
ICANN Transcription

GNSO New gTLD Subsequent Procedures PDP Working Group

Monday, 14 December 2020 at 15:00 UTC

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MICHELLE DESMYTER: Well, welcome everyone. Good morning, good afternoon, and good evening, and welcome to the new gTLD Subsequent Procedures PDP Working Group call on Monday the 14th of December, 2020 at 15:00 UTC. In the interest of time, there will be no roll call. Attendance will be taken via the Zoom room. So, if you happen to be only on the audio bridge, would you please let yourself be known now?

Okay. Thank you. Hearing no names, I would like to remind all participants to please state your name before speaking for transcription purposes and to please keep your phones and microphones on mute when not speaking to avoid any background noise. As a reminder, those who take part in the ICANN

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multistakeholder process are to comply with the expected standards of behavior. With this, I will turn the meeting over to Jeff Neuman. Please begin, Jeff.

JEFF NEUMAN:

Thank you very much, Michelle. Welcome everyone to our call. This is the last one in which we will be going over formal topics but we are having a call on Thursday. So, on Thursday, we'll discuss how we're going to group the items for consensus calls. We'll discuss any last-minute—any issues that may come up and so on.

So, it is on your calendar. It's been on your calendar so please do pay attention to that. Also, before we get started, I forwarded around a note that we got from the GAC on the timeline so you all have it. Not really in a position to discuss that letter since we just got it and haven't had a chance to hook up with the other members of the leadership team.

So, we'll send around an email later on just to give an update if that changes anything. So, we have a lot to discuss today so I don't want to use up more time for that since there's some matters of substance that we do need to cover. With that said, let me just ask first to see if there's any updates to statements of interest.

Okay. Not seeing any, which is good. So, the first thing we're going to have today, hopefully, is a readout of where we think the small group on auctions ended. And so, we'll do that for a few minutes and then we'll get onto the topics of conflicts of interest, applicant freedom of expression, and dispute resolution procedures.

I don't want to put anyone from the small team on the spot. So, if someone wants to give that update—or Cheryl or I could give a readout. But if anyone from the small team would like to summarize, that would be ideal so let me see if there's any brave volunteers. Okay. Well, having none, Cheryl, do you want to or do you want me to give that update?

CHERYL LANGDON-ORR: Jeff, if you want, go for it. It's fine. It's not as if it's going to be terribly wordy.

JEFF NEUMAN: Yeah. Okay. So, thank you. So, the small team consisting of probably up to no more than 10 people. I don't think, if that, got together on a couple occasions over—had a couple of calls, had some email exchanges. At the end of the day, as has been fairly consistent with the discussions, there are some firmly held beliefs on either allowing all forms of private resolution without any—or without too much in the way of guard rails other than what we've already talked about, to others that don't believe that our recommendations go far enough into stopping some of the behaviors that they consider to be less desirable for the ICANN community.

So, at the end of the day, although there were a number of fruitful conversations, the recommendations essentially as we have in the draft report are going to stay the way they are. At the end of the last meeting that we had, we did ask the group to consider

whether the transparency requirements—sorry, the disclosure requirements were enough to provide some of the protections.

At the end of the day, the reality is that because there's so little data from the last round publicly available, there was not much to analyze and really understand whether some of the less desirable behaviors actually took place and whether they're likely to take place again. So, I think the one thing that group agreed on which is similar to what we have within our report is that access to more data or at least the types of data that we recommend in the report should help us if we so choose—and by we, I mean the ICANN community—to review what happens in this next round and see whether some of the undesirable behavior that we were concerned about actually does happen. So, that data, the disclosure requirements is an important element of that so we can—again, if the community chooses to, we could study that for potentially future rounds.

So, that being said, I think that's the sum total. I don't know if anyone from the small group wants to jump in with anything else. But the small group consisted of, I know Paul McGrady, Susan Payne, Jim Prendergast, there was Elaine Pruis, Justine. I'm trying to think of anyone else that may have been—Christa Taylor, right. Thanks Jim.

So, and if I missed anybody, sorry. Unintended. So, I mean, they gave it a good shot. But it's something that there's strong beliefs on all the sides. Donna, I'm sorry, Donna. So, there's strong beliefs on all the sides and until we actually have data to show one thing or another, it's going to be hard to get representatives from the different sides to change their view. So, anyone else

want to add anything? I don't want to hog the whole conversation here.

CHERYL LANGDON-ORR: You've got Elaine's hand up.

JEFF NEUMAN: Oh, great. Elaine, please go ahead.

ELAINE PRUIS: Thanks, Jeff. I just wanted to mention that the small group didn't address the comments that were submitted in the public comment period for the draft final report. And I'm wondering if we will take some time as a working group to go through that process. Maybe they won't be addressed in our final, final report or are we planning on drafting a letter? What's our plan for that work?

JEFF NEUMAN: Thanks Elaine. That's a really—

CHERYL LANGDON-ORR: We can go to Paul. Yeah. Jeff, let's go to Paul because in fact there was a table of the comments that was in fact looked at at the first meeting but Paul, go ahead.

PAUL MCGRADY: I just wanted to say that, in fact, we did look at quite a bit of the public comments. We did get stuck on the board comments which

I know as a community, we're not supposed to favor one commenter over another but the board is the board, right?

So, we got stuck there. We did look for, I don't know, four or five minutes at the IPC comment on accepting DotBrands from the closed bid, whatever it's—I forgot—a sealed bid, there it is. The word came to me. But that didn't really, unfortunately, get any traction. So, I don't want to leave this Working Group with a misimpression that we didn't look at the comments. We did.

I'm not sure that we looked at them as thoroughly as could have been done of course because that's—we just didn't have gobs of time. But yeah, but we did look at them and I think if I'm—and Jeff, you can correct me, I think that we talked about this specific question that Elaine has raised on our small group calls.

