

**ICANN**

**Moderator: Brenda Brewer  
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2:00 pm CT**

Thomas Rickert: Awesome. Thank you so much. Good morning, good afternoon, good evening everyone. I'd like to welcome you to this call Number 93 on the 3rd of May, 2016 of the CCWG Accountability. My name is Thomas Rickert and I'm the GNSO-appointed cochair of the CCWG.

As usual we would like to welcome all of you and we would like to take the roll call from the remote participation room. Is there anyone who's only the telephone bridge and not on the Adobe?

Keith Drazek: Hi, Thomas. This is Keith Drazek. I'm on audio only today. Thank you.

Thomas Rickert: Thanks, Keith. Noted. Anyone else? Doesn't seem to be the case. Then we'll turn to the usual request for update of interest – updates of statements of interest. There don't seem to be any.

Okay with that we can move to the second agenda item and that is just to briefly outline the next steps of our work. As you know, the public comment period on the draft bylaws is currently running. And we are having this call

today in order to hopefully finalize our discussions on the comments that we received on the draft bylaws.

As you will remember, the draft bylaws have been translated from our final report and while we did have some language that might have looked like bylaw language in our – the final report, the lawyers worked on those – three teams actually and came up with draft bylaws that every one of you had a chance to look at.

We will go through a couple of slides with you momentarily in order to discuss these comments that you made and then it's up to this group to determine whether the comments actually require action, and at this stage it is not for us to change the draft bylaws but the process that we're going to use is that we're going to draft comment for the draft bylaws and we need to distinguish those points that have been brought up that are – that are of concern for individuals from those that are concerns shared by the whole group.

And we should only put into the official CCWG public comment those concerns and observations that are supported by this group. So should we find out that there are issues that are only issues for individuals but as we used to say during our development work that did not get a lot of traction in the whole group then we would recommend that those comments, those concerns, are presented to the community by those individuals or by individual groups with their own individual public comments and not by means of the CCWG public comment.

So again, today hopefully we're going to finalize the deliberations on the comments that we have collected from you with the goal of filing a public comment on May the 10th, which is a week's time. And also we're going to

split those points that are of general concern from those that are of individual concern.

Let me also say that we will, together with the help of staff, gladly take a – take the task of formulating the public comments based on the input that we’re discussing. And we have also discussed what tone our comments should have when we discussed this during our preparation call. And we are very much in favor, and this is something that hopefully all of you support.

The general tone of our public comment will be supportive. We will go on record showing our appreciation for the excellent work from the legal drafting teams and from ICANN Legal and the splendid job that they did translating the report into draft bylaw language and then we will add as the case may be depending on the outcome of our discussion, suggestions for consideration by the penholders in order for them to consider our comments and hopefully update the draft bylaw language in the spirit of our suggestion.

So I think this is – this is it in terms of introductory remarks. Let me virtually look at Leon and Mathieu whether there’s anything to add with respect to the next steps. And I’m being signaled that we’re good to go, we’re good to go and move to the third agenda item which is the discussion of the CCWG responses.

And for that I would like to turn to Mathieu.

Mathieu Weill: Thank you very much, Thomas. This is Mathieu Weill speaking, ccNSO-appointed cochair. Welcome to this call Number 93. As you’ve seen in the AC room, for those of you who are in the AC room, we’ve assembled a little bit of supporting documentation to facilitate our discussion and we’ll take each of

the items one by one. These items were listed based on the inputs you have provided on the list as we had discussed.

And we tried with the support of staff to provide the relevant bylaw sections in the draft as well as a reference to the recommendations and very short description of each issue and the proposal. You will see the word “proposal” is the proposal that was mentioned by the colleague who raised the issue previously so it’s not a cochair or leadership proposal or anything.

So the first item was the item we started discussing last week which was the Whois Review Team and the five year frequency requirement. You will remember that the draft bylaws are in compliance with the recommendation that the reviews shall be convened no less frequently than every five years measured from the date the previous review was convened.

And the issue had been described very clearly that the Whois review would immediately be one year late when the bylaws would enter into effect. And it was proposed that we comment to avoid this initial default in this (unintelligible). So that was where the discussion was when we received this comment. There was some discussion last time on whether that was appropriate or not.

I think to start the discussion seems to – we’ve been discussing this in the leadership group it’s – it should be noted that certainly the bylaw language is meeting the report requirements. There was no mention in the report of the issue of the Whois review being late or any exception. And it’s – it is our impression not necessarily the CCWG’s role to take the initiative and actually address this issue by raising this in our comment as an answer to the question whether or not this is a discrepancy, a gap, between the requirements and the draft bylaws.

However, we certainly should be aware of the issue but it's probably more of an issue to be discussed with the chartering organizations between the chartering organizations and the ICANN Board to address something that is actually, if I'm not mistaken, already an issue right now within ICANN because the Whois review according to the AOC was already behind schedule.

So that's the way I would introduce this issue. I'd like to call for any comments, suggestions on whether or not we should add this topic in our comment and under what directions. I heard someone speak who was maybe on audio only. No, it's probably someone who was not on mute.

I'm seeing no hand raised at this point. Usually it's difficult to ask the first question. Alan, very fitting that you raise your hand since you introduced this issue so please you have the floor.

Alan Greenberg: Thank you very much. Technically in this meeting Leon introduced the issue, I did speak to it however. A couple of things. I think at the very least we must note it in our comments even if we don't make a recommendation but we must note that it has been raised and there is some concern that ICANN could be in default and would have to take action which might – may or may not be appropriate at that time because of it. So I think at the very least we have to do that.

You say we're currently in default but technically we're not. Right now we are in violation of the AOC but the AOC is cosigned by the board and the NTIA. The board made the decision to defer; NTIA has not objected so it's not clear that we are in fact in the same situation now in default as we would be in the bylaws. So I don't think it's fair to equate the two.

I personally feel that it would be a huge misuse of resources to initiate a review at this point. As Steve Crocker has pointed out, we certainly, if nothing else, need a good analysis of how all the bits and pieces put together. That I think is a staff job and I think that should be in hand prior to making a decision whether to hold a review or not and I think the board ultimately needs the ability to make that decision whether to hold it or not. So whether we make that recommendation or it comes from a bunch of other places I think at the very least we need to note it.

And I'll introduce one more comment and treat it either as humor or serious, as you wish. Technically we will not be in violation. The bylaws call for an RDS review five years after the previous one. There has never been an RDS review. There has been a Whois review. The bylaws make no connection between the two. It's up to us or individuals to make that connection. As I said, either serious or humor. Thank you.

Mathieu Weill: Thanks – thanks, Alan. And agree with you that the fact that we must note the issue should be part of our comments, that was indeed my intent when I did the introduction. James. Welcome James.

James Gannon: Hi, thanks. So broadly in line with what Alan said, I think that something needs to happen with this but I don't think it really needs to come from the CCWG. But I would like to see us raise it as an issue to the board, not that they don't already know but that we feel that, you know, my suggestion would be that that needs to be a qualifier on the very first review on this. You know, we need an additional qualifier on this bylaw.

But I don't really think that it's the place of the CCWG to make that recommendation. I think that should probably come from the board in reality. But I definitely do think it really does need to enter our comments because it's

a huge (unintelligible) issue that's going to cause problems for the (unintelligible).

Mathieu Weill: Thanks, James. Greg, just checking that you're in line with that so that we can move to the next item later on. Greg.

Greg Shatan: Yes, I'm commenting on this item.

Mathieu Weill: Are you – okay, please.

Greg Shatan: I think that the – if we took away some flexibility that the board previously had in terms of scheduling reviews, that was probably not intentional but if it was we need to consider that. I don't think that there is a kind of de facto situation here that this Whois review needs to be postponed. I don't think it's within the gambit of this group to recommend that it be postponed. I think there are perhaps maybe there are good reasons that the Whois review should be postponed – that the Whois working group or RDS working group should be postponed so the review could take place.

Seems to me it's not, you know, good government to postpone scheduled reviews. And I would be opposed to any recommendation that implies that it would be a good idea for this to be – this review or any other review to be postponed. That said, if we took away flexibility that was intentionally part of the governance of ICANN up to this point and that was not intention that should be rectified as well. Thanks.

Mathieu Weill: Thank you, Greg. So I think the direction of the mission is quite clear, that we should note it but not make any specific recommendation how to address it. And I think with that I can move to the next item. And I'm turning back to Thomas.

Thomas Rickert: Thanks very much, Mathieu. And just as a reminder for everyone, we have roughly 20 topics to cover in less than 100 minutes or now it's 90 minutes or so so you can easily calculate the average time available if we don't want to go into overtime or schedule an additional call. So can I please suggest that if you just agree with a statement that has been made previously you can indicate your agreement with the green tick mark and let's just put ourselves in the queue if we want to oppose or add a new dimension to the comments that have been put on record before.

