ICANN81 | AGM – Joint Session: ICANN Board and GNSO Council
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FRANCO CARRASCO: Hello. My name is Franco Carrasco, and I am the participation manager for this session. Welcome to the Joint Session with the ICANN Board and the Generic Names Supporting Organization. Please note that this session is being recorded and follows the ICANN Expected Standards of Behavior and the ICANN Community Anti-Harassment Policy. Interpretation today for this session will include English, French, Spanish, Chinese, Russian, Arabic and Turkish. Please state your name for the record and the language that you will speak if speaking a language other than English. Please also remember to speak at a reasonable pace.

The discussion today is between the ICANN Board and the GNSO Council only. Therefore, we will not be taking questions from the audience. Having said that, I will now hand the floor over to the ICANN Board Chair, Tripti Sinha.

TRIPTI SINHA: Thank you, Franco, and welcome everyone to this bilateral meeting. We actually enjoy having these constituency day meetings because it's our opportunity to have a frank and candid conversation. So, I know we've done a back and forth with questions. So, Greg, if it's okay with you, shall I ask my first question from the Board and read it for the sake of the audience and let's discourse on it?

So, the first question that we had sent to the GNSO was about the Global Public Interest. And the Board has been doing work on this for a while now in relation to ICANN's policymaking and has recently finalized what we call the GPI Framework Checklist. So, we're eager to get feedback from you on the checklist and hopefully you've had a chance to look at this and whether you feel it has a place in your policy development process and any thoughts on how this could be potentially improved.

Now, just some context on the GPI. As you know, it is a key element in all of ICANN's governance documents from our bylaws to our articles of incorporation, affirmation of commitments. And we started this work way back in 2019. And the purpose of the framework is really to facilitate a bottom-up multi-stakeholder-driven understanding of GPI issues relevant to each decision that's made, particularly when it comes to the Board. And the whole intent of the framework and the tool is to see how it can be embedded in processes to, one, reinforce our commitment to public interest and also to show that any recommendations, advice, and public comments that come in are in the global public interest. So, we would love to get some feedback from you on that. Thank you.

GREG DIBIASE: Thanks, Tripti. So, I think this was just posted. So, we haven't had a chance to go through it yet. We will have that on our agenda. In general, we look forward to this. We think documents like this are helpful in defining our mission and clarifying how we go about our work. So, we don't have feedback yet because it was recently posted and we haven't had a chance to review, but we're eager to do so. And we'll be sure to give our feedback and follow up with questions as we have a chance to review it.

TRIPTI SINHA: Thank you. Can I ask just one follow-up question before we move away from this topic? So, when you do your work, do you ever consider global public interest in your deliberations and discussions? That would help inform us as well.

GREG DIBIASE: See, I think in speaking in my personal capacity to some degree here, but that is always in the background of all the work that we do. That is part of ICANN's mission and policy development that supports ICANN's mission. So, I think the answer is yes, but I don't know if I have the specific examples offhand on like mechanisms, for example, of how we do that, but that's certainly something we can take back.

TRIPTI SINHA: Okay. No, I'm quite confident that GPI is always in the background, but we didn't want to reinvent a tool that you may perhaps already have, right, or maybe enhance a tool that you might be using. So, thank you very much. So, let's move on to the questions.

EDMON CHUNG: Tripti, if I may.

TRIPTI SINHA: Go ahead. Sorry, Edmon.

EDMON CHUNG: Yeah. So, I was going to give a bit more context to this work, actually, and we think it's quite related to the Board readiness discussion that the Council is actually having. So, as you think about Board readiness, this is probably a good checklist to look at. The background of it, of course, yes, this checklist was circulated very recently. However, the text in the checklist actually has been around quite stable for the last two years, coming out of the pilot of the GPI framework that was done for both the SubPro ODA as well as the SSAD ODA. So, that's the framework.

And then there was actually feedback that was incorporated into the GPI Framework Version 5, which was published in 2023, and all that text that you see in the checklist actually came from that document, and we just added some check boxes and potentially relevant, potentially not relevant, and those kind of things into it. So, it has a little bit of a context to it, and I think it has quite a bit of a relation with the Board readiness piece that the Council is working on.

GREG DIBIASE: Thanks. That's helpful context, and, yeah, that is a project ongoing in the GNSO, and maybe more specifically, we're looking at ways where we can involve the Board earlier in the process. So, as these recommendations are being developed, we want to avoid surprises, for lack of a better term. We don't want to get to the end of the process and have the Board say, wait a second, we don't think this aligns with the global public interest. So, that's great to hear.

