

GNSO Working Session  
Sunday 22 June 2008  
Afternoon Session

<http://www.gnso.icann.org/meetings/paris-agenda-22june08.shtml>

### **7. Discuss Jon's Paper (12:30-13:00)**

Relation between ccNSO and gNSO: New gTDLs

<http://gnso.icann.org/correspondence/bing-to-ccnso-26mar08.pdf>

>>CHUCK GOMES: Okay. We're going to go ahead and start. I'm going to give Avri a break so she can work on a presentation for later. And then she'll pick up when I have to leave in about an hour or a little less from now.

Oh, yeah. Okay.

Our topic during this session has to do with the IDNC and -- so IDN ccTLDs.

And a couple purposes specific for the meetings today and tomorrow. In the GAC meeting, the joint GAC meeting with us at 4:00, that is one of the topics. And in our meeting later in the week, on Thursday, over lunch with the ccNSO -- oh. Was I looking at a different agenda?

>>AVRI DORIA: No. Sorry. One of the things I had said earlier -- maybe this was when you were out -- since we didn't cover Jon's paper before lunch, we moved it to first thing after lunch.

>>CHUCK GOMES: Okay, I missed that. I'm sorry. No, I wasn't, obviously, or I wasn't listening. That's a possibility, too.

So let's talk about Jon's paper.

Jon, would you be so kind as to share the main points of your paper so that we can maybe use that as a takeoff for discussion?

And by the way, his paper relates to this topic of IDN ccTLDs. So it fits very nicely.

Jon.

>>JON BING: Thank you. It is a very modest effort to sum up some of my own doubts at the earlier stage. And there are by no means any original thoughts in it, but there is a point of concern.

In the -- introducing the new top-level domains, there has been talk over fast track. And there's also been mention of the possibility of the CC domains being given perhaps one shot each for fast-track additional domain. This is commented in the bullet point just being circulated. And I won't say anything more about this.

But my discussion presumes that there is -- is a start of CC new domains before the PDP is fully developed and adopted. And it has been mentioned that the possibility may be of a two-year period to go before a PDP is fully adopted. When it's adopted, it will be given a retroactive action or force through the contractual arrangements, which makes the contracts dynamic. And that retroactive force presumes, however, that there is a contract which may make -- may implement that action.

And here is where my doubt comes in. Because, first, if the CC domains are given an additional domain, that may be used perhaps in a different way to the typical use of a CC domain today, which is noncommercial use. There certainly are different examples of commercial use, also CC domains. And my suggestion is that the fraction, the number of such examples, will increase by launching of the new domains. They will then have certain advantage in working for two years, or a period before the generic top-level domains are launched. And in that time, they may get the certain advantage in the marketplace.

Then comes the PDP and wants to take retroactive action and coordinate the field. And that presumes that the CC domain is bound to implement such -- such a policy.

And as you know, there are several CCs which do not have any proper contractual relation with ICANN. This is explained by several ways, one of them being that the relation between the CC domain and the former system is traditional and old, and therefore it has been difficult to introduce the ICANN regime fully over these rather independent domains. And they are also noncommercial to a large extent, and have a tradition within the Internet community.

But if they -- this has led them not to have the contractual framework in place. And there is also argument -- in my mind, very weak argument -- that there are sovereignty issues at stake, that a country or nation cannot contract with a private organization like ICANN. I think that is a false argument. But it has quite often been referred to.

This --

>>CHUCK GOMES: Jon, would you go over that last point just a little bit again. Restate it.

>>JON BING: Sorry, yes. You'll excuse me if my language --

>>CHUCK GOMES: That's okay. I just want to make sure that everybody gets that.

>>JON BING: The argument is that the nation is a sovereign nation, and if it makes a contract, it has to make a contract to another body in the international public law domain. And it is not seen by someone that ICANN, being a private organization under state, U.S. state, law, belongs to that domain.

As I said, I think that is a false argument, because it is quite usual that the registry is in the private domain as an operator with telecommunication service.

>>CHUCK GOMES: So what you're saying, then, is the argument that we've heard often that it's not possible for a government to enter into a contract with ICANN in this specific case, if the government's involved in the IDN ccTLD, that that argument is a false argument?

>>JON BING: Yes, it is -- I see it like that.

If you take the very similar situation in telecommunication area, there's nobody making the argument that a country can't, for instance, enter a contract with AT&T because AT&T is in the private sector. And, obviously, the telecommunication operator in the country usually would also be in the private sector, though the country may have some control over such an important national resource.

