

Working Session 1 Meeting #61(19 October 2015)

Attendees:

Members & Participants: Alan Greenberg, Anne Aikman-Scalese, Aarti Bhavana, Alain Bidron, Ali Hadji, Alissa Cooper, Allan MacGillivray, Andrew Harris, Andrew Sullivan, Arun Sukumar, Athina Fragkouli, Audrey Plonk, Avri Doria, B Pfremmer, Becky Burr, Bertrand de la Chappelle, Brenden Kuerbis, Brett Schaefer, Bruce Tonkin, Caitrin Dwyer, Carole Cornell, Cherine Chalaby, Cheryl Langdon-Orr, Chris Disspain, Christopher Wilkinson, Craig Ng, Dave Kissoondoyal, David Johnson, David McAuley, Edward Morris, EJ, Everton Rodrigues, Farzaneh Badii, Finn Petersen, George Sadowsky, Gonzalo Navarro, Gordon Chillcott, Greg Shatan, Greg Wood, Griffin Barnett, Guru Acharya, James Gannon, Jordan, Carter, Jan Scholte, Jay, Jeff, Jeff LeVee, Jian Chang, Jie Zhang, Jimm Phillips, John Poole, Jonathan Robinson, JP, Julia Wolman, Kate Wallace, Kavouss Arasteh, Keith Drazek, Konstantinos Komaitis, Leon Sanchez, Lito, Luca Urech, Lynn St.Amour, Malcolm Hutty, Mark Carvell, Markus Kummer, Martin Boyle, Mary Uduma, Mathieu Weill, Matthew Shears, Megan Richards, Michael Niebel, Milton Mueller, Niels ten Oever, Nurani Nimpuno, Paul, Pedro Ivo Silva, Par Brumark, Ram Mohan, Rishabh Dara, Roelof Meijer, Robin Gross, Ron DeSilva, Sabine Meyer, Samantha Eisner, Seun Ojedeji, Sivasubramanian Muthusamy, Steve DelBianco, Suzanne Radell, Suzanne Woolf, Sebastien Bachollet, Teresa Elias, Thomas Rickert, Tijani Ben Jemaa, Tomohiro Fujisaki, Wolfgang, Xavier, Z. Dancey,

Legal Counsel: Edward McNicholas, Holly Gregory, Rosemary Fei, Steve Chiodini,

Staff: Alice Jansen, Bernie Turcotte, Emily Pimentel, Grace Abuhamad, Hillary Jett, Marika Konings

Apologies: Giovanni Seppia

Please let Brenda know if your name has been left off the list (attendees or apologies).

Transcript

- [Transcript CCWG Working Session 1 _19 October.doc](#)
- [Transcript CCWG Working Session 1 _19 October.pdf](#)

Recording

- The Adobe Connect recording is available here: Part 1: [here](#) Part 2: [here](#)
- The audio recording is available here: <http://audio.icann.org/meetings/dublin2015/ccwg-accountability-19oct15-en.mp3>

Agenda

1. Welcome, Roll call, administration (14:00-14:05)
 2. Debrief & updates on community feedback received to date (14:05-14:30)
 3. Review of items discussed in previous Dublin sessions (14:30-16:30)
 - Removal of individual Board member
 - Reconsider/reject budget
 - Community-decision making
 - Principles, core values & commitments
 - IRP
- Break (16:30-16:45)*
4. Collaborative workshop to document the nature of models discussion (16:45-18:15)
 5. Summary of progress made and key takeaways of the session (18:15-18:20)
 6. A.O.B (18:25-18:30)

Notes

Documents Presented

- [3 COLUMN Summary Comparison of Enforcement Mechanisms](#)
- [Dublin breakout on Community Decision v2.pdf](#)
- [BudgetVeto19-10-15](#)
- [Power - Recall Individual Board members](#)
- [Revised Comment Summary PRINCIPLES V3](#)
- [Enforceability discussion revised.pptx](#)

Chat Transcript

Brenda Brewer: (10/19/2015 07:42) Hello, my name is Brenda and I will be monitoring this chat room. In this role, I am the voice for the remote participants, ensuring that they are heard equally with those who are "in-room" participants. When submitting a question that you want me to read out loud on the mic, please provide your name and affiliation if you have one, start your sentence with <QUESTION> and end it with <QUESTION>. When submitting a comment that you want me to read out loud of the mic, once again provide your name and affiliation if you have one then start your sentence with a <COMMENT> and end it with <COMMENT>. Text outside these quotes will be considered as part of "chat" and will not be read out loud on the mic. Any questions or comments provided outside of the session time will not be read aloud. All chat sessions are being archived and follow the ICANN Expected Standards of Behavior: <http://www.icann.org/en/news/in-focus/accountability/expected-standards>

Kavouss Arasteh: (08:04) Hi Everybody

Kavouss Arasteh: (08:05) Dear CO-Chairs

Kavouss Arasteh: (08:07) May I respectfully draw your attention that we need to provide opportunity to every and all participants of CCWG to freely and openly raise their concerns about issues under discussion, in particular, sensitive and delicate issues without putting an obstacle such as time constraints and ...

Cheryl Langdon-Orr - CLO: (08:10) hello everyone

Kavouss Arasteh: (08:11) Dear Co-Chairs,

Kavouss Arasteh: (08:11) Pls put the comparison paper, two pages doc. regarding the Sole Designator and Sole Member for discussion as well as Plan B

Mathieu Weill, ccNSO, co-chair: (08:13) Point taken Kavouss

Kavouss Arasteh: (08:13) I hope all activities of CCWG would be open transparent with opportunity to those who wish to participate to be included in the discussion. The situation does not prevail

Alice Jansen: (08:17) Kavouss is referring to the following memo --> <https://community.icann.org/download/attachments/52896826/Summary%20Comparison%20of%20Enforcement%20Mechanisms%20by%20Model%20-%20Final.pdf?version=1&modificationDate=1445242793000&api=v2>

Jordan Carter (.nz, WP1 rapporteur): (08:18) Sensible of the Board to re-assert its commitment to this process. Welcome.

Jordan Carter (.nz, WP1 rapporteur): (08:18) Re-establish, perhaps.

Anne Aikman-Scalese - IPC: (08:19) As I understand it, the difference between Single Designator and Single Member is that AFTER all the stages on the staircase have taken place, in the Sole Member model (including IRP), enforcement in the Sole Member model is specific to the decision that was challenged by the Community whereas in the Sole Member model, enforcement is indirect via removal of the directors.

Jonathan Zuck (IPC): (08:20) That's basically correct @Anne

Anne Aikman-Scalese - IPC: (08:21) Sorry I misspoke. Enforcement is direct on the particular issue in the Sole Member model and indirect in the Sole Designator model because in Sole Designator, after all the steps are taken including IRP, the remedy is removal of directors rather than specific enforcement of the Community decision, which would happen in the Sole Member model.

Jonathan Zuck (IPC): (08:21) right

Avri Doria: (08:22) it is more than details. calling these difference details and deprecating them is not useful.

Wolfgang: (08:24) @ Avri: It is and will remain a process with many steps.

Alice Jansen: (08:24) In addition to the link provided above, please refer to <https://community.icann.org/download/attachments/52896826/3%20COLUMN%20Summary%20Comparison%20of%20Enforcement%20Mechanisms%20.pdf?version=1&modificationDate=1445243202000&api=v2>

Jordan Carter (.nz, WP1 rapporteur): (08:31) Employment relationships have NOTHING to do with governance relationships.

Steve DelBianco [GNSO - CSG]: (08:31) thanks, Alice. That link compares just SM and SD enforcement across all 7 community powers.

Andrew Sullivan: (08:33) (Random observer noting something here, in case it is useful to anyone: in the IETF, nomcom appointees can be removed by the recall procedures for any reason. Of course, you have to convince others -- we use a petition -- so you effectively have to give your reasons anyway.)

Anne Aikman-Scalese - IPC: (08:33) It just boils down to whether the Community recommends having direct and specific enforcement on the individual issues that are within scope of its ability to challenge (the 5 powers) or whether the Community is satisfied that having the power to remove the directors will be enough of a deterrent to cause the Board to reconsider. In other words, an IRP decision in favor of the Community may not be enforceable in court under the Single Designator model, but if the Board does not follow it, the Community could remove them. The reason it would not be enforceable in court under the Single Designator Model is that the Board retains absolute right and duty to exercise fiduciary duty and Community cannot take this away. In Single Member model, the Community Member reserves the particular power and the duty and right to exercise it. So one or the other has the final say, but in the Single Designator, the Community cannot enforce the IRP, but can instead remove the directors. (I am not a California lawyer.)

