

ICANN – CCNSO – FOIWG

Meeting Notes (draft V1) for 23 February 2012 – 21:00 UTC

## **1. Present / apologies**

### **ccNSO:**

Ugo Akiri, .ng  
Becky Burr, NomCom (Vice Chair)  
Chris Disspain, .au  
Stephen Deerhake, .as  
Desiree Miloshevic, .gi  
Patricio Poblete, .cl  
Kathryn Reynolds, .ca  
Nigel Roberts, .gg  
Bill Semich, .nu  
Dotty Sparks de Blanc, .vi

### **GAC:**

Frank March

### **Other Liaisons:**

Cheryl Langdon-Orr, ALAC  
Carlos Aguirre, GNSO

### **Staff Support and Special Advisors:**

Jaap Akkerhuis, ICANN / ISO  
Bart Boswinkel, ICANN  
Kim Davies IANA  
Kristina Nordström, ICANN  
Bernard Turcotte, ICANN

### **Apologies:**

Keith Davidson, .nz (Chair)  
Eberhard Lisse, .na  
Martin Boyle, .uk

## **2. Chair**

2.1. BBurr chaired the meeting given KDavidson was absent.

### **3. Meeting notes for 9 February 2012 – Accepted.**

### **4. Response to GAC recommendations on Consent**

- 4.1. BBurr noted the Exec is drafting a reply to the GAC which should be circulated to the wg.
- 4.2. BS noted his concern about the 60 day recommendation. BBurr and FM noted that there was no agreement on the specifics of this.

### **5. Final Report on Consent**

- 5.1. BT explained that the final report, similarly to final reports for the DRDWG, has simply been re-packaged to be more accessible to parties outside the FOIWG. The recommendations have not changed.
- 5.2. BS had a minor grammatical correction which BT agreed to incorporate in the version to be distributed.
- 5.3. BBurr asked if there were any objections to the document being distributed at large – there were none.

### **6. Public Consultation on SIP**

- 6.1. BT noted there has only been a single submission which will require an extended consultation period.
- 6.2. CLO noted that the ALAC would not post a comment on this.

### **7. RFC1591 Section 3.4 – Misbehaviour and IANA Stepping in**

- 7.1. BBurr suggested the wg use the remaining time to continue its discussion on this topic.
- 7.2. NR noted that RFC1591 was written to apply to all TLDs including .com and is interested how we can interpret the duty to serve the community when considering this. Additionally the duty to serve the community in 1996 meant being competent at publishing the zone file – which was something that was done manually in those days.
- 7.3. CD noted that all gTLDs and some ccTLDs have contracts with ICANN and that those agreements supersede RFC1591 and therefore there is little to be gained in exploring the gTLD aspect of this. Additionally *“In respect to what misbehavior means and what is the operating for the trust of local community, I think there's a lot more debate to be had on that issue. Whether that can happen on this call I have it on the list, but there's a way to go yet before we get clarity on it. I just want to say one thing which is I think -- it depends on how deep you want to go into this, but I think the use of the word misbehavior is, in a legal interpretation, is likely to*

*be interpreted slightly more widely than specifically in respect to technically managing the zone file. It's an unusual word to use in the context of purely technical matters and fits much more comfortably linguistically in the context of the community."*

