

Discussion of ccPDP in Luxembourg

12 July 2005

Chris Disspain (CD)—Bart Boswinkel (BB), the Issue Manager, will chair the session. CD will be participating with .au hat on. For clarification Bart is not connected with .nl or SIDN in any capacity, he is independent. Further we have asked Peter Dengate-Thrush to provide a run down of the history behind the establishment of the ccNSO.

PDT—in 1998, first encounter with ICANN bylaws, Boston international wrap up, peace broke out between the counterparts and the solution was that there was to be newco, a company to look after this. A draft of bylaws was provided and the Boston working group was created. Late night discussions with Ira Mgaziner—green paper and white paper out of doc. The first interest was when turned up in Singapore in 1999, and discussions were around how the organization was going to work, ccs have been involved in the process for a very long time. Singapore achieved the creation of the DNSO plus a general assembly below this. By Berlin, some were organized and formed various constituency groups. Marina del Rey meeting at the end of the year there was a ccTLD constituency. Andrew Mclaughlin advised that they did not want cc organization they wanted a peer to peer relationship. By Yokahama cc's got together to consider how to organize. Marina del Ray meeting at the end of 2000 a presentation about unequal voice of ccs in the DNSO as they were 1/7th of the DNSO group while having the greater number. Proposed a ccSO.

By Stockholm announced withdrawal from DNSO and withdrew in Shanghai, branded wwTLD. BKKim form the wwTLD secretariat did a rough draft of bylaws and these were produced and considered in Ghana and many concepts still exists such as five regions. More recently, the ICANN restructuring in Bucharest announced that there would be a ccNSO. An assistance group was selected to draft bylaws, Bart and Chris were members of this. A launching group launched to take it forward to implementation. There was unanimity in Rio and Montreal about bylaws. There was unexpected backlash from ccs later. There are still others that consider there are gaps in the current bylaws.

BB—before we start to discuss the issues in detail I will walk through where we are in the ccPDP process. [BB provided a quick overview of where in the process]

I will try to publish something to list on Thursday for comments prior to submitting the minutes as comment .

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Regional Statements from representatives appointed by the Region

Paulos Niayari, regional rep, Africa—not sure of the result of the request but will provide an update during the course of the day.

Patricio Poblete—regional representative of LACTLD, the request was sent by himself and Luis Furlan, no comments received.

Kim von Arx, North American Region —no comments received.

Giovanni Seppia, Regional Representative European Regional Organization (CENTR),—sent out two emails to their members on 28/6 and 4/7 and also followed-up with individual emails to registry's managers on 6/7. So far, Portugal, Luxemburg and Switzerland have advised they will not provide comments. So far Giovanni Seppia has received two comments. .ac has confirmed earlier comments and .se provided some more inputs and clarification. The CENTR letter to Paul Verhoef has served as input to the ccPDP process and was ratified during the CENTR General Assembly in Trondheim in June 2005. GS stated that several registries have reported him that the process is quite complicated to be followed. Some of them have not in-house lawyers or legal advisors to prepare precise comments. GS believes the CENTR paper is clear on what the main concerns of its members are. Most of them have been taken into account in the report and GS will follow the next steps with CENTR members.

David Farrar obo APTLD—secretariat is run by Jordan Carter, has confirmed that there have been no substantive comments. His notice has also gone out to ccTLDs in Asia Pacific who are not members of APTLD as well.

STAND ALONE ISSUES

A—No binding policy for non-members of the ccNSO.

Relevant bylaw

Article IX Section 4.2

....The application shall include the ccTLD manager's recognition of the role of the ccNSO within the ICANN structure as well as the ccTLD manager's agreement, for the duration of its membership in the ccNSO, (a) to adhere to rules of the ccNSO, including membership rules, (b) to abide by policies developed and recommended by the ccNSO and adopted by the Board in the manner described by paragraphs 10 and 11 of this Section,.....

Article IX Section 4.10

Subject to clause 4(11), ICANN policies shall apply to ccNSO members by virtue of their membership to the extent, and only to the extent, that the policies (a) have been developed through the ccPDP as described in [Section 6 of this Article](#), and (b) have been recommended as such by the ccNSO to the Board, and (c) are adopted by the Board as policies, provided that such policies do not conflict with the law applicable to the ccTLD manager which shall, at all times, remain paramount. In addition, such policies shall apply to ICANN in its activities concerning ccTLDs.

ISSUE

Under the conditions enumerated in Article IX section 4.10 a ccNSO policy shall apply to members of the ccNSO by virtue of their membership. Is this language sufficiently clear?

CENTR comments

It should be made clear that ccNSO policies cannot bind non-members of the ccNSO.

DENIC Comment

ccNSO membership and bilateral relation ccTLD manager and ICANN
According to DENIC it is unclear if and to what extent termination of membership of the ccNSO the termination of that relation has an impact on the bilateral relation between the ccTLD manager and ICANN/IANA. According to DENIC there are (valid) concerns that ICANN would use the termination of the membership as a basis to initiate a change of ccTLD manager.

Clarifying remarks

Stephan Welzel (SW) .DE—two issues:

1 is it clear that the ccNSO and ICANN cannot bind the non-members, that is pretty clear in the wording.

2. The second issue is what would be the impact of former membership in the ccNSO when the cc has decided to leave the ccNSO? DENIC is concerned that there could be problems but we are aware that the problem cannot be solved by ICANN bylaws. We have no clear answer to the issue, but need to be aware of it. Actually, for the time being I don't know how they could be solved. Not a bylaw issue but a ccNSO membership issue. During the discussion on ccNSO, I kept being told that if you don't like it you can leave and not bound by anything. Don't think this is not true.