Izumi Okutani (ASO): (08:35) On Kavouss's point the Board member will have an opportunity to express their situation in removing the Board and the community discussions is expected to encourage the SO or AC to make a balanced consideration. While the final decision may be of the appointing SO /AC, the explanation is to be provided

Jordan Carter (.nz, WP1 rapporteur): (08:35) I wonder if there is a fix here. What if the directors on appointing sign springing resignation letters that mean they automatically resign if they don't follow the five powers?

Thomas Rickert, CCWG Co-Chair: (08:36) The queue is closed after Bruce!

Jordan Carter (.nz, WP1 rapporteur): (08:36) as an "overlay" on a designator model.

Robin Gross [GNSO - NCSG]: (08:36) that's a non-starter, Jordan.

Athina Fragkouli (ASO): (08:36) that's my understanding too Izumi

Robin Gross [GNSO - NCSG]: (08:37) limiting removal to following the 5 powers is very restrictive.

Jordan Carter (.nz, WP1 rapporteur): (08:37) no - as an automatic "axe". Not to restrict the community powers already defined.

Anne Aikman-Scalese - IPC: (08:37) @Jordan - Would such a "springing letter" be consistent with the exercise of fiduciary duty?

Robin Gross [GNSO - NCSG]: (08:37) thanks for the clarification, Jordan.

Izumi Okutani (ASO): (08:38) The comment from George is consistent my understanding of what we discussed on Saturday

James Gannon: (08:38) Anne that would be my concern

Jordan Carter (.nz, WP1 rapporteur): (08:38) [to deal with the fact that in a designator model, there is only enforceability of board removal. If directors knew an automatic consequence of defying the community's exercise of the five powers was their resignation, that means it is highly improbable they will defy them.]

Jordan Carter (.nz, WP1 rapporteur): (08:39) Anne: legal question.

Samantha Eisner: (08:39) @Jordan, from what I understand, you could craft the springing letter (or pre-service letter) as you suggest

Keith Drazek: (08:39) +1 Jordan and Sam

Wolfgang 2: (08:39) Bertrand 1+

Milton Mueller: (08:40) I agree with Anne A-S long comment about the difference between the designator and membership powers, and that is why i don't think it is reasonable to give up membership

Milton Mueller: (08:41) Bertrand did a great job of articulating the philosopher-king idea of the ICANN board. He rightfully earned the applause of other board members

Alan Greenberg: (08:41) If each of us goes to the wall on every issue, we will never come to closure.

Robin Gross [GNSO - NCSG]: (08:42) we can't give up on membership if designator can't meet requirements. We are still waiting for confirmation of that.

Jordan Carter (.nz, WP1 rapporteur): (08:42) I think I am wrong. For things like the bylaws and director removal, the designator model is already enforceable. The other powers - budget, IRP, separation, all require the exercise of judgement of directors - a decision has to be made. And Holly has told me that that would not be workable. This is the conflict of lawyers we have run into previously, but I accept our counsels' advice on this.

Jordan Carter (.nz, WP1 rapporteur): (08:42) So a springing resig letter doesn't solve for that.

Robin Gross [GNSO - NCSG]: (08:42) are we still going in circles on this issue with the board members? we have to move on to real issues.

Becky Burr: (08:43) agree, this is a working session not an engagement session

Becky Burr: (08:43) with respect

Milton Mueller: (08:43) Since the board is not in any way accountable to the public, on what basis does it claim to represent a "higher" perspective on what the public interest is?

Samantha Eisner: (08:44) @Jordan, every single decision the Board makes requires an exercise of judgment by directors. I'm not clear that's a dividing line for enforceability.

Robin Gross [GNSO - NCSG]: (08:44) CCWG has a lot of work to do. listening to board advocating for restricting community removal rights over and over again is beyond tiresome. The conflict of interest is glaring.

Jordan Carter (.nz, WP1 rapporteur): (08:45) I don't see any mood to change the approach beyond what came out of the small group on Saturday, personally.

Alan Greenberg: (08:46) If we are going to re-debate issues here, with the same arguments heard before, I will go tak a nap.

Jordan Carter (.nz, WP1 rapporteur): (08:46) Sam: that's the fundamental distinction between the membership model and the designator model. In the designator model nothing can replace that judgement.

Robin Gross [GNSO - NCSG]: (08:46) the board members in the mtg on Saturday morning agreed with it, now they are retreating.

Robin Gross [GNSO - NCSG]: (08:47) we had agreement and the board is still advocating to restrict the community's removal rights.

Chris Disspain: (08:47) we are not retreating Robin

Chris Disspain: (08:47) did I miss something?

James Gannon: (08:47) +1 Alan I thought this was a working session

Robin Gross [GNSO - NCSG]: (08:47) I've heard board members (and ex-board members) trying to restrict the removal right beyond the compromise we made on Sat morning.

Samantha Eisner: (08:48) @Jordan, agreed that there are areas in the membership model where the member can make decisions and effectively remove the Board's duties. But that is not a precursor to be able to taking an issue to IRP.

Chris Disspain: (08:48) @ Robin...in what sense?

Robin Gross [GNSO - NCSG]: (08:48) trying to require specific cause for removal. we got past that on Sat. morning.

Milton Mueller: (08:49) Yes, we did.

Jordan Carter (.nz, WP1 rapporteur): (08:49) I think we have - so let's just move on

Chris Disspain: (08:49) agree...not cause....state specific reasons / give rationale

Anne Aikman-Scaless - IPC: (08:49) I think Sidley said that in current structure, SO or AC can in fact remove its appointed director because it is the Designator and the power is given by statute. So this would not represent a change in structure - I say this but I do not oppose requiring cause. It is just a clarification of current structure per Sidley.

Matthew Shears: (08:49) we need to go back to the working groups and get into the details - there is still lots to do

Andrew Sullivan: (08:49) To my (just observing) ears, I didn't hear any board members arguing in favour of cause

Jordan Carter (.nz, WP1 rapporteur): (08:50) Neither did I

Cheryl Langdon-Orr - CLO: (08:50) agreed Chris I disagree with Kavous on this point

Bruce Tonkin: (08:52) Steve - row 4 on your chart - also needs to cover the scenario when a director appointed by the nominating committee is removed.

Anne Aikman-Scaless - IPC: (08:53) It seems that in relation to IANA transition, the most important power to measure in the Single Designator or Single Member is number 7 re: IANA separation of PTI. That is effectively the current NTIA backstop.

Bruce Tonkin: (08:53) Note that 8 of the 16 Board directors are appointed by the nominating committee.

Arun Sukumar: (08:53) as well as a CWG requirement, I think

Guru Acharya: (08:53) The comparison table referred to by Kavous clearly reflects that we will fail to comply with CWG requirements (Power 7) if we go with the sole designator model. The CCWG may be willing to internally compromise on a lot of issues, but I don't see how we can circumvent CWG requirements. <http://goo.gl/ZOMrDv>

Robin Gross [GNSO - NCSG]: (08:53) Agree, Anne. If we can't get enforceable separability, it doesn't meet requirements.

Brenden Kuerbis: (08:54) Definitely Robin

Robin Gross [GNSO - NCSG]: (08:55) will we be able to hear from the lawyers on this point today? it is key.

Keith Drazek: (08:55) There's no question that CWG requirement/power 7 is a critical issue.

Keith Drazek: (08:55) It is the paramount dependency.

Arun Sukumar: (08:56) I appreciate Bruce's statement on behalf of the Board, but this seems really about the details - are the critical powers for accountability being supported in the designator model?

Julia Wolman, GAC, DK: (08:56) +1 Keith that is a paramount dependency

Arun Sukumar: (08:56) if they are not, then what exactly is the board supporting?

Arun Sukumar: (08:57) powers being - separability, IRP enforceability and budget/strategic plan

Keith Drazek: (08:57) On CWG-7, I hope it's a question of "how" and not "if."

Guru Acharya: (08:58) +1 Keith

Avri Doria: (08:59) in bertrand's case, if it was misbehavior, then the board should get rid of them. if they didn't then nuke the whole board for not getting rid of a misbehaving member.

Julia Wolman, GAC, DK: (09:00) Agree with Keith

Aarti Bhavana: (09:00) Question/Comment: This point was raised during the breakout sessions on Saturday, but I want to flag it again. By casting the community escalation support in hard numbers, we may run into difficulty later on, when new SO/ACs are added. So that should be kept in mind when drafting the Community decision process.

Bruce Tonkin: (09:01) Note Avri that under a designator model - the Board can pass a resolution to remove a board member, but will also need to get consent from the designator. This is OK I think - but just worth knowing..

Keith Drazek: (09:01) @Aarti: Yes, the CCWG recognizes that challenge.

Holly J. Gregory (Sidley): (09:02) +1 Bruce, plus the board may remove for cause (a high legal standard)

Avri Doria: (09:02) Bruce: I had not realized you lost the ability to expel for cause. missed that point.

Robin Gross [GNSO - NCSG]: (09:02) under designator model, we also need to clarify if "fiduciary interest" or "global public interest" can override community decisions - a hole the board can drive a truck through. I think our lawyers were going to work on a proposal for this issue.