- 7.4. PP supported by SD *"Yes, about what Nigel said, I tend to think that we cannot interpret this misbehavior as particularly limited to being competent in the technical operation of the registry. Even in the early days, before the RFC1591 was published, there were problems with ccTLD managers to how -- trying to take advantage of their position to favor their particular IFC if they were competing with others and if they were in the IFC for instance. And I think that's one reason why in RFC1591, number 3, it says the designated manager must be accessible to all groups in the domain that have domain names. And this means that the same rules are applied to all requests and a number of other things. And this nondiscrimination clause, if it were not followed by the manager, I think it would be interpreted as misbehavior."*
- 7.5. NR agrees with PP and notes *"I was actually going to refer to that. There are two things here. There's the requirement to operate with competence and there's the misbehavior clause for revocation. The two are separate. In 1996, the requirement to operate with technical competence necessarily only referred to operating the DNS with technical competence. Because there was nothing else. I suggested on about two or three calls ago that you would now purposely interpret the clause to include technical competence in operating a registry."*
- 7.6. NR *"Yes, there's two different duties here. There's a duty to be technically competent, which is -- and again, if you look at it even more carefully probably applies at the delegation phase, although it's hard to understand how you could only apply to delegation phase and not thereafter. There is then misbehavior. Now misbehavior implies something a little bit more than just being incompetent. Misbehavior implies some kind of intentional thing the way Patricio was describing it. And if you read 1591, Jon Postel clearly, because he had experience I'm sure, was dealing with the situation whereby you had a country where the internet was emerging. Let's say there were two or three ISPs, one of them became the ccTLD manager, and said, well, I'm giving free domain names to all my customers, but everybody else has to pay \$1,000. That's misbehavior. It's not substantial misbehavior, it's misbehavior. Substantial misbehavior might be misbehavior that's repeated when told not to do it anymore. I don't know. So that's where we're going with misbehavior and substantial misbehavior."*
- 7.7. BBurr *"Okay, so here's my question. I just start reading this and I come to the -- in Section 3 before the bullet points, it says, the designated manager, the major concern is that they be able to carry out the necessary responsibilities and have the ability to do it in an equitable, just, honest, and competent job, to do an equitable, just, honest and competent job. And then there are these points after it. So where do the equitable, just, honest parts come into that? Or do they in your analysis?"*
- 7.8. NR *"Well I think that that specifically refers to the test you have to pass to get the*

- delegation.”*
- 7.9. CD *“Nigel, can I just stop you for a second? If you have to pass that test to get delegation, doesn't it inexorably follow that you are expected to behave that way?”*
- 7.10. NR *“I think I said something along those lines, about two minutes ago, Chris.”*
- 7.11. NR *“But I think that falls into misbehavior. In other words, what they're saying is, you have to show that -- and let's be blunt here, it was you have to show you know how to configure a DNS zone file. That's what it meant. Once you've done that, you have to carry on doing that probably, but there's no explicit clause saying that. It's implicit I think, and it's implicit in the fact that, if you don't do that, it's not quite misbehavior, but it is in a way. Misbehavior to my mind means something intentional and has some kind of guilty mind to it, some kind of wrongdoing associated with it as in the scenario that Patricio mentioned....But if for example the name service for the entire TLD becomes non-authoritative every other week, that's misbehavior. Whether it's substantial or not is a matter for the individual fact”*
- 7.12. CD *“The misbehavior is actually not fixing the issue. If you want to be very specific about this example, the misbehavior would be not fixing the issue.”*
- 7.13. BBurr *“Okay, so this discussion is a little bit about what -- how you -- how you get from misbehavior to substantial misbehavior. But I still, Nigel, Section 2 says that the authorities have a duty to serve the community. And so --”*
- 7.14. NR *“And when you read that work carefully, it talks about the community being global as well as local, yes.”*
- 7.15. BBurr *“Correct. So what does that mean?”*
- 7.16. NR *“A duty to serve the community. Well it's practical words, isn't it? It's hope and moral obligation and grand, fine words.”*
- 7.17. CD *“Motherhood and apple pie”*
- 7.18. BBurr *“And nothing more?”*
- 7.19. NR *“Well, I'm struggling a little.”...”No, you know and I know what we all as ccTLD managers do, we serve the community. But what exactly in the sense of I hate to use the word law, but in the sense of mutual obligations here. And again, I'm struggling a bit. It's like the old trust deed or in a will saying I leave you all my money on the basis that you use it to do good work in the community”*
- 7.20. BS *“It's always been my belief that the duty is related to managing the top level domain and nothing more. It's not like you're going out giving blood every other day on the job or building schools or anything like that. I mean people can do that, as part of their charter as an entity, but I don't think that's what's being required here. What's being required here is to realize that what you're doing is managing a service for the community and not something purely for your in crowd of private people who want to go out and court domains.”*
- 7.21. BBurr *“Okay, I agree -- I mean I definitely agree that it would be hard to read something else -- serving the community in the operation of the ccTLD, I think that makes sense to me.”*