Discussion

BB—why are you afraid that this is not exactly true, what is your underlying concern?

SW—when you join the ccNSO and ICANN and its functions are as set out in the bylaws, we often had discussions and disagreed with ICANN on its mission and what it should be. So even though we support ICANN we may not agree with all the things ICANN does and thinks it is responsible for. When you join the ccNSO you agree to ICANN bylaws and decisions, but once you leave you may still be bound.

BB—with regard to your initial statement “I’m afraid that when you leave the ccNSO as a member your pos.....”, what would happen if you leave the ccNSO and how would this affect you.

SW—I don’t know, but the fact that you were a member and then are not? ICANN did not assign cc management to them, the internet community did. Once you join ICANN you might be agreeing that you got your cc delegation from ICANN. This is all hard to grasp because I don’t know how this would be modeled, but it is possible that being a former ccNSO member will change your legal status when you leave the ccNSO.

CD—not in a debate here, to paraphrase, would your concern be less if there was a statement in the bylaws that says joining or leaving would not change your status? Would this help.

SW—It would not harm. If the safeguards and rules were so that our ccNSO could join light heartedly and was ensured that the ccNSO could not become something terrible that the members might leave, the best way to handle it is to ensure that ccNSO is nice place.

Nigel Roberts (NR) .GG —don’t agree with the way the comment is viewed, [CENTR comments] but this is teaching wolves to chase sledges, by remaining outside. What it is saying, for those who have particular concerns, your best policy is not to join the ccNSO, so there should be no binding, for members as well as non members.

David Farrar (DF), .NZ—I agree that the ccNSO has no desire to pass policy that is binding on non-members. Lawyers might be able to come up with clearer language, but in reality there is limited scope to bind members also. Internetnz has no desire to have ccNSO develop policies for non-members.

Patricio Poblete (PP), .CL—We are making some progress because this issue of whether or not the ccNSO is able to make policy that is binding on non-members seems to be less of a concern, I hear Stefan say that he does not think it is a concern.

NR—David (DF) missed my point. The ccNSO should be as inclusive as possible and enable all ccs to join, but going as far as to say you cannot bind non-members you are encouraging some members not to join. You are saying there is a 99.99% chance that you won’t be bound by anything. What is the purpose of binding policy?

BB—this discussion (no binding policies) is more at place when we go through the interrelated issues. Returning to this issue: Is this issue of concern to all ccTLD managers present? Who has the same issue as proposed by CENTR. Do you share this concern?

PP—how many people agree with CENTR that ccNSO cannot bind non-members of the ccNSO?

CD—the first question is how many people think that the current bylaw should be made clearer that policy should not be binding? 4

How many consider it is clear? 1

If it could be made clearer, does anyone object to making it clearer? [no response]

B -- IANA Services

Relevant bylaw

Section 4.3

Neither membership in the ccNSO nor membership in any Regional Organization described in [Section 5 of this Article](#) shall be a condition for access to or registration in the IANA database. Membership in the ccNSO is independent of any individual relationship a ccTLD manager has with ICANN or the ccTLD manager's receipt of IANA services.

At article IX section 4.3 it is stated that ccTLD's manager's receipt of IANA services is independent of membership of that ccTLD manager in the ccNSO Is this language sufficiently clear..

NOMINET comments

According to Article IX, Section 4,3 "Neither membership in the ccNSO nor membership in any Regional Organization described in Section 5 of this Article shall be a condition for access to or registration in the IANA database. Membership in the ccNSO is independent of any individual relationship a ccTLD manager has with ICANN or the ccTLD manager's receipt of IANA services."

According to Nominet there should be a clear statement that IANA services are not in any way contingent upon membership of the ccNSO.

DENIC Comment

ccNSO membership and bilateral relation ccTLD manager and ICANN
According to DENIC it is unclear if and to what extent termination of membership of the ccNSO the termination of that relation has an impact on the bilateral relation between the ccTLD manager and ICANN/IANA. According to DENIC there are (valid) concerns that ICANN would use the termination of the membership as a basis to initiate a change of ccTLD manager.

Clarifying remarks

BB—Is this language sufficiently clear to ensure that membership or non-membership will not affect the receipt of ccNSO services.

Lesley Cowley (LC), .UK—Firstly, I make some general comments on behalf of both .uk and .no. Hilde Thumen, from Norid, .NO, who had to go home because of illness and sends her apologies. Thanked the council for initiative of the ccPDP, and Bart for his work to date. Appreciates that this could be major piece of work. Believe that .uk, .no and others should be member and the ccNSO can be more inclusive. Hopes that we can make ccNSO contributions and play an active role in the ccNSO.. In response to the particular point, made clear it is not the most burning issue, the concern expressed are in the context of debate about IANA services and accountability frameworks in particular and concerns ccs have about those issues. If these could be resolved this may not be an issue.

Discussion

CD—would a simple word change solve this for you?

LC—‘membership in the ccNSO is not in any way contingent on any’...rather than ‘membership in the ccNSO is independent of any’.... [Article IX, Section 4.3]

SW—Denic’s comments concerned the first point (Issue A). Nothing to say on this clause.

NR—looking at the particular wording, section 4.3 the ‘last line’ is a little narrow and should include something like ..’is independent of the cc manager’ ,three words added to section 4.3 ‘independent of status as ccTLD manager’

CD—Does anyone object to changing the words as suggested by Lesley—No

Does anyone object to change suggested by NR—No.

C -- Amendment of Article IX.

