
DUBLIN – CCWG-Accountability Working Session I
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LEON SANCHEZ: Hello, everyone, and welcome to our CCWG accountability working session 1. We have a lot of work ahead. We have made really good progress on these days and let's hope we keep the trend going. As a reminder, I kindly ask you to state your name before speaking. We have remote participants and for the benefit of those participants it would be good if you could remind to state your name before speaking. I also remind you of the standard rules of behavior. We -- we call upon all attendees, either physically or remotely, to abide to these proposed standards of behavior. And well, I won't take much time in continuing to the welcome. The roll call, if it needs to be, we'll have the regular roll call in cc -- in the AC room, and I would like to go with Mathieu to continue our next agenda item.

MATHIEU WEILL: Thank you very much, Leon. Welcome, everyone. This is Mathieu Weill speaking, the CCWG appointed co-chair. Since we had our sessions on Saturday, 48 hours have gone by. Wow. Wow. It may be that some actually discussed accountability in

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between, as if there was not enough sessions about it. This is just pure speculation. And as a consequence, we think it would be interesting and useful for the further discussions of our group to allow a small session of reporting about what those discussions were about and whether they have brought new ideas to the table. And that is why we wanted to offer this possibility. Do you have the AC room? Because I'm not in the AC room yet. Okay. For any updates on community feedback received to date.

To initiate this, I would like to report on the very successful engagement session that was held this morning. I think we've had a very good turnout and very good interactions with the room. There were a number of interesting points raised regarding the board removal that confirmed that some of the discussions we've had already are very much on the community's mind. We've had some statements regarding the need to deliver as fast as possible now because timeline is definitely very high on the agenda of significant parts of our community. And we've also heard from comments that confirmed the interest on some of our Work Stream 2 items such as diversity and SO/AC accountability as well as transparency. And I think that is rather reassuring and at the same time, it definitely showed that we need -- still need to refine some of the

latest developments in our discussions. And that is going to be on our agenda later, just after this point actually.

So with that, Alice, is there a queue forming because I don't have my AC room here yet. Anyone who wants to provide an update? No? Bruce? Bruce?

BRUCE TONKIN:

Okay. I'll just get my notes here. Thanks, Mathieu. I just thought I'd report on some of the conversations and discussions that have happened amongst board members over the last couple of days, particularly following the CCWG working sessions on Friday and Saturday morning. And I think, you know, it's fair to say that in general the board was very encouraged by those discussions. We support the new community powers that the CCWG is working on and we're encouraged by progress on how these powers should be executed in -- and the progress that was made on Saturday morning in those discussions.

We also agree that those community powers must be enforceable. We continue to support approaches that ensure the enforceability can be achieved using simple approaches without major changes in our corporate structure. We believe that most disputes can be resolved through a community, independent review panel or IRP but in the unlikely event that a

future board doesn't comply with the outcome of the panel, the community should have a solid foundation to be able to achieve enforcement.

With respect to enforcing a community IRP in court, we noted that there's been some discussion about what legal entity, or even potentially multiple legal entities, should be used for the community to have standing in court and then what legal status should we give that legal entity within our bylaws.

With respect to the bylaws status, the board supports the consideration of the designator model as the closest to our current governance model. So basically from our perspective, the board will continue to actively participate in refining how best to implement the community powers and following up on the work that was done on Saturday morning. And the board is willing to participate in investigating how a sole designator model could be implemented. So that's where we currently stand, Mathieu.

MATHIEU WEILL:

Thank you very much, Bruce. And thank you for the appreciation and encouragements that you, in your board liaison capacity, are providing to our group. I'm seeing Kavouss' hand is raised. So Kavouss, you would like -- is that a statement or was that a question to Bruce?

KAVOUSS ARASTEH: A statement given in the chat. I hope you take that into account. I have two major concerns I can put in the chat -- not to take your time -- but it applied to Bruce. I'll also put it in the chat. Before we talk about -- I hope that we do not refer to designator. We are talking of sole designator but not designator. Designator has many meanings.

If the board is in favor to pursue discussion on sole designator, no problem. But before doing that I would like that the two-page comparison paper provided by our legal counsel comparing the sole designator with sole membership will be discussed to see what are the shortcoming deficiencies, difficulties of the sole designator. And in what way we could remedy or compensate or do something about that by some other complementary measures or some reinforcement of those measures which are in the sole designator in order not to have the difficulty. That two-page document of the legal counsel is very, very instructive. A lot of thing is there. And there are three areas that the issue will not be covered, in particular transition will not be properly addressed. And there are one area that it could be, but that area should be reinforced. So I would like that at some time, whatever or whenever you deem appropriate, discuss that two-page comparison table. It is very, very important. Thank you.

MATHIEU WEILL: Thank you very much, Kavouss. And I think you're -- you're skilled enough into this type of discussions to provide very expert advice into this and that is very close to what we are about to do at -- after the break this afternoon where we need a substantial discussion with -- informed by facts so that we can discuss these models based on facts, requirements, in a thorough and documented manner because that is what is expected from our group. And that is -- the three-page paper that you're referring to I would ask that maybe someone repost the link into the chat room so that everyone can ensure we are on the same page. But it's certainly a very sound basis for that discussion, and I thank you for bringing that up.

I have Tijani.

TIJANI BEN JAMAA: Thank you Mathieu. Tijani speaking. Very happy to hear that the board accept today the sole designator model. I feel today more confident that the transition will happen. So thank you for your open mind.

MATHIEU WEILL: Thank you very much, Tijani. I think -- I haven't heard accepting in Bruce's words, so I would like to correct that for the record.

[Laughter]

But I think we've had already a strong signal of willingness to participate in the conversation and that is already much appreciated. Next is Alan.

ALAN GREENBERG:

Thank you very much. It's hard following that. In discussions within the ALAC it became quite obvious that even with people sitting in this room there are very different perspectives of what the, quote, sole designator model means. I think part of the problem is we are using the term "designator," which is a legal term related to appointing board members, and extrapolating the sole designator to incorporate the rest of the ACs/SOs if you look at the decision models we were looking at and that's caused some amount of confusion. I know for my own purpose I'm going to try writing up something later tonight and I'll send it to the list, and I would -- I guess it would be useful if other people tell me does that match what they think it means or not. Because we really need to have one -- one image of what it is, if we're going to decide whether we like it or not. Thank you.

MATHIEU WEILL:

Thank you very much, Alan. And you're definitely right, and we need to be very clear on that at the beginning of that discussion

when it comes on our agenda. Before turning to Malcolm, I think Athina has been raising her hand and was waiting on the list. So when you speak, if you can just raise your hand for a couple of seconds so everyone can see in which direction to look at it would be -- I think facilitate exchange as well. And Athina, yes, I'm not asking you to stand all the time but that -- you from the floor, Athina.

ATHINA FRAGKOULI:

All right. Thank you. So when the representatives from the ASO first joined this group and participate in this group, we said some clear requirements on what we expect the outcome to adhere to. At the same time we also provided a proposal for a model and that would be the multi-designator model and we didn't just give this as a proposal but we also provided supporting documents and -- so we really backed this up with legal documentation.

When we saw that the discussions were not very much in favor of this model and there were concerns, we -- we draw back because we understand that if there are concerns, we can be flexible. As long as our requirements are respected, we are flexible to any model everyone else feels comfortable with.

Now we see that we're very, very, very close to a conclusion. We just have some details to work on and to agree on. And let's see

the biggest picture here. We are also very, very, very close to a complete proposal for the IANA transition. The ICG has completed their proposal, they're almost there, and they're waiting for our requirements so that they have a finalized complete and beautiful proposal for the IANA transition.

Now I understand that there are some details to be agreed upon and that are somehow controversial. But let's take a step back and see the complete picture and let's consider whether these details are worth delaying the progress we've made and the improvements we are about to bring to the whole multistakeholder model with the IANA transition. This is the message from the ASO community. Thank you.

MATHIEU WEILL:

Thank you very much, Athina, and I think this message -- the way you're recollection the ASO's position is a -- something that should inspire us in our further discussions because of this open mind -- open mindset that you personally and you as a community has demonstrated -- have demonstrated along the process. I think that's -- that's very valuable. Malcolm. Raise your hand. Malcolm is over here.

MALCOLM HUTTY:

Thank you, Chair. Malcolm Hutto, for the record. I'd like to thank Bruce for that very helpful and constructive statement on behalf of the board. I'd like particularly to draw attention to the comments that he made regarding the board's acceptance that the IRP needs to be not only binding but that in the unlikely event that the board in a particular case declined to enter into such binding arbitration, that it must be an enforceable mechanism for ensuring that it does so. I think this is a very significant step forward.

In our previous discussions prior to this week I have been of the opinion that the -- on the basis of the advice that we've given, that the only mechanism that can be -- can deliver that assurance is the single member model. Following further legal advice and discussions that we've had in our deliberations and particularly constructive discussions that I've had in private with certain members -- individuals on the board as to their own personal thoughts, I now see that it may be possible to construct alternative mechanisms that would deliver on that requirement that the board have just said is so important -- have agreed are important and that I believe are so important. And in that I think it is possible that we may be able to find some way of resolving the disagreements that we've had about the -- the model that we have so as to achieve solution on this issue at least in a different way. So I hope that time will be made in our

deliberations to discuss the importance of how we go about implementing that, understanding that simply going with one or the other models may not of itself deliver on that requirement but that other mechanisms supplementary to those that we've considered so far may achieve it. Thank you.

MATHIEU WEILL:

Thank you very much, Malcolm. And I'm struck by the openness of all of the statements, and I take that as a very, very encouraging sign as we move forward in our session. And I think I'm seeing no further hand raised, so I would like now to turn to Thomas as we move to the substantial points of refinements for our model for our discussions.

THOMAS RICKERT:

Thank you very much, Mathieu, and welcome everyone back to another intense work session. The purpose of this agenda item is that we try to recap and see whether there's additional need for discussion on the four areas that we've been discussing before the weekend. And that is removal of the board, individual board members, the budget, community power, the community decision-making and the principles, commitments, and core values as well as the IRP.

So in the interest of time, let me be brave again and suggest that we don't walk through these in detail but just ask whether -- whether the support for the first of these points, i.e., the removal of indirect board members as defined by the subteam, as discussed before the weekend, as explained by Chris Disspain during the engagement session this morning stands. So can we confirm our agreement to that community power? So in the absence of -- shouldn't there be any further comments or requests for changes, we could confirm this, but I see that there is a queue forming. So Malcolm is -- Malcolm, is that a new hand? Old hand? Then Chris, Roelof, Kavouss, Alan.

CHRIS DISSPAIN:

Thanks, Thomas. I just wanted to say that it became sort of quite clear I think this morning, one, that there's still a fair bit of explanation to do to the community about the principle, because there are some who don't understand the principle. And secondly and perhaps more importantly, we haven't yet matched up what that group put together with what Steve's group put together and there are some -- there are some mismatches in that process that we're going to have to try and work out on the basis of, you know, if it's going to be the decision of the SO and the AC right the way through, that doesn't fit with Steve's listing, you've got to have two to do this and three to do this and four to do that. So I think that that line --

that line in Steve's chart is going to need to change to take account of the -- of the agreement in the -- the consensus in the small group about the board change. I just wanted to flag that because I think we musn't forget to do that. Otherwise it will be a mismatch.

THOMAS RICKERT: Thanks. And Steve, maybe you can prepare for maybe explaining that point, but let's go further down the queue first. Roelof is first.

ROELOF MEIJER: Roelof Meijer. Thank you, Thomas. I understand that we're time pressed, but may I recommend that for each item one of the co-chairs or somebody else gives a very short summary of what the actual item or the actual proposition is now because I think that we have people in the room who weren't in there this morning, and not to restart the discussion but just to make sure that everybody is aware that what are we asking to comment upon or to agree with.

THOMAS RICKERT: Thanks, Roelof. And I think that listening to you -- what you said and what Chris said, it might have some value and you, Steve, just briefly outlining where we are with the latest change that

has been discussed. Is that something that you could do for us?
So Steve, could you maybe do a quick recap?

STEVE DelBIANCO: Thomas, a quick recap of the entire decision-making escalation method or only with respect to the single board member removal. I want to understand your question.

THOMAS RICKERT: With respect to the single board member removal.

STEVE DelBIANCO: No, I don't think we should do that now. Let me continue to coordinate with Chris to integrate it into the total process because recall, I was not part of that group and we treated individual board member -- to the extent that the community has anything to say about it, we treated it as like the other community powers and did not integrate the individual SO and AC activity that they did. So you'll have to give us a later point in the agenda today and I think we can get to it then.

THOMAS RICKERT: Okay. Great. Kavouss.

KAVOUSS ARASTEH: Yes. Two points. One, today in the session that Mathieu categorizes as successful, I categorize it as a listening meeting because when you say something and I did not -- the act doesn't mean that I agree. It means that I understand what you are talking about.

Second, there was a question, removal without cause. I am not convinced, Thomas. Imagine that you want to employ somebody, and imagine that you employ me as your employee.

Imagine that one day you are not happy with me and you want to dismiss me. And imagine you take me to the administrative tribunal of your company and you say that I want to dismiss this person; vote for that. And they ask you what cause. You say no cause. Is it acceptable?

Somebody says that Mr. X wanted this. I don't agree with that. We need to have a cause. You could not dismiss anybody because you have elected me, selected me as your employee. If you want to dismiss me, you should give full reasons. And then the tribunal says, okay, vote for that and dismiss me.

You cannot dismiss. This is number one.

Number two, yes, on Saturday we had some arrangements to take care of the community's involvement, but it was not properly mentioned. We have to properly mention, yes, SO or

AC -- AC but no others, decide to remove one board member. They consult among themselves, and then the community and them they come back and they say how that consultation would be carried out. Is it going to each SO and AC and asking their recommendation or their views and after that they decide or what? It was very generally mentioned.

If we have clearance on this point, we don't have any problem, but I have serious difficulty to remove any board member without cause.

Thank you.

THOMAS RICKERT:

Thanks, Kavouss. Just a quick response to that. "Cause" is a legal term, so our understanding is, and I think this got a lot of traction in this group, that we would not ask for "cause" as a legal term but that a rationale needs to be provided for why the board member needs to be removed. And I think that's -- I understand that's what you're actually asking for.

With respect to the second point, the decision is being made by the designating organization, by the organization that places the board member on the Board, yet there was a need, expressed particularly by Tijani and others, that this discussion should not take place secretly. And, therefore, there's now this notion

baked into the process as proposed that there would be an open consultation; that the views of the whole community, all the SOs and ACs, would be heard so that the organization that puts the board member on the Board can then make a decision with all the information from the whole groups.

But for those board members that come through an SO, they would actually be, then, replaced based on a decision by that designating organization.

So I hope that clarifies, but we will see the process being further fleshed out and visualized, as I understand, so that we can recap that.

Alan.

ALAN GREENBERG:

Thank you.

With regard to the same process -- and I don't want an answer. I just want to point out a discrepancy that needs to be addressed as it's fleshed out.

Chris in his talk today said at one point that if we don't get support of three, or whatever the number is, ACs and SOs, it doesn't progress to a community forum. That could be taken to mean ultimately the AC/SO cannot dismiss it. It sounds like that

may be a decision to skip the community forum and proceed to the next step. So we need to clarify that as we move forward.

THOMAS RICKERT: I understand Chris wants to clarify so maybe we can remove that concern.

CHRIS DISSPAIN: Thanks, Thomas. Yes, Alan, thank you, you're right, and I misspoke. The SO is in charge or the AC is in charge. There should be an obligation on them to have the community forum.

If no one turns up, no one turns up, there is an obligation on them to go through that process. They don't need to have support, but they must follow the process.

ALAN GREENBERG: Thank you.

THOMAS RICKERT: What you can't see from where you are sitting, you made Alan happy, and that's a good thing, isn't it.

George.

GEORGE SADOWSKY: It's quite an achievement.

[Laughter]

Subject to Chris's and Alan's comments, I want to say that I support this path. I was part of the group that put it together, and I commend Mike Chartier for running a group in which every option was considered and we came to a harmonious conclusion.

There are always errors of course that one makes when one makes a test. Statisticians will call them type one and type two errors, and there's always a possibility that a process which isn't as tight as someone might like will admit the possibility of failure.

In this case, my colleague Bertrand De La Chapelle made a fairly eloquent presentation about the responsibility of board members to reflect the welfare of the organization as a whole rather than responding to any particular constituency, and I think that's clear and that has to remain in the bylaws.

But in this case, I think I am willing to admit that -- I would take the risk of ensuring that the SOs and the ACs either collectively or individually do not go rogue. And under this process, if an AC or SO decides to recall its director because they didn't like something about it, like his hair is green or something like that

or he voted against us, I would think some kind of -- the kind of consultation that's required here, the stating of the reason, the requirements for the other bodies to consider, would be sufficient in terms of pressure and in terms of reason to ensure that the right thing happened. And, therefore, I'm in favor of the process as it is now defined.

Thank you.

THOMAS RICKERT:

Thanks very much, George. That's much appreciated.

Let me also state on the audio that the queue is closed on this item.

Bertrand.

BERTRAND DE LA CHAPELLE: Is this working? Yeah. Bertrand De La Chapelle for the record.

I want to continue briefly on what I said this morning, and I want in advance to apologize. I know it is difficult to come in at a late stage in the process. I understand there has been a lot of discussions, but I may be like a few other people here, somebody who knows about the internal functioning of ICANN but has not necessarily dedicated a lot of time following the work. So bear with me for just one second.

My concern with the way it is presented today is that the conditions under which the recalling or the removal of one particular board member is envisaged in my view should be for failing to fulfill the responsibilities as a board member. That include a nonexhaustive list. Conflict-of-interest issue, it can be a lack of fiduciary duty, it can be a behavior that has a particular -- is an element of misbehavior.

I do not think that not following whatever position an SO may have on one topic is a misbehavior for an ICANN board member. This is not what I understand is the function of the Board.

We collectively as a group and as a whole community create a body that is a collegial body. And I am concerned about the notion that somebody who has been elected by a particular constituency is entirely and exclusively representing the positions of this constituency. In a certain way, and I was making the comparison earlier today in a private conversation, this is one of the problems that we're witnessing in the European Union where governments are considering that their commissioner is actually there to represent their community; i.e., their national interests. This is the hobbling the European Union at the moment, and I think this is a potential danger for ICANN.

I think the board members should become extremely independent when they are designated and held accountable for that's misbehavior as a board member and not as the representative only of the community.

I think if there is a list of explicit causes, whether you name it "causes" or not, it's okay, but if it is a completely open-ended thing, it is replacing accountability by oversight. And I do not think the community is above the Board. The Board is responsible to the community. That is different.

And the final point is there are actually three elements that are slightly distinct and confused here. One is the responsibility of a board member towards the community it comes from. The second is the responsibility of a board member to the organization. And the third, which is always conflated with the second, and I think it's wrong, is the responsibility of the board member to the global public interest.

There are situations where the duty of a board member, in my view, and I agree that not everybody may share that, the duty of a board member is to think about the global public interest first, the interest of the community -- of the corporation second, and the fulfillment of the coordination with its originating constituency. But it is a higher task, and it's a higher calling than

just carrying whatever position their community may have at one point.

THOMAS RICKERT: Thanks, Bertrand.

[Applause]

Let me just remind everyone of keeping their statements as brief as possible.

The concerns that you raised, Bertrand, have been discussed in this group at length, particularly the notion of bringing out the concerns that an individual group has with the board members to the public was installed as a safeguard to ensure that the board members are not just parroting the views of their respective organizations. And by doing that, at least those that had raised concerns have expressed afterwards that with this new process, their concerns would be sufficiently addressed.

Let me also say that in practice, I would really like to see a designating organization -- an S.O, let's say -- go public and express their view that they're removing a board member because that board member has agreed to a budget that cuts down their travel slots. I think there's going to be a dynamics if you bring out the issues to the public.

Let's move to Cherine now.