>>CHUCK GOMES: Thank you. Adrian, did you have another question?

>>ADRIAN KINDERIS: Adrian Kinderis.

I think that it's more of a -- it's not whether you can have an agreement. It's -- from what I understand now, it's more of what is the nature of that agreement.

I believe that, for example, Saudi Arabia have overcome the issue of dealing with "the government" or the U.S. government as such, but now it's more of, well, what sort of agreement are we signing. So I think it's -- I don't know that you can necessarily look at it and say whether a government -- or whether an entity will sign a contract with the U.S -- you know, seen as the U.S. government or with ICANN in that way, it's more of what sort of an agreement will they be signing.

>>CHUCK GOMES: Go ahead.

>>JON BING: Thank you.

Yes, that's certainly -- certainly one possible way of looking at it.

I think there is a lot of -- there are several false versions of this story being discussed. So I'm not quite convinced that this is the basic reason.

But in the context I'm presenting it here, it's only to emphasize that it may be a reluctance to enter into the contractual arrangements with ICANN necessary to make the PDP adopted retroactive. And if that is the case, you will have the possibility of arising two different regimes for the new top-level domains, one governed by the PDP, and one not governed by the PDP, but being more or less let on its loose.

And, therefore, this may, if you want to be dramatic about this vision, it may sort of pull the system apart, because there will be different regimes, different law applied to different domains, and the whole structure of ICANN may be under such tension that it may tear apart because of this dynamic elements. I'm not saying that it will happen; I'm only saying that this was one of the reasons I'd like to make this note, in order to draw attention to that possibility and have -- share that view, simply.

>>CHUCK GOMES: Let me interrupt you again.

I think, Carlos, did you have something?

>>JON BING: I'm finished.

>>CHUCK GOMES: Oh, you're finished.

>>CARLOS AFONSO: It's Carlos Afonso, from NCUC. Just some quick comments, and confirming what Adrian says.

And I really believe that in this case, it's not a matter of you can or you cannot enter into an agreement with a private entity. But it's much more an issue of the contents of this contract. For example, this is something very related to arbitration. From what I know, in Brazil, that's the case, the Brazilian government cannot enter into an agreement with arbitration clause, because there are some indisposable rights that cannot be subjected to arbitration. So maybe this is just one example of a certain number of clauses that could not be -- could not be contemplated in agreements with states and private companies, which is an example.

>>CHUCK GOMES: Thank you.

Anybody else have a question or a comment?

Tom.

>>THOMAS KELLER: Yeah, I guess the comment I would have is that I find it kind of strange that we should start treating the CC space now in different levels, actually. So you have the old ccTLDs, but only a few of them have contracts, and they were actually bullied into contracts at a time when they had redelegation going on, but most of the major ccTLDs don't have any contracts. And I don't see why we should enforce now contracts on them to have some kind of a process established with them.

First of all, it kind of achieves problems with the incumbents. And on the other hand, they can join the ccNSO and I guess these registries, or the new ones, would join the ccNSO and then they're bound by

the scope of the ccNSO PDP process. So I don't see anything being torn apart, or whatever. The GNSO and the gTLD world was always totally different to the CC world, and you don't see that change in the future.

>>CHUCK GOMES: So you don't -- if I understood you correctly -- just a second, Tim, you're next. So you don't -- I just want to clarify what Tom said.

So you don't think we ought to push the contract issue with ccTLDs? Is that what I heard?

>>THOMAS KELLER: Yeah, absolutely.

>>CHUCK GOMES: Tim?

>>TIM RUIZ: I have a little different view. Actually, the exact opposite view.

[ Laughter ]

>>CHUCK GOMES: Just a little.

>>TIM RUIZ: My concern is, once we, you know, allow these IDN ccTLDs, then it's not the ccTLD space anymore. You know, it's beginning to expand. They're being given, you know, first opportunity at this particular market with IDN TLDs. And then they're going to be doing it without any, you know, agreement with ICANN or the similar, you know, consensus policy restrictions, whatever, you know, use of accredited registrars and on and on, that the gTLD space is required to have.

So, you know, I don't understand why we would hand them all of this on a silver platter without any expectations that there's some agreement between them and ICANN that's going to bind them to something at least this -- the results of the PDP, if not even more.

>>CHUCK GOMES: Thank you.

Olga.

>>OLGA CAVALLI: Thank you, Chuck. This is Olga Cavalli.

