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Board Meeting with Registrar Stakeholder Group

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Tuesday, 21 June 2011

ICANN Meeting - Singapore

>>PETER DENGATE THRUSH: Okay. Let's begin, if people could take their seats. We'll do an introduction for the scribes of who is at the top table, and we'll begin with the questions that we've exchanged as the agenda for this consultation.

So if we could just quickly start at your end of the table, David, and just perhaps for the scribes' benefits, let them know who is on the table.

>>DAVID OLIVE: Thank you very much. I'm David Olive, ICANN staff.

>>STEVE CROCKER: Steve Crocker, ICANN board.

>>KURT PRITZ: Kurt Pritz, ICANN staff.

>>ROD BECKSTROM: Rod Beckstrom, ICANN board and staff.

>>PETER DENGATE THRUSH: Peter Dengate Thrush, ICANN board.

>>MASON COLE: Mason Cole, chair of the Registrar Stakeholder Group.

>>ROB HALL: Rob Hall, Momentous, from Canada, and I am the nomination committee of the EXCOM of the registry -- registrar group.

>>PETER DENGATE THRUSH: That's a lot.

>>ADRIAN KINDERIS: Adrian Kinderis, AusRegistry group and I'm the representative to the GNSO Council.

>>JEFF ECKHAUS: Jeff Eckhaus from eNOM/Demand Media, and I am treasurer of the stakeholder group.

>>STATTON HAMMOCK: And my name is Statton Hammock. I'm with Network Solutions and I'm vice chairman of the Registrar Stakeholder Group.

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>>PETER DENGATE THRUSH: Could I just ask board members to stand up? I'm not going to ask you to introduce yourselves.

Could board members, liaisons, directors, et cetera, just stand up so people know who you are? I think we've got pretty full attendance of board members, so the idea is we have a pretty open exchange and we've got a first question and I'll perhaps ask you, Mason, to kick off the substance of today's talk.

>>MASON COLE: Thank you, Peter. I do.

We've asked to talk a bit about the registrar accreditation agreement. I prepared -- our stakeholder group has prepared a communication which has not been published but I'd like to read just a bit of that as a way to kick off the discussion, if I may.

So let me just begin by this.

There's an introduction and then there's, I don't know, five or six points, so allow me to do that.

The registrars recognize that within the ICANN community, there is friction around the RAA. Unfortunately, that friction comes from a drift away from the well-established and understood way that ICANN forms policy. Instead of recognizing that ICANN, as it has so often referred to itself, is a bottom-up, consensus-based policy development body, an unfortunately growing part of the community has somehow come to believe that support organizations form de facto policy by direct negotiation of contracts and not through their policy development process. The RAA should reflect the results of the policy development process rather than the other way around.

The more practical question, rather than dealing with individual contract amendments, that we should all be asking is: What are our desired outcomes and what is the most sensible way to reach those outcomes? The answer sometimes will call for a contract amendment. Often it won't.

However, the community continues to default to the RAA as the preferred, if not sole, method for implementing policy, and if that happens, perspectives will remain skewed, accusations will continue to be leveled, and trust will erode.

Registrars don't want to see this happen, and if there's going to be improvement on anything, we'd like to start with that.

So let me address a few issues.

The first is why the RAA has become the focus.

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Registrars can interpret that community thinking may be going something like this -  
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Oh, I'm sorry. We're scribbling? I apologize. I will slow down.

Community thinking may be going something like this: We see things that registrants and bad registrars do that want to be controlled or eliminated. Registrars are the ones that deal directly with registrants, the RAA governs registrar activity, the RAA is an enforceable document, and if we amend and enforce the RAA, we can better control what registrants and registrars do.

The second item is why the RAA is not a wide boulevard and why the picket fence provision of the RAA is important.

So, quick and appealing as the RAA may seem as a path, there are problems with that line of thinking.

It doesn't honor ICANN's established policy development process for establishing the rules that the industry operates under, it introduces unpredictability in the way registrars care for their customers, and it is not the fastest way to effect change, as changes to the RAA come into effect only when a new registrar becomes accredited or an existing registrar renews their accreditation agreement.

ICANN, by its own declaration, handles policy development related to the technical coordination of the Internet's unique identifiers in a bottom-up, consensus-based manner. ICANN does not coordinate domain name policy in a contract amendment debating model.

The community has at its disposal a reliable, predictable method for developing policy, with full opportunity for community input.

Our third item is the idea of policy development processes versus amendments.

There's a great deal of talk about making sure that impacted parties have a say. Registrars certainly agree to the importance of a community say in policy development. There's a fundamental misunderstanding, however, of the separation between the GNSO's role in policy development and ICANN the corporation's role in converting policy into contracts.

Contractual condition policies were the outcome of a PDP, not of a contractual negotiation with registries or registrars.

The order goes like this: The GNSO develops policy through a PDP where the community has a say; staff converts policies, if necessary, into contract language with the other party to the agreement; the draft contract is published for public

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review and the board would not presumably approve a contract that's inconsistent with approved policy.

The ICANN staff has used policy to guide development of agreements and to guide contractual negotiations. It has used this model successfully over time, including recently the agreements for dot xxx and dot net.

The fourth item is the assumption of an outcome.

Amending or at least proposing amendments to the RAA may not achieve the ultimate objective either. It focuses the debate on specific implementations of business rules without clearly defining the related objectives, principles, policies, and impacts prior to determining the best implementation.

Registrars learned this during the meetings with law enforcement agencies to review their proposals, discovering several technically unworkable, while others created conflicts with national law and international treaties and we are now in the process of working through those issues with the law enforcement agencies.

So assumptions about the outcomes of policy, whether implemented through a PDP amendment or another method, are dangerous and can sometimes be wrong. All need to take appropriate care with a road to a hoped-for outcome.

The fifth item is having a say in negotiation.