CHERINE CHALABY:

Thank you. I fully agree with the principles that Bertrand has put, and I have participated in the work group and I personally have moved my position in terms of the proposed solution because I feel what's on the table now can actually achieve, to a great extent, what's been said by Bertrand, and I'm happy to spend time with him explaining that.

The only concern I had this morning was I for development the solution presented was not exactly what I felt we reached in the discussion in the small groups. And perhaps it was a matter of emphasis rather than anything else, so I'd like to participate in the discussion later on to make sure that.

And the specific point is around what happens after the community forum. What we discussed afterwards is that there should be a process, and even enshrined in the bylaws, where the petitioning SO and AC should request a formal recommendation or feedback from the other SOs and A.C, and that when they make their decision, all of those feedback and recommendations should be clear and transparent, and the SO and AC that is petitioning or removing the director has to explain why they're going for some instances maybe against the recommendation of the rest of the community.

Thank you.

THOMAS RICKERT: Thanks, Cherine, and thanks for your continued support to that subteam. I suggest you connect with Steve and Chris to ensure that when we show the updated visualization of the process that the concerns are addressed.

Bruce.

BRUCE TONKIN: Thanks, Thomas.

Yeah, just on this one, I think it's probably just something to be a bit clearer as a communication too many. But when I looked at the diagram from this morning, the individual board member removal, that diagram pretty much focused on the removal by a single supporting organization and ALAC. And I noticed there was a question, I think in that public forum and maybe also just a little while ago, about the process for removing a board member that was appointed by the Nominating Committee.

So I think the only difference in process is that at the final step, instead of being a single supporting organization or the ALAC, the decision-maker is actually the single legal entity, whatever we want to eventually call it. And that single legal entity makes

that decision by some threshold of the supporting organizations and advisory committees that participate within that legal entity.

So I think it might just be worth putting that all in one diagram, just to confirm that.

THOMAS RICKERT: Thanks, Bruce.

Kavouss, then Tijani, and after that we're going to stop this.

KAVOUSS ARASTEH: Yes, thank you, Thomas.

In reply to my first -- First of all, I agree with what Bruce and Cherine said. This is number one.

Number two, in reply to my questions, you said that, yes, they will consult the community. But the word you used, I don't recall, but I would like to replace whatever you propose and "take into account" is not considering. It should take that result of consultation into account. Okay; I understand what you say, take into account. Number one.

Number two, whatever you devising here will go into the bylaw. In the removal of one director by the board itself, the verb is

used is -- or noun, is "cause," is not "rationale." We could not have two different terminologies.

So I cannot agree with "rationale." It should be "cause." If you want to put "rationale," you could change the bylaw related to removal of individual board member by the whole -- removal of a director by the whole member. Replace the "cause" by "rationale." But I don't mean "rationale" has no real legal meaning. "Cause" has legal meaning, and we are drafting bylaw and bylaw is legal document. Should you use legal term.

So I cannot agree with the "rationale."

Thank you.

THOMAS RICKERT: Thanks for your view on that, Kavouss.

Tijani.

TIJANI BEN JEMAA: I'm sorry. Since several months I was saying exactly what you said, Bertrand. And even in Paris at the end of the meeting, I expressed my disappointment. And that's how the community forum was created, was initiated.

So the discussion inside the community forum will limit drastically the possibility to have a removal of a board director

for the narrow interest of the SO or AC. And in the small group on Saturday, we added another layer, another step asking the SO or AC who wants to remove the director to formally ask all the SOs and ACs of ICANN about their point of view.

So it will be recorded, the point of view, of the other SOs and ACs. This will also reduce the risk.

I agree with you, but we don't have always what we want. I think it is not too bad what we have now.

Thank you.

THOMAS RICKERT:

Thanks very much, Tijani.

As promised, we're going to show you the revised visualization of this community power. I sense that we need to work on some details but that there's agreement or broad support for the general approach. That's a good sign.

I'd also like to commend those who spoke on the willingness to accept sacrifices in certain areas. That's the nature of the bottom-up consensus approach.

And with that, we would like to end this call, and we're actually changing the order in which we're going to discuss the topics on

the agenda. And the next topic is going to be the community decision-making.

LEON SANCHEZ:

Thank you very much, everyone. This is Leon Sanchez.

Well, we made a lot of progress also in decision-making, and I'd like to ask Steve DelBianco to please provide us a very quick introduction to where we are at and of course explain us where we're standing.

Steve.

STEVE DELBIANCO:

Alice, are you prepared to put up the stair-step escalation slide at this point?

ALICE JANSEN:

I have not received your document, Steve, yet.

STEVE DELBIANCO:

Co-chairs, would you like us to start with the discussion we did this morning, because I heard that earlier today, or go directly to the chart, the document that the subgroup prepared?

MATHIEU WEILL: What matters is clarity about what is being discussed, so if you have an accurate description of the state of play, that's the best place to start.

STEVE DELBIANCO: Then, Alice, I circulated that about an hour and a half ago. It's a PDF, and you don't have it.

Thomas, I would suggest deferring until I can get the document into Alice's hands. The ACCT staffed relay takes forever, so I may have to just send directly.

LEON SANCHEZ: Okay. So I think we can go to -- Do you have it already?

THOMAS RICKERT: It's going to be fine.

And, Steve, just a very brief recap. Not a full presentation. But I thought when we were trying to do the individual board member removal, people thought we should have a little refreshment of memory on what we discussed before the weekend.

STEVE DELBIANCO: All right. Alice, thank you for putting that up.

This is a table that derived from the chart on the easel we worked on Saturday morning where we delineated all seven of the required community powers. And then the columns simply show the decision-making process to figure out the three increments. The first increment is having a conference call, the second one is convening a community forum, and the third is actually exercising the power itself.

The co-chairs have asked me to specifically focus on row four, which is the removal of individual board directors.

So I can see that on the screen, you can display the column headings along with row four.

So the first point of that discussion is who gets to decide if we have a conference call about removing an individual board director? In this case, the appointing AC and SO is alone sufficient to ask ICANN staff to set up an Adobe Connect with dial-in in order to host a conference call. And that conference call would of course be vitally interesting to the AC and SO who's moving for that director's removal. And I believe it would need to be open to any ICANN participant to listen in and participate, but the AC and SO in its leadership would be in charge of organizing and managing that call.

Chris, does that match with your understanding? Because those edits came from Mike Chartier after we met on Saturday morning.

CHRIS DISSPAIN: Yes.

STEVE DELBIANCO: Thank you. And the second column is moving to the decision of should we convene a community forum? Because at the end of that telephone call, either it's apparent that there's support to continue or there's doubt about whether they should proceed with the removal of that director. And it's somewhat more heavyweight to organize a community forum. It requires picking a date and a place to hold an in-person meeting with that AC or SO whose director is being sought for removal, and ICANN staff will support with travel for designated representatives of that AC and SO as well as Adobe Connect resources for transcription, recording, and, I guess, even translation if it were absolutely essential.

And that one-day forum would hopefully occur during an ICANN meeting, on the day before, perhaps the day after, so it didn't interfere with other things that are happening. And I do hope the new meetings format would allow us to do that, to take

advantage of travel and the presence of staff even on the shorter four-day meeting.

At that community forum, again, I believe that others can attend but it's primarily focused on whether the AC and SO itself wanted to move forward with the power to remove that director.

The third step is consensus power to exercise and remove the director. Well, if the appointing SO and AC makes the decision to continue, then that formal consultation with the director is held, and all SOs and ACs are invited to comment on it. And I do want to suggest that that happens at the community forum itself. That consultation, which is open to the other ACs and SOs, and that commenting should happen there.

I believe that at the end of that process, the actual AC and SO uses its own method of decision-making to decide whether it wants to proceed with the removal. So for some ACs and SOs, that may be voting. For other ACs and SOs, it could be a consensus-determining process.

So Chairman Thomas, is this even remotely close to what you and Mathieu had in mind for this explanation?

LEON SANCHEZ:

Thank you very much, Steve. Yes, this is a snapshot of what you have been doing.

And I see Chris Disspain has his hand up. Chris.

CHRIS DISSPAIN:

Thank you, Leon.

Yes, and no. There are some steps, some critical steps that are missing. So I'm not suggesting we can fix this now. We need to take it away and work on it, but in essence, there are two things. One is that it was a specific part of the process that there would be a call for comment and that comments would come in and they would be -- so not having people chatting at a community forum. There would be a formal call for comments from the other ACs and SOs as a critical part of the process.

The second thing I would say is just, as I said this morning, I think we need to write into the -- this process the allowance for the possibility that community forum does not necessarily have to be face to face. If you take Alan's point about it is the SO and AC's decision themselves at the end of the day, they can call a community forum but if no one cares, no one turns up other than themselves. In other words, because the rest of the community knows that it doesn't have any ultimate decision-making capacity, they simply know they're coming to comment. Actually having to force that to be a face-to-face meeting just doesn't make any sense to me. It would make much more sense

-- you might want to do that, but you equally might want to say we're having a phone call.

So all I would say is the principle of having the AC or SO actually making the decision is captured up there, but there are some steps in the process, and I think this one is different and doesn't fit in those three columns. It probably needs to be excised from that document and given its own set of columns because it's not that simple.

Thank you.

LEON SANCHEZ: Thank you very much, Chris.

Steve.

LEON SANCHEZ: Thank you very much, Chris. Steve?

STEVE DeBIANCO: Hey, thanks, Chris. Before excising the column, I wanted to ask one follow-up question. So the two points I took from what you said is that there ought to be an official call for comment from the other ACs and SOs before the community forum is organized, and the other change is that the forum might not have necessarily have to be face-to-face, that that would be at the

choice, I presume, of the appointing AC or SO, right? And with respect to putting the call for comment out, do you think that that would be a request that, say, the other ACs and SOs come back with a yes or no or is it just general comments on the proposed director removal and the reasons for it?

CHRIS DISSPAIN: So -- can I respond? May I respond?

LEON SANCHEZ: Yeah, however --

CHRIS DISSPAIN: Do you want to take this out --

LEON SANCHEZ: We're going to have a breakout session of this and we can further out-flesh in it the breakout session.

CHRIS DISSPAIN: Let's do that then.

LEON SANCHEZ: I think that the two key points that Chris outlined or highlighted are well taken by Steve, and in the breakout session you can iron

out the rest of the details. So next in the queue I have Alan Greenberg.

ALAN GREENBERG: Yeah. Again, I'm not trying to settle anything. I think in this particular case it's rather blatant. In the other ones it may also be applicable. As we're doing this work we really need to make sure that whether it's a face-to-face forum, who gets travel funding and things for it may vary from case-to-case, and let's just mark that as something that we need to fill in the details later. Thank you.

LEON SANCHEZ: Thank you, Alan. Next in the queue, Bertrand de la Chapelle.

BERTRAND DE LA CHAPELLE: I have a parallel question to the one I was raising before. What happens if there is the misbehavior of one particular board member regarding the criteria that I was highlighting before, (indiscernible) fiduciary duty, real misbehavior regarding the global public interest. And the SO or AC that this person is coming from actually is very happy about this misbehavior and considers that this person is fully promoting the interest of the SO and AC. Where is the accountability function? This system

doesn't allow the community to remove this board member, does it?

LEON SANCHEZ: Steve.

STEVE CROCKER: I have had quite a lot of enjoyment over the years interacting with Bertrand on various subjects and I've always enjoyed the depth and thoroughness of his thinking. In this particular matter, Bertrand, is it not sort of intrinsic in the notion that a board consists of a diverse set of people so that if a particular board member is sort of off in one extreme area, for any reason, whether it's because they're not supporting global public interest or whatever, that is the -- the nature of the fact that it takes a majority, at least, and sometimes a supermajority of board members to move in a particular direction that provides the fundamental protection. Removal of a board member is appropriate, I would say, only if the board member is particularly disruptive or undermining the functioning of a board as opposed to simply having a difference of opinion or a point of view that is perhaps not consistent with the majority but is nonetheless a -- not an inappropriate point of view. And that line between what's inappropriate versus what's just simply a minority point of view is one that I would recommend we be very

careful about. I think removal of a board member is an extreme measure, and at least in my view is one that we want to be reticent about. Having been on the board for a long time and chaired the board for several years, I certainly understand that we have situations that we have to tolerate and work with some board members that insist on presenting a point of view. Most of the time -- and by most here I mean like 99%, not like 51% of the time -- we can deal with that. We're all experienced members of communities and organizations and when necessary there's all sorts of soft measures to impose discipline within a board as there is in any group. So as I say, I tend to be quite conservative about the removal and it ought to be in a pretty extreme case.

LEON SANCHEZ:

Thank you very much for that, Steve. It is clear that we need to flesh out some details still and those will be, of course, ironed out. And now I'd like to try and keep the conversation focused on issues that would literally -- are like no-goes, like which are die in a ditch for it. So next in the queue I have -- I thought it was Kavouss but it's Cherine. Cherine Chalaby.

CHERINE CHALABY:

I'm going to be very brief, just responding to Steve DelBianco's point. Steve, the issue of the formal consultation should happen

after the community forum so that the SOs and ACs have the opportunity to hear what the candidate -- what the board member has to so that there's a fair -- fair and balanced input into the SOs and ACs. Thank you.

LEON SANCHEZ: Thank you very much, Cherine. Next on the cue is Kavouss Arestah.

KAVOUSS ARASTEH: Yes, two points. First, the disagreement of one board with the other board should not be interpreted as misbehavior. The memo of the legal counsel dated 12 of October clarified the matter that board member may have different views on particular subject. It is not misbehavior. That is their views and they are supposed to do that because not all of the interpretation are exactly the same. So --

UNKNOWN SPEAKER: It's needed.

KAVOUSS ARASTEH: Second, the important issue is that we are rushing. There are many details should be put on the table before we proceed. Once again, please kindly not rush into any process. We have to

have all details. That is why in one of the comments to the second public comment was that details are not sufficiently mentioned. I request distinguished colleagues to put all of the details that we know how it is going on. Otherwise we are rushing to make something (non-English phrase).

LEON SANCHEZ: Thank very much, Kavouss. I'm closing the queue with Sebastien Bachollet, and next on the queue is Steve DelBianco.

STEVE DelBIANCO: Thank you, Leon. I'd like to respond to this general notion of whether or not criteria has to be specified because it's more important than ever that the criteria for board removal be discretionary. It's more important than ever if we settle on designator model, where the ultimate element of enforcement becomes removal, to constrain that unduly to be under a certain checklist of conditions would significantly constrain the effectiveness of that enforcement method. Steve Crocker has educated me many times that board members have a fiduciary duty to the corporation as well as a duty to the mission and core values which include listening to the community and the bottom-up process. But board members retain discretion to use their own judgment about what decision to take to meet the fiduciary power. They retain their judgment to do that. And we

had a legal memo to that extent, that fiduciary duties is a judgment matter. And as long as it's done in good faith, a board member has executed their duties.

However, there is a difference of opinion between -- if there's as difference of opinion between the community and a board member on what the -- the balance is between the mission core values and their fiduciary duty to the corporation, that is when you want to try to educate a board member that there's importance to see the broader picture. But if the board member continues to persist in judging fiduciary and core values differently than the community, that's going to lead to an effort to remove. And it ought to be permitted to remove because we're looking for someone with a different perspective than the - the individual in there who's decided to put the fiduciary concerns of the corporation above that of the community. So I think we need the discretion. Thank you.

LEON SANCHEZ: Thank you very much, Steve. Next on the queue, Sebastien Bachollet.

SEBASTIEN BACHOLLET: Thank you. Just to propose a question, can we have two roles, one with removal of individual board directors selected by SO

and AC and another one for the NomCom because there is a lot of discussions about are we discussing on one, are we discussing the other, and I think if we add one, 4A and 4B would be a good thing. And just take this opportunity to say I hope, I hope that everybody in this room considers that the diversity of opinion, it's what we need. We don't need to -- to be everyone's the same and everyone is thinking the same. If we are going that direction, we can empty this room and leave a few people to run the organization. Thank you.

LEON SANCHEZ:

Thank you very much, Sebastien. And I think that's a very good suggestion. And of course I would encourage rapporteurs for this subject to actually divide in 4A and 4B so that we can -- we can have clarity on whether we're speaking on individual board member removal by SOs/ACs or appointed by SOs/ACs or by the NomCom. So thank you very much for the suggestion.

So taking stock of this, we have taken into account some provisions that need to be included in the document. We have also heard about the division of 4A and 4B. We have heard some details that need to be further fleshed out and, of course, the group working on this will be looking into them and hopefully we will have progress in this work in short time.

So I would like now to turn to my co-chair Mathieu for the next agenda item which will be budget.

MATHIEU WEILL:

Thank you very much, Leon. This is Mathieu Weill speaking. And a couple of reminders just before turning to Jonathan and to give Alice time to bring up the document. This is a CCWG work session. We work in an open and inclusive manner. Everyone is welcome in our work, but we need to take a certain dynamics which is that of a working group and ensure that we are keeping our comments concise as well as directed towards the refinement or the adjustments of the proposals. And I would certainly encourage that we really try and find that right balance between those two so that we're finding the right efficiency. And I would like also to inform the room that there was a comment made by Steve earlier who referred to something that he mentioned, accountability staff being too slow, and for us in the leadership team, it's absolutely clear that it's -- it was referring to a technical mailing list that was too slow where -- and not staff.

[Laughter]

I mean, the accountability staff is tremendous.

UNKNOWN SPEAKER: Amazing.

MATHIEU WEILL: They are doing wonders.

[Applause]

And I know that's just definitely what Steve was mentioning --
was referring to but yes, the room was not necessarily aware.

CHRIS DISSPAIN: Mathieu, I have just a point of order.

MATHIEU WEILL: Yes, please, Chris.

CHRIS DISSPAIN: Are we going to go back to the discussion of the community
decision-making and look at the other sections? Because I --
because I certainly have some comments about that, and I don't
know whether we're going to get there or not.

UNKNOWN SPEAKER: It seemed to me that --

UNKNOWN SPEAKER: (Off microphone).

CHRIS DISSPAIN: No, the chart that Steve just put up, we've only discussed in terms of the individual director. Are we going to have a discussion about the chart generally?

UNKNOWN SPEAKER: Yeah.

MATHIEU WEILL: Okay. Point taken. Then we'll go back to there -- to that in a moment. I guess we've had an extended conversation on the individual board removal, including that particular aspect of it. I take note that we need to revisit the rest of it. We need to bear that in mind.

But Jonathan, for the moment, the budget. A quick reminder of where we are so that we can take stock, assess whether there's any refinement needed, and hopefully move to the next stage. Go ahead, Jonathan.

JONATHAN ZUCK: Thank you, Mathieu. As I mentioned in the earlier session, we've had a number of meetings already this week on this topic in a kind of a subteam on the budget veto and the outgrowth of all

those meetings is that there's more consensus than there is difference. So in looking at the areas of consensus, the idea of having an outright community veto of the five-year strategic plan or five-year operating budget was something on which there was some consensus and we need to just draft language around that as a separate entity.

There was also a discussion about a lot of the improvements that have been made recently in the budget development process and how there's better community engagement, more detail in the budget, et cetera. And the process now involves the community, the individual SOs and ACs, et cetera, and has been very productive. And so there's been the notion of enshrining those new developments into the bylaws, you know, in a way that doesn't prevent change but that enshrines those new developments as requirements going forward. Because the best place to work on the budget is up front and not afterward.

There's also a consensus that the PTI budget needs to be treated separately and have its own protection, and there's agreement on that and that's in the language drafting phase as well.

So where there was the majority of community comments that we got on the budget veto, it had specifically to do with community veto of the annual operating budget. And there were a number of things that came out of the discussion. The

first is that the distinction between the annual operating budget and the plan were somewhat specious at some point and it made sense to simply say the veto would be of both of them and because the real motivation for vetoing the budget would be to make changes to the plan and how that plan was expressed by the budget. So that was an agreement as well.