And I thought that you and Cheryl were going to do some communication back to the board on those issues. Not necessarily in the report but in the communication once the report's finalized and out but if that's wrong, please, correct me. Thanks. Bye.

CHERYL LANGDON-ORR: We are going to address responses to the board, Paul, yes. But it wasn't decided by the small team what they were and of course it went beyond auctions with what we were concerned about from the questions as Avri made clear to us all, that the board had raised as opposed to edicts. Sorry to jump in, Jeff, but as you know, I did get relatively deeply involved in all this. At arm's length, I'll hasten to add for any work group members who are concerned about fingers on the scale. There was none.

JEFF NEUMAN:

Yeah. Thanks Cheryl. No, great to jump in. And you certainly made the point I was going to make as well and that's just, look, we still are contemplating a response to the board. But I think what we're going to focus on now is the material for the final report and then perhaps after the consensus call, while others are busy doing minority reports or whatever it is they want to do or just glowing support—I'm just kidding.

Then we'll consider some of the—Cheryl and I and of course anyone that wants to participate, we'll look at drafting some specific responses to the questions. Because I think there are some important ones and—well, all of the comments are important. But there are some important responses I think we owe.

And I think, if you saw just maybe a half hour or an hour before this call, Alan and I had an email exchange about the PICs and RVCs. So although our recommendations aren't changing a large amount, we do owe, I think, the board an explanation as to why we view the recommendations that we have as being in line with the existing ICANN bylaws.

So, I think all of that's important. It doesn't change our recommendations or implementation guidance but I think it is necessary because the board is going to want to make sure that—or see responses to make sure that we have thought about all of their comments, whether they agree with us or not, is not something we can control. But certainly that we've thought about it and responded.

Sorry, I'm just reading the comments on the chat. Yes, we don't get holidays. This is 2020 after all. Anyway, let me just see if there's any other questions on the small group and those discussions. All right. Not seeing any. So, let's go from the exciting topic of auctions to talk about conflicts of interest. And everyone show your excitement.

All right. As we get that changed, [inaudible]. This is an important issue and of course you want to make sure that all decisions that are taken, whether it's by ICANN Org or by independent evaluators or dispute providers, panelists, etc., are truly independent and not subject to—influenced by any conflict.

So, I think, as you'll see from the comments which are now up on the screen—and I'm sure they will put a link in the chat for it. Most of the people either didn't comment at all which hopefully meant that they were fine. But then there was a good amount of agreement and whether—as written or willing to accept it as written. There were some comments though on—okay, we're on community applications here. We should be on—I'm like reading this going, this doesn't look like it. Is it just my screen that has community applications?

CHERYL LANGDON-ORR: Oh, no. It's everyone's.

JEFF NEUMAN: Thanks. All right. Here we go. Conflicts. All right. Now—

CHERYL LANGDON-ORR: It was just to check to see if we were all paying attention. That's all.

JEFF NEUMAN: No problem.

STEVE CHAN: Jeff, this is Steve. My computer is giving me the spinning wheel of death constantly but we will have to switch over, [here,] in a moment but hopefully it's showing correctly now. Thanks.

JEFF NEUMAN: Yeah, it's good. Thanks. Sorry. It was just messing with me on a Monday morning. All right. Okay. As you can see that there was a lot of support as written, we had a comment from InfoNetworks that they thought our wording would block any potential panelists from—any CPE panelists from serving—sorry, any experts from serving as CPE panelists.

And we went through the text and we weren't sure that our language did that. I don't know if anyone wants to discuss this or anyone had the same concerns. Again, we read through it and didn't see that as being a conflict but I don't know if anyone else has any comments on that.

Partly, it wasn't our intention to block any experts from serving as a community party evaluation panelist. All right. I see Steve's going to change over the computer so just bear with us for a second. There we go. So, anyway, if anyone wants to take a look

at that offline and disagree with us, then let us know, but we didn't think that the text actually did that.

Okay. The next comments were on new information. So, there was a comment from dotBerlin, and I don't know if they're on the call because this one's another one where we were hoping for some explanation. I'm just looking to see. I know Katrin's on here so maybe she can weigh in. Sorry to put you on the spot.

But was there anything in the 2012—we weren't aware that the geographic names panel wasn't transparent or that they didn't make their deliberations public. So, and there's nothing in the guidebook or anywhere else that would counter it being transparent. I mean, we note the comment and if you could, yeah, get back to us if there's anything either in practice or in the language that countered the fact that they have to act in a transparent manner and make it public, that would be great to know.

We didn't see it but, look, we're not perfect. Okay, so Katrin's going to check on that. WIPO, and the IPC, and Flip mentioned a guideline on conflicts of interest that's used by international arbitration or the IBA. And we thought that this would be good to mention in the rationale, right? So that we have an implementation guidance in there on conflicts but when the IRT is actually writing or revising any of the rules, then it's a good source that the WIPO, and IPC, and Flip have pointed us to.

So, we thought we would just put it into the rationale as a good reference. I see Justine is plus one-ing that so that's good. Anyone have any other thoughts on that? Nope. Okay. ICANN

Org filed a comment that said they want us to define a conflict of— define exactly what was it in the 2012 round that ineffectively guarded against conflicts of interest, and they want specific examples.

And I think for this one, leadership talked about this and we certainly are aware and this Working Group believed that at the very minimum, there was a perception of conflicts and certainly a number of members of the Working Group in actual filings, either objections or otherwise, certainly made an argument that there were conflicts of interest.

And we just, rather than saying definitively that there were conflicts of interest, we certainly believed that there was at a very minimum a perception. And therefore rather than listing out examples which would just be arguable by all the sides, we would just state the principle here and cite the reference here and the rationale and trust that ICANN Org and the IRT will consider these principles when drafting the final rules.

Well, let us know if you agree with that assessment. I mean, like I said, we could spend time working on what some believed were conflicts but at the end of the day, it's more about perception and opinions rather than something definitive. Not seeing any disagreement with that or any hands raised so, okay.

