

Transcription ICANN Toronto Meeting

BOARD / GNSO joint Meeting

Sunday 14 October 2012 at 13:00 local time

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Coordinator: Okay the time is 1:07. Please begin.

Stephane van Gelder: ...you very much. Welcome back everyone. We are still working through our GNSO Council weekend work sessions, and we have the ICANN Board members here with us now to have our usual conversation between the Board members and the GNSO Council.

So I want to welcome every member of the ICANN Board. Thank you for once again taking the time to meet with us here in Toronto. And we have received a set of questions from you.

We have also added some questions of our own. The questions are being shown on the screens in front of you. And we on the GNSO side in discussing the topics that you wanted to discuss with us have assigned kind of topic leaders to these topics so that we can make sure that the right people just share information that we need to share on these topics.

Before starting perhaps I can just turn to Steve or Fadi to - for any opening remarks and just to welcome Fadi as incoming CEO - done this together so welcome Fadi. And I don't know if you both want to...

Steve Crocker: It's a pleasure to be here. The Board looks forward to these exchanges. As I think all of you know this is a format that evolved relatively recently and we found it to be quite helpful in that it would...

Fadi Chehade: I want to say one thing please, that one of the toughest things - doing so I want to be very clear on some of the messages I heard. Equally important that we don't swing that pendulum - equally important as we listen with various voices that we also make sure that we don't end up not listening enough - resources, our efforts equally and too with the maximum veteran embrace of your thoughts, of your ideas at the table that no one across the community will be put in a negative view or in a vilified view because of various views.

Everyone is welcome. Everyone is at the table and I - that's my commitment to you and to Stephane.

Steve Crocker: Thank you Fadi. You reminded me of a couple of points that I perhaps should've emphasized. The listening aspect is quite deep in our thinking, quite strong.

We have started a process at the Board level of paying close attention to what we hear in these kinds of - in these interactions, recording them and echoing them back at the end of the week to say what we've heard and what we plan to do.

And then further echoing back at the next meeting what we heard before, what we said we were going to do and what we actually have done. So this week we will try to make good on that promise as to what we heard from Prague.

And so Thursday afternoon will be the kind of formal presentation of that. And I'll say a couple of words tomorrow during welcome speech about that, but the main depth will come Thursday.

And then afterwards we'll not only take what we've said in that report, but also what we are hearing at the same time in the public forum that is part of that session, issue a formal report shortly after the end of the meeting and use that as the basis for reporting again more fully in Beijing.

This is definitely a work in progress, a very strong effort on our part but also an understanding that we may only get it partly right. And so feedback on that will be quite welcome and expected frankly.

And then the other aspect of what Fadi has alluded to is an attempt to treat everyone respectfully and have constructive dialog on substance, and much less focus on personal attacks or other non-constructive methods of engagement - make this more of an adult activity if you will. With that let me turn things over to Stephane.

Stephane van Gelder: Thanks very much Steve. Thanks very much Fadi for those comments. So we'll go straight into our list of topics and the first topic is one that came from the Board asking for any additional input on the WHOIS Policy Review Team Final Report, which is something that we have been looking at at the GNSO Council level obviously with great care. We...

Milton Mueller: Stephane, just a point of order. Can you increase the size of that? Nobody can read that.

Stephane van Gelder: Can I do it personally? No.

Milton Mueller: Whoever is screening that can they increase the font size of those letter - those questions so that people can actually read them?

Stephane van Gelder: Thanks Milton. Marika's going to try and help you. Thank you Marika for providing such excellent support all the time on this. So we'd be looking at the WHOIS RT Final Report and we have asked Brian Winterfeldt to try and start

us off on this by explaining to the Board members the work that the GNSO Council has done so far, and taking us through what we have been looking at up to yesterday when we had a discussion on this.

Brian Winterfeldt: Great thank you. Brian Winterfeldt. I'm Councilor for the IPC. I want to thank Fadi and Steve and the whole Board for coming to meet with us today and taking time from their very busy schedules.

Thank you also for reaching out to us for an opportunity to provide you feedback on the WHOIS Policy Review Team Final Report. We wanted to just give you a brief update on where we are, and we want to thank you for giving us additional time.

I know you originally gave us an earlier deadline to get back to you. We have created a small group to draft a response that included myself, Wendy Seltzer, Thomas Rickert, Wolf-Ulrich Knoben and Jeff Neuman.

We did need extra time because we actually found ourselves having a lot of divergent points of view, and we felt like that feedback wouldn't frankly be extremely helpful to the Board.

So we've actually been working hard yesterday and today to try and reach a greater consensus so that we can provide meaningful feedback to you. Our hope is to have a letter to you hopefully by tomorrow that will give you an executive summary on where the Council sits with regards to the various points included in the Final Report.

And in addition we're going to include a couple appendices for you that will kind of break out the analysis sort of at the constituency level so you can sort of see in a more granular level if you need it.

But again we do appreciate the extra time. We're mindful that you are voting on Thursday so we do want to get this to you as quickly as possible. And we

did need the extra time to reach more consensus and appreciate you giving it to us.

Stephane van Gelder: Thank you very much Brian. Does anyone want to comment or ask questions? Bruce. Sorry.

Bruce Tonkin: Thanks for the update Brian. Given that other groups have started to provide their response to the Board, is the Working Group also taking into account some of those responses such as the advice from the Security and Stability Committee and, you know, ALAC input, GAC input, et cetera? In other words are you looking at what some of the other groups are saying?

Brian Winterfeldt: To be honest we haven't. We were really trying to give you a summary from our various constituencies and Stakeholder Groups, and we haven't really had time to synthesize the feedback you've received from other groups. Jeff, do you want to add?

Jeff Neuman: Yes. I mean, I think many of the constituencies and Stakeholder Groups already submitted their thoughts individually in response to the public comment period.

I think you'll find that there is such a wide divergence of views. There are some that believe that we don't need to do any policy work on any of the items at all, and that everything can just be implemented.

You have the other side of the spectrum of constituency that believes that everything requires a policy development process, and then you have others sort of somewhere in between.

And so you can imagine getting some sort of consensus to these widely divergent views, which is - really happens a lot in the GNSO because there's such fundamental - we're coming from such different areas.