Cheryl Langdon-Orr - CLO: (09:02) exactly @Holly

Robin Gross [GNSO - NCSG]: (09:03) "fiduciary duty" rather (not "interest")

Avri Doria: (09:03) i was assuming misbehavior == cause

Milton Mueller: (09:03) +1000 Steve

Robin Gross [GNSO - NCSG]: (09:04) yep - I thought we closed this issue (again) 30 minutes ago

Rosemary Fei (Adler & Colvin): (09:04) Causes are listed in the statute, Avri, and very narrow/extreme, like being of unsound mind, or conviction of a felony.

Anne Aikman-Scalese - IPC: (09:04) So in evaluating PTI separation power, the question is whether (after following all the steps on the escalation staircase including IRP), does the Community want the right to specifically enforce the IRP decision in favor of separation of PTI or is the Community satisfied with the indirect power of removing all the directors if they decline - in the exercise of their fiduciary duties - to abide by the IRP in favor of separation. Single Member - Community can execute the separation of PTI itself. Single Designator, Board cannot be forced to separate PTI, but Community can remove them.

Robin Gross [GNSO - NCSG]: (09:05) how did we get back to this issue of cause for board removal?

Bruce Tonkin: (09:05) I support Sebastien's suggestion.

Arun Sukumar: (09:05) thank you for clearly stating that Anne

Samantha Eisner: (09:06) @Anne, binding IRP can exist outside of a member context

Alan Greenberg: (09:06) We are one hour into this meeting and still re-debating an issue that was largely already closed.

Brenden Kuerbis: (09:06) Anne, I agree that is the difference and a question we should focus on.

Robin Gross [GNSO - NCSG]: (09:06) right - we only have INdirect enforcement (spill the board) for some critical powers.

Steve DelBianco [GNSO - CSG]: (09:07) @Robin -- I was responding to statement by Bertrand, regarding specific criteria for board removal

Robin Gross [GNSO - NCSG]: (09:07) I appreciate that Steve, it is just a shame some can't let it go.

Anne Aikman-Scalese - IPC: (09:07) @Arun You are welcome. This is what I gleaned from discussion with Sidley this morning, but of course that should be clarified with them. (I am not a California lawyer but just wanted to know the answer for myself.)

Steve DelBianco [GNSO - CSG]: (09:08) If we end up with board removal as our main enforcement tool, we can't have that tool constrained to just a pre-written list of "offenses"

Robin Gross [GNSO - NCSG]: (09:08) precisely.

Guru Acharya: (09:10) @Anna: I am also unclear how board removal will help in enforceability of Power 7. If the first board refuses to comply with separation by citing fiduciary responsibility; then why would any replacement board reach a different assessment - that separation is now suddenly in line with fiduciary responsibility?

Guru Acharya: (09:10) *Anne

Christopher Wilkinson: (09:11) The proposed procedure for removal of Board members could become quite destabilising. Any self-repecting Director is likely to resign before any of this procedure can be implemented. I share the reservations expressed by Bertrand, particularly as they related to Directors appointed by NomCom. CW

Alice Jansen: (09:12) The document Jonathan is presenting can be found at - <https://community.icann.org/download/attachments/56143663/BudgetVeto19-10-15.pdf?version=1&modificationDate=1445263031110&api=v2>

Seun Ojedeji: (09:14) @Bruce, at the moment the bylaw was not entirely clear on whether a refusal by the appointing SO/AC for board to go-ahead with the removal will be honored by board

Anne Aikman-Scalese - IPC: (09:15) @ Guru re Separation of PTI - I am not sure why removal of directors is sufficient power - perhaps because the Community would then appoint directors who would agree to separate PTI before they get elected?

Guru Acharya: (09:16) Nomcom would agree to that as a selection criteria?

Anne Aikman-Scalese - IPC: (09:16) Sorry I do not know enough about how new directors get appointed after "spilling the Board".

Guru Acharya: (09:18) Thanks Anne. Hopefully we will get answers to these important questions soon.

Anne Aikman-Scalese - IPC: (09:20) yes hopefully. I think it will really help to focus on separation of PTI.

Guru Acharya: (09:20) Agreed.

Samantha Eisner: (09:21) @Holly/Rosemary, is it allowable under law to require board candidates to agree to voting in a particular way on a particular issue prior to being selected to the Board?

Ethan Wham: (09:23) Thin line between forcing a vote one way and running on a platform they agreed to before hand

Holly J. Gregory (Sidley): (09:23) @Sam, They cannot be bound contractually, but much like selection of Supreme Court Justices's the selecting groups can interview them and quiz them on their views and beliefs in advance.

Christopher Wilkinson: (09:24) Hmmm ... that is hardly a legal question it is political: it looks like attempting to "pack" the Board. CW

Guru Acharya: (09:24) Im sure Nomcom, with all its transparency, would agree to conduct interviews in that manner.

Ken Salaets/ITI: (09:25) Some might suggest that the interviewing of prospective Supreme Court justices has proven to be a flawed art. It's certainly no panacea for this.

Chris Disspain: (09:25) did we get consensus on having an elevator in the first place?

Alan Greenberg: (09:26) Perhaps would depend on number of stories in bldg.

James Gannon: (09:27) ICANN Stairmaster Simulator 2015

Chris Disspain: (09:27) well there are many many stories in this ccwg

Alice Jansen: (09:27) The community decision paper can be found at - <https://community.icann.org/download/attachments/56143663/Dublin%20breakout%20on%20Community%20Decision%20v2.pdf?version=1&modificationDate=1445263428190&api=v2>

Guru Acharya: (09:28) Like all good stories, it starts with: "Once upon a time, the board suddenly decided to..."

Robin Gross [GNSO - NCSG]: (09:29) excellent point, Malcolm.

Steve DelBianco [GNSO - CSG]: (09:32) thanks for posting, Alice. I just want to note that this is a very early draft, and we have not yet made the edits requested by Chris, Cherine, and Sebastien

James Gannon: (09:32) The record needs to be set straight on ST18

Cheryl Langdon-Orr - CLO: (09:33) I started to respond here but decided I could simply use 2 letters then decided not to

Samantha Eisner: (09:33) Could we express the thresholds in percentages AND minimums, to make it easier to allow new entrants?

Anne Aikman-Scalese - IPC 2: (09:33) @James G - love the "ICANN Stairmaster" reference! Good analogy to a "work-out"

Robin Gross [GNSO - NCSG]: (09:34) LOL

Holly J. Gregory (Sidley): (09:34) +1 @Sam

Robin Gross [GNSO - NCSG]: (09:35) Seems like we have been over and over this again and again.

Jan Scholte: (09:36) @Steve. Still wondering how one adjusts the numbers with the addition of new SOs and ACs? Does it require an amendment of the bylaws every time a new SO or AC arrives on the scene (or departs)?

Keith Drazek: (09:37) @Jan: Yes, any new SO or AC would require a bylaw amendment anyway.

Cheryl Langdon-Orr - CLO: (09:37) but IMO the transcript of Kavous's intervention is not an accurate representation of either the intent of St#18 nor how it should be referred to in fact

Jan Scholte: (09:37) Thanks, Keith

Kavouss Arasteh: (09:39) ANY AC wish decide to participate

Chris Disspain: (09:40) Breaking news...Leon has permission to shake his head

Robin Gross [GNSO - NCSG]: (09:40) This was one of the biggest issues we received public comment on - we do need to adjust this.

Leon Sanchez (Co-chair ALAC): (09:40) Thanks Chris!

Leon Sanchez (Co-chair ALAC): (09:40) And I enforced my right already!

Chris Disspain: (09:41) :-)

Robin Gross [GNSO - NCSG]: (09:43) We need to account for the fact that some ACs simply are not supposed to be making decisions about budget or board recall.

Ken Salaets/ITI: (09:44) But under the designator model, spilling the board is the only real recourse. The asterik all but ensures that the enforceability will likely never be used.

Milton Mueller: (09:44) I was told to make a specific proposal. I would accept a designator or member model that involves only the SOs and ALAC.

Jan Scholte: (09:44) +1 Chris. That's what I was getting at.

Mark Carvell GAC - UK Govt: (09:44) I was in the minority position of 1 objection blockign removal of entire Board because of its potential de-stabilising impact on the organisation.

Avri Doria: (09:45) adding percentages makes it resemble voting even more.

Milton Mueller: (09:45) It is voting

Robin Gross [GNSO - NCSG]: (09:45) The role of ACs was absolutely one of the biggest issues we received comments against. We have to deal with this issue.

Edward Morris: (09:45) If we move to a designator model with removal of board members the most direct enforcement mechanism then thresholds that high make true accountability an aspirational goal.

