the extent rather than – rather than taking the time to go through the strategic plan and the operating plan and figure out if there’s anything that anyone might think was out of mission that needed to be grandfathered, at

least, for this plan, since it's already been approved, we thought that putting in the current strategic plan and the current operating plan, which would not continue to be grandfathered after the current ones expire or a new one comes not play, we thought that was a good solution for that.

The inclusion of the PTI IANA contracts that are not yet in existence, Holly may want to speak to this as well, but I know that Sharon Flanagan from Sidley who's been one of the lawyers heavily involved on the CWG side with which Adler Colvin is not involved, Sharon Flanagan made a point when we asked her about this question that it was actually quite important that there not be a problem even though those contracts do not exist today that they be included – they will exist before the bylaws come into force, she said.

And she's quite concerned that the concepts that those contracts are within ICANN's mission is kind of seated throughout the new CWG materials. And we really need to keep that. So I can speak to that.

And the last thing I can speak to is a very good point that we had raised at one point that we did not prefer to have references to external agreements, not just in the mission but in governing documents generally. It's not considered a best practice. For various reasons you raised the question of whether that document has now become – has been incorporated by reference into the mission or the bylaws or the articles or wherever it's referred to, and also you – that raises questions about what happens if that agreement changes.

I think that our willingness to allow references to external agreements has had to be modified in light of the technical issues that have been raised that there doesn't seem to be any other way to talk about what you want to talk about. We are – I have to say we're probably not very – it's not something we love

about the way the drafting has turned out but it's something that we can live with and it seems to be what the community can live with best. That's all.

Mathieu Weill: Thank you, Rosemary. And I think this is probably highlights that it's – it's good to spend a little bit of time actually understanding each of these clause and understanding the technical or legal issues that are – that require these to be added. So I would be tempted to keep the recommendation from our group that any – all of these – each of these additions would benefit from the legal teams, and that definitely includes ICANN legal because obviously they are the ones who probably raised some of these issues with reason.

And as you said, you agreed with them in many – in all of these cases. But I think our group would feel better if these technical or legal issues could be highlighted and put in writing so that we can understand and be comfortable with it and it does not give raise to any concerns of actually using these for some form of mission creep or anything like this which has been a concern.

Andrew, I'm seeing you in the – in line. Maybe we can hear you now?

Andrew Sullivan: Let's see whether my mic is better now that I've switched computers?

Mathieu Weill: It's really good.

Andrew Sullivan: Good. Thanks. So if – I – first of all I appreciate the correction. The concern that I have here is fundamentally that we're just including, by reference, these external agreements. And in (unintelligible) they could have anything at all in them because several of them aren't written yet. So is there a way somehow for us to get the text that would be included or something like that? Like I'm presuming that it's the current five year plans that are included here and not something that could be revised between now and October.

I confess that this is partly of concern to me because these showed up sort of surprisingly given the – given the pushback that we'd gotten earlier about including these external documents. And also given the attempt so far to insert broadening language into the mission that I think the CCWG agreed to. I'm very concerned that we make sure that we understand what it is that we're agreeing to here. And that's the reason that I really think we need to have nailed down precisely what text is going to be, you know, included by reference.

And so I don't – like I really don't know how to do that but it seems to me that some of these are documents that could be changed between now and the first of October by unilateral action of the ICANN board and so we need some way to make sure that that isn't what we're, you know, what we're agreeing to. I mean, this is just, you know, sort of basic agreement writing that we can't have things that one party could change unilaterally once everyone has sort of agreed that something is going to happen.

Mathieu Weill: Thank you very much, Andrew. I think I would add your point about how to avoid any change between now and the – when the bylaws enter into force that how would that be covered. I think, Holly, you were next in line. Rosemary, I assume your...

Holly Gregory: Thank you.

Mathieu Weill: ...it's an old hand that is showing. So I have Holly and James and then we'll move on.

Holly Gregory: Thank you. Well I think that there's probably a way to put language into this that indicates that the strategic and operating plans shall not be changed

without, you know, community participation and agreement, you know, for this little type of grandfathering.

I wanted to react though to the suggestion that we should put in writing all of the many, many points where there's a legal reason why we've had to do some drafting. And I think we simply don't have the time to do that. We're happy to try to discuss those issues if people have concerns.

I think it's very much the process we've been going through and asking you questions where we thought we needed more guidance and also responding to your questions and concerns where you think we may have expanded beyond the clear scope of what was in the proposal.

We're happy to respond to those but we do not have the time to both get the bylaws completed and to write those things down between now and next week when we need to be able to have a draft that we can certify. So I just wanted to let you know that. And I apologize, as you know, we've done this on a very, very, very short timeframe. We had estimated that drafting bylaws would take 6-8 weeks. We're into it for 3 weeks now. We're close to the finish line but it means that we haven't had a perfect a process in our ability to communicate with you as we would have liked certainly. So thank you.