It takes a little extra time as Brian had said but most of the Stakeholder Groups and constituencies have separately submitted their statements, and now we're trying to see if we can merge those into something more coherent to assist you all better in coming to a decision.

Stephane van Gelder: Thanks Jeff. Chris.

Chris Disspain: I would encourage you to read the SSAC report. Take that into account when you get back. It's worth reading.

Stephane van Gelder: Thank you Chris. Jonathan.

Jonathan Robinson: Thanks Chris. Just to emphasize we did, I mean, SSAC presented to us this morning and offered us some opportunity for priority, and I think it was you Jeff that recognized that their work on - in this area was something we wanted to hear about.

So we did hear about it this morning but that's kind of hot off the press to that extent and posting work that Brian and Knoblen did.

Stephane van Gelder: Thanks Jonathan. Jeff.

Jeff Neuman: Yes just to add to that I think the SSAC work was really helpful. I think they've sort of avoided some of the hotter topics like privacy, intentionally so, right.

They recognize that that should be left to the policy groups. So the areas that I find most difficult for us to come to consensus on are those areas like the privacy proxy and whether that should go through a formal PDP, or whether it should just take the Review Team's recommendations, implement them in such a way.

And of course you have the Registries and Registrars that believe there are certain elements of that that fit within the - what we call the picket fence in the contract.

And, you know, if you want to implement them in all of the Registries including the existing ones, then you actually may need to go through the policy development process.

Stephane van Gelder: Thank you. Wendy.

Wendy Seltzer: Thanks. In reading the SSAC report what struck me was the layers of prioritization that they were doing, and I found it particularly helpful that they remarked.

We need to understand the purpose before we get into all of the individual recommendations, and so putting that before even we get to the chart of individual issues. That's my perspective.

Stephane van Gelder: Thanks very much. Any further comments or questions on this? Okay so we'll move on to the next topic, and this is one that has also come as a question from the Board to the Council on the Security, Stability and Resiliency of the DNS Review Team Final Report telling us that you intended to vote on this on Thursday and that you would welcome input and comments on this.

And to be honest we - when we discussed this we found ourselves slightly at a loss because we did not know what exactly you intend to vote on. So we would probably appreciate a little bit more insight into what it is that you're trying to get from us so that we can respond.

Steve Crocker: ...colleagues from the Board are going to rescue me from this.

Stephane van Gelder: Oh go ahead.

Bruce Tonkin: I think we've probably actually changed that from being voting on it to being discussions at the Thursday Board meeting and that applies to the WHOIS Report.

So we are considering both of these reports in our workshops this week and taking input on those. We'll give a bit of discussion on that on Thursday during our Board meeting, but we're not thinking about any specifically at this stage.

But really what the question is is that each of these Review Team reports have a series of recommendations, and really what we're seeking is, you know, do you support those recommendations or not is probably the intent of the question.

Stephane van Gelder: Thanks Bruce. You lifted that - I've seen Ray. You lifted that - the question that we had was, you know, if that's just a discussion and that makes much more sense. Ray.

Raymond Plzak: Yes, I just wanted to amplify that. Just as the Board has been criticized in the past for getting - closing a public comment period and then two days later voting on something, it's actually essentially the same thing here.

If we get comments during the week how can we then close it off and have it - and have a discussion and so forth and then vote on it? So the intent is is that since we are in the information gathering mode in meetings more and more than we are in the voting aspect of it, so just view this as another form of gaining public comment if you will, and that we will take action after this meeting after we've had time to digest all those comments.

Stephane van Gelder: Thank you Ray. So is there anyone from the Council that wants to speak to this? Like - just like you Steve no one's going to rescue me. And this - when we were preparing for this session our discussions on this issue really

stopped at wondering what the motion would be and what you'd be voting on, what the resolution would be.

So to be honest we haven't progressed much in our discussions on this specific question. So if no one's willing on the Council to speak to it then perhaps we will continue to work on it and then come back with a response. Steve.

Steve Crocker: Let me say something that applies to both the WHOIS and the Security, Stability and Resiliency reviews. Those are two of the four reviews that are mandated by the Affirmation of Commitments, and ICANN Staff, Board - whole organization fully subscribe to that process.

Each of those as you well know involve a very rigorous and intensive process by a team that is chosen for the purpose, and they work very diligently and earnestly and produce these reports that have a series of recommendations in them.

The first one was the Accountability and Transparency Review Team Report, ATRT, and there were 27 recommendations. And our response was to say, "Yes we adopt all of those recommendations and we'll go forward and implement."

That may have created a implicit expectation that that would be the - that we'd provide the same response to each and every one of the reports. As a matter of form and for quite valid reasons it's absolutely vital that we give great weight to those reports, but not automatically just accept them as written and commit to implementing them and go on about our business.

There is a very necessary process of reading, understanding, testing our understanding, determining whether or not we understand how to implement them if we choose to accept them, what the cost would be, what the

timeframe would be, what the implementation path would be, who would be in charge and so forth.

And then in addition some judgments as to whether that is appropriate. That process includes getting evaluation from Staff, and it also includes reaching out in other directions for expert advice in a form of due diligence, not to have the ball and say start up of a policy development process necessarily but give us what we need in order to make an informed judgment and assessment.

Those processes are underway. They don't have the same visibility yet as the - when the review process is underway itself. And so there's a possibility that it may look like there's delay without action or that things are not clear what's going on.

I intend to try to bring the level of action, make it more visible, outline what those steps are and report on where we are along that process. So it's not a - it's not intended to be a black hole.

It's not intended to be mysterious but these are necessary parts of the process. So that's - we're in that period with respect to both the WHOIS report and the Security, Stability and Resiliency report.

We're looking for additional inputs. We're doing very extensive internal assessments of what the consequences would be of implementing in terms of as I said cost and feasibility and so forth.

And where there is uncertainty or differences of opinion we want to probe that before we make a step forward. So as Bruce said the - what we intend to do Thursday is not to vote as what's suggested here but to provide a report to the community about where we are, set the expectations going forward and try to reach sober and informed decisions on these things.

And let me reiterate the very first point that I made. No one should understand from what I'm saying that we tend to be casual or arbitrary or dismissive.