Robin Gross [GNSO - NCSG]: (09:46) If we are re-opening threshold, then put me in the queue

Andrew Sullivan: (09:46) Given that every individual board member can be removed anyway, spilling the whole board can be achieved through that mechanism. So isn't it the threshold that counts?

Keith Drazek: (09:46) +1 Thomas

Matthew Shears: (09:46) + 1 Ed

Andrew Sullivan: (09:46) (just for the chat)

Avri Doria: (09:47) they are not composed by the board, they go through their own nomination process and are rubber stamped by the board. how often has the board rejected a nominee?

Keith Drazek: (09:48) Also agree with Ed....worth discussing.

Alan Greenberg: (09:48) If RSSAC/SSAC have the option of taking these actions, we need to remove their appointment by the board. It is currently effectively a rubber stamp in any case.

Matthew Shears: (09:48) I agree that thresholds may be model dependent - we need to explore further

Anne Aikman-Scalese - IPC: (09:49) If a single SO or AC can block, that is CAPTURE

Robin Gross [GNSO - NCSG]: (09:49) The CCWG lawyers stated in their memo about voting v consensus that it is really the same thing.

Avri Doria: (09:49) thresholds might count if that is the only alleged power the community has.

Milton Mueller: (09:50) Alan your minor point is correct but the larger point is that SSAC people, e.g., are already represented in GNSO, ASO, ALAC, etc.

Keith Drazek: (09:50) +1 Matthew. Also, I suggested on the list a while back that, if relying on the designator model, perhaps the non-designating ACs (GAC, SSAC, RSSAC) would not be a "voting" parts of the community structure. They could of course participate and provide advice to the community, but not have a "vote" per se.

Avri Doria: (09:50) Milton in what way are they already presented. I do not see this point at all.

Milton Mueller: (09:50) To give SSAC or RSSAC the same "consensus" power as an entire SO is a travesty

Sivasubramanian M: (09:50) than call it rough consensus

Mark Carvell GAC - UK Govt: (09:50) Need to bear in mind this schema is not just about taking decisions but identify meaningful steps for resolving complaints WITHOUT going to votes or equivalent SO/AC mechanism.

Robin Gross [GNSO - NCSG]: (09:50) And GAC still has its special advice privilege in ADDITION to this voting/consensus model.

Keith Drazek: (09:50) Agree Milton, and I think they'd agree.

Avri Doria: (09:50) they present technical concerns and interests that are not presented anywhere else.

Avri Doria: (09:51) except at the highest level of speak as in: all people are citizens somewhere so everyone is represented by the GAC.

Brenden Kuerbis: (09:51) Agree Keith, they should fulfill their advisory role to the SOs, much like they do (or should) to the board.

Malcolm Hutty: (09:51) 'When I use a word,' Humpty Dumpty said, in rather a scornful tone, 'it means just what I choose it to mean — neither more nor less.' 'The question is,' said Alice, 'whether you can make words mean so many different things.' 'The question is,' said Humpty Dumpty, 'which is to be master — that's all.'

Bruce Tonkin: (09:51) I note that if you move away from saying 4 support, you could instead define a quorum requirement - ie at least 4 SOs must participate and agree by consensus with no objections.

Megan Richards European Commission: (09:51) the thresholds for changing the fundamental bylaws vs regular bylaws and their different thresholds apply if the same wording is used. one says approval (4) the other says block (3) which may arrive at equal numbers depending on totals. perhaps better to say either block or approve in both cases to clearly show the distinction in thresholds

Matthew Shears: (09:51) + 1 Anne

Keith Drazek: (09:51) Yep. Plus ALAC because they are also a designator / appointer of a board director.

Mark Carvell GAC - UK Govt: (09:52) typo "complaints" - even pre-call stage can be opportunity for resolving the issue at the core of the petition.

Steve DelBianco [GNSO - CSG]: (09:52) Good point, Megan. Will make that edit for clarity

Milton Mueller: (09:52) Avri: Look at the list of SSAC members. Guerra, for example, was an ALAC member; Huston is part of APNIC and the RIR system, Xiaodong Lee is a ccTLD operator

Milton Mueller: (09:52) etc., etc, etc

Milton Mueller: (09:53) SSAC's chair has actually stated that he thought participation in such a structure would undermine SSAC's proper role as expert advisory body

Matthew Shears: (09:54) + 1 roelof

Jan Scholte: (09:54) @Keith at the moment it is expected that only 4 SO/AC to participate in 'decision-taking' capacity (ccNSO, GNSO, ASO, ALAC), so requiring 4 support equates to unanimity? What if, against current expectations, one of these four would not join community council, and there would not be 4 to support? Or is it assumed that SSAC, RSSAC would 'join' a designator when they would not join the member model?

Mathieu Weill, ccNSO, co-chair: (09:56) @Jan : GAC is willing to contribute as well if need be

Avri Doria: (09:56) not none, at one, me did argue for their equality. and i think there may have been one other. in the rough, perhaps, but not no one.

Jordan Carter (.nz, WP1 rapporteur): (09:57) i beg your pardon, Avri

Anne Aikman-Scalese - IPC: (09:57) GAC Advice would be one of the 4 consensus calls

Andrew Sullivan: (09:57) Some consensus processes don't use numerical thresholds. True consensus takes a long time. Some use rough consensus and then someone gets to use judgement; I gather that wouldn't be good here.

Jordan Carter (.nz, WP1 rapporteur): (09:57) I just thought it had to be put on the table

Robin Gross [GNSO - NCSG]: (09:57) Agree with Jordan - we are going against the public comment if we don't deal with the fact we got so many complaints on this issue.

Matthew Shears: (09:57) well said Jordan - the push back was the notion of equal weighting - which in a way we are replicating here

Robin Gross [GNSO - NCSG]: (09:59) can someone please post a link to the public comment tool here? I can't find it.

Mathieu Weill, ccNSO, co-chair: (09:59) on the way...

Jordan Carter (.nz, WP1 rapporteur): (10:00) <https://community.icann.org/display/acctcrosscomm/Staff+Summary++Second+Public+Comment>

Jordan Carter (.nz, WP1 rapporteur): (10:01) linked at the top of this, Robin

Robin Gross [GNSO - NCSG]: (10:01) thank you.

Anne Aikman-Scalese - IPC: (10:01) Re voting - the big pushback on Second Draft was against proper allocation of number of votes. Sometimes you cannot determine what consensus is without counting.

Alice Jansen: (10:01) Link to principles document Becky Burr is presenting - <https://community.icann.org/download/attachments/56143663/Revised%20Comment%20Summary%20PRINCIPLES%20V3.docx?version=1&modificationDate=1445266856192&api=v2>

Megan Richards European Commission: (10:11) since I have difficulty having hand recognised I put the comment here: on commitment 5 the extensive list of all other participants in the multistakeholder environment (even end users) but excluding any reference to governments in their public policy role leads a most unusual tilt in the commitments. the wording in the core values are of lesser legal importance

James Gannon 2: (10:21) Strongly support Malcoms points

Matthew Shears: (10:21) + 1 Malcolm

Robin Gross [GNSO - NCSG]: (10:22) I share Malcolm's concerns. This seems to be an expansion of ICANN's mission.

Becky Burr: (10:22) it's not Robin - the picket fence is our most important protection

Cheryl Langdon-Orr (CLO): (10:24) watching via AC

Thomas Rickert, CCWG Co-Chair: (10:25) Let us mark it a requirement for the drafting process that the mission must not be expanded.

Becky Burr: (10:25) and the discussion of consensus policy in the bylaws would need to reflect

Seun Ojedeji: (10:27) +1 to Andrew on that as well

Wolfgang: (10:28) @ Greg: This is the language I use since years

Seun Ojedeji: (10:28) We are expanding the scope of ICANN mission without recognising that we are indirectly adding more ambiguity to the fiduciary duties of the board and giving the board means to always win in court (whenever it comes to that level)

Lynn St.Amour: (10:29) +1 to Andrew, that has been a source of misunderstanding over the years..

Lynn St.Amour: (10:29) referring specifically to the IAB's submission

Anne Aikman-Scalese - IPC: (10:30) @Greg - don't think GAC would be too happy with non-governmental sector if their reference to taking into account public policy is not made. Either way, I support the suggested amendment by Spain.

Greg Shatan: (10:31) I think we need to be clear about what was meant by private sector. That does not exclude adopting the Spain amendment.

Anne Aikman-Scalese - IPC: (10:31) Suggested amendment from Spain is already in the commitments so no harm in repeating, right?

Greg Shatan: (10:31) @Becky, I believe the comparison chart in the Second Draft compares to the First Draft and not to the current Bylaws, etc.

Anne Aikman-Scalese - IPC: (10:32) Okay Greg - I see what you mean.

Alice Jansen: (10:33) We are now on a 15-minute break. We will reconvene at 15:48 UTC

Jimm Phillips: (10:35) This may have been asked earlier but what's the URL for the captioning feed?