Let's then move on to the next one which I believe is freedom of expression. This is a real difficult one too because it's one of those really important concepts but when it comes down to drafting specifics, it's not always so easy. And so I don't know if you also have our outputs on our recommendations on this one just to

refresh everyone's recollection. Do you have that up there? Is it Emily, it's your computer now? I'm not sure. Yeah. Emily, do you have the outputs from this section 10? There we go. I could summarize it but I thought it would be better just to point to them. All right. So, we're getting there.

Thank you. Okay. So, we essentially affirmed the principle from 2007, 2008 which talks about not infringing the legal rights of others and then talks about not infringing our internationally recognized rights so we just affirm that. And then we also talk about incorporating the work that's done from Work Stream 2 which some of you have participated in.

And I'm not sure if there's any other guidance after that one. I think that might be the general. Is there any more of that, Emily, if you can—yeah. So, we give general principles there, we don't really cite to examples but relying on the work that's going on now on Work Stream 2. And so now if we go back to the comments, you'll see that a couple of the comments are asking us for more specifics and that's hard to do.

If you look at ICANN Org, they're basically again wanting specifics. And I don't know if, Cheryl, if you want to address this, I know you're actively involved in Work Stream 2 and had some thoughts when we were discussing this the last time.

CHERYL LANGDON-ORR: Well, sure. Sorry. It took me a moment to get off mute. Work Stream 2 is and it's many—100 plus—recommendations are in the midst of their implementation program. Some of them, and we do

need to recognize and remember, of course, for those of you who missed the updating of the—was quite some time back, Work Stream 2 activities. It was like four point something years between making those recommendations and implementation getting kicked off.

So, that in itself means that ICANN as an entity is a very different construct, beast. Bylaws, a whole sorts of things have changed. So ignoring all of that type background on Work Stream 2. Implementation and the implementation review team from each of the tracks is currently working on the Work Stream 2 activities.

So, it does not behoove us as we discussed—as we developed these, very light touch [text] here. Well, not here, because this is the comments in the report, was that—to second guess what the actualities were or the effects were going to be, was really not in our timeline. So, what else did you want me to say, Jeff? I mean, I can't remember what words of wisdom I gave at the last interaction. Sorry. It is an unfriendly hour for me.

JEFF NEUMAN:

Yeah. No. Thanks. That's good. I think at the end of the day, we do have some things in here about freedom of speech in our rationale and we certainly have, in developing our recommendations, have certainly looked at making sure that rights are protected and that—

CHERYL LANGDON-ORR: I guess the only other one is—sorry, Jeff. Less negative feedback is occurring between my synapses. Like I suppose what the work

group should be cognizant of is of course the ongoing work and the work that has been completed regarding what is considered part of the human rights aspects and outputs of Work Stream 2 which includes that often used phrase, freedom of expression.

And of course the—what's the word? Not the guideline, the framework of interpretation, took me a while, told you I was struggling. The framework of interpretation regarding human rights and the resultant assessment tool that was recommended has been done. That is completed work.

The entity, ICANN Org itself has also gone beyond that. So, they've actually had third party assessment of other aspects of where their whole gamut is within human rights and that also includes whether there was any obvious issues regarding freedom of expression.

But it does mean that going forward, it may behoove applicants to consider that framework of interpretation as they put in such an application. Because the framework of interpretation is designed for regularity of use and that includes all activities from the SOs and the ACs. So, it is a very wide reaching, not specific to new gTLD, piece of—in inverted commas—advice. So, have I made that a little bit clearer there?

JEFF NEUMAN:

Yes. Thanks Cheryl. And I think at the end of the day, what we're going to do or what we've proposed to do, which is in the leadership comments, is to just do a footnote to this ongoing work and to the framework of interpretation.

CHERYL LANGDON-ORR: Yeah. And what we do need then to make sure we separate is, there is a [circulating ...] So, sticking it to references to Work Stream 2 and Work Stream 2 outputs, absolutely ironclad, no problem at all. But what we do need to recognize is there is also circulating a few ad hoc—sorry, results or suggestions from an ad hoc group which also uses the name human rights within ICANN.

It's well-meaning, and keen, and has great expertise but it's not at this stage in any way official activity of ICANN but it is producing templates for consideration, for example, for the ACs and SOs to perhaps pick up to assist in this exercise of doing human right impact assessments on their work. And I guess what I'm only concerned about is that what this working group tags into its report is quite specific to what is bonafide and full community process as opposed to very important but ancillary at best work at this stage. Thanks.

JEFFREY NEUMAN: Thanks, Cheryl. There you go. All right, I'm just reading the comment there, it says [something important] about the footnote. Why don't we then move on to our final topic, which is a little bit harder? Actually, no, that last topic is pretty hard.

Dispute resolution procedures after delegation. So for this one, we had some text that's got some fairly broad support, and then some didn't have any opinions, but for the ones we got, most of these are just ones where we note them. So there are a number of groups that for one reason or another feel that the PIC DRP is not

as—or as complex, lengthy and—I'm just using the language from the GAC, I think, which is complex, lengthy and ambiguous.

The problem with these comments—they're good comments, of course, and we take them seriously, but there wasn't much in the way of specificity in these comments to look at individual things to change. And that coupled with the fact that at least with the PIC DRP, there's only been two cases that have been filled—and one could look at that in a number of different opposing ways, but the fact that there's only been two of them doesn't really give us much to go on.

So the comment from the Swiss government, from the GAC as well, we note those, but at this point it's not much that we can do about that. The Business Constituency also notes about one instance where they question the timeline and transparencies, and then they cite one specific case. But that's obviously a matter of opinion, and I'm sure the registry in that case would have the opposing view of that one. So while it's instructive and it's noted, it's not something we can really act upon.

