1. Summary of the CWG proposal

The core of the CWG proposal is that a new legal entity (which we call the Post-Transition IANA or PTI) would be formed. PTI would be an "affiliate" of ICANN, which is the nonprofit version of a wholly owned subsidiary.

The existing IANA functions department, staff, resources, processes, data and know-how would be transferred to PTI.

As a separate legal entity PTI would have its own board of directors. The composition of the board or its method of appointment is not settled yet, see further discussion below.

ICANN would contract with PTI for the naming-related IANA functions. The contract would be subject to non-renewal by ICANN if a Periodic Review Function (PRF) team, which would be an independent multi-stakeholder body independent of ICANN, recommended it. PRF makes recommendations to ICANN board, e.g. to replace PTI board members, remediate breaches of the IANA contract, or to initiate an RFP or even terminate the contract and transfer the naming-related IANA functions to a new entity. The period we are talking about is 5 years, but is not fixed yet.

There would also be a Customer Standing Committee (CSC), an independently organized group of direct IANA registry users. It would receive reports from PTI about performance, and would be able to raise issues related to performance with the ccNSO and GNSO, and ultimately the ICANN board. This could trigger a special review function outside of the normal periodic one.

2. MM's somewhat-hasty analysis of the implications for the proposals for the protocols and numbers communities

By creating a legally independent subsidiary, the names community is, within the constraints of NTIA's deadline and ICANN's legacy structure, trying to replicate the contractual arrangements and separability that already exist for the protocols-related IANA functions and the newly proposed contract between the RIRs and ICANN for numbering-related IANA functions. This is perceived as a middle ground between a purely internal solution and a more external solution.

My assessment is that the CWG plan is fundamentally compatible with the numbers and protocol proposals and in some ways enhances them because it is based on a similar model. Both numbers and protocol proposals were drafted before the idea of a legally separate PTI was floated, so naturally they assumed these agreements would be with ICANN rather than PTI. So some minor adjustments of both proposals could be made to reflect the new counterparty to the contracts.

2.1 Contracting with PTI

2.1.1 IETF

IETF (actually IOAC) already has a MoU with ICANN for the protocols registry (RFC 2860) and an SLA with ICANN's IANA department. According to CWG's legal advisors, any existing contracts or MoUs that third parties have with ICANN with respect to the IANA functions could be handled in any of the following three ways:

- It can be assigned to or assumed by PTI

- It can remain at ICANN with a subcontract to PTI
- It can be replaced with new arrangements

For IETF, which is happy with the status quo, my sense is that the first option is the most desirable because the existing MoU and SLA simply move to PTI when it is divested from ICANN as a separate legal entity. I do not know whether IETF would have to revise the language of RFC 2860 to say "PTI" rather than "ICANN" but I do not see why it would. IETF members of ICG have already clarified that ultimate enforcement of the MoU rests not with courts but with their own ability to exit.

The second option would have the advantage of not requiring a nominal change in the counterparty to RFC 2860, but would introduce a potentially troublesome intermediary (ICANN) into the negotiations with the actual IANA functions operator. Worse, it might also mean that the protocols and numbers IANA functions remain in ICANN proper and don't go to PTI. One would assume that all 3 IANA functions should be housed in a single corporate entity, for the sake of scale, simplicity and coordination. Of course, should any operational community exercise its right to switch IANA functions providers, there is the possibility of separating the execution of the 3 functions. But at the outset it is probably best to stay with a single provider, as separation is seen by all 3 communities as a last resort remediation.

The third option seems the least desirable as it might lead to renegotiation of the whole MoU. One gets a very strong message from IETF that they don't want to re-open RFC 2860.

2.1.2 The Numbers OC

The RIRs are proposing a new contract with ICANN for the numbers registry.

For the RIRs, the creation of PTI does not disrupt an existing contract; thus, the CRISP proposal could be adjusted *ex ante* to specify PTI as the counterparty rather than ICANN. But, the issue of who the RIRs negotiate with to finalize this contract during the transition process remains somewhat fuzzy. ICANN legal is already engaged in negotiations with the CRISP team about their proposed contract. The PTI board does not exist yet. Should ICANN negotiate the agreement with CRISP or should CRISP deal with the new PTI board?

In addition to that ambiguity, negotiations between CRISP and ICANN legal raise a very important process issue. As ICG we have viewed ourselves as an entity that receives consensus proposals from the operational communities and does not try to alter them. Shouldn't we expect the same from ICANN? If ICANN legal is attempting to make major alterations in the terms of the contractual rights exercised by an operational community as part of the transition, isn't it interfering with the consensus proposal of the affected operational community? There is also the fact that these negotiations are going on behind the scenes and are not transparent to the whole involved community.

2.2 The PTI board

The CWG proposal does not yet specify the composition of the PTI board. There seems to be consensus that the board should be small, and not broadly multi-stakeholder, so as to avoid interjecting policy considerations into the performance of the IANA functions.

One option is that the board would be designated entirely by ICANN and/or would include its CEO. I don't know how much support this idea has, but several have noted that it undermines the independence of PTI, which is the whole purpose of legal separation in the first place.

Other proposals try to make the PTI board representative of the 3 operational communities. One specific idea would have a board of 5 persons consisting of the existing IETF liaison to the ICANN board, someone designated by the Address Supporting Organization (ASO), someone designated by the GNSO, someone designated by the ccNSO, and the Executive Director of the PTI (i.e., the general manager of the IANA functions).

Within the GAC there seems to be some support for making the PTI board include governments and other policy-oriented stakeholders, however.

The PTI board composition options that include protocols and numbers community people may create the need for additional actions by the other communities to specify their desired level of participation in the board, if any.