First, I would like to commend Jon for his document. I think it's very good, and it raises some concerns that we already talked about in the summer with our drafting team for the responses to the GAC and ccNSO.

From my perspective, I think it's -- I think that we already have two regimes. So I agree with Jon, but I think it's happening today. ccTLDs have a different regime than gTLDs. And I'm not sure if this is fair for both parties.

Thank you.

>>CHUCK GOMES: Jon, go ahead.

>>JON BING: Thank you.

Yes, my point was only that for the new round, I want to ensure that there was a contract in place which made the party obliged to take on the results of the PDP.

I -- I find that, as a lawyer, I'm fascinated by the way ICANN is being constructed, and occasionally, I find that my fascination is not really appreciated outside a circle of people who think in legal terms. But this is an international organization which wholly is based on the contracts with ICANN. If one of those chains -- links in those chains is broken, there's absolutely no authority in -- formally that ICANN has. That is completely different from a usual international organization, where a treaty will communicate some of that sovereignty on the nation into the treaty organization, which then can be -- the treaty organization has an authority which flows from the sovereignty of the nations, and they can use this authority to regulate the space within the treaty boundaries. Such is not the case of ICANN. ICANN has to say that the reason that you have to do this is that we have a contract, and that contract is linked into this contract and all the way back to the original contract with ICANN. And if you're not making that this is -- is very, very clear and certain, one will have problems. And, of course, these problems will become more severe as time goes on and as the number of parties expand. And that is exactly what is happening now. We're expanding the number of parties by a factor of some rather large factor. And the administration of the contractual system will become a critical factor in making the domain name system a unified system, in my opinion.

>>CHUCK GOMES: Thank you.

Cary.

>>CARY KARP: I move with some degree of discomfort, but, nonetheless, between the camps here. I spent the morning with the GAC. I spent yesterday with the ccNSO. And here I am now, and in my chest beats the heart of a gTLD registry operator.

But I note from the CC perspective the essential difference between CCs and Gs have nothing to do with the strings of their origin. It has to do with the fact that CCs do not exist by contractual obligation to ICANN, and the Gs do. And they expect that to be grandfathered into this fast-track process.

They're talking about IDN ccTLDs for one reason, and one reason only, and I think it behooves this organization to be very keenly attuned -- this group to be very keenly attuned to the nuance in that.

>>CHUCK GOMES: So I think the question that we need to discuss is, where do we go with this.

And in terms of our discussions with the GAC and in terms of our discussion with the ccNSO later in the week, as well as in meetings with regard to IDN ccTLDs that are occurring at other times this week.

Jon, if there was one or two points out of your paper that you think we ought to put forward, what would those be?

>>JON BING: I think the essential point is to make sure that there is a contractual arrangement with any organization setting up a new CC -- a new top-level domain, that there should be a contractual arrangement with any setting up a new top-level domain, whether CC or generic, and that that contractual arrangement made the organization obliged to take on the result of new PDPs.

>>CHUCK GOMES: So what -- the key element of that contractual relationship, then, would be to ensure that they abide by the ultimate CC PDP; is that what you're saying?

>>JON BING: Yes, I'm saying that they abide by the outcome of policy development processes within the -- within the --

>>CHUCK GOMES: So in the case of the Gs, it wouldn't be that process; it would be our own processes; correct.

Cary and then Adrian.

>>CARY KARP: The documentation that underlies the fast track recognizes need for some contractual instrument. It's just that this instrument is not going to be based on G boilerplate, it's going to be based on the minimal extension of the CC basis of existence into the ICANN-sanctioned realm. And the whole PDP thing has also been very, very cautiously thought through and thought about. And it is the essence of the fast track that it terminates the moment that the actual PDP has been conducted, that it's a fast track somehow bypassing the policy-making process that provides the legitimacy for suggesting anything in the first place.

So it's very intricate. And the document does touch all of the points that are being raised here. But, again, touching them from considerably different perspectives from the ones that we've got in mind as we discuss this.

>>CHUCK GOMES: Thank you. Adrian.

>>ADRIAN KINDERIS: Yeah, Adrian Kinderis. Maybe I can help understand what I need to get out of this. If it can be explained to me what we're fearful of, contract or no contract, say there's nothing. If we can lay out on the table as a group what we're fearful of, maybe we can understand, you know, why we need to push for a particular position.

Is that going back too far? Is that a lack of understanding?