That's something that we're really thinking hard about, is how we can create new processes to make sure the Board is involved all the way through, and we don't get to the end of these processes and have back and forths that could be counterproductive or inefficient.

TRIPTI SINHA: Thank you, Edmon. So, Greg, I'm going to turn it over to you now. I believe you have a series of questions for us. Would you like to read yours, and then I'll give you the Board's response?

GREG DIBIASE: Sure, yeah. So, I think these may be more updates on work we've been doing together and kind of the next steps. The Board recently sent us a letter, and we had a discussion about Recommendation 20. 6 regarding private resolution of contention sets. And the Board noted that in adopting the GAC advice on contention of resolution sets, that might not align with Recommendation 20. 6, and so they would like to unadopt it.

We've talked about in the past that there's not a clear process for this yet, the unadopting a recommendation. So, kind of taking those things into consideration, we have written a letter to the Board, I think that was just sent today, and at a specific level, it says we understand the Board's thinking, and we don't object to the unadopting this specific recommendation. However, we want to stress that this is pretty narrow. There were still some concerns on Council, even about the nature of the GAC advice, whether this unduly limits the abilities of private parties to do business.

There was also some talk about this recommendation hadn't implemented yet, so maybe that makes it more palatable for unadoption. So, that's kind of the specific action item that we're not objecting to the unadoption of this recommendation, but we have more work to do in defining a process for this, right? This is, I think, it's been hypothetical, but now it's reality. This is a gap in the policy where the Board adopts something, circumstances may change, and a recommendation may need to be modified or adopted.

So, in our strategic planning session that's coming up in January, we're going to take this up and start thinking about how do we get our hands around this, creating a process, so the next time this comes up, which as the world gets more complicated, it's almost sure too, we'll be thinking about the process. So, that's just kind of an introduction to our thinking on this and the letter that's sent over, and we're hopeful that this doesn't delay the next round. And then I think as a side note, the Council really wants to express how much we've appreciated the informal communication on this. I think there's been frank, continuing, informal communication that have kept a lot of these work items on track. So, that's slightly long-winded, but I hope that all makes sense.

TRIPTI SINHA: So, thank you, Greg, and we're trying to do everything to ensure that things remain on track. And Becky and Alan will like to respond to this, yeah.

ALAN BARRETT: Yeah, thanks. This is Alan Barrett. I'll take that. Thanks very much, Greg, for raising your concerns. The SubPro Recommendation 20.6 essentially was about the use of joint ventures to resolve a contention set. At the time, I think back in 2023, the Board accepted that recommendation, but even then, we were concerned about gaming the system. We didn't want a repeat of something like the private auctions that we saw in the previous round, and we were concerned that joint ventures could just be window dressing to hide or to cover up some kind of a financial transaction between the two parties that would have been against some other part of the recommendations.

So, even when we accepted it, that we would go ahead with joint ventures, we wanted to implement it in a way that could not easily be gamed. aAd we engaged an expert to report on how that could be done, and it turned out that there wasn't really a good solution. We could not see a way to allow joint ventures like that in a way that couldn't easily be gamed. Now, of course, joint ventures before the application are perfectly fine. If multiple parties want to get together and jointly submit a single application, there's no problem with that. It's when there are two applications and they want to later on form a joint venture.

And having investigated the issue and also having listened to the advice from the GAC and the ALAC, yeah, the Board took the difficult decision to go back on our previous adoption of that recommendation, and we didn't do it lightly. We thought it was in the best interests of the global community. But we do recognize, as you rightly pointed out, that unadopting a recommendation raises many questions. We don't have a good process for it.

So, we're pleased that you'll have a strategic planning session. And, yeah, we're planning to have some of our Board members, I think Chris Buckridge and Becky Burr will participate in that. And so, we do hope that that will lead to a better way of interaction between the Board and the GNSO and procedures for how we can adopt or unadopt recommendations. I hope that helps.

BECK BURR: If I could just add, I want to clarify, there's a part in the letter that I think is very important where you're expressing a concern about accepting GAC advice that could alter GNSO recommendations. And we also got advice from ALAC on this. I just want to stress the Board actually made a determination that it was incredibly uncomfortable with post-application joint ventures before we got the GAC advice and the ALAC advice.

