
BUENOS AIRES – Board with Non- Commercial Stakeholder Group

Tuesday, November 19, 2013 – 15:30 to 16:30

ICANN – Buenos Aires, Argentina

STEVE CROCKER: Is Fadi in the room?

Can –

ROBIN GROSS: Can we get started? Folks take their seats?

Okay. I think we're going to get started. This is the discussion with the board of directors and the Noncommercial Users Stakeholders Group, and my name is Robin Gross and I'm the chair of the stakeholder group for about another day, and then after my chairmanship, it will be Rafik who will be the new chair of the noncommercial stakeholder group. He's been elected so I just wanted to introduce you guys to Rafik Dammak down there at the end and he'll be the new chair.

[Applause]

It's better if you speak to the mic because it's difficult to follow.

Thank you.

ROBIN GROSS: Okay. Thank you. Thank you for that.

STEVE CROCKER: And let me also welcome everybody.

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This is our time for the board to listen, primarily, and engage in direct, frank, specific interaction with each of the constituencies. A long time ago, these were more social and we transformed them into this kind of setting so that we could jump right into things.

I know one of the topics that's on your mind, as it is on -- has been on everybody else's, is the development of coalition, the development of the 1net initiative, the Brazil meeting and so forth, and so to move that forward, I asked Robin if we could just -- if I could ask Fadi to give a very brief statement about what's happening tomorrow morning, so that we have that as a place where we could have an extended discussion of these things.

Would you just describe quickly, Fadi, tomorrow morning's meeting?

FADI CHEHADE:

Certainly.

I think we have -- we all have clarity that the Brazil meeting is broader than the ICANN remit or community. The Brazil meeting will involve people from other communities beyond -- including ICANN, but beyond ICANN, and a lot of that debate is happening through the 1net effort that is just starting.

Having said this, over the last few days I've heard very clearly from many of you that, "Okay, 1net will have its debate but we as a community -- ICANN -- would like to have our own discussion on that meeting." And I completely concur with that, and so tomorrow morning from 7:00 to 8:30 a.m., if you are an official card-carrying member of the noncommercial group, you can come here. I'm just kidding. Anyone

can come here. Everyone is welcome. From 7:00 to 8:30 tomorrow morning.

And what we will do during that time is listen to each other. You know, we'll share some high-level details, but then let's share, let's scope. And this is important, given that next week on Tuesday the Brazilians have made it clear they intend to announce a few more details about their conference, along with the 1net folks.

So I think it's important. We're all here. Let's meet. Let's talk. Please come. We'll make sure there's at least coffee. Hopefully more than that.

See you tomorrow.

STEVE CROCKER:

Thank you very much. So with that, your agenda.

ROBIN GROSS:

Thank you.

We did send a list of six topics to the board that we wanted to discuss, and we -- when we were talking about them in our policy committee meeting on Sunday, we did a little bit of reorganizing of the issues, so forgive me if we don't go entirely in the order that we've -- was sent to the board last week.

But the first issue that we wanted to discuss was the Brazil meeting and the 1net initiative and the ISTAR coalitions, and I was going to actually

turn it over to Bill Drake, who is the chair of the noncommercial stakeholder group, to kick off our discussion on that topic.

BILL DRAKE:

Thank you, Robin.

This doesn't actually need to be an extended discussion in this context, particularly since we have this discussion tomorrow morning as well. And also, we do recognize that in its details, this is not necessarily a matter for the board to be deeply engaged in. This is a broader process and so on.

Nevertheless, it also struck us that we should take the opportunity here to simply make a point, you know.

While there are others in the community who have expressed concerns about this whole initiative, it should be understood to everybody that we have strongly supported it from the beginning; that many of us have been involved in these discussions in Bali, here, on multiple listservs, and indeed for the past 10, 15 years in varying ways, so we have a pretty long track record of supporting the sorts of objectives that this -- that this initiative has.

And at the same time, though, we recognize that we looked at the recent board motion that indicated that in undertaking these various initiatives, Fadi was executing a mandate from the board that specifically directs him to continue supporting these initiatives and to encourage all -- and also encourages all parties to participate.

So we only want to share with the board our concern that indeed ICANN work to ensure, in whatever role it does play, that indeed the members of its community, who are civil society, do get to participate.

There have been concerns expressed on a number of -- in a number of different contexts by various civil society actors, and I know Fadi and I have talked about this a number of times, about the ways in which the 1net initiative is being booting up and whether or not there's been sufficient transparency and inclusion on the part of civil society participants.

Also, concerns have been raised about the high-level panel, et cetera, and people are wondering about the meeting next year as well.