Relevant bylaw

Section 6. ccNSO POLICY-DEVELOPMENT PROCESS AND SCOPE

1. The scope of the ccNSO's policy-development role shall initially be as stated in [Annex C to these Bylaws](#); any modifications to the scope shall be recommended to the Board by the ccNSO by use of the procedures of the ccPDP, and shall be subject to approval by the Board.
2. In developing global policies within the scope of the ccNSO and recommending them to the Board, the ccNSO shall follow the ccNSO Policy-Development Process (ccPDP). The ccPDP shall initially be as stated in [Annex B to these Bylaws](#); modifications shall be recommended to the Board by the ccNSO by use of the procedures of the ccPDP, and shall be subject to approval by the Board.

Under the current bylaws there is a provision (Article IX section 6) that deals with changes to Annex B and Annex C of the bylaws.

Should the ICANN Board only be able to change or amend Article IX, Annex B and Annex C after consultation and the consent of the members of the ccNSO?

CENTR comments

Under the current bylaws there is a provision (Article IX section 6) that deals with changes to Annex B and Annex C of the bylaws.

According to CENTR Article IX, Annex B and Annex C should only be amended by the ICANN Board if a minimum of 66% of the members of the ccNSO consent.

NOMINET comments

The ccNSO membership must be involved in any change to the by laws that effects them.

DENIC Comments:

Ability of the ICANN Board to amend bylaws unilateral: Article XIX of the bylaws.

According to DENIC the Board of ICANN is able to change or amend Article IX of the bylaws without participation of the ccNSO. As a result the Board can potentially: a. circumvent or remove the safeguards for ccNSO member in the bylaws or b. impose additional obligations on the ccNSO members through the bylaws.

Ability to change the Bylaws after periodic review: Article IV section 4.
According to the bylaws (Article IV section 4) there needs to be a periodic review of the Article IX and Annex B and C. This review can result in a change of the bylaws.

Clarifying remarks

CD—is it correct that this point is basically that the bylaws say to change the scope you must do a PDP?

BB—no, there is no mechanism in the bylaws that a change to article IX should include the ccNSO.

GS— reiterated the comments on this point made within the CENTR letter.

LC—good practice that the organizations affected by any policy changes should be able to agree them.

SW—This is one of the core points for DENIC regarding the ccNSO. Actually it is very simple. We have bylaws, and have put in a lot of time and effort and still doing that to ensure that ccTLDs can live with them. Our point is that we need safeguards to ensure that the ICANN Board can not change the bylaws and by doing so can abandon all safeguards just like that. It needs to be made sure there is nothing in the bylaws which would allow ICANN to change bylaws at a whim. So as in any good constitution in your countries we should have a safeguard against that in the bylaws, you don't say probably because you have elected the government that they will not change the law in a detrimental way. If the ICANN board wants to change the bylaws that relate to the ccNSO, they should only be able to do this when the ccNSO is in favor of such a change.

Discussion

CD—agree, if the bylaw is amended to include Article IX as well as Annex C and B, It should not be any bylaw that affects the ccNSO. One of the questions then is who determines what effects the ccNSO? If you agree that these are Article IX and annexes B and C, I'm not sure how you can extend this to all bylaws.

SW—I'm not to say anything that could possibly affect them. The problem with your solution, by adding article IX, is that you still can amend the bylaws, for instance by including an Article IX A, with for instance compulsory fees, which would impose other and new obligations on a member of the ccNSO.

CD—Does anyone object to changes outside article IX?

BB—The solution you propose is outside the scope of this ccPDP, however it can be noted in the Initial report as a comment.

SW—that means the board is free to do that without asking the ccNSO.

E- Binding policies outside ccPDP

Relevant bylaw

Article IX Section 1. DESCRIPTION

There shall be a policy-development body known as the Country-Code Names Supporting Organization (ccNSO), which shall be responsible for:

1. developing and recommending to the Board global policies relating to country-code top-level domains;
2. Nurturing consensus across the ccNSO's community, including the name-related activities of ccTLDs; and
3. Coordinating with other ICANN Supporting Organizations, committees, and constituencies under ICANN.

In addition to the above core responsibilities, the ccNSO may also engage in other activities authorized by its members, including: seeking to develop voluntary best practices for ccTLD managers, assisting in skills building within the global community of ccTLD managers, and enhancing operational and technical cooperation among ccTLD managers.

Article IX Section 4.2

...The application shall include the ccTLD manager's recognition of the role of the ccNSO within the ICANN structure as well as the ccTLD manager's agreement, for the duration of its membership in the ccNSO, (a) to adhere to rules of the ccNSO, including membership rules.....

ISSUE

Can the ccNSO potentially set binding policies on its members on activities not defined in Article IX section 1 but authorised by its members? If so, is this an issue? If not, should the ccNSO be able to do so?

DENIC comment:

“Besides, the ccNSO can, in addition to its core responsibilities, also engage in any other activities authorized by its members (cf. Article IX section 1 of the ICANN bylaws). With that, the possibility is left open that the ccNSO decides to develop policies that are binding on its members besides the ccPDP and beyond the ccNSO scope. At the same time, it remains unclear how (in particular, with which majority) the necessary authorization would have to be given.”

Clarification

SW—The bylaws say that besides playing a role in these PDPs the ccNSO can do anything else that the members want the ccNSO to do. One of the things that the ccNSO can decide upon is to set its own policy and make it binding for members. It may decide not to need the Board’s approval just to set a policy. The ccNSO could decide independently that they may do binding policy for members.

Discussion

BB—What do you mean by the ccNSO? The Council? The ccNSO members? Or this combination? Are the policies on its members set by council or the members?

SW—If a majority said that from now on the council can set a binding policy, or if we need the majority of the members to decide upon it, the point is, it is possible that the ccNSO decides to set binding policies for its members independently of and not using a ccPDP.

LC—Can we cut through some of this by requiring a ccPDP for any policy change?

