
COPENHAGEN - GAC Discussion: Managing Confidential Internal Documents

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ICANN58 | Copenhagen, Denmark

CHAIR SCHNEIDER: Okay. Please, please take your seats. Welcome to the session that has the number 12. And this is about -- This is a discussion that we were requested to provide for some space, and I think it is right to discuss the managing of confidential GAC documents, or of what we thought were confidential GAC documents. So we have a little bit of a briefing paper for those are not -- not too, too familiar with this.

The issue is this, that we have had a case where an Independent Review Panel is looking into some decision of the ICANN Board related to delegation or not delegation of a string based -- and the board decided not to delegate that string based on GAC advice that we've been given in Beijing in April 2013, if I'm not mistaken. And as part of that IRP, there has been a request to ICANN to produce a number of documents from the GAC, from the GAC mailing lists, and also discussions -- transcripts from the discussions that the GAC had at that time, and also after -- after that. And we have looked into this in the leadership team. And although we were not particularly happy with allowing the production of these documents for obvious reasons, because we

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basically considered, and the exchanges on our email list, as confidential as internal to the GAC, we have come to the conclusion that that is actually in the interest of the GAC, and in particular to those who were asking the GAC to take that consensus decision that we took in Beijing not to delegate this string, that we would support ICANN in its efforts to prove or demonstrate as part of this Independent Review Panel that the GAC advice was made according to the rules and that the ICANN decision was made according to the rules as they are in the Applicant Guidebook so that everything was basically following the rules in the correct order. And then we decided to accept this.

And also knowing in the later course of action, this -- in case this would go to a court, maybe even in the IRP, and at the latest with this would go to a court, access would have been given -- have to have been given to these documents and communications anyway.

So this is the concrete case. And -- But that brings us, actually, to -- or we think that brings us to a broader debate, not necessarily about this particular case but about the fact do -- that we have to understand that our assumption that the GAC communication on the e-mailing lists and the archives of that list are only confidential until somebody asks for access to -- to

this communication through a procedure, be it an ICANN internal review panel or be it a court, a court case. And then these communications will not be confidential anyway.

This is the case under the U.S. jurisdiction, but it would also be the case if ICANN was in a different national jurisdiction. There are different transitions between different jurisdictions, and when and on request by whom documents can be produced. In other countries it's -- In this case, was lawyers from parties. In other countries, it needs to be the judge or the panel that would ask for this. So there are some differences also in what stage of the process these documents can be or have to be produced. But the fact that can and have to be produced is probably the same in all of the jurisdictions.

As well as we should be aware that for most -- many, probably most if not all governments, whatever we write with our professional emails on a list, whether it's the GAC list or whether it's an email that we write to colleagues, if somebody on national level would ask for access to this, there are open government policies and laws that actually force or give the right to citizens and other parties to have access to what we do in our role as public servants with some restrictions if something is about national security, and so on and so forth. But in general, in many if not most countries, whatever we write from

our professional emails can be made available, accessible to people anyway.

So this is based on a tendency that is, I think, global that more transparency and access to information is asked. And another element that we should consider is that given that we are now having all our sessions openly accessible and we're having no more closed sessions, I question that we should need to ask each other is -- does it actually make sense to think that we need or should use a confidential communications email list in a situation where what we say in a meeting is public anyway? And the documents that we put on the screens and the drafts are, in that sense, transcribed, and so on, anyway.

So I think -- I think we should mainly use the -- use the time for asking us the general question, instead -- I'm happy to answer questions for clarification on the particular case that we had behind us. There may actually be more cases like this to come, so that was probably not a one off. But the more relevant or the key question here I think is do we -- would we want to have a confidential email list, yes or no? Or under what -- in what situations? In what conditions? And then the question would be where can we actually get -- in the case we think we should need this, where can we actually get such a confidential email list? Because we have been thinking this through again at our

leadership meeting and this is not so trivial. In the end, we would probably have to use our own private emails if we want nobody accessing the emails through any channels.

So I will stop here as an introduction. And, yes, take my pen and then note down who wants to take the floor, but I see Brazil is first. So, please, go ahead, Brazil.

BRAZIL:

Thank you, Thomas, and thank you for this introduction. However, with all due respect, I think we should not at this point discuss what we want for the future. I think it's -- the GAC can decide anything. As we have said, there is a tendency for open government. My government certainly subscribes to this. It's not the case for each and every government, of course. And -- But it's up to the GAC to decide. No -- no question about that.