I will also note that one of the issues with the PIC DRP, at least from the first one, was that there was no ability for ICANN to take action based on fraud, and we've now addressed that and written that into—or at least recommended writing that into the contract. So that's one area where we already have made an improvement. The ALAC does suggest—and I think this is as well that there should be more promotion and outreach concerning the post-delegation dispute mechanisms.

So I'm not sure we have this in there, but I think what we're going to do is, I believe the section on communications period does talk about all aspects of the new gTLD program or outreach on all aspects of the new gTLD program. So that does include specifically ability for the public to participate, including in this way. So I think that's covered there.

The ICANN Board, if we scroll down, sort of asked the same question that leadership is posing as well. so we do put in there that for the PIC DRP and the registration restrictions dispute resolution procedure, we do have a recommendation that states that it should be clear, more detailed and better defined guidance on the scope of the procedure, the role of all parties and the adjudication process.

Now, the Board—and Org later on—note that since we started these recommendations and have been discussing it, there were adjustments made—I believe it was January of this year, 2020, or February, where the registries and ICANN agreed to change or clarify some of the elements of the PIC DRP. So hopefully, that did cover some of those issues. So obviously, we were considering this issue before that happened, so whether those couple changes does eliminate our concerns or not is not something we state in here. But certainly, I think it is still an important statement for us to make, that all of this stuff needs to be clear and publicly available.

Here again, the ALAC does want greater visibility on the efforts of ICANN Org to increase public awareness. So one of the questions that leadership had asked was whether we have some of this in the outreach, so that's an action item for us to just make sure that

this is not excluded from the communications section that we have. In other words, make sure that the outreach does in fact, the language we have does in fact cover all aspects of the program.

Then again, you have the same comment from the GAC, complex, lengthy, ambiguous. But there have been improvements made to it, but two is, again, it's kind of hard to act on these general statements. So if there were specifics that they had come forward with or anyone had come forward with, of things that absolutely needed to be changed, then we would consider that. So just looking to see if there's anything in the chat.

Still some more stuff on human rights. Sorry I've missed all this here. Avri points out that the framework's already active, and so we need to cite to the actual enacted FOI.

Okay. Are there any other questions on the dispute resolution procedures after delegation? And of course, the RPM group tackled the trademark post-delegation dispute resolution mechanisms, so that's not something we had to tackle. Anybody else with some last comments on that? Have a quiet group.

So before we end this call—and I know we're early, but I just wanted to draw attention to an e-mail I sent around about a half hour before the call on a final topical email—and thanks, Justine, for reminding us. This is the one where we talk about or ask about the community priority evaluation overall scoring. So what you'll see in that e-mail is ultimately a recommendation that we frame the ... Well, it's actually sort of two parts. One is that there's sort of a lowering of the threshold, but also to kind of frame that threshold in terms of percentage of points as opposed to just a hard score.

So people had recommended changing it from 14 to 12, but at the end of the day, that assumes or makes the assumption that all of the scoring will remain exactly as is forever. So the way that we frame the implementation guidance is more in terms of percentage in case it becomes 20 points or it becomes, in the overall scoring, out of 20 or 50 points or whatever happens in the future, that we make it a percentage as opposed to a hard score. Paul, go ahead.

PAUL MCGRADY: Thanks. Two-second question. So, does that change the outcomes in terms of contention sets? Does the highest score win, or do everybody with a certain score get put into a contention set? Sorry for not having read the e-mail yet. Thanks.

JEFFREY NEUMAN: Thanks, Paul. We don't change that from the way it was in 2012, so if two communities were successful, then those two communities would go into the mechanism of last resort or work it out or whatever. So that doesn't change.

So percentage-wise, 14 out of 16 was somewhere around 88% and 12 out of 16 is 75%. So the recommendation asks the IRT into looking into changing it into a percentage of at least 75 to 80%. So an application needs at least—

CHERYL LANGDON-ORR: Jeff, in chat, it helps me at least—it may help others, who knows, although not many people think like I do, I guess, sometimes—it's less a hardcoded number—in other words, a gating figure—and

more a threshold. So it doesn't matter whether it went to 100 points, it would still be a percentage threshold.

JEFFREY NEUMAN:

Yes. Thank you. That's right. So Maxim's going for another mechanism of dispute resolution, but I think we're going to rely on the mechanisms that we have at this point. So Marc's expressing the view of—so it should be noted that while we had a number of supporters in favor of changing the threshold, there were some that didn't support, and I point that out in the e-mail. So really would love official responses to that e-mail, because I think that's going to be important, because while some of the comments address the lowering the threshold, not all of them said one way or the other whether they agreed with that. And certainly, ALAC had agreed with it. I believe the BECAUSE, and I believe there were some others as well. But so Marc, thank you for that. And anyone else, please do, actually, if you could weigh in on the list. That would be great.

So Marc, the proposal is to change it to a percentage that makes it 75 to 80% as opposed to 88%, which is what the 14 of 16 is. I'll note for the record—and this is also in the email—that had we lowered the score to 12 in 2012, only one additional community would have passed, but that again uses the older criteria which we've made some revisions to to clarify and hopefully improve the fact that it wasn't just economic or it isn't just economic-based communities that could succeed in providing more clarifications.

So Anne, we're not making it more difficult. And I don't think that's Marc's suggestion either. We're just talking about whether to lower

it percentagewise. Anyway, I don't want to solve that here. Leadership will look at the comments we'll get in by no later than Wednesday and decide whether to add that into the final report.

And Marc, you ask a question that doesn't have a ... there's no objective, factual answer to that question. There will be people that say absolutely, there were communities that didn't make it in, and there will be others that say, well, no, according to the criteria it was done perfectly. So I don't know how fruitful of a discussion that will be. It's really about how much of an emphasis we want to put on communities going forward. Alan, go ahead.

ALAN GREENBERG: Sorry, this is a new topic, so whenever you finish this one, come to me.

JEFFREY NEUMAN: Oh, no, that's okay. Is there anyone else that's got anything on communities? Okay. Well, Alan, go ahead.