RP - Tech 2: (10:40) <https://www.streamtext.net/player?event=LiffeyB19Oct2015>

RP - Tech 2: (10:43) That is the link to the captioning feed

Jimm Phillips: (10:44) thank you!

Alice Jansen: (10:50) the group is reconvening

Cheryl Langdon-Orr (CLO): (10:54) noted I will be back a tad after 1700

Alice Jansen: (11:00) The slide-deck can be found at <https://community.icann.org/download/attachments/56143663/Enforceability%20discussion.pptx?version=1&modificationDate=1445270297793&api=v2>

Alice Jansen: (11:02) Please refer to this version instead - <https://community.icann.org/download/attachments/56143663/Enforceability%20discussion%20refined%202.pptx?version=1&modificationDate=1445270550471&api=v2>

Jordan Carter (.nz, WP1 rapporteur): (11:08) that sounds confusing

Jordan Carter (.nz, WP1 rapporteur): (11:08) oh I see. practical different minimal. agree.

Andrew Sullivan: (11:08) I have never understood why the participation in the single entity doesn't have the same problem of legal entity for participants. Don't all the various ACs and SOs have to have a way to enforce that the sole entity does what it's told?

Andrew Sullivan: (11:09) (I would be most happy with a pointer to the Fine Material that explains this. I don't want to take up session time with my lack of knowledge)

Jordan Carter (.nz, WP1 rapporteur): (11:09) Andrew: not really a problem, because our lawyers have been very clear that the bylaws that instantiate it as an entity will subject it entirely to the decisions of the participants

Jordan Carter (.nz, WP1 rapporteur): (11:10) and it won't have any capacity to do anything else

Jordan Carter (.nz, WP1 rapporteur): (11:10) we dealt with that pretty comprehensively, but I could not point you to the memo sorry. holly or rosemary might be able to.

Andrew Sullivan: (11:10) I tried to read the advice about this, and I guess I just don't understand it

Jordan Carter (.nz, WP1 rapporteur): (11:10) suggest grabbing holly or rosemary and having a chat

Jordan Carter (.nz, WP1 rapporteur): (11:10) they are in the room

Andrew Sullivan: (11:11) It seems to me that forcing the sole entity to do what the bylaws insist they do needs the same mechanism as forcing the board to follow its bylaws, and from there you get to needing to sue and so on. But yeah, I'll see whether I can corner one of them. Thanks

Anne Aikman-Scalese - IPC: (11:12) The issue may be to make sure we use the specific CA statutory language. We would have to ask Holly and Rosemary if we can say "coordinated" in front of "Sole"

Jordan Carter (.nz, WP1 rapporteur): (11:12) what the bylaws say is one thing

Jordan Carter (.nz, WP1 rapporteur): (11:12) our report isn't the bylaws

James Gannon 2: (11:13) Which is one of our problems Jordan I think we have tried to mix the two in our report =>

Jordan Carter (.nz, WP1 rapporteur): (11:13) we have to describe stuff crisply for the ICANN community and for the decision-makers in this process. We should take that challenge seriously to be accessible, easy to get, and so on.

James Gannon 2: (11:13) Exactly

Jordan Carter (.nz, WP1 rapporteur): (11:13) James: I totally agree. Let's do better next time!

James Gannon 2: (11:13) Lets have a human readable report (Not that lawyers aren't people) and some legal appendices

Rosemary Fei (Adler & Colvin): (11:14) You make call the new entity any name you want to give it -- Coordinated Sole Designator or Fred, equally fine.

Athina Fragkouli (ASO): (11:14) very good points about enforceability: costs and delays.

Rosemary Fei (Adler & Colvin): (11:14) Sorry "Designator"

Matthew Shears: (11:14) Fred sounds good

James Gannon 2: (11:14) I'd vote for Fred

Anne Aikman-Scalese - IPC: (11:15) Agree Athina - timing of effecting community power is very important

Sabine Meyer (GAC - Germany): (11:17) @ Matthew and James: In light of a certain book series George seems preferable to Fred...

James Gannon 2: (11:17) Fraternal Relationship - Enhanced Designator F.R.E.D. (Sorry for the sexism and support of designator) =)

Chris Disspain: (11:20) I'm a tad confused are we actually going to discuss the models this afternoon - in only 1 hour?

Robin Gross [GNSO - NCSG]: (11:20) what about the requirements and stress tests? shouldn't they be on "criteria for assessment" slide?

James Gannon 2: (11:21) Yeah that's a very important point Robin

Alice Jansen 2: (11:22) 3 column summary available at <https://community.icann.org/download/attachments/52896826/3%20COLUMN%20Summary%20Comparison%20of%20Enforcement%20Mechanisms%20.pdf?version=1&modificationDate=1445243202000&api=v2>

Jordan Carter (.nz, WP1 rapporteur): (11:27) I will paste into the chat what Annex L said on the power it wanted.

Steve DelBianco [GNSO - CSG]: (11:28) "PTI separation" was only an extreme example of a recommendation that could come out of an IANA Functions Review. We're really talking about the community's power to force the board to implement a IFR recommendation

Jeff LeVee: (11:28) I see that CCWG counsel has stated that arbitration is likely unavailable for this issue, but Jones Day disagrees and believes that arbitration would be available for this issue as it would for any other issue. The fact that fiduciary duties are implicated does not make the issue unavailable for arbitration.

Mathieu Weill, ccNSO, co-chair: (11:28) @Robin; we have tried to be specific about the requirements and stress tests associated. Do you see anything missing?

Guru Acharya: (11:29) +1 James - Exactly the point. Very well said.

Jordan Carter (.nz, WP1 rapporteur): (11:29) Creation of an ICANN fundamental bylaw to describe the IANA Function Review (IFR) and establish the above voting thresholds for triggering a Special IFR and approving the outcomes of an IFR.

Jordan Carter (.nz, WP1 rapporteur): (11:29) Creation of an ICANN fundamental bylaw to describe the procedure for creating the SCWG and its functions and establish the voting thresholds for approval of a new operator for the performance of the IANA Functions or other end-result of the SCWG process.

Jordan Carter (.nz, WP1 rapporteur): (11:30) Approval by a community mechanism derived from the CCWG-Accountability process to approve the final selection of the SCWG (if this tenet of the CCWG-Accountability proposal is not implemented a new approval mechanism will have to be put in place).

Jordan Carter (.nz, WP1 rapporteur): (11:30) and a sub bullet to that last - Per the above separation process the selection of the entity that would perform the IANA naming functions following a separation process will require community approval through the established mechanism derived from the CCWG-Accountability process.

Matthew Shears: (11:30) +1 James - agree that the lack of certainty is problematic

Athina Fragkouli (ASO): (11:32) Thank you for this clarification Jonathan, very helpful

Milton Mueller: (11:32) Jonathan's comments do not address James's question

Matthew Shears: (11:32) enforceability requires certainty

Guru Acharya: (11:32) Jonathan is not in a position of making that call without consulting the CWG

Guru Acharya: (11:32) When we asked for enforceability - we didn't mean weak impractical enforceability

Edward Morris: (11:32) +1 Matt

Martin Boyle, Nominet: (11:32) @Jonathan +1

Jonathan Robinson: (11:33) I am not making a call on the model. I am simply saying that we did not specify a model or mechanism.

Avri Doria: (11:34) one is likely one way, while the other is likely the other way.

Milton Mueller: (11:34) +1 Matt. It is CCWG's job, not CWG's, to deliver a mechanism that is capable of enforcing an IANA separation if need be. The CWG merely determined that such separation should be possible

Jeff LeVee: (11:34) Per the ICG Proposal, the Names Function will be governed by a contract between ICANN and its PTI. There will be escalation procedures in the PTI contract and in the Bylaws. If ICANN did not follow the escalation procedures, the matter could be brought to binding arbitration (as set forth in ICANN's amended Bylaws). Additionally, PTI itself could sue for breach of contract and seek specific performance in court to force ICANN to comply. Finally, like other issues, the indirect enforcement mechanism of Board removal could also be pursued by the Designator.

Athina Fragkouli (ASO): (11:35) +1 Matt and Milton

Steve DelBianco [GNSO - CSG]: (11:35) but there are OTHER bylaws, Chris. Board could say that separation would violate a bylaws requirement for security, stability, etc.