We intend to give very, very great weight to the reports as written and it is a process of due diligence and deep understanding before we go forward, not a - an attempt to redo or undo or supercede the excellent work that each of these Review Teams has done.

Stephane van Gelder: ...very much Steve. So I'll move on to the next topic, which is one that I know is of great interest to the Board. It's a great interest to the GNSO Council for obvious reasons.

It deals with the impact of the new gTLD program on ICANN instruction and processes. This is something that is at the heart of the GNSO and potential - the potential impact of this is obviously of great interest to us.

So we've had a team of people working on this. The team has been led by Thomas Rickert. I will ask Thomas to update the Board on what we have done so far, but in all fairness to him we have had to juggle the agenda for this weekend a little bit.

And we had planned to have a discussion session on this topic before meeting with the Board. Unfortunately it's not been able to - we haven't been able to schedule it before.

We are doing it later so Thomas may be lacking some feedback there, so please give him the benefit of the doubt and I'll turn it over to you Thomas.

Thomas Rickert: Thank you Stephane. So just to refresh our memories we are very thankful for the Board to reach out to us with the letter of August the 1st. We have started working on a response prior to the various group having or part of the groups having provided their feedback themselves.

We know that until now various ACs and constituencies have responded to your request, and our Council letter that was sent on the 24th of September didn't know part of that information.

So we intended to follow up on that in the session that is unfortunately now taking place right after this session. So instead of being able to update you on the new Council position specifying more how the responses have impacted our position, and how we intend to move forward with this question that is going to be on our agenda for the next couple of months, possibly years, we now would like to hear from you as to what your reactions to the responses that you received so far are and how the Board would like to proceed with it.

Stephane van Gelder: Very much Thomas. Bertrand.

Bertrand de la Chappelle: Thank you and just a quick - a clip of data and in response, all the responses that have been received from the different SOs, ACs and constituencies have been posted on one single page at the moment, and if the address has not been circulated it will be given.

The intention initially was to have a full session open in Toronto to gather those elements and get feedback. Due to scheduling constraints it was very difficult to insert it directly into the solution that has been adopted.

And on Wednesday morning the Chairs of the SOs and ACs and constituencies have been invited to participate in a breakfast, a very short breakfast that will not deal with the substance and I insist on this element.

It's not about finding solutions. It's not about getting into the details but it will mostly address the question of how do we move this discussion forward in the community, because one of the very strong, I mean, there were a few elements that I would like to pick up from the feedback that were sent to us.

And there were ranges of positions, particularly regarding the amplitude of the impact itself, some actors considering that it's basically going to be incremental and others having a more straightforward feedback regarding the importance of the changes that it will bring.

A second element of feedback was about the timing as well. There was a - there's a tension between isn't this discussion premature, or is it necessary because it is an important topic to start slowly early on, even if it takes a little while?

The other element is also on the paths that could be taken, i.e., just an organic adaptation and evolution or a real discussion talking about structural reforms or not.

And generally speaking also the question of whether the focus of the discussion should be on structural elements or the processes and the way the decisions are being made.

So without getting into details at that stage, what I want to highlight is that we're looking very much to the feedback that you will give. But I want to insist on the fact that this is not a process that is driven.

It's not a Board process. It's a process that has been triggered from the discussions inside the Structural Improvement Committee, but it's extremely important that the community as a whole discusses and decides how it wants to move forward, and in particular how it wants to organize the discussion in Beijing and up to Beijing.

One of the things that I would like to share is that a good way to facilitate a discussion that is distributed but coherent is that there is a significant agreement on the list of topics.

So my suggestion would be that the early stages, and maybe we can discuss that on Wednesday, is that the early discussion focuses on making a clear list of threads and topics that can structure the discussion, see whether we're covering more or less the range of potential impact.

That's how the ongoing discussion will - that could be by - of a Contract Group if you think it's appropriate or I think just to parallel track and regular meetings.

That's up for the community to discuss. And although one of the major impacts is likely with consequences, is likely to be regarding the GNSO, it is not only a GNSO issue - potentially other structures and how they interact.

So that's the general idea and the feedback itself. Well it's just after this I regret that it's overlapping with some of ours.

Stephane van Gelder: Thank you Bertrand. Steve.

Steve Crocker: Bertrand thank you. You covered basically everything associated with that and just want to add that so far we have not had a large number of responses. My comment would be that the responses have been very orderly.

So the door remains open. We're going to listen. I think we're short - well short of the time to make - draw any conclusions and make any decisions, and we'll treat this subject as one that has to be attended to, because there - strong understanding that when you scale up a part of the system it also forces a change in the structure.

And - but we don't yet have enough information to translate that general principle into any specifics.

Stephane van Gelder: Thank you Steve. Jeff.

Jeff Neuman: Yes, thanks Steve and Bertrand. I think this is one of those areas that's going to be continually evolving. It's not going to be something even by Beijing that we're going to be able to make some concrete recommendations.

I think even within the Registry Stakeholder Group, which is probably the first to be impacted, you see that there are changes that we've recommended to our Bylaws to accommodate some things that we've learned, and those are out now for comment.

We have a interest group within our Stakeholder Group that we're asking for formal recognition, although the Stakeholder Group itself has recognized it called the NTAG, the New TLD Applicant Group.

That group has been expanding I won't say daily but pretty close to daily. I think there are now 77 or more members of the New TLD Applicant Group, which in comparison to the actual members of the Stakeholder Group, which are only about 13 or 14, it's pretty substantial.

I think we've had some growing pains in terms of Secretariat services, although I don't know if Sheri's here who supports the Registry Stakeholder Group.

She was here earlier. She's done a fantastic job and we've made some internal changes. We've allocated budget to the New TLD Applicant Group, and I think what you've seen over the last couple of months is you've seen some statements from the New TLD Applicant Group on their own.

They're not necessarily the Registry Stakeholder Group. They may be similar in a lot of respects but they may be different in a lot of respects. And I think that's the type of thing that we're going to see kind of naturally evolve from a - the bottom up process it is.

I think it's working fantastic. I think the New TLD Applicants that are part of that group are enjoying that experience as well, and I think it's working for them.

We're on an outreach campaign to get more people to participate, and I think you're also seeing some other groups that are going to find that when they are finally -- I'll knock on wood -- approved TLDs, that they will be forming their own constituencies whether it's brands or community-based or whether it's geographic.