ALAN GREENBERG: Thank you. This is in regard to the message you sent out on enforceability of PICs and RVCs. And I responded to that. I realized as I was looking at the log, I had never seen any comments on it. And looking at the archive, I see, Jeff, you did respond to me. For some reason, I never got the e-mail. So just a note to staff or something. Perhaps make sure things are working. I was wondering when that's going to come back up in a discussion during a meeting.

JEFFREY NEUMAN: So Alan, I think the recommendation is essentially that ... first of all, the plan or the hope that we were just talking about before was to respond to the Board in a letter or some other communication that talks about why we believe that the current bylaws would support the recommendations that we have. So the first and foremost is that we don't think that substantively, many of the or any of the recommendations need to change from the way that we had them in order to be compliant with the bylaws. So I think that's the important part. I'm not sure what else we need to discuss for the final report. We certainly can discuss at a later point—when the final report's done, we could certainly discuss the response back to the Board. But the e-mail that you responded to was just sort of some thoughts as to why or how our recommendations could or do fit into the existing bylaw.

ALAN GREENBERG: The problem is my response indicated that I don't believe that is sufficient in the final report. And if you don't want to discuss that, I guess that's a leadership choice, but I just wanted to point that out. And as I said, I'm troubled that I didn't get that message. I don't know what's going on with the list. But I'll look into it on my end in case there's a problem here. I don't think there is, but in any case, other people may not have also seen that response. Just in case whatever the problem is is more universal.

JEFFREY NEUMAN: Okay. Thanks, Alan. Does anyone else want to address that?

ALAN GREENBERG: Certainly an important issue to At-Large. I'll point out that it's not a personal opinion I was giving. It was one that came out of a joint discussion meeting.

JEFFREY NEUMAN: So Alan, can you just help—since we do have a couple of minutes—understand what the At-Large issue specifically is?

ALAN GREENBERG: Yeah. Sure. The rationale you gave, as I said in my note, uses the term “I/we believe or think” something like six times. If any of those beliefs are false, then we may end up with contracts, terms in contracts that are essentially unenforceable. And I think the concept of ICANN signing a contract and continuing to sign contracts in the future knowing ahead of time that they're not going to be able to enforce them is ludicrous, and it puts the value of PICs and RVCs in question.

So what I'm suggesting is that if indeed everything you say is true and they're all enforceable because of that logic, that's fine. But if they're not, we end up with the whole thing collapsing. And I think we need a recommendation to the Board that ultimately contracts need to be enforceable, otherwise they have no meaning. And as was discussed when we were talking about this, if there are indeed problems, then the Board needs to be able to take action and we need a recommendation. Avri and Becky I think made it pretty clear they're not likely to undertake such action on their own unless there's a recommendation.

So I think there needs to be some level of recommendation that says ultimately, contracts are enforceable. You also commented in your responses I just saw a moment ago, I pointed out that there's a fallacy in the argument saying that disputes can be handled and can be resolved if the registry contacts with the dispute provider.

Then we have a situation that if ICANN cannot be involved in that process at all, including even identifying the acceptable dispute processors, then we have a registry picking a dispute processor on its own who may well be privately contracted to say, yes, I'll side with the registry. They get to pick whoever they want to judge their own case. And I just don't think that's acceptable. I think we need to make sure that whoever is judging these cases is impartial, even if they're paid by the registry. And moreover, we have a situation where it's possible the registry will simply refuse to do it. If there's no clause in the contract requiring them to hire an impartial dispute processor, then that dispute won't even be heard.

So I think we need an enforceable set of conditions to make sure that if there is a dispute on a PIC or RVC, that it will be heard, there will be a dispute processor who'll listen to it, they will judge it fairly, and then ICANN can enforce the results. If we don't have that, then the whole thing, again, falls apart. So I don't think we can avoid having a requirement that the registry must actually follow a policy of hiring a fair and impartial dispute processor.

JEFFREY NEUMAN:

Thanks, Alan. Yeah. Let me go to Greg who has his hand up, and then I'll put myself in the queue.

GREG SHATAN: Thanks. I second everything that Alan had to say. As a newly minted member of the ALAC, this is—and was even before that—a key concern of mine personally and now, on behalf of the ALAC. So I think that this is a ... Right now, it's all very mushy. The idea of contracts ... contracts do not thrive on ambiguity, and especially not contract enforcement. And as Alan said, if something is in a contract that's not enforceable, there's really no need for it to be in the contract. It's even somewhat of a bait and switch if it's in the contract. You may have occasionally on purpose statements of encouragement rather than absolute obligation. But you do that on purpose, you don't put something in an agreement and then say, "Well, if the other side doesn't perform, I'm not going to enforce their compliance."

So I think this is a concern. I think given that it think it falls to us to provide some rules of the road for dispute providers here, we should do so, and not leave it to the next step in this process. Thanks.

JEFFREY NEUMAN: Thanks, Greg. A couple things. So let me start with the first point that Alan made, which is that this is like a house of cards and there's a lot of "we believe" and "we think." Just to give what I said in my response, the reason why there's a lot of "the working group believes" is because at the end of the day, we the working group are not the ultimate arbiters to interpret the bylaws. So all we can really do is express our opinion as to whether something is in

compliance with the current bylaws or not. So that's why the "we think," "we believe," all of that.

And is it a house of cards? Yeah, it is. And if something changes where some of the recommendations that we put forward cannot be implemented and the Board has an obligation to come back to the GNSO and let them know that and then figure out what to do next with it. What we're expressing is a viewpoint that we don't believe that the current recommendations are not in compliance with the current bylaws, and that's all we can do. We can't really say any more than we believe, because like I said, we're not the ultimate arbiters. We're not the ICANN Board, we're not their legal counsel. It's all we can do.

With respect to making a contract enforceable, do we really need a recommendation that says that anything you put into a contract should be enforceable? Isn't that kind of implied in any contract? It doesn't necessarily hurt to have something in there, but it doesn't seem necessary. Why would you put something in a contract you didn't or couldn't enforce.