The concerns I say fall into two categories, the concerns that were raised. One were with what the implications of a veto might be in terms of decision-making. One issue that was raised is wanted to make sure there wouldn't be trivial rejections of the budget on trivial issues. So there was a very brief discussion about setting some sort of a dollar minimum or something like that. But we think the results of the community mechanism discussion that raised such a high bar for a community veto addressed that issue quite well.

Another issue that was raised was about sort of a small number of SOs or ACs kind of ganging up on another one, and again, we think that the high bar that was set by the community's decision subteam went a long way to address that as well.

So that had to do with outcomes. And then the -- the real majority of comments that -- about the budget were all from people that agreed with the notion and principle but in practice were concerned about what state it would leave the

organization in the interim as that process of a budget veto took place and what that would look like. And we've gone through a number of different discussions about that, what happens to the budget while it's being vetoed, if it's vetoed, you know, while it's being further discussed, et cetera, and what state does that leave the organization in. And so there have been different iterations of that. One was it's the -- the organization's forced to operate on last year's budget. Another was last year's budget plus 10%. But those all share a weakness in that they don't map at all to the priorities of the current year, right? You might have things in last year's budget that are programs that have already expired, for example. You may have a revenue shortfall this year and this year's budget is half the size of last year's budget so that -- that sort of easy solution of let's use last year's budget was problematic in a number of different areas. And so the solution actually came from Cherine in our subteam which was instead to look at the notion -- and this is an area where the vocabulary becomes sticky sometimes, but so we've used a lot of different vocabulary for it. But Cherine's notion was of discretionary or non-discretionary items in the budget. There's also the -- the word that came up yesterday in the subteam meeting was of a caretaker budget. But the idea is a budget, whatever budget is necessary for the successful operation of the organization. So both Giovanni and I were discussing, you know, what we had back in our home countries. In Europe there's

something called the caretaker budget. In the U.S. there's something called the sequestration exemptions. But in each case there's this notion of a minimal budget that would prevent any sort of chaos within the organization, it would prevent staff from not getting paid, et cetera. So we'll find the right vocabulary, the right way to describe it in our case. What we've done is instead placed a very hide burden on Xavier, our esteemed CFO, to begin to look at the notion of a framework for a future CFO to look at the budget and define what needed to be in place for the organization to continue to run, to meet its contractual obligations, et cetera. And that would be -- this caretaker budget would mean that a lot of discretionary programs are put on hold. And so whether it's your favorite project or the board's favorite project, that pain would be shared equally and would cause some organizational discomfort but really be minimal in terms of human impact or suffering because people aren't getting paid or something like that. So that was something around we reached some great consensus in principle, and Xavier has promised to work on that over the next couple of weeks. There's a lot going on this week, obviously. But we'll look at that framework, and I think that we'll be able to reach some consensus about what that framework looks like. And that addressed a lot of the concerns, the different concerns that were raised about the state of the organization during a veto. So I feel very optimistic that we'll be able to reach a

consensus position on that, which is why I have colored these check boxes yellow and -- ugly yellowish green because they are on their way to being green, I think in fairly short order. I'm happy to open up a queue to discuss it further.

MATHIEU WEILL:

Thank you very much, Jonathan. I'd just like to check with the other participants first whether that's -- who are still in line. I've seen Cherine nodding. I've seen Asha, I think she was nodding that it was a fine summary of where we are and I think that's good before turning to the queue, and next in the queue is Sebastien. Oh, is that an old hand? That's an old hand, Sebastien? So I have Chris. I would not qualify you as old hand anyway. Kavouss.

KAVOUSS ARASTEH:

Yes, thank you, Jonathan. I hope finally you put it in non-telegraphic language and more clear.

Second, in presentation today in the famous meeting of the engagement, it was a different presentation. You refer to not blocking the entire budget but blocking an area that we have difficulties. And it was some other terminology you use. It not here.

Could you please kindly refresh our mind on that? What you proposed this morning was more clear than now in one area.

MATHIEU WEILL: That's a good point, Kavouss. Let's try to put on the record what describes accurately what the area of the veto would be for our further reference, if that's possible. What would be your best shot at this, Jonathan?

JONATHAN ZUCK: I'll do my best because we try to keep coming up with new words that better describe it, and that may be adding to the confusion, and I apologize.

The new concept that came out of the subteam that met on Saturday morning is that the budget that would be in place under the regime of a veto would be a kind of caretaker budget. There would be a framework for deciding what that meant, but it has to do with what have been called the nondiscretionary components of the budget. Contracts that are in place. Staff that may need to be paid. The rent, things like that.

So the point was never to put the organization itself into any type of chaos or distress, but simply to put what we might call discretionary items on hold.

And so it is a -- it is a budget that is less than the budget that was proposed, and we will come up with a framework for determining exactly what that means. So we've been calling it a caretaker budget, and that just means a budget at that takes care to make sure the organization is still running effectively.

Does that help? Okay.

MATHIEU WEILL:

Yeah, the way to capture that, try to capture that in a sentence, without using any summary word, because I think sometimes summary words are a trap, will be a budget that ensures that nondiscretionary expenses are covered so that all that -- all the organization has the ability to hold to its commitments, whether it be commitments to staff, to any providers that have -- any contractors, and the minimal level of commitment is provided. I think that's the kind of idea that I had understood. I just want to check whether that's still covering, because I think it has value. If we really said that as a requirement -- once again, we want to have a requirement-based approach, and then obviously Xavier has a big challenge of finding us a solution. Just like in other areas, we would turn to an expert in legal; this time we will turn to an expert in finance. But I think the idea behind this requirement is that.

I see Cherine raised his hand, so, please, Cherine.

CHERINE CHALABY:

Yes, I would like to support Jonathan in what he said. We're very much in agreement on this line. And just to add context to the community, because you used the word "minimum budget," and I thought people should just get a feel of what it is.

So if we were to take this year's budget as an example, and I'm only going to be very brief, which is the cost is 118.5, what is nondiscretionary is about 94 million.

So what is left is something in the order of 24 million or so. And remember that will be working for a period of six, seven months on those, because this is where all the discretionary projects are.

So I like this power because it's also -- the chances of it being exercised will be seldom, but it's there to give the community. But I just wanted to give an order of magnitude.

Thank you.

MATHIEU WEILL:

Thank you. Thank you very much, Cherine. And we need to -- So this 80/20% balance is absolutely classical in any organization. I think that's not very -- not much of a surprise. And we need to remind ourselves on the chart here that for the overall size of ICANN's budget, the appropriate way to interface on it is more

accurate in the five-year plan because you don't restrict any organization's core expenses on the one-year basis. It's much stronger. And I think that's something that needs to be said.

80%, there is still an influence from the community of using the engagement but also through the veto for the five-year strategic plan.

It's just like the other items. We're striking, in my opinion, a compromise that takes everyone's perspective into account so that it's a very workable solution.

So thank you very much. I think we've had extremely good exchanges the last few days on this matter, and it's a testimony of what a collaborative approach can provide.

Next in the line, I have Alan and James you, and then we'll move on to the next item. I will close the queue.

Alan.

ALAN GREENBERG:

Thank you very much. I just want to note that this really neatly finesses the problem of protecting the IANA budget, even if it's an increased one because that's clearly a nondiscretionary item.

So it completely removes the need to have special provisions for that. So I think it's really neat.

I'll just observe something else without commenting on whether it's good or bad. There are certain discretionary items where if you can delay the decision for two months, it's no longer applicable. Just interesting side effect.

MATHIEU WEILL: Thank you very much, Alan.

And James.

JAMES GANNON: Merci. A point of amusement more than anything else. I just realized, going back to the days of the CWG, that myself and Chuck Gomes actually came up with actually the exactly same plan for this for the PTI budget on June 4th this year.

So it's nice to know that the CCWG is still trying to catch up with the CWG.

[Groans]

MATHIEU WEILL: You know what? I don't find it that amusing because that means for all this time you have been abstaining from sharing this interesting idea with the group.

JAMES GANNON: It was so long ago, I forgot.

MATHIEU WEILL: Thank you very much, James. I think that's very good.

Xavier wants to add something?

Where is Xavier. Yes, you're here Xavier. No? Okay.

Confirmation that you're on it, and we trust in your expertise to find us the right way forward.

XAVIER CALVEZ: Yes, we'll work on it over the next couple of weeks, and we'll provide a proposal.

I just want -- To your point earlier on vocabulary, "discretionary" is a notion itself that is very complicated to define. And if you ask 1,000 people that question, you will get 1200 answers. So this is why Jonathan has brought forward the topic of the caretaker budget, because "discretionary" does not mean that it does not have to be spent. Let me take an example. If the elevator breaks down, you can decide not to replace it. I don't know if that qualifies for the notion of discretionary or not, but maybe in certain languages, it does.

So do you have to replace the elevator or not is a decision that you can make to either do or not do. Is that the right thing to do

and is that something we want to avoid in -- during a veto period? Probably not.

So bottom line, we simply need to define for ourselves what we think this caretaker budget should be so it's a non-issue as opposed to creating issues at the end of the day.

MATHIEU WEILL:

Thank you very much, Xavier. And I would add that I think this motion might evolve over time. And that's perfectly fine. So that's something we need to remain flexible about somehow in the process. And that's probably an item to be considered in the five-year budget, what is the kind of flexibility we're giving to ourselves.

And with that, I think thank you very much, Jonathan, and everyone who is working on this budget item because the progress made has been outstanding this week. So I think they deserve a big round of applause.

[Applause]

And now we are turning back to the community making -- decision-making.

THOMAS RICKERT: And for that we'd like to get the chart back on. And I suggest that we now test with this group the individual community powers, whether there are concerns, or otherwise we would like to confirm the common understanding and take it to the next phase; i.e., fleshing out more details.

So I -- Let me call for comments on the first community power, budget veto. Are there any comments on that?

And again, this is just for refinement purposes, for confirmation purposes. We can't have full discussions on that, but I understand that Chris has a view on some of those and would like to comment. And let's hear those views.

CHRIS DISSPAIN: I was only going to talk about the -- number 5.

THOMAS RICKERT: Good. But then let's -- let's hear about concerns, if any, for community power number 1, block operating plan/strategic plan, and budget.

Kavouss, I understand that's an old hand?

Fire away.

KAVOUSS ARASTEH: New hand.

At the meeting of a small group, I suggested that when you talk of objections, it may be interpreted in two way. One way is voting. The other way is expressions of agreement, and so on and so forth, but not voting as such. That is why I have added after "objections" or no advice from one or two, whatever, on the contrary.

So I want to put advice in order to enable the advisory committee to participate in that decision-making, if stress test 18 allow that. Currently, stress test 18 block that. We will discuss that later on. So we would like to have advice on that, because sometimes an AC may decide not to participate in decision-making but continue to provide its advice. This advice may be in agreement of that proposal or may be against that proposal.

So, or any advice against.

This is the term also used in the comment from the Board which I like very much.

Thank you.

THOMAS RICKERT: Thank you very much. Let's go to Malcolm and then we'll get back to that point.

MALCOLM HUTTY: I have a question, actually following that last point. I wonder if Kavouss could explain to us if the consequence of an advice in the negative is to prevent the action being taken, how does that differ from participating in the decision-making so as to take the decision that it shall not happen?

KAVOUSS ARASTEH: That is a very complex issue. We have to first discuss that many governments, but not all, believe that currently there is an attempt to block or to prevent the government to participate at any level, at any decision-making in whatever way is possible. And this lies within the famous stress test 18 which has been written for this purpose, which has nothing to do with the stability, nothing to do with accountability, nothing to do anything, but one of the purpose is this one. There is another purpose.

So until the time that we resolve this issue, what we don't like, we should have no provisions to disable the AC to participate at decision-making in the form of advice. How this advice have influence, that is something else. But they would wish to have

this possibility. If they decide on a particular issue to have an advice, there should be no way to prevent them. And currently stress test 18 prevent them to that. Because at the level of discussion whether or not they participate, one country could block. No, I don't want. So that the whole GAC will be disabled not to participate. That's all, because of that.

There is a link between that. Very tricky point. Some people may not have found that, but some people, they found that. We have discovered that. There is a link between this.

So either you want to discuss this now or later, it's up to you.

Thank you.

THOMAS RICKERT:

Kavouss, let me try to translate that into concrete language.

I guess what you're asking for is that the GAC can use the vehicle of GAC advice to express objection or support, so that you don't need an extra process for that.

KAVOUSS ARASTEH:

Yes, with the proviso that stress test 18 does not prevent the GAC to provide that advice. Because if 146 or 152 country are there and 151 wants to provide that advice, positively or negatively,

one country could block that, and that is not good. That is what stress test 18, designed for that particular purpose.

Thank you.

THOMAS RICKERT: I guess we can't conflate the stress test 18 discussion with this particular discussion. That's, at least, my discussion because I think that will not allow for us to close on this matter.

I suggest that we clarify that expressions of support or objections can be done via GAC advice. So the GAC can use that vehicle for expressing concerns or support.

So let's sit that with us for the moment in order to -- for everyone to think about it. Let's move to James, and then Steve.

JAMES GANNON: Is Jan before me.

THOMAS RICKERT: I apologize.

Jan.

JAN SCHOLTE: Jan Scholte, accountability advisor.

Just a clarification. Are there reasons why 3 and 6 are so different from the others that they need three rather than four, just for the consistency sake? Or is that just different groups have come up with different numbers and then in the end, we have variation?

And the second thing is does this presume that the numbers of ACs and SOs remain fixed into the future? And how would one adjust the numbers if additional SOs and ACs came in?

THOMAS RICKERT: Very briefly, I think they are discrete processes that are required, so it's not an error in the system.

UNKNOWN SPEAKER: Yes.

THOMAS RICKERT: And with respect to the point of new entries, we would need to revisit that scheme anyway if there are more groups coming.

Steve, you wanted to add to that?

STEVE DELBIANCO: Your answers are basically correct but I could add a bit of color to it. Absolutely. Jan, you weren't part of that group Saturday.

You would have been great to have you on there, but these thresholds are different on purpose. Each one was chosen. There are four of them that require a full four ACs and SOs to move forward with the decision. That was budget, fundamental bylaws, recalling the entire board, and a challenge to an IANA Functions Review. The others required own three ACs and SOs with the absence of more than one objection.

There was a purposeful discussion on raising the bar for certain decisions that were particularly disruptive of the corporation and the activity that it does. In other words, they're meant to raise the -- I shouldn't say disruptive, but items for the community power should require higher degree of consensus, and that was all chosen on purpose.

And the second point, Thomas, I think you answered that one already.

THOMAS RICKERT:

Thanks, Steve, for that clarification.

I'm going to close the queue after Alan.

Let's move to James now.

JAMES GANNON: Extremely briefly because I think it's very important that the record is reflected, because these transcripts will be used back in the GAC and they'll be used in national ministries to clarify stress test 18. It is not about telling what -- the GAC what to do. That is not the intention of it. It's to do with telling ICANN what it must do in response to GAC advice.

Stress test 18 is not here to try and restrict the GAC. We need to be extremely clear on the record about this.

THOMAS RICKERT: Steve.

STEVE DELBIANCO: Steve DelBianco. James is exactly correct. So Kavouss and other GAC members, please understand stress test 18 would have nothing to do with the ability of the GAC to indicate its preference in decision for any of these decisions. It is not giving advice to the Board. Stress test 18 addresses only advice to the Board, and none of these are advice to the Board. The exercise of a community power would return to the GAC just like a multi equal stakeholder, and say, "GAC, what say you to whether we should block this particular bylaws change?"

Just like everyone else, you will use your own procedures to come up with a decision. And that decision, we can call it

advice, we can call it a vote, we can call it a resolution, but there is never a situation where the Board is going to work out a solution --

THOMAS RICKERT: I'm sorry, Steve. I think the points are clear. Let's not have this transform into a discussion about stress test 18. Thanks for the clarification.

Next is Chris and then Alan.

Chris.

CHRIS DISSPAIN: Sorry. Me me, me. It's all about me.

We're now moving on to talk about all of these blocks; right? So not just one of them.

THOMAS RICKERT: I needed to get the discussion structured, so I closed the queue on this. So let's here where -- let's try to get this thread completed. I have not closed the entire section on the agenda.

CHRIS DISSPAIN: But we're still only talking about number one? Or number two?

THOMAS RICKERT: Yes, and we got derailed.

CHRIS DISSPAIN: Lovely.

THOMAS RICKERT: So, Alan.

ALAN GREENBERG: Sorry. If we're only talking about number one and number two, then my hand isn't up.

THOMAS RICKERT: We got derailed. I wanted to get this sidetracked information ended. And if you're not talking to the sidetracked discussion, let me just confirm that we are good with power number 1. And I don't see any more hands on that, which allows us to go to number 2. So I'm seeking confirmation for number 2, please, and only number 2.

STEVE DELBIANCO: Thomas, it's Steve. Let me clarify for people. If you scrolled in the document, and I believe Alice sent it around to everyone, if you scroll down the document to the bottom, you'll see the

other preliminary conclusions that were reached on Saturday's breakout, and then working in comments that came from a subgroup that had done work on the community forum a week or two ago.

So there's quite a bit more information in the document than just the table at the top which indicates the thresholds.

THOMAS RICKERT: Thanks for that clarification.

Kavouss, is that a new hand? And, please, not about stress test 18.

KAVOUSS ARASTEH: No, not this. The amendment you made to column one applies to all five columns or advice.

THOMAS RICKERT: Correct.

KAVOUSS ARASTEH: Thank you.

THOMAS RICKERT: I was making the suggestion which could sort of preface the table.

Let's now move to the third point, block changes to regular bylaws.

Any comments on that or can we take that as confirmation? And pause for a few seconds.

And again, this is the basis for fleshing out further. So we will not have a table in our final property. This will be further formulated. But we need something to lean on as we progress. So we need to take stock of the interim steps that we took.

Individual board member removal, anything to add to that? I think we sufficiently discussed that point. And then we can move to number 5. I understand that there are hands being raised on that. But before we hear those, Milton, your hand is up.

MILTON MUELLER: This is a comment that applies really to all of these. Again, I really want to know what units we're talking about here. ACs, which -- which ACs in particular are we talking about. And, you know, if you're giving numbers here 2, 3, 4, 1, I think there's an issue that still needs to be discussed. And you told me this morning would be discussed, was not closed yet, regarding who

we're talking about. Particularly when some of these ACs have indicated that they don't want to be part of this process.

THOMAS RICKERT: Our current state of play is that the community is the -- is the combination of all SOs and ACs. We've moved away from a voting-based system to a consensus-based system. So the whole community can chime in. We had the definition of the community in our previous report, so that would be all the SOs and ACs and --

MILTON MUELLER: And you received significant pushback on that in the public comments which you seem to be disregarding. And when you say 4 and 1, you're talking about voting. I'm sorry. That's not consensus. You're talking about -- voting unit is the AC and the SO. Don't shake your head, Leon. That's a fact. You're counting numbers.

LEON SANCHEZ: We can agree to disagree, Milton. I'm sorry, I can shake my head.

MILTON MUELLER: Yes, you can shake your head, but, I mean, I'm not satisfied with that as an answer and it's never been addressed in public

comments. How many public comments have objected to that?
Do you even know?

THOMAS RICKERT:

We can pull the information out, that's no problem. Milton, I guess what we need to take into account when we're having this discussion is when we had our first -- our second report out we had a few organizations that would cast weighted votes and that is something that a commenter has took issue with. So we moved away from the notion of voting in our discussions. Thoughts and consensus-based model. And as we do under some definitions of consensus in the ICANN ecosystem, we would look at the objections. So there is consensus with certain caveats, and we're trying to define this here. And I would suggest, Milton, that rather than refuting the idea of proceeding as we do, you might come up with concrete proposals as how to we -- how to address the obviously the risk that you perceive we -- we associate with this. Next in line is Alan, please.