And so obviously I simply want to say, you know, we're here, we work on these issues, we have a long track record with them, we want to participate, we want to -- we have a stake, we've contributed to building multistakeholderism, and we assume that ICANN has a stake in making sure that we're included fully and not going to end up in a situation where some other set of actors announces to us, "We've selected the civil society representatives to be on this group or that group or that group," and we're like, "Really? How did that happen?"

There has to be an inclusive process, so we just want the board to be aware of that consideration.

And Fadi wants to add something.

FADI CHEHADE:

Yeah.

STEVE CROCKER: Before Fadi answers, I'll just steal your thunder.

We expect every one of you to sign up on the 1net initiative, and of course we will indeed cross-reference that against the membership in this -- and publish that.

FADI CHEHADE: I think the only thing is I wish to second what Bill said. The speed at which some of this happened may give the impression that (a) we don't know or don't certainly understand all the things that happened before. I want to assure you and reassure you and reassure our stakeholders that all we were trying to do is to energize what was already there, not - - there's nothing new here. This -- you all know, certainly more than me, about this for decades. At least a decade. So I'm deeply appreciative of that. I need to reemphasize what my boss just said. Please sign up. Please participate. Do not let anyone pick anything for us. And that's why tomorrow's meeting is important.

Tomorrow's meeting is not to -- we may mention 1net, but it's not about 1net. This is about us, ICANN, now as a community coming together and making sure our voice is strongly, you know, heard in all these activities that are going on.

You have my full commitment to that, Bill, and anything -- anything! -- we can do as staff to support you to have your voice heard, you can count on me.

And by the way, you said something at the beginning that I don't want anyone to mishear. You said this community -- this community has been supportive of what we're doing. I want to thank you for that, because indeed from the moment we opened our mouths on this, and despite the fact there were misgivings about how it all came about, you were supportive. All of you. Every one of you here I see at the table, I thank you personally because I -- we needed that support at a time when, frankly, many were not supportive. We appreciate it. Thank you for that.

ROBIN GROSS:

Was there anyone else who had a comment on this issue?

Okay. The next issue we wanted to talk about was -- it's often described as "policy versus implementation," but really what we've got in the case that we'd like to discuss, which is the adoption of the Trademark+50 policy, was changing the policy, violating what the policy actually said.

The policy that was adopted by the GNSO Council in the STI report, Section 4.3 of the recommendations, which were approved by the GNSO, says, "The database should be structured with strings that are considered identical match of the validated trademarks." And it goes on to spell out what that means, and basically what it means is truly identical match.

Then what happened subsequent to the GNSO Council approving this policy was the staff decided to adopt a Trademark+50 policy. 50 additional words to go into the database for each trademark.

So this was a violation of what the GNSO had actually approved, and so we filed a reconsideration request and that was denied, and we are preparing to file an IRP -- independent review panel -- process on this issue, trying to get the policy back to what the GNSO said it should be.

So we're very concerned with what -- how does the board view the role of the GNSO in making policy, and how does the board view what is the staff's role in implementing the GNSO approved policy?

STEVE CROCKER:

Ray?

RAY PLZAK:

The board's view is clearly stated in Section 10 of the part of the bylaws that deals with the policy development process for the GNSO, and when it talks about implementation of approved policies, it says, "Upon a final decision of the board adopting the policy, the board shall, as appropriate, give authorization or direction to the ICANN staff to work with the GNSO Council to create an implementation plan based upon the implementation recommendations identified in the final report and to implement the policy."

Then it goes on to say that "The GNSO Council may, but is not required to, direct the creation of an implementation review team to assist in the implementation of the policy."

So I think the simple question that needs to be asked first: Was this followed? And if not, then that is a point of con- -- of discussion.

The second thing that could be discussed is whether the provisions of Section 9, which is actually the approval process for the policy -- and it has -- and it's quite detailed -- if the provisions of that were followed.

In other words, was a policy change made which is in contravention to the way Section 9 says it should be done.

And I guess lastly is that you really have to pull out the language of the policy as it was adopted originally and look at it and say, "Was the criteria specific enough that it was clear what was to be done, and was that followed?" And if not, then you actually have a violation of the policy.

So while I said -- I started this by saying "the board's position," the board's position is actually what's in Sections 9 and 10. I did some editorial comments there along the way.

ROBIN GROSS:

Well, if the -- you know, if the board's position is that's what needs to happen and I think I -- I sent a paper to the board a few days ago trying to explain that that isn't what happened, I think we've got a problem with a top-down process changing policies that are made in a bottom-up process.

I mean, ICANN pays a lot of lip service to being a bottom-up multistakeholder policy development process, but those of us who have been engaging in this process are actually finding much of the important decisions are being made in a top-down manner, contrary to what the GNSO Council has said on these issues, and so we would -- we can't implore upon you enough to please try to guide this organization back

to a truly bottom-up organization that follows its own bylaws on how policy is supposed to be made.

