
JOHANNESBURG – GAC Session on the Implementation of new Bylaws (Session II)

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CHAIR SCHNEIDER: Good morning, everybody. I hope you had a nice and relaxing evening last night after our intense, but constructive, work on the communicate.

We still do have a few things to work on today that are still important, one of which is to continue our -- sorry, our work on the GAC implementation of the new bylaws, also based on the experience that we've now had with this first community forum that took place Tuesday morning, and let me give the floor to Tom. He will present you a proposed way to go for this for the next 25, 30 minutes. Thank you.

TOM DALE: Thank you, Thomas.

Good morning, everyone.

This session continues on from the longer session that the GAC had on implementation of the new bylaws on Monday this week, which seems a long time ago now, I must say, but yes, it was only Monday.

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I'll just run through the issues that were identified in the brief and that provided a framework for your discussions on Monday and indicate what I think might be the priorities.

With regard to 1, on the issue of the GAC chair continuing to represent the GAC in the Empowered Community Administration, I think there was agreement that that should continue to be the case for the time being.

With regard to principles for GAC participation in the Empowered Community, there was some view among GAC members that it may be possible to adopt the principles in the briefing as interim procedures, pending further work between now and Abu Dhabi, but that wasn't made completely clear at the end of the session.

The same applies to 3 and 4 that you see on the screen. That is, the application of principles to the community forum -- and I'll come back to in a minute -- and GAC procedures for engagement.

So the issue there is whether you wish to adopt either the principles and/or the procedures for Stages 1, 2, and 3 suggested in the briefing as interim principles and procedures, pending further work, and hopefully finalization in Abu Dhabi or whether you just wish to leave that and focus on the further work.

Two other issues, I think, for this session are the next steps on a GAC response to the issue raised in the community forum, which is approval or otherwise of the bylaws amendment.

In that regard, you may wish to have a brief discussion about that this morning because I think most of you attended the community forum.

Please bear in mind the GAC has 21 days from the end of the ICANN meeting today to express a view concerning the proposed amendment.

Now, my suggestion will be that that would be sent out as a request on the GAC list to members to indicate what they wish to do, but of course you're welcome to suggest other approaches, but the clock is now ticking on a GAC response to the bylaws amendment.

And the final issue I'd suggest for this morning, if possible, is to agree on some sort of process for taking forward outstanding issues intersessionally, with a view to try to conclude some -- at least some of these at the next meeting, and the suggestion in the brief was a small -- was for some sort of small ad hoc group of perhaps three or four GAC members to work with the chair and with the secretariat to advance that work. So I guess if that were done, then there would be some hope for moving forward. Otherwise, you've heard at other meetings with other

constituencies, other groups, including the GNSO, who are still working through their issues as well, so those issues are challenging and they're new and they're not unique to the GAC. Thank you, Thomas.

CHAIR SCHNEIDER:

Thank you. So I have no knowledge of a next case, but we may have to be ready at any time that a next case will come up where somebody will either raise a petition or move -- or bring forward a petition where we are asked -- will be asked to discuss this, have a view on it, and so I think it would actually be -- or if the board has another idea for a bylaw change that we're supposed to have a view on, so I think it would really be good if we could today, before we leave, agree on an interim set of principles and guidelines at least for how to work in the early stages of the process.

We may take more time then to gain experience to see how this develops. Also in case we have a -- something that is coming up through a petition, we should have clarity of what we do, and then can discuss the, let's say, maybe less urgent items, continue to discuss this in Abu Dhabi.

So I see that there are some requests for the floor.

Denmark and Iran.

DENMARK:

Thank you, Mr. Chairman.

When we discussed it on Monday, I only give the Danish views on who should represent the GAC in the interim period.

As to the criteria, I think from the Danish side we have mentioned that -- several times that we only think that it is appropriate if there is a clear, direct public policy implication that GAC should be involved, so we would like to see the criteria changed in Number 2. Or, if not, then we will decide it on a -- on a case-by-case basis.