And I think that you're absolutely right. If the GAC and the ALAC are sitting in policy development projects, their processes, they're participating, the advice thing comes in as another bite, that they're entitled to do that. But we do have to be very careful to think about that and understand that. But this decision by the Board was motivated by the Board's concerns coming out of the NERA review and not primarily motivated. It just so happened we could accept the GAC and the ALAC advice because we had already gotten there.

PAUL MCGRADY: Thanks, Becky. Paul McGrady here. So, two things on that. I participated in the SubPro working group. There were concerns all the way back then about that particular provision. So, I 100% agree with you that this should not be a surprise to anybody, that it still remained a sort of a difficult issue. I think the big win in all this, and this has a lot to do with your involvement with the supplemental recommendations and all the way through.

In the last couple of years, I think the working relationship between the Board and the Council has so improved that when this came down, our response, this Council, the response was practical. Like how do we not get in the way and at the same time figure out for the future how to paper something so that everybody has some clarity about how this works. But how do we not get in the way of what needs to be done for the community and not be territorial, right?

And I think that for all kinds of good reasons, not the least of which has been how communicative the Board's been over SubPro issues in the last 18, 24 months. And so, we're just, because we're not at loggerheads on this issue when if we became proceduralist, we very easily could be. I think that's because of the cultural change, both with the Board and the Council learning to work together. And so, from my point of view, how this has gone down is a big win. I think we should celebrate when we see our culture improving and getting more cooperative. I just don't want to miss the opportunity because I think that this is what this is. We're learning to work together.

GREG DIBIASE: Greg for the record. Becky, that's really helpful context. And I think part of the reason that's in the letter, just to make sure that our non-objection to this unadoption doesn't mean that we still want to be able to discuss issues like the impact of GAC advice. So, I think that language is more just preserving that as an ongoing issue that we always need to be thinking about as we work together.

TRIPTI SINHA: Greg, would you like to move to your second topic now?

GREG DIBIASE: Yeah, sure.

TRIPTI SINHA: Thank you.

GREG DIBIASE: Thanks, Tripti. So, the next topic regards a Council letter related to the dismissal of IPC's RFR concerning auction proceeds. And so, we sent a letter kind of citing our concern about the way this complaint was handled, and I don't think we need to go into the specifics of the actual case. I think we just had a concern, and we want to make sure that these accountability mechanisms are robust.

So, if there is a constituency within the ICANN community that is alleging a violation of the bylaws, when we see a complaint regarding that go forward and it's dismissed for something like lack of standing, there are concerns that this could be, instead of addressing this issue on the merits in a fully transparent way, there's a perception by some that it's leaning on a legal technicality. And so, I think we just wanted to raise this and put it out.

And in our letters even before this, we had a letter to the Board saying, hey, there is this issue regarding a potential bylaw change on the CCWG on auctions. We want to make sure that we address the merits. And if there is an IRP or a complaint, the Board doesn't go for a legalistic win, I think is the language we used. So, I think at its core, it's just that the Council wants to make sure that these accountability mechanisms are robust, and that if there is a constituency that thinks there has been a violation of the bylaws, that we look at that on the merits.

So, I guess we're kind of looking at your feedback to our letter. Do our concerns make sense? Is there a way we can communicate better about these things going forward? So, we just like your thoughts on this topic.

TRIPTI SINHA: Thank you, Greg. We had a discussion on this topic in our previous session with the CSG as well. So, I'm going to actually turn this over to Leon, and Becky will likely add to it as well on the topic. Leon?

LEON SANCHEZ: Thank you very much, Tripti, and thank you very much, Greg, for the continued dialogue on this topic. As Tripti is saying, we had a discussion on this topic in our previous session with the CSG, and I couldn't agree more with you in that these matters need to be evaluated based on merits and not necessarily on legalistic issues.

And I'd also like to clarify that we, as the Board and as the BAMC, we don't think this is a win because we're not against anyone, right? It's not us versus anyone else. It's just a procedure, an accountability mechanism that we need to take care of, we need to deal with. And the rules are there, and they are very clear, and there are bylaws, and we need to respect and to abide with those rules that are written in our bylaws to provide certainty, predictability to our processes and to fulfill our duties as a Board and as a committee within the Board towards the community and towards the outside world.

So, we did evaluate these on the merits, and proof of that is that we went back to the Board, and we redrafted the language for the proposed bylaw amendment. We engaged with the community, we engaged with the IPC, and we had this dialogue. Now unfortunately, because of the way the process is embedded into our bylaws, this couldn't happen within the process of the RFR, right?