Grace Abuhamad: (11:35) 401 Enumeration of the relevant accountability mechanisms that could or must be exhausted before a separation process could be triggered: Creation of an ICANN fundamental bylaw to describe the IANA Function Review (IFR) and establish the above voting thresholds for triggering a Special IFR and approving the outcomes of an IFR. Creation of an ICANN fundamental bylaw to describe the procedure for creating the SCWG and its functions and establish the voting thresholds for approval of a new operator for the performance of the IANA Functions or other end-result of the SCWG process. Approval by a community mechanism derived from the CCWG-Accountability process to approve the final selection of the SCWG (if this tenet of the CCWG-Accountability proposal is not implemented a new approval mechanism will have to be put in place. Per the above separation process the selection of the entity that would perform the IANA naming functions following a separation process will require community approval through the

Samantha Eisner: (11:36) But once the Board takes that decision, you could still challenge whether the Board was WRONG in ignoring the community outcome

Samantha Eisner: (11:36) that is what an arbitration would be over

Milton Mueller: (11:37) There are other people in the queue. Does Disspain have 3-4-5 bites at the apple?

Samantha Eisner: (11:38) @Jordan, that is not correct. You can still challenge that decision.

Guru Acharya: (11:39) +1 Jordan

Greg Shatan: (11:39) @Jeff LeVee, PTI is controlled by ICANN, so it is highly unlikely to sue for breach of contract and specific performance, unless ICANN likes suing itself. (P.S. I assume you are the same Jeff LeVee who is a litigation partner at Jones Day.)

Jeff LeVee: (11:39) You can enforce the decision via arbitration under a designator model; I do not understand the legal reason why such enforceability might be precluded.

Jeff LeVee: (11:39) Yes, I am Jeff LeVee of Jones Day

Guru Acharya: (11:40) ICANN can frustrate the arbitration process but refusing to share documents, refusing to participate, and delaying the process.

James Gannon 2: (11:40) Co-Chairs coming into Dublinwe had agreed that all legal counsel would be identified as such on the Adobe

Matthew Shears: (11:40) If the community determines that separation is necessary (and it would not be taken lightly) the community needs to have the certainty that such a separation would occur

Jonathan Robinson: (11:41) In the CWG proposal, we specifically contemplate a membership model but do not require it e.g. footnote following para 127. This community mechanism could include ICANN membership, if ICANN were to become a membership organization per the CCWG-Accountability work efforts.

Guru Acharya: (11:41) +1 Matthew

Greg Shatan: (11:41) Jeff, we understand that is what your partner asserted in her memo today. Our counsel has not yet had a chance to respond, but that differs from their advice.

Keith Drazek: (11:42) @Guru: This is why we will need to ensure access to records if we move from member to designator.

Kavouss Arasteh: (11:42) Statement of Chris in saying that "WE WILL DO IT" IS NOT sufficient to ensure the proper implementation of this very important process

Jeff LeVee: (11:42) Yes, I understand that CCWG counsel has not yet had an opportunity to respond, and I look forward to the response.

Jordan Carter (.nz, WP1 rapporteur): (11:42) and firing the board is a lot faster than a court case.

Guru Acharya: (11:43) +1 Kavouss.

Avri Doria: (11:43) I repeat what I said about the use of the word 'likely' opposite things are likely in the two models. In one it is unlikely to get arbitration, in the other it is likely to get arbitration. Just because the word 'likely' is used in both sentences, does not make them the same. There is a world of difference between the two uses.

Kavouss Arasteh: (11:43) We must clearly indicate the ability to proceed with the separation process in a clear and explicit manner. The situation is vague, insufficient, and inadequate

Jordan Carter (.nz, WP1 rapporteur): (11:44) the key difference is the decision right, and as I read it, it is reasonable to read what the CWG said as suggesting the community must have a co-decision right

Jorge Cancio (GAC Switzerland): (11:44) +1 Mathieu - there are ways to avoid that fiduciary duties are used as an excuse

Farzaneh Badii: (11:45) what are those ways?

Jordan Carter (.nz, WP1 rapporteur): (11:45) on Anne's point - you can always appoint directors who will go in a direction

Jordan Carter (.nz, WP1 rapporteur): (11:45) (I've done this myself.)

Andrew Sullivan: (11:46) It seems to me that this is just about power, and obviously the point is that if some board member won't do the thing the community wants, you find someone who would

Andrew Sullivan: (11:46) I think it would be only natural to interview people with that question

Jorge Cancio (GAC Switzerland): (11:46) supermajorities or more to override community decisions, increased transparency requirements, some degree of arbitration... I got that from the Sidley memo...

James Gannon 2: (11:47) Just for clarity on my own comments, I don't expect it will be used as an 'excuse' I wouldn't denigrate board directors in that way, I am speaking to the genuine possibility that the community and the board may disagree

Guru Acharya: (11:47) In case of a board spill, nomcom will definitely adopt a transparent process to select replacement directors who are pro-separation.

James Gannon 2: (11:48) Not all of our directors are appointed

James Gannon 2: (11:48) some are selected by nomcom

Jordan Carter (.nz, WP1 rapporteur): (11:48) Sam, sorry, I missed that before. The argument is at one further level of abstraction. In an arbitration that involves a power for the board's decision, the Board could challenge enforcement of that decision arising from arbitration by arguing its fiduciary duties are infringed

Jordan Carter (.nz, WP1 rapporteur): (11:48) while that prospect is remote, it is not zero

Matthew Shears: (11:49) moving the IANA function is no small decision - but if the community has been through the names proposal mechanisms such as the CSC, IFR etc., and gone through the escalation processes we are contemplating then it would be inconceivable that the Board could not agree - but that possibility is not acceptable considering the importance of the IANA functions and its continuity, etc.

Samantha Eisner: (11:49) @Jordan, agreed. The Board would take that issue to arbitration. Then the outcome is binding

Guru Acharya: (11:49) If the 1st board is objectively determining that separation violates fiduciary duty then every replacement board will also come to the same objective conclusion - spilling the board serves no purpose at all.

Jordan Carter (.nz, WP1 rapporteur): (11:49) After the binding finding, Sam, ICANN could in the court argue it should be set aside. That's what our lawyers have told us.

Anne Aikman-Scaless - IPC: (11:49) The question is whether it's clear that the Community could screen replacement directors based on whether or not they would implement a Community decision in favor of separation of PTI.

Jordan Carter (.nz, WP1 rapporteur): (11:50) Anne: absolutely

Jordan Carter (.nz, WP1 rapporteur): (11:50) Directors can and often are selected to change an organisation

Milton Mueller: (11:50) Matthieu that is a completely wrong statement

Guru Acharya: (11:50) The chairs put in the essential criteria of time delay and costs - going to court to enforce separation is adverse to those criteria

Greg Shatan: (11:50) Anne, having been through the director selection process, I'm confident that such a "litmus test" could be used.

Jeff LeVee, Jones Day: (11:51) There is no basis whatsoever for the Board to argue that its fiduciary duties compel it to ignore an arbitration award. Were that the case, a corporate board could ignore any arbitration award, and of course that cannot happen.

Anne Aikman-Scaless - IPC: (11:51) In court, under Sole Designator, ICANN Board could argue IRP decision is not binding because decision is governed solely by Directors exercise of fiduciary duty, which they cannot delegate to any third party or process - according to our lawyers - Community would have weaker case in this situation than would the Board.

Jeff LeVee, Jones Day: (11:51) Anne: I do not understand the legal basis for your argument.

Anne Aikman-Scaless - IPC: (11:53) Sole Designator and Sole Member have equal standing but Sole Member has direct enforcement to achieve result and Sole Designator means Community says to Board "either you implement IRP decision or else we will remove you."

Guru Acharya: (11:54) Request Sam to also elaborate on whether there are any ways for ICANN to frustrate and delay the arbitration.

Steve DelBianco [GNSO - CSG]: (11:54) If the IRP found that the board reasonably followed its fiduciary duty, that would prevent the separation recommended by IANA Function Review, right?

James Gannon 2: (11:54) Exactly Steve

Arun Sukumar: (11:55) Jordan, lawyers are going to get into this anyway :D

Holly J. Gregory (Sidley): (11:55) We do not disagree with what Sam just stated. What we do disagree on is the extent to which you can try to bind a board outside a member context on matters that lie at the heart of a board's fiduciary duty

Anne Aikman-Scaless - IPC: (11:55) Re arbitration of whether or not it is an exercise of fiduciary duty - it appears to me absolutely ALL of these Community powers involved fiduciary duty exercise by the Board unless reserved to the Members - but again that is in a general sense - not specifically under CA law as I am not a CA lawyer. It just appears to me there is no issue as to whether these involved core fiduciary responsibility. They absolutely do. Waste of time to arbitrate that as to these limited core powers.

Guru Acharya: (11:58) +1 to the idea of limiting members powers to Power 7 and being designator for all other 6 powers.

Matthew Shears: (11:58) it is definitely worth exploring

Jeff LeVee, Jones Day: (11:59) Every corporate board takes decisions that involve the exercise of fiduciary duty. But those same boards get sued all the time (think stock takeover situation), and the boards' decisions are subject to either litigation or arbitration, and those results are binding.

Anne Aikman-Scaless - IPC: (11:59) I would sincerely doubt you can be a Member corporation for purposes of # 7 and a Designator for purposes of everything else.