Looking at the bylaw change we saw in front of us and which was discussed at the policy -- the EC forum on Tuesday, I think that discussion was very useful, and what I heard -- and that was from the board member, Chris Disspain -- was that there was actually no public policy implication of that bylaw change. That was what I heard very clear. He said that there could be certain efficiencies within the board of that, but there was not, to his knowledge, any public policy implication there.

He also said that this, in one way or another, was a test case for the Empowered Community.

Looking at it from the public policy point of view, from our point we have difficulty to see that there is any public policy

implication there. It's an administrative thing how the board organizes themselves. That is -- should not be the concern of government. It is at least not the concern of the Danish government.

On the other hand, we -- we accept that if the board thinks it's more effective, we will certainly not be there to stop, but we are not able to subscribe that we as governments support this under the heading of that it have public policy implications because we don't think it have.

This is a nitty-gritty thing and it may have been better, as I heard one of the questions raised, why didn't the board suggest a bylaws change so the Empowered Community was not involved in that kind of things of -- which have really low implications but it's only a matter how the board divide the work between themselves.

As to the Stage 1, 2, and 3, from a Danish point of view we think it's important that GAC normally are involved and can raise their voice and be informed during that process and we very much welcome the comment and suggestion made by Canada that we phrase Point 5 more positive, that we do not use the word of three formal objections but if there's three members of the GAC who would like to have a full discussion, we will have a full discussion.

As to GAC involvement in the decisional part of this, here it's very important for us that GAC involvement here should be with full consensus. Thank you.

CHAIR SCHNEIDER: Thank you, Denmark.

Iran?

IRAN: Thank you, Chair.

Part of what I wanted to say was said by yourself, that this is interim procedures. No problem if you put it somewhere at the beginning. Otherwise, I have to modify the Paragraph 1 saying that GAC agreed unless otherwise decided subsequently. For the time being, we have no problem that you are representing, but it depends what is the situation, but if you put in the heading something this is interim procedure, we don't have the difficulty.

Now, coming to points raised by our Danish colleague, I think for -- the issue was discussed, yes, I raised at the board -- at the meeting of NomCom that even we could leave it out, but Chris Disspain mentioned as usual that, yes, it is efficiency and -- but I don't think that for this one, we should say is it or it is not public policy. Let us go to this sort of the exercise to be more familiar

with the situation. It's harmless. I don't think harmful. We did not discuss whether that is public policy or not public policy. But in general, yes. However, it is very difficult to say what is public policy, what is not public policy. We have that in many other areas and there are a variety of views on the issues. I don't think that at this stage we should comment on what we are doing for this first exercise. Let's continue. You have been in the first meeting, and after 21 days you convey the decision of the GAC with respect to that, and so on.

The next item, if it comes, we review case-by-case basis. I don't think that we should go back to the decision made in Morocco. That decision is valid and case by case and we should not come back to that at any stage. And I don't think that with respect to the -- another consensus, yes, we have to decide whether there is other consensus way to express as we did in the operating principle. Currency -- currently we have full consensus defined. No problem. But we might have other type of consensus. And the thing that is important, one or two or three governments should not block the whole thing. This is very dangerous. And it was one of the conditions of the transition that the community should not be captured. But by doing that, that means they have no other possibility. One single government could block everything. So no purpose. So we have to close the shop. Thank you.

CHAIR SCHNEIDER: Thank you, Iran. And U.K.?

SWITZERLAND: Thank you, Chair. Good morning, everyone. Jorge Cancio, for the record.

I think that it really makes sense to do a test drive of the principles we have and the procedures we have as a proposal on the table, and if I understand it correctly, in the next 21 days it is expected from us that we take a decision as a decisional participant whether to abstain, support, or reject the bylaws change. And I think that it is important also to recall that in order to have this bylaws change being passed, there is a high threshold. I don't know if it's three or four in support of -- three. Three in support and not more than one rejection or objection from the decisional participants. So I think we -- we have to be mindful of that.