STEVE CROCKER: Bertrand?

BERTRAND DE LA CHAPELLE: The independent review panel that you're talking about, or the procedure that you're envisaging, is related to one specific decision and the reconsideration process on 13.3 that you filed afterwards.

That's one process. There are many arguments, pros and cons. I stated my own statements when the reconsideration 13.3 was passed.

This is a broader issue, and the distinction between policy and implementation is an ongoing debate that we also had in one of the previous interactions this morning with other -- with another group, and here I will quote something that Cherine mentioned.

It is extremely difficult, especially in our environment, to draw an extremely precise line saying, "This is policy here and this is implementation there," because in many cases there is a fuzzy zone in between where one thing progressively morphs into another, which is why the implementation teams have been considered.

But beyond that, one thing that I want to highlight -- and I -- and we had this discussion also yesterday in an interaction with the ATRT2 -- the system of reconsideration is based on an interpretation of the Section 2.2(a), the -- of the bylaws regarding the responsibility of staff, and reconsideration comes on board actions or on staff actions or inaction.

And there is an ambiguity in the interpretation of the term "in contradiction with established ICANN policies."

Because in those terms of the bylaws, we have never decided collectively whether this term "policy" means policy as adopted through a policy development process excusably or a larger set of rules, and I would encourage that irrespective of what you, in the end, decide to do regarding an IRP or not on the particular case that triggered Reconsideration 13.3 and the TMCH+50, that the place where a part of the discussion will be done is in the working group on implementation and policy within the GNSO, and I strongly hope that we will explore this fuzzy zone in between, rather than trying to frame the debate in terms there's a very concrete line or precise line. Sorry.

ROBIN GROSS:

Well, if I could just respond very quickly, I've got a copy of the policy in front of me and I would encourage all of you to look at it, Section 4.3 of the STI report, which says that it should be an identical match with the validated trademarks, so it's really not an issue of implementation versus policy. If you -- it is a violation of the policy.

BERTRAND DE LA CHAPELLE: You point exactly --

Sorry to take the floor again. You exactly put the finger on what I was talking about in terms of interpreting what policy is.

The STI report and what came into the applicant guidebook is not a policy development process. It was not a PDP per se. It was validated

afterwards by the GNSO but when you talk about -- when you talk to the staff, the development of the applicant guidebook was considered implementation of the GNSO policy that was adopted in 2008, unless I'm mistaken. And I see nodding. Maybe I'm interpreting that wrong.

But that's how the applicant guidebook has always been considered. No?

ROBIN GROSS: I've actually got some hands here. I've Milton, Marie-Laure, and Avri.

MILTON MUELLER: Just a response to Bertrand.

It is, indeed, the case that there is a fuzzy line between policy and implementation.

However, this case almost has nothing to do with that because what we have in this case is an implementation that not only violated the explicit policy, but the GNSO Council then passed a resolution saying that it was against that.

So I don't want it to sound to anybody -- we've discovered a lot of confusion about this, that the staff seems to think that if they call this implementation then they're home-free. And it's not about that at all. It's also not about revisiting the outcome of the policy process. We actually got the outcome we wanted in a policy process, but then it was reversed by the staff. So I just want to make that point undeniably clear.

ROBIN GROSS: Okay. So, okay, Avri and then –

AVRI DORIA: Thank you. I just wanted to go back to the history, because if you don't accept the STI as policy, then you need to go back to the initial gTLD recommendation that said there would be no required RPMs. So, I mean, this policy has been changed so many times.

BERTRAND DE LA CHAPELLE: Sorry. We're getting on the wrong track here because I'm fully in agreement with you. I'm precisely saying that this -- in this case the question of whether the TMCH plus 50 was a policy or not is open and that the -- the interpretation of policy in the bylaws as being exclusively the PDP and when the PDP is over it's not policy, it's just implementation, is precisely the problem we're confronted with. But anyway, let –

ROBIN GROSS: Marie-Laure.

MARIE-LAURE: Thank you. My comment has nothing to do with this case. It has to do with your point about the working group and policy and implementation and I happen to be part of the working group and maybe for those of you who are not aware of it, we have created a subgroup, many subgroups but then of them is about definition. So we want to -- because we're talking about there is need for clarification about specific terms that we're using and that's what we're going to do.

There will be this subgroup and we'll be working on -- within ICANN and outside ICANN, how do we define specific terms that are key terms in this context.

ROBIN GROSS: Was there anyone else who had wanted to say something on this?

STEVE CROCKER: Let me -- I -- you know, this is not the right -- it feels like I'm in a courtroom and we're in litigation here. This is -- this isn't the place where we can get these things completely settled. But I think that in terms of raising attention and making sure that we've heard you, I don't think there's any question about that. And so maybe that's where we should leave this for now and move forward.