Clearly there was dissatisfaction over the extent of changes to our 2009 agreement. It should be noted that registrars primarily agreed to changes that were consistent with policy -- for example, the need to escrow our WHOIS data -- but improved implementation based on industry experience.

There was no substantial change in policy in the amended agreements, and this frustrated those who wanted to create new policies such as requirements to authenticate registrants or restrictions on privacy services through direct changes to the agreement.

One would have to agree, as others including non-contracted parties have pointed out, that contract by committee is a prescription for a messy outcome.

Now, if I may be direct about this, I'd like to deal with the next issue, which is the perception of registrars in the community at the moment.

That is, that the registrars are the party of no or a continual roadblock --

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>>PETER DENGATE THRUSH: sorry to interrupt, but there's a lot in that -- you seem to be moving off the RAA. I'd like to come back to some of that, if you'd like, to help frame that conversation.

>>MASON COLE: Certainly, yeah.

>>PETER DENGATE THRUSH: The issue for me seems to be -- the question really seems to be: What do you think the proper limits to the scope of the RAA --

You're complaining about people wanting to expand it, so what do you think the proper limits are, and how do you define that, and how do you keep other people out of helping define that?

The next exercise is who should be able to negotiate amendments to that? Who are the proper parties to that contract, in other words, and who can negotiate amendments to it.

And falling out from that was the question then: Well, who ought to be able to sue for breach of that contract and who are the beneficiaries? Is it limited to the parties or -- or are there perceived third-party or even nonparty benefits?

So can we come back to your --

So you're complaining that we've got that wrong, so what's your view about what the proper limits to the RAA should be?

>>MASON COLE: Well, fortunately or unfortunately, I'm not a contract attorney, but -- but the registrars' interpretation of the agreement is that within the picket fence, the community has an opportunity to influence outcome of a particular amendment. Other than that, the agreement -- or the policy is developed through the GNSO process through a PDP.

>>PETER DENGATE THRUSH: Okay. Bertrand?

>>BERTRAND DE LA CHAPELLE: Thanks, Mason.

Bertrand de la Chapelle, for those who don't know me.

The -- thanks for the very dense amount of information and I've followed that very closely. I've listened to a certain number of comments made in the community regarding this process, and I understand better, after what you described, where the problem lies.

Let me put it this way: Supposing that we follow exactly every argument that you've lined up, the question nonetheless remains the following: As ICANN is using

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contracts as a way to embody a community agreement developed through policy, as -- if I follow your reasoning, the policy that has been made is transferred to staff to convert it into a contract. We still have the question of whether, in converting this policy into a contract, the staff has, by the sake of negotiation or by misunderstanding or by transforming it, changed, actually, or not faithfully converted. Because a negotiation is a negotiation.

Once it is in the hands of the staff to negotiate with the registrars, it becomes a negotiation. By definition, there are things that move. That's the purpose of a negotiation.

So the key question that -- again, irrespective of changing anything -- and there may be changes to the -- or disagreement with the line of thought that you have. My line of thought is, even if I follow exactly the -- what you have, if there is no visibility in the different parts of the negotiation process, how can the community verify that the translation has been faithful before it arrives and it's revealed in the end, in which case it is just the responsibility of the board to say, "Yes, we're scrutinizing every single line."

I think there is benefit -- and maybe there are arguments against -- there's a benefit to having some involvement, some following, some monitoring, some capacity to observe the course of the negotiations so that the community, with its different viewpoints, has the possibility to verify that the policy that was adopted is actually faithfully translated.

I got the point -- and I think it's an important one -- that the negotiation should not be a proxy for a policymaking. This is an important point. Thank you.

>>PETER DENGATE THRUSH: Can -- thanks, Bertrand.

Before you move to those two very different questions, have we satisfied the question that I posed, which is the proper scope? It's simply a PDP that should set this? Or is there more to that?

Because this seems to be the fundamental issue. We'll come back to Bertrand's questions, which are, as I understand, Bertrand, the transparency of the negotiations and the accuracy of the transcription into the contract. Good point -- good -- the lower-level technical questions.

At the higher level, who should be making this and what is the role of the PDP versus, if you like, bilateral negotiations between a registrar, almost, or the registrar community and ICANN. That seems to me the key turf issue that needs to be sorted out.

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>>ROB HALL: And Peter, if I can answer that in this way: The RAA, I think, is broken into two parts. Clearly there are the contractual provisions of doing business together between two parties. Also in the RAA is what we refer to as the picket fence, but -- where it defines and perhaps needs to more clearly define which policies can be affected by the GNSO that automatically become part of our contract, if they are put into place through a PDP or consensus process.

I don't think any registrars are saying, within that picket fence, whatever those policies are that we define can be affected or changed by the GNSO, that we don't want to agree to them. In our contracts right now, this exists. What I think we see happening is people saying, "I don't want to go through that process. Let's jump over to the administrative side of ICANN in the contract and try and put clauses there." Because that's easier to negotiate than going through the community bottom-up process.

So I think we'd all be happy with clear definition of what's in or out of the picket fence, because we know the process of how to affect those. I think what we're worried about, frankly, is people trying to end-run that process and say, "Let's jump around that and put them into the non-policy part of our contract as a way of faster and perhaps more enforcement."

>>PETER DENGATE THRUSH: So just I understand, we understand the concept of the issues that are in the picket fence. Are you saying that people are taking issues that are in the picket fence and not using PDP for them, or is there lack of clarity about what's in the picket fence so people are able to say "We don't need a PDP to deal with that, we can do that over here."

>>ROB HALL: Both, I think.

>>PETER DENGATE THRUSH: Okay. So that should be a relatively straightforward issue. We need, by whatever process, a list of the issues inside the picket fence. Those are the ones that we agree will be changed by a PDP and which we, as registrars, will all immediately agree to be bound by. And quite clearly on a contractual basis, you need to know what they are and what the process is that changes them before you commit in advance to being bound by them. That seems to me --

>>ROB HALL: Correct.