- 7.22. BS *"And that relates to a little bit of apples and oranges. I think Nigel said that substantial misbehavior would be if dot com were dead every week. But I don't think that substantial misbehavior section applies to the DNS failing. In fact in number 4 where, further down in number 4 -- where is it? Yes, satisfactory job of operating the DNS service. That's a revocable action and it clearly states it. I'm not even sure that the misbehavior and the stepping in implies a revocation. Stepping in might be sending out IANA technical stock troops to help somebody or whatever. I don't know, I'm just saying -- so I don't think we have come to a point where we know what it is, what misbehavior is, nor what the stepping in is. But I definitely don't think it's incorrect or poor or incompetent operation of a DNS because that's covered in Section 5."*
- 7.23. BBurr *"So what would be misbehavior in your reading?"*
- 7.24. BS *"I think it would be related to serving the community properly. But again, I'm not sure we're talking about a revocable act by IANA if they step in. I think we do have a little tough row here to hoe coming up with these interpretations which are agreeable to all of us. But the stepping in issue I think needs to be solved before we figure out what misbehavior is, is one thing for me."*
- 7.25. PP *"In the RFP, there is a number of -- there's a list of obligations for the manager. Like the domain has to be managed in a competent way, in a (inaudible) way, and so on. And one would have suspected that would have been a general remedy for the cases when the manager is not complying with any of these. But only in number 3, there is this sentence about the IANA stepping in when there is misbehavior. And that's one problem I have when trying to interpret this document. Actually it's number 4, the significantly interested parties section. That's a problem I have when I try to interpret this document. Why is it only in number 4 that there is this penalty or something that could apply when there is misbehavior? What happens if there is misbehavior with regards to some other of the obligations? There doesn't seem to be anything for that. And that's why I tend to interpret that this misbehavior sentence and the possibility of IANA stepping in should apply to all instances of noncompliance by the manager, not only to number 3."*
- 7.26. CD *"No court -- bottom line is, if this ever ended up in court, what we try to do is come up with a series of guidelines and interpretations of the standard operations. No court is going to interpret 5191 purely on a clause by clause basis. In other words, taking each clause in isolation. Neither is it going to look at a clause and apply specific -- sorry, I'll try it again. If it looks at a particular clause and applies specific examples to it, unless you can come up with a roadmap where the clause takes you, just to have a circular clause that says we don't know where this takes us, is meaningless. And the court wouldn't agree to that."*

*So as a simple example, if you had a ccTLD where the manager refused to delegate domain names, as I said, they're not technically incompetent because their DNS is running fine, the (inaudible) is running fine, but they refuse to delegate domain*

*names. Or, a finer case, they refuse to delegate domain names to the government. Now, unless anyone is suggesting that that is not covered, it seems to me that one way to work through what these clauses might mean is to use specific examples where we might be generally comfortable we think illustrating that behavior and work backwards from there.”*

7.27. BBurr and DM *“Okay, so she's going to type it in. Nigel, one of the issues that I struggle with when I see this, what I think Chris was just starting” articulating, which is at least under statutory construction here, a court would attempt to ascribe meaning to all of the provisions of the document. And so if the duty to serve the community doesn't have a separate meaning, then it's superfluous.*

*Desiree has typed that misbehavior does not relate purely to the technical management of the DNS or the TLD, but there is a policy and commercial aspect to it that it operate and governance models taken down from the DNS. “*

7.28. SD *“Well that goes back to that whole business of, I'll sell you my -- sell my neighbors one for \$1, but for you it's \$100. That kind of misbehavior.”*

7.29. BBurr *“That seems to me also to be covered by the word equitable. “*

7.30. NR *“I think the word equitable -- you and I have had this discussion before, Becky, about the nature of any binding obligations that might have been created. And I think that's where they might lie, in the principals of equity rather than principals of law.”*