ROBIN GROSS: Ray.

RAY PLZAK: Slight fly in the ointment. What's the next step, if we're not going to talk about it now? Where is it going to be talked about? I think that it -- it just can't be stopped at this point. I mean, there's a very avid discussion going on here. And I agree that we probably shouldn't try to litigate it or whatever right here and now, but the point has been raised, and I hate to say okay, the point has been raised and we'll talk about it, without some degree of understanding about when it's going to be talked about or where or how. So I would like personally to know that. Because I don't want to, three weeks from now, now see another email

coming up about this or why don't we -- why aren't we talking about this? I would like to at least get some idea put together about how we're going to get to the next step.

ROBIN GROSS: Well, we're -- we're at your disposal on this. We will accommodate our time and schedules to discuss this further with you. Yes, Avri.

AVRI DORIA: I mean, I just want to add, we have been following the process all the way through and getting stymied all the way through. I think the next thing we have to do is have a bake sale so we can afford the IRP because that is the only step we have left. Of course, it costs \$1 million to do that, so, you know, we're at a point now where other than bake sales -- because we're noncommercial -- to pay for an IRP, I don't know what other venue we have for this.

RAY PLZAK: Well, that's why I'm bringing the point up. And I don't bake. I know Robin does, but the point is, is that, you know, I hate to see this thing drop right now and that yes, we need to talk about it. I'd like to see some little bit of discussion about what -- what's going to happen. Because, you know, as I said before, I agree that we probably shouldn't try to litigate that here and now, but at the same point, we recognize that this has been brought up and it -- it requires attention, and so I would like to at least see some little thought being given to how we -- how we get to the next step. That's all I'm saying.

ROBIN GROSS: Should we have another meeting later in this week perhaps to discuss the next steps? I mean, you tell us, board members, what are the next steps?

STEVE CROCKER: One of the simple facts of life is that although the board's name is on the process, everything that comes into the board gets reflected into staff for action, so it isn't really that the board is going to set the schedule for what happens next. We'll turn this over to counsel.

ROBIN GROSS: With all due respect, turning it over to counsel is not an acceptable solution to us. I mean, that's -- it is counsel that has been -- it is counsel that has been telling us that we're wrong all along. And I think we need someone other than counsel to look at this. That's the problem. It's all been in counsel's hands.

STEVE CROCKER: I don't have a better answer to give you. I mean, you're raising issues that are effectively legal process, and that's what we do.

ROBIN GROSS: Perhaps there might need to be some independent counsel look at the issue and do an analysis from an independent viewpoint. Rather than someone who -- an organization that developed the policy and implemented the policy.

Ray.

RAY PLZAK:

All I suggested was not settling the issue. What I suggested was what was the next step to get to some place where we're going to discuss the issue. We said that we weren't discussing this now in terms of the depth and detail that I think that the NCSG wants to discuss this, and they clearly want the board to interact with them. And so my fundamental question just was from a point of personal curiosity, when is this going to happen and how is it going to happen? I'm not talking about engaging counsel or having a policy discussion, but there are some fundamental things I think we need to talk about in terms of next steps. You know, and I'm not talking about a -- some kind of reconsideration. I'm not talking about any other kind of evaluation. But clearly there's some things that have to be talked about because there's disagreement in the room about what is the root cause or what things are. You know, it's not a matter of resolving the problem itself, per se. But we have to get to the point where we can figure out what is the best path forward to do that. And I thought that that was what was being suggested. And I would just like to know when and where or how we're going to do that, that's all.

STEVE CROCKER:

Mike, did you have your hand up?

MIKE SILBER:

Yes, I did, Steve. I'm just getting a little confused over here because the topic seems to be going from the specifics of this matter to the inadequacies of the current process. I'm just trying to understand what we're trying to do. I'm also not really sure what this session is aimed at because I don't think the board is going to constituted itself as an

emergency appeals tribunal and hear the matter here and now. So I think Ray's question is a valid one, which is, what next?

STEVE CROCKER: So Robin, you're asking for a kind of a common sense interaction to get at the issues. I suspect we could put that together, but the point that Mike's just made is a relevant one, that, you know, there may be some value in that but we're not going to create an ad hoc emergency separate appeals process over the -- all of the ones that we have in place and put ourselves in greater jeopardy than we might be already. But that said, I'm sure we could have a chat.

ROBIN GROSS: Can we -- can you tell when and where? I'm at your disposal.

STEVE CROCKER: I think -- I think we need to caucus internally for a second and get back to you, so -- but we'll get back to you.

[Speaker is off microphone.]

STEVE CROCKER: Before you leave? Well, depends on when you're leaving, but stick around.

ROBIN GROSS: I'll take you at your word for that.