I think you're seeing that bubble up. That's all going to evolve over time and I think we need to at some point let that happen. I'm not sure how we file comments on it because we ourselves are still learning, but I think it's been good so far.

Stephane van Gelder: Thanks Jeff. Perhaps I can just add from my own point of view as a Registrar that the questions that we're looking at are basically twofold from the GNSO point of view I guess, which is first of all the actual impact on the GNSO Council, which might be one of the questions that you're asking us.

But it's also as Jeff just described something that's very much down to individual groups and the potential impact on those groups as well. So each group will have different approaches and different - they will be impacted in different ways with the new gTLD program coming online.

So the questions that we might be asking ourselves are really twofold. Is the general Council structure resilient enough to withstand a major change such as this program?

And also as you know this ties in for us very much with the question of the GNSO review, which is slated to come online very soon. And we have also been asking ourselves about the - how to mix the - but the impact of the new gTLD and the timeline for the review together.

So those are some of the - just to explain to you Board members that those are some of the questions and discussions that we've had at the Council level on this very important question. Bertrand I know you wanted to follow up.

Bertrand de la Chappelle: Yes if I may just a quick feedback. I think it's absolutely clear. Not only is there going to be no recommendations or agreement in Beijing, but if by Beijing we have collectively a clear vision of the bullet points and the issues that have to be addressed, that would already be a great move forward because I think it was said it's an ongoing element.

The second feedback I want to give is I think there is now doubt and it was a very clear message that came immediately that the structures have resilience. There is an adaptation capacity and the main benefit of having this discussion relatively early is to say probably in the full term there is good resilience.

How will we make sure that the evolution allows this progressive structuring in a good manner? And the way to do this is to highlight some questions early on and I give you an example.

We had this morning a discussion in the Public Participation Committee regarding the meeting and their structuring, where they go and how they're organized.

There's one question for instance that I do not have an answer to and nobody has, is is the program going to bring more attendees to the meetings or not? And we don't know because on the one hand there are much more players, but on the other hand some of those players have large portfolio of actors that they are representing in a certain way.

This is the type of question that I just would like all of us to have as records like metrics to see whether we have the - an evaluation of that sort of thing.

What does that change in terms of the number of rooms that may be needed for meetings if there are new constituencies or new groups?

You know, that kind of question that are very down to earth are what we're trying to identify.

Stephane van Gelder: Bertrand. Ray.

Raymond Plzak: Thank you Stephane. I want to touch briefly on the review versus this program. First of all we are more or less tied and - to what the Bylaws say as far as doing it.

There is some wiggle room there but not a whole lot. But if you look at it from the other perspective the review is going to give you a snapshot of the strengths and weaknesses of the organization.

And so what the program that Bertrand is talking about here really is a strategic planning type of an exercise. And one of the very early things that you do with strategic planning is you do a SWAT analysis.

So you could view this review as being the SW part of that SWAT analysis. The other part of it will come from the work that's being done with the - looking at the future if you will in terms of the organizational changes because of new gTLDs.

And I'll take a brief moment here to state that everything that's going to be in the review is going to be known in advance. You're not going to have this voyage of discovery, thinking you're going to Asia and ending up in the Caribbean.

So to that end we're having a meeting that has been requested and has been promised by me and a couple of meetings being - and one's for Senegal, another time in Costa Rica with the Chairs of the Stakeholder Groups and so

forth to discuss the criteria, and we'll be getting a little bit more in depth as far as the approach to the review.

So the intent is is that - is to capitalize on the review and we actually give some very credible and valuable information to this other process. They're not intended to be working against each other, but they are really complementary.

Stephane van Gelder: Thank you Ray. Does anyone else have a comment? Steve.

Steve Crocker: I'm - I've been thinking about your comment Stephane about the coming review of the GNSO and how all of it fits together and then Ray's comment. I think this is a very helpful opportunity.

The two elements to it that both need to be kept upon - one is it may be extremely useful to use the Bylaws mandated review time. The other side of this is that that review process we hope would not be so dominated by this single question to admit other issues that are - so in setting up that review process hope - I hope that the people who put it together have both sides of that.

This is a great time to take - also very important to have - Ray's hand went up.

Raymond Plzak: The - you've been working for some time. Staff has been working for some time and has been having some discussions with various members of the community about the criteria that's going to be used, the things that are going to be looked at.

And so I can assure you that this one issue is not going to dominate this review, because an awful lot of things are needing to be looked at and actually explored and so forth.

And so I would say again that - remind everybody that's going to be there Thursday morning that we are doing that, and we're looking forward to it. It's something that we promised, something that you asked for and so we're going to move forward with it.

Stephane van Gelder: And perhaps I can also add just a general feeling that I've conveyed to the GNSO Council from conversations with Board members is that - and the Council's not taken a decision on this as yet but they may do is that I think I'm right in saying that the Board will find it useful for the GNSO Council to comment on the opportune moment to do a review, and what might be part of that.

So obviously this is something that will continue for the new Council, which will be seated on Wednesday but we have been discussing this possibility just so that you are aware of that.

Raymond Plzak: Yes. To that end your successor will be there Thursday morning.

Stephane van Gelder: Any further comments? Okay so we'll move on to the next topic, which was one which once again raised questions on the Council, trying to understand exactly what the context of it was.

So the topic reads as coming from the Board that you're seeking input on whether there's a need for a policy with respect to declaring patents in policy development or contract negotiations.

We are aware that this was also a question that the Board has put to other community groups, and when we read this our initial reaction was to ask why you're asking this question? Where does this question come from? Bruce?

Bruce Tonkin: Yes I think yes (it's good) that it came from me. One of the things we're becoming aware of is that there is certainly a lot of business process patents

starting to get created around the domain name industry and the Internet industry.

There are patents for example on verification of contact details like telephone verification. There are patents starting to emerge on processes for DNS sec and the managing signatures and things like that.

And so from the Board of Governance Committee one of the things we're spending a lot of time on in the last 12 months has been sort of ethics. And I guess the focus there has been on board and staff ethics.

But it's also occurred to us that other groups that create rules for the industry like the W3C IETF do have policies in this area.