>>PETER DENGATE THRUSH: Right. Okay. Well, I understand. Thank you, and it was --

>>ROB HALL: Sorry. And if I can answer the second part of your question, though, about third parties, I think there should be no third-party privity to the contract, if you will. It's between you and us. I'm not sure we would ever want third parties,

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but that may get into a longer discussion. But it seems to me that what's happened right now is the community has come up with their list of wants. It might behoove staff or ICANN to go through that and say, "These are not within a contract negotiation. You have to go through the picket fence process for them. These are."

So I don't know where that process is, but it seems to me that would be the process we should follow.

>>PETER DENGATE THRUSH: Okay. And there was a comment -- Jeff, is it?

>>JEFF ECKHAUS: Thank you. I just -- I'm not a contract lawyer either, but I did want to state that it does specifically state in the RAA that there are no third-party beneficiaries and I believe that was the question that you had asked.

>>PETER DENGATE THRUSH: Do we want to get a sort of -- a staff reaction about this or anyone else's reaction?

I've got Bertrand. Can we start with Thomas? Thomas.

>>THOMAS NARTEN: Yes. So I -- maybe kind of a clarifying question. I mean, the question about what is within the picket fence and, you know, what should be done via contract is not a new issue, and we've heard that at meetings in the past as well. And so what I'd like to know is: Are you bringing this issue up now kind of in the generic sense because this is an issue that hasn't gone away or are there specific things going on today that are driving your need to discuss it now?

>>PETER DENGATE THRUSH: Mike or Bruce?

>>ROB HALL: No. Sorry. Turn your mic on. We can't hear you.

>>BRUCE TONKIN: I was just making a side comment, but it's probably appropriate for you guys to answer that.

>>MASON COLE: We became party to a renegotiated contract beginning in 2009, and the community wanted to keep that process open, the amendment process, so it's been a -- it's been a -- it's been a steady issue for the past two years.

>>PETER DENGATE THRUSH: Well, what about staff reaction? There's either -- there's either a clear list of things that are inside the picket fence or there isn't. What's the staff view about the clarity of that list?

>>KURT PRITZ: I think it's hard to establish that list a priori. We have a list of topics the community wants us -- the registrars and ICANN -- to consider for amending our registrar accreditation agreement. As those negotiations move

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forward, they might move into a policy area on that topic or it might be outside the picket fence.

The staff position -- or my position, anyway -- is that ICANN and the registrars should start negotiation on those topics and see where we can move forward and make amendments, take the topic areas, see where we can agree to amendments.

In parallel the GNSO Council, you know, can undertake a PDP or a policy discussion on anything that's policy-related.

So the registrars and ICANN can -- can negotiate any set of amendments, so long as it doesn't violate existing consensus policy, and the -- in parallel, the GNSO can take up, you know, any issues that are -- that are policy issues.

>>PETER DENGATE THRUSH: Okay. I've got Bertrand, StÈphane, and Bruce.

Could I just ask a question? What -- as -- because I am a contract lawyer and I can't understand how we can be having a discussion like this without a reasonably clear specification. So who set up the picket fence? Where do I go to find it?

>>ROD BECKSTROM: RAA.

>>PETER DENGATE THRUSH: Okay. I'll go and have a look at that in a minute.

StÈphane -- sorry. Bertrand, StÈphane, Bruce.

>>BERTRAND DE LA CHAPELLE: I'm not a contract lawyer either, but the contract is the form. It is not all of the agreement. What I mean by that is that it is the form that it ultimately takes.

The content is not, as you say, developed in the contract negotiation.

The substance of the objective, the things that you accept to be bound by, are determined outside. And you're saying that yourself.

So the message is, at the same time as you are asking the community not to weigh in through the contract negotiation, you must understand that you have a responsibility to abide by the reverse, which is not use the moment you're negotiating with the staff to alleviate the constraints that the policy wants to put on the registrars.

Hence, the thing that I want to share with you is that it is not about whether it impacts third parties or not. I do agree with the notion that no other actors in the community should be participating as a negotiator in the negotiation. I think this is clear. This has to be said. And it would be disrespectful of the process to believe that.

However, the challenge we have -- and I don't have a perfect solution -- is how to make sure that the rest of the community is associated, can be observing as meeting points in the course of the negotiation, to make sure that in the course of that negotiation, the fact that the registrar constituency is negotiating with ICANN doesn't give the registrar constituency a capacity to shift a little bit the force of the rules that have been decided.

And the second point is that regarding the content of those rules and what is in the picket fence and what is not in the picket fence, we are entering a new phase. This new phase is bringing new gTLDs. Trust in the system is paramount to maintain the model for your well-being and for the rest of the system's well-being.

I will -- I want to share with you exactly what I shared before with the business constituency and others, and the registries just before you.

Whether it is absolutely within the picket fence, not in the picket fence, is arguable, and you can have a negotiating capacity to say "No, no, no, no, no, it's not in the list of limited issues."

What you must ask yourself is, is the subject that is raising up in the community or in the process of a policy development necessary and useful to guarantee the trust in the model. And as a group, you not only have the responsibility to defend your interest, which is the function of the constituency, you also have a group responsibility to make sure that you self-organize, accept the rules, and even promote the rules that bind you, because it builds the trust in your activity in the model and the rest.

So I just wanted to share those two elements. It is not easy to manage. Yes, it is unsettling to have a potential extension of the rules that may apply, but it's an element to take into account. It's a responsibility. Sorry for being long.

>>PETER DENGATE THRUSH: StÉphane.

>>ST...PHANE VAN GELDER: Thank you. StÉphane Van Gelder, registrar stakeholder group.

I just wanted to very quickly say that some of the discussions that we're having here, we run into the same problems with discussions that we have on this at the GNSO Council level.