But nevertheless, we recognized the value in the concern. We went ahead, we engaged again, we redrafted the proposal. And we just recently in our meeting, the last meeting we had, we went on and approved the resolution that will trigger the formal process for the fundamental bylaw amendment to go to the empowered community and continue with the process so that if it gets approved by the empowered community in the end, then it will be enacted.

But what I'm trying to say is we didn't look for the easy way out, because that's not what we're here to do. We're here to address the concerns of the community, to hear, to engage, and to act upon or in consequence. So, I think that's what we did, and we now have this proposed bylaw amendment which will go through the formal process to be enacted, will hopefully approve the enacted, and that is where we stand. Again, it's not an issue of claiming a win, because as I said, there is no win in this. The win in this is to provide certainty to the community and to address the concerns from, in this case, a constituency which I wholeheartedly value, and it's about fulfilling our duties as a Board. So, I don't know, Becky, if you want to add anything to that.

BECKY BURR: I have a really important, what I think is a really important thought that I would like to share with you. The accountability mechanisms in the bylaws are not the only accountability mechanisms that exist. The community can raise its hand and say we disagree with you, and the Board can be responsive to that, and that is an account, that we were accountable. In fact, the issue of doing a bylaws amendment was resolved before we got the RFR.

I've heard people say the accountability mechanisms aren't fit-for-purpose or they weren't sufficiently robust. There are formal, elaborate, expensive accountability mechanisms in the bylaws, and they are there to be backstops if the Board is not accountable in a normal, interactive way. So, I really want to not see this as a failure of accountability or as an insufficient robustness in the accountability mechanisms. If you raise your hand and say we have a problem and we ignore you, then maybe we need a different kind of accountability mechanism, but that's not what happened here. Please, you can hold the Board accountable before you get to an RFR, and that's the way it should work.

I actually think of this as a win for accountability, and I really encourage you to think of it that way. I understand that once we issue one of these summary rejections of a dismissal of an RFR, it's very formal. It looks lawyerly and has sharp language and all of that, but I think the Board was accountable. The accountability mechanisms worked, and if we fail to be accountable in the future, then let's think about whether we need different or more robust or broader accountability mechanisms, but there's nothing that happened there that suggests to me that the accountability mechanisms are inadequate.

GREG DIBIASE: Thanks, Becky. This is Greg, and I see Susan's hand, but yeah, I guess one more dimension of this is communication. Like when that dismissal of the RFR was sent out, perhaps there could have been better communication between our groups. And I almost feel like before we had fallen into a little bit of the formal letter writing leading up to that, so maybe I'm flagging that as a potential part of this as well.

BECKY BURR: That's totally fair, but just to be very clear, we did communicate with the IPC on this. We told them where we were coming from on it. This was after the Board had already agreed that it was going to do an amendment in the form that the community had asked for, right? And we did tell them that we would have to dismiss it because it did not meet the standing requirements in the bylaws.

We hoped not to issue a formal dismissal of that for a variety of reasons. They elected not to withdraw it, which is entirely and absolutely their right, and there's nothing wrong with that, but we can always do better on communication. You're absolutely right on that, but I want to be clear. This was not just we had fallen back into the bad old days of throwing letters across the transom. We tried really hard to make this work.

GREG DIBIASE: Thanks, Becky. Susan, did you want to chime in here?

SUSNA PAYNE: Yes, thank you. Hi, it's Susan Payne. And I really appreciate that we've ended up in a good place on this, on the change to the bylaw point. I do think we've still got a certain amount of reservation, as you know, per the discussion just earlier about the standing issue. But absolutely, on the bylaw point, we have ultimately ended up in a really good place. But I do think we did have one of these communication issue problems.

Becky, you've mentioned it would be good to be able to solve these things without ending up in a kind of formal process in an RFR. But actually, there isn't really an alternative. I think if you think back to just before Hamburg, we were in a discussion about the form that the bylaw amendment should take. You were in that discussion with members of the Auction Proceeds Group and Council. And then we were, as Council, very much taken by surprise by the fact that the Board then took made a resolution in Hamburg in the form that it made it because we felt we were still engaged in dialogue.

And having made that Board resolution, then there's not really an option in terms of continuing with the informal dialogue because the bylaw's processes, as you know really well, there are really strict deadlines on when you can bring a challenge and how much time you have. And once you bring that challenge, you get into a process which itself has timelines. So, it's unfortunate. I think dialogue could have fixed this better. And ultimately, there was dialogue and it's fixed it. But one can end up in one of these processes where there isn't a way out because the bylaws say you've got X number of days. And then the bylaws say that the BAMC must consider it within X number of days. And you get into a legal issue when really you should be having a conversation.