And examples of those policies would be, you know, if you're proposing that particular management business process to be incorporated into a contract or incorporated into a policy and you actually have in parallel either have a patent or have applied for a patent, you know, you should declare that.

And so we're just wondering if that's something that you believe also and perhaps that's something to incorporate in our policy processes.

And as I said it's mostly an ethics issue that if you're going to advocate a particular position or a particular solution to a problem and you - and behind that you have a patent that, you know, it's appropriate to declare that just as it's appropriate to declare business interest when pushing a particular topic.

So it's really just an open question, something that we're becoming aware of. And certainly we have board members. We have a liaison from the IETF and a liaison from the W3C. And both of those bodies have a policy in this area but ICANN does not.

Stephane van Gelder: Thanks Bruce. Jeff?

Jeff Neuman: Thanks Bruce. And I certainly think it makes sense. I would advocate creating something like a legal working group in the community (unintelligible) because it's actually a little bit more complicated I believe than in the IETF than in the W3C, this kind of environment because there's so much commercial interest that drives a lot of the policymaking.

We have to discuss things like it's not just disclosing a patent but it would be a little bit more complicated as things like brand licenses or, you know, reasonable and nondiscriminatory licenses and royalties and what happens as a result of that.

I think we're a young organization. But to just disclose that you have a patent I think gets you one step but not all the way especially when you're talking about things that would become mandatory on a bunch of commercial players.

Whereas in the IETF it's things could be standard but not necessarily mandatory and there's always ways that you can find around that.

Here we're talking about imposing mandatory policies in some cases. So if that were the case and it was patented and that was the way forward we'd have to establish either waive certain patent rights or establish certain reasonable licensing terms.

But I think it's a tough discussion for the general community and more for the creation of something like a legal working group from the community and staff and others to work on that issue.

Bruce Tonkin: Yes I think what we're asking of the general community is that something that you're talking about the implementation (unintelligible).

So I think really at this stage you're just getting feedback on whether you think that's something worth considering versus the actual mechanism. As you say obviously external legal advice is welcome.

Jeff Neuman: Right. And I think it hasn't quite gotten to the place that it is a steep concern but it could easily get there and it's always best to take the preemptive approach.

So not sure you're going to hear feedback from the community that it's a concern. But we should address it before it does become a concern especially now with new gTLDs coming in and a lot of those being large brands that are coming into the space.

Stephane van Gelder: Thanks. Jeff and Bruce. Any further comments? Jonathan?

Jonathan Robinson: Just to comment actually in a related area. It's not specifically in the region of the patents. It's very closely related.

I was involved as some of you will know with a big four trademark clearinghouse. We put together a commercially focused bid. We thought was very good but that's besides the point here.

What happens in parallel was that ICANN ran something called the Implementation Action Group, the IAG. And I found that challenging and I think we need to be careful because there's a presumption with some of our activity that we can contribute freely and without constraint.

And although the IAG did require a declaration of interest it's still somewhat challenging to participate freely whilst your commercial pitch was still on the table for being a vendor of those services.

So I think we sometimes I think we're so used to this sort of collective collaborative mode of working which is fine in the policy area.

But when it comes to something like that so I apologize if it seems like I'm bringing something in that's not particularly about the patent area.

But it does strike me that it's a related area and the way in which we work where there's potentially commercial interests and community input. And where these things can nudge up against one another we need to think carefully about the kind of appropriate processes to deal with them. Thanks.

Stephane van Gelder: Thanks Jonathan. Anything further on this? Thomas?

Thomas Rickert: You know, it's just a thought that, you know, detailing interest is good but when talking about patents are we talking oh but existing patents or are we talking about patents that are applied for, about patents that are being prepared?

So I think that, you know, if we bend it too much we might actually have - it might actually have an incremental interest on innovation.

And so I think that we have to balance our discussions very carefully at the same time being transparent.

So I think that's a very tricky subject to be dealing with and I think that it requires further discussion.

Stephane van Gelder: Thanks. Another Thomas?

Thomas Rickert: Yes thanks. I mean all I'd really say is I think the idea of setting up kind of a working group to study the issues is a good idea.

I would say you want just not legal people but people that have experience in other organizations.

Because a lot of the issues are - I mean there's certainly a legal side but there's also the pragmatics of how do you actually work constructively and how do you pass the rules that you can live with and actually work in practice?

And I would just say that there's a lot of experience standards buys and other organizations where they've got a lot of experience and they know a lot of the minds to avoid.

And so the answer to your question is yes, you have to worry about existing patents, about patterns that are applied for, et cetera.

And if you think you can sort of sidestep those issues and, you know, if you don't really want to crush innovation wait until you hear one of the similar horror stories that can happen when patents kind of come in at the very last second that really throw things out, you know, off the bus so to speak.

Stephane van Gelder: Thanks Thomas. Any further anything further? Milton?

Milton Mueller: If the question was whether the community sees a need for a policy I would suggest that the discussion would just have suggest that the answer is simply yes.

Stephane van Gelder: Thanks Milton. Anything else Thomas?

Thomas Rickert: Maybe just a very brief observation. Every single of the questions on substance, disclosure or licensing, patents or applications et cetera, each of those is actually decision point that you will find answered in the existing patent policies of existing organization.

And I think basically we were having a preview of the sort of discussion that in a structured way perhaps ought to happen.

Stephane van Gelder: Thanks Thomas. So we move on to the next point which is something that the GNSO council wanted to ask the board in light of the recent Article 29 letter. And I'm sure I don't need to explain here what that letter is.

Does the board feel the issue of Whois verification and data retention should be taken out of the current RAA negotiations and dealt with as a PDP?

For obvious reasons I will not talk about this topic at all. But we have Yoav from the registrar stakeholder group who has volunteered to lead us into this topic. Yoav?

Yoav Keren: Yes thank you. So as all of you probably have seen the letter and their responses what many of us in the community believe that this letter clearly shows that the issue of recertification and data retention is a complicated issue.

The legal implications of implementing Whois verification are yet to be resolved as it seems as inside of this letter inside of the letter coming from the council of Europe I must say that many were surprised from the response made by ICANN to that letter.

The reason for that is the response was offering a possible way around by allowing European registrars to opt out of the need for Whois verification.