This next point is hopefully going to be a quick one, that's 1.1(d) – sorry, 1.1(c) and that related to a linguistic issue. The word “such” was used in the draft bylaw language and it was unclear what this “such” would refer to. So I'm going to skip a little bit –you all have scroll control so that's laid down on two slides. And let's look at the suggested fix and that is that the simple solution would be to remove this clause and end the sentence with authority, that removes the issue of what does such regulation refer to.

And that received a lot of support during previous calls. And we're just seeking confirmation from this group that there is no opposition to suggesting this language fix. No one's putting him or herself in the queue. And with that I would suggest we move to the next point and that's 1.1(d).

And 1.1(d) deals with integrating external agreements. And I'm not sure, Becky, I guess this is a point that you wanted to speak to, right?

Becky Burr: I think that the issue here is that we specifically said in the proposal that we would grandfather the Registrar Accreditation Agreement and the Registry Agreement, the current forms that are being used. And that – everybody seems fine with it. There are concerns about grandfathering agreements that have not



been drafted yet particularly the PTI agreement. And I think that's what the concern that people have raised here.

I honestly I do think it is a significant concern. There are obviously many ways in which we could – many opportunities and tools that we will have to ensure that the PTI agreement says what it's supposed to say. But I do think that, you know, that those people who are saying we should see the PTI agreement and sooner rather than later is better, are right.

Steve DelBianco: So this is Steve, if I could in the queue please?

Thomas Rickert: Sorry, I was talking to a muted microphone. It's your turn, please go ahead.

Steve DelBianco: Thank you, Thomas. Yeah, I should just note that there has been some discussion on the ICG list on this topic. And my understanding is that it is not simply a concern about PTI as an agreement but it's also those involved with the IETF and IAB concerned about the IETF MOU, which has yet to be concluded. And that the ICG is likely, along with the IAB, to be submitting a comment on this particular point. And it's one that they are – have serious concerns about I should say. Thanks.

Thomas Rickert: Thanks very much. Next is Kavouss. Please. Kavouss, it's your turn.

Kavouss Arasteh: Do you hear me?

Thomas Rickert: Yes, we can hear you. Go ahead.

Kavouss Arasteh: Yes, sorry. This was a question and concern which was raised many, many, many times by several people, including Milton, myself in a very brief manner but now within the ICG, all members – not all – most of the members of ICG

they support this serious concern that this grandfathering has been extrapolated and extended to cover something that was not meant to be covered. So this requires a clear actions and to be resolved as soon as possible and we should not limit it.

We have many, many messages exchanged and we were given the task to bring it again to the attention of the CCWG to resolve this matter. Section 1.1.2 Roman A is okay. But from 2 Roman B to E it should not be there. And we have serious concerns about that. Thank you.

Thomas Rickert: Thanks, Kavouss. I suggest we stick to this 1.1(d) for the moment. The – it looks like we are second guessing about concerns that third parties do have. And it appears like the appropriate way for us to is to leave it to those concerned organizations to speak up and make themselves heard. And that would include, as Becky said, the IETF, she made a comment in the chat window, but also we could ask the ICG to work on this and come up with solutions.

Alissa.

Alissa Cooper: Thank you. Can you hear me okay?

Thomas Rickert: Yes, go ahead.

Alissa Cooper: Great. So just one kind of note on that, what you just said, Thomas, is that one thing that has certainly resonated what me the more that I've thought about this is that – well I think a lot of the discussion has arisen because these provisions don't appear to have any grounding in either the ICG or the CCWG proposal. And I think, you know, if they had appeared in, you know, probably would have appeared in the CCWG proposal, if they had been in the proposal

then, you know, discussion around them would have occurred on – probably on a longer timeframe and more to the community would have been involved.

But I think that might be something that the CCWG wants to consider if one of the tasks of the group is supposed to be to, you know, determine that the bylaws are consistent with the proposal I think it could potentially – you know, the ICG make the comment, which we're talking about doing, that essentially says we can't – we don't see any anchor for these bylaw provisions coming from the proposals themselves. I mean, we can read the CCWG proposal but we can't really speak for it.

And we can speak a little bit more for the ICG proposal. So it might be useful if that's something that the CCWG agrees with that this is a provision – these are provisions that appeared sort of in whole cloth and not from the proposal that the message could be reinforced if the group agrees with that. So just – I understand the notion of, you know, having individual communities speak for their own pieces of this which they are affected, although I would say I think potentially, you know, most of the community is affected by this because agreements with all kinds of different parties are listed here. So it might be worth the CCWG taking a broader view.

Thomas Rickert: Thanks very much, Alissa. So it looks like the issue is still (unintelligible) according to Alissa's proposal. Kavouss. Kavouss, you might be muted...

((Crosstalk))

Kavouss Arasteh: ...to raise the concern. Yes, I think we are – I am a liaison of the ICG and ICG is composed of three main operational community. And two of those operational community they have problem with this. So it is up to us, I as the liaison of ICG, maybe Keith Drazeck as well, I don't know, but Alissa is the

Chair of ICG, raising the question not on behalf of herself but she has been given mostly – most of the ICG member support to raise the question. So I don't think that we should leave it to the community to raise. This is a concern with this and it need to be considered and take appropriate action. Thank you.

Thomas Rickert: Thanks very much, Kavouss. So it looks like we are in a difficult situation that it is likely that an answer on this is expected from us. And I think that we need to go back to our report and state what we had in our report and maybe look at this again from a requirement basis. But before I speak more to that Mathieu has raised his hand. Mathieu, the floor is yours.

Mathieu Weill: Sorry, Thomas. I was actually about to say exactly what you concluded with which is that our comment can certainly confirm what was in our report and that's the Registry Agreement, Registrar Accreditation Agreement, as well as the renewals because we had a good discussion with the lawyers about why the renewal was necessary in the previous calls. We've had this in our pervious comments on the draft bylaws before they went out for public comment so we can certainly reaffirm that.

And also make a note that others agreements are in the draft bylaws but are not covered in our report so should be certainly it should be certainly double checked that their inclusion is relevant – is based on some other community's reports and specifications and not just by unilateral addition. So I think we can certainly frame a comment like this to accommodate the various views that have been expressed. Thank you.

Thomas Rickert: Thanks, Mathieu. Alan.

Alan Greenberg: Thank you. I think this bears some similarity to the previous one we talked about regarding the RDS Whois review. This is another item where there

appears to be some desire in parts of the community, certainly in our legal drafters at this point, that a change needs to be made from what was verbatim what was in the RDS.

And, again, it's reasonable for the CCWG to identify the issue. If you're going to be expecting the organizational – and specifically the chartering organizations to weigh in if indeed something needs to be changed from the report, then I think the CCWG coming out of this meeting has to send something to the chartering organizations identifying the issues that have been demonstrated to be veering from the report and would be worthy of the chartering organizations commenting on. Thank you.

Thomas Rickert: Thanks, Alan. Let us put that into the minutes. And let's just wait for a second how this comes through in the minutes. Since I think Alan, your point is an excellent one, that we need to give a heads up to the other organizations. But I guess that Mathieu's comment was spot on based on the requirements, based on what we had in our report. And given the discussions that we had over the last couple of weeks I think it's unrealistic and not desired for this group to come up with proposed language on this. I think we can just shed some light on what our expectations were when the recommendations were drafted.

I think we need to move on to the next point now. So let us – thank you very much, Kavouss. Let's move to the next point. And I see that Becky's hand is raised so I understand that you want to speak to that.

Becky Burr: Yes, thank you. Brett Schaefer raised a concern about the language that is the – that implements Paragraph 147 of the CCWG report. And in that we said that existing registry agreements and registration accreditation agreements including PICs and as yet unsigned new gTLD agreements for applicants in the new gTLD round that commenced in 2013 should be grandfathered.

That language in the first draft of this set of bylaws was pretty clear. But then it was changed to talk about agreements that are in force as of – or undergoing negotiation as of October 2016. And I think it's possible that some of the new gTLD – the 2013 round applicants may or may not be in negotiations for their contracts but we intended to grandfather agreements containing, you know, agreements for any registry applicant in the 2013 round.

And then the new language goes on to say, “including in each case any terms or conditions therein that are not contained in the underlying form of Registry Agreement.” And then it refers to the Registrar Accreditation Agreement. Now the Registrar Accreditation Agreement, that form is out there so I don't actually – I mean, obviously to the extent that ICANN signs up new registrars using the existing Registrar Accreditation Agreement it should be able to do so.