ALAN GREENBERG:

Thank you. I thought we were talking about item number 5 so I'm going to try to do that. I believe since we have been talking about removal of the whole board as the nuclear option as an option which if we ever do it the impact on the organization and how we are perceived throughout the rest of the internet

governance and government world will be radically changed potentially that I would think that this would need a significantly higher threshold than some of the other ones which are relatively mundane. Thank you.

THOMAS RICKERT: For which column would you like us to change which figure to what?

ALAN GREENBERG: Sorry. I am looking at column number 4.

THOMAS RICKERT: Correct. But you said that you want different thresholds. Are you --

ALAN GREENBERG: You're asking me to make suggestions.

THOMAS RICKERT: Correct.

ALAN GREENBERG: Well, the asterisk certainly includes one suggestion. That is, any objection will kill it. Another alternative is to have a higher number of yeses. I'm suggesting that.

THOMAS RICKERT: But then obviously your view is reflected with the asterisk, correct?

ALAN GREENBERG: That would be one way of addressing it. If that's not acceptable, I would consider requiring a higher number than four.

THOMAS RICKERT: Understood. Chris?

CHRIS DISSPAIN: Yes, I wanted to make that point as well, I think. If you look down the list you will see that the highest level is 4 and no more than 1 objection. And I think to use that for some of those other ones and have the same level for the removing of the entire board is just not sensible. I strongly support the -- that an SO or AC should be able to object and then have that dealt -- and have that blockage. I'm not suggesting that you couldn't build a process under which there would still be something that needed to happen, even if there was a block such as some sort of

mediation or whatever. But fundamentally I think you could have a situation where one of the -- one of the SOs, the ASO, the ccNSO, the GNSO, the policymaking bodies, you know, ICANN, were very strongly against doing that, and I think that just to me sounds like a step too far to say we can ignore your objection.

If you'll indulge me I did want to say something about the hall system. I'm fine with it generally, but I do think we need to build into it for the future, that there may be more SOs and ACs and I would recommend that we use numbers and percentage so that we can move forward with that without having to revisit because with a percentage you can build obviously but you can't with the numbers.

THOMAS RICKERT:

That's a good point. I suggest that we add that as a clarification, that the thresholds are spelled out both in concrete numbers as well as in percentages. I will close the queue on number five, after Steve, please. One of your --

UNKNOWN SPEAKER:

I've been trying to raise my hand.

THOMAS RICKERT: I think you haven't tried hard enough then. I'll get to you in a moment. Next is George.

GEORGE SADOWSKY: Yeah, thank you. I -- I'm happy that this discussion is taking place. I was a part of the community that dealt with number 5 in -- Saturday and my sense was that it was a fair -- it was a large discussion of a lot of things and it was fairly rushed. And I'm not -- I'm not convinced that the -- the minority there is -- is represented appropriately. The vote was taken very, very quickly. I think this deserves further discussion. And I'm in accord with my colleagues here. I think any SO and AC ought to be allowed to object and that should trigger something fairly serious because this is -- if it ever occurs, it's a cataclysmic effect and it's going to change ICANN in ways that I don't think any of us here can predict, but I don't think I'm going to like it if it happens.

THOMAS RICKERT: There are a lot of hands going up. Even a lot of hands went up after I closed the queue. I understand -- or I would anticipate that some at least of you want to speak to the threshold question and I would like to make a practical suggestion on how we deal with this particular issue. I think the threshold required for board removal will depend on the model of enforceability

that we use. You might look at that question differently if board removal is the only enforceable remedy rather than if it weren't, right? So I would suggest we park this point for the moment until we have discussed the model because then maybe it will be easier for us to agree on thresholds. Those that don't want to speak to that specific point, keep your hands up. For those who wanted to speak to that point, I would beg you to lower it so that we can proceed.

Next -- I'll give you some time to lower your hands, if you could.

UNKNOWN SPEAKER: Nice try.

THOMAS RICKERT: So Sebastien -- George -- George has spoken. Sebastien.

SEBASTIEN BACHOLLET: Yeah, just to say that all the example given in the other hand you have one AC who is composed by the board and it's something we need to take into account. And if we don't want to have this, if we put threshold that it's not possible to achieve, even once if it's really needed, then let's keep this possibility out. It was my proposal since the beginning. But if we want to have it, then it

must be workable. If not, there is no sense to do that. And this discussion it's quite the weird. Thank you.

THOMAS RICKERT: Thanks very much, Sebastien. Steve, you really wanted to keep your hand up?

STEVE DelBIANCO: Thank you, Steve DelBianco. With respect to Milton's question about voting, I thought I would describe what we did in the subgroup to come up with these thresholds. Voting is something like where you have weights, where you have splits, the GNSO might have five different votes and they're by percentage thresholds where you count the number of votes and if you exceed a threshold, that's enough to win. And that's what voting is strictly. Where this came about Saturday morning was heading down the road of we wanted to understand consensus as being strong support in the absence of multiple objections. Strong support in the absence of multiple objections. And that is completely different than doing voting with percentage thresholds. The reason we suggested multiple objections instead of a single objection was the terms of reference that we went into that session on said that under all of these powers, none of them should be defeated or blocked by a single AC or SO. So it was a very clear set of principles on our

terms of reference. And we followed your instructions to move away from voting and go to a model of consensus. And we used the model of consensus that's used in several groups given here, like the ccNSO which is strong support in the absence of objection, multiple objections in this case. Thank you.

THOMAS RICKERT: Thanks, Steve. Before we move to the remaining speakers, Jordan, as rapporteur you wanted to answer that?

JORDAN CARTER: At the end.

THOMAS RICKERT: At the end. Okay. Roelof, did you lower your hand?

UNKNOWN SPEAKER: (Off microphone).

[Laughter]

THOMAS RICKERT: He said, he did not lower his hand but he agrees with the fact that it has been lowered. Kavouss, and since Anne hasn't spoken, we're going to hear Anne, but after that we're going to move on.

KAVOUSS ARASTEH: Thank you. My knowledge about Milton Mueller is he's a professor. He may also be lawyer but what he says is absolutely right. When you talk about number you're going to the voting. You cannot deny that. You say 4 in favor, 1 against, you're voting. So we cannot mix up the things. The formulation is saying in the absence is better. But when you say 4 against -- in favor, 1 against, you're going to the voting exactly. So please try to be clear. It is very difficult. If you want to end up this meeting saying that everything is okay, so far so good, but the job is not done. If you want to do the consensus the only way to say that in the absence of consensus, in the absence of and put that objections and advice. But not 4 and 1. 4 and 1 is voting and I fully support Dr. Mueller.

THOMAS RICKERT: Kavouss, you made this point on a couple of occasions. I think our group -- broad parts of the group want to define consensus as having certain support in the absence of certain objection. That's perfectly possible and we're doing that and you're nodding which is a good sign, so I think we're on the same page here. Anne, please.

ANNE AIKMAN-SCALESE: Is this thing on? Can you hear me? Okay. Just three quick points. I think that there's been a lot of concern expressed about capture and not keeping things open to capture. And from my standpoint if one SO or AC can completely dictate the nuclear option, the use thereof or no use thereof, that would be a capture situation. So if only one can completely block, that's capture. That would mean one SO or AC can capture. So I agree with the way it's formulated now.

Also, I think very much agree that this question should primarily be considered after a discussion of the model because it's the -- the item in the community powers that is very much dependent on model because in the single designator model that is the only true enforcement mechanism is removal of the board. You don't get specific enforcement, and it's just a question of whether the community wants to have the specific enforcement of the decision that it makes or remove the director. So it's very model dependent. And I think you're absolutely right to defer that discussion.

And then lastly, I would say very quickly that of all these decisions and community powers, number 7 most closely relates to the considerations in the IANA transitions and so when we do come to looking at models, I'm hoping that we'll have a robust discussion beginning in reverse order with number 7, since number 7 is essentially the backstop that is currently the role of

the NTIA. And that's because they have the ability to place the IANA contract elsewhere and so this community power has a very direct relationship to the IANA transition and I would like to potentially discuss in reverse order when we come to the models. Thank you.

THOMAS RICKERT: Thanks, Anne, and also thanks for confirming that we're guiding the discussion in the correct fashion, according to you. Roelof have you raised your hand or has it inadvertently been raised by the Adobe ghost?

ROELOF MEIJER: No, I raised my hand. It seems I was being overly cautious with this process. Since we're discussing it, I might as well do it now too. My point is already the chance of the whole board going rogue, I think we would consider it very small. The chances of the community collectively going crazy is probably far smaller. And I think the effect of -- oh.

UNKNOWN SPEAKER: The community just went crazy.

[Laughter]

ROELOF MEIJER: Well, at least part of the community just went crazy on me. So maybe I'm being overly optimistic. But I think we should bear into account that the same quantitative threshold will be more difficult to reach if the impact of the power is more severe. There will be no frivolous voting to out the whole board, so I don't think it's a good idea to raise the threshold for this particular thing because it will make the power inexecutable. The big stick will become a twig. Nothing will happen.

THOMAS RICKERT: Thanks very much, Roelof. And just to remind everyone, tonight is the opportunity for all of you as a community to go crazy in (saying name). But after that we go back to work and try to do a good job here. Jordan, as rapporteur, you wanted to make some concluding remarks on that point?

JORDAN CARTER: You might -- some of you might not find this helpful. Hopefully all of you will find bits of it helpful. We're under a lot of pressure and we're working together better than we have been for a while and this decision-making thing, this new consensus model did, feels a bit like that. Sometimes when a large group or a small group, depending on how you look at this, is working under pressure like that you get a little group thinky. The public comments that we had in response to our first proposal were

pretty down on the idea of equal say for each of the SOs and ACs in whatever community decision-making process that we had. And that's why the CCWG kept the same allocation of authority in its second draft proposal as it did in its first. And we -- the feedback that we got in the second, as I recall it, from the public comments, no one has ever argued through those public comments really that every one of the SOs and ACs should have the same thing. So I know that we are talking about this as a consensus-make process, and in some ways it is, but there are still numbers on the table. And the numbers are the numbers of participants in that consensus-making process. So where you have numerical thresholds and you have numbers of entities expressing views, people outside this room are not going to buy the idea that that isn't a voting system, I would argue. And people outside this room are not going to buy the argument that we're not giving equal weight to each part of the ICANN community through this.

So I'm only saying that to make sure that as we keep working and developing this, we have to think about that external reality. Because we're going in a direction, you can argue -- logic says you can argue -- that is against the feedback that we've had. So I just wanted to put that on the table so people are clear about what it is we're doing.

THOMAS RICKERT: Thanks, Jordan. We're closing the discussion on number 5. Any comments on number 6? Or 7. Let's take them in combination in the essence of time. Good. There don't seem to be any comments. Kavouss? I thought that was an old hand. I'm sorry.

Good. There don't seem to be any comments.

Kavouss, I thought that was an old hand. I'm sorry.

KAVOUSS ARASTEH: Yes. The point that Anne raises is absolutely right. When you say no more than one, that means you captured everything in hand of one.

Suppose SSAC will participate in the discussion and it says no, and they block everything. So we should increase one by two. Not one. One is total capturing. She is absolutely right.

Thank you.

THOMAS RICKERT: Kavouss, there might be a misunderstanding. It's no more than one. So one objection can't hold up the train.

Two. At least two would -- Okay. Great.

Kavouss is just nodding, just for the remote participants. We're on the same track, which is a good sign.

So with that, I suggest we end the discussion on this. We will note that on number 5 we have not confirmed what's in this chart. We will revisit that after we have discussed the enforcement model.

And with that, I'd like to hand over to Leon to take us through the next agenda item.

LEON SANCHEZ:

Thank you very much, Thomas.

And our next agenda item deals with principles, core values and commitments. And for that I would like to -- yeah, I would like to ask Becky if she could walk us or give us an update on the latest state on the discussions of this issue. And it's principles, core values, and commitments.

Would you like to join us here, Becky?

I think that's the latest version; right?

BECKY BARR:

Correct. This looks like the correct document. I hope everybody is looking at this in the -- on the screen because in the Adobe room, it's tiny. Any possibility of getting it bigger in the Adobe room? I did circulate it earlier.

Okay. Just to walk through. We have a -- we have high level of agreement but not absolute agreement, and we do have some -- sorry. I'm losing my voice here. Let me just get it up.

And we do have some areas where there -- be where we definitely need more work to be -- excuse me. I just want to open this up on my comments so I can see it.

So first of all, if we scroll down a little bit to the areas of consensus, there was general consensus from the 33 commenters who addressed this that we are moving in the right direction; that we generally support the notion of tightening and clarifying the mission statement.

I'm not going to be talking about the issues of human rights, which was the subject of further work in work party 4.

In the mission statement, there are a number of commenters who expressed concern about the prohibition on ICANN's use of its power to regulate services that use the Internet's unique identifiers or the content they carry. It wasn't that they objected to this particular provision, but they were concerned that this language could be interpreted to prevent ICANN from enforcing contracts were registries and registrars.

This is probably the most difficult issue that we have before us, and it is one that I think we need to have a breakout on

specifically. I believe that there is the possibility of finding consensus and clarifying the language, getting some clarifying language that everyone can live with. But at this point, we don't have it.

The ALAC also expressed concern about the language being problematic if the main string itself is considered content. And we did have a few other groups who expressed similar concerns. For example, in particular, with respect to child exploitation issues.

In the summary of comments, we have two -- be two responses. One is that consensus policy -- and I think in addressing the first concern, the contractual enforcement issue, we will have to find a way to state explicitly that consensus policy is within ICANN's remit to enforce; that it is necessarily, by definition, within ICANN's mission statement. And in that regard, specification 1 does specifically provide for the resolution of disputes regarding registration of domain names, and in the registrar case, including policies taking into account use of the domain name. Likewise, the new gTLD Applicant Guidebook, which was consensus policy, prohibited use of -- prohibited strings that would be contrary to general principles of international law for morality and public order.

So I think this is an example of how, once we clarify the first language to ensure the consensus policy is not subject to the -- properly defined consensus policy is not subject to the regulatory prohibition, we can address it.

We had two comments suggesting clarification of the language. On the prohibition, they are minor and they are wording changes, and these appear to be acceptable. So I don't think we need to do work on that.

ALAC raised a question about language in commitment 2 regarding the obligation to preserve and enhance the neutral and judgment-free operation of the DNS. This was language that was taken specifically from an NTIA requirement, but ALAC's view was that it might be too open-ended. That was a solo comment, and we don't have comments in response to that, so, you know, to make sure that we have addressed all of the issues we need and put on that.

Commitment 5 -- I'm really sorry about my voice -- reference says the following. It obligates ICANN to employ open and transparent and bottom-up multistakeholder processes led by the private sector, including business stakeholder, civil society, the technical community, academia.

We have two different sets of comments on that. The first is that several commenters urged us to include end users in the list of

private sector members. I have not heard any opposition to that concept.

Second, although concerns were expressed in different ways, I think the government of Spain -- and this was further reinforced by Switzerland, have suggested that if we include a reference to the private sector leadership there, that we should also reference the role of government, which is articulated in core value 7 that suggests -- or obligates us to duly take into account the public-policy advice of governments and public authorities.

I think that Brazil and Argentina, if I am interpreting their comments correctly, objected to the reference to private sector leadership, but I don't know if the solution proposed or the approach proposed by Spain would work for those commenters.

Having said that, I want to note that there were many comments in support of the retention of the reference to private sector leadership.

We have two places in core value 2 and core value 4 where the current bylaws reference feasibility and appropriateness. In the first comment round, I think in response to the suggestion of the U.K. government that these caveats were not necessary, particularly because we have a balancing test built into the core values that this was not necessary, but ALAC did object to the

deletion of the language regarding feasibility and appropriateness.

We do have one commenter who objected to the language in core value 4 about depending on market mechanisms on the grounds that ICANN was created in part to regulate competition in the DNS markets. I would note, however, that this language is not new language. This language has been in ICANN's bylaws since December of 2002. These are the evolution and reform bylaws.

In the first draft of this core value 4, which is now core value 5 -- which relates to core value 5 in the core bylaws, we were attempting to build some of the Affirmation of Commitments into this, and so we had a phrase that said that ICANN would depend on market mechanisms to promote healthy competitive environment that enhances consumer trust and choice. As a result of quite a lengthy discussion in the working party, we moved the Affirmation of Commitments language into the review section, because it's a -- it is a provision that relates exclusively to the new -- the introduction of new gTLDs. In doing so, we moved the consumer trust and choice language there, and the U.K. government noted that that was problematic. And also several commenters objected to moving the language that had been in the first draft into the review section. I just want to reiterate that the Affirmation of Commitments language that we

moved, one, related specifically and exclusively to the introduction of new gTLDs. So there were some who thought that in an overall mission and core values, having a specific reference to was not appropriate, and, two, that the language that appears in the Affirmation of Commitments is, in fact, part of the Affirmation of Commitment review language.

Okay. And then finally, you may recall that in the first draft of the report, we had a provision that limited ICANN's obligation to duly consider public-policy advice to advice that was consistent with ICANN's mission and core values. This received enormous pushback from members of the GAC. We spent a lot of time talking about this.

We confirmed that the intention was not to modify the GAC's position with respect to ICANN's obligation to consider its advice but to clarify that in acting on any advice from any advisory committee, ICANN must, nonetheless, no matter what the advice is, act in a manner that is consistent with its bylaws.

So to accomplish this goal -- and I don't think it was a compromise. I just want to say it was really a process of listening to what the governments were saying and teasing out what the concerns of the community were. So it was really a listening-and-exchange process. We removed the language that received objection from the GAC out of this.

We included a general expectation that advisory committees would provide a rationale for their advice. In Article XI which deals with advisory committees, let me just state, because some people have asked, that does not affect ICANN's obligation to work in good faith with the GAC to reach a mutually agreeable selection, but it does reflect the ATRT2 suggestion, recommendation that a rationale be given for such advice, particularly with reference to national and international laws that come into play.

And second, in the independent review document, we provided the opportunity for people to bring an IRP on the basis that an action or inaction of the ICANN Board including action or inaction taken in response to advice was inconsistent with the bylaws.

Again, this does not prohibit or limit the GAC's ability to provide advice on anything it wants. It does not limit ICANN's ability to act on that advice. It merely states that in doing so, ICANN just act in a way that is consistent with its bylaws.

Although I think that this satisfied the governments' concerns, we got quite a few comments in response to the second draft report saying that this language should be returned, and that is why I raise it. And I think, really, it's probably just -- that is probably just a discussion point.

So those are all of a -- a summary of the comments that we got. I hope that they are pretty comprehensive. And as I said, overall there was some support for the direction we were headed and some requests for clarification.

LEON SANCHEZ:

Thank you very much, Becky. As you can see, the comments have been taken into account. There were changes made by the working group working on this, the working party working on this. And of course now the floor would be open for comments and questions.

But I just wanted to note that I see in the chat that Megan Richards' hand wasn't recognized by the Adobe Connect room, and I would, of course, like to hand the floor to Megan Richards because it was firsthand. And then we will go with Malcolm and Milton.

So Megan.

MEGAN RICHARDS:

Thank you very much, Leon. In fact, it was in the previous thing. I think it's because I'm registered as a guest. I can't figure out how to sign on as a participant. I'm over 21. So it was really on the previous discussion that my hand wasn't recognized.

On this one, I've written it in in the chat, and it really relates to commitment 5, where now -- I think most of the GAC members agree, and certainly within European Union, that "private-sector led" has been in the bylaws for many years, it's something that exists, but now if we expand that to say the private sector includes academia, technical community, end users, everyone, but there's no mention of governments and their role in public policy, this puts a very unusual wording into what is in the commitments, which are at a higher level than the core values.

So I think that's something that we really should look at in a bit more detail.

So that's the comment. I put it in the chat.

Thanks.

LEON SANCHEZ:

Thank you very much, Megan. And this is just some -- some of the feedback that we received when we met with the GAC was exactly in this direction. So I guess you've already looked into this; right, Becky?