It looks to some of us that this idea was not thought through because in practice if this is done the whole concept of verification would be pointless because the criminals would just move to register with European registrars.

And on the other side it also provide a competitive advantage to European registrars.

So again this is clearly an issue out of many issues that we're talking about. If there's something that is relevant and will affect probably all stakeholder groups this is the one.

So what many of us believe this should be taken off the RAA negotiations table. I think that, you know, talking for the registrars I think that our group has shown, has tried to be as cooperative as possible. And I think we've been able to provide and agree on most demands coming from law enforcement and GAC.

I think that at this point with this issue not being resolved and as it is so complicated is better to go to a PDP.

Now I - please I want to make it clear that although I'm speaking for the registrars and this is not the view only of the registrars. It's a view of other people in the community. And so we want to hear what the board thinks about that. Thank you.

Stephane van Gelder: Thanks Yoav. And yes just to echo what you just said, we did have discussions on this yesterday. And it was clearly not only a view shared by the registrars.

I think there was some strong signals sent by the community on this and we want to make sure that those do feed up to the board.

So let me open it up if anyone wants to comment, add questions, respond? Please (Erica)?

(Erica): Maybe a few points. I think what this letter shows in the answer is actually that how much more complicated the issues we are dealing with.

Because I mean when the GAC gave their opinion on these two points I mean the Article 29 working group which is the working group of the

European Union so it's not a council working group. I'm not sure if I misunderstood you maybe.

So it's the official authority correctly which is yes, which takes certain points into consideration if this is what you meant which I understood from you.

So I think what it shows that in our consultation and internal consultation processes the GAC and even beyond we probably in the future have to maybe proactively reach out more actively for these data privacy authorities.

And this is true for the GAC but it's true for all of the constituents so that as early as possible we take their point of view into consideration.

What I would caution in a moment not to overstate of the, you know, the exchanges of letter, it is the kind of early warning for all of us that we have to respect much earlier and engage with their position.

And so far I think there's still sufficient time, you know, for us to do this. And but we have to do it I fully agree with you.

But again the two points is raised when you look at them from a legal point of view are very different ones because they're very different legal obligations when you take for example data retention and the implication of the existing data retention law.

And then draw the conclusion to our environment I would say there's still some legal work that needs to be done to understand this completely.

And the same is true for data privacy. And even the European Union there is the laws are completely reshaped at this stage.

So I think probably it is good to engage but to be maybe careful in allowing, you know, to in terms of conclusions right now.

Now I didn't yes...

Yoav Keren: Just to verify clearly I think we share the same view. And what I was trying to say that many of us believe this is a complicated issue and we need to be dealing with it very carefully and the way to do that is through a PDP.

Stephane van Gelder: Yes (Erica) please.

(Erica): Yes I fully agree. And there's another conclusion which we have to draw because I mean the letter from the Article 29 working group and to some degree our reply argues that legal requirements which are placed in different jurisdiction need to be taken into consideration which is true.

But this of course poses some difficulties on us because we of course the requirement which we need to implement must determine to a large degree the globally impossible.

So it's a contradiction which I think we should just have to look at it and understand that - understand the implications.

Stephane van Gelder: Thank you (Erica). (David)?

(David): Thanks Stephane. I wasn't here yesterday when we formulated this question. But I do note that the IPC view and I think it's the same as the CSG view is that they should remain in the RAA negotiation. That's quite clear on our side.

And having said that it's clear that ICANN shouldn't be obliging the registrar registry to breach local laws coming.

Stephane van Gelder: Thanks (David). Wendy please?

Wendy Seltzer: Yes (that from) the noncommercial users we had reached out to various privacy authorities. And we heard from the Council of Europe as well that they shared concerns about the privacy implications of data retention and verification.

So I think this illustrates that the challenges of hearing all of the law enforcement perspectives are greater than is sometimes reflected in the RAA negotiations that we've heard because data protection authorities are also law enforcement.

And while they weren't initially at the forefront of the law enforcement demands they do enforce laws in their jurisdictions. And we don't want to be negotiating contracts that are unenforceable in many of the areas that ICANN serves.

So I - this is I think an issue that needs to come back to PDP on whether we wanted to be pushing for all of these elements. As the noncommercial groups have said before we don't believe that they should be in this.

Stephane van Gelder: Thank you Wendy. (Chris)? (Sorry) I missed (unintelligible). I had you before but thank you (unintelligible).

Chris Disspain: Thinking personally it's - I don't claim a great deal of knowledge on this but it seems to me that isn't this something that we should be actually throwing back to the - to where it came from in the first place?

I mean if you send it back to the ask the GAC to explain how they and law enforcement to explain how they would deal with the what appears to be the institutional paradox where one law enforcement is acceptable under one law enforcement and not under another I mean I'm not entirely clear that we necessarily would want to be taking that on as a policy development (unintelligible).

The issue itself is not what your policy is. The issue is at a higher level than that. But that's just a (unintelligible).

Stephane van Gelder: Thank you Bertrand.

Bertrand de la Chappelle: I'd like to make a point a little bit in the line of what Wendy was saying.

I must confess on a personal basis and as a formal representative of the French government that I'm extremely puzzled because he unofficial letter of a very authoritative public set of agencies in Europe coming that late in the process against the position that has been defended by another part of the authority when the repeated message from the GAC has been that in every single country the coordination between the law enforcement agencies and the privacy authorities has been perfectly done.

And I say that having been in the GAC and even sharing one of the sessions that decided whether to transmit the law enforcement requirements to the rest of ICANN.

And I perfectly remember without getting into details or revealing confidential information that there was a very strong discussion on whether the request from the law enforcement agencies could be transmitted or endorsed.

It is an illustration that in the policy development process or in any policy setting what we mean by government involvement covers more than just one representation.

There are many representations. There are many public agencies. It is obvious that in the GAC the GAC representative as indeed the coordination role and this should remain.

However in the course of discussions like this one it is it obvious that we would've avoided as a global public policymaking structure into all a lot of problems if the law enforcement agencies and the privacy commissioners had been involved from the onset.

That being said and with us hiding ourselves behind our fingers we all know that the Whois issue cannot be solved in the way the problem is (going) today.

And speaking personally I participated when I was in the GAC in one of the probably innumerable Whois working groups that took place.