But the language about including in each case terms or conditions that are not contained in the underlying form of Registry Agreement, seems to explode the point of the grandfathering to encompass anything and everything. I suspect that this was intended by the lawyers just to clarify something but it really has introduced ambiguity that I think we need to think about going back to language that was contained in the first draft of the bylaws.

Mathieu Weill: Thanks, Becky. This is Mathieu speaking. So your suggestion on Brett's comment is to provide – to confirm that registry – or registrar agreements that are under negotiation are covered by this 1.1.(d) section but that some of the wording should be – should be reviewed, is that correct?

Becky Burr: That is correct. And it should – it should not permit grandfathering terms and conditions that, you know, are not in the form agreement.

Mathieu Weill: Excellent. So I think that's the direction of travel for our comment. Kavouss, do you have an issue with this way of...

((Crosstalk))

Kavouss Arasteh: Yes, I have the issue that we as well explained the grandfathering was designed for the limited application but now it seems that it has been expanded and extended. And any wording to exclude any interpretation of such expansion apart from what was really meant to be grandfathered. So we should be very, very careful. Becky mentioned as a form of action but it requires to see exact wording to avoid any misuse or any misinterpretation or extension to any other things that was not meant to be grandfathered. Thank you.

Mathieu Weill: Thank you, Kavouss. I think we're definitely in line with that in general with that – with the 1.1(d) clause. Sam, you are providing input in the chat but I'm not sure I'm capturing exactly the – I mean, how much that would change our way to comment or if that's an important issue for – to share with the whole group.

((Crosstalk))

Mathieu Weill: ...Sam Eisner.

Sam Eisner: No, I think Becky and I are having a little bit of an exchange but she's just clarifying – I was trying to recall from our conversations if we'd include that other terms and conditions as a way to explain the legacy agreements that exist that don't follow the form for the 2013 new gTLD. She and I are in full agreement that all future signed agreements would follow the form, right, but

then there still is the grandfathering of the existing agreements no matter what the terms of those are. So I think we're okay, we're kind of working that out here. Just making sure we weren't making decisions on the fly that impaired the existing contracts.

Mathieu Weill: Of course, yeah, that's why also I wanted confirmation on that. So that's good to hear. So we have a direction on the answer of 1.1(d). And before turning to Brett, I would add that if you look at Slide Number 10 there was another comment by Brett about the renewal of some of the agreements that we're discussing.

And obviously if we make a comment that some of them are not in the scope of our report and we flag this and certainly that applies to this close where the renewals of some of these agreements would be presumed – could not be challenged according to the mission. So I think that would address also your point on this aspect, Brett. And I'm turning to you now, Brett, to see if you are satisfied with the way we would answer.

Brett Schaefer: I think so. I think Becky actually explained very well how the terminology that's currently in the draft would create I think broader windows than was really intended in the CCWG draft proposal or I guess final proposal. And I'm interested in seeing what the modified text looks like and how this can be narrowed to more specifically define what exactly would be grandfathered and what – and under what circumstances.

I'm concerned that the broad – or what possible terms could be in the existing agreements that might permit renegotiation or expansion of those renewals that could go beyond the scope and mission of ICANN as we're envisioning here in the report. And I want to make sure that that is also properly cordoned in in whatever we're drafting here in terms of language. Thank you.



Mathieu Weill: Thanks, Brett. Alan finally and then we'll close this item. Alan.

Alan Greenberg: Yeah, thank you. I believe I'm in complete agreement with where we're going which if I understand it says that items which are renegotiated or imposed by ICANN have to be within the mission. Items which are not being renegotiated but are being carried over from previous agreements are allowed and are being grandfathered. And if that's what we're saying I'm in complete agreement.

I have a little bit of concern about the process, however, by which these changes are going to be incorporated after the comment period ends and there is a very short window before they actually have to be approved by the board. How does the community see those comments, see those changes in the window from when the comment period stops until they're actually ratified? Is there any plan that there be any visibility of these? My question I guess is on the overall timeline, not this particular issue.

Mathieu Weill: Alan, can we keep that question for...

Alan Greenberg: Sure, oh yes of course.

((Crosstalk))

Mathieu Weill: ...I think it's a very relevant question but I'd like to make sure we focus on addressing each of these issues. But certainly that's an excellent question and I don't have any answer at this point but we need to have one.

Alan Greenberg: Yeah, thank you.

Mathieu Weill: So we'll move to the next item which – and the next item is on Slide Number 12. Thomas, if you – I don't know if you're ready for it, it's the item on the number of decisional participants, if it ever changes, it was a comment from Brett.

Thomas Rickert: I apologize, I had to get off mute. So Brett made the comment on the number of – or changes on the number of decisional participants for any reason, including the resignation of any decisional participant or the addition of new decisional participants as the result of the creation of additional supporting organizations or advisory committees.

Should the possibility of SSAC and RSAC deciding that they wish to become decisional participants in the EC are to be specifically addressed. This is not captured in either example. And this is a point that we have not discussed in this group so I would like to open it up for comments from this group. So Brett wanted to add some clarifying language.

Brett Schaefer: I'm sorry, Mathieu?

Thomas Rickert: This is Thomas actually. Brett, do you want to speak to that? Go ahead.

((Crosstalk))

Brett Schaefer: No Rosemary is raising the point that in the – or that the text in the draft prior to the parenthetical covers them which means that if they want to change their minds and become decisional participants then that will require a change in the bylaws. And that was my assumption of how the bylaws would work but it isn't specifically there and the two examples listed don't specifically refer to that. And that was where my question lie. And if – it could be simple as just

specifying that or it could be unnecessary but I wanted to raise the point because it was a question in my mind. Thank you.

Thomas Rickert: Thanks very much, Brett. I see Sam's hand is raised. Sam, you want to speak to that point?

Sam Eisner: Yeah, sure. Thanks, Thomas and Brett. So if you look earlier on in this section regarding how the decisional participants are defined those are specifically called out and so the SOs or ACs that would be participating from the outset, the five that have stated that they want to participate, are specifically identified. And so while this section that you've identified says any change in the number or identity of decisional participants doesn't explicitly call out the RSAC or SSAC and what would happen.

If you look earlier in this section because RSAC or SSAC are not named that's where we – we don't need to name them again here because if you just reference up to the earlier part it would be clear that a bylaws change would be necessary to add them in if they chose to be added in.

Thomas Rickert: Julie.

Julie Hammer: Yeah, thank you. I agree that I don't think it's necessary to mention SSAC specifically. We haven't discussed it but I don't think it's necessary. It can be accommodated should that ever happen.

Thomas Rickert: Thanks very much, Julie. Brett, you heard from explanations on the call and in the chat. Does that satisfy your need? Can we take this off the list?

Brett Schaefer: If everybody else is convinced that the bylaws will cover it then that's fine. This was – again this is something I'm raising to make sure that it's clear to

everybody what the intent and what the in house situation would be handled in the future. If they're satisfied then that's fine with me.

Thomas Rickert: Okay thank you so much. So I think we can safely take that off the list for the – for the public comment. So we are now moving to Page Number 14 or Slide Number 14. And Leon is going to introduce the next topic.

Leon Sanchez: Thank you very much, Thomas. I believe it's Slide 13, right?

Thomas Rickert: It's Slide...

Leon Sanchez: Yes, it's Slide 13, draft bylaws (unintelligible). And there is a question on why don't we specify that decisional participants have to decide by consensus. So we have the draft bylaws (unintelligible) is that three or more decisional participants (unintelligible) from the respected chairs or each such decisional participant that a constituents of (unintelligible) participants have (unintelligible) determined that there is a credible allegation that ICANN has submitted (unintelligible) or that there have been across mismanagement of ICANN resources. ICANN shall retain a third party independent firm to investigate such (unintelligible) activity or gross mismanagement.

Then we have some CCWG recommendations (unintelligible) Lines 37 and 38. And we have online 37, that there could be events where the community might wish to have additional power of transparency either (unintelligible) of potential fraud. And or financial mismanagement in ICANN and also that to address these concerns the CCWG Accountability recommends the adoption of the following (unintelligible) processes.

And we have upon (unintelligible) decisional participants, the empowered community coming together to identify a perceived issue which

(unintelligible) or gross mismanagement of ICANN resources, ICANN will retain a third party independent firm to undertake a specific audit to investigate that issue.

The audit report will be made public and the ICANN board will be required to consider the recommendations (unintelligible) of that report. And well this is not in the CCWG report and it's consistent with the empowered community practice of the (unintelligible) the chairman their own procedures. The phrase "by consensus" should be struck.