7.31. KDavies *“I can just say what I typed, if you'd like. Sorry. I don't -- I was just going to say, many ccTLDs today are already doing some kind of price discrimination depending on the type of registrar. I think the question is whether it's being developed through a public process or guided by public interest principals in developing the particular pricing structure. So I think it's not black and white to what are these issues, but the process by which you came up to what you've done.”*

7.32. NR *“I think that's quite a dangerous road for an outsider, whether it's me or you, to go down to judge the local context.”*

7.33. SD *“Let me put this on the table as an example, because with AS, if it's an on island registration, it's free. If it's not on island, it's not free. Are we being discriminatory here in violation of the RFC?”*

7.34. CD *“Stephen, it's a good question and it comes back to the use of the word -- I just want to, I'm sorry to do this, but I want to be very specific about it, because you used the word equitable, right?”*

7.35. SD *“yes”*

7.36. CD *“And I want to make absolutely sure that well, yes, there's a difference between using the word equitable in the context that it is currently being used and discussing whether it's a legal obligation in equity or in common law. Those two things are different. So I think it's important to make the point that equitable has a simple meaning, generally just with how we deal necessarily with the board, etc. But again, Stephen, what it seems to me we need to be able to do is to find an*

*acceptable test against which we could put your thus described behavior and come to the conclusion that in fact you meet the test. And equally, we could put some examples that we all agree don't meet the test up against that test and have them fail.”*

- 7.37. SD agreed
- 7.38. BBurr *“Right, I do think that makes sense. Equitable to me means fair. It doesn't mean identical necessarily.”*
- 7.39. SD *“I would accept that, because from my standpoint, equitable is, if the domain is available and you're the first one to ask for it, whether you're on island or off island, you have first right to that. Whether it's on island for free or off island for a fee.”*
- 7.40. NR *“Stephen, there's actually another way of looking at this in your particular case and I would suggest -- just bear with me for awhile, it sounds whacky to start with. I would suggest that you're actually charging everybody the same including on island and off island and that you're making a donation to the on island people in order so that they can get it effectively to them no cost. “*
- 7.41. BBurr *“Well that -- I mean this is an issue about context, right?”*
- 7.42. NR *“I mean you're doing good works for your local internet community by forgiving or waiving any change that you might otherwise have made.”*
- 7.43. SD *“It's not equal, but it may be equitable. “*
- 7.44. BBurr *“So, Chris, I kind of like your notion of trying to sort of articulate some things that we think would pass the test and some things that wouldn't and then try to figure out what the difference is. Otherwise, we're in -- otherwise it is very, is potentially very subjective.”*
- 7.45. NR *“I think it's quite interesting, and I'd like to see what Chris is suggesting. What I think he's suggesting is that we use inductive reasoning to get where we're going.”*
- 7.46. CD *“I think you may be right that that's what I'm suggesting, Nigel, although I wasn't clear that I was suggesting that until you just suggested it.” ...”* Becky, *I think was can do some work on this, on the list. If Bernie would -- if we were to start with sort of like a clean sheet of paper and drew up a whole series of ridiculous examples that are quite clearly in the test and quite clearly out of the test and then start molding a test from there I would have thought. But it's going to be hard and we need to concentrate on it and it's not going to happen very quickly.”*
- 7.47. NR *“There's also a danger that we're going to run across in doing this, and I'm not suggesting for any reason we should not do it, is that we may come up with something that we all agree is one side of the line, the other side of the line. And then we turn around and we find that the ccTLD, and I'm not going to pick any particular continent, but a ccTLD down somewhere is doing exactly that. And they're a member of our community and they're going to get upset. “*
- 7.48. CD *“Yes, but the purpose of this, Nigel, is not to hold the examples up, but to simply use them to, as you had said, for reasoning purposes.”*
- 7.49. NR supported this.