So I do think that -- I mean, a lot of this debate, a lot of the points that have been made, some of the points that have been made by Bertrand right now, registrars have already addressed in that arena.

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And I do think that having a clear definition of the picket fence will help others in their interaction with us.

If it's clear what's inside and outside, then it will become clearer to members, certain members of the community, how RAA issues can or cannot be handled and how PDPs can be started, what they can be started on.

What I'm thinking is that there's a lot of -- a lot of these discussions are generated by the lack of clarity that we have with our own rules, our own systems, and our own processes, and I think if we can address that, that would go some way towards helping people cope with that.

I'm sure if you ask even some -- some of the registrars in the room, some of the board members in the room, I'm sure it's not clear to everybody what's inside or outside the picket fence today.

>>PETER DENGATE THRUSH: Thanks, StÉphane. Bruce?

>>BRUCE TONKIN: Could I -- I'll just start with a question of clarity.

Are the registrars seeking to renegotiate their contract or is staff coming to you with suggested changes? That's the first question. Are you seeking to -- are you going to the staff and asking for contract changes or is the staff coming to you with suggested changes on behalf of the community?

I think I want to get that clarity, because I think there's a misunderstanding that you are somehow going to the staff and negotiating changes and people feel like they're locked out of that.

So who is asking for changes?

>>ROB HALL: The community.

>>BRUCE TONKIN: Okay. So I think that's the important distinction, right? So I just want to clarify that for Bertrand. There's no registrar going to try -- let's get this clear. There's no group of registrars going to try to remove something from their contract by going to staff and saying, "Hey, you know, delete this," right? That's not happening.

What is happening -- and let's get the history right. What is happening is, the standard registrar agreement was in place for sort of four or five years and then it gets renewed, and many registrars are coming up for renewal and so now's the time -- at that time -- it was a couple of years ago, because there was a burst from 2000 when there was a big lump of registrars created. That's the time to sort of say, for ICANN, before it renews its contract, "Are there some things we should change?"

So they did some consultation and they ended up with a list of stuff.

And what registrars did is to say, "Okay, here's some stuff that's fairly simple, we're just going to agree to, because we think that's useful," and the staff, you know, went through a process, and as a result there was a new registrar accreditation agreement created. Again, on -- on -- staff on behalf of the community.

Now, what's happening -- and this is where I think the process is broken. Now what's happening is that people that didn't get everything they wanted in that step are now saying, "Okay, we want to have another stage at negotiating the contract," and what Mason is saying is the policy development process is what should be used there, because the policy development process is a very structured process for doing that.

First step is an issues report. That's -- so I'll take a specific example. Authentication of registrants. That is, checking e-mail addresses and checking postal addresses.

That's not just an issue for registrars. That affects 80 million registrants plus the other 20 million that will register in the next couple years, so a hundred million people. That's not something registrars can even make a call on, or shouldn't.

And so the appropriate process for something like that is not for the staff to come to the registrars and say, "Hey, change this text and add this authentication because we've got some people that would like you to make that change." The appropriate process is use the policy development process that the GNSO was set up to do, which starts with an issues report. What is the issue that we're trying to solve by registrant authentication?

As a result of that issues report, is this subject -- is this an appropriate topic for policy development? If so, form a working group. Working group comes up with a proposal, goes out to public comment. There's about three steps of public comment in there.

Let's say at the end of that process is an agreement that there should be registrant authentication. Then there would be a discussion with registrars to say, "Okay, how do we actually implement that? What's the right contractual language to use there?" And that contractual language would go out to public comment.

So I think what the registrars are saying is they've already done the step where they've agreed to the no-brainer stuff and then this other stuff, they're saying, "This is a negotiation exercise, because registrars should not be negotiating that," and they agree with you.

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What they're saying is, use the policy development process that was established in the GNSO for making these more substantive changes, and what -- I think what we've got at the moment is a lack of faith in that process.

So we've got people saying "That process takes too long" or "It won't get me the answer I want so I don't even want to use that process. I'm going to go to the staff and tell the staff to go to the registrars and ask for some change in the contract."

So I just want to be clear. That's what this is about.

>>PETER DENGATE THRUSH: Does anybody disagree with that analysis? Does anybody disagree with that -- that's how -- sorry. Steve.

>> I'd like to go upstream a little bit and suggest that -- I mean, I agree with that analysis but there should not be a point prior to that where someone has to decide if this is a policy issue or not, right?

>>PETER DENGATE THRUSH: That's the issues report.

>> Right. So -- but staff -- my understanding is, staff will look at an issue and say, "Should this go to the GNSO to do an issues report," and I would suggest that -- and this gets into the definition of a picket fence. Maybe everything goes to the GNSO and they throw it back to staff if it's not inside the picket fence.

>>PETER DENGATE THRUSH: Okay. Thank you for the clarification. Yes, obviously, how you start the process is relevant.

Does anybody on the staff disagree with that as the process?

So where is the disagreement coming from? If we all understand the process and we all agree with the process, what's the problem?

>>MASON COLE: Well, I think the problem is as Bruce just very well articulated it, which is, there's lack of faith in the PDP process because perhaps in the community there's thought that that takes far too long, it doesn't get me eventually what I want. Changes wouldn't become effective immediately. Yeah.

>>PETER DENGATE THRUSH: Who is doing that? And which staff? Let's just get this sorted out. If what you're saying is as simple as you say, then the answer is simply no.

>>BRUCE TONKIN: Well, it's not simple, Peter. The staff can ask who is asking for the changes to be made. The staff are just doing what the community -- some members of the community are asking for the staff to change the RAA, so the staff is

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doing that, and what the registrars are saying is "We would rather you direct those people to the GNSO, rather than try and negotiate the RAA with us."