So I believe we have no contentious point here. The suggestion would be to only strike the phrase "by consensus" so are there any oppositions to actually strike this phrase? Okay so hearing none objections then we should strike that phrase "by consensus" so please note this as a decision in our notes. And now I will hand it back to Mathieu.

Mathieu Weill: Thank you, Leon. Extremely effective, as usual. The next slide is 14 on my screen at least. And it's still about the draft bylaws 22.8. And this time it's about the board's power to redact reports – investigation report within the scope of the new investigation power. There's a – the draft bylaws article enables the board to redact as determined by the board, including and there comes a list of potential issues including to preserve attorney client privilege, work product doctrine or other legal privilege or where such information is confidential.

This list of items is already somewhere else in the report and we've had the opportunity to discuss this within – during the discussions prior to the public comment. But it should be noted that there was no specific provision for redaction in our recommendations in Annex Number 1.

And so the suggestion that was made, and I think it's still by Brett Schaefer, who made a very thorough review, was just to strike the word "including" so that at least the list of potential criteria that would enable the board to redact is a closed and exhaustive list and not just a list of examples that can be expanded later by the board upon their discretion.

And I think that's a suggestion that brings the draft bylaws closer to our recommendations. And if – I'm going to ask if there's any objection but if not I would certainly support the proposal. I am seeing no – oh I see Kavouss hand is up. Kavouss.

Kavouss Arasteh: No problem but what was the fear of Brett that if we maintained "including" what is – does this "including" came out of the space or we had in mind when we say including not limited to what we have today. So what is the reason that we try to tie up our hands? I'm not objecting to his proposal but I want to have a reason, a justification to make it as specific but not any room for future maneuvering. Thank you.

Mathieu Weill: Thank you, Kavouss. And I think there's been a lot of discussions in our – in our requirements when we were finalizing the reports and the various iterations about the need to be extremely explicit about the board's ability to redact documents, about transparency. And I think I may be – maybe I'm not interpreting Brett correctly but I think that's the concern that we are trying to address here and the way he's suggesting that we use this is certainly in line with that general strive for greater transparency in the way reports are disclosed.

I'm seeing that now it's opened for a greater line. Brett, you're next and it's good that you can respond. And then Alan and then we'll move on. Brett.

Brett Schaefer: Thank you. I think you summarized the point very adequately and very succinctly. The main point is that with the current phrasing it would say that the board has the power to redact based upon its own discretion and it's not limited to a certain number of circumstances. I'm certainly aware and support the idea that attorney client privilege and other information such as on employees or other confidential matters should be open to redaction by the board.

But I don't think that it should be completely at the discretion of the board and I think that we should have a finite list here so that we do have standards for transparency and that the privilege is not abused. And that is the purpose of the suggestion that we strike "including." Thank you.

Mathieu Weill: Thank you very much, Brett. Alan.

Alan Greenberg: Thank you. I support the removal of the word but note that if it's removed there may need – there may need to be one or two other additional items added to the explicit list. I'm not a lawyer, I'm not going to try to dream them up but if it is in fact a closed list then clearly people have to think carefully that we include everything, you know, such as employee confidentiality issues and things like that so just a comment. Thank you.

Mathieu Weill: Thanks, Alan. I think what I'm...

Brett Schaefer: I will note that at the end of this there is somewhat of a catch all that says that we're...

((Crosstalk))

Brett Schaefer: ...or such information is confidential which is a rather broad but defined category of exemptions for redactions.

Alan Greenberg: Thank you, noted.

Mathieu Weill: Yeah. And that's a list that we can find somewhere else. I don't remember where else in the bylaws. So obviously there's been a lot of thought being given onto this list already. So with that I think we can move to the next item and I'm turning back to Thomas.

Thomas Rickert: Thanks very much, Mathieu. I'm now looking at Slide Number 16, at least on my screen size. And just before we start a discussion that relates to the GAC carve out, because the GAC carve out language comes into play here, let me preface this by sharing my understanding of the suggestion with you. This is draft bylaw language that relates to approval action. And it has some qualifications in there.

And Brett is suggesting that the draft bylaw language or that the bylaw language for approval action should be mirroring the bylaw language that we find in the draft bylaws for a rejection action and that has an additional piece of language speaking to potentially a required adjustment based on the carve out.

So let me turn to our legal drafting team members. Maybe they can comment on whether this is necessary, whether we're covered or whether that's a suggestion that you would gladly accept in order to improve consistency of the bylaws both for approval as well as rejection action. I think this is more a point of drafting technique than anything else.



Kavouss, before we turn to you I would really like to hear from the pen holders of the draft bylaws to get their thoughts on the drafting. So maybe Rosemary, Holly or Sam would like to speak to that? Okay so let's move to Kavouss first. Kavouss.

Kavouss Arasteh: Yes, somebody said is drafting technique. I'm very sensitive to this type of drafting technique which might have some intended – intentional or unintended unintentional consequences. You know that how much concern about this carve out, I would be very, very careful not to accept any change under the name of drafting technique. I don't know who is the inventor of draft technique.

So I'm not – I'm not convinced to any change beside or any addition what we have in the proposal of CCWG. Not any extension, not any interpretation, and not any extrapolation or interpolation. So I'm not convinced. Carve out is very sensitive issue. And I don't agree with the drafting technique at all. Thank you.

Thomas Rickert: Kavouss, we're going to see each other later this week in Geneva, maybe you can explain your point more to me. I was not referring to anything in terms of substance with the GAC carve out. As you will note we've always been very clear that the implementation of our report should neither diminish nor augment the applicability of the carve out that we have defined. I'm just interested in learning whether the draft as it stands is missing something if we don't synchronize rejection actions with the approval action.

And I see that Ingrid's hand is raised. Ingrid, the floor is yours.

Ingrid Mittermaier: Hi, yes. Ingrid Mittermaier with Adler Colvin. As you know the main GAC carve out shows up in the main part of the bylaws in 3.6(e) and there is

language in there that makes it clear that a GAC carve out could apply to an approval action. We were trying to minimize a lot of, you know, in the first draft of this there were a lot of references to the GAC carve outs in Annex D and that just felt like it was too heavy handed and put too much focus on this one issue.

And so the decision was to mention the GAC carve out more expressly in two areas in the rejection actions and there it is especially important because the threshold of four goes down to three. And as well in the – I think it's in the bylaws – it's in the part of the removal actions where there has to be the specific IRP process. So for those two areas there's a specific reference to the GAC carve out.

For example, in approval actions and in some of the other escalation processes the main effect is to simply have the GAC not be able to be a voting participant and so we didn't expressly call it out in those parts of Annex D. So it's not a completely parallel process in each of the escalation processes which is why we didn't mention it in every single escalation process. Thank you.

Thomas Rickert: Excellent. So it looks like this drafting is intentional. Brett, and then we hear Kavouss again and then Holly and after that we're going to close this point.

Brett Schaefer: Thank you. Thank you to Ingrid for this summary and the explanation for that. And I do note that in the previous draft and the current draft specific mention of the GAC carve out was deleted in almost every single instance. In fact it now appears in the Annex D in only two places that I could see. But I think it's important to mirror the phrasing of those two instances here in the approval action because there is a instance where the GAC carve out could apply with respect to the exercise of the community powers.

It is specifically mentioned as applying in terms of approval action in the 3.6(e) section. The text that I've suggested here exactly mirrors except for the specific reference to the approval action under consideration. The text that is used elsewhere in Annex D, it is not in any way intended to be an extension of the GAC carve out, it is merely a reflection and a – of the GAC carve out and how it should apply in the terms as laid out in the approval action process.

So I don't see this as controversial at all. It is simply an explanation and a clarification exactly where it applies and how it should apply and I think it's necessary to do so in all the cases where the GAC carve out may apply. And while I (unintelligible) that the GAC carve out language was heavy handed before, but it shouldn't be excluded where it needs to be applied going forward. Thank you.

Thomas Rickert: Thanks, Brett. Kavouss.

Kavouss Arasteh: Kindly explain what is the relation of the GAC carve out and approval process of bylaw? GAC carve out does not have any relation with that. That was something else created by Becky at the last minute and extended by GNSO people and some other people. What is the relation of the GAC carve out and approval process of the fundamental bylaw? What is the relation of that? And why it should be there.

You know that many people tried many things unfortunately or fortunately. They did not succeed, but now they try to come from other door. We put them out from the window, they come from the roof. We put them out on the roof -- they come from other window.

Now I am not convinced that there is any relations between the (unintelligible) and approval (forces) upon them in those bylaws.

If there is, you as a chair, or Mathieu or Leon explain (me) why. Because you must be useful. The other people know -- they are against that. They are (unintelligible) people.