Mathieu Weill: I understand the time constraint and I don't want to put any additional burden that would affect the overall timeline.

Kavouss Arasteh: Mathieu? Mathieu, I have a comment.

Mathieu Weill: But I think – yes, Kavouss, noted. I will turn to you after my remark. Would there be any – because obviously this specific call is not the place to go in details around all the concerns and issues that have been raised by Andrew but

also by others. And I know it doesn't only include CCWG participants but also CWG and others. Is there – and is there any way that we could probably, I don't know, maybe organize a specific call with ICANN Legal, you and those members of the community who are interested in getting more details, that they – where they could provide questions and discuss this in an efficient format?

Because it's still very uneasy for us to actually be asked to provide approval or comments on something where we're not very clear what we're approving in this instance. So I'm trying to find an efficient way forward on that. So probably – we're probably not going to make a conclusion on that here and now but we need to find a way to address those concerns by providing more details and in a way that is not too expensive in time for the lawyers at this point.

Holly Gregory: We're certainly happy to participate in whatever conversations you would like to participate in. But I do think that this process of asking questions and responding to questions, including in writing has given a lot of transparency into the kinds of concerns and issues that we've been facing. So I don't think that there's a lot more – I don't think there's a lot that – I don't expect that there's anything that's hidden; it's all pretty much out there on its face.

I know it's a big document to go through. But we're here to reply to questions any time you want to shoot us questions or to participate in a phone call any time you want us to participate in a phone call. Happy to do it.

Mathieu Weill: Kavouss, if you're speaking I cannot hear you.

Kavouss Arasteh: Yes, I want to talk if you allow me?

Mathieu Weill: Of course I do.

Kavouss Arasteh: Yes, Mathieu, when you incorporate a document into the legal text you give the same status of the legal text to that document. If there would be any change to that document we discuss it should come back to see whether still the modified version could be considered as part of the legal document. That is what we do in the UN.

If not, you could detach that. Otherwise you give a blanket agreement to something that we don't have any control of that and could be unilaterally as (unintelligible) modified. So we should be very, very careful by cross (unintelligible). Thank you. Incorporated by reference, sorry. Incorporated by reference. Thank you.

Mathieu Weill: Yes, Kavouss. Thank you very much. It's a good point. So I think we'll – I think we've conveyed our potential issue here very well and would like to – we'll certainly continue this conversation in line with the CWG. And with that I'll turn to Thomas for the next slide.

Thomas Rickert: Thanks very much, Mathieu. Hello everyone, again. Let's move to the next slide please. Yes, you hear me? Can you hear me?

Alan Greenberg: Yes, we can hear you.

Thomas Rickert: ...for that I would like Becky to give us a quick update on what the state of play with this point is.

Becky Burr: Hi, I'm sorry. I was on mute. There have been some questions about how mediation works with respect to the community IRP. In the – in a regular IRP there is a informal process for resolution then once the IRP has been filed

there is an – a more formalized engagement process that can be turned by either party into mediation. So it comes in right after the IRP has been filed.

The question – that’s relatively easy to deal with in a individual IRP. It’s a little bit more complicated and so one of the questions is simply whether once a community IRP is filed it moves immediately into mediation – a formalized mediation process or whether, you know, you stick with the engagement process.

Holly and Rosemary, please correct me if I’ve gotten the sequence on this wrong because I’m remembering our chart in Los Angeles but I can’t quite remember all of the detours along the road.

Thomas Rickert: Holly and Rosemary, would you like to comment on this?

Rosemary Fei: I’m not sure I understand what this question is. It’s not – what I’m seeing on the screen is escalation to lead to mediation automatically. There is supposed to be a mediation or – I can’t remember it’s called a CEP as an alternative. There’s some options. But I don’t know what that – what this question is to mean automatically. I’m going to have to go back to the original Question 33, sorry.

Thomas Rickert: Okay now just to – just for everyone to be able to get back on track with this, you might remember that we had a question Number 33 from the lawyers which was discussed by this group and we’ve asked the lawyers to reframe the question. And then a couple of days back we received a clarification, a paragraph or two, detailing more what the original question was about. And then there was an exchange between Becky and the legal teams because I think Becky was also not really clear on the clarification.

And so this was an attempt to shed some light on this issue. So I would suggest that we park this topic for the moment given the uncertainty around it. And I would like to ask Becky to consult with the legal team and then maybe we can get back to this during – later during this call so hopefully we can close it then.

So let's move to Slide Number 9 then please. Actually go to 10. Okay so I guess with respect to this point we were waiting for some comments from the legal teams on the middle ground language basically that was suggested by the – by Becky. I think there is no news on this point between the call yesterday and today. Becky, since this is, again, on your turf, topic-wise, do you have any update or was my assessment that there is no progress on this since yesterday correct?

Becky Burr: No progress since yesterday.