CD—This is the case already, any policy, to be binding, must go through a ccPDP.

SW—this is true under the ICANN bylaws, the ccNSO could say that in addition to the bylaws, we view ourselves as a policy making body of its own, and you say that the policy is to be binding.

CD—It is clear, the only policy that is binding derives from ‘article IX—section 4.10.

SW—According to the ICANN bylaws the ccNSO can develop its own policy.

CD—Do you want a clear definition of what the ccNSO can ever do written down in the bylaws?

SW—Yes, but it can be done that the ccNSO can do what ever it wants but not to be binding.

NR—without seeking to draft, it is my view that all of Stefan’s concerns can be cut through by two small changes ‘ relevant’ and ‘including’ should be replace by ‘such as’ para 3 under Article IX section 1.

CD—Does anyone object to making it clear that the only binding policies are those policies which have been developed according to article IX section 4.10?

F -- Changes to ccPDP and Scope

Relevant bylaw

Section 6. ccNSO POLICY-DEVELOPMENT PROCESS AND SCOPE

1. The scope of the ccNSO's policy-development role shall **initially** be as stated in [Annex C to these Bylaws](#); any **modifications to the scope shall be recommended to the Board by the ccNSO by use of the procedures of the ccPDP, and shall be subject to approval by the Board.**
2. In developing global policies within the scope of the ccNSO and recommending them to the Board, the ccNSO shall follow the ccNSO Policy-Development Process (ccPDP). The ccPDP shall **initially** be as stated in [Annex B to these Bylaws](#); **modifications shall be recommended to the Board by the ccNSO by use of the procedures of the ccPDP, and shall be subject to approval by the Board.**

ISSUE

The use of the word “initially” in Article IX section 6 implies the scope for setting binding policies (and the ccPDP) will change over time. Should the ccNSO be able to change the Scope and the ccPDP over time? Should the ccNSO be able to change Article IX over time?

DENIC Comment:

According to the ICANN bylaws' wording, the ccNSO scope and the ccPDP will “initially” be as defined in Annexes B and C (cf. Article IX section 6 of the ICANN bylaws). This implies that the current definition of both is just tentative and supposed to be changed once the ccNSO has become active. Attempts to enact such changes, possibly broadening the scope, would gain additional legitimacy from this clause and run contrary to the original intention to keep the ccNSO scope as narrow as possible?

Clarification

BB—use of the word initially

SW—the scope of the ccNSO should be rather narrow which is why so much effort went into defining the scope. Then, someone could interpret the word ‘initially’ later that the intention was to define the scope narrow and to broaden it later.

Discussion

CD—The reason it is there is that when we negotiated it in the first place we really did keep narrowing the scope, but we could see that in the future there may be a need to vary the scope. The word initially was to enable a change.

CD—Does anyone object to removing the word initially—No.

G -- Applicable law exemption

Relevant bylaw

Section 4.10

Subject to clause 4(11), ICANN policies shall apply to ccNSO members by virtue of their membership to the extent, and only to the extent, that the policies (a) have been developed through the ccPDP as described in [Section 6 of this Article](#), and (b) have been recommended as such by the ccNSO to the Board, and (c) are adopted by the Board as policies, **provided that such policies do not conflict with the law applicable to the ccTLD manager which shall, at all times, remain paramount**. In addition, such policies shall apply to ICANN in its activities concerning ccTLDs.

ISSUE

Where a policy developed through a ccPDP conflicts with the law applicable to the ccTLD manager, the policy does not apply to the manager. The law applicable shall always remain paramount.

Should a process be inserted into Article IX section 4.10 that sets out how a decision should be made as to whether a ccNSO policy does conflict with the national law of a ccNSO member?

DENIC Comment

Article IX section 10

In case a policy developed through a ccPDP conflicts with the law applicable to the ccTLD manager, the policy does not apply to the manager. The law applicable shall always remain paramount. In the view of DENIC it is unclear who bears the burden of proof and therefore it is a source for potential conflict between the ccNSO member and ICANN/ccNSO.

Clarification

SW—The basic issue is, if there is a policy that is binding on ccNSO members and in a case where that policy conflicts with your national law...who decides if the national law is applicable. The bylaws are silent on that. This could lead to a situation that ICANN and a ccTLD manager have a dispute over the (non)-applicability of a law and for which they end up in court.

Discussion

BB—What would happen if a cc manager knowingly or not knowingly does not use the exemption because it was not aware of national law?

SW—The registry would get into trouble at home. The same can happen with current rules in the bylaws, what if cc doesn't realize it is in conflict and doesn't realize it? The GAC has some concerns about this, but the conflict will be dealt with at home under national legislation.

BB—At the time the bylaws were drafted (ICANN Montreal meeting) this language was drafted in close cooperation with the GAC.

CD—By way of background, representatives of the GAC did not want it to say a breach of national law. They also did not want the cc manager to be the sole claimant of what it

is or is not outside national law. Could we suggest that an independent legal advice could be sought?

NR—It is unlikely that my suggestion will be taken into account, but the reality is that if it's against national law you can't do anything against it. Therefore the language in the bylaws is superfluous and can be deleted.

Bart Mackay (BM)—In some cases we can assert there is a presumption, so a registry manager deems the policy to be in contradiction with national law. Adding presumptive language does not mean an absolute exemption, but ICANN could come back and prove otherwise.

SW—What Bart (BM) suggests would improve the situation, but you would still have the risk that ICANN and a registry can get into legal battle about the applicability of national law. What's the difference between exempting on grounds of national law and alternatively say a policy is against national religion and therefore opt's out.

CD—This is in there because the GAC wanted something in the ccNSO bylaw to say that national law is paramount. The question is whether we should change the bylaw.