BECKY BURR:

Yes. I think this is a fair question that there is -- that we have not resolved. I -- I think that there are, you know, several options.

One is to retain the language as it is. The second would be to insert the phrase suggested by the government of Spain that references due consideration of government advice on public policy, which is the language that now appears in core 7. And I guess the third option would be to take out the reference to private sector leadership. So those are the three options on the table.

LEON SANCHEZ: Thank you very much, Becky.

UNKNOWN SPEAKER: (Off microphone).

LEON SANCHEZ: Okay. Well, yes.

So from these options that Becky just highlighted, we would like to hear thoughts on which would be the one that most likely would address the concerns that we have just heard.

So....

UNKNOWN SPEAKER: (Off microphone).

LEON SANCHEZ: Is it number 2, the one that --

Which one was proposed by the government of Spain?

BECKY BURR: The approach offered by Spain is certainly one of the approaches that we can follow. You know, I don't have any input from other members of the community to judge consensus one way or the other.

LEON SANCHEZ: So I remember a couple of supportive comments in the list with regards to the language proposed by Spain. So I think it could be a safe way to go. But we'll, of course -- Anyway, we would have to confirm with the rest of the group.

Yes, Thomas?

THOMAS RICKERT: My connection was cut off so I couldn't raise my hand in the Adobe, but it looks like, Becky from what you said, that -- the proposal made by Spain, picks PICs language that we already have.

BECKY BURR: Yes. It just repeats the language in core value 7.

THOMAS RICKERT: And if that does the trick to make everyone happy, why not seize the moment? Why we can't confirm for eternity now what we can -- what I'd like to understand, and I see a lot of nodding in the room, is whether anyone in this group has an issue with that? Otherwise, why don't we take it as, let's say, our interim solution to be confirmed at the next meeting?

Again, my connection has been cut off, but I don't see any objection here. I see the EU, Denmark nodding. I think there might be --

BECKY BURR: Could I just make a suggestion? We have hands up in the room, but unless people are going to address that, that's certainly something we could go --

LEON SANCHEZ: Yes, let's go through the queue, and in the end we'll just confirm whether we have any objections or not on this language.

So next on the queue in Malcolm Hutto.

MALCOLM HUTTY: I was going to speak to one of the other points that Becky raised, so if I wish to close out this item first by reference to the queue only, Chair, I will wait my turn to speak to the other point.

BECKY BARR: I think you could just go ahead and we could come back to this. If there are no comments, there are no comments and it would work.

MALCOLM HUTTY: Okay, in that case it was a comment with regard to the comments that Becky had on the definition of consensus policy, the suggestion that consensus policy should be made to be -- I don't mean is, should be made to be by definition within ICANN's scope. This would, if it were taken forward, seem to be a very significant change to the scope of ICANN's mission. It would empower the consensus policy process to make policy in all areas without limitation to the scope of ICANN. That would seem to be a very significant step, if that's what's being intended. Now I understand that specification 1 has certain limitations in it as well, but they, as they currently stand, point back to the current mission. So I think that any suggestion or changing the scope of what consensus policy may cover in this area would need to be looked at very carefully and we need to

see any wording before we could give an agreement that this can be passed directly to the lawyers to implement. Thank you.

BECKY BURR:

Could I just respond? Anybody who knows me knows that I am the last person in the universe will ever suggest changing the definition of consensus policy or the picket fence. I suspect that I stand -- I stand out to no one on defense of the picket fence. So you can have my assurance that that -- that the full definition of consensus policy, as defined in specification 1, is the only thing that I would consider an appropriate change here. The other thing is, by the way, we can't change that anyway if we wanted to. That is embodied in every single registry and registrar contract.

MALCOLM HUTTY:

Thank you.

LEON SANCHEZ:

Thank you very much, Becky. And I will encourage you to keep it very concrete and focused. And we have ten minutes before the break. And we still need to go through the IRP, so I'm closing the queue with Robin Gross. And next on the queue I have Milton Mueller.

MILTON MUELLER: Yeah, in some ways I'm reflecting what Malcolm said but I think I have a different take on it, Becky. My understanding of the mission and core values as a commitments was that it was a limitation similar to like a Bill of Rights, okay? And when you say consensus policy would still apply, does that mean that if we agree as a consensus policy that the use of domain names as part of the registry policy, they must require that all these domains, let's say only allow content that supports a particular religion? If that becomes a consensus policy, does that mean that ICANN can do this? I would have thought that this is meant to be a rights limitation that prevents consensus policies or any policies from doing certain things.

BECKY BURR: So consensus policy by def -- as defined in specification 1 by definition, I believe, would preclude that. There's a long story. So we will need some additional wording. But I -- but consensus policy, when I'm talking about consensus policy, I'm talking about specification 1. Not policy that is the product of a PDP but policy that was -- is within the four corners of the subject defined -- the subjects defined in specification 1.

LEON SANCHEZ: Thank you very much, Becky. Next in the queue is Kavouss.

KAVOUSS ARASTEH: Yes. Becky, thank you very much. We are sorry that we bother you so much and you lost your voice. You are among the most respectful and the most recognized person that we really appreciate your work.

BECKY BURR: Thank you.

KAVOUSS ARASTEH: Now, what I said in the GAC yesterday, I'm talking of the (indiscernible) individual. We have to see whether or not we want to go to the reality and -- or privilege. I think if you take the reality, it may not be harmful to retain private sector rooted or private sector leaders or leading. Doesn't change anything. ICANN Internet continues to work, whether somebody is private sector rooted or private sector leader. But it would be a mistake if we expand that but would not mention the government. It would be a mistake. Because ICANN is working a multistakeholder inclusive. So I must favor if you expand that we should include governments in the appropriate place of the sentence.

Thirdly, there is some language purview. Private sector can be some people, really private sector includes business, academia and so on. Private sector does not include academia. Academia is academia. Perhaps private sector includes business and then after that the goes and government. So there is a little bit of language -- linguistic style that we have to correct. But this is my personal view, let us not to talk about the privilege superiority and feel that we are subordinated, not subordinated. Leave the private sector as they are but include nothing new. Expand that to include government in the appropriate place and correct the sentence that not meaning that private sector includes civil society, includes academia and so on and so forth. I understood it only includes business. If I'm wrong, please correct me. Thank you.

LEON SANCHEZ: Thank you very much, Kavouss. And I think that's pretty much what's being proposed.

BECKY BURR: Yeah, I think the approach we're talking about would address that.

Exactly. Next in the queue I have Andrew Sullivan.

ANDREW SULLIVAN: Hi, I'm Andrew Sullivan, and I'm chair of the Internet Architecture Board. We sent some comments about these documents, both the first and second reports. And part of the discussion here that's going on right now I -- I find a little frustrating, partly because there's a lot of scoping discussion and the point of the comment about this area that the IAB sent was precisely that if you drew the mission statement more narrowly to focus exclusively on the registries, which is what ICANN's job is, then you wouldn't have this problem. Because you wouldn't be talking about the whole Internet. You will just be talking about the registries. So I really strongly encourage you to reconsider that point because it would help a great deal not to draw you into discussions outside of ICANN's remit if you had this mission that said no, no, we just work on registries. That's what our problem is. Thank you.

LEON SANCHEZ: Thank you very much, Andrew. Next in the queue I have Greg Shatan.

GREG SHATAN: Thanks, Greg Shatan. Just briefly, and this is partially in response to Kavouss but also to make another suggestion. Clearly when these documents were first drafted, private sector meant everything other than governments. It did not have the

narrow meaning that Kavouss is trying to ascribe to it. In the interim, in other Internet governance documents and forum -- fora, the word "private sector" has been used differently if the more narrow sense to mean commercial and business interests. But that does not mean that this use of private sector is wrong, but it does mean that it has become confusing. So a suggestion, an alternative to adding kind of the list of all of the types of private sector interests that would be in the broader definition of private sector to clarify that it's not the narrow definition of private sector, instead of getting into all that listing, we could just say the non-governmental sector, which is what was meant. As opposed to public -- it was the public sector and the private sector. That was pretty easy. That's pretty binary. If you don't want to use private sector to describe everything that's not the public sector, say non-governmental sector and then you don't have to worry about who didn't get into the list. Thank you.

LEON SANCHEZ: Thank you very much, Greg. Next in the queue is Alan Greenberg.

ALAN GREENBERG: Thank you. Two things. Just for clarity, Becky's been talking about consensus policy and spec 1. Spec 1 is a term used in the new gTLD agreements, not old ones and not in the RAA. So if

we're going to use a term, we should try to make sure it's the --
it's applicable to everything.

You made reference before to these things will come back for a second reading. When it does can we please have current bylaws, proposed new bylaws side by side or blank and brand new bylaw provision so that when we're saying -- you know, giving our blessing to it, we really know exactly what it is we're changing. Because my short-term memory is not all that good, my medium-term memory is probably failing, and I never had a photographic memory. So just to make sure that when we're giving sign-off we all know what we're signing off on.

BECKY BURR:

Okay. Just for your reference that document is posted with the second draft report. There's a specific side by side. But we'll do --

ALAN GREENBERG:

No, I'm talking about when we have now made these refinements, that is what we should be using to do the sign-off on. Thank you.

LEON SANCHEZ:

Thank you very much, Alan. And last is Robin Gross.

ROBIN GROSS: Thank you. This is Robin Gross, for the record. I just wanted to support some of the statements from Malcolm and Milton regarding concern for expanding scope. And Becky, I really appreciate that you're saying this -- that isn't what we're going to do here. But I think we need to be careful, even if it wasn't what we're intending. Maybe when we get the language -- specific language back, it could be interpreted in such a way. So I think it could be very dangerous. And so I think we have to look at it very, very carefully. And, you know, over some time have -- have a period of time where we can actually sit with the language and work with the language before we have a meeting about it because I think it's -- it could be a real problem. Unintended, but it's just so -- it's such a crucial issue that we could expand the mission or expand what's in spec 1. So I just wanted to raise that we need to look at that very carefully going forward. Thank you.

LEON SANCHEZ: Thank you very much, Robin. And I think that this is -- I think the way forward could be to actually task the lawyers when they look into drafting the corresponding bylaws to verify and make sure that there is no expansion of the mission and the scope of ICANN's remit. So I think that could be a way forward. And I

would like now to go back to confirming whether we have any oppositions on the proposed language by the government of Spain. I think that we really didn't have any oppositions when we first asked and as opposed to oppositions I saw a lot of nodding, as Thomas pointed out. So this is the last call. Is there any opposition to going with the suggested text that was proposed by the government of Spain in regard to commitment 5, that's right. Yes, Kavouss?

KAVOUSS ARASTEH:

Not opposition, but I think we should stop after government but not expanding government in respect of pa-ta-ti-pa-ta-ta. So include government like others. But not go government in respect of what. So I would like to generalize the issue that put government like others. Thank you. Without specifying areas in which they are responsible. They are responsible in the collective manner, in the entire process. You don't limit them. We are not WSIS. Thank you.

LEON SANCHEZ:

Thank you very much, Kavouss. So there's no objection, and I hope that Becky can take that last comment into account. So we'll now go to our break and when we come back, we will go to reviewing IRP, and I don't know how many time does our boss let's us have as a break, but I think it's a 25-minute break. No,

I'm sorry. It is a 15-minute break. I was overstepping with 25.
No, it's a 15-minute break. We shall reconvene at 4:48. Thank
you.

[Break]

MATHIEU WEILL: Welcome back, everyone. Second part of this session and thank you for taking your seats. We have one outstanding agenda item from the category that we previously discussed, which were items where we made significant progress Friday and Saturday and we wanted to take stock and have clarity about the next steps. And this is the enhancement of the Independent Review Process. Also known as IRP. And to remind everyone here, the next step that we said we would consider when we discussed it on Friday was create an expert group that will work with lawyers to refine implementation of the IRP as we had discussed that we had considered that our requirement work was complete. And I'd like to use the opportunity of a half full room to have this confirmed by acclamation. Obviously that's a good practice. And confirm that we will indeed organize this so that we can move forward on this very, very much expected aspect of our proposals so that we are demonstrating our progress.

THOMAS RICKERT: We don't need that.

MATHIEU WEILL: Okay. So that's for the IRP. That was just a warm-up to enable everyone to get back into the room. I hope you've stretched your legs and arms. It seems to be the theme of the day, and did a little bit of dance outside. Because we're now going into one

of the major aspects of our work today, which is the collaborative work that we need to have to find a way forward on the models, a way forward that needs to be -- that needs to be acceptable to all, that everyone can live with. And I will strongly encourage everyone to keep that definition in mind. That we can live with.

So we are going to try and address this in a manner that is requirement-based, fact-based. So please leave aside the statements of anyone's interests or positions. We need to look at the facts and requirements. We want this to be documented. Actually we want this session to form the core of the documentation that we will have to provide for the choice that we are going to make. And we wanted to remain in the spirit that we've seen for the last few days which is a spirit of collaboration and not a spirit of working against each other. And we'll pay particular attention to clarifying the underlying concerns and requirements so that it can constitute the basis of a robust discussion. That was asked earlier I believe it was by Anne. But also substantial discussion and not talking past each other.

And finally, remember there is no gala dinner until we've found a way forward.

[Laughter]

UNKNOWN SPEAKER: (Off microphone).

MATHIEU WEILL: So there's going to be actually three -- three small parts, three or four. First we'll do a little bit of context setting. That's going to be Thomas. We'll try to take stock of prior discussions we've had already on the models, just to bring everyone on that. We will certainly -- we will also look at -- remind ourselves of the materials and the informations we already have, which is pretty extensive, about the options and their -- the assessments that we've received about the consequences of picking one option or the other. And then we'll try to assess what are the requirements in this discussion and move on the short list of models to look at them carefully and compare them carefully. That is the intended approach. Of course, we'll be -- while we know you're a group with which we have to be flexible sometimes, although that's definitely not our favorite characteristics, to be flexible but we will certainly listen.

And with that, I think I will move to Thomas for a bit of context setting.

THOMAS RICKERT: Thanks very much, Leon. And welcome back after the coffee break. I hope you're all fully energized for this discussion -- discussion. Just to put things into perspective, we have established earlier these -- this triple E approach or three E approach. We have the engagement phase, we have the escalation phase, and then the enforcement phase. If we are doing a good job in the engagement phase, let's say on the budget, the community interacting with the board, making sure that there are no misunderstandings, that all the information is traded back and forth, then chances are good that the board will pass a resolution on the budget that meets the criteria, meets the requirements of the community. And it is only then, after the fact, that on an -- in a finite list of enumerated powers we can have this escalation path, which again would start with a board decision and then if all else fails, there could be the need for enforceability, after the board has failed to accept the community's wish to redo or revisit its decision, after the board has failed to take the -- the signals coming out of the community forum where things have been discussed publicly, after the board has failed to accept a budget veto coming from the community, after the board has failed to accept an IRP decision favorable for the community. Only after all of that happened cumulatively there will be the need to enforce a community power. And that's exactly what we're talking about. It's really a last resort scenario.

So what were the options for enforcement models that we have been looking at?

You will remember the scale between the trust-based model and full enforceability, and on the scale we had the status quo, which is basically a trust-based model or some have called this the collaborative model, then you have the Board proposal with is the MEM, which is an arbitration-based model, then you would have the community mechanism as sole designator. You would have the second proposal community mechanism as a sole member, and the first proposal, first report, multiple-member model.

All these models we have discussed.

We also discussed the multiple-designator model, but we haven't included it in this chart.

So you see that there is a spectrum between trust and enforceability, and we would just like to confirm with you that we are abandoning the notion of maintaining the status quo. We know that there are minority views that would like to do that, but that didn't get sufficient traction in the CCWG as well as based on community feedback.

We would also like to rule out what we had in our first proposal; i.e., the multiple -- or the multiple-member model with the avatars. The oldest amongst us will remember this model.

And that leads us to a short list of models. And if we can go to the next slide, then, we have a short list that basically focuses on two variations around a main topic of pooling the community powers in a single entity, be it designator, be it a member.

So why are we discussing this first? Because we think that if we take this first and put it in front of the bracket, then we can really focus on the differences between a member-based model and a designator-based model.

So why are we not -- This is our understanding. Why is this group not willing to pursue models based on multiple entities interacting with ICANN?

We learned from the commenters that they want us to avoid reallocation of power. They want us to avoid a concentration of power. They want us to avoid the risk of capture. And if you have single -- multiple -- not single. If you have individual designators, multiple designators, or multiple members, each of those could potentially exercise rights of their own and do things bypassing the community process.

Also, since they would need to assume legal personality, we would force single groups in our community to change their status or recognize that they already have a status that they don't want to publicly acknowledge; right? So we want to leave the current SO/AC structure unaltered. We want to avoid the risk of capture by pooling that. So the community power shall only be jointly exercised.

And that you do with the notion of single; right?

So this is our understanding from previous conversations. And you will remember that we went to a single member because we got public comment after the first report frowning upon the notion of multiple; right? So we went to single. And we want to confirm with you that we would like to keep the notion of single; i.e., pooling the whole community into a single entity that would then interact with ICANN.

Jordan.

JORDAN CARTER:

I just want to add one more piece of context for those who may not remember.

In terms of multiple, when we were talking about the multiple approach, we only talked about it in respect to those who are

appointing board directors, which is arguably the status today with some of the SOs and ACs being legal persons.

But if we were going to have collectively exercised powers among the whole community in a multiple situation, we would have to establish legal personality for all of the SOs and ACs. And we've had very clear signals from the GAC, as one of the SOs and ACs, about how they feel about the idea of membership in a legal person. So that was with another of the reasons that we paid very good attention to the very strong feedback we got in the public comments on the first proposal to add to all the things Mathieu -- Thomas has said about why the multiple model was not nice.

THOMAS RICKERT: Thanks, Jordan.

Alan.

ALAN GREENBERG: Thank you. I'm going to say something which will either be illuminating or confusing, and I'm not sure which it will be to everyone, but --

THOMAS RICKERT: You can still pass.

ALAN GREENBERG: -- but I'll try.

[Laughter]

No, thank you.

I agree that we have no choice but to use a communal single body to represent the ACs and SOs in order to take legal action, or to take formal action. There is no choice in that.

It is relatively transparent, however, to the designator part. We've been using the term designator and then applying it to the larger community.

The designator is a legal term which is about appointing board members.

In fact, if we were to keep -- Right now, if the ccNSO appoints a director, they write a letter to the secretary of the board saying we've made a decision. In the combined model that we've been calling the sole designator, they have to tell the designator and the designator writes the letter; okay?

We could keep the ACs and SOs that appoint directors writing the letter themselves. We'd still need the communal organization to enforce the powers.

So, in fact, a multiple designator but single entity to enforce the powers. The two are almost identical except who writes the letter to the secretary of the board.

So just for those who are adamantly still trying to look at a multiple-designator model, they are effectively the same in terms of all of the powers and all of the rights. It's really only who does the designation, who writes the letter to the secretary. So --

THOMAS RICKERT:

That's very helpful, and I found illuminating, to my surprise.

[Laughter]

Usually I'm not that bright.

Sebastien.

SEBASTIEN BACHOLLET:

After this illumination, it will be hard to follow.

Different point. The first one, it's -- I know that the word (indiscernible), but I really don't like those image because I consider that I am part of ICANN. And it seems that we are designing something to go to somewhere, and somewhere it's not us, but ICANN, it's all this system. It's not just the bubble at

the top. And we have to find another word and other image for that, because we have part of ICANN.

I have one -- one question. Is the designator currently are the body who are appointing -- who appoint voting board director or can we imagine or can we name the other who appoints a liaison? They also designate somebody to the board. Would not doing the same thing? The only thing they are not doing, it's not voting. For the rest, they have the same powers as anybody else, even at the end of the month, have the same treatment.

And my last point is that I think if we go to the sole -- to the wording of "sole designator," I would like to suggest to add something like a "coordinated sole-designator model." Because it's not that we want one. We want one to coordinate what we are doing, the current situation. Then I think we need to find -- I don't know if it's legalistic correct, but I think in that term or image, it could be good.