And if we do the -- this test drive, what I would expect is that the leadership team, in view of the principles, which state amongst other things that we will guide us on whether this has, or not, public policy implications, they would make a proposal and they would send it to the GAC and then we would decide.

We would see if there is more than one objection or not, and -- according to the Step 4 of the procedure which is being proposed.

So I don't really see any problem in doing this test drive with this issue, which is more or less harmless, and where we may have different points of view, whether it has public policy implications.

But I think Chris Disspain actually answered one question from me and he gave a couple of ideas and I understand that as those ideas having some connection with public policy. But I think that more importantly, the call on whether something has public policy implications or not is not something that the board or the proposer of the -- of the motion has to make. It depends on us. So -- because, for instance, in a future budget rejection proposal, it could well be that the SO or AC that moves doesn't speak to any public policy implications. But if, for instance, it's to cut all the budget that is for the support of the GAC, of course it would have public policy implications indirectly, but very -- very strong ones. And in this case -- and I won't go into the substance too much -- I think that of course the improvement of the functioning of accountability measures of the board as to the reconsideration procedure has an impact on public policy.

But again, I think we are really -- at the moment we are being asked to decide. We have some interim procedures on the table. We can test drive them, and I would be very interested in seeing how the leadership team prepares the proposal, how they motivate it, how they do this excellent job. And I trust our vice chairs and our chair to -- to do this properly.

Thank you.

CHAIR SCHNEIDER: Thank you, Switzerland.

UK.

UNITED KINGDOM: Yes, thank you, Chair. And I basically concur with comments that have been made previously.

I thought the community forum was a successful first run at this in terms of a process, and so on. And I agree with what's been said about us now rolling out our interim procedure with regard to this specific issue. I noted that the 21 days runs from the end of the Johannesburg meeting. So, indeed, the leadership team will have to get into gear pretty quickly to consult the membership on the position again. And on the substance, I think there is a public interest issue. And the briefing prepared

by ACIG brought this out, I think. It's all about enhancing the Board's ability to deal with reconsideration requests, which is about challenges to Board action or failure to act. And of course how these reconsideration requests are dealt with in a timely fashion, and I also noted in the community forum that there was reference now to a -- a hard stop in terms of timeline, and the explanation that Chris Disspain gave about the need to collate the legal skills and maybe other related skills necessary for dealing with reconsideration requests, which can be quite complicated. I think all of that was sort of helpfully explained, and I think it is in the public interest that how reconsideration requests are conducted, you know, it's important for this organization to maximize its efficiency, transparency, and its capacity in terms of required skills and resources to be able to deal with reconsideration requests. That's -- it's in the public interest that ICANN does this as effectively as possible.

So those are my comments at this stage. Hope that's helpful.

Thank you.

CHAIR SCHNEIDER: Thank you, UK.

I have the European Commission and the United States.

EUROPEAN COMMISSION: Thank you, Chair. This is Cristina Monti, European Commission.

Actually, my remarks were going in the direction of what the representative of the UK just mentioned and pointing to what we have in our briefing concerning the public-policy implications which could be seen in this specific case.

I'd also echo some of the remarks of other speakers concerning the opportunity that we have here to test the process and then maybe learn from this exercise. And also, I would like to highlight that the activation of the Empowered Community can occur for several different cases. But in this specific case we are talking about change to the fundamental bylaws, and so I think that this is also something to be considered, you know, as an important thing. We should be aware of any changes in the fundamental bylaws and possibly be part of -- of the -- of these.

Thank you very much.

CHAIR SCHNEIDER: Thank you.

United States. And then we to wrap up.

UNITED STATES: Thank you. And before I start with my intervention properly, can you please just confirm for this exercise where we are now entering into is actually stage 4 of the process; is that correct?

We are exercising the community power of approving or disapproving the Board -- the bylaw change.