And from the onset I do not believe that there is any other angle of approach than what at the time I was calling differentiated technical modalities of access to the same data.

The different rights of access, the different modalities of access to the data must be different. And there's no way we can continue to solve and discuss this thing the way we do.

But the participation of all the relevant and balance to use Fadi's words governmental agencies is something that must be addressed.

It is not possible and I'm sorry to say on the GAC's behalf that the GAC does all the coordination and speaks only to the board at the end of a process whereas on an issue like this one its subpart of governmental representation and a very legitimate one I insist, was the only part of making the talking.

Thank you.

Stephane van Gelder: Thanks Bertrand. Steve?

Steve Crocker: Thank you. As to our hearing into complex topic with big forces at work one of the things that crosses my mind is that there are other records of registration. You have the way back machine of who was.

And so if one wants to look at this in the larger context of what data is actually being retained out there the ICANN processes, the registry and registrar processes are not the entirety of...

Stephane van Gelder: Thanks Steve. Milton.

Milton Mueller: Yes I'm just not sure why this as complicated as we're making it out to be. It seems to me that you have differences in jurisdictions. And you want global contracts. So you define your global contracts as minimally as possible.

If a particular jurisdiction wants to require registrars to verify, if it wants them to require them to retain data then they pass a data retention law in that jurisdiction that applies to people in that jurisdiction.

So the question we have before us is should these things be taken out of the RAA? To me the answer is obvious that it should be simply because if governments really have a legitimate need to use the democratic process to pass these data retention laws they can do so. And it will only apply to the people under their jurisdiction.

Stephane van Gelder: Thank you. Thomas?

Thomas Rickert: I'd just like to comment on the question that actually hasn't been asked in this session. But as we're talking about different retention periods than there's a two-year period and the six month period.

And the six-month period I guess stems from the fact that in Europe there was a bit of a retention directive.

Where people think that if you might go practice six months, you know, regardless of the of other groups in the (non-letter) that one could stall for six months.

And I will just to share with the group that this is our retention directive. It's in the area of technical communication which is not what we're talking about here.

And on top of that if you look at the data set that can be stored, the data retention specification that was discussed within the framework of the RAA limitation is much broader than that.

So even if we did assume that the data retention directive was applicable than what's currently on the table in (unintelligible) would go beyond that (unintelligible).

Stephane van Gelder: Thank you Thomas. Any further comments on this?

Then we'll move on to – we should be able to make our last two topics. The next one is one that the council wanted to take up. Once again this is coming from the council side.

In light of changes which are being proposed to the ICANN structure which leads to Fadi changes that you have also discussed and that you've discussed with me and I've shared with the council so and the need to which you have identified to move towards greater internalization for ICANN what is the legal impact for ICANN?

Just to – I wanted to give you context around this. Unfortunately and this obviously shows that I'm way past my sell by date I've completely forgotten who brought this topic to the table. So I think it was (John). So (John) perhaps you just want to speak to it before.

John Berard: Sure, John Berard. Interestingly enough the idea came to the table after we had our discussion about the Article 29 Working Group, the implication of the back and forth in thinking about what was presented or suggested as a carve out for European-based registrars – yes, registrars that would – could create different legal requirements for registrars on a global basis.

From a business perspective, you know, ever since businesses (peaks) moved from pistols at 30 paces to lawsuits and countersuits a venue has always been very important. You either look for a (deporter) venue or you venue shop.

ICANN has been assiduous in keeping its single venue. The combination of announcements, actions, potentialities I guess -- I think I heard that in a movie once -- suggests that there may be extraordinary pressure to maintain that single regime.

And so the question is have you – has there been thought given to that? Is there a commitment to maintain it? Is it likely that it will be maintained or will it be perhaps under assault?

I am also concerned that the reporting I see about the possibility of lawsuits that continue to – that might arise from the new gTLD program could also put additional pressure on ICANN.

And so I'm just curious as to what the thinking has been and if there hasn't been perhaps we can, you know, give you yet another bogeyman to worry about under the bed.

Stephane van Gelder: Thank you (John). Is anyone wanting to address the (unintelligible)?

Steve?

Steve Crocker: (Unintelligible).

Stephane van Gelder: I don't have an answer know telling you something that is baked yet.
However it is part of our thinking.

We are – we actually have ready for some – by some of our law firm (matter)
that I am very careful not to do something before I have a plan.

The first two goals, then the plan then where do we go, then the rest. We'll
have a (few) steps (in there).

Stephane van Gelder: Yes Bertrand.

Bertrand de la Chappelle: Just quick reply to (Don). Yes this is a very valid question. A few
hints in that regard.

Irrespective of the form shopping one evolution that may need to be taken
into account given in the discussion that I mentioned earlier is for instance
because we have ITNs we have operators that are going to be in various
locations around the world.

And little by little I do not exclude that the pressure will be that they may want
at one point to have their contracts in their own languages which is – goes
beyond translation because in many cases there are formulations that can
translate more or less in one environment or the other.

They may even progressively want to shift and request -- I don't know if we
will do it or not -- but may want to shift and say why as I am serving mostly a
community that is in this geographic zone with an operator that is based in
this geographic zone? Why am I subject to mostly a contract that deals with
US extradition only?

Furthermore and for those of you who know that I am running a program on Internet (unintelligible) the criteria that are being used on Internet matters for asserting (contradiction) competence are all over the map.

And you have situations where I'm giving you just one example, there are two lawsuits that have been filed in California by a Korean rights owner because of a problem they had with a site in Australia.

And the lawsuit was split between two courts in the same district of California. And the two courts made completely different assumptions and decisions on whether they were competent or not and whether a California court (contradiction) or not.

So here we will be confronted with the growing number of arrangements of impacts of the activity of one registry or registrar, two registrants in different countries.

And so the legal patchwork that is likely to emerge is not a given. So the question you're asking us typically one that is heading in the whole discussion of the strategy orientation.

Should there be a voluntary decision to make sure that there is one traditional hanging because it simplifies matters for some others or should there be also a regionalization of the legal structure?

I don't have an answer on that but it's the way I would formulate one thing is with the question or (the queue).