I think that's a choice to be made. And maybe the staff can identify -- and I'm not close enough to it now and I don't even know who the right staff person is, but a member of staff should indicate who is asking for the changes. I think that would be appropriate.

>>PETER DENGATE THRUSH: Okay. Let us be clear. I wasn't asking for a polling of staff to find out things. It was largely rhetorical. Elliot?

>>ELLIOT NOSS: Yeah. I mean, I think that there have been three or four examples at the last, say, four or five meetings of this. I'm going to use WHOIS privacy as one of them.

The staff gets harangued by various members of the community, you know, waving their arms, calling and screaming. Sessions -- in quotes -- get scheduled. Those sessions are then attended and discussed and, you know, people -- you know, generally there will be -- you know, and these are where the registrars who are the voice of "no" come from.

You know, three or four different parties will come and complain. These are clearly going to be policy issues. They're clearly going to be contract issues.

A registrar representative will be in the room defending themselves. But it's been scheduled, it's put on the agenda, it's taking up a room, it's taking up a slot on everybody's busy schedule, it's taking up time and money of the organization, and at the end of it, the people that are in the room, what are they left with?

Now, what are we going to agree on? What are we going to recommend? What do we want the action to come out of this session to be? And invariably, it's a RAA amendment. So this has been true of a number of IPC requests, a number of LEA requests.

There will be a session at one meeting, and then it will get followed up with a session at a second and sometimes a third meeting.

Now you have people who are in these sort of branch PDP processes that have nothing to do with the GNSO. So, of course, for them, they've now sat in three sessions at three meetings. They want some results for their time.

If the staff could be firmed up to just say, "Sorry, here's where you put this," then I think a lot of this problem goes away.

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By the way, I've noted this to the staff before, why did you schedule these sessions? And I want to say that's -- I don't think it is their fault. They are getting pressure and haranguing from people and don't know what to do with that energy. So, you know, if you can support and help them to be able to say, Hey, direct this into the GNSO, that's where you go. By the way, you are a member of this constituency or that constituency. Send it to your councillor. If they are empowered to do this, a lot of this noise goes away.

By the way, just look at the agendas of the last three or four meetings and you will find in every one of them two or three of exactly this type of session.

>>PETER DENGATE THRUSH: Thanks. Kurt has got a reply, and then we'll come over to Rob and then down to Tim, I think, is it? Kurt?

>>KURT PRITZ: I agree with Bruce's process almost -- almost wholeheartedly. There is some of the recommendations that have come up in these discussions that everybody -- you know, we all agree to have these discussions with the GNSO after the first RAA round.

And some of the recommendations are clearly outside the picket fence. You know, there's increased audits or penalties for sanctions or, you know, better identification of directors. So some of these are clearly outside the picket fence. And in those areas, the registrars and ICANN could be responsive by negotiating -- you know, deciding whether we wanted to augment the RAA and be a little more proactive. And I think we don't want the GNSO taking up those issues that are clearly outside the picket fence.

>>BRUCE TONKIN: I guess in that case, have the registrars said they are happy to make those changes?

>>KURT PRITZ: No, I think it has to be a negotiation.

>>BRUCE TONKIN: That's where I think you are getting caught up. As soon as you start getting into the negotiation, people feel they need to be part of the negotiation.

If you have clear set of issues, you said you have got agreement from everybody. If the registrars aren't agreeing, then suddenly you no longer have a policy basis for doing that.

>>KURT PRITZ: I'm not saying we have agreement. I'm saying there is a list of topics, some of those topics are outside the picket fence. And just like many of the RAA amendments last time were outside the picket fence.

I think the registrars and ICANN don't want that to become the topic of a GNSO discussion. We want to take it out of that and say the registrars and ICANN will

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negotiate those, maybe adopt some of them like we did last time in the RAA negotiation.

You know, there is a proposal from the GNSO for a registrar-ICANN negotiation with no observers. So I think we can take advantage of that and have a bilateral negotiation just on those topics that are certainly outside the picket fence.

>>PETER DENGATE THRUSH: That seems to be a different topic, which would be who are the proper parties to the negotiations of the issues that are agreed to be outside the picket fence. That's different from the argument which is that we are dealing with things that should be inside the picket fence. There is obviously more than this.

Let's go Rob and Tim and then to Rita.

>>ROBERT HALL: I will try to keep it brief. I want to try to answer a couple people.

Kurt, I think to your point earlier, you said you should start negotiating the whole list. I think it would be very helpful if staff could go through the list and say what they think should be handled within the picket fence and what isn't. I think that would be a great starting point because right now we have this whole list and there is some confusion about what's in and out.

Peter, to your point, I think you have got different sets of staff. We keep referring to "staff." You have policy staff whose job it is to shepherd these groups and forward them and marshal their consensus. I think they are doing a good job.

You also have got staff that are going to sit down on your legal team and negotiate with us. Somewhere we got to get from, Here's the list and this is what the community really wants changed that we need to negotiate versus what we share with the GNSO.

To Bertrand's point, sir, I'm at a bit of a loss, I have to admit. The process you followed for the amendment of the dot net contract, you went into private with staff, you negotiated with VeriSign, you published it for public comment, and I assume the board is going to approve it. Why can we not have that similar process? The community goes to the staff with their requests. The staff come and negotiate with registrars. We publish the contract for public comment. And the board, if the public comment is favorable, enacts it. I don't think we are asking for something different than what has been done over and over and over again.

And, again, these are on issues that aren't policy but more administrative and contractual. And just before -- I know. I get it.

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You know, I will give you an example, Bruce. We sat in a GAC meeting this morning, and the law enforcement agencies have three or four requests that we think would be fairly easy for us to agree to. And so we sit down as registrars and think something as simple as mandating that we must have a real physical address on our Web sites where they could serve us if they needed to in an emergency isn't part of the contract right now. And we think, well, we could go through a PDP. That would be an easy amendment to the RAA that I think most registrars agree to.