7.50. BBurr *"Right, and I do think this requires some further consideration including putting some of those examples on the table. And I think clearly the -- it would be important in this debate to sort of understand where GAC's members are coming from as well so that we're, so that we understand the whole picture. I think that Bill has his hand up. Bill?"*

7.51. BS *"Part of my concern here is that I'm not sure that this whole equitable share and so on treatment concept applies to what might be called price discrimination. A couple things. Obviously this was written at a time when there really was only one real registrar and that was always the registry whether it was NSI for dot com or NIC.FR for France or whatever. And so the concept of price competition, which also could be seen as price discrimination, really wasn't on the table as far as prices were concerned. And also, the names were all being registered for free anyway in I would say all cases during that time period.*

*So I'm going to suggest that we not try to get too confused on concepts of pricing which is a commercial model idea, and equitable treatment meaning rules are fair and apply to everyone equally just a simpler concept. Now the rules are fair and apply to everyone equally in fact could be easily interpreted to mean if a name is two characters you can charge more for it than if it's four. Because everyone who wants a two character name will have to pay more for it. That's fair and equal. So these are the kind of concepts I'd like to put forward for any draft report on this thing to consider."*

7.52. BBurr *"Okay, so I think the suggestion is here to take this issue to the list and to have people suggest examples of things that they view as clearly on one side or the other of the standard."*

7.53. CD *"Well I think the examples will help us to draft a sort of standard, Becky, as opposed -- we start with you don't necessarily have to have the words of the standard report, but you have to at least have a coming together of minds."*

7.54. BBurr *"Exactly. What I meant to say was, sort of examples of things that are clearly okay and things that are totally not okay so that a standard can be articulated..."* Okay. All right. And then, Bernie, do -- are we prepared -- it seems to me it's difficult to have a view about what stepping in means unless we have at least some view of what the standard is, but maybe I'm wrong."

7.55. NR *"Can I speak on this? I think stepping in is very simple. It means doing something. I thought I captured it in an email some weeks ago. I think the question you're asking is not what the stepping in means, but what are the tools that are available and what is not available?"*

7.56. CD *"What are the options."*

7.57. NR *"Yes. Stepping in basically means the IANA will do something..."* The comment that then follows is, would the something be anything short of outright revocation?"

7.58. CD *"Well again, you can start to look at that by listing what IANA could do. So for example, what -- it can't fine you, it doesn't have the power to do so. It can't*

*-- there's a whole list of things it can't do. The question is, what, and it's open to interpretation, the question is what is it within its power to do? But that clearly then is your grab bag of options. And then the next question is, at what stage is it inevitable to take that piece from the grab bag and use that? So a really stern letter publicly posted on the website might for example be something that IANA could do. What would it -- when would that be reasonable and so on. "*

7.59. NR *"And then of course we get to the very interesting question, and I like your analogy of the grab bag, what pieces of the grab bag are available du jour and what are available de facto? In other words, just because they can do something is it legal?"*

7.60. CD *"That's correct, and you can always -- but in our context, Nigel, in what we're trying to do, there's nothing to prevent us from deferring to a we think they can do this. If they do do it, it would be an act for the court to decide if they have the right to do so. We don't have the obligation nor do we for that matter have the skill."*

7.61. NR *"Agreed. The common thing is I think we're beginning to zero in on some very interesting territory. "*

7.62. BBurr – summary *"So we are going to start by offering examples of actions or behaviors or conducts that we think would be certainly permissible and other examples of behaviors, conduct that we think would be clearly problematic. And from those examples, attempt to identify and articulate the principal that's driving them. But it's kind of lining things up and seeing if we all agree on what side of the line things fall on and then figure out from that what "*

7.63. NR example as requested *"Okay, well mine is quite simple. An example of what is acceptable behavior. Charging a fee for registration for annual maintenance of a domain name. "*

## **8. Progress Report for CR**

- 8.1. BT presented the draft report
- 8.2. BS Issue with the use of the word approve
- 8.3. BBurr Suggest group approve pending BT and BS agreeing on a resolution of the issue – generally agreed.
- 8.4. Note BS and BT settled on a final wording later that day. The progress report was published with this modified wording.

## **9. Future Meetings**

- 9.1. The next meetings of the WG will be at the ICANN meeting in Costa Rica on Thursday March

## **10. Conclusion of the meetings**

10.1. The meeting was concluded at 22:45 UTC.