Holly J. Gregory (Sidley): (11:59) @Bruce, CWG Annex L requires enforceable separation process - and arbitration re process under both models is fine.

Anne Aikman-Scalese - IPC: (11:59) Not true that IRP decision is equally enforceable in court under Sole Designator model.

Jeff LeVee, Jones Day: (12:00) Apparently, we will have to agree to disagree.

Bruce Tonkin: (12:00) This is what the CWG asked for:

Bruce Tonkin: (12:00) "The selection of a new operator to perform the IANA Naming Functions or other separation process will be subject to approval by the ICANN Board, and a community mechanism derived from the CCWG-Accountability process. [62] A determination by the ICANN Board to not approve a recommendation by the SCWG that had been supported by a supermajority of the ccNSO and GNSO Councils will need to follow the same supermajority thresholds and consultation procedures as ICANN Board rejection (by a supermajority vote) of a PDP recommendation that is supported by a supermajority of the GNSO."

Andrew Sullivan: (12:00) I think the point just made, though, that this is about power and if you have the ability to remove the board then you have the power in practice no matter what

Anne Aikman-Scalese - IPC: (12:01) The stated reason by Sidley Adler that it is not equally enforceable under Sole Designator is that Board may not delegate fiduciary duty. So they cannot actually legally cede that exercise of fiduciary duty to binding arbitration.

Andrew Sullivan: (12:01) It's a blunt instrument, of course, but it's certainly an instrument that you can use

Bruce Tonkin: (12:01) We already have a co-decision process with respect to creating fundamental bylaws

Guru Acharya: (12:01) @Anne: From what I understand, there would need to be one sole member and one sole designator. The sole members powers would be restricted to power 7 by increasing decision thresholds for all other powers (in phase 2 as per sidley memo). the sole designator would exist in parallel to the sole member.

Anne Aikman-Scalese - IPC: (12:02) In single member model, nothing can ultimately override the decision of the Board in the exercise of its fiduciary duty - at least per Sidley members.

Anne Aikman-Scalese - IPC: (12:02) per Sidley memos - sorry

Bruce Tonkin: (12:02) Both the Board and the community must agree before a bylaws change can be made, and we are using a similar decision process with respect to separation

Jeff LeVee, Jones Day: (12:02) Anne: I am not sure that the Sidley/Adler memo actually says that, but if it does, Jones Day strongly disagrees as reflected in the memo circulated earlier today.

Alan Greenberg: (12:03) I find this discussion fascinating. If indeed IANA is not working and we are going through all of this, the IETF and RIRs would have long left. Since it seems clear that IANA is not working properly for the names function, we are running through unending processes, and the Root Server operators and the registries new way to get the root zone updates and distributed. And we would have argued ourselves out of the business.

Anne Aikman-Scalese - IPC: (12:03) @Jeff - so you are saying that the Board CAN delegate a decision like PTI separation to binding arbitration?

Guru Acharya: (12:04) +1 Alan!

Samantha Eisner: (12:04) @Anne, it's not the delegation of the decision. It's the evaluation of a decision already taken against established tests

Holly J. Gregory (Sidley): (12:04) Bruce, California law allows Bylaw approval rights to be given to a non-member third party ; hence under designator model you can have direct enforcement.

Athina Fragkouli (ASO): (12:05) Very good point Greg

Bruce Tonkin: (12:05) Agree with Greg.

Alissa Cooper: (12:05) +1 Greg

Izumi Okutani (ASO): (12:05) +1 Greg

Asha Hemrajani: (12:06) Well put Greg

Bruce Tonkin: (12:06) The process will be that the community decides it wants to appoint a new operator and the Board will follow the bylaws with that respect. The board and the community will decide on whether the new operator is going to do the job properly. If the Board is not making sensible decisions then you should remove the Board - it is fairly straightforward.

Bruce Tonkin: (12:07) IN fact if the IANA function ever gets to the point that there is a community discussion to remove it from ICANN - then I would be certainly looking to remove the Board as it hasn't been doing its core job.

Greg Shatan: (12:07) If we go "Total Recall" on the Board, the whole fiduciary duty issue is moot.

Bruce Tonkin: (12:08) Agree @Greg

Jordan Carter (.nz, WP1 rapporteur): (12:09) to run PTI properly

Jordan Carter (.nz, WP1 rapporteur): (12:10) (a core responsibility)

Guru Acharya: (12:11) " BUT WE DO THINK THERE ARE AREAS WHERE IT'S DIFFICULT TO CONSTRAIN FIDUCIARY JUDGMENT WHEN IT COMES TO THE VERY CORE OF WHAT A BOARD IS EXPECTED TO DO." - Any example of how this could play out in the separation process?

Jordan Carter (.nz, WP1 rapporteur): (12:12) the actual decision to separate

Guru Acharya: (12:17) +1 Avri

Anne Aikman-Scalese - IPC: (12:17) @Jeff - Are you saying the Board can legally delegate the decision to separate PTI to binding arbitration?

JP: (12:17) +1 avri

Brett Schaefer: (12:17) I find it amazing that, over the course of a few months, we have traveled from virtual consensus that spilling the Board would be a hugely disruptive nuclear option that would be exercised only in extreme circumstances to today hearing that it is far less disruptive than avoiding that necessity by giving the community limited powers through membership.

JP: (12:17) we do not want to remove the Board to begin with it should be the last option

Kavouss Arasteh: (12:17) The ICG will seek confirmation that the CCWG final Work Stream proposal meets the CWG requirements. If the CCWG output does not meet the needs as contemplated by the names proposal, the CWG has indicated it will revise its proposal. Because of this dependency it is impossible for the ICG to conclude its assessment of the accountability mechanisms with regards to the names functions at this time.¹⁰⁴ After the finalization of CCWG Work Stream 1, the ICG will make a final determination about whether to recommend that NTIA approve the transition proposal. Based on the outcome of the evaluation described above, the ICG is planning to recommend that NTIA approve the transition proposal.

Jeff LeVee, Jones Day: (12:18) That is not what I am saying. I am saying that the Board will make a decision one way or the other, and that decision is then subject to a binding arbitration, the result of which binds the Board just as any other arbitration would bind the board.

Andrew Sullivan: (12:19) I still don't understand how this ramifies. Avri seems to say that a mechanism in which people vote and then maybe disagree and have a tussle. Otherwise, people disagree and they have a tussle. The question is who has the power, and the point is to strengthen the community's power.

Anne Aikman-Scalese - IPC: (12:19) If indirect enforcement via spilling the Board is the method of enforcement, you certainly need thresholds for doing so that are not super difficult.

Keith Drazek: (12:19) BUMP!!!

Farzaneh Badii: (12:19) I agree Anne

Guru Acharya: (12:20) +1 Avri for rightly making the distinction that membership is a cooperative model and promotes the multistakeholder process

Robin Gross [GNSO - NCSG]: (12:20) yes, Guru

Andrew Sullivan: (12:21) Well, I would say that the membership approach requires voting, and discourages the multistakeholder process

Andrew Sullivan: (12:21) It seems to me the argument cuts both ways, and I don't think there's an easy answer

Guru Acharya: (12:21) @Andrew: Voting is present in all models and we have already tried to overcome it by moving to a consensus mechanism

JP: (12:21) agree with Matthew completely on stability

Avri Doria: (12:21) to put it briefly: if both parts have power, they must learn to cooperate. If only one has power, there is only the fight.

Andrew Sullivan: (12:21) The IETF does not vote, for instance

Brett Schaefer: (12:21) +1 Matthew

Jordan Carter (.nz, WP1 rapporteur): (12:21) but Matthew, you can set out the co-decision

JP: (12:22) well said Avri

Andrew Sullivan: (12:22) so it's not present in all models, just all the models you're talking about

Wolfgang: (12:22) Remember Penny My cean, <https://www.bing.com/videos/search?q=lady+bump&qvpt=lady+bump&FORM=VDRE>

Jordan Carter (.nz, WP1 rapporteur): (12:22) the only question is if someone defies it, what the court would find

Jordan Carter (.nz, WP1 rapporteur): (12:22) find

Anne Aikman-Scalese - IPC: (12:22) @Jeff - are you saying the Board can delegate a decision to separate PTI to binding arbitration?

Wolfgang: (12:22) Remember Penny McLean <https://www.bing.com/videos/search?q=lady+bump&qvpt=lady+bump&FORM=VDRE>

Samantha Eisner: (12:22) @Anne, Jeff and I have each answered that question

Izumi Okutani (ASO): (12:22) Avri, I don't quite follow your rationale on why Single Member Model is more cooperative - under both model, it will require the community will be having discussions through the Community Forum and arbitration. Won't those process accommodate discussions and dialogue?