THOMAS RICKERT:

Sebastien, I have asked for this visualization, and if you find it ugly, that's on me.

Let's find a name. Let's try to do a good visualization. I would like to confirm your agreement with the notion that we need one

body, one entity to help us communicate to the -- to ICANN what the community has decided. So I guess the purpose.

And I don't see any -- Jordan, your hand it up?

JORDAN CARTER:

I want to riff off the point Sebastien made about labels.

We keep geekily and intensively in our deep and detailed discussions trying to come up with labels for things and then not realizing that in broad audiences those labels might convey things that we don't quite know. So I would just like to keep whatever we call this thing as a working title for now and not assume it's what we're going to label it in the final report.

We know we have to do a much better job at communicating whatever we come up with. Let's include better labels as part of that effort.

THOMAS RICKERT:

Good. So the queue is empty, so I take this as a good signal that we can move forward on the assumption that we are looking for something sole, provisionally. Might get a different name as we move on.

Next slide, please.

So having removed the status quo as well as the first reports, enhanced SO/AC model, that leads us with these three options that we should keep under comparison. We've been asked to have a discussion with you that would look at the pros and cons, the features of these options, and we honored that wish.

So we're basically looking at three options as we move on. This is just the -- just a reminder that we're having three items on the continuum from trust to enforceability.

Next slide, please.

We also said that we wanted to have this discussion requirement-based with you. So we're going to look at and confirm which of the models meet CWG requirements and also which ones fulfill NTIA requirements. So you can expect that to happen anyway. But when it comes to a decision-making, there are other factors that seem to be important to this group as well as to the community. And we want to make sure that we're looking at the right criteria.

Enforceability has and is -- has been and is a big issue. So we need to look at the question and the pros and cons of direct versus indirect enforceability.

We need to look at enforcement delay in the worst case, because if you look at enforceability, it's not only to have the

enforceability, but we also need to look at how quickly you get the results that you wish, how quickly does the community get its wish. And cost, potentially. Since we want to be cognizant and accountable when it comes to budget, we might wish to take into consideration a cost factor when looking at enforceability.

Then there is the risk of capture. There was the risk of derivative action against the Board as being a scenario of capture. The right to dissolve an organization as a risk. The balance between SOs and ACs, so that no single or no subset of the SOs and ACs can do things to the dislike of the rest of the community. And the scope of issues where the Board can have its business judgment, exercise its fiduciary duties with a discretion that can't be challenged in an IRP or in court. Then we have the issue of transparency. Access to corporate records is an important factor for at least some in this room as a feature for their decision.

And complexity. We've been discussing this over and over again, that we need something and we get a lot of public comment on that. We need to ensure that what we are doing here can be understood. That we're not leaving the rest of the world outside this room or outside this convention center behind understanding what this enhanced ICANN, what this post-

transition ICANN is look like and what remedies it offers to the community.

So complexity can lie in the need for establishing additional legal persons. It can act -- It can lie in the fact that natural persons are required to take action and act on behalf of the legal person. Ease of understanding. We want people to understand what we're doing. And the ability -- the ability to explain that the changes that we're applying are minimal. We heard a lot about ICANN being well established as a multistakeholder organization, and that we might get pushback if we give the impression that the ICANN as we know it today is not really as good as everybody said it is, because we need to completely revamp it. So minimal change was also a requirement criterion for assessment according to some, if not many.

We look at these points again, but we just wanted to share with you an assessment methodology to allow for more objective decision-making. And if you think we're missing important points on this, let us know. We can add that.

We don't have to add it now, because we will come back to these points, but if you think that a point that is important for your decision-making is not reflected here, let us know.

Next slide, please.

MATHIEU WEILL:

Let's stop on this one. We need to stop on the criteria. I think we need to take stock of that carefully before we move to the next step. This was an attempt to recap and sometimes rephrase most of the concerns, requirements, and discussions that we've had related to the models within our group, on the mailing list, as well as in the public comment sessions. So it is our good-faith attempt at doing this, and I think we need to really ensure that we have captured everyone's concerns here one way or another regarding the choice of models. During the - - We've heard simplicity. Of course that's the complexity aspect of it. We've heard the concerns about derivative rights several times in the first public comment. We've heard the concerns about transparency and access to cooperation records on a certain number of occasions. I want to ensure we're all in sync on this, and that you actually can read these ugly slides which were prepared by the co-chairs, and especially me, and I apologize for that. And we've been bashed by the relevant people for providing slides that have not been vetted for readability, and it's a fair comment.

Okay. I see more. That's good. That's pretty complex already, but I think we -- that shows the amount of discussion we've had so far that we can tease out so many of the key aspects that we need to check.

The next point is to look, really, at what kind of material we have. At this point, two informal discussions on this, on the assessment of the models. And as Kavouss -- I'm sorry he's not here because he's been insisting so much about us going into this absolutely excellent memo we have received from our lawyers comparing a number of aspects of these three models -- I think there were more than three on the table. I think it was four. So there's a wonderful three-page memo that is worth just looking through so we are all aware of what kind of information is in there and how it can be useful to inform our discussions.

And for that, Jordan, the three-page memo? You prepared to take us through it or do you want me to do it?

JORDAN CARTER: Why don't you do it and I'll interrupt if I think anything needs to be added. I did five hours on Friday morning, remember?

MATHIEU WEILL: Good! This is what I call collaborative effort.

[Laughter]

So, I'm sure that's very readable.

JORDAN CARTER: Isn't there a version of that table with the same content but only the two columns that involves single member and single designator?

MATHIEU WEILL: Is there a version of this?

UNKNOWN SPEAKER: Yes.

JORDAN CARTER: It would be easier to read. Do you want me to Skype it to you?

MATHIEU WEILL: Just while Alice does the usual wonders at finding a specific document in a pile of thousands of emails and tracks, just a couple of comments about the context. This was drafted to assess the various models against the ability to deliver on the powers, the seven powers -- the seven requirements of the CWG which were the basis of this as well as provide additional information about how it would practically work out. That's why it's relevant to our discussion today. Excellent. The two-column one. Wonderful.

So I think we should start with the end. Let's go down to power number 7, to follow Anne's suggestion earlier, and look at line --

row number 7, the reconsideration projection of a board decision relating to the reviews of the IANA functions including ability to trigger a separation of PTI. Also known as IANA enforcement separability. As Anne was saying, that was probably one of the most complex aspects and one of the most central to the IANA transition. IANA stewardship transition. I slipped.

So what this table shows is how it will play out on the left column on the sole designator. On the right on the sole member model. And so on the sole designator -- I need to adjust my glasses -- the sole designator would have the right to trigger board consultation up to a specified number of times with bylaws or sections, so we would have a process. Thank you. The sole designator would be standing to directly enforce consultation right and then arbitration would probably not be available or not be fully efficient for a separation decision because of the discretion that would ultimately rest with the board because of the tight relationship with some of the core aspect for the corporation because of how it might affect. But once again, we are at the end, at the end, at the end of a process where it's most probable that all of the board is convinced that it's -- it's not -- the board does not -- it is not assumed in this paper that the board would say no. It is just in the case where that would happen because it's most probable that the board

listening to the community would follow along, as Thomas reminded us earlier. And so -- but there's -- there's uncertainty whether an IRP decision would be enforceable over the board in that case. But the community would have the ability to recall the board and reinstate a new board based on its intention.

And on the sole member model, you can find that the bylaws would reserve powers for the sole member to override board decisions such as this and that would over -- go over the fiduciary duties of the board. And as a consequence, the enforcement would be direct instead of going through the board recall. And there's -- so there's a more direct way to enforce on this particular one. And that's what the table is designed to say. And I'm seeing some confused looks as well as a queue. So I would like to turn to Alan for a question.

ALAN GREENBERG:

Thank you. The lower left substantive box says "arbitration is likely unavailable for a separation decision." I'd like clarification from the lawyers, when you say separation, do you mean separation of PTI as an affiliate of ICANN or do you mean separation of the IANA function? Because one of the ways you can get separation of the IANA function is to keep PTI there as a quasi subsidiary but just contract with someone else to do the

work. Was -- so was that specific to the former type of separation or applicable to both?

MATHIEU WEILL: Ed, would you like to --

ED McNICHOLAS: Sure, I'll clarify that. It would be for either way. Something as significant as that -- the powers that are being talked about are the powers talked about in appendix -- Annex L of CWG, right? It's a process. And so if the arbitration is unlikely available for the actual separation decision but the board can be bound to follow the process in Annex L, so that's an important point, that the board can be bound through arbitration to follow the process. So I think we don't have any problem with hitting the CWG contingency on the designator model.

ALAN GREENBERG: The point I'm making is, you can have separation by severing the relationship with the PTI and you can also have it by simply issuing an RFI or an RFP and issuing a contract to someone else other than PTI and leaving PTI there. So Claire, I was hoping for clarity. Thank you.

MATHIEU WEILL: So the answer is both?

ED McNICOLAS: Both.

MATHIEU WEILL: Both cases. Good. What I will try to do with the lawyers along all this session is just ask very clear yes/no questions confirming that our -- our own requirements or assessments are accurate but not go into lengthy legal discussions because I think that would be dangerous. James.

JAMES GANNON: Thank you. James Gannon. So I came to CCWG from the CWG
(temporary loss of audio.)

And looking at these two options up here on the right I have confirmation, I have yes, we have a direct enforcement number. On the left we don't know is basically the answer. Because that indirect enforcement, which is a form of enforcement, is not a guarantee for us. Which poses concerns for somebody in my position. I'm not -- I'm not a member of the CCWG, I have no voting power here or whatever else, but I want to express why we have this concern and I don't think I'm alone in it either. I think a number of us like other things about membership but the

core of what a number of us feel the push for the membership side of things is for is to have that requirement that came over from the CWG. Not just necessarily in the direct text of it but in the feeling and the ethos of why we went down this road. And for me personally as designator stands on its own. I personally don't feel that it meets the spirit of the requirement of the CWG. If we can have something above and beyond just the right to recall the board, if we have some other additional mechanism that our lawyers or that, you know, the community can come up with in order to give us an additional layer of certainty around the ability to separate this critical thing which is essentially what the entire transition is for --

MATHIEU WEILL: James, would you agree with me that your concern is that the board would not follow a separation discussion, that's your core concern.

JAMES GANNON: Oh, yeah.

MATHIEU WEILL: And we've heard that indeed the member has direct enforcement and the designator has some form of indirect enforcement that can be enhanced as was said earlier by a very

clear bylaw process that would patch -- add to the basic designator. And the question that we'll have to ask at some point is whether that is sufficient or not sufficient to address the -- our underlining concern, which is that the board would not follow the community output for bad reason. If it's for a good reason, we're all in agreement.

JAMES GANNON: Briefly to respond. I think that --

MATHIEU WEILL: I see Jonathan Robinson is -- is right behind you in my line of sight and raising hand, probably -- is that to provide some CWG perspective? So I think that would be very appropriate at this point.

JONATHAN ROBINSON: So it's Jonathan Robinson for the record. I respect James' opinion. It's -- and I understand where he's coming from. But I think for us the test is, what did the CWG recommend. Not what each of us individually or in different groups felt within the CWG. And I don't think the CWG made a call as to a specific enforcement mechanism. And so that -- I think that's -- that for me, there's a critical separation between those two points. Like I say, I respect those that would like a strong or the strongest

possible enforcement mechanism, but if you think about it from a CWG perspective, we simply requested enforceability and we didn't really specify to you, we expected you to determine enforceability. So we were not that much in the detail as to these mechanisms. So I hope that's a help of supplement.

MATHIEU WEILL: So it's your view, Jonathan, that the level of enforceability on both sides here, none of the sides is in contradiction with the conditions of the CWG at this point.

JONATHAN ROBINSON: I think that's a fair way to represent it. Yes.

MATHIEU WEILL: Thank you. That's I think something very useful to have in our deliberations at this point. Next is Chris Disspain. Chris.

CHRIS DISSPAIN: It is indeed. Thank you. This is Chris Disspain. So I want to make a couple of points. I can't help but view this as a lawyer. I'm slightly perplexed by the wording up here. If you look at the left-hand column it says "arbitration likely unavailable." So it doesn't say it is unavailable. It says it's likely unavailable. So I don't understand what that means. And over on the right-hand

side it says, "sole member would have greater latitude, although issue is not certain." Which sounds to me as if that means that we don't actually know the answer to that one either. So I'm actually a little perplexed at the way that -- in other words, I'd much rather see us say it's uncertain in both cases or it's not certain or it's certain. But having said that, my understanding --

MATHIEU WEILL:

Can I just take stock of that? Can we interpret this as, there isn't certainty, which is what Chris would prefer to hear? Just to make sure we get that clear, obviously the wording can always be confirmed, but is that reflecting that there is a level of uncertainty, and certainly we don't want uncertainty. Pun intended. And is that -- is that correct?

JORDAN CARTER:

There is some level of uncertainty under both columns. However, one should not overstate for the fact that we couldn't define it -- give an opinion to use the lawyer term, you could not give an opinion that it would definitely happen, but there is a likelihood that it would be enforceable. And the sole member -- and as we said the process for the designator.

MATHIEU WEILL: So I think it's fair to say we'll have to live with some level of uncertainty in that way.

CHRIS DISSPAIN: Good. Thank you. Now just to be very clear, my understanding is that the separation will be in the bylaws. And that the arbitration is used if we violate our bylaws. And my understanding is that violating our bylaws is a breach of our fiduciary duty. So I'm unclear why we're having an issue here, because if the separation is in the bylaws and if we violate that bylaw, then we are in breach of our duty. So how can we claim that we don't have to follow our bylaws, because that's what this is about, right? This is about a finding that -- oh, have I missed something?

MATHIEU WEILL: Holly, my personal understanding is there's always room for interpretation. There might be conflicting views on the bylaws interpretation and that is the source of interpretation.

CHRIS DISSPAIN: So the key there is the word "always."

HOLLY GREGORY: For clarity, the bylaws, to the extent that they provide a process, you can definitely go for enforcement under the sole designator model just as with the sole member model. What the difference is is whether or not you can bind the board to follow a decision that the community was trying to dictate. So if you look at Annex L in the CWG proposal, it sets out a process. That process can be enforced through the bylaws under either of these models directly.

MATHIEU WEILL: See the distinction you're making Holly is between a case where a process is set that says if the decision is green, you have -- the board must do this. Versus a provision that would say there's a report with a recommendation and the board considers. Is that what you're saying?

CHRIS DISSPAIN: No. No, but that's not true. Because if the bylaws say subjects to this process --

MATHIEU WEILL: Yes, but we're in agreement. If the bylaws says subject to this process --

CHRIS DISSPAIN: We will do X, then we will do X.

MATHIEU WEILL: You will do that. But then Holly is saying this is -- this is -- this is enforcing in both cases.

CHRIS DISSPAIN: Yes.

MATHIEU WEILL: But if it's not specific in terms of process, then there might come this conflict.

CHRIS DISSPAIN: But why are we talking about it --

MATHIEU WEILL: What Holly is saying is that in the CWG report Annex L -- and I think that's what maybe Jordan wanted to tease out a little bit, so I'll turn to him in a minute -- there is a process. Which can be put into the bylaws.

UNKNOWN SPEAKER: Paragraph 391 in Annex L is the one where it says, "there's no prescribed result." That might be -- to the process. That's the key.

MATHIEU WEILL: Jordan, you wanted -- is that what you wanted to tease out?

JORDAN CARTER: Yeah, I do, because I'm looking at the end of the annex L in the CWG report and it's got CCWG accountability dependencies listed. And it says it wants an ICANN fundamental bylaw to define this review. That's easy and that could exist in both models. It says it wants to describe the procedure for that and its functions and established voting thresholds and approval and blah, blah, blah. You can do that as well. It says it wants approval by a community mechanism derived from the CWG accountability process to approve the final selection of the SCWG. Now, you can put that in the bylaws and you can assume that ICANN's board will follow it. But if ICANN's board chose not to follow the decision that was made under the designator model, you couldn't have standing against that. You couldn't uphold that. But under the member model, if the right to make that decision was granted to the member, that would be enforceable. So that is -- that is a distinction based on text in the CWG report which is a requirement.

And then further down, it says, "per the above separation process the selection of the entity that would perform the IANA naming functions would also require community approval through the established functions." So in either case, the community approval can be put in the bylaws and can be exercised and we can assume the board would agree with that. But the difference between the two models is if the board doesn't do -- doesn't follow that co-decision, the decision right is given to the member, not the designator. So it's a distinction, but I go back to what I said the other day, I think it's a distinction that is dancing on the head of a pin.

CHRIS DISSPAIN:

Yes, I agree with you. And isn't it true to say that in effect, with a designator model, it in effect forces an extra step because you have to then go -- go to -- you would be forced through arbitration; right? Because at the end of the day, it doesn't matter what the arbitration is about. The arbitration is binding.

JORDAN CARTER:

No. As our lawyers advised right there, arbitration is likely unavailable for --

CHRIS DISSPAIN:

It doesn't say it's unavailable. It says it's --

ARUN SUKUMAR: There's a queue forming. I hope you can -- This Arun. There's a queue forming. Please adhere to the queue.

MATHIEU WEILL: I'm aware of it. I'm aware of it, and we need to make sure we're not getting into -- sidetracked. There are other discussions. This is a key one, this is a key one, but I think what I understand from this discussion is of course there's a more direct way to enforce in this particular case on the member track, but the difference is something that needs to be assessed, and it certainly has abilities to be seriously, seriously constrained, and we're not in breach, or at least obviously in breach at this point with the CWG requirements in either way. That's, I think my key point at this point.

Next is Anne.

ANNE AIKMAN-SCALESE: Yes, thank you. Anne Aikman-Scalese.

In trying to understand enforcement in the sole-designator context with respect to this issue, a question arose earlier in the chat, and I would like to flesh that out a little bit and ask about it. And as I understand it, when we're talking about this

example, hypothetical example of PTI separation, it would be the decision itself to separate PTI, whether in the -- in either one of the two ways that Alan mentioned before.

So the difference between the two models is that if the Board thinks, for example, in a PTI should not be separated and the community thinks for example that PTI should be separated, what we are saying is that in direct enforcement under the sole-member model, once we get up at the end of the stairmaster, which I love James' term for that, the ICANN stairmaster, and we've gone through a whole lot of communication, but still, there's an honest disagreement between the community and the Board.

So in sole member, the community directly enforces because the Board is not liable for the exercise of a fiduciary duty under the membership corporation.

In the sole-designator model, the Board continues at all times with fiduciary be duty in the exercise of all of these decisions. And so the ultimate power of the community and sole designator is the removal of the directors if, for example, the Board declined to follow an IRP decision saying we will not follow it because we cannot do it in the exercise of our fiduciary responsibilities.

And the practical question that came up in chat is suppose we go sole designator and we say, so? The community strongly disagrees, feels PTI should be separated strongly, has a strong consensus on that according to various thresholds, so we're going to remove these directors. And then the question becomes so when you are going about the process of appointing new directors, how does the community get the result that it's looking for? Do you prequalify directors who say they will separate PTI? Is that a fair way to look at how one qualifies directors? What type of interview process by the NomCom is involved there? What is the practical effect of the power to remove the directors as an enforcement mechanism in respect of this issue?

MATHIEU WEILL:

Thank you, Anne. I think you're raising a couple of very interesting points. One is that directors have to exert their fiduciary duties, and I think we all agree we want board members who do care, are loyal, and provide their business judgment into their function within ICANN. So I think fiduciary duty is really, really a good thing.

What is -- what would not be a good thing, and that's been expressed by James and others, would be to actually have fiduciary duties used as an excuse for not doing something, but

it's not fiduciary duty that's an issue. It's being that -- using it as an excuse.

And then you're raising the point about effectiveness of the Board recall and basically how long it would take with the interim Board -- Board be empowered to do this, to do this separation.