Stephane van Gelder: Thank you. In the interest of time with some of the (BOLD) members' of agendas being very tight I suggest we move on to the last topic very quickly and try and wrap this session up.

The last topic is going to be led by Jeff Neuman and Jeff perhaps best just if I let you take us through it please.

Jeff Neuman: Thanks. Sorry my voice is going off.

I kind of want to draw on the theme that I think Fadi you had mentioned earlier today about. And I think that I've seen a great improvement over the last several months a year of so is the listening aspect of ICANN staff and ICANN board. And I think that's great.

But I think one thing we need to do for the next step is not just listening but interacting. I think that's key.

What we're seeing in some cases is yes, they'll hold the Webinar or they'll come to me, these ICANN staff they'll listen. That's great.

And but the problem is you try to get feedback and that's a whole other step where getting real-time feedback is kind of difficult on a number of items where it's, you know, they take everything back and then it needs to be a carefully thought out response before any kind of interaction can take place.

So there's been a recent example. Sorry that's one concept. The second concept that I'll delve into this is the notion of we're talking the pendulum right?

Well the pendulum has swung in my opinion and a number of others at least with the contracted parties, the pendulum has strong swung so far away from the contracted parties in terms of listening and interaction that we think it's been detrimental to ICANN as an organization.

ICANN's a very unique organization where there's so much expertise at its realm, at its grasp if its only willing to take that expertise.

And there's an example of an action activity that's been really seriously going on bottom-up with the trademark clearinghouse.

But there was a proposed ICANN implementation model that came out with it in consultation with its consultants that it hired.

In response in response to that consultation model there was a bottom up community process to produce an implementation model that we believe as registries as the ones that need to actually implement in our system to come up with a model that we felt we could implement in a cost-effective efficient manner. And we came out with our proposal.

We are seeking community feedback on our proposal. But even before we were able to get back community feedback we received a letter from ICANN staff saying we've looked at your proposal, we've considered it and we'd rather not go that direction.

But they seem to imply that they have even board and put on that. But I'm not sure. It's kind of written as in a way that we didn't necessarily knew – know.

And what we felt was that it was almost a roadblock. Here you have for the first time a bottom-up technology driven solution only to be told by ICANN staff even before the (thought) percolates that we shouldn't go down that path.

It seems like that bottom-up process then turned into top down even before the process was allowed to finish.

Without getting into more details which we'll get into this week I guess what we're asking for is more interaction with the groups that come up with these whether it's interaction between the board members or whoever is making decisions on this with the entities that are making these proposals and that

the ICANN board and staff trusts the resources it has at its disposal to – and our expertise to come up with the implementation that can (unintelligible).

Fadi Chehade: Thank you Jeff.

So the short answer is spot on. I really agree with the points you're making. Let me just address them. You had three points there.

The first point listening does not lead to engagement is exactly (unintelligible) also maybe even sometimes problems (unintelligible). But listening has to lead to engagement.

And ICANN as you know on the very first day I joined 40 days ago or 39 I should say, I hired Sally Costerton as the new Chief Stakeholder Engagement Officer.

Sally's in the room. I'm going to ask her to stand so all of you meet her and know her. Sally's ex-CEO of Hill & Knowlton in Europe and the Middle East, someone with enormous experience and both on the management side and on the engagement (side).

Sally is on board. Her role is to engage. And she's the first one who will tell you while engagement starts with listening must go on to relationship building and to other activities. Otherwise it's (useless).

So she's here and her job is to make sure that when you speak to ICANN it doesn't go to a black belt, that you get responses and you get answers. And I'm helping her build the resources and the capabilities she needs so she can engage with you. But please do engage her as much as you can. And she's here for you. Thank you Sally.

The second thing you brought up is the pendulum swinging. I started by saying this and I'm so glad you say it again.

I felt it all summer listening to many people in the community. I must be candid. Well I understand what's driving some of that input the reality is as it was in my opinion on balanced, you know, full training of registries and registrars as villain it's just unbalanced. It doesn't work. Everybody's here trying to make this work. We're all on the same boat.

In fact there are many people outside this room who really don't want us to make this work who would love to see us dysfunctional.

So my job is to make sure that balance happens. And I know some people who are upset with me yesterday at the noncommercial side because I used paternalistic statements. But it's the closest thing I can say.

Reality as a father I can't figure out how to love one son more than the other. I have two boys and I love them equally. And they're very different.

And somehow we need to find that balance as managers, as leaders, we have to find the balance.

And I will do that in action not just in talking, by listening, by engaging and by balancing the actions we have to do. So that's the second thing you said and I'm there.

I hear it. And again my job is not to swing the pendulum to the other side. My job is as much as possible to be balanced.

Now the third thing you bring up the trademark issue. So on the very first week I was on the job I was presented with a folder, a very nice little folder and a little yellow thing that says a sign here.

I looked at what I'm signing as I normally do and I saw the moving forward with a lot of activities related to the trademark clearinghouse was really what I'm being asked to move forward with.

And I'll be frank with you. My first reaction was do all the people who will be affected by this agreement, did we hear them all about this before we signed it? Are they all part of the decision-making that led us here?

And the answer was muddled. It was yes. And I said no. I want to make sure that we use the time in Toronto to listen everybody and make sure that before I commit anything, anybody to anything this party is very much part of the problem, part of the solution.

I'm committed to you. I don't know how we'll get there because I just started. And I'm looking at all of these things and I'm saying we need to do this thing together. We need to do it right.

We have all the input before we commit anyone to anything. So that's my commitment.

Stephane van Gelder: Very much Fadi. We're going to have to close this off Jonathan. I'm sorry. But before we do I want to give Steve some – a chance to make some closing remarks.

Steve Crocker: Thank you. One small detail from the beginning about a couple of you thanked us for taking time from our busy schedule to meet with you.

And it came to me because this is what we're doing. This isn't about taking time from our schedule. This is our schedule. And so no thank you required. And we – this is what we live if you well.

Far more important very...

Stephane van Gelder: Very. This is...

Steve Crocker: It's mid-afternoon, just seeing if everybody's awake. I'm conscious that Stephane's end of his tenure here. It's been a pleasure working with you.

And I think from where we sit we feel well served. We hope the community feels well served. (Messer) whoever that might be (unintelligible) so let me (unintelligible).

END