Andrew Sullivan: (12:23) I completely agree with the point Thomas is making right now: you couldn't actually have this fight in a court. The proper operation of IANA would halt

Avri Doria: (12:23) BUMP - We need a bylaw that enshrines the Bottom Up Multistakeholder Process

James Gannon 2: (12:23) Which should be enshrined as Avri's Law =)

Alissa Cooper: (12:24) it strikes me that the stability of the naming functions largely depends on what the PTI staff decides to do while ICANN is either being sued or having its board spilled and replaced

Holly J. Gregory (Sidley): (12:24) Avri, you could do it as an Articles provision that is part of the defined purpose for which ICANN is organized.

Brett Schaefer: (12:24) The option to spill the Board is present in both options, the question is where the final authority resides.

Samantha Eisner: (12:25) Final authority on spilling the Board would rest with the community in both the member and designator model

Matthew Shears: (12:26) we throw around spilling the board far too easily

Bruce Tonkin: (12:27) Yes - we also throw around that the Board is going to over-rule bottom up policy processes is just as extreme. It has never happened.

JP: (12:27) fully support Malcolm's point

Andrew Sullivan: (12:27) In jurisdictions where recall can happen, it happens really very rarely. Instead, it's a power arrangement.

jorgeancio (GAC Switzerland): (12:27) human structures may be captured, for sure

Robin Gross [GNSO - NCSG]: (12:27) me too - the community is supposed to direct the board in a bottom-up model.

Bruce Tonkin: (12:27) It requires a 2/3 vote to rule against an SO/AC or CCWG.

JP: (12:27) thomas was correct in stating that he would be spinning this

jorgeancio (GAC Switzerland): (12:27) and we have to make sure they are not

Brett Schaefer: (12:29) But not the authority of separation, budget, strategic plan, inspection, etc. that have been identified as critical for accountability. Spilling should be rare, having the community have final authority in a few selected areas would be far less destabilizing IMO.

Guru Acharya: (12:29) @Jeff: If the board were to argue that they rejected the community separation decision because in their judgement separation was not in line with the bylaws for some procedural or substantive issue - in that case could arbitration possibly rule in favour of the board and say that the board was merely exercising their fiduciary duty?

Matthew Shears: (12:30) good question guru

Jeff LeVee, Jones Day: (12:32) I am not positive I understand the question. If an arbitration panel determined that the Board violated its Bylaws or Articles in conjunction with a decision to separate, that arbitration decision would bind the board irrespective of the Board members' views as to whether their decision was "required" by their fiduciary duties. Does that help?

Wolfgang: (12:32) @ Roelof: 1+ From the very first day IANN was about a "grand collaboration"

Guru Acharya: (12:34) @Jeff: My question is not whether the arbitration is binding. I am saying could the board use that as a defence during arbitration to get a favourable judgement.

Robin Gross [GNSO - NCSG]: (12:35) If the board must act in the global public interest as their fiduciary duty, and that is completely subjective - just someone's view of what is in the global public interest. It is in addition to the statutory fiduciary duties (loyalty, due diligence, care, etc.). It is this subjectivity about what is in the global public interest that cannot be questioned which concerns me.

Bruce Tonkin: (12:36) Robin it is the view of the people you have elected. If you think those people make bad decision - then replace them.

Jordan Carter (.nz, WP1 rapporteur): (12:36) Robin: as Holly noted, there are some things that can be done about that.

Bruce Tonkin: (12:36) There are ample opportunity to do so - you can replace a third of the board every year, you can remove individual directors and you can remove the whole board.

Robin Gross [GNSO - NCSG]: (12:36) well I sort of heard it both ways, so would like to tease this out further, Jordan.

Jeff LeVee, Jones Day: (12:36) Yes, the Board members must assess individually their own fiduciary duties, which they owe to the corporation. But an arbitration panel (just like a court) could determine that the Board decision was contrary to the Bylaws or Articles (i.e., the Board decision was wrong), in which case the Board would be bound by that decision.

Keith Drazek: (12:36) Speaking personally, I agree that spilling an intransigent Board would be a far more likely scenario than taking it to a lengthy court battle. I also don't think spilling the Board would be as disruptive or destabilizing as many appear to believe. If there's community consensus to go to court, there would be community consensus to spill...and if there's community consensus for either choice, it's necessary.

Bruce Tonkin: (12:37) The IRP process is intended to be used when the Board doesn't follow the bylaws.

Bruce Tonkin: (12:37) Direct board removal is when the people you appoint make bad decisions.

jorgeancio (GAC Switzerland): (12:37) agree with Keith

Bruce Tonkin: (12:38) That is how most democracies work. If the Government breaches the law you use courts, if the government simply makes what in your view is the wrong decision - then replace that government.

Steve DelBianco [GNSO - CSG]: (12:38) See Stress Test 33 on page 116 of our 2nd draft. It was requested by NTIA. "Participants in an AC/SO could attempt to capture an AC/SO, by arranging for over-representation in a working group, in electing officers, or voting on a decision.

Anne Aikman-Scaless - IPC: (12:38) @ Jeff - it is not the question whether they violated fiduciary duty. The question is whether the Community can make the final decision instead of the Board. So if Board says, in the exercise of its fiduciary duty, there will be no separation and the community says - you got it wrong - PTI needs to be separated and you cannot see it. I don't see how an arbitration of the substance of this decision which runs in favor of the Community's assessment of that issue could be enforceable against the Board.

Athina Fragkouli (ASO): (12:39) agree with Keith

Holly J. Gregory (Sidley): (12:39) Transparency rights can easily be expanded through bylaws in any model. S

Malcolm Hutty: (12:40) @Steve I explicitly said that capture of a SOAC as a structure is a real thing that should be tested, it's the bare concept of a "captured community" that I find nonsensical. Capture of a SOAC means it no longer reflects its community

Jeff LeVee, Jones Day: (12:40) Anne: such a decision by the Board could be arbitrated just as any other decision. I do not understand the distinction. Yes, this is an important decision, but there are lots of important decisions, and the Board can be held accountable on each one.

Holly J. Gregory (Sidley): (12:40) Agree @Anne

Steve DelBianco [GNSO - CSG]: (12:40) Agree completely, Malcolm. I posted ST 33 in response to Mathieu's remarks

Keith Drazek: (12:40) Thanks Holly. I think transparency rights will be critical if we move from member to designator. If the community is to rely on replacing the board, it needs to know when the time is right. The only way to know that is to have transparency in Board decision-making.

Robin Gross [GNSO - NCSG]: (12:42) Agree, Keith.

Seun: (12:42) +1 Keith I agree and it believe that can be ensured

Robin Gross [GNSO - NCSG]: (12:42) Agree, Keith.

Anne Aikman-Scaless - IPC: (12:42) @Jeff - if the Board acts in reasonable exercise of fiduciary duty - how can you possibly overturn that via arbitration? What if reasonable minds can differ on the same question and the real question is: who is best situated to make that judgment? In the case of PTI separation, is the Board or the Community best situated to make that separation decision?

Keith Drazek: (12:42) Also perhaps a modified Board election cycle so there's a more frequent opportunity to elect new directors and replace sitting directors....without having to recall or remove.

Brett Schaefer: (12:42) +1 on transparency point Keith

Guru Acharya: (12:42) @Jeff: His point is that the arbitration decision could also easily go in favour of the board if the board were to argue that in their judgement the board was in compliance with the bylaws even if the community feels otherwise. This is because this judgement is especially substantive due to the nature of ICANN's mission.

Malcolm Hutty: (12:42) @Keith. I also don't think spilling the Board would be as disruptive or destabilizing as many appear to believe. But that doesn't matter: so long as there is a big chunk of the community that finds Board dismissal utterly unacceptable in almost any conceivable circumstances (as appears to be the case now), there will never be sufficient consensus to achieve it and so the power becomes unusable.

Jordan Carter (.nz, WP1 rapporteur): (12:44) I've worked on a table that sort of matches the criteria on the screen - I'll circulate it soon

Seun: (12:44) @Keith changing (reducing) election cycle could have impact on the continuity of the organisation. Having experienced board members on board is also important

Jordan Carter (.nz, WP1 rapporteur): (12:44) to help us find our way to a decision

David McAuley 2: (12:44) Thank you Jordan, it will help

Keith Drazek: (12:45) @Sean: If they're good directors, they'll be re-elected. I didn't say reduce the total available service. I said more frequent elections. Perhaps every 2 years instead of 3.

Farzaneh Badii: (12:45) The threat of litigation is inducive for the board to come to cooperate with the community.

Farzaneh Badii: (12:46) It's the possibility that should not be denied. We are not going to necessarily go to court and spend 4 years to resolve a dispute ...

Anne Aikman-Scaless - IPC: (12:46) The potential problem is that you may want PTI separated and it may be reasonable but you don't really want the directors removed otherwise. You want to use a scalpel not a hatchet

Malcolm Hutty: (12:47) +1 Farzaneh

Alice Jansen: (12:48) Thank you all for joining this session!