But, my God, are we afraid to walk down that path and open that can of worms where if we say, Okay, look, we can do these three things -- like we did last time. That's essentially what happened last time. The registrars after the RegisterFly thing said, Look, you need more enforcement, ICANN. We will agree to these. We are in agreement. We don't want to open the can of worms of these other 50 things coming in and ending up in a problem. So there are things we'd love to help the community with that we feel our hands are a little tied here until we get some clarity, Peter, on what is in and out and what is the process to move forward.

>>PETER DENGATE THRUSH: Rod on some staff reaction.

>>ROD BECKSTROM: Quite a few different threads there. Rob, you raised a few.

First I want to respond to the policy development support staff's role is obviously policy development support. It is a challenging job because this is a very decentralized governance body and system with so many different stakeholders groups and constituencies of different types. And the staff obviously strives to support the will and the wishes of those groups, which sometimes might be at odds with each other or take different views.

But the staff as a whole is still one staff. So I think it is challenging for them to, on the one hand, be policy development support and, on the other hand -- you know, it is like not like there is a master plan in this system. There is a lot of obviously different parties using different strategies to accomplish what they want. And I hope the staff is really making their best efforts to do that. I think they are. But there is one staff. That's just the one point.

Secondly, with respect to the VeriSign dot net agreement, I thought perhaps I could have Kurt could share some of the process background on that in response to your remarks. Okay?

>>KURT PRITZ: So I think the process would be similar to dot net. VeriSign gave us a proposal for renewal. And then we had some negotiations with them. We published the results of that negotiation, you know, not unsimilar to how we did the RAA last time. We did regular reporting to the community about where we were on this negotiation and what we were considering. But, clearly, they were bilateral -- you know, bilateral discussion.

>>ROBERT HALL: I think we want that.

>>KURT PRITZ: Right, yeah, yeah.

>>PETER DENGATE THRUSH: We need to move on. We got another topic and almost out of time.

>>BERTRAND DE LA CHAPELLE: Peter, could I have the right to respond to the question?

>>PETER DENGATE THRUSH: Not in this session but we will have to find another way to do that.

The next topic is?

>>BERTRAND DE LA CHAPELLE: I'm sorry, there's an element --

>> MASON COLE: Actually, it is Adrian's turn.

>>ADRIAN KINDERIS: Thanks. We wanted to discuss -- I guess it is agreements, but it is under the -- probably the heading of the dot net agreement but there is a number of different sort of subheadings that come in underneath with respect to vertical integration and some discussions around that.

So, in a nutshell, the registrars are concerned about the discussions that have taken place with the board and the notion -- at least perceived notion that existing registries can cherry pick from the new gTLD agreement in particular with respect to vertical integration. Now, I know that has been dealt with.

But, the way the process that happened, I personally read on the board minutes some discussions that were had around NeuStar's ability to apply for a clause that would allow them to vertically integrate.

The concern for us is effectively that you're allowing -- under the auspices of setting up a level playing field, you are allowing registrars to take the good out of the new agreement without taking any of the responsibility. Sorry, registries, my apologies. Thank you.

From our point of view, hopefully as an end point, we would like to see that you either have the new agreement or you move over -- and you maintain your existing agreement. You can't have little pieces of the new one, if that makes sense.

>>PETER DENGATE THRUSH: Again, it is probably easier to go to staff on this. As a matter of principle, I don't think that's correct. Unless we are going to get down to

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putting up the clauses and pointing out what they are on the board, which would be a level detail not helpful I don't think today.

Kurt, are you able to respond in general to the point about cherry picking some bits and not others?

>>KURT PRITZ: We saw that in some of the comments. So my best attempt at an answer here -- and I will get a better one -- is that the board was requiring the code of conduct to be adopted by a registry in order to get to where they could -- it is about vertical integration, right, and the ability to change your registry agreement in order to vertically integrate. So that's changed somewhat in the last couple days. But one of the prerequisites was to adopt the code of conduct so it was not to allow registries to avoid some obligations and choose others but be more specific.

And then, as you know in the last couple days, we got a letter from the DOJ and European Commission about vertical integration. And so the board has adopted some of the aspects of allowing registries and registrars to vertically integrate the new ones while it sorts out the existing registries.

>>ADRIAN KINDERIS: I appreciate on that particular point.

I guess my concern, the concern of the registrars, is the precedent that this sets. There may be other parts of the agreement going forward that an existing registry wants to take.

>>KURT PRITZ: Are you asking about the dot net agreement in particular?

>>ADRIAN KINDERIS: It seems poignant that we are discussing -- that the dot net -- we personally put some comments towards the dot net agreement to this effect. So whilst we are discussing dot net, VeriSign could come through and say, We want to pick up some of these new points. That's why we are sort of tying them all together.

>>KURT PRITZ: So I'm probably answering a different question. But during the dot net negotiations, you know, we changed those terms that needed to be in order to bring that agreement into line with the others, the existing agreement, as we're supposed to. And there were some areas of vagueness that needed to be cleared up. But, otherwise, we were careful just to leave the existing agreement into place so there really wasn't a cherry picking. It was just sort of a cleanup exercise.

>>ADRIAN KINDERIS: The board did have discussions and it is minuted where they talked about vertical integration being accepted by NeuStar. That to me is -- well, new registries are going to have it, so...

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The concern we have is it went down that road to a certain degree. There was discussions held to the point where there was resolutions passed at the board about a particular clause within the agreement.

We as registrars can't do that, and Rob's articulated that today. It is an all or nothing for us. So that was the concern. And we just wanted the board to hear that.

>>PETER DENGATE THRUSH: Rita, you got a question where you can help? And then Bertrand.

>>RITA RODIN JOHNSTON: I think what Kurt just said to Adrian sort of reflects some of the discussion we have had today on a number of these topics which is he is answering a different question. I am getting a little bit lost.