ANNE AIKMAN-SCALESE: No. Actually, also the bigger question of whether you get directors who will effect the separation or whether you're not really entitled to do that. In other words, does the community get the result that it wants or is it not really entitled to do that? In other words, it appoints all new directors, because it has the right to remove them. Do they then vote to separate PTI?

MATHIEU WEILL: I think at least if the community -- I mean, the basic thing in the framework is that the community appoints board members, the community selects the NomCom, which in turn provides for NomCom-appointed board members.

If the community selects board members that are in disagreement with, at this point, a very, very significant will, because we've been -- I mean, at this point, we've been through at least a year or a year and a half of process saying we want

separation. So if the community appoints board members or is not able to come up with board members that are willing to do that, then I think we have something more profound that's not working.

Now, would the interim board members make that decision themselves or would that be delayed until the proper board is reinstated? I don't know. But I don't think that delay of -- that extra delay of two, three months is really that significant compared to the overall process.

ANNE AIKMAN-SCALESE: Yeah, I'm not speaking of the delay.

MATHIEU WEILL: All right.

ANNE AIKMAN-SCALESE: I'm speaking of the ability to effect the separation. Can you say to a new director that you're going to appoint, "We're only appointing you if you agree to effect the separation?" And I agree, it's unlikely ever to be used, but it's trying to --

MATHIEU WEILL: No, it's not that. It's if you agree to follow a community recommendation that is compliant with the bylaws that the

former board did not want to apply. Because you are at a point where the board did not follow a provision that's in the bylaw that's in the process, and so on. And so that's --

ANNE AIKMAN-SCALESE: So you can select a director on a basis.

MATHIEU WEILL: I don't see how it could be else, but....
Anyway.

ANNE AIKMAN-SCALESE: I'm glad you know the answer. I don't think I do.

MATHIEU WEILL: I have difficulty imagining that after all we've been through, and it is such a remote case of the Board not following the process that have been decided on, that we could not replace them and be effective.

In any way, it's so remote.

I don't want to spend too much time, and move to the others in the queue.

Kavouss.

KAVOUSS ARASTEH: I'm sorry; perhaps I missed you. I'm sure that you have not missed me within 45 minutes.

MATHIEU WEILL: On the record -- on the record, Kavouss, we have missed you.

KAVOUSS ARASTEH: Mathieu, we are dealing with the most crucial be issue which directly relates to transition. As a liaison of ICG, I would have difficulty on Thursday to tell the ICG that the issue under number 7 is going to be properly covered. For me, it's not covered because, first of all, thanks to Holly and thanks to Rosemary for the very good document prepared. It says that arbitration likely unavailable. So the only thing that we have, recall of the board member.

So you append something to some other thing which also is not currently clear or removing the entire Board, how long it takes, how would we do it, so it is very important.

In my view, this provision is not sufficient for the transition.

We need to put necessary supplementary element or procedure in order that complement what is missing here. If you look at

the sole member, you have all possibilities there. You have that. But here you don't have.

Properly compare these two. Something is missing. If you do not fill up this gap, we have difficulty for transition.

We receive many comments that this PTI is not good process. We told them that don't worry; we have the separation process. But now the separation process is under the questions. So the whole thing is under a bias.

So please kindly put necessary attention to this one currently, and I don't agree -- I'm sorry, excuse me, I apologize to Chris, I don't agree that we said we will do that. You will not be there when this thing will happen. This is not we and you. It should be legally in the document.

MATHIEU WEILL:

So that's where we -- I don't know if you were here when Jonathan Robinson provided us with his personal -- his assessment at this point that both models were -- none of the models was obviously not complying with the CWG condition on this. So it is viewed that those both can work at this point. And comply with the expectation that was -- the condition that was set by the CWG. And I'm looking at him to see whether he's nodding or not.

So I think that that's something that, indeed, needs to be very, very carefully looked at and I think it's good that we're spending some time on it because we need to be very clear. But it's -- it would not be appropriate at this point to say that one is ruled out on that basis because that's not the feedback we're getting from the CWG at this point.

And next is Samantha. Sam.

SAMANTHA EISNER:

Thank you, Samantha Eisner from ICANN.

I raised my hand earlier, so it might not be directly in line with what we're talking about but it still has to do with this chart.

I think it's important to realize, because I know that one of the other things that we would be talking about in this situation is timing of process and how things follow. And it's really important to remember, as far as I understand, the CCWG's second draft proposal included, even within the member model, as one of the limitations on the member power that you go to IRP first before you go to court.

And so, you know, as we're looking at that as the source of the binding arbitration, in some ways we're very equal here in terms of what you have in terms of timing, because you go to arbitration first, then you go to court to enforce it. And the more

you go to a designator model, the more you have a person or persons legally, an unincorporated association or however you want to look at it, who is able to then go to court to enforce.

So it sounds like a lot of what we're talking about here is the ability to enforce. Clearly that's a place where we're having some disagreements about the ability to enforce and the scope of that enforcement.

Earlier today, following on from the small-group conversation that I was in on enforcement model, we talked a little bit with our counsel Jones Day and we shared a memo that they completed this morning and sent to Sidley and Adler. There's a fundamental disagreement with -- between the scope of that enforcement, and you'll see in that memo, and I encourage all of you to read it, and I know Sidley and Adler have not had a chance to respond to it so I'm not stating that it's the final word on anything, but you can take the question as to whether or not the Board's action in any of these events was a proper exercise of their fiduciary duty. That can be arbitrated, and you can wind up with a binding arbitration decision about that. And that's a really important point to realize.

If you can't arbitrate whether or not a Board has properly exercised its fiduciary duty, you could never take a decision of

any Board that's obligated to operate under fiduciary duty to arbitration. It really is that logical of a statement.

And so I urge you to keep that in mind as you're reading through these documents.

MATHIEU WEILL:

Thank you, Sam.

From the points that you made, one is very important also -- several are important. One is that on the timing aspects, it's very similar in both cases, in the worst case. That was one of the criteria we mentioned earlier. There's no -- we all benefit on each side in terms of timing of enforcement.

Then the other part on the arbitration, I think for us as a group of nonlawyers, my personal assessment is that I can see there is discussion amongst lawyers. I tagged this as legal uncertainty and a certain level of risk if we move in that direction, which doesn't mean anyone is right or wrong at this point, but if you get into these discussions, then that means lawyers in 10 years or 15 years can get into these as well, and that may not be the place we want to be in 10 it 15 years. So I think that's -- that's my take-away from this exchange on this particular question, which I am absolutely not qualified to take part into.

I will close the queue after James, and Milton is next.

MILTON MUELLER: I'll go. Yes, I have a comment and a question for the lawyers.

My comment. Mathieu, I think you may have inadvertently sort of diverted our discussion of the issue here because, in effect, you appealed to Jonathan and you said, "Jonathan, you're the chair of the CWG. Does the CWG plan make us -- help us decide between these two models?" And the answer is of course the CWG has no idea which model.

The CWG designed a system that was designed to enable separability of IANA. I was on the committee. You could have asked me that question. The point we're debating now is how do we enforce separability? What is the best way to enforce it? And we do not -- you know, the CWG is in no position to answer that question. Jonathan is not in any special position to answer that question. We have to decide on the merits here in this CCWG.

MATHIEU WEILL: I agree. What I said is the CWG conditions do not constrain that discussion in our group.

MILTON MUELLER: Exactly. Nobody is saying --

MATHIEU WEILL: It is our judgment call --

MILTON MUELLER: Mathieu, it's my mic right now; okay? You've had plenty of time to talk, and I would like to just make the point that we have to debate this issue on the merits.

Of course it's true that the CWG plan does not require us to go designator or membership, but the CWG plan does require enforceable separation. And what we're trying to do here is have a discussion of whether we can get enforceable separation with either of these two models. So I'm asking you first please do not constrain that discussion by appealing to the CWG chair as if he was in a position to rule on that, and I'm sure Jonathan would agree that he's not. Okay. So that's my comment. And I'm sorry if you felt put on the defensive by that, but I do think that we're getting into a --

MATHIEU WEILL: That must have been inadvertently.

MILTON MUELLER: Yeah, I think it was inadvertent.

So the question is for the lawyers. Is it possible for us to create a membership structure that only applies to or comes into existence for the IANA separation and nothing else?

MATHIEU WEILL: Wow! Is there a yes-no answer to that?

HOLLY GREGORY: We would need to go study. I have some doubts, but I wouldn't want to give a definitive answer without going to study. We would still have issues around statutory powers, et cetera, as we have said in the past.

MATHIEU WEILL: The next is Bruce.

BRUCE TONKIN: Okay. It does seem that we're well and truly in the weeds here.

I've just gone and read the CCWG -- or CWG report, and it basically says that -- this is the recommendation from that report which seems to have wide community support. And I was in a session earlier this morning, there wasn't a single question raised, so I'm taking that as a degree of community support. It basically says that there will be a Cross-Community Working Group to decide whether to do separation, and then that Cross-

Community Working Group can define an RFP for selecting the new operator. And then it says that the ultimate decision to select that new operator is a combination of a decision by the ICANN Board and a community mechanism developed by this group.

So let's say the community mechanism is this single legal entity that we're constructing. So it's a joint decision. It's a decision by the Board and that new entity. That's what they've asked for, and I can't see any difference between these two models in how that would work.

So in both cases, if the Board didn't follow the bylaws with respect to that process that they've asked for, in both cases you can arbitrate that. And the decision of the arbitrator is whether we followed our bylaws. That decision is binding. Either a member or a designator can enforce that in court. That's the process.

Now, if you don't like the Board decision, which is what the CWG actually asked for, then get rid of the Board. And in both cases, the single member and single designator have the powers to recall the Board.

So we're really debating something that there is no difference between these two models.

MATHIEU WEILL: Thank you, Bruce. And I would like to just point out that there's not only the separation discussion. It might be useful to flesh out what your perceptions are about the other differences about the two models so that we get a complete picture and not only on this one, which is, indeed, a very important one.

Next is Jonathan.

Jonathan Robinson.

You're done.

UNKNOWN SPEAKER: (Off microphone).

MATHIEU WEILL: Do you want to -- I'm sorry. You have a question that was in the queue?

JORDAN CARTER: I had a hand up and you skipped me. Very sad. But it follows up from Bruce's question and it's a question for the lawyers which is there's a difference between the models, I think, and it's just on that decisional point.

So as Bruce says, the CWG asked for a co-decision process on separation or community endorsement of the process. So the question -- I'm sure we can put that in the bylaws, and whether the Board -- you know, whether the Board is able to share that decision with some other entity and whether the decision that gets made can be enforced. So, again, I think we're on the head of a pin, but is that still the difference between the models?

HOLLY GREGORY:

To the extent that we're talking about process, we can enforce the process under both models. To the extent we're talking about some ability to try to override a decision of the Board, then we cannot. But I don't -- I think that what you're talking about is really a process. I don't think we're in the -- in the first column on that.

JORDAN CARTER:

So it sets out a process requiring co-decision, that process can be enforced in either model.

HOLLY GREGORY:

It's the co-decision part we're struggling with as to whether that's process or substance.

So I'm sorry, I know it sounds sort of like we're waffling, but these are fine be points who have not been decided that we're aware of.

MATHIEU WEILL: So if we were to recommend that this is made a process, the distance between the two models would be extremely narrow. That is what you are positively saying, if I reframe; correct?

HOLLY GREGORY: And I read Annex L, which is the CWG provision, to be largely process.

MATHIEU WEILL: Thank you. So I hope I'm not lost in the queue, but I have Greg. Waiting.

GREG SHATAN: Thanks. Greg Shatan, for the record. I moved up to the adult table.

UNKNOWN SPEAKER: I'm in the wrong place.

[Laughter]

MATHIEU WEILL: Can you provide an ID?

GREG SHATAN: I have not been carded yet. There have been a lot of things that have occurred since I put my hand up as well as the things I put my hand up to speak about but very briefly -- ha -- in responding to what Chris was saying about the issue of uncertainty -- and I'm going to speak about this as a lawyer -- lawyers tend to qualify things, especially when they haven't done huge massive amounts of research. When I write a legal memo, I often write it very assertively in the first draft and then I start inserting the qualifiers in the second draft because you always can't be quite sure. So you use tendencies rather than absolutes when you draft these things. That does not mean that you don't know what the heck is going on. It just means that you're shading a little bit. I know it's maddening, especially when you end up -- when you pay many hundreds of dollars for that memo, but frankly it's just keeping a little uncertainty in the process because there is a little bit of uncertainty inherent in the law. That's just the end of it. So if somebody is saying something is very likely, that means it's -- you know, you pretty much can bet on it and very unlikely, the other way. So you're just not going to get the blacks and whites.

The other point -- again speaking as a lawyer -- and I've been thinking about this a lot over the last few days, which is kind of what we've been mandated to do, not sleeping much, in terms of this group as a corporate governance client, I think we're a difficult client. Very rewarding on every level, as we've just seen, but difficult.

UNKNOWN SPEAKER: (Off microphone).

GREG SHATAN: Can you imagine us as a litigation client?

[Laughter]

That will be interesting. I think -- and let's -- I'm a retired lit -- or recovering litigator. I hate litigation. And I hate it when I did it and I hate it when I don't do it. So we will hate litigation. That does not mean we shouldn't litigate, we shouldn't be afraid of litigation. But real litigators, you know, file a couple of complaints before breakfast without even thinking about it. So litigation is nasty, brutish, and not short. So that is -- as an alternative to spilling the board, that needs to be considered. Frankly, I think this community would be more likely, given the choice between spilling the board and entering into lengthy litigation, to spill the board. And I think frankly if we get to the

point where the board is so intransigent and so out of step with the community, spending three years litigating with that board while they remain in power or taking three months to get them the hell out and get in a board that is in step with the community is much more likely. Thank you.

[Applause]

MATHIEU WEILL: Thank you, Greg. I hear your point as unlikely to get to litigation, that would be my summary.

GREG SHATAN: Fairly unlikely.

[Laughter]

MATHIEU WEILL: Thank you. I like conciseness. Robin.

ROBIN GROSS: Thank you. This is Robin Gross, for the record. I just had a point and a couple of questions I wanted to ask. The first I wanted to point out on the slide that we saw earlier, on -- under requirements that we were missing the actual CCWG requirements and we're missing the stress tests and so those are

kind of really important things that we should have on that slide. And then I also have a couple of questions about this fiduciary duty issue because as you know, this is something that I've been a bit concerned with trying to figure out a way to constrain this. There is concern that fiduciary duty and defining -- or the global public interest basically amounts to carte blanche for the board to overturn the community in the designator model.

So we had some discussion on Saturday about trying -- how to constrain that and is it possible to put something in the bylaws that fiduciary duty requires following the bottom-up multistakeholder model? Is there a way we can constrain this so that hole that many of us are concerned about -- concerned that a truck will be driven through -- can actually be constrained in some way.

So that's my first point. And then my second question on this was, it seems like we could be in a situation where we have a conflict between two fiduciary duties. The fiduciary duty to exercise your own independent judgment on a specific issue versus your fiduciary duty to follow the bylaws. And so if these two fiduciary duties are arguably in conflict, how would that be resolved? Thank you.

MATHIEU WEILL:

Thank you, Robin. On your first point on requirements, I think we've made an attempt in the slides you were referring to, to capture -- I shouldn't say capture. To take into account the main stress test requirements, stress test-induced requirements, and that includes capture. I mean, we've got a lot of stress test about capture. That includes complexity because we know the more complex the changes, the more likely we have some unintended consequences. So we've tried that. We may not have succeeded fully, but if you can just elaborate on exactly what kind of requirement of stress test you think is not -- is not taken into account, I think that's -- that would be perfectly eligible. And the requirements we're seeing now as well. So it's - - we won't put requirements as a whole because it's too wide. We've tried to be more adequate but maybe we're missing something concrete. And if that's the case, please -- please speak up and tell -- and say it.

Regarding the fiduciary duty, the option to constrain fiduciary duty, my understanding reading the memo and I'm looking at the lawyers, is you don't constrain fiduciary duty, because that's legal. However, what I understand is that the fiduciary duty includes serving the purpose of the organization in an organization like ICANN and so you can be -- maybe you could be more explicit about the relationship between the community and the board in the articles of association. And I'm seeing

some nodding that this could be a way to clarify -- to mitigate the perceived risk that the board would not -- would go at odds with the community. And that's -- and that could be investigated. Holly?

HOLLY GREGORY:

Agree with what you just said. And one point of clarification. The bylaws are the bylaws. They're the rules for the corporation. And there is no fiduciary judgment about whether or not to follow the bylaws. There may be some judgment involved at times about how to interpret them, but there certainly isn't a fiduciary out for the board on following the bylaws. And I do want to underscore, there's a lot of confusion about this point. We certainly agree with what Sam Eisner said earlier, that the board cannot simply raise fiduciary duty anytime it wants to avoid arbitration. And I hope no one ever thinks that that's what we said. 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.

MATHIEU WEILL:

Thank you, Holly. So that's something to keep in mind. We have potentially an option to bring this more into clarity in the articles of association which might help breach the perceived gap

between the two columns in that table. That's very useful. Thank you very much, Robin.

Next is, if I'm not mistaken, must be Avri because Milton's hand is old here. But Avri, you have the floor.

AVRI DORIA:

Thank you. Avri speaking. Actually the first time today. And I want to apologize. I'm not a lawyer. I'm educated in philosophy and tend to be even more confusing than lawyers, I think.

So when I look at these, first of all, I really got very confused at the discussion about the word "likely." Because in one column I saw that something was unlikely. And in the other column I saw that something was likely. In my world of interpretations there's a world of difference. And an infinite number of angels between those two words. So in the first column I see that we basically -- arbitration is unlikely. In the second column I see arbitration is likely. Certainty, I don't believe there's such a thing, so it really doesn't matter whether the lawyers tell me there's certainty or not because there is no such thing. You're arbitrating in this case the PTI decision. And there was a PTI decision to move --

UNKNOWN SPEAKER: (Off microphone).

AVRI DORIA:

There was -- okay. The question was, but what are you arbitrating? That's sort of a side issue than what I was going to go to but let me try. Right. You're -- no. Basically the PTI -- I mean, the separation group has come up with a recommendation to separate and as part of it -- and I also confess to having been one of the authors of Annex L, which probably makes it unlikely that I understand it. However, because obviously once you abandon writing others interpret it. So anyhow, you have made a decision at that point. You've made a recommendation to move. The community separation group has made a decision to move the naming -- and they're not even separating IANA. They're separating the naming function from IANA from ICANN. So they've made a decision to do that. They've even made a decision of where to take it. And at that point that has been written that at that point the finalization of that decision is done jointly between the board and the community mechanism. So what you have there is we have our community mechanism and we have the board. They both agree to it. Great. You move forward. They don't both agree to it, then the presumption there is that you arbitrate --

UNKNOWN SPEAKER: (Off microphone).

BRUCE TONKIN: I mean, I think you are getting to the crux of the issue. Because we're -- I think -- so when you arbitrate, you have to arbitrate against something. So arbitration is not an arbitration between the board and this community.

AVRI DORIA: The arbitration is between two decisions. One was to move and one was to not move.

BRUCE TONKIN: No, no, no. So arbitration -- the way we've set up --

AVRI DORIA: It's supposed to be a joint decision.

BRUCE TONKIN: No. Hang on. The way the independent review panel is set up for arbitration, just to be clear, is about whether we have followed the bylaws or not. Arbitration is not used to decide did the board make a good or bad decision. That's not what arbitration is about. The arbitration is did we follow the bylaws or not. That's all it is. And so what -- what is in that annex -- and I've just read and it and the annex you've written which is great, so we're talking the same thing -- it basically says that group

comes up with a recommendation, just like the GNSO comes up with policy recommendations, and that goes to the board, that's what this says, and then the board can reject that presumably with a supermajority decision of some sort. You can't actually arbitrate that.

AVRI DORIA: But then the community mechanism has the right -- and as it's supposed to be a joint decision. It's not supposed to be like a GNSO decision.