TOM DALE: No. My understanding, that this is not -- this is an approval process rather than a stage 4 process, so my understanding, it would not be -- in the way that the GAC has considered these powers before, it would not be the exercise of a community power but that it's open to interpretation, I think.

Thomas?

CHAIR SCHNEIDER: That's a good question.

UNITED STATES: If you look at the community powers, one of the community powers is approving a bylaw change; correct?

CHAIR SCHNEIDER: Yeah. So you could be right. So we'll have to look into it.

The thing is, I think for the leadership team it is fairly clear that also taking into account that several governments have in the past issued reconsideration requests, and unless we think that accountability and good governance and redress mechanisms are not of public interest or not public-policy issues, then -- then this is, of course, a very relevant governance issue which is of course a public-policy issue. That is the view that we would propose you in whatever we will bring to you.

UNITED STATES: Excuse me? I'm sorry.

CHAIR SCHNEIDER: Yes?

UNITED STATES: I just needed that clarification before I made my intervention.
May I continue or --

CHAIR SCHNEIDER: Yes, of course you may.

UNITED STATES: Okay. Thank you. That helps tremendously in better understanding where we are.

Just to briefly -- and I will be brief. I am perfectly fine, as Goran said, to proceed on an interim basis and make this very clearly distinguished. But that being said, with respect to the principles, at least as it is being currently proposed, we believe that in principle number 4, we need to insert here this is, what we're talking about participating in the exercise of any community power, that we will approach each case based on its merits, but this will be determined on GAC consensus. That's consistent with what's being proposed, so I think it would be consistent to have that reflected in the principles.

Also, when looking at the procedures for stages 1, 2, and 3, I agree that there needs to be flexibility built into this process, and so I appreciate what's being proposed here, but I do have a question on the more than three formal objections. This just seems a bit arbitrary, the number. I'm curious as to the rationale for three or more, and also if there's current practice that we could look to and draw from as opposed to -- if this is, in fact, arbitrary -- to actually have a more rational reason more the numbers that are being proposed here.

Thank you.

CHAIR SCHNEIDER: Thank you, U.S.

On your last question, we have no precedent for this, so whatever we put in is arbitrary in the sense that there -- it is new.

What we have, we have two mechanisms. One is how to agree on advice. That is on consensus, which is now defined as if it's consensus in the definition of the bylaw, and then there's another possibility to have GAC advice according to the bylaws. The other thing that we have which is on procedures is the paragraph 53, I think, in the operating principles, that says a simple majority, the GAC can change its operations -- its operational procedures on the basis of a simple majority.

So for advice, we have been working on consensus; for operational issues, we have been working on the basis of a simple majority.

These are the two things we have historically. And the idea of these not more than three objections is to maybe not go down to a simple majority, because that's maybe not strong enough for this new procedure. But also, and has -- has expressed, not go for consensus because this is not an advice, and the feeling was it shouldn't be possible to block participation just because one country is against it. So that was, like, something that is a proposal. We can also go to five or ten. But three is like the smallest that we felt is legitimate in the sense that if a significant number or a significantly small number is against it, maybe we

shouldn't do it, but if it's just a very small number, then that shouldn't block the very large majority of others.

So that's the rationale behind the number of three, but of course we can talk about five or seven, or what have you. That is -- that is not cast in stone.

As I said, what we have is rules for advice and we have rules for developing our operational procedures. This is what we historically have.

We have to wrap up here, actually, because we're already five minutes into the BGRI.

We will propose something to you as a way forward very soon because we have 21 days, as we all know. That is, for some people, a part of their holidays, so we'll see how that goes. Yes. We can -- Maybe, if we want, we can continue after this session with the BGRI and give this five more minutes if that's what people would wish. But I think we can't let our colleagues from the Board wait for too long.

So we'll stop here and then ask the colleagues from the BGRI from the Board side to come to us, and then we may continue the discussion after this session.

Thank you.

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