MIKE SILBER: Steve, sorry to interject. I have no problem meeting, but the question is, for what purpose? What are we trying to achieve? What's the aim and objective?

STEVE CROCKER: Right. And what I'm suggesting is, let's you and I and whoever else get ourselves organized about that, get back to Robin and have an informal and delimited chat and see where we go.

Thanks.

ROBIN GROSS: Okay. Thank you. Ray.

RAY PLZAK: Not on this topic and not on any of the other topics that are on this thing. I would just like to take this opportunity to notice a significant event that occurred recently in the ARIN region. Milton Mueller, clearly not a number resource guy, has been elected to the ARIN Advisory Council which is the policy consensus body of the ARIN region. And so here you see an example of participation by the civil society inside one of the policy forums, and the fact that he's in this position indicates the significance to which that particular group of individuals puts the -- having his point of view actually being present in a -- in a body where the consensus are determined on policies. I just want to point that out. And I thank Milton for his contributions. He's been, I know, participating for several years. And so he had to gain the trust and

understanding of that sometimes rowdy crowd in order for them to say we want this guy here. So Milton, thank you very much, and congratulations.

[Applause]

ROBIN GROSS: Thank you, Ray. Okay. The next issue, and you thought you were done with it but actually we're kind of coming back to it because the next issue also has to do with the adoption of the trademark plus 50 policy and our attempts to achieve some of the policy inputs that were provided to ICANN that led to the ultimate adoption of that. So I actually want to turn this over to David to discuss initially.

DAVID CAKE: There's some ways in which from the board point of view the trademark plus 50 issue is not really -- from the board's point of view, is not really about trademarks or so on but rather it's a gateway through which NCUC entered the exciting world of ICANN accountability mechanisms to an ultimately disappointing journey.

On this particular issue about -- this is about the -- oh, don't they? Sorry. This particular issue is about the DIDP, the document -- basically the document disclosure policy. And what we found in the -- in this trademark plus 50, we sort of said well, the policy was this at this point, and then later it was different. And what were the -- could we find out what the policy inputs are to that process that caused ICANN to change its position. And we were essentially told no, you can't see those policy inputs. And we have sort of realized this -- the issues with the DIDP. It's

supposed to be -- I mean, ICANN is supposed to be able to have a default of transparency, default of all documents being shared. That generally happens. But when it doesn't it appears that there's no real -- there's no easy appeals mechanism for the DIDP. There's no sort of real explanation where if -- and ultimately appears the -- your -- well, ultimately it appears that your request for an appeal in the DIDP is evaluated by the same people who made the decision in the first place. So most of the time, 83% of the time on recent requests, they say no, we were right to refuse your request the first time. We're really asking about what can we do to -- we find a -- you know, when there's a huge lack of transparency on this particular issue, but it -- it appears to be a continuing thing. If your document you want isn't shared the first time, you have very little chance of getting it without a very complicated appeals process that's -- you know, very heavyweight for what you're asking.

We'd just like some explanation from the board. Do you think that this policy -- are there any ways you think you can suggest that we look at this issue, improve -- improved -- not so much the existing trans -- so improve the appeals process on DIDP. And one of the suggestions that we have talked about earlier is this appears to be an issue where the ombudsman would be appropriate but it's not really covered by his existing role in the bylaws.

STEVE CROCKER:

So two things. Again, we're talking about some very specific process issues and statements that you're making that I'm sure that you, you

know, feel very strongly about and certain about. But it moves sort of toward a litigation aspect here.

So I know you don't want to hear, you know, we refer this to counsel. More helpfully, we did take a look recently at the role and charter of the ombudsman. And one of the realizations we came to is that the ombudsman is underutilized in the sense that the charter for the ombudsman is broader than we believe people understand. And so you might give it a shot. I don't know how well it would work, because then -- it depends how he takes it up, but from where we're sitting, and we looked at the various appeal processes and so forth, we said so there is a pretty wide spectrum of possibilities coming through the ombudsman and we're not seeing it exercised. But in principle, one could go to the ombudsman -- there is less limitation than might appear on the set of issues that you can take to the ombudsman.

DAVID CAKE:

I think that's good feedback. But we also -- on this general issue of the DIDP, we are having a lot of issues with it. The staff -- all right, essentially the -- there is supposed to be a compelling sort of public interest reason to refuse document transparency but we're not provided with what that reason is. And there not being a sort of clear definition of the public interest views within ICANN, it is very -- it seems a little bit arbitrary. Are there any -- if we were to think about some process to review the -- not so much the DIDP but the accountability mechanisms, would that be something you think the board would --

STEVE CROCKER: I don't really want to comment on any of that. I mean, we're in territory that I want to stake out pretty carefully. But you -- you're making your points clear enough, and we'll chew on them. But, you know, as I said, the ombudsman is certainly available and has pretty -- pretty broad authority to probe pretty deeply. I'm sorry, Ray.