>>CHUCK GOMES: No. I think that's very valid. And Jon, at least indirectly, in his paper, hit on that a little bit when he was talking about a first advantage. And whether it's a first advantage or whether it's an advantage because of less stringent contract conditions, that's a competition issue. And so I think that's really the basis. And what we need to do as a council is to see if we have a unified position.

Now, we have a unified position in our response to the issues paper. And, in fact, if you -- everybody should have a copy of that at your table. And just -- not a copy of that. Excuse me. A copy of, I think, 11 bullet points that I took out of our executive summary that seemed to be particularly relevant for our discussion today.

And if you look at the very last bullet point, it says, "ICANN should have a contract or some other form of agreement with the IDN ccTLD operator that includes appropriate technical, operational, and financial requirements."

Now, that's a lot more than what Cary was just talking about, and even what Jon was talking about. And I fully appreciate Tim's position, 'cause, you know, as a gTLD person, I'd a lot of to see them have all the requirements I have. I don't think that's realistic. And we have to decide, do we want to be realistic and propose something that might work but -- or hold fast on that position where they have all of those elements in their contract.

Okay. Who was -- I think I saw some -- oh, it was Tim. Thanks, Tim. Edmon was in my way. I couldn't see.

>>TIM RUIZ: Yeah, I don't disagree, Chuck, that -- you know, about being realistic. And maybe the approach would then be that there's some sort of -- and I think it's kind of hinted at in what we've recommended up until now, that there's some kind of fast track for the existing gTLDs, so that there's some balance there at least giving them the opportunity to introduce, you know, TLD IDNs in their name space, as well as the ccTLD name space, can keep that par time wise.

>>CHUCK GOMES: Thank you.

Cary, go ahead.

>>CARY KARP: It might be worth noting along that line that the entire discussion in the CC context derives from the fact that there's some notion of natural language nexus attaching to a domain that's supposed to represent a territory or some government entity.

And there's been some equivalent discussion on the G side of this, but it's been extraordinarily nonfocused, very, very sweeping, very, very broad, and easily dealt with on that basis. And there are, in fact, equivalent arguments that can be leveled towards the CC approach, but nobody's leveling those arguments. And the question is if this raises run or if it's high time for the Gs to see if there is some defensibly arguable principle that might justify a G fast track parallel to the CC fast track.

>>CHUCK GOMES: I don't see any other hands, so I'll take this opportunity to comment.

I believe in our paper we said exactly that thing. We said that if there's a fast track -- I don't know if it was this exact words -- if there was a fast track for Cs, then the Gs should be able to do that as well. I think the underlying principle there is that neither Cs nor Gs should go before the other, just to keep it a level playing field there.

>>CARY KARP: Well, the point that I think probably needs to be noted here is that nobody -- when it was agreed that there might be a principle that the Cs can evoke, the Cs went ahead and really drafted what they regard and what appears to be a compelling argument for implementing that. And on the G side --

>>CHUCK GOMES: For implementing what?

>>CARY KARP: This fast-track thing is just about to become reality, to be implemented.

And the Gs are still talking about the fact that there actually might be reason to want to have a G fast track as well. So there's a huge distance out of the gate that the other guys are at this moment.

>>CHUCK GOMES: Well, I'm not sure that we need a fast-track in the G's, because we have got a process that is -- implementation is being worked on, and it suits the IDN TLDs as well as it does the gTLDs with the possible exception of anything that we think is a prerequisite with regard to technical standard. And I know that's another debate issue that we won't get into here.

So, you know, how do you fast-track the new gTLD process? I don't think that can happen.

We would all like to do that. I could take a raise of hands right now and everybody would probably stand up instead of just raising their hands, we do that.

The point is -- and by the way, when I look at the document, Cary, and I would be curious to get your reaction on this, what I see is there's an awful lot of implementation work to do with what they are proposing as the fast-track as well.

So we may not actually be that far apart in terms of -- and in fact, ICANN's document in this regard kind of hinted at that, that probably they are going to happen about the same time.

Do you think I assess that incorrectly?

>>CARY KARP: I think there is significant enough likelihood that you may have assessed it incorrectly for a plan B to be kind of something we might want to yank out of a sleeve, yeah.

>>CHUCK GOMES: And I'm all for that, because I -- and in my opinion -- I'm sorry, as Chair I shouldn't be talking so much, but as -- in my opinion, we need to stake that -- that is one point we need to take out very clearly.

And I think there's a way that we can do that that shows that we are not trying to have an advantage ourselves.