Are you asking a question about is vertical integration going to be allowed? I thought what you were saying was cherry picking, meaning dot biz, NeuStar has an agreement, if they want to vertically integrate, they are getting the choice of staying where they are and amending their contract or choosing the new registry agreement or choosing certain provisions of that agreement?

So I've had that -- they're saying yes and you are saying no. So this is what drives me up the wall.

[ Laughter ]

>>ROBERT HALL: What we don't think should happen in a nutshell is you either keep your old and you take the new, because the new hangs together a bunch of policies. You shouldn't be able to take your old and say, I like this policy and not that one.

>>RITA RODIN JOHNSTON: Correct. That's how I understood cherry picking historically. I have had a number of conversations with John and policy staff on this. So have we made a decision? This question has definitely been out there. Do we have an answer as to how -- so we know that vertical integration is going to occur, right? So we know that the existing registry contracts have to be amended because they prohibit it.

So these guys are asking, how is that amendment process going to occur? Do we know yet? Do we have an answer to is there going to be cherry picking? What are the two options? Do we know?

>>KURT PRITZ: We posted -- you know, with the new gTLD program, we posted a process for how to amend the agreement, the process for requesting an amendment and then ICANN doing that market power check and possibly referring it to competition authorities.

>>PETER DENGATE THRUSH: Rita set out the proposition, which is -- I think is correct. You either amend your existing contract by adding specified clauses and you don't get any choices, there is no cherry picking there, and you agree to abide by the code; or you transition to the new contract. And, again, there is no cherry picking there. So that's --

>>RITA RODIN JOHNSTON: The question is, is that right?

>>PETER DENGATE THRUSH: That's what we think we voted on. We are looking for confirmation if that's right. If that's right, there is no cherry picking. You have a choice of putting these clauses, no cherry picking into your contract or you go to that contract.

>>RITA RODIN JOHNSTON: Or you just wait. You amend your current contract and then when it comes up for renewal naturally, then there is negotiation. But we did not want cherry picking. I thought we said there wasn't going to be. Is that right?

>>KURT PRITZ: That's correct. That's correct.

>>ROBERT HALL: Then there is no issue.

>>PETER DENGATE THRUSH: No issue.

Bertrand?

>>BERTRAND DE LA CHAPELLE: There are three buckets. One is the new gTLD space where we took a decision, actually the board before the recent ones of us joined, took the board decision in the Palo Alto that said in the new gTLD space there will be no obligatory separation, except if there are market power situations. The reason why this position was taken is because generally speaking the new TLDs are going to be relatively small when they start, and it makes more sense to start with a known separation because separation is fundamentally a remediation tool in competition issues.

Second element is existing TLDs, biz, org and others, when the new TLDs come into play, are they disadvantaged -- are they going to be disadvantaged in the future in their competition as a registry with the new TLDs that will emerge because some will be integrated and they have an obligation to separate. It is a very valid question. However, there is no urgency to solve it. It means changing the dot biz contract, the dot org contract or others; but there is no urgency because there is no operational new TLD yet. So the landscape is still the same at the moment. So there is no unlevel playing field. Therefore, we respond, deferred temporarily, didn't discard but deferred, addressing this modification which is a very important one but that triggered a reaction by competition authorities.

The third point is the one that needed being addressed, which was within those contracts, there are two provisions. One says you cannot sell your own TLD, right? And the other one says you cannot have an ownership in registrars.

This provision de facto prevented at least some of them to apply as registry back-end operator in an integrated manner for the new gTLDs. So it is not a change of the dot biz contract for the management and the selling of the dot biz or dot org names. It was a modification of a provision of the contract that actually was having an impact on completely new activities and whether the level playing field was for this round not fair, if I'm --

>>ROBERT HALL: This is not about VI. We seem to have focused down on that one. We all support VI. We all think all registries should be allowed to VI.

>>BERTRAND DE LA CHAPELLE: This is about the way you modify contracts.

>>ROBERT HALL: This could be about pricing. This could be about use of registrars. This could be about all the things in the new contract.

>>BERTRAND DE LA CHAPELLE: I fully understand the argument.

>>ROBERT HALL: Okay.

>>BERTRAND DE LA CHAPELLE: The reason why I want to make this distinction is that this provision is not about changing the way, for instance, the dot biz contract is run. The changing of this provision has no impact on the activity of, for instance, NeuStar in the management of dot biz. That's a change that is not impacting the contract. And so in that case, it is a separate element that was unwanted -- I mean, when the contract was made, it was made in the environment at that time, not in anticipation that in 2011 there would be a new gTLD program and so on.

>>PETER DENGATE THRUSH: We are getting a long history of that. I'm not quite sure how helpful that is. The question was about cherry picking, and I think we have solved about the contracted party.

>>ROBERT HALL: It is about the bigger issue --

>>PETER DENGATE THRUSH: Okay, so let's go to Christina.

>> KRISTA PAPAK: It's Krista. To your point the discussion is about cherry picking and not about VI, the process that was posted actually gave existing registries -- it is a proposed process that was posted by staff -- gives them the choice to -- I just found it here, to either amend their existing agreement to include VI in this instance --

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that's the policy -- or sign on to the new form agreement once it's approved, either/or.

To us, what we hear is that they now have the option of cherry picking vertical integration in this case and adding it.

>>PETER DENGATE THRUSH: We just clarified that they don't.

>> KRISTA PAPAK: Okay, that's fine. Thanks.

>>PETER DENGATE THRUSH: Chris, can you help?

>>CHRIS DISSPAIN: I don't know if I can help. I can certainly hinder. It seems to me that we are talking at cross-purposes here.

If you believe that being able to pick some -- being able to take something out of the new agreement and put it into your old agreement is cherry picking, then they can cherry pick. It just depends on what you mean.