My -- The concerns I raised in regard to this issue, and I want to address it from -- as a matter of principle, not touching on the particular case and as it was indicated by yourself through the ACIG secretariat, it refers -- the specific case refers to the IRP that is in process so we should not discuss it here, but I would like to address this issue from -- as a matter of principle.

So when I read your communication and the annex with the communication that we received from Mr. John Jeffrey, there were a few expressions that strike us. First of all, to learn that internal documents even related to closed sessions and transcripts of private conversations were under ICANN's control. I think this is something that maybe other delegations would not be surprised but we thought it would -- it was quite striking that ICANN, in the performance of a kind of secretariat service for GAC, would keep records of all these communications. And I refer to the annex of Mr. Jeffrey that says that the kind of documents that would be provided under this category includes transcripts of GAC meetings, including closed sessions. So we are not talking just about emails. So there will also be transcripts of closed sessions. Sessions we would hold in -- thinking we had some privacy but at some point were recorded and were being made available in that context.

And also internal GAC communications concerning Amazon application and blah, blah, blah.

So the first point was this. And we would like to receive some input and some -- from colleagues on how they feel about ICANN have under its control all of our communications. As we have said, take into account that the emails are stored in a server. But it really strikes me because we always try to look at that kind

of situation as a government trying to put it in a larger picture, and we are government here. We are government at the U.N. We are government elsewhere. It's not because we are here in ICANN that we become private sector or civil society. We are governments. And we are bound by, let's say, some way of doing things governments do, and we are accountable to our superiors, and we will have to at -- at some point to explain things that are doing here.

So I think it's very important to -- for us to -- to make sure that as we work in a multistakeholder environment that the -- the way of doing things of each stakeholder is duly respected.

This is a lesson, by the way, we learned when organizing NETmundial, because at some point we were -- some people were trying to prompt us, for example, to impose on civil society the same rules or the same way of making decisions that governments do. And we said, no, let's -- let's leave each stakeholder group organize itself according to its own way of doing things. They have their way to validate the decisions, to select their representative. So let's not impose.

We are very -- we want to be very clear about that. We want to be very constructive in this environment, but we think as government we should not deviate from the way we do things,

because at the end of the day, we will be accountable to our government authorities.

Then we would, in that light, and because this refers to the past not to the future, we can decide -- decide to do, and we will be more than glad to go along with any such decision. But what kind of documents that were termed as confidential or closed session? I think we need some more clarity. What was exactly the -- in substance, what was under that caption of, let's say, some confidentiality and that was offered to -- to the IRP? I think it's something we'd like to -- to hear.

We think that there is a tendency -- And we are not against it. For transparency, we are certainly in favor of providing some more transparency to our proceedings. We certainly would go along any such decision. However, we think there is a matter of principle here with we're under the assumption that some documents and some discussions were, in a way, preserved. And it's quite striking to see that that was not the case. So we'd like to address it as a matter of principle.

We don't think that sometimes the same kinds of information that are required from GAC are required from other constituencies. I understand that I have never seen a public discussion on private sector on their strategies, and I have never

been appraised of any strategic discussion, even within (indiscernible).

So -- But we have been asked to do it as government. It might be -- it strike us as a little bit.

I think maybe the next step is to request us to form our own internal discussions in each country that led us to that position, because since transparency is being sought in such a way.

But anyway, we want to address it as a matter of principle, as you have said, to set a precedent or to make sure that unless we decide otherwise, that we will make a decision that is totally consistent with what we have been doing so far.

Thank you.

CHAIR SCHNEIDER: Thank you, Brazil.

Well, first of all, I think the -- this is probably a language, the word "control" that you refer to. In the case -- in this case I guess means it's a technical and mainly legal fact that if ICANN is recording our sessions and then archiving them somewhere on their servers, that they have the control over this file. And the same goes with the email archives. If they have the email archives on their servers, which is nothing new to us, I think

everybody knows and knew that the GAC email list is hosted by ICANN. Is hosted on ICANN servers. That also, if we take an Adobe room that we may have for a GAC meeting, also our leadership meetings that are run on Adobe rooms, it's ICANN who organizes these meetings. And these are stored somewhere on an -- on a server, in whatever country the server or the data are actually stored, but it's under control, if you want, of ICANN. This is nothing new. That is just a fact, I would say.

The issue about us being governments and working under certain condition or assumptions, it's true. If we are working in a intergovernmental institution, then normally there are some immunities that are granted to that institution according to its legal statutes, under public law, according to the host country agreement that each institution has with the country in which it's physically located, and so on and so forth.

It is also known to us that we are not working in an intergovernmental organization here. This is -- This is a private institution under the laws of a particular country and in a particular region of that particular country. So this is also nothing new.

