
ABU DHABI – GAC discussion on Jurisdiction
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ICANN60 | Abu Dhabi, United Arab Emirates

THOMAS SCHNEIDER: Before we go to the next session which is about jurisdiction, let me just inform you for those who do not know because that may be relevant for this afternoon session, that the Board this morning has passed a resolution on .Amazon which is laying out a timeframe or an expected time frame and also addresses the GAC, giving the GAC the opportunity to provide for additional information, rationale, advice. It invites the GAC to look at this again and come up with additional information by ICANN 61. We're trying to find the text of the resolution and send it to you as quickly as we can before the afternoon.

It's not a decision again on substance, but it's a decision on the process in particular inviting the GAC to spend time on this and come up with further additional information and views on the issue. So just so that you are aware of this decision and you will get the resolution as soon as it's available. Thank you.

With this, let me move over to the agenda Item Number 11 which is on jurisdiction. You know that there are several elements to this. We are having one part of Work Stream 2 of the accountability work. That's one element that will pop up. The

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other one is the scheduled cross community session on jurisdiction, which is held on Thursday next week here in Abu Dhabi.

Let me give the floor to Tom who will introduce you based on the briefing about what we would like to exchange about for the next 30 minutes. Thank you.

TOM DALE:

Thank you, Thomas. The two issues that the GAC is free to give their own priority to, I guess, in the next 30 minutes are, firstly, developments in the Cross Community Working Group on Accountability and in particular on the jurisdiction subgroup. There were reports and further discussions here in Abu Dhabi on Friday. A number of GAC members, of course, attended that and have been active in the jurisdiction subgroup and they are in the best position to