RAY PLZAK: I just have a general question, and I don't -- I just need a yes or a no answer. Is what you're saying -- I'm talking to the NCSG. Is what you're saying is that the board created a policy outside of the GNSO policy process, is that what you're saying? Yes or no, that's all I want to know.

DAVID CAKE: We –

RAY PLZAK: I'm trying to get clarity. So a yes or a no is all I really need to know. Are you saying that the board created a policy outside of the GNSO Policy Development Process?

DAVID CAKE: Yes. All along we have -- we believe –

RAY PLZAK: Okay. So your answer is yes.

DAVID CAKE: Yes.

RAY PLZAK: I just wanted to know that so I can start to understand the basis of all -- of everything else you've said. That's all I want to know.

Thanks.

DAVID CAKE: We think it was a staff-created -- you know, it -- the process was the staff created the policy rather than the board as such. But yes.

RAY PLZAK: Well, now you are saying something different because I asked you a specific question, are you saying that the board created a policy outside of the GNSO policy process, and you said yes. And you didn't -- so then you -- you expanded upon your answer by saying, "Well, the staff did it." Well, it's got to be one or the other.

DAVID CAKE: One of the issues is without access to the --

RAY PLZAK: So I -- I would like to maybe get clarity on this offline. But the point is, is that if it is the board, then that's one matter. If it is staff doing something, it is another matter. But we can't sit here and shift the responsibility back and forth.

DAVID CAKE: This -- that issue -- the general sort of origins of our complaint is we believe the policy was created outside the policy procedure.

But in reference to the specific question about the DIDP, we asked for the policy inputs that led to the decision and we were not able to obtain them. So we actually have no way of knowing whether the process involved only staff or board because we do not have access to the policy inputs that led to the decision.

RAY PLZAK: When you use the term "policy input," you are implying that the board is making a policy. And so that's why I asked the question.

DAVID CAKE: Yeah. And I –

RAY PLZAK: So if the board is acting upon a staff action recommendation, that's one thing. If you're saying that the staff action combined with what the board did in response to it was making a policy outside of the policy development process, then it's the board making policy outside of the GNSO policy development process. That's all I want to know.

DAVID CAKE: And without understanding the policy inputs that led to that decision, it's difficult for us to give an unambiguous answer.

RAY PLZAK: You are the one that says they're policy -- I don't want to proceed with this anymore. But the point is, is that there is sufficient confusion here insofar as what you really mean and what you're really trying to get at.

So I would like to have another conversation some other place and time about this as well.

STEVE CROCKER: Let me just observe we're in a loop here. So now that we've taken care of the easy ones, can we move on to some of the tougher issues?

ROBIN GROSS: Okay. The next issue -- and I don't see it on this screen here because we sent six issues, and I guess it didn't fit on this screen.

But the other issue that we want to discuss was new gTLD auction revenues, how to be utilized, and who decides.

And Avri was going to be the one -- oh, it is up there, okay -- to discuss that.

AVRI DORIA: Thank you. Yeah. This one is -- in 2007, as part of the new gTLD policy, which is always good to go back to and we could have gone back to it in other discussions, there was a point made about auctions and that the revenues of those auctions, yes, needed to be determined but there was a requirement at that point that the funding be kept separate so that any monies that came in from auctions would go into a separate

fund. That's one issue where we are curious to find out what the arrangements, indeed, are for that.

The other one is that it left open the discussion of what would happen with those funds and that there would need to be a community discussion on it. Now, the community ranges all the way from people that say that money should be put into the reserve fund, that money should be given back to applicants, there should be a foundation, to my particular favorite that says it should go for a no-cost remedial gTLD application for development areas. There are many of us that have suggestions. There are many of us that have ideas, many uses for these funds.

Now that we've reached the point where we expect some of that money is going to start coming in, we're wondering what the plans are for opening up a community discussion to, indeed, figure out what's going to happen with those monies.

So basically going back two questions: Are those monies going to be put in a separate fund that is totally unrelated to any of ICANN's operations? And, B, when will the community process to determine how those funds will be used commence? That's the issue, as I understand it.

STEVE CROCKER:

Yeah, this is a topic that I feel very strongly about, have spoken about as crisply and forcefully as I can. And I'm in 100% agreement with you. And to make the point in a positive way, I will echo back some of the key points you've made in my words.

The funds -- any funds derived by auction will, indeed, have to be kept segregated. We have made that point very clearly. Akram is shaking his head yes. Cherine, as chair of the Finance Committee -- Xavier, are you still where you were somewhere? Our CFO. This is a point that has been emphasized over and over again. We don't have any of those funds yet, so we don't have a place.