BB—The concern itself that national law always remains paramount is not disputed, what needs to be made sure is that the principle is crystal clear, so should the language be changed?

DF—Clause 4.10 is on national law, clause 4.11 is another mechanism. Could we not add another piece to clause 4.11?

CD—No, because that is an election. You have no choice, it is against national law or it is not.

BB—It needs to be ensured that the suggestion really covers the need determined by Stefan (SW).

CD—Anyone object to amend the bylaw to say that if the ccTLD manager makes a statement that it is against national law then it is deemed to be so, with a second tier of legal opinion.

There would be an obligation

I -- Membership quorum voting on PDP recommendations

Relevant bylaw

Annex B section 13. Members Vote

Following the submission of the Members Report and within the time designated by the PDP Time Line, the ccNSO members shall be given an opportunity to vote on the Council Recommendation. The vote of members shall be electronic and members' votes shall be lodged over such a period of time as designated in the PDP Time Line (at least 21 days long).

In the event that at least 50% of the ccNSO members lodge votes within the voting period, the resulting vote will be employed without further process. In the event that fewer than 50% of the ccNSO members lodge votes in the first round of voting, the first round will not be employed and the results of a second round of voting, conducted after at least thirty days notice to the ccNSO members, will be employed irrespective of whether 50% of the ccNSO members lodge votes. In the event that more than 66% of the votes received at the end of the voting period shall be in favor of the Council Recommendation, then the recommendation shall be conveyed to the Board in accordance with Item 14 below as the ccNSO Recommendation.

ISSUE

According to the current bylaws (Annex B section 13) a vote of the members is valid without a quorum. Should a vote of ccNSO members only be valid if at least 50% of the members have lodged a vote irrespective of the round of voting?

CENTR comments

According to the current bylaws (Annex B section 13) a vote of the members is valid without a quorum. According to CENTR a vote of ccNSO members is only valid if at least 50% of the members have lodged a vote.

DENIC comments

In order to make Recommendations to the Board the ccNSO members are given the opportunity to vote on the Recommendations to be presented. The first round of voting is only valid if at least 50% of the members have lodged a vote. Where less than 50 % of the members lodge a vote a second round of voting will be held. The outcome of this round of voting will then be employed irrespective of the number of members who have voted. As a result there is a risk of capture of the voting in the second round and setting a policy which is of no interest to the majority of the members.

NORID comments

For a vote of the ccNSO members to be valid a minimum of the members must vote.

Clarifying remarks

LC—Speaking obo Norid—If there was not a lot of interest in a the first round of voting there should be a minimum quota for a second round of voting as well.

Discussion

SW—This is one of the issues where there was agreement in Montreal. There should be a quorum in all rounds of voting because if there is no quorum in a round of voting, it could be possible that a small minority approves something in which the majority is not interested in.

CD— .AU can live with current bylaws, but does have sympathies for the solution proposed. There was previously lots of discussion about whether abstentions should be counted as “no” votes. If you require a quorum, apathy may rule and nothing would happen.

SW—When you have a quorum abstentions could be counted as no votes, but when you have them counted if something is really important people will deal with it.

Bernard Turcotte (BT). CA—From a historical point of view, not happy with the current rule. You should not let one person make a decision for all, however doubts it will get to this. But if this issue is being re-opened, strongly supports 50% quorum to pass.

Yassin Mshana (YM) NomCom member of the ccNSO council—a split vote should not stop an issue moving forward.

BT—if you send out a “yes” or a “no” ballot the only way to abstain is by not voting. If send out yes, no, and abstain ballot, you can count the abstain votes as part of the quorum.

GS—this was the only issue which has been put unanimously forward in the preparation of the CENTR-paper.

LC for HT—abstaining is not a “no” vote. It would be unusual to have a quorum for first vote and not for the second,

It was clarified that an abstention is a vote.

DF—Two issues, assuming there is some quorum for a second vote, should the quorum for a second vote be less than the first.

BT—no.

CD—do we need a second round? Do you just vote and that’s it? On second thought I would like to see a second round, one of the reasons for being there are periods where people are not available because of holidays.

PP—Agree, a second round might be necessary for safety net. As a different issue, what would people say if a motion was passed with (more than 50% members have lodged a vote) with most of the votes being abstentions?

BT—To be clear, the second round is for a lack of quorum on the first vote. So the answer to your question depends on rules around the second vote. In my view the basic safeguards are there.

NR—No view of comments about abstention, you can change the wording from ‘returned a vote’ to ‘returned a ballot’.

LC—The quorum is important, so is a second vote.

CD—Are there objections to put the quorum into both votes set at 50%? No objections

J -- Rejection of PDP recommendations by the ICANN Board

Relevant bylaw

Annex B section 15. Board Vote

a. The Board shall meet to discuss the ccNSO Recommendation as soon as feasible after receipt of the Board Report from the Issue Manager, taking into account procedures for Board consideration.

b. The Board shall adopt the ccNSO Recommendation unless by a vote of more than 66% the Board determines that such policy is not in the best interest of the ICANN community or of ICANN.

1. In the event that the Board determines not to act in accordance with the ccNSO Recommendation, the Board shall (i) state its reasons for its determination not to act in accordance with the ccNSO Recommendation in a report to the Council (the "Board Statement"); and (ii) submit the Board Statement to the Council.

2. The Council shall discuss the Board Statement with the Board within thirty days after the Board Statement is submitted to the Council. The Board shall determine the method (e.g., by teleconference, e-mail, or otherwise) by which the Council and Board shall discuss the Board Statement. The discussions shall be held in good faith and in a timely and efficient manner, to find a mutually acceptable solution.