I am not convinced that whatever they said is the fact of reality. I am always doubtful what they said. They have shown that view -- they - was it in ('90) just three calls that that is (attrition).

Whenever it is possible, they try to come and attach to this. Kavouss Arasteh.

((Crosstalk))

Kavouss Arasteh: I'm sorry (unintelligible) - agree with that unless you explain...

((Crosstalk))

Kavouss Arasteh: ...relation. Thank you.

Thomas Rickert: Kavouss Arasteh, you have gone on record with that multiple times. We really need to move on. And it appears like this concern with - draft as it stands is held only by Brett. We haven't seen any other individual on this call supporting this.

So it looks like this could be a point where we would encourage Brett to file this as an individual comment unless others speak up in support of Brett's comment to be included in the CCWG response.

So we really need to speed things up now, so Sam if you could, please keep it very brief.

Samantha Eisner: Sure, I just wanted to follow on from Ingrid's statement. This is actually an issue that we had discussed between the attorneys as to whether or not we needed to make reference. They've got (part of that) in this section, but because of the fact there was no change to the threshold as a result of the GAC carve-out -- and even though it could relate to the GAC not being able to participate -- it was determined after extensive conversation that it really wasn't needed in order to keep the bylaws consistent with the proposal.

Thomas Rickert: Thanks very much. There's the new queue forming...

((Crosstalk))

Thomas Rickert: Can you please Mute your microphones when you're not speaking? Again, this is - this exercise is just about ensuring that our report is adequately covered in the draft bylaws.

And my suggestion would be since I trust that Greg and James are going to speak up in support of Brett's point, that we include in our report a pointer to this section, 1.B, requesting that the board should check with the legal teams whether an adjustment for approval action is required in order to ensure consistency.

And I would suggest that we not go further on this point, so if you can please lower your hands, we can't take this any further than this. And with that, I'd like to hand over to Leon for the next point.

James Gannon: Sorry, could I just...

((Crosstalk))

James Gannon: So this is going in our comment because we still think it to be very vague on what we're doing here because we're saying two things here.

((Crosstalk))

Thomas Rickert: There was some crosstalk.

James Gannon: Sorry, can we just get a - confirmation that "yes" we are now putting this in our comments because we started off the conversation saying that, "No, because it was just (fresh) and we show that there was more than just (fresh)" -- so can we get just an explicit confirmation that "yes" we would be making a comment on this point?

Thomas Rickert: Yes, I was asking when I explained that it looks like Brett's point is not supported by more individuals on this call -- this was a test. And then we saw that others were chiming in -- and therefore we should go back to the requirements.

And our requirement was to adequately cover the GAC carve-out throughout the report and we would not make any requests for changing the draft bylaws, but just point to 1.4B and ask the board -- which is actually conducting this public comment period -- to check with the legal drafting teams whether an adjustment to this point is necessary to ensure consistency with the report.

So with that, let's move to Leon for the next point.

Mathieu Weill: And it's still Mathieu who's going to take the next points because we like to juggle ways to chairs here. So I'm saving Leon for the next item on human rights actually. So hopefully we can be quick on this one.

This item is on Slide 16 for (media) issue and it's Annex D, Section 22C1A -- Specific Rationale Is Not Required In (OCCWG) Recommendations. The point that is raised by Brett once again is that the drafting seems to imply that the rationale must be provided in a - in O -- Rejection Actions while recommendations did not require this for every rejection action -- but only for specific powers such as board director removal and budget and strategy plan.

So Brett was concerned that there might be a gap here between the recommendations and the bylaw draft. So there's probably two things we need to check here -- whether the reading that Brett was doing is consistent with everyone's view.

A first reading for me, actually, it seems to be quite a relevant aspect. And whether we - if that's the case, then certainly the - Brett's suggestion can be supported in our comments that is about to be sent.

Brett, I hope I have covered your concern well, but please take the floor.

Brett Schaefer: Thank you that's - that was part of it. And - but the other part was that the section at hand requires that the rejection be based on specific rationale. And I don't believe we've raised or set forth specific rationale in the report -- just that a rationale should be necessary.

And I was proposing that this explicit list of rationale could constrain the (EC)'s rejection in circumstances where the (EC) should not necessarily be constrained. It should be able to reject and provide a rationale not bound by these specific criteria -- but just to - bound by the requirement to provide a rationale at all.

Mathieu Weill: Thank you, Brett for this additional clarity and certainly we should -- in our comment -- remind the board and the drafting team of exactly where the rationale is required and where there's a constraint on the type of rationale which is once again only for the strategy plan and budget if I'm not mistaken.

Kavouss Arasteh, you're next. Kavouss Arasteh? We can't hear you.

Kavouss Arasteh: Do you hear me?

Mathieu Weill: Yes, now I hear you.

Kavouss Arasteh: Yes. I said that with respect to the human rights and the issue of they will (unintelligible) interpretation, there is a discussion -- an email exchange that someone they don't want explicit mention of the approval requirement by chartering organization. When we try to authorize that, somebody came saying that, "Okay, approval of chartering organizations accept (that)." This is not acceptable.

We need to reference exactly chartering organizations without any further explanation -- including...

Mathieu Weill: Kavouss Arasteh?

Kavouss Arasteh: Yes?

Mathieu Weill: I'm sorry to interrupt you, Kavouss Arasteh, no it's not yet the point that we are discussing, so...

Kavouss Arasteh: Okay, when you come - please allow me to explain my situation.



Mathieu Weill: Of course. Certainly.

Kavouss Arasteh: I'm sorry for that.

Mathieu Weill: No problem. Alan, you're next.

Alan Greenberg: Thank you. I believe the only place that we put such restrictions in was for the budget and plan. That is, you could not reject the budget or plan unless you had raised the same issues or related issues in the comment period which preceded it.

We did not put any such restriction on rejecting bylaws or anything else.  
Thank you.

Mathieu Weill: Thank you, Alan. Holly in the Chat is pointing out that the principle of a detailed rationale is laid out in Annex 2, Paragraph 32. So certainly we need to review that. There's still a lot of validity in Brett's comment about the restriction -- about what type of rationale can be acceptable or not.

But this didn't (fulfill) the work and certainly I need to comment on that in language so that we are in perfect alignment between the two. Alan, I think that's an old hand.

Okay, so we have a little bit of work here to do to make sure we match the recommendations correctly as well. But there's certainly some comments here to be included.

We're now moving to the next item and this time I am introducing Leon.  
Leon?

Leon Sanchez: Thank you very much. (Unintelligible). Our next advisement is in regard to the approval of human rights (framework) (unintelligible). And we have had a third discussion in the list.

I've come to all of the (notes) that have been exchanged between (unintelligible) some members of the (unintelligible) group. And I believe that we have probably some - easier to find out a solution that (unintelligible) than we imagined.

So we have a (unintelligible) Section (7.3) of the (unintelligible) bylaws saying that (unintelligible) recommendations and was some - (two) CCWG account of these chartering organizations.

I (unintelligible) at the - at each of the (unintelligible) organizations would need to approve. But they should have (used) that - generated some controversy in the list of course.

Then what does the report (action) say? The report says that a (unintelligible) human rights be developed by the CCWG. (Unintelligible) concerns - recommendation (unintelligible) -- including of course chartering organizations' approval.

As we follow this process in our Work Stream 1 work. So the suggested approach would be to replace Number 2 in the bylaws with - and approved by the CCWG using the same process as (unintelligible) 1 recommendation.

This would, of course, make it clear that not that we are setting a high standard for approval of these (unintelligible). But this (cost) in the list, nor we are trying to exclude any of the chartering organizations from discussing

and of course letting the rest of the group know what they think and whether they approve or have comments on the (unintelligible).

And this would (close) this issue. And I see that Kavouss Arasteh has his hand raised and I'm happy to go with you, Kavouss Arasteh.

Kavouss Arasteh: Yes, thank you, Leon. I think we need to be quite explicit. It is evident that any decision needs to be approved by chartering organization at the end. CCWG sends the report to chartering organizations and they have approved that in one way or another.

So I don't understand why we cannot explicitly and openly and clearly mention including chartering organizations. I don't want to make it implicit saying that as was done in Work Stream 1 and the evidence of that is that email or message I received from one of the participants and saying that, "Yes, I believe it all (SO) and (AC) excluding that. So it shows that I was right at the very beginning not to agree to any implicit wording and language.

I prefer -- and I would like to have a explicit reference to approval by chartering organizations without any explanation -- including excluding each (unintelligible). And I don't understand any need to have any discrimination of any constituency or any part of the ICANN of the system saying that excluding GAC.