BRUCE TONKIN: That's not what it says. Read the words.

AVRI DORIA: No, it basically says, if you look at the last paragraph, and I guess we can go up and it really does start to look like philosophy.

MATHIEU WEILL: Can I suggest that --

AVRI DORIA: But I didn't finish my comment here.

MATHIEU WEILL: And I'd like to hear the end of your comment, Avri, and we'll look at the separation paragraph maybe later. But I think we've been through it, we ground it a little bit already, so unless there's something really illuminating that comes back at us, I think we have what is necessary at this point on this particular point in terms of assessment of how it would play out in both models and how it could inform our decision about a model. Avri, please finish your comment if you have --

AVRI DORIA: Yes, thank you. Okay. So when we're also talking about likelihood and like -- unlikelihood, I think both going to a protracted court case, taking the board to court, or offing the board are pretty much equally unlikely. I don't think we're going to do either of those. And I think the likelihood that we do it ever -- do either of those is equal, that we are going to get into endless discussions like we do here to try and come up. But I think that basically we have a forum where in one, the membership, there's really much more of a cooperation model between the community and the board. Because they basically both have responsibilities. In the single designator model, the only power is to be offensive. The only power is to get rid of the board. And we're constantly talking about you got a problem, you get rid of the board. Whereas in the membership model you basically have two locuses on some of the severely designated,

limited powers. You've got the ability of two units, each of which has some right to decision-making to get together and come up with a common decision. And in fact Annex L is meant to be finding a way to come -- to find a common decision.

So for me there's really a significant world of difference between the single designator, as I say that its means is battle. Its mean is, if you don't like what I got to say, get rid of me. As opposed to the other one says you don't like what I got to say we've got to find a way to resolve it because we each have some say in this matter.

Now, and the last thing I wanted to say, there was a comment that came up about, if you look at our rules, we really don't have the bottom-up multistakeholder model. And this is something we actually need an acronym for, and BUMP would be a good acronym for the bottom-up multistakeholder process. But anyhow, we don't have that in the bylaws. We don't have that in the articles. We have presumptions of multistakeholderness and we have some presumptions of bottom-up nature. But we really haven't enshrined anywhere in this. Now, I still very much support the membership model because I see it as much more of a cooperative model as opposed to seeing the designator as an oppositional model. But in any case, in either of these models, we really should think about enshrining our BUMP, enshrining our bottom-up multistakeholder process in either articles or in

bylaws. And it's not my idea. I've heard it from many people far smarter than me suggesting it, but, you know, it's -- that's where I'm done.

MATHIEU WEILL: So you're supporting this idea, and it's very clear and --

AVRI DORIA: And I'm supporting the model because I think it's a non-oppositional model.

MATHIEU WEILL: And you're supporting the model because you think it's more cooperative. So I would suppose -- it's not intuitive. I'd like to hear others, if there's also belief that the member has the most cooperative approach. It was not my personal impression that it was a significant difference in that part so if it's -- I would suggest that we get some inputs about it at some point because that's -- that's certainly to me personally was counterintuitive when you said it initially but I hadn't considered it seriously.

AVRI DORIA: Philosophers are known for being counterintuitive.

MATHIEU WEILL: I'm closing the queue after Bruce because we'll certainly have to wrap this up. Matthew.

MATTHEW SHEARS: Thank you, Chair. Matthew Shears, for the record. What's become apparent to me is that we clearly need to do a little bit of work in terms of how we mesh the processes that are in the CWG proposal and the CCWG when it comes to the IANA function. But the point I wanted to make was this, making the decision to move the IANA functions operator is no small decision. And when you think about the decision-making process and the engagement of the community that that requires under the CWG proposal, that's quite extensive. And then to take that through whatever set of enforcement and resolution and escalation processes we've got that we're outlining here is yet another major step. So by the time this gets to the point where we're actually facing the board, we have to -- we're pretty certain at that point in time that the community needs this, DNS needs it, we need it for stability and resiliency and everything else, to have the uncertainty that the board, for whatever reason, might at that point in time say no, we don't agree, which would be even more disruptive, I think would be really problematical. And I don't agree with those who would kind of throw around, oh, we can recall the board. That's very disruptive as well, and I think we're underestimating how

disruptive that element can be. So I don't find that a very viable alternative.

So I think for that reason, I think the sole-member model and that ability to override the Board as it's noted up there is essential to stability and resiliency.

Thanks.

MATHIEU WEILL: Thank you, Matthew.

Thomas.

THOMAS RICKERT: Yes, I have put myself in the queue in order to play devil's advocate, try to spin some of the arguments that have been made into another direction.

We've talked about the risk of capture. We've talked about the risk of destabilization.

Let's remember that when we started, we really talked about replacing the big stick the U.S. government provided.

We came up with membership as a result of our request for less invasive powers. We didn't want more powers. We wanted to

have a more nuanced repertoire to be able to intrude less than with Board removal.

Now we find ourselves in the situation where we have two paths and let's think them through. We have a membership model. We can spill the Board, but we can also force the Board in court to do what the community wishes. That will be at least a year's worth of court action under the global eye. It will be watched. It will cost a fortune, and I think that in itself can be destabilizing for an organization. It will take away so much trust from ICANN if that happens, other than a quick removal, replacement of the Board and move on. That's one thing.

Also, if we had -- if we have the designator model, there is the risk the Board will not honor an IRP decision for the membership model. Do you really think, and this was Roelof's point, that we will keep a Board that we had to take to court in order to get our will? I think it's highly unlikely. I think having a Board that has been so much distrusted will also destabilize the organization.

Now let's talk about designator. We have a designator where the Board -- a designator model where the Board wishes to not implement an IRP decision. They claim they exercise their fiduciary duty in the best interest of the global community and refuse, in this case, to allow for the transition -- the separation to take place.

Now, there's two aspects to it. We're always talking about a rogue Board just refusing the community's wish. And if that is actually the case, we take them out, we place a new Board, but it's also possible they have good reason for exercising their fiduciary duty in a certain way.

Let's assume the community has a weak moment and is captured. We talk so much about capture in unlikely cases, but let's assume for a moment the community is captured, makes this resolution, passes this -- takes this decision and directs the Board to do that. Then we have -- then this decision has actually been implemented. We can get that enforced. And in that case, it can turn out to be valuable to have an extra safety net if the board members can exercise their fiduciary duty.

And if we think this is a pattern, if we think that they're constantly doing this at the detriment of the global community, we take them out.

And if we take them out, we can do that in almost no time. There is far less cost, there's less time needed, and if they refuse to lead after we want them to go, we can get a preliminary injunction and get them out and move forward.

And I just want to add that to the discussion, because I think it might help us put the un-, un-, unlikely cases into maybe a little bit different perspective. And I think ultimately we need to ask

ourselves what the probability of reaching success -- reaching consensus in the community is here with one or the other model.

I think we're so close in terms of meeting requirements. They're both delivering on the requirements. And I do not fully agree with the power or the authority that Jonathan has.

We've asked do you think this will fulfill you CWG requirements? And CWG requirements had an enforceability component in it, and he confirmed that the enforceability requirement from the CWG will be delivered by both models. And I think that's quite a strong statement.

I should pause here.

Thank you.

MATHIEU WEILL: Thank you, Thomas.

Malcolm, you're next.

MALCOLM HUTTY: Thank you, Chair. Oh, dear, I don't like disagreeing with the chairs and not both much you at once. It's not the way to make friends and influence people. But I'm afraid I'm going to have to.

On that last intervention from Thomas, I mean, there's a couple of things there that I don't -- that I don't think can stand. I mean, the talk of the community being captured. Well, the ICANN community structures the SO/ACs. It needs to be checked that they can't be captured. But the community as a whole? I'm sorry, but the concept of the community being captured is an oxymoron on the face of it and we need to discard that.

THOMAS RICKERT: I was talking about in unlikely cases.

MALCOLM HUTTY: No, it's not that it's unlikely. It's an oxymoron. There's no such thing. Capture by the community -- the community is the capture. The community is what we want, yeah. The notion of the community being captured -- the structures maybe, but the bare concept of the community, it's not an issue -- it's not a concept. It's not a valid concept.

And similarly, you talked about that then captured community forcing the Board to do something. But looking at these powers, you know, what power does any of them to force the Board to do anything? Well, the only one is PTI, and there has been -- the whole separate structure, the CWG, to make sure that could only happen in the correct case.

So I don't think that it's useful to wave that's shrouds.

But I'm afraid I'm going to have to also disagree with the other co-chair, because, Mathieu, you put up a slide of what you called assessment criteria, and then we moved on and we didn't have a discussion about that, and I thought, okay, that's fine. It's not the time for it.

UNKNOWN SPEAKER: We can bring them on and have the discussion. That's okay.

MALCOLM HUTTY: But when Robin challenged you on that, you actually chose to take that comment and not rule it out of order, and you gave your response to that. So I don't want to leave that response lying on the table. I want to challenge it.

You said -- Robin said, and I agree with her, that the assessment -- key assessment criteria are the NTIA requirements and the stress tests, and to that I think we would add the CWG requirements and community consensus, which is actually included within the NTIA requirements. These are the assessment criteria. Boiling those down, including 36, 37 stress tests with all the nuances that have been brought in by all the community onto a single slide, you elide out so much of the analysis and so much of the assessment that it becomes that

you lose the assessment to what actually are the real criteria. So I don't think you can boil that down to a single slide.

I don't know mind you having a slide to use, but you can't present it as these are the criteria. The criteria are much more elaborate and developed than that, and people will continue to use those other criteria that are not on your slide as being whether they find the proposal as being acceptable.

So I'm sorry, I need to say that because the status of this slide, I don't think it can be this is the be all and end all in assessing what the model is, these are the criteria we're going to use.

MATHIEU WEILL: That's fair.

MALCOLM HUTTY: It's a tool and I'm fine with it as a tool, but we mustn't --

MATHIEU WEILL: Then we're in agreement.

MALCOLM HUTTY: -- we mustn't give it any higher status.

MATHIEU WEILL: And I'm glad that we're in agreement, because I hate it when I'm not in agreement with people in the room.

Next is Roelof.

ROELOF MEIJER: Thank you, Mathieu. Roelof Meijer for the record.

First, Malcolm, apologies for my ignorance, but I'm not a native speaker, and I didn't have a classical education. What kind of a moron is an oxymoron?

[Laughter]

[Applause]

My second point is on Avri's submission. I don't agree at all that a model that has more possibilities to legally enforce powers is a model that stimulates more collaboration. In my opinion, it does the opposite because it lowers the threshold of going to court and solve issues there. If you have a model that only allows for the legal enforcement of a decision that has a maximum impact, I think it will force both the community and the ICANN Board to go to very, very long ends to solve this collaboratively before going to court and get their asses fired, so to speak.

MATHIEU WEILL: Thank you, Roelof, I think we can just check that there are different views on this. So that's at least something we can take from that exchange of view.

Was your comment finished or did you have something else? I wasn't sure.

ROELOF MEIJER: You want some more? No, no. That was it.

MATHIEU WEILL: I'm not asking for more.

ROELOF MEIJER: Did it end abruptly or something?

MATHIEU WEILL: Turning now to Bruce Tonkin.

BRUCE TONKIN: Thank you, Mathieu.

I just want to separate decision processes versus abiding by our laws. So we have a set of laws which the community agrees are the bylaws. The Board must abide by those bylaws, as Chris had mentioned earlier, and we have an arbitration process to ensure

that we meet those laws, and we have an external court enforcement mechanism in case we don't follow the outcome of that arbitration. So that's the same for both models. That's the "we must obey the law" process.

Then we have decision processes in the community. The supporting organizations and advisory committees basically appoint the Board to make decisions. Board members are appointed for three years, and, in fact, a third of the Board gets appointed every year. So a lot of flexibility of appointing your decision-making body.

And in terms of Avri talking about that decisions are made in a cooperative way, that's how they're built into our laws. Our laws require major policy decisions to go through supporting organization and advisory committee processes, and then the Board can only reject those decisions with a two-thirds majority of those people that you elected to make those decisions. So you've actually elected those people to do the very thing that they're doing, which is making a decision.

Now, if they can't make good decisions, remove them. It's as simple as that.

So I think we confuse the decision-making process. You're electing people to make good decisions. If they're not making good decisions, replace them.

Separately, we must obey the law, and the law are the bylaws. And we have an arbitration process for dealing with that, and then we have a final court mechanism if we don't follow that arbitration. That's if we're not obeying our laws.

So separate decision processes from obeying the law.

MATHIEU WEILL: Thank you, Bruce.

Anne.

ANNE AIKMAN-SCALESE: Just very quickly. I think that when we talk about ultimate enforcement mechanisms, we're not really talking about whether the community will actually pursue those but whether or not you have sufficient incentive or bargaining power or big stick, and on the sole-designator side we have the so-called nuclear option, removal of all the directors, and then on the sole-member side we have what I call the specific enforcement option seems to be clear where we actually -- if directors were not going to follow the IRP decision, that you could get specific enforcement and effect the decision.

I think it's really not a matter of whether we'd actually go to court, but, rather, the reality of having the power to do so. I'm

not actually saying that that's necessarily better. It's just clearer.

And I think this whole question that -- maybe it's Robin who raised it first, as to whether you can, within the bylaws, define what constitutes the exercise of fiduciary duty and put parameters around Board decisions that relate to defining that duty in terms of taking into account the community action, that really would be interesting to investigate. Whether you can define fiduciary be duty in the bylaws or not. And I don't -- certainly don't know the answer to that.

MATHIEU WEILL:

Thank you, Anne.

Is there -- Okay. So I think there's no need for legal clarification or anything on this.

We've come a certain way, but we have still far.

Basically on that imperfect, just global guideline type of slide, which is certainly not capturing everything, we've discussed about enforcement, we've discussed about the most important aspect of enforcement, which is the PTI which I think is -- once, if we ever solved the PTI, we've solved everything. I think we've covered that quite well.

We've touched upon capture with some disagreement about exactly what kind of risk of capture is we're talking about. There's capture of the Board, there's capture of the community which has been challenged by Malcolm as a concept, which I believe in terms of our stress tests, there is a stress test, I don't have the number with me here, about the risk of capture of the community by what in French we call entrism, and I think that's far from a farfetched concept in any group or community. That has been demonstrated as being something that happens in some organizations at some point in their history. So we've touched a little bit on that but we haven't been very far.

We haven't discussed transparency much, and I know Ed is here and he's been very vocal on the fact that the member model provide access to corporate records to members, whereas the designator model does not provide that.

And we haven't talked much about complexity, although it is clear in many of the inputs we've received that it's a very significant requirement for many out there, including the NTIA criteria, which are -- one of them being the security and stability of the organization; of the service, and then the organization. Another consequence, complexity must be taken very, very seriously because the gaps always induce some form of potential for insecurity or instability. We haven't touched upon them, so we'll have to.

We had a quick discussion on the chat whether we would extend until 10:00 p.m. or midnight, and I'm -- unfortunately, I have to report that we didn't come to a consensus, which is -- which is -- be yeah, we couldn't choose a model for extending. And it's -- it's a shame that we -- yeah. We would have expected some objections. But I think we need to probably pause here, take stock of this, think of a way to probably map the differences in a more efficient way. Ensure we capture everything, because focusing only on enforceability does not address all the aspects. And maybe we're missing some others. And I'm honestly totally -- I think it would be extremely helpful if you see something missing in here and you take the night to think of it, that we actually inform our decision based on the actual requirements. So we can review all the stress tests and think does that mean that we have a concern that is not captured here? That is not taken into account? Let's do that by all means.

And then what we'll prepare for tomorrow's session, because tomorrow's session will have to be a follow-up on this one. I mean, there's no other way. There's no way to -- we won't do anything else until we've solved it, is prepare some form of table comparing both models and looking at whether there are differences in how they address the requirements that are outlined here.

We'll try to do some prep work on this, but obviously it's going to be fully reviewed with you. And I think that's -- that should take us to the point where we'll have to look at these pros and cons in the way with the eye of, once again, what am I willing to die in a ditch for, and can it be addressed?

And before we do that, there's one point that I heard in the conversation which I think we should take on board right away. It's this idea of looking at whether we can narrow the gap or, actually, the discussion on the potential of conflict between taking on board community's input and fiduciary be duties. And we've -- There's been a very useful suggestion by -- I think it was Robin and then echoed by Avri to look at how this could be -- the Articles of Incorporation could highlight that the purpose of the organization itself is also to promote multistakeholder model and the bottom-up -- the bumps. Was that correct? We would avoid acronyms in the Articles of Incorporation, I would say.

I'm hearing this as quite consistent with one of the NTIA criteria, to be certain that sort of ringing like, oh, I've heard that before.

So I would try and take this -- there's a couple of things we've actually achieved in this meeting on that section. It might surprise you. Cheryl is very surprised.

We've achieved to narrow our choice to two so far, and our investigations to two models. That's one thing. We've taken on

board that suggestion that would be an interesting one to proceed with. And we've also captured a number of items that we can take on board as our shared view on the difference in the models.

We've seen that the member approach got a very logical way of doing the separation and the enforcement of the powers, because it's really embedded, but the difference itself with the designator is not that large and can be narrowed through this approach.

We've heard -- We know that it's not -- both models can meet the condition of the CWG. That does not mean that we do not have to exert our judgment and study the merits of each to see which one has the best enforceability or the best characteristics, but at least we're not in any of these apparently in violation with the CWG conditions. That is actually an important one.

We have acknowledged a certain level of uncertainty with some aspects of arbitration. I think we could leave it at that. It's the case in both models, so it's not really a very important aspect of our work precisely on this part. So let's leave it aside.

And we've been reminded that enforcing some of the powers, and especially for the members, there are more powers, if we want to think of it as legal action and not Board recall, that a year's worth of litigation. Litigations are apparently hate --

something of bad things, apparently. I don't know. But we know that it's time, it's money, it may not be the most efficient way forward. So we need to take that into account as well.

And that the IRP in both models, the arbitrations in both models, I mean, basically the enforcement would, litigation apart, take as long a time in both models. So that's not a differentiating factor.

So that's the key take-away that I'm taking from this session, which I will try to recap in an email or in the records or the notes. We'll check that so that it's part of our -- we take that on board for our deliberations tomorrow and further assess both models along to this. On Wednesday. Wednesday; sorry. I would hope we would be all ready Tuesday, but apparently it's not the case.

So tomorrow is Tuesday, and Tuesday is a very interesting day in the ICANN meetings because we get to discuss with our respective communities. So I would strongly encourage avenue one of you taking that on board, to discuss with the respective communities not what is your preferred option but what kind of requirement does my community want to die in a ditch for. All the rest, we cannot afford.

If there's a slight preference, but I can live with it, let's acknowledge it, move on. If it's really a critical issue, then we need to discuss how we can address this. But let's, by all means,

focus here about serving our respective communities. We will not be cap can heard. We will be worthy of what the -- the way we're seeing the community empowerment when, in these rooms, everything we say is inspired by what we think is the interest of the communities we represent.

That is -- even as individual, you can think about the interest of the global individuals you are here to serve.

So I think that would be my recommendation for tomorrow so that when we reconvene on Wednesday, we are obviously with an open mind but also focused on -- ready to say, "I don't like this, but I can live with it," and "This is something I would die in a ditch for."

Would you like to say a final word, Thomas?

THOMAS RICKERT: No, just to say that we will relabel the Wednesday session; right? The Wednesday session we will relabel so we can have witnesses from the outside, but we will relabel it as a working session, not an engagement session; right?

MATHIEU WEILL: I'm sorry I didn't make that clear but that was, indeed, the plan.

UNKNOWN SPEAKER: (Off microphone).

MATHIEU WEILL: So with that, I think it's time for beer. Lots of beer.

[Applause]

May that bring you to illuminating moments so that when we reconvene, we get to that conclusion.

Thank you very much.

[END OF TRANSCRIPTION]