But in every discussion, we have made the point that there will have to be -- there must be a segregated place for that.

The second point that we've made, and I in particular have made publicly several times, is that there will be a separate process for determining what to do with those. And that process will go -- will be the full community consultation process, that there is no preconception about the disposition of it. There is no bias in terms -- and that in particular, they won't be just put back into the operating fund and consumed as part of the ordinary expenses.

Nothing has progressed past that point. We have not begun that process. We have not defined that process. And there's -- we haven't begun taking applications for funding or grant proposals or anything.

One of the reasons why that process hasn't started, even though it was counseled that maybe we should have, is that there was a great deal of uncertainty as to whether or not there was going to be an enormous amount of money which was some of the dialogue once upon a time or zero money because there might not be any auctions at all.

There now appears there will be some auctions, there will be some money perhaps. And so we do need to begin that process.

And I think the timing is about right in the sense that -- this time.

I don't have any preconception about what to do with it except I do have one, which is I think that everybody's eyes are a lot bigger than the amount of money we're going to have. That money -- whatever amount of money is probably going to be oversubscribed many, many fold. So I just tend to be cautious about the expectations associated with that.

Cherine?

CHERINE CHALABY:

100% echo everything you say. The timing is the real question, when do we start. And, frankly, common sense, if you start now, not knowing what's the amount of money available, we're going to come up with some real theoretical options. Whereas, we will segregate it once we know the size of the money. There's plenty of time to decide what to do with it. And the community's going to make that decision; we're not going to make it ourselves. So size of the fund will determine what we're going to do with it in one way or another.

So I think we're all going in the right direction. And rest assured that the process will be properly and timely and the funds will be segregated. I'm 100% in support of what Steve said.

STEVE CROCKER:

Let me -- let me emphasize what Cherine has said. Some of us have been in the position of organizing funds or having money to disburse and so forth.

If it's \$5 million that is the net of this, that's one size problem. If it is \$50 million, it is qualitatively different. If it is \$500 million, it is yet qualitatively different. And there are stopping points in between all of those. You can't begin to imagine what a process is until you sort of have the range. At 500 million, you are talking about money that can last for a long time. You can endow things, you can build, continuing things. At 5 million, you have got a relatively short-term problem and you better have a very short list of what you're going to do with it just to give a rough sketch.

I have no clue yet what range -- well, I have a clue. I don't think we're in the 500 million range. And we may well be down in the few million range.

CHERINE CHALABY:

And there is language in the applicant guidebook giving some options already, but it is just ideas and thoughts. And I think until we know the size of it, it would be very hard to decide what to do with it. Anyway...

STEVE CROCKER:

The applicant -- yeah, that's a bit of a sensitive point. The applicant guidebook gives some ideas, but I don't view the applicant guidebook as controlling the outcome from this point forward. It's suggestive but not controlling.

AVRI DORIA:

Yeah. I appreciate the answers I have gotten and it does fill me with a little bit of comfort.

But one of the things that I think -- if we look at how processes go in ICANN and -- it strikes me that the time to figuring out sort of the -- yeah, I hate to use the word, the metaparts of this, how we're going to put together this group that does this, how it's going to be managed. And I don't think that that really matters whether it's going to be 5 million or 50 million or even 500,000 in terms of looking at what is the proper process within this community for making that kind of determination.

And I know we're putting together many, many different kinds of panels to do this, panels to do that, and panels to do all kinds of grand things. And it just strikes me that this kind of is it a panel, it a committee, is it a something is something that perhaps we can start thinking about because one of the other things I've noticed about organizations and such is that when there's a big bunch of money burning a hole in someone's pocket, the urgency of figuring out how to spend it sort of starts to drive the decision. And the exigency of the day sometimes helps force a case and such. So getting the mechanisms in place for making these determinations seems to be something that we should possibly start as soon as the first auctions are starting so once that money's there, that hole doesn't get burnt in the pocket.

Thanks.

STEVE CROCKER:

We're in agreement. I understand the force that a pile of money brings.

The balancing side of this is one can get very excited about building very complex mechanisms on the expectation that one's going to have a very big pile of money, and it turns out...

Kuo?

KUO-WEI WU:

I don't need to repeat Steve and Ray and Cherine's saying. I agree with your point. But I would like to know, what is -- in the noncommercial stakeholder, what do you think -- what your recommendation is? Can you have some idea so we can share?

AVRI DORIA:

No. We have not -- I mean, we have talked about various things like foundations, like getting in applications and figuring -- but, no, we have not formed --

KUO-WEI WU:

Then I think thanks for your question. I think the board will take it back and think -- put it in an issue and to discuss it.

Thank you.