And I don't understand those people think that excluding GAC -- I don't understand that. So please kindly -- if you put it back including chartering organizations -- I have no problem. But I don't agree as it (unintelligible) in Work Stream 1 because (it) would be subject to interpretation again.

So we would like to have explicit reference to chartering organizations. Thank you.

Leon Sanchez: Thank you very much, Kavouss Arasteh. And I don't want to go back into the controversy that was raised in the list. I believe that the impression of having the GAC being excluded comes from a misunderstanding of one of the emails that was sent to the list in which it was stated that just at - in Work Stream 1.

The GAC didn't believe - approve the whole report, but rather not object to the report -- then the same thing could happen at the part of the Work Stream 2 decisional process in which the GAC could also go the same way of monitoring, but also not objecting the (firmly) (unintelligible) interpretation (unintelligible).

So I think that that was interpreted as trying to isolate the GAC and exclude the GAC from the decisional process. But I believe that is not the intent of anyone here. And as we said, of course, the GAC would be able to take part of (unintelligible) to stress their thoughts on this.

So there is no decision of the GAC, however we would of course think of asking our lawyers to clarify that the method of approval for Work Stream 2 would certainly include the chartering organizations in the same way that would be in Work Stream 1.

So next on the queue I have Greg Shatan. Greg?

Greg Shatan: Thanks. First, I have responded to Kavouss Arasteh in the Chat and won't waste everybody's time here. Second, I think what needs to be clear is that we're following no different - a system or a process with regard to the framework of interpretation than we did in Work Stream 1.

And then we will -- with all other recommendations -- in Work Stream 2. I think the language supplied by our (counsel) does that well. If we need to have an express reference to the chartering organizations, then it needs to be done in such a way that it makes it clear that we are not seeking any different level or standard such as unanimous approval by all organizations.

This is - that's not what our charter says and it's not how we've proceeded and there is no basis in our discussions or in our text for that -- other than a possible misinterpretation of an ambiguous parenthetical which I recall being put in there solely to make it clear that the framework wouldn't go directly from the CCWG to the board without the usual trip through the chartering organizations.

That's all that was meant then -- that's all that's meant now -- let's just make it clear and move on. Thanks. And I think finally that to reiterate our counsel's (point) which makes it clear. Bye.

Leon Sanchez: Thank you very much, Greg. Next on the queue I have Tijani, then (Unintelligible). Tijani, go ahead with the floor.

Tijani Ben Jemaa: Thank you Leon. Do you hear me?

Leon Sanchez: Yes, we hear you.

Tijani Ben Jemaa: Okay, thank you. Thank you Leon and thank you all (Unintelligible) speaking. I have made the proposal for this special point. I'd like to speak more or less to our final report, but also to (unintelligible) because that's right -- I agree with the people who are against it because the spirit wasn't clear in the bylaw draft.

So I propose to add after the mention of the chartering organization -- as per the charter of the CCWG. And the charter of the CCWG doesn't require that (unintelligible) of the chartering organization to approve.

This is a way to avoid this very long discussion. We will be sticking to our final report, but also brief.

Leon Sanchez: Thank you very much, Tijani. I think that the next thing will be to ask our lawyers and to provide direction to our lawyers to help us clarify what we have discussed.

I'm not sure which would be the right final language for this and that's why we would be of course asking our lawyers to provide us with this new language that would clarify the situation. But like given the context and the discussion that we have been holding, I believe that our lawyers will certainly sort it out and there will be no more confusion on whether we are trying to have a (remedy) or whatever other misinterpretation that might have arose from the discussion.

I think the point is clear. The point is that the (final) interpretation will be developed as part of Work Stream 2 as the - everything that was carried out in Work Stream 1. And before sending this report, we will ask the chartering organizations whether they approve or support or just don't object to what we have developed as part of the Work Stream 2 framework of interpretation.

So that should be the items for our lawyers (in) this point. Finally, I have Kavouss again. Kavouss, did you want to add something?

Kavouss Arasteh: Leon, please kindly consider that. We would like to explicitly mention chartering organizations -- not only Work Stream 1. And I don't understand

some people -- how they are able to prejudge the decision GAC in Work Stream 2.

Something happened - Work Stream 1 -- not necessarily what happened Work Stream 2. So I would like that it is deferred directly and explicitly to the chartering organizations after Work Stream 1.

Whether to Tijani's proposal is agreed -- I have no problem with that. But explicit mention of chartering organizations is required -- not only Work Stream 1. Chartering organizations -- after Work Stream 1 -- is required. This is important and this is absolute necessity. Thank you.

Leon Sanchez: Thank you very much, Kavouss. I believe that our lawyers should have a clear picture and items on where we're trying to reach. So I wouldn't (give) them the discussion on this subject.

Tijani, you want to add something?

Tijani Ben Jemaa: Leon?

Leon Sanchez: Yes, Tijani?

Tijani Ben Jemaa: Leon? Okay, thank you. Leon, please - the text as it is now - as it is modified by our lawyers as you said, is not acceptable today like it is. So if it is our comment -- the comment of the CCWG -- it is not accepted like it is now.

If you mean that the lawyers will change it to make it more close to the report and to make the necessary wording to avoid any (unintelligible) for the chartering organizations to approve the - to approve, it is okay.

But if you want to make this proposal that was the modification of our lawyers, I don't agree with it and it cannot be the CCWG comment. Thank you.

Leon Sanchez: Thank you very much, Tijani. Okay, so having no further comments on this issue, I'll jump to the next slide which is (covered) by Brett Schaefer. I believe in which they have the draft bylaw and of course the CCWG recommendation as well.

And the draft bylaw has a phrase in the final paragraph that says, "except as provided herein" and it refers to ICANN's notification to respond or consider any complaint related to human rights.

So it says that ICANN, "This shall not (unintelligible) ICANN to respond to or consider any complaint, request or the (manner) seeking the enforcement of human rights by ICANN except as provided herein."

So what we have in our report is (unintelligible) its core values. ICANN will permit to respect international (unintelligible) recognize human rights as required by (unintelligible) law.

Distribution does not create any additional obligation for ICANN to respond to or consider any complaint, request or demand seeking the enforcement of human rights by ICANN.

And the concern raised is that the phrase, "except as provided herein" is not in the CCWG draft and it is not clear what (unintelligible). This is concerning because it would seem to undermine the (fear) of constraint stated prior to the phrase, "this core value does not create and shall not be interpreted to create any additional obligation for ICANN -- and shall not obligate ICANN to



respond to or consider complaint, request or demand seeking the enforcement of human rights by ICANN."

The phrase, "(attempt) as provided herein" should be deleted. So that is the concern raised by Brett. In my mind, I don't think that this (unintelligible) confusion.

I mean for me it's clear that the phrase, "except as provided herein" refers to the fact that there is clear guidance under which situations might ICANN jump into any kind of discussion or situation in regards to human rights. And this is why we need, of course, the framework of interpretation as well.

So I'd like to hand it to Brett so he could clarify a little bit more on how you see, Brett -- this can be a (following) because I think for me it's clear that when you say, "herein" it refers to the bylaws themselves.

So please go ahead, Brett -- you have the floor.

Brett Schaefer: Sure. What I see is that this phrase creates an opportunity to eviscerate the restriction put in there. The restriction is that the core value does not create -- and shall not be interpreted to create -- any additional obligations for ICANN.

And shall not obligate ICANN to respond to or consider any complaint, request or demand seeking the enforcement of human rights by ICANN. That's what was in our draft bylaw. We have now added the phrase, "except as provided herein" which provides for the opportunity to create a obligation or a request or a demand seeking the enforcement of human rights by ICANN.

You've created a caveat -- you've created a window through which such an obligation could actually be created. We've already established up in the first

sentence that -- subject to the limitations set forth in 27.3 -- which is the Human Rights Bylaw section -- that we're going to consider human rights in the context of ICANN.

But that should not in any way create an obligation or an additional responsibility by ICANN to respond to or to enforce human rights. That's the whole purpose of this second sentence that was negotiated very painfully over approximately four or five or six months -- and where we came to a very careful balance on this particular bylaw.

And adding this particular phrase dramatically undermines that - the purpose and intent and the structure of that second sentence. Thank you.

Mathieu Weill: Thank you, Brett. I think Leon's call dropped, so I'm stepping in. This is Mathieu speaking. So Brett, please -- have you noted that there's a suggestion made by Rosemary in the Chat that to substitute Section 27.3B to the words herein so that it's clear that this exception is relevant as you mentioned -- which it's a repetition of what's already up there of the Section 27.3 (Close).