So you need to be really clear. They have the option to amend --

>>PETER DENGATE THRUSH: Select some name. They can select some identified clauses and everyone either takes all of them --

>>CHRIS DISSPAIN: Yes.

>>PETER DENGATE THRUSH: You can't pick from them. You can't go get any other ones. You either take these named ones and put them in your contract --

>>CHRIS DISSPAIN: Yes.

>>PETER DENGATE THRUSH: -- or you do something else. If you think that's cherry picking, then the answer would be, yes, that is what we are going to propose. But you can't go into the other contract and take any other provisions that you want.

>>ROBERT HALL: Peter, didn't we get here -- Sorry. Didn't we get here by someone coming forward and saying, We need this one issue solved -- it happens to be VI. The board came up with here are the clauses around VI that you will take out of the new contracts and put into yours.

What's the next issue? Is it price caps? Is it use of registrars? This is what we're --

>>ADRIAN KINDERIS: That's exactly where I was going to go. Maybe this will help. Yes, pricing is probably a better one, price caps.

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So there are no price caps in the proposed agreement. There are --

>>PETER DENGATE THRUSH: Yes, agreeing with you.

>>ADRIAN KINDERIS: And so now if they turn around and say, I want to take that particular part of the new agreement and put it in my old one, no, you can't because there is good and bad in the new agreement, if I can call them that.

There are -- sorry, there are obligations that are upon you that are -- So, we also have to have certain registry agreements so on and so forth.

>>PETER DENGATE THRUSH: The short answer -- Perhaps maybe Rita can answer this. The short answer is we have done that just as you said we need to tidy up -- these are the consequential amendments as a result of the VI decision. There hasn't been a long argument over price caps and a decision to change rules about price caps. So we don't need to do any consequential changes to price caps but we haven't done any priority change to price caps.

So I think you can rest assured that we see this not as the start of some subterfuge or a way of changing it. We changed the rules of VI as a result of a lot of community pressure and discussions, rightly or wrongly. But we made that change. And now we are dealing with the consequential changes.

>>ADRIAN KINDERIS: That's helpful.

>>PETER DENGATE THRUSH: Rita?

>>RITA RODIN JOHNSTON: I think that's right, and I think I was with everyone until you said certain clauses, then we went back.

What Krista read is what we are saying. There is no cherry picking. So you are only going to either transition to the new agreement or amend their agreement. There are then provisions that -- there's, I think, three or four here. I have stolen her iPad, so there could be more. There are three or four that relate to VI. You can't be a registrar if you become an affiliate or a reseller. It used to be prohibited. Now it's not. That's the only -- there are two or three provisions. Those are the only ones that can go into an existing agreement.

If not, you got to take de novo all the new stuff. It is very clear here. Let's just move on.

>>PETER DENGATE THRUSH: Next topic.

>>RITA RODIN JOHNSTON: You guys hear that's not happening, then scream really loudly, okay?

>>PETER DENGATE THRUSH: Next topic.

>> That's it on our agenda.

>>PETER DENGATE THRUSH: And it is nearly time to break. So we can just about -  
- Rod would like to say a few closings, and I would like to hear from the community  
and the participants about this format as a way of having an exchange because that  
would be useful to us.

Rod?

>>ROD BECKSTROM: Sure. Just really quickly, I want to thank all of you for the  
tremendous efforts you put into bringing the new gTLD program to conclusion  
which, of course, was voted up yesterday. And I simply wanted to ask, as we just did  
with the registries, for your help on the implementation side.

We're going to absolutely commit ourselves to executing on this and gearing up and  
moving. There are some open areas where we could use your help, such as the  
clearinghouse design which is very important. And, clearly, your thoughts and  
expertise could be of great value there.

Also, the JAS working group, the topic of how do we provide the most effective  
support for needy applicants in developing countries, I think that the business  
perspective that you bring could be valuable on that. Or certainly -- I know  
SÈbastien here and other members of the group are -- that are the experts are  
present, but simply to observe.

The time frames on that will be very tight, right? That needs to be clarified before  
the application window opens. So that means that there's got to be design. There's  
got to be some public comment ideally and some feedback. But there has got to be  
implementation and decisions because that's a lot of money to deploy, and it has got  
to be done professionally.

I simply want to request your help please. Help us move those issues forward  
productively. And there will be many, many other areas. We have appreciated your  
great engagement in developing the program. As we move in implementation, there  
will be areas like that where we could really use some help. So would like to reach  
out. Thank you.

>>PETER DENGATE THRUSH: Thanks, Rod.

Bertrand, closing comment?

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>>BERTRAND DE LA CHAPELLE: Very quickly since I didn't have the opportunity to answer to Rob early and I don't like to leave questions unanswered.

Your reasoning is absolutely perfect. What we're discussing is different from the way the dot net agreement has been renegotiated.

My conclusion, and it is a personal conclusion -- it is a process that's ongoing and it is for the future -- is that you are reasoning should lead to the exact inverse conclusion that in future negotiation of registry agreements more visibility and transparency of the negotiation process should be put in place. What the right solution is is not clear now. But the same problem applies in both cases. So you're right.

>>PETER DENGATE THRUSH: Bertrand, I really didn't want to reopen that debate. I thought we were having close comments on the format of the session. I said take that offline and do it somewhere else.

Can we have a closing comment on this session?

>> MASON COLE: I personally found this to be orderly and easy to do. But I -- I'm not speaking for the stakeholder group. I found this productive.

>>PETER DENGATE THRUSH: And orderly is good, or would you rather we were a bit more disorderly?

>> MASON COLE: There is nothing about ICANN that is disorderly, is there?

>>PETER DENGATE THRUSH: Okay. Thanks, guys.

>>MASON COLE: Thank you very much.

>>PETER DENGATE THRUSH: We will take a break and we will be back for the noncommercials at 3:30. Thank you.

%%%jen1end.