Thomas Rickert: Okay so let's move on to Slide Number 11. And that is with respect to the term "global Internet community," the question was whether this term should be discussed, should be defined, I'm sorry. And Jordan had suggested in yesterday's call that we should define the global Internet community as the global Internet community that chooses to participate in ICANN structures or provide input through ICANN public participation mechanisms.

Andrew has kindly shared an analysis of the report where he has identified those parts of the report where reference to the community is made. So the question is what we make out of that. So since Andrew, you've entirely conducted that research, would you like to speak to that point?

Andrew Sullivan: Sure now that I have managed to figure out how the mute button works. So I did this quickly sort of, you know, late yesterday afternoon. I just went

through everything where something called “the community” had to do something. So there are places in the document where community is referred to. But I didn’t think any of those were important but if somebody else wants to do that and check my work please, you know, feel free. There’s 500 some odd places where the word “community” appears in the document. And happy reading.

But these cases were, I thought, problematic because what it said was essentially that there was this group of people, who knows who they are, that needed to do something. And it just felt to me like, you know, future looming dispute about exactly who gets to be included. So for each case I tried to suggest a way to do it within the bounds of original proposal from the CCWG.

It is possible that – because I was working from the clean copy of the bylaws so I actually don't know whether any of these are cases that were in the previous bylaws. I don’t think so. But regardless it seems to me that these are some opportunities to just clean that up. So I don’t know if people, you know, thought this was a reasonable thing. I did note a note from – well I forget who it was but anyway somebody responded saying yeah, that seems close enough to me.

So, you know, I’m happy to take any corrections or people can refine this as much as they would like. I don’t feel wedded to any of the things that I put in it but it does seem to me that we don’t – we don’t want to say, you know, the members of the global community need to do something without having some mechanism by which we decide who those people are.

Thomas Rickert: Thanks very much, Andrew. Just for those that did not have the opportunity to take a look at Andrew’s email, if you search for community in the draft bylaws, that’s actually the subject line, you will find it.

I'm not sure whether you, Jordan, would like to comment also since you had originally made a suggestion on this? I think Jordan is not on, just checking. Okay so – what I suggest doing is we – this is actually the last slide, the last point for us to discuss. And I think that you might need a few minutes to go through Andrew's email. Again, thanks, Andrew, for putting that together. That's been a huge help.

So on this point as well as on the other two points where we need further input from the legal teams, I suggest that we take those offline, continue discussing them on the list, and closing the conversation on the list. So...

Kavouss Arasteh: Can I talk?

Thomas Rickert: Yes, Kavouss. Let me just check...

((Crosstalk))

Kavouss Arasteh: Dear Thomas, thank you – thanks, Andrew, for the hard work he has done. As long as there is no misunderstanding between global multi-stakeholder community and the global Internet community, and community I have no difficulty. The problem is that we should have a clear understanding of what does mean what. So I hope, the analysis of Andrew that I have not seen unfortunately, (unintelligible) I'm lazy, is that must clarify the situation that we need not to be worried when we phrase these three different descriptions or these three different connotations or naming and so on so forth.

If there is no problem between these three and one simple explanation, could clarify the matter, I have no difficulty. Otherwise, we would face difficulty every time whether we are talking of the entire global multi-stakeholder

community, the whole world, or we are talking of the Internet community, or we are talking of the community which means more or less SO/ACs. So we should be quite clear about this. Thank you.

Thomas Rickert: Thanks very much, Kavouss. I suggest that we all go and take a look at Andrew's analysis of the report and continue the conversation on the list. Now I think that some of the answers that we've found today are quite straightforward. So what we will do is compile those and send those results to the list for your review as soon as possible.

So that you have the opportunity to comment in case you think that what we have prepared does not accurately reflect the outcome of our discussions. Then we have two or three questions where we are awaiting feedback from the legal teams so we will work with the legal teams to get certifications out to them where needed and make sure that we get answers from the legal teams as quickly as possible.

We will then send that to the list immediately so that you can see their proposed answers, for example, on the issue of the word "regulation." And if we – and we will, you know, start doing basically from now, which is a little bit after 13 UTC, I think we should set ourselves a timeframe of 24 hours. So – the group will get the opportunity to continue the conversation for the next 24 hours so that we can then aggregate the outcome of the discussions and close the Q&A so that the drafting teams get our instructions subsequently.

So that is the plan for the next 24 hours. Let me just check whether there are any questions from your side? There are no hands raised. No one seems to be typing in the chat.

Kavouss Arasteh: Thomas?

Thomas Rickert: Kavouss.

Kavouss Arasteh: Last night people mentioned to regulate or to impose regulation. They are not the same thing, are not the same meaning. So just (unintelligible) people dealing with that. To regulate is different from to impose regulations. Thank you.

Thomas Rickert: Thanks very much, Kavouss, for that clarification. So I would suggest that we then move on. And last agenda item is actually AOB. Do we have any other business? That doesn't seem to be the case so with that we can adjourn. Thanks, everyone, for interesting and fruitful discussion. And we're going to reach each other on the list. Thanks for now and bye-bye.

END