So the reason why there's nothing in there right now that says you need to enforce or you need to make sure everything in your contract is enforceable, it just seems like one of those things you don't really need.

Now, Marc on chat, "ICANN's got a history of not enforcing things." That's a choice that ICANN makes. It's enforceable, but whether ICANN chooses to enforce it or not is a totally different question. And that's not one we can really ... That's not really the question here. The question is whether it's enforceable. And it is,

at least in our view. So we're not the general counsel of ICANN, we're not in a position to say anything other than we believe it's in compliance, and that's it.

Now, nowhere in the recommendations does it say that the registry can pick an impartial dispute provider. Now, whether we need to say—at the end of the day, because—remember, what we're talking about here is where there is, let's say, two parties agree to a settlement and therefore there's some content restriction, let's just say, in their agreement, the two parties will be the ones to pick the dispute provider. So those two parties that entered into the settlement agreement will pick a dispute provider. We can't tell them who they can and can't pick, so it's up to those two parties to pick the dispute provider.

Now, were it something with, let's say it's because they made a change to their agreement because of ... let's say it was GAC advice that basically wanted ... whatever it is, wanted some restrictions, and let's say ICANN wants a content-based restriction that they should not be the ultimate arbiter of. We never said that the registry could pick its own arbiter and it could be biased and always find in favor of the registry. I don't think you get that from our recommendations.

But in the registry agreement, there should be a provision in there that agrees to some sort of dispute provider. And since the registry agreement is with ICANN, then ICANN needs to consent in that contract to the dispute provider selected by the registry. So again, I think I would agree with you, Alan, in the sense that if it was worded in such a way as to where the registry can pick their own dispute provider and no checks and balances, then yeah, but

that's not the way it's written. I'll go to Maxim, and then if anyone else wants to enter the queue.

MAXIM ALZOBA:

First of all, I might remind that PICs are part of contract. It's not something separated from the text, and thus, the registry contracts have few pages of what is compliant and how that's resolved. So, just it's formally not different from other lines of contract. And if a registry in a breach of any piece of that text, it's a compliance matter and it's resolved by ICANN Compliance. Saying that some third party have to have more power over ICANN contracts than ICANN itself, it's not a good idea. I'm not sure if the board approves such approach. And the last thing is nothing prevents a registry from adding text saying clearly what should be and what should not be done in situations relevant to those PICs items which were the reason for granting such TLD to them.

And following that, and since it's a part of contract, nothing prevents ICANN from just enforcing—following those bits of text. Not looking into the substance. That's it. Thanks.

JEFFREY NEUMAN:

Yeah, thanks, Maxim. I think the one difference between PICs and other provisions in the contract is that a third party can initiate the compliance action and Compliance has the option to bring in a third party to hear the issue. Whereas, if it's just a normal contractual provision, ICANN does not have the discretion to outsource, if you will, the decision as to whether there was a violation. But that's the only difference or the major difference, I should say, with some of the PICs, not all of them. Greg, go ahead.

GREG SHATAN:

Thanks. Just briefly, hopefully. On the, “I believe,” and, “I think,” area, I would suggest considering that where we’re stating something that is a fact that we have been informed of, or something that we believe is an external fact to say, “It is our understanding that ...” And where it’s completely an opinion then maybe, “We believe.” But I would suggest the, “It is our understanding,” when we’re not merely opining but reporting what we believe has been stated elsewhere and that we’re relying on, at least in moving forward. And secondly, now I agree very much with Maxim and with those who say that everything in the contract should be enforceable.

The fact of the matter is that over the last number of years there’s been a lot of discussion of enforceability of PICs, so I think that perhaps we want to say, “For the avoidance of doubt,” or, “For the purpose of clarification,” or, “We affirm that PICs are parts of contracts and therefore expected to be fully enforceable and subject to the decisions of the parties.” Just to say that we say that we say that—[inaudible] too much to say. Just say that we’re confirming that we understand they are enforceable PICs and RVCs which are PICs part deux or de novo PICs. Still wish it didn’t have the word voluntary in there because it’s still going to confuse people who think it isn’t. Maybe that’s one of the reasons why people think it isn’t enforceable, because it has the word voluntary. But I digress. Hopefully, a little clarification could end this exciting discussion once and for all. Thanks.

JEFFREY NEUMAN: Thanks Greg and so good point on the—all of them are good points. But I like the notion of going into and only stating, “We believe,” if it’s purely an opinion, but if it’s something where we are basing a good amount of recommendations on, I like the, “It’s our understanding that.” And so I think we’ll go through that in this section and change that wording. I think that’s good, and I think adding something to the rationale about enforceability or that we’re adding these to be enforced, I think is a good suggestion as well. Okay.

ALAN GREENBERG: That’s a new hand, Jeff.

JEFFREY NEUMAN: Hold on a sec, let me scroll down. Go ahead, Alan.

ALAN GREENBERG: Okay, thank you. A couple of points. Yes, we assume when contracts are enforceable, but in this case, we’ve had several red flags raised and we know that some of the words in the bylaw were put in at the time of the accountability exercise to, in fact, make sure that content related PICs were not going to be enforceable in the future. And we’ve had flags raised by a number of people, including the Board, that there might be potential problems. So although a presumption of enforceability for any contract is always there, in this case, we have had warnings and I think we have to act on them. We cannot pretend those warnings never happened. So, and again in terms of the contracting with a

dispute processor, I think there need to be hard contractual terms saying that is an obligation because, if not, it may not be done.

I think because of the assumptions we're making here, because we've had red flags waved, I think we have to take the prudent way. There are no third-party beneficiaries in our contracts unless they're allowed for in dispute processes. And, therefore, we need to make this crystal clear and not just presume that the right things will be written into the contracts when we come to that point during the implementation. Thank you. And now the hand is down.