BECKY BURR: If I can just say, absolutely fair point on the communication before the Board vote. Absolutely fair. I've got no issue with that.

GREG DIBIASE: Thanks, Becky. And then I guess maybe the last question we'd have on this point that I'm not sure was answered directly is kind of if the Board considers a violation of the bylaws, it's harm, right? That was one of the things that I guess was debated here is can a constituency within ICANN suffer harm if they feel the bylaws have been violated, even though they might have not had the concrete harm and that they were not able to submit an application for support?

BECKY BURR: So, I don't even think we reached that because we didn't violate the bylaws. Maybe if we had proceeded, you could have brought a case that said we violated the bylaws and we would have reached that question. But we didn't reach the question because we changed our mind when we listened to the community. And I don't think that there was a bylaws violation. So, I don't think the BAMC had a long conversation about that.

GREG DIBIASE: Thanks, Becky. Well, maybe then I'm just flagging that as food for thought going forward when we're thinking about accountability mechanisms. Any other councilors have points on this? Maybe the next one. The next one, we have next steps on the Council letter regarding urgent requests. So, this regards the recommendation regarding urgent requests and the EPDP phase 1, I believe.

And the Board had highlighted a concern with this recommendation in that it might not be fit for purpose and that urgent requests likely should be faster than multiple business days. However, they recognized that any urgent request from law enforcement will likely need to be validated by a registrar and that would take time. We set up a call with the GAC and in parallel received a letter, the GAC basically proposing a path forward where policy work could potentially continue. And in a different path, work on authentication could continue and maybe the recommendation could rely on that authentication work.

The Council hasn't had a chance to review this recommendation. I expect that we'll review it, flag questions or concerns we have about the proposal. I would guess the Board will do the same. So, I guess my proposal would be to collect our thoughts on the GAC proposal and then decide when to meet and discuss. So, I guess the question is thoughts on the GAC proposal and next steps.

TRIPTI SINHA: Becky, I'm going to turn this back to you again.

BECKY BURR: Thanks. I was going to say we're really interested in hearing what the Council thinks about the proposal. We thought that the conversation that we had with the Council and the GAC and the Board was very useful, and I think we want to hear from the Council on its views on next steps. I would say we at least probably need to have some more conversations like that to understand the parameters and what questions do we need to shape up to do policy, what information needs to be in place, all that kind of stuff. So, I think we want to hear from you on it and we expect that there will need to be more of the three-way conversation.

GREG DIBIASE: Thanks, Becky. This is Greg. Yeah, and I think even in that initial call, there were a number of issues being flagged. So, yeah, that proposal to go forward I think makes sense to us and we'll pick it up as soon as possible.

TRIPTI SINHA: I believe we've come to the end of your question set, right? So, we've still got time. So, is there anything else you'd like to discuss?

GREG DIBIASE: Other councilors?

TRIPTI SINHA: Board colleagues, is there anything you'd like to discuss? We've got 25 minutes. Yeah, we can end early as well. I think several of us are jet lagged and would like to get a cup of coffee.

GREG DIBIASE: Sure, I'm okay with ending early. I just do want to add kind of to something Paul was saying in that I feel like we're coming up with more mechanisms and more direct communication. What we've seen in getting SubPro over the finish line, the supplemental recommendations, kind of handling these unexpected events as they arise without derailing the timeline for SubPro, I at least find encouraging. So, I think the Council is very appreciative of how much the Board has given their time and attention to these matters. And we look forward to making potentially new policies on recommendations to address things like recommendations that are no longer fit for purpose.

TTRIPTI SINHA: Thank you, Greg. And also, the Board appreciates the back-and-forth dialogue and I think they're getting better. In spite of a couple of hiccups here and there, things are definitely getting better. And yes, we need to address recommendations that are no longer valid. So, thank you very much. And does anyone have any other comments to make? Becky?

BECKY BURR: I'd just like to say on behalf of the Board that we have really appreciated the very constructive work that we've done with the small team and the Council on all of the next round policy issues. I think Alan would agree with me that we've had very constructive conversations. Everybody's been open, polite, looking for solutions. And I do want to say in particular that Paul McGrady deserves big thanks for his work on the small team.

TRIPTI SINHA: I think you just embarrassed Paul.

BECKY BURR: You shouldn't be.

TRIPTI SINHA: Well, thank you, everyone. This meeting is adjourned.

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