The fact is that we basically never asked us this question before. If we had asked ICANN ten years ago or when the whole thing

was set up what will you do in a case when an internal or an external case, you would be asked to produce documents -- produce some documents, we would have probably gotten the same answer. It was just -- it was just never -- it never happened that -- that this -- this such a case popped up where we had a clear interest, I would say, to support ICANN in following a decision that we've asked them to take on the basis of a consensus advice. So that is a -- is the -- is basically the new thing.

And, yeah. So this is all I can say on this. And you are absolutely right. In the end, it's a question of principle, but we need to maybe be clear about the legal conditions that we're working under in a -- in an environment like this where -- where governments are members of a sub- -- of a constituency or an advisory body to a private -- as part of a private institution. Maybe we need to look into this more closely to see what that means. But I think basically there is -- there are no secrets. Everybody can look at this at any time. So there is -- About this, there is nothing new. At least not to my knowledge.

Yes, Brazil. Thank you.

BRAZIL:

Thank you. And sorry to intervene again. May I just add that I think this -- It's not the matter under discussion here, but in our view, this relates exactly to what you have said: That we are working under certain jurisdiction, under certain legal conditions. I think that leads directly to the discussion on jurisdiction because we have been working in environments to which we have not agreed upon those rules. Those are -- were, in a way, decided upon a few years ago. That was not discussed in the transitions. We do not agree with many aspects, especially in regard to dispute settlement. And it's also a surprise, for example, that we have been working for years on the assumption that some sessions are closed. And there's a meaning for closed sessions in intergovernmental feature being in ICANN. We are working a closed session, and then we are told no. According to the U.S. legislation or the California legislation, if a judge would require and ICANN has it under control.

So you see these things relate to each other in a way that is maybe not surprising to some of us, but I'd like to say from the perspective of government it must be accountable to, it really -- it really raises some concerns. And this is to the jurisdiction issue. Thank you for reminding that.

CHAIR SCHNEIDER: Thank you, Brazil. And I think for clarification, when we say closed or open, those meetings that were closed, they are still not -- nothing out of our mailing list is acceptable -- accessible by the general public. It's accessible to a very small, defined group of people that are involved in a case. So I would still make that difference between something being publicly available to anybody or something being available to a very limited number of persons that have a particular function in a particular -- in a particular process. So just to make that clear.

But of course, yes, we are working in this environment under the legal conditions that this environment has established. That is, I think -- that is a fact.

Other views? Comments? Questions?

Iran.

IRAN: Thank you, Thomas, and thank you for the issue that you raised, which was subject to some comment.

I think we should distinguish between various points. First, are we discussing about the past or we discussing about the future?

Subdivision of that would be are we discussing about the past on a specific case or are we discussing about the past on general case?

We can have a simplistic approach. We could have a realistic approach.

In the law, everything is based on two things: letters and spirit. Spirit means that environment and circumstances under which that discussions were held.

If the content of an email as it is submitted without taking into account the environment on which that discussion was carried out and all background, they may give some wrong impression to the court. Because they just read that small email. But many, many emails has been exchanged. And that email or that discussion was result of some other discussions. Another important thing is that we should not discourage the people to speak. If we know that everything we say at this meeting will go to the court or subject to the court, we may close our mouths and don't say anything any more. And they had sufficient means to be supported by court. So we should be very, very careful of these things. This is a dangerous way that we have taken. We are taking care. And we have to realize that it is not easy, that court base itself on that mission.

Another element of that, some of these discussions were made when the meeting of GAC was closed. From certain period we have opened our meeting. But some other meeting, perhaps the one in that was discussed, it was one of the closed meetings in communique. So you're going to the past and applying something retroactively.

Other thing that was mentioned is that we're under the ICANN legal arrangement, which is subject to California law. I have some difficulty with that.

When you're discussing in Beijing, you may not be under the California law because discussion took place at that particular country. When you're discussing in Marrakech -- Morocco, that is another issue, whether that should be totally subject to another legal instrument like jurisdiction of ICANN in California.

So we should be very careful we get into an area of very, very complex. And we should not simply decide on something. If you want to discuss in specific cases, we may have some agreement on that specific case.

But this is very difficult to generalize a particular case as a general case and decide on that. I'll stop at this point. But I think it's a very, very complex legal issue that we disclose the

emails and the transcripts and the discussions and so on and so forth.

Sometimes transcript is not correct. I can show you that I said something. It was transcribed totally differently. Either my pronunciation was not correct or my grammar usage was not correct or the person who wrote that did not grasp it totally. So I don't think that transcript is just to provide some facility to read, but it does not have any legal value to be used in favor or against a particular thing. So I think it's very, very complex issue. Thank you.