3. At the conclusion of the Council and Board discussions, the Council shall meet to affirm or modify its Council Recommendation. A recommendation supported by 14 or more of the Council members shall be deemed to reflect the view of the Council (the Council's "Supplemental Recommendation"). That Supplemental Recommendation shall be conveyed to the Members in a Supplemental Members Report, including an explanation for the Supplemental Recommendation. Members shall be given an opportunity to vote on the Supplemental Recommendation under the same conditions outlined in Item 13. **In the event that more than 66% of the votes cast by ccNSO Members during the voting period are in favor of the Supplemental Recommendation then that recommendation shall be conveyed to Board as the ccNSO Supplemental Recommendation and the Board shall adopt the recommendation unless by a vote of more than 66% of the Board determines that such policy is not in the best interest of the ICANN community or of ICANN.**

ISSUE

Under the current bylaws the Board can reject a recommendation of the ccNSO in case the Board determines by a vote of more than 66% of the Board that such policy is not in the best interest of the ICANN community or of ICANN (Annex B section 15).

Should the ICANN Board only be able to reject a Recommendation or Supplemental Recommendation as the case may be in exceptional circumstances?

CENTR comments

Under the current bylaws the Board can reject a recommendation of the ccNSO where the Board determines by a vote of more than 66% of the Board that such policy is not in the best interest of the ICANN community or of ICANN (Annex B section 15).

According to CENTR, recommendations to the ICANN Board following a ccNSO PDP should only be able to be rejected by the Board in exceptional circumstances.

NOMINET comments

PDP recommendations to ICANN Board

Recommendations to the ICANN Board following a ccNSO PDP should only be able to be rejected by the Board in exceptional circumstances.

Clarification

LC—.UK, suggests that the barrier for rejection of a PDP recommendation might be too low. Adoption should only be refused in exceptional circumstances for instance where there is a possible breach of fiduciary duty of the Board of directors.

Discussion

CD—Could you explain? This is not about the percentage of the ICANN Board members who vote against adoption?

LC—Our comment is about the reason for deciding not to adopt (refusing to adopt) a recommendation and we are suggesting that there should be a raising of the barrier on the grounds for refusing.

BB—under current bylaws board can reject a recommendation when it determines that **such policy is not in the best interest of the ICANN community or of ICANN**

LC—We would like to see exceptional circumstances. In our own bylaw it is exceptional circumstances.

CD—Then the board would have the power to determine what is an exceptional circumstances.

LC—We suggest a different generic phrase to the current one in the ICANN bylaw as the reason for rejection of a policy .

NR—Nominet's suggestion raises, but also lowers, the threshold. Needs to be careful

CD—Does anyone object to changing the wording replace with 'exceptional circumstances'?—no.

INTERRELATED ISSUES

D -- Setting binding policies

Relevant bylaw

Article IX section 4.10

Subject to clause 4(11), ICANN policies shall apply to ccNSO members by virtue of their membership to the extent, and only to the extent, that the policies

(a) have been developed through the ccPDP as described in [Section 6 of this Article](#), and

(b) have been recommended as such by the ccNSO to the Board, and

(c) are adopted by the Board as policies, provided that such policies do not conflict with the law applicable to the ccTLD manager which shall, at all times, remain paramount. In addition, such policies shall apply to ICANN in its activities concerning ccTLDs.

ISSUE

Under the current bylaws (Article IX section 4.10) a member of the ccNSO shall be bound by an ICANN policy if, and only to the extent that this policy (a) has been developed through the ccPDP and (b) has been recommended as such by the ccNSO to the Board, and (c) is adopted by the Board as a policy.

Should a policy only be binding on members if and only to the extent the policy is on an issue that is within Scope and has been developed through the ccPDP and is adopted by the Board?

CENTR comments

Under the current bylaws (Article IX section 4,10) an ICANN policy shall apply to a member of the ccNSO by virtue of its membership if, and only to the extent that this policy (a) has been developed through the ccPDP and (b) has been recommended as such by the ccNSO to the Board, and (c) is adopted by the Board as a policy.

According to CENTR a policy should only be binding on members if it is on a matter that is within Scope and has been developed through the ccPDP and is adopted by the Board.

NOMINET comments

A policy can only be binding on members if it is on a matter that is within Scope and it was created by using the PDP.

Clarifying remarks

SW—Under the current bylaws the outcome of a PDP goes to the board and if they adopt the Recommendation it becomes a binding policy regardless of whether the issue the policy addresses is within scope or not.

Discussion

CD—To be clear here as a consequence of what SW is suggesting: if General Counsel says the issue is within scope we can run a PDP, if General Counsel is of the opinion the issue it is not within scope we cannot run a PDP, no matter what the ccNSO thinks.

SW—I'm not saying the ccNSO should not be able to run a PDP on whatever it wants. I'm saying it should be possible to develop a binding policy on an issue which is not within scope.

LC—We are back to scope, looking at the scope list and if a PDP is developed on those areas then the members will be bound.

CD—Only purpose of a PDP is to develop a binding policy. If the suggestion is adopted you can only do a PDP on what the general counsel says is within scope.

With regard to SW remark, what's the purpose of a PDP if the result will not be a binding policy?

SW—This process for PDP can be used to result in a not binding policy. There must be no binding policies on issues outside of scope. (why) Currently you can have binding policies on anything.

LC—Propose a different solution. We are learning about PDP process and it is complex and long. If the ccNSO is also for best practice PDPs will not be needed for this., There will be areas where policy via a PDP is required, but these areas should be within a narrow scope.

BT—is this just on principle?

SW—A PDP can be done if it does not result in a binding policy.