In my conversation with Suzanne Sene, who is the GAC representative in the council on this issue, she -- I told her, I said I think if you translate what we said in our paper -- in our response to their issues paper, you can conclude that we really don't think that either side should go before the other.

They shouldn't go before us; we shouldn't go before them, unless one side particularly decides to do that.

>>CARY KARP: Well, I'm not sure I have heard the same thing being said from the other perspective.

>>CHUCK GOMES: You mean from the CC perspective?

>>CARY KARP: Yeah.

>>CHUCK GOMES: No, I'm not either, Cary. No, no, I agree totally. And that's ground we need to cover. I am with you all the way.

Let me be quiet and let some other people jump in. Who else would like to enter this discussion?

Mike.

>>MIKE RODENBAUGH: Is it a discussion about any of these bullet points or just --

>>CHUCK GOMES: Well, we're kind of transitioning from -- that's a good question. It's a transition from Jon's paper into this. And his paper really relates to this.

So not any of the bullet points. We should, for a moment at least, try and focus on the contractual issue, which was a key element of what Jon's paper dealt with. And what -- what he and -- and some of you missed what his discussion -- hopefully you read his paper. But key point there is there needs

to be a contract with ICANN for the IDN ccTLDs to ensure that they follow the -- ultimately follow the -- whatever policy is developed by the -- in the CC PDP. It's going to take a couple years; okay? Some people have advocated for more -- more elements. In fact, our statement advocated for more than that in a contract between CC's and -- or IDN CC's and that.

Was there another hand?

Kristina.

>>KRISTINA ROSETTE: I am having a really hard time with this. And here is why.

From a substantive perspective, I agree with Jon that there should be, in the ideal world, if I ran it, that there would be a contractual relationship. But the concerns I have are, first, even if you say, okay, there's really no -- or the claim basis in international law for not entering into that agreement is not as strong as everyone would like you to think, I mean, let's be realistic. To me, I keep coming back to these are the governments. Whether it's directly or indirectly, these are the governments.

So whether there is a valid basis for international law for them to say we're not going to enter into these agreements, the fact of the matter is it's up to them.

And so if you have that -- In the other context, I also see a concern about the possibility of almost a kind of slippery slope. That if we say, okay, fine, you have to have or agree to enter into a contract with ICANN with regard to this aspect, I anticipate that there would be a concern that, okay, if you say that, then the next step is to go something more broadly along the lines of what we have suggested and so on and so forth.

And what I am really ultimately having a hard time getting is how likely is all of this to really happen? And by continuing to pursue it, are we jeopardizing or undermining our future relationship with the ccNSO on other issues?

>>CHUCK GOMES: Thank you.

Avri.

>>AVRI DORIA: Yeah, I would like to ask a question, I guess. And with all due respect to governments and their ability to do things, if there is a basis in international law for some sort of agreement, you know, whether it's contract, whether it's arbitration, then is it -- why is it well, their government, so it's up to them, if there is a basis in international law.

If there isn't a basis in international law and governments do have a right to do exactly as they please, then of course you're right.

But I don't understand why, given that there maybe a basis in international law to require such a thing, it is purely up to them.

>>KRISTINA ROSETTE: What are we going to do if they say, "No, we don't want to." I guess that's what I keep coming back to.

Even if there is a basis, what's ICANN going to do? You know.

>>CHUCK GOMES: Well, of course they can do what they did to the new gTLDs when they -- and I'm not saying -- I am not advocating this, please. So get my qualification there; okay?

What did they do to the new gTLDs, the first seven? When they sat down to negotiate and they wanted certain things and were told, if you want to get in the root, you will do this.

So there is actually something ICANN can do.

I am not advocating that position, but that's probably the only thing that they could literally do. Cary.

>>CARY KARP: Two other factors.

Contracts are foreseen in the fast-track documentation. And they all address issues of stability and security, all the kinds of things that might disrupt the stable operation of the domain name system are being very, very carefully tracked. And sure there is going to be a contractual instrument obligating any prospective operator to all of this stuff and again it's provisional. This is just to get some IDNs in the root. And when the CC PDP is complete, that will be the end of the talk of this.

But there is the other recourse that they have, and that's if ICANN says, "No, sorry, you are not going to accept our contractual terms," they can send their Ambassador to the United States Department of State and wonder what on earth is this all about? Is it really true that the United States government is the only up with that can order things into the root? What about the rest of us?

And I don't really know what an entity that exists by virtue of a Memorandum of Understanding with the United States government is going to do about what a cabinet secretary might decide.

So it's -- it's a different situation.