CHAIR SCHNEIDER:

Thank you, Iran. And I think you made some very fair points, in particular, the last one with the transcript. I could also give you some examples of, for instance, my country being confused Switzerland with Swaziland. And that has some effect sometimes.

But, in addition to the transcript, normally there's an audio recording. And that is then, basically, reflecting what somebody said. But the transcript is maybe to 80 or 90 or 95% correct. But, if the 5% -- the main 5% can actually look completely different from what you said. So you have an absolute fair point.

And I don't know to what extent the transcript would count as proof or as a testifier of something. They would have to go to the audio if they really want to know what has been said, because a transcript is an approach.

And, of course, thank you for the distinction between the past and the future.

I think we have to look at this with a view to find solutions for problems in the future. But, in order to do that, we need to understand what happened in the past. So, of course, these two things are linked.

I see that Peru is wanting to take the floor. Thank you.

PERU:

I will speak in Spanish.

Peru speaking. I fully agree with the comments made by my colleagues from Brazil and Iran. I fully understand their comments. And I believe we are all a little bit surprised in view of not knowing a regulation or a norm that forced us to deliver documents or disclose documents. And we were not aware of that regulation.

But we all know that lack of awareness of a regulation doesn't mean that we can infringe that regulation. Our duty is to be cognizant of the rules. Therefore, we are a little bit lost, if you will.

However, I would like to say that I agree with Iran and Brazil. And I do believe that it is worth reflecting upon the fact that we are facing a two-fold situation. On the one hand, we face a situation that we are not used to, at least those of us working in this international arena. We are not used to this type of record and control.

And, on the other hand, we face our willingness to help resolve an issue on which the GAC made a statement at the time. And that is .AMAZON. And, because the GAC recommendation was adopted, the Board is in this situation, at this point is facing a panel and has to produce evidence as if producing rabbits out of a hat in order to uphold a situation derived from our recommendation.

Therefore, with all due respect and taking into account our willingness to help ICANN and the ICANN board, I do believe that we should consider the possibility of finding a way around that will ensure a certain discretion for governments. If I had the intention to send an email for everybody to read, I would just

send it to everybody on the GAC list. But, if I send it only to Thomas Schneider, it's because I only want Thomas Schneider to be the reader of that email.

Therefore, I believe that, when we meet the Board, we could use that opportunity to put forth a suggestion so that they work together with us and find a way around that is mutually satisfactory, a way out so that the GAC can have some discretion without creating a conflict with the Board in the future. Thank you.

FRANCE:

Thank you, Chair. As was said by our delegation, I think there are three important points. The first one is about the clarity. Right now there's still some confusion about what's confidential, what's not confidential. Maybe, as you suggested, there's nothing confidential with the emails exchanged between two private persons. But what we need is some clear rules and a clear transparency policy from ICANN. So maybe we can ask the Board about that.

I think the other issue that was mentioned by Brazil was a question of reciprocity regarding other constituencies and SO and ACs. So, for instance, the conversations in closed sessions at GNSO and other groups, are they also going to possibly be

made public and accessible to us? It's also a concern for the overall broader community in ICANN.

And I think the third point I wanted to make is, you know -- I think Brazil mentioned that as well -- is about jurisdiction. I think it does indeed fall into the questions related to jurisdiction and Work Stream 2. And this issue, actually, we're discussing is actually an impact of having to work under a national jurisdiction and not benefiting from anything sort of an entity would apply for an international organization, for instance.

So three points I wanted to make about clarity, reciprocity, and jurisdiction. Thank you.

CHAIR SCHNEIDER: Thank you, France.

Other comments? If I look at the -- Brazil, one second before I give you the floor. Just, I think we are -- with a view to time, we are coming to a close. We have to come to a close. The question is what do we do with this? How to move forward? So let's spend one or two minutes on this. One proposal is to raise this with the Board. That came from Peru. Yes, Brazil.

BRAZIL:

Yeah. Thank you, Mr. Chair. I'm sorry to take the floor for a third time. But I was exactly trying to now look into the future.

And, to be fair to you, Mr. Chair, I think we -- if we had been consulted before, we would certainly not oppose or object the decision you have taken yourself.

We just raised those points because, by reading the text, we detected some areas of concern in light of the discussion. And I thank Iran and Peru and France for having further highlighted some aspects. I think those issues really deserve our attention.

But, in relation to what you have done, we have no objections because there's nothing to hide. We don't have anything in that particular case -- no concerns about anything that will come up in those documents.