I think that's a very useful suggestion for clarification, Rosemary, and we'd like to check whether that's something that people would be willing to consider.

The next in the line is Kavouss.

Kavouss Arasteh: I think Rosemary was quite right. Herein was very, very vague and unclear. We should have "as provided" or "except provided" and we should refer to particular or a specific paragraph, but not "herein."

What does it mean "herein?" I'm very sorry, this is not a legal word. Sorry I agree with the reference, but I don't know the (cross) reference whether that is (unintelligible) or not because I don't have the text before me.

But I agree with the concept proposed by Rosemary to refer to a specific paragraph, but not say "herein." "Herein" is meaningless -- is senseless. Thank you.

Leon Sanchez: Thank you very much, Kavouss. And I back on the call. I am (unintelligible) and I am taking over again. So my sense is that we are agreeing to the proposal that Rosemary put on the table.

So are there any objections to proceed forward with what Rosemary has just (unintelligible)?

((Crosstalk))

Leon Sanchez: Brett, is that an old hand or a new hand?

Brett Schaefer: New hand.

Leon Sanchez: New hand, okay, so please go ahead.

Brett Schaefer: Well, I don't think that that - Rosemary's suggestion actually solves anything. I think we need to eliminate the phrase because if we put in there "except as provided in 27.3B," then again we're caveating the section and saying that if the FOI or the human rights language comes forward and says that there are certain circumstances where ICANN must respond to demands or requests to enforce human rights, then that is allowed in the - under the bylaws.

I think we need to be very clear here that there is no obligation and no expectation and no possibility of ICANN being obligated to enforce human rights. What we're talking about here is ICANN shall not respect human rights within its mission and scope and within its core values.

But this is no obligation whatsoever and no caveat and no possibility for enforcement -- and that's where I think that this phrase should be eliminated. Thank you.

Leon Sanchez: Thanks, Brett. I do, however, tend to not agree with you because I believe that would actually void the whole obligation for ICANN to respect human rights - - and that's not - that's definitely not what the group intended in their discussion in regard to human rights.

So if the concern is whether ICANN will go enforcing or try to enforce any kind of human rights issues here. We also discussed very thoroughly that - respecting means the same as enforcing.

So in my mind, then, maybe we could actually comment on removing the word "enforcement" instead of removing the phrase "except as provided herein."

So I think that should fix both ways in that ICANN will not be going into enforcing any kind of human rights. And will only be respecting human rights as provided in its own bylaws -- and in the (unintelligible) interpretation that will be developed as part of Work Stream 2.

And I see Kavouss hand is up and then James and then I will have to close the queue because we need some more (unintelligible). So James?

James Gannon: Hi, thanks Leon. So I was on the fence from this one and so we started discussing it in more detail here. I think I'm coming around to Brett's thinking. We really do need to call out that ICANN is not going to be in any position to enforce and putting in that "except as provided herein."

I think until we introduce a huge amount of ambiguity, that's going to cause huge problems and I'm not sure what the justification for requiring it to say "therein." And I don't think that really the enforcement works either -- we need to call this out. And so I think that I agree now and having changed my mind, thus, you know, the "except as provided herein" -- I don't see the value of keeping that phrase.

I'm not sure what the justification for keeping that there is.

Leon Sanchez: Thank you very much, James. I had a little bit of trouble hearing you. So I don't think I am in a position to (unintelligible) because I really had a hard time hearing you.

So I will go now to Kavouss. But I do see that a lot of people disagreeing with James, so that's the thing. So Kavouss Arasteh, you're next.

Kavouss Arasteh: Yes. Leon, I'm sorry, I also cannot agree with your text. We are in the bylaw - - you could not say "except as provided in the bylaw." Bylaw could not say that this is an obligation or not obligation, except as provided in bylaw.

Either you have an exception -- you should have a specific paragraph which describes what you want that excludes so I cannot actually - neither - the herein, nor with the proposal that you made as provided in the bylaw.

There is no other paragraph provided in the bylaw if you do not mention that. So please kindly -- I think we don't need this sentence -- this phrase at all -- as except those provided herein, so on, so forth.

It is better, but I don't know whether the part of (unintelligible) bylaws is correct or not. But I suggest that we do not make any change to that and leave it as it is. And that was the subject of the (unintelligible) discussion and we don't want to change that.

It would be risky to do that because bylaw cannot accept bylaw. Thank you.

Leon Sanchez: Thank you very much, Kavouss. So I would suggest that since we are running short in time and we are going in discussion, we - that we ask our lawyers to explain the rationale on this phrase on the list so we can continue the discussion in the list -- and hopefully find conclusion for our comment on this issue.

And with this, I would go back to Mathieu.

Mathieu Weill: Yes, Thomas, - yes, Leon -- I'm calling you Thomas now. This is getting worse and worse. So this is Mathieu speaking. We have missed an item in the slides which is an item that was raised by Tijani regarding the IRP provisions.

So we'll have to do this discussion without the benefit of the document's support documentation. But it's on Page 26 of the Draft Bylaws. It's a close about the IRP panel and about the fact that the written decision should be provided no later than six months after the planning of the claim.

And there's been an addition -- I accept as otherwise permitted under the rules (of) procedure that was discussed previously. But an additional sentence has

been added that says that for this (unintelligible) the IRP panel's failure to issue a (recent) decision within six months shall not be grounds to another change.

So Tijani, maybe you can introduce your concern about this issue and hopefully we can come to a conclusion on how to comment on this very quickly after that. Tijani?

Tijani Ben Jemaa: Thank you, Mathieu. Do you hear me?

Mathieu Weill: Yes.

Tijani Ben Jemaa: Okay. Thank you. So as I (saw) that on the mailing list in the Section 3.4, but Paragraph (F), the - this paragraph is about the IRP panel. And it is about the period of (consideration) of the claims.

And I find it good, but there is a sentence added to it saying that for the avoidance of doubt, an IRP panel's failure to issue written decision within six months after the filing of the claim shall not be grounds for another claim.

This will make the period of consideration infinite -- nobody can say, "Oh, you are - you exceeded the time" because we said six months, but it is extendable and the extension -- we said it would be explained or dealt with in the (rule) procedure and they are very fine with it.

Assuming that and the rule of procedure we will define the kind of circumstances under which we make the extension and the maximum period of the extension. My fear is that if we make the period very long, it will open the rules for I would say (gaming) because I don't want to say another thing.

You know that the results or the decision of the - an IRP is very important and very important sometimes for the budget -- for the business of some companies. And, you know, when you want to reach a decision, you are ready to do anything.

So if you give more time and limited time, it will give more possibility of (gaming). So I would like it -- this last sentence to be removed and keep it to the rule of procedure that will fix the sentences and the period of extension. Thank you very much.

Holly Gregory: This is Holly. I'd like to raise my hand and I'm only on my phone.

Mathieu Weill: Excellent, Holly, because my next move would have been to ask whether some of the members of the drafting team could provide maybe some context about the addition of the sentence. So it's to you now, Holly.

Holly Gregory: Happy to, and Tijani, we are happy to remove that sentence. That sentence was put in at the request of ICANN legal for the following reason. And we don't disagree with the sentence, but I want to make it clear to you -- there is no IRP against an IRP panel.

And so if the IRP panel fails to do something in six months, it's perfectly true and correct that there is no IRP available to challenge the failure of an IRP panel. The IRP panel is an independent body and IRPs are only available to challenge the actions of ICANN.

So the statement is both true and it is unnecessary. And on those grounds, we are happy to take it out. We agree with you that there has to be some discussion in Work Stream 2 to talk about what happens -- how do you ensure



that this independent body -- this IRP panel -- functions in a six-month or year -- a reasonable timeframe.

So with that clarification -- again, we think the statement is both true -- that there's no IRP available to challenge an IRP panel that goes too long. But we also agree that it's fine to take it out. Did that help?

Mathieu Weill: Excellent. So we have agreement on that. Samantha Eisner wants to add a word. Sam?

Samantha Eisner: Thanks, Mathieu. So I think we're all in (unintelligible) agreement that there are principles that the IRP should conclude within six months. And that there - but we recognize that there might be situations where it's not feasible for the IRP panel -- for whatever reason -- to conclude within six months.

We also agree that, you know, if the IRP panel doesn't conclude within six months, that there's no - there would be no IRP claim against the IRP panel because there's nothing that exists.

However, with the removal of the earlier bylaw language that we've had in here about the potential that the IRP panel might not hit the six-month period in the reference to the operating procedures, what happens is we're left with a situation where the bylaws would say that the IRP panel must issue its decision within six months.