STEVE CROCKER:

Let me -- even though you said you haven't thought about it all, let me just pick on the word "foundation" there because that is one of the ideas that floats around. And we've taken some -- I've taken some guidance on this in the past.

If one imagines that what we should do with this is create a foundation, that's plausible in one sense but it begs the issue of, okay, you create the foundation and then what are the rules for the foundation? What is its purpose? What is its focus of direction and so forth? So that's -- I don't want to use the terrible phrase "kicking the can down the street," but it's only a part of -- it is only the beginning of an answer about what to do because the very next thing will be, as I said, how you're going to frame what its objectives are and principles and so forth so if people are going to put in applications, what is the evaluation criteria. So all of that has to be worked out. And then it becomes an implementation detail in a sense as to whether or not you use a foundation or whether you use something else. But the substance of what you want to do has to be worked out.

KUO-WEI WU:

I think, you know, we already notice these issues. And it is a point. I don't think we should talk in too detail about a foundation because we still didn't hear what other stakeholders are thinking about. You know, be careful. So it might be you say foundation is good, but maybe the other stakeholders doesn't think so.

As a bottom-up, we not only listen to the one stakeholders -- or I would say be careful, not now. But we take seriously your point.

STEVE CROCKER:

Olga, you had your hand up?

OLGA MADRUGA-FORTI: Yes, thank you, Steve. This is a really interesting dialogue because there is so much interest in what all the good that could come with such funds that would be collected. And you certainly urge us to have ideas about that as soon as possible, in fact, in advance of the fund growing over months which is a good idea.

But we have also talked today about board and management, perhaps not getting too ahead of processes before, in a multistakeholder way, the idea has time to percolate within your community.

So my question back is: Do you have a process in mind to discuss within and among yourselves what would be the best recommendation regarding the fund? And if so, what kind of timeline? How will that happen? Can others participate?

Thanks.

AVRI DORIA: I kind of feel like I'm caught in a very strange trap here because if I give you any ideas of what I think should be done with it, I'm told that I shouldn't rush it. And if I have the notion that says we should be building a cross-community work to start talking about this, I'm asked, "Well, what are your plans for using it?"

And I feel that, basically, we're at a point where we really should be getting a cross-community group of people to start working on these issues. Once that cross-community is built, people like me can put in -- I have my favorite suggestion. We have a JAS -- we had a working group called the Joint Applicant Support group that had ideas. So there are

many ideas. What we have need to do is bring them together in a cross-community way so we can start talking about it.

STEVE CROCKER: I think that's fair. I'll take Kuo's question as one that was intended to stimulate something formally.

But we will start -- whenever we do it, we will have an organized level playing field, an open process, involve everybody. Send out calls for input and you'll see it.

KUO-WEI WU: Steve, can I make a comment for this one?

STEVE CROCKER: Yeah.

KUO-WEI WU: I'm not negative. Please, don't misunderstand it. I take your point. What I mean is, for example, for your -- in this case and also for the first case you are raising about, you know, the GNSO policies, those two is very good point. And I will try to suggest at least a kind of recommendation.

Since we have a public forum, all the stakeholders will be there. If you, the noncommercial, thought about this, too, it is very critical and important for the board and for the whole -- you know, the staff to follow up. I think raise that in the public forum, and let's try to hear the other stakeholders' response. I encourage you to do that.

STEVE CROCKER: That's an excellent point. Thank you very much. I was discussing with Brad White the structure and rough schedule for what are we expecting in the public forum on Thursday. There is plenty of room there to have that be a very specific topic if that's what you want. And we can tee that up. That's a good suggestion.

We're also out of time.

AVRI DORIA: We're out of time.

ROBIN GROSS: Okay. I guess we have to close this without getting to our other issues. But if I could just briefly say what they were. We wanted to talk about these new strategy panels and how they relate to the bottom-up multistakeholder policy development process and the fact that we're seeing, again, more and more not policies being made in this top-down fashion by hand-picking people from -- the staff wants and not from the community in the bottom-up way. So we wanted to raise that issue.

We also wanted to raise the issue about the accountability mechanisms that ICANN currently points to, things like the DIDP, things like the IRP which costs a million dollars in order to file.

Our concern, these accountability mechanisms are insufficient. They're meaningless. And we need to get some kind of independent, outside accountability mechanisms in place that will really help ICANN to have the kind of credibility and the kind of legitimacy that it needs if it is going to engage in global governance of the Internet.

So those were the only two other points we wanted to make that we hope you've heard.

And I'm also really hoping we can -- frankly, insisting that we speak again this week on the adoption of the trademark +50 policy with the board. So if I have a commitment we can do that this week.

STEVE CROCKER: Thank you. Thank you, everybody.

ROBIN GROSS: Thank you.

AVRI DORIA: Thank you.

[END OF TRANSCRIPT]