JEFFREY NEUMAN:

Okay, thanks, Alan. I can't remember so maybe Emily, Julie, or Steve can correct me. I guess we'll go through the text of this section. And Alan, if you could make sure you read that and tell us specifically in the text what you would change, that would be helpful. Let us get back with the next redline of this, which should be shortly, and then, if that's not acceptable then let us know specifically what words you would put in there. Paul, go ahead.

PAUL MCGRADY:

It's Paul McGrady. Sorry Alan, go ahead.

ALAN GREENBERG:

Yeah. Jeff I just wanted, for clarity, when is this likely to come up? Is this going to come up this week or do I have a few days to do this?

JEFFREY NEUMAN: Well, we're probably going to submit the next redline in the next day or so.

ALAN GREENBERG: Okay.

JEFFREY NEUMAN: And it should be the last redline to cover all the subjects. Paul, go ahead.

PAUL MCGRADY: Thanks. In so doing, Jeff, I just would like to urge a bit of caution in terms of contractual construction by most courts around the world. That, a generalized clause saying, "Hey, this contract really is binding," is redundant and when you go in and you pick a particular clause and you say, "And we mean it. This particular clause is really enforceable, I mean super-duper enforceable," then that casts doubt on the rest of the contract about whether or not the rest of the contract is super-duper enforceable. Again, I think that we might be creating the bad outcome that some people are worried about by tinkering with the contract like this.

As you guys go through it, please do keep in mind that there have been others who have already said, essentially, "We're not the general counsel of ICANN and this is really not what the working group is supposed to be up to." So whatever edits you guys make I hope they're minor and don't usher in even more difficulties around these agreements. Thanks.

JEFFREY NEUMAN: Yeah, thanks Paul, and we're not drafting the contract so that's not our role and I don't think that's even the—well, I guess the implementation review team will be assisting. It's ICANN staff that drafts the ultimate new agreement, but totally get your point and I see Maxim also supports that. So, Alan, go ahead.

ALAN GREENBERG: Yeah, just to be clear I wasn't proposing that we have a clause in the contract saying, "This contract is really enforceable." I agree completely with Paul, that would be ludicrous and it would call into question why we're saying that. I'm looking for provisions to make sure it's enforceable and ones that ICANN has not already said, "We're not going to enforce," or, "We may not be able to enforce." Thank you.

JEFFREY NEUMAN: Okay. Thanks for the clarification, Alan. All right, let me just take a look and see if I missed anything in the chat. Greg says, "I think the point is that there should be no difference in enforceability between the PICs and the rest of the contract." And I think that is correct, that there is no difference in the enforceability. It's just who makes the decision as to whether something was violated or not may be outsourced to a third party because ICANN may believe it's beyond their mission to be the arbiter of content-based restrictions. Okay. Any other last words here? For Thursday's meeting, we are going to see if there's any last-minute items that we need to cover.

You will get another redline way before then, to look at, which will be the final redline. If there's any last issues to cover on Thursday, we will cover those. Then we will quickly make any changes and freeze the text, and also we'll discuss the consensus call methodology and the sections that we're going to group together, as we talked about the last time. And leadership is still talking about the timelines and so we're ... Cheryl, do you want to?

CHERYL LANGDON-ORR: Yeah, I do, Jeff. I just want to make sure that everyone realizes it is the members of the Working Group who will be responding to the consensus call. If they are [directed] or not is kind of not our issue. We're interacting with the members, capital M, as listed on the Wiki, of the Working Group regarding responses to the consensus call and I would venture, the minority reports. So, for example, advisory committees need to consider exercising their rights for other mechanisms of giving advice as well. So just [seem to feel] there's an awful lot of, "But we can't have enough interaction with our community before we respond to whatever," recognize that, but you are here as recognized members of various constituencies. If you are, for example, like Justine an authorized liaison appointed by the ALAC then that's a different kettle of fish. But let's make sure we realize whom we will be looking to to respond to our consensus call when it goes out because I think there's a bit of muddling there from some. Thank you.

JEFFREY NEUMAN: Yeah, thanks, Cheryl. It's a great point and one I appreciate you making. And, yeah, the assumption is that when you give your thoughts in the consensus call it is you personally. Unless you tell us otherwise. I mean, you're free to say, "And this is the view of the IPC." I'm just looking because Anne's got her hand raised and I'll get to you, Anne, in a second. But the assumption is not going to be that Anne is voting on behalf of—sorry, voting is a bad word. Did not mean voting. That Anne is expressing her view as Anne, that is the assumption. Not that Anne is expressing the view of the IPC.

So while we understand and we have received the GAC letter. To the extent that anyone from the GAC is participating in this group and wants to participate in the consensus call, they are participating as a working group member, not as the GAC. And so when minority statements come in, they should be coming in from a person in the working group that, again, could be speaking on behalf of another organization if they so choose. But that is not the assumption. Anne, go ahead.

ANNE AIKMAN-SCALESE: Yeah, thanks, Jeff. And I appreciate the discussions on the clarifications. The Working Group guidelines in relationship to minority viewpoint talk about a minority viewpoint being the viewpoint of a quote, "Small number of individuals." You guys seem to be characterizing the reactions to consensus call as something that could happen on behalf of one individual member. But minority viewpoints, I think, are designed under the working group guidelines to be coordinating with others who may share your minority viewpoint and so that's question number one. I do

have another question, but that's where I was coming from on that.

CHERYL LANGDON-ORR: Can I react to that one? Yeah, I get excited at this time of processes. Sorry, Jeff. It's my queen of process genes coming out again. I'll try and tamp them back down, I promise. Anne, there's a difference there in your question between a minority viewpoint which will be considered in how the chairs of the, in this case, the new gTLD Subsequent Procedures Working Group assess what is or is not the level of consensus, and a minority report which is lodged either individually or from a small group, and we've seen them happen in both ways. So don't care who signs a minority report as long as the minority reports are available so that they can be appended without either discussion or any annotation. They just get added, because we don't fiddle with them at all, to the final report.