As I said, our concern was as a matter of principle.

So my suggestion would be that from now on I think, if we are faced with similar situations, I think maybe a very quick consultation -- information before, I think, maybe would suffice because at least people would be appraised. And I don't anticipate -- maybe I could be wrong and have surprise -- that no one would object. Because, as I said, the tendency is that ever more our meetings are open and everything is being discussed.

I think one of the points -- my last comment is one of the points raised by Peru just led me to think maybe we need to have some clarity in relation to the exchanges we make. The exchanges in the list we understand they are under ICANN control. But maybe some exchanges that are direct to individual participants, I'm not sure. Because then I think we are using our personal mail.

Is ICANN also in control of our personal mails just because they are -- in ICANN server they have control to all communications we exchange even on a private basis? I think that would raise a very serious concern on the part of privacy. We know privacy nowadays is a very maybe idealistic goal. But we would be concerned if ICANN, by having our emails, would be in control of all communications we send to the list, even those that are not on the ICANN list. Thank you.

CHAIR SCHNEIDER:

Thank you, Brazil. Just one information about the -- informing the GAC. We have been informed that this risk or request may be coming or has been put. And then we had the discussion in the leadership team. I had several calls with the CEO of ICANN and with the legal counsel. And we were informed that this is an urgent matter, a rather urgent matter. And in one of the calls we were informed that it was a very urgent matter. And I asked

them on the call for a deadline. And I was told that actually the deadline was tomorrow. And they had already asked for an extension. So there was no time in that case to consult.

And I think -- but trying to look towards the future, I think we should really ask us the question, if there are communications that we want to keep confidential, not just in the sense that the broader public does not get access to it but also ICANN is not in a situation where they can or have to give access to third parties, then we would need to think about what we do.

And I think that, basically -- well, of course, we're using a VLAN, a wireless LAN set up by ICANN. But I don't think that gives anybody access to the communication. So this is not a mass surveillance issue here, at least I hope. And the same goes for other services that are paid by ICANN in that sense but are probably not -- so I don't think that communication that do not go via mailing lists or services like the Adobe rooms and so on, ICANN is not in control of this communication.

But I think we -- yeah, we should think about what happens if this -- such a situation comes up again. Because it may. And hope probably -- not, hopefully, but probably will come up again in some point in time and we are prepared.

So the question is we should maybe start thinking what -- is there -- are there communications that we would want ICANN not to have access to? And the question is: Where and how do we organize them so there is a clear separation between these two? Iran.

IRAN:

Thank you, Chair. We don't want to say that ICANN should not access communication. We are concerned about the use of the communication. How do they use it? Use it with another discussion with ICANN members or using in the court or using -- that is the question. That is the privacy.

Second, in the letter that you have distributed, there is some thing that strikes me. It mentioned that, if you do not provide this information, the case is lost. Who have said that? This is IRP said that? This is the court said that? This is ICANN legal department said that? What is that sentence? This is some sort of intimidations. Why? Why do we need to have that thing? Where does this come from? Based on what judgment does this come from? Please clarify the method that, in order to push the people to comply or, if you don't comply, the case is lost? Perhaps the people behind that specific trend may have some difficulty to that saying that, if you don't release all these emails

which may be used against us, we lose the case. So please kindly clarify what was that text and where this comes from and who said that. Thank you.

CHAIR SCHNEIDER:

Thank you. On the first point, the thing is: If ICANN has access, or if you call it control, then they can be forced to produce these documents. So, if you don't want ICANN to be in a position where they can be asked to produce documents, we cannot give them access or control to these emails. Because that's a legal connection that is there if somebody asks us for this.

The other thing -- I didn't write if we don't produce this document, the case is lost. I did not write that. I wrote what I've been informed. Because I asked the legal counsel what happens if we don't disclose or if you don't disclose these documents? They said -- and he said -- and that's what I reported that something like -- I don't know the wording, but something like it's highly likely that a case is lost. There's a difference. That is an assessment of the legal counsel that has more experience than I, personally, have -- I never have personally been involved in any IPR whether at ICANN or anywhere else. I was just transporting that information that this is the case. And I think

it's -- from what I can assess, I would share that view. But I'm not an expert.

So -- but I didn't say, if we don't do it, the case is lost. But there is a high likelihood that ICANN may or will lose that case.

And I think that's probably -- that's a prediction, of course. The judge didn't say that, but he will then -- or she will then take a decision.

I think we have to stop here. Thank you for this discussion on, as we all know, a delicate issue.

Thank you very much. We have to move to the next meeting, which is a first meeting with the geoTLD constituency.

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