And then the reason that ICANN had requested that that line be put in is the fact that you can't file against an IRP panel -- we all agree with -- but there's still a fact that the bylaws wouldn't be met. And so what's the remedy if the bylaws aren't met -- you file a claim against ICANN.

And so we wanted to make sure we didn't get into an incident loop of challenging ICANN for a third party's inability to meet a bylaw's obligation. So that's really what the intention of it was. It wasn't to allow the extension of time to go on and on.

We think that the IRP implementation oversight group should have some very clear guidelines so that we have IRPs that conclude as quickly as possible and within the six-month timeframe. But that if the IRP panel itself isn't capable of doing it, that ICANN's resources shouldn't be used to defend itself against a claim that ICANN's violated the bylaws because the IRP panel didn't meet that six-month timeframe.

So that's the reason that that language is in there. So I think with that in mind, we'd like to, you know, if there was a comment to that effect, we'd like to look at that a little bit more deeply just to make sure we don't get into a place of using the community resources on that type of claim.

Mathieu Weill: Thank you, Sam, but I think...

((Crosstalk))

Mathieu Weill: Did someone want to speak next?

Holly Gregory: This is Holly. I was wondering if I could...

Mathieu Weill: Yes.

Holly Gregory: ...just respond briefly?

Mathieu Weill: Sure.

Holly Gregory: And Sam makes a very good point that the problem here is that you - the IRP is available for when the bylaws are not being met. And so ICANN faces a potential claim about something over which it has no control.

And so that is - becomes an absurdity -- I would argue that such a claim would be a frivolous claim on the grounds that it's an absurdity that's bringing IRP against ICANN for something that's outside of ICANN's ability to control which is the action of the third party.

But I do understand the concern that ICANN legal is raising and I think that we do need to find some kind of language to address it. So the sentence that was added -- which is a true sentence -- which is the IRP is not available would be a good sentence.

Mathieu Weill: Okay.

Holly Gregory: And it doesn't address - of course it doesn't address the fact that we still -- in the next - in the development of procedural rules for the IRP -- need to come up with something that encourages the IRP to complete its actions within a six months' reasonable timeframe.

Mathieu Weill: So I think we should - in terms of what we can comment as a group -- we can certainly point attention to that part as something that is not part of our recommendations -- that sentence as it is. We're noting that we understand the concern that's underlying in there.

And that we would welcome some maybe other way in this to address this. Tijani, would you recognize that this concern is valid and that we can take it on board?

Tijani Ben Jemaa: Mathieu, highly just said, that an IRP cannot challenge an IRP. So this sentence would not have a meaning at all. This in anything...

Mathieu Weill: Of course.

Tijani Ben Jemaa: ...there will not be another claim since the IRP cannot challenge the IRP.

Mathieu Weill: But now the question becomes do we as a group submit a comment that's acknowledged -- just like we did acknowledge the issue under who is (reviewed) previously -- that there might be an issue here. And that it - and do we encourage the legal teams to find a proper way to mitigate this issue?

That's the question I think will - for you, Tijani, beyond the wording and the fact that the sentence itself -- as Holly was saying -- is true, but also is not really fully addressing the issue.

Okay, I'm taking your silence as probably you're thinking about it or it's a good sign. I see Kavouss is next.

Kavouss Arasteh: Mathieu, I think this six months does not come from the sky. And is not (unintelligible) -- it's something that people mention six months -- so we should think of some exceptional cases -- would it be possible that the (unintelligible) normally be told that makes room for some circumstances that may not be finished within the six months.

But not adding something just because it is a tedious process. If it is not something...

((Crosstalk))

Kavouss Arasteh: ...(unintelligible) particular case, yes.

Mathieu Weill: We've discussed this, Kavouss, and the regular bit of rooms through the rules of procedure. We've already made this room available. Tijani, you're next.  
Tijani?

Tijani Ben Jemaa: I am okay and yes and...

Mathieu Weill: Okay.

Tijani Ben Jemaa: ...sorry, I am okay with what was said and I wanted to respond to Kavouss, but you did exactly what I wanted to say. Thank you.

Mathieu Weill: Thank you, Tijani. So way forward on this is that our comment we'll - point to this sentence as not the right probably way to address this - to address our - I mean to translate our recommendations into the bylaws.

And at the same time, we will acknowledge that there is a concern about the type - these type of claims and encourage the lawyers to find the right solution on that. And I think with that, we've covered all the issues. So I'm turning back to Thomas for the general conclusion and how we finalize this submission of the comments. Thomas?

Thomas Rickert: Thanks very much, Mathieu. And I would like to congratulate you all on a very constructive discussion. Actually we were not (exhaustive) for two hours that were allocated to this call.

So to just to briefly outline what the next steps are going to be. As mentioned during the introductory remarks, we're going to submit our CCWG comments

on May 10. Certainly you will want to see the last comment before its submission. So we will get to work on the comment which we will base on the results -- the outcome of this very call.

And we can't specify at this moment, but we will do so soon when we're going to release the Draft Comments to the CCWG mailing list. But rest assured that we will give a 72-hour time window to the group to review the Draft Comment before its submission.

So that's it in terms of next steps. Are there any comments or is there - I see Brett and Alan's hands are raised. Brett, please.

Brett Schaefer: Thank you. I wanted to - I guess this is something that someone can respond to me afterward. I hope that the edits that I suggested in my email are also addressed since changing the bylaws to do editorial changes is obviously a more (unintelligible) problem later on than it would be right now.

But I also wanted to raise the final point that I made in my email which is the consideration of whether the CCWG wants to recommend that the ombudsman be given the power to give interim relief or a stay in a judgment when somebody offers or makes a request for reconsideration -- and that request is not similarly dismissed.

This is a power that is specifically laid out in the IRP process, but is not specifically laid out in the request for reconsideration. But I think that it's obvious that somebody could face the possibility of irreparable harm from a decision that they've requested for reconsideration.

And whether the CCWG wants to propose that that power be granted in those circumstances -- because it is consistent with what we've recommended for

the IRP -- even though we didn't specifically lay it out for the request for reconsideration.

And I don't know whether this comment is going to be making proposals of this type or rather we're going to just be commenting on where the bylaw changes are consistent or inconsistent with our own proposal. But I think that this is certainly related to it and it's not - is not inconsistent with what we've laid out as processed -- at least in the IRP -- and what we've laid out as what people should be able to avail themselves in terms of the request for reconsideration process.

And so I wanted to raise that before we concluded. Thank you.

Mathieu Weill: Sure, thanks Brett. And while this point may have merit, please note that at this stage we can only verify whether the draft language is in line with our report. And as you know, the ombudsman topic is going to be discussed in Work Stream Number 2 -- so I am afraid that our hands are tied at this stage to come up with those (substitives') proposals to change or amend other processes. Alan?

Alan Greenberg: Thank you. I just wanted to bring back the topic which you said you'd come back to later -- on the process going forward. And what involvement the community will have, if any, with the modified version of the bylaws coming out of the comment period and prior to the board adopting them.

Mathieu Weill: Alan, just to - I need to refresh my memory. But I think that the point we wanted to get back to -- wasn't that notifying the concerned about the community so that they chime in?

I think that at this stage we will comment on the bylaws. Then the board will have a short turnaround time to analyze the public comments. And they will then produce a final version of the updated bylaws, adopt those and pass them on to NTIA. That is my understanding.

Alan Greenberg: You're merging my two comments. One of them was we should alert the chartering organizations of issues where we believe there is a possible conflict with what our report said and good governance.

And one of them was with regard to the Whois report. The other one was regard to - I guess the grandfathering issue on non-RAA contracts -- and make sure that they were aware that we had identified potential problems that some people see in the report -- and therefore in the bylaws -- set for the bylaws -- follow the report.

The other issue I raised -- and I think it was Mathieu who was chairing at that moment and said we'd come back to it -- was is there going to be an opportunity post-the adjustments that are made to the by - draft bylaws after the comments -- and before that they get verified before they get adopted -- for the community to look at the results -- and see did it indeed match it?

There's the potential for conflicting comments, for instance, that - and we don't, you know, will we know how they are - how they get resolved in the final bylaws? I'm asking -- is there going to be a - such a window -- I don't recall it being mentioned when we discussed the timeline.

Mathieu Weill: Yes, you are correct. At the moment, there's no such window. But the answer to your question is that we will raise this with the bylaws drafting team -- by the drafting group. And will get back to the group with an answer in writing.



Alan Greenberg: Good answer, thank you.

Mathieu Weill: So, thanks, Alan. And with that, we can adjourn one minute -- so the top of the hour. Thanks again everyone and talk to you next week. Bye-bye.

Woman 1: Bye everyone, thank you.

Man 3: Bye everyone.

END