CD—If the issue is within scope the ICANN General Counsel would say it is within scope, and the PDP would run as a result, a Recommendation will be sent to the Board , and when adopted would become binding. If General Counsel says the issue is not within scope, under your proposal, you run a PDP and the Recommendation does not go to Board. If the only basis on which a PDP can be run is if it is within scope (determined by the General Counsel), you are changing the way who determines it is within scope.

SW—It is too early to decide, under the current wording there can be binding policies on the color of carpets in the building of the registries.

PP—We may want to generate binding policy within scope. Can somebody give any realistic examples on matters that we would want to develop policy without scope?

NR—matters outside scope but on which there might be a policy are data formats, exchange formats with ccNSO.

Bill Semich (BS), .NU—The question can't be answered because we won't know until the General Counsel tells us.

Sabina Dolderer (SD), .DE—The ccNSO may develop policies which are already done by the GNSO, for instance grace redemption. It is important to know what policies will be developed by the ccNSO. We (DENIC) don't want to see a policy imposed on us on an issue (such as grace redemption) which should be determined by individual ccTLD's at local level.

PP—Binding policies are not binding if you can claim against your religion and they can not be enforced. Binding policies should only be those within scope, call other policies something else.

BT—data formats, exchange formats with ccNSO perhaps not appropriate.

BB—SD, if it is the ccNSO itself who determines the scope are you then still strongly opposed?

SD—We are committed to agreeing to anything that is within ICANN mission, but if it is outside ICANN's mandate it can be binding if it is developed this way. Denic does not want to a policy imposed upon which is outside of scope even if the vast majority of the cc's think it is a good idea.

CD—That's what you've always said. The reason for the opt outs in the bylaws is because of what you said. If you don't want to be bound by a policy that is not within the scope, you can opt out. The question is does the ccTLD community want an organization that has the capability to run a PDP and bring a recommendation to the board that should be binding policy that is without the scope?

SD—I can opt out for national law, but it is also important that ICANN does not go outside its purview.

BS—We are talking in circles. Scope should be restricted, but it comes back to General Counsel who determines if an issue is within the scope. Should it be a trusted group?

BT—How do you amend the scope? (with a PDP)

CD—The recommendations that we make are considered by the Board, it should be the General Counsel who determines if it is within scope. If it is left the way it is, the only person is the General Counsel who can say that something is within scope.

SD—the extra point is not whether a PDP can be run without scope or not, it's whether they can be binding. Suggests that ccNSO and General Counsel must agree or not.

LC—supports BS, should only be binding if within current scope.

BT—if ICANN Counsel disagrees this is the same as if he doesn't agree in the first place. In case the ccNSO thinks it is within scope and General Counsel thinks it is outside scope, could this deadlock then be resolved by a kind of arbitration?

BB—Stop subject here and move to next issue. Does anyone object that this issue will be further investigated and we will return to this in the second comment periods? (no), Is there a principle objection to looking into a change to the bylaws (no.)

H -- Initiating a ccPDP

Relevant bylaw

Annex B section 3. Initiation of PDP

The Council shall decide whether to initiate the PDP as follows:

- a. Within 21 days after receipt of an Issue Report from the Issue Manager, the Council shall vote on whether to initiate the PDP. Such vote should be taken at a meeting held in any manner deemed appropriate by the Council, including in person or by conference call, but if a meeting is not feasible the vote may occur by e-mail.
- b. A vote of ten or more Council members in favor of initiating the PDP shall be required to initiate the PDP provided that the Issue Report states that the issue is properly within the scope of the ICANN mission statement and the ccNSO Scope. **In the event that the ISSUE Report states it is not properly within the scope of the ICANN mission statement or the ccNSO Scope, then a vote of twelve or more Council members in favor of initiating the PDP shall be required to initiate the PDP.**

Under the current bylaws the ccNSO Council can initiate a ccPDP on matters which are within Scope and outside of Scope (Annex B section 3.b).

Should it only be possible for the Council to initiate a ccPDP on matters that are within the Scope of the ccNSO?

CENTR comments

Under the current bylaws the ccNSO Council can initiate a ccPDP on matters which are within Scope and outside of Scope (Annex B section 2.b) According to CENTR a ccPDP should only be possible on matters that are within the Scope of the ccNSO.

NORID comments

A ccPDP should only be possible on matters that are within the scope of the ccNSO.

NOMINET comments

The PDP process should be radically simplified.

DENIC Comments

The bindingness of policies developed through the ccNSO is not limited to those within the scope of the ccNSO (cf. Article IX section 4 paragraph 10 of the ICANN bylaws). Therefore, such policies are binding on ccNSO members regardless of whether the concerned issue is within the cc scope or not. In other words, the scope of the ccNSO is irrelevant in this most crucial instance.

Clarifying remarks

LC—View of Norid—a PDP should be initiated only on issues within the scope of the ccNSO.

SW—The issue is not so much whether there can be a PDP outside the scope, the issue is can there be binding policies on issues which are not within scope.

BB—This issue as raised by DENIC and Norid has been discussed extensively in the context of the previous issue. Propose to move on. No objections.

K -- Ability of Board to set binding policies on Issues not within scope.