There's a difference there. But the chairs do have to consider either the value of clusters of opinion just the same as they are considering the difference between numerical value and some other measure as well. The reports and opinions are not the same things. That's all. Thanks. Sorry, Jeff, I'll try and behave again.

ANNE AIKMAN-SCALESE: Okay, as just to follow-up then Cheryl. Are you saying that minority viewpoints will actually be—already you guys will be publishing minority viewpoints in the consensus call? [inaudible].

CHERYL LANGDON-ORR: A viewpoint would be considered. So let me try and take it through an example then. If we see all of the advisory committees are of a particular opinion on a particular issue then we see that, but it does not prevail. Right? So the view of the GAC and the ALAC does not prevail on a particular issue. That is noted, it is taken into consideration as we decide on what will be the published level of consensus. It doesn't mean that we articulate those viewpoints in that. We may note that there was a uniform minority viewpoint from the advisory committees that did not prevail. But we're not going to rearticulate anything. Does that help you understand?

ANNE AIKMAN-SCALESE: I guess my question was a yes or no question. Will you be publishing minority viewpoints in the consensus call report?

JEFFREY NEUMAN: No.

CHERYL LANGDON-ORR: Absolutely, unequivocally, capitalized, bold-faced, no.

ANNE AIKMAN-SCALESE: Well, in that case I don't see the difference between minority viewpoint and minority report. I'm sorry, it's a little confusing. I mean, the operating ... the guidelines [inaudible].

CHERYL LANGDON-ORR: If you want them published, if anyone wants them published, report in by date, appended, end of story. [inaudible].

ANNE AIKMAN-SCALESE: And are you saying that an individual can file a minority report rather than what...

CHERYL LANGDON-ORR: Absolutely. Absolutely. As long as they are a member, capital M, listed in the Wiki. Absolutely.

ANNE AIKMAN-SCALESE: Okay, so if there's no minority viewpoint that's going to be in the consensus call and no minority viewpoint that would result after the consensus call, what is the meaning of minority viewpoint in the Working Group guidelines?

CHERYL LANGDON-ORR: The opportunity for minority reporting has been a fair and reasonable activity in all of the policy work that I've been involved in over many iterations with ICANN. And that's because we don't silence or influence the ability of voice or voices being put forward to be associated with the report, and I have no problem doing that. But that's a minority statement.

ANNE AIKMAN-SCALESE: Yeah, it seems that based on the distinction you're making that there would be minority viewpoints in the consensus call because you've [inaudible].

JEFFREY NEUMAN: Sorry, let me jump in.

CHERYL LANGDON-ORR: We will hear everything, Anne, and trust me, we're listening, and it'll all be considered. But it's not not considered but it influences the degree of consensus that the chairs allocate. And then you've all got a couple of days to disagree with us and that's okay too.

ANNE AIKMAN-SCALESE: Right, but you've said in advance that there were no minority viewpoints in the consensus call and that makes no sense [inaudible].

CHERYL LANGDON-ORR: I never said the term minority viewpoints. Sorry, if there's a nomenclature problem there. Minority report or statement has been used as interchangeable terminology. Viewpoint, certainly not out of my mouth and I doubt out of Jeff's.

JEFFREY NEUMAN: Yeah, so Anne, let me try to simplify this a little bit here. You, as an individual, would respond to the consensus call either in support of the subjects or not in support, and then we'll ask you to

specifically state what you're not in support of. Then Cheryl and I will take back all of these individuals that responded and we will determine the level of consensus according to 3.6. And so if there is a full consensus, well that's easy, we'll designate it. If there's consensus, that's a position where only a small minority disagrees but most agree. Then if you scroll down into the definitions, there is and can be a minority review refers to a proposal where a small number of people support the recommendation.

This can happen in response to a consensus, strong support but significant opposition, and no consensus. So Cheryl and I see that the reason that two advisory committees, let's say, have objected happens to—or sorry, that the individuals from these advisory committees that have indicated their non-support have done so for a similar reason or they would rather have a similar alternative, then at that point, Cheryl and I, after reading all of these can go, “Okay, there is strong support, significant opposition, and a minority of those that responded said that they wanted to see this, this, and this.” Right? In your response. That's what we could do as a minority view.

But that's very different than a minority report which is filed by you or an individual after we've indicated the level of support. So, Cheryl and I do not have to express any minority views but if we notice that there is, we may. The other thing just to remember that's important is—and I'd really want to emphasize this—that we've all worked very hard to come up with compromise language on a lot of areas, and a lot of you have worked very hard on doing that. And we understand that no one got everything, or probably even most things that they wanted. But we would hope that when

it comes time to indicate the level of support, that you would take that into consideration when indicating whether you support something or not for the purposes of the final report.

Now, again, it may not be something you agreed with when you came into these discussions four or five years ago. Individually, it may not be something you agree with today, but if it's something that you believe represents a compromise of the group, a workable compromise of the group, then we ask that you take that into consideration in response to the consensus call. Otherwise, what we will be left with really just a reflection of what you individually came in with and that's what we're individually coming out with and it won't represent the hard work that's been done. Now, there will be some areas that we fully expect not everyone to agree on and that's fine. I think we all know those areas.

But if there's a subject that we have gone over, and over, and over again, whether you got everything you wanted or not, we would still love to see the compromise reflected in your assessment of support or non-support. I'll leave it at that. Any questions on that? Okay, so look out for some emails on this and we will talk to everyone on Thursday. I don't know if the time was put into the chat yet. I'm taking a look, there you go. December 17, Thursday at 20:00 UTC, after which all text will be locked. Thank you everyone and, yeah, I think we can end the call.

CHERYL LANGDON-ORR: Thanks everyone. Bye for now.

MICHELLE DESMYTER: Thank you everyone. Meeting adjourned.

[END OF TRANSCRIPTION]