Relevant bylaw

Annex B section 15. Board Vote

- a. The Board shall meet to discuss the ccNSO Recommendation as soon as feasible after receipt of the Board Report from the Issue Manager, taking into account procedures for Board consideration.
- b. The Board shall adopt the ccNSO Recommendation unless by a vote of more than 66% the Board determines that such policy is not in the best interest of the ICANN community or of ICANN.
 1. In the event that the Board determines not to act in accordance with the ccNSO Recommendation, the Board shall (i) state its reasons for its determination not to act in accordance with the ccNSO Recommendation in a report to the Council (the "Board Statement"); and (ii) submit the Board Statement to the Council.
 2. The Council shall discuss the Board Statement with the Board within thirty days after the Board Statement is submitted to the Council. The Board shall determine the method (e.g., by teleconference, e-mail, or otherwise) by which the Council and Board shall discuss the Board Statement. The discussions shall be held in good faith and in a timely and efficient manner, to find a mutually acceptable solution.
 3. At the conclusion of the Council and Board discussions, the Council shall meet to affirm or modify its Council Recommendation. A recommendation supported by 14 or more of the Council members shall be deemed to reflect the view of the Council (the Council's "Supplemental Recommendation"). That Supplemental Recommendation shall be conveyed to the Members in a Supplemental Members Report, including an explanation for the Supplemental Recommendation. Members shall be given an opportunity to vote on the Supplemental Recommendation under the same conditions outlined in Item 13. In the event that more than 66% of the votes cast by ccNSO Members during the voting period are in favor of the Supplemental Recommendation then that recommendation shall be conveyed to Board as the ccNSO Supplemental Recommendation and the Board shall adopt the recommendation unless by a vote of more than 66% of the Board determines that such policy is not in the best interest of the ICANN community or of ICANN.
 4. In the event that the Board does not accept the ccNSO Supplemental Recommendation, it shall state its reasons for doing so in its final decision ("Supplemental Board Statement").

5. In circumstances where

(i) the Board determines not to accept a ccNSO Supplemental Recommendation, and

(ii) the opinion of the General Counsel pursuant to Item 2.e. was that the issue was within the scope of the ccNSO pursuant to the ccNSO's Scope,

then the Board shall not be entitled to set policy on the issue addressed by the recommendation and the status quo shall be preserved until such time as the ccNSO shall, under the ccPDP, make a recommendation on the issue that is deemed acceptable by the Board.

ISSUE

Under the current bylaws an issue outside of scope can be considered in a PDP. In a case where the final recommendation to resolve the issue is a Supplemental Recommendation (Annex B section 15) and the issue is within scope according to General Counsel pursuant to Annex B section 2, the Board may not set a policy and the status quo remains.

If the Council will remain able to initiate a ccPDP outside of Scope, is the ICANN Board able to set its own policy, if the issue is not within scope pursuant to the opinion of the General Counsel and in case the Supplemental Recommendation is rejected by the Board? If so, should this remain the case? If not, should this be introduced?

DENIC comments

“...Moreover, the ICANN board is free to disregard a ccNSO recommendation and set a policy on the concerned issue at its own pleasure if the issue is not within the scope (cf. Annex B section 15 paragraph 5 to the ICANN bylaws). This leads to the somewhat absurd result that it is easier for the ICANN board to set policies regarding ccTLDs if such policies do not lie within the ccNSO scope.”

Clarifying comments

SW—This issue is closely connected to the issue before (issue D). It would not be an issue if the only binding policies are those that are within scope. If we sort out the other problems according to the lines we have suggested, this will be solved.

Discussion

BB—Could you indicate why this is the case. If General Counsel is clear that the issue is not within in scope and the policy is not recommended. Why do you think this is an issue?

SW—When an issue is not within the scope and the Board does not accept the Supplemental Recommendation the Board can replace it with its own view, which may be something the ccNSO may not like.

BB—through what mechanism?

SW—It's the red in section 5 of the wording. It is based on a contrario reasoning of what is said in the bylaws.

BB—it is based on your interpretation.

CD—If it were to happen as you (SW) suggested, that policy would not be binding because according to article ix section 4.10 the policy has to be recommended by the ccNSO to the Board in order to be applicable.

SW—That is correct, so this is not necessarily an issue which involves the ccNSO, but it can be related to ccNSO or ccNSO function.

BB—I do not understand that interpretation. It can only be binding if it is recommended by ccNSO through a PDP.

SW—It is easier for the Board to make a policy on issues which are outside the scope than inside the scope. And although they are not binding according to the bylaws, there might be a political/policy impact. It could be on something they want from the ccNSO on funding or whatever. We want to make sure this does not happen without going through the ccPDP.

BB—I note that what starts out as discussion on a legal issue and we concluded can not result in a binding policy, political/policy implications are introduced. I need to test if this is shared by others.

Stefan—The way the bylaws are drafted are weird.

BT—I'm just glad it's not a problem in itself.

L -- Should the Scope of the ccNSO be redefined?

Relevant bylaw

Annex C (Scope of the ccNSO)

Issue

Should the scope of the ccNSO be redefined?

CENTR comments

According to CENTR the scope of the ccNSO's global policy responsibility should be limited to making policy for the operation of the IANA function as it relates to ccTLDs. This may comprise IANA procedures (including those related to IANA in the event of a registry change), and fees to IANA.

NOMINET comments

The scope should be clarified and limited.

NORID comments

The scope should be limited.

Clarifying remarks

CD—this scope as defined was by unanimity.

Discussion

BB—as issue manager the only thing I can do is agree to take this on board. The scope as defined will remain in the next period.

CD—yes but can recommend that the council agrees that the scope should be looked at as soon as possible in the process.

LC— Believe the scope should be redefined, but as we have already discussed suggest you ensure a cross-reference to other discussions about issues within the scope.

CLOSURE OF THE MEETING

BB—tomorrow will try to make minutes of the meeting and have the draft published by Thursday or Friday . If you have comments on the minutes i.e he minutes do not reflect what you have said please send your comments to Bart so the minutes can be adjusted. By Friday evening or Saturday will submit the minutes into the ccPDP. Thanks for attending, particularly those who have raised the issue.

CD—does anyone else have anything they want to say at all (no response). Thanks to Bart for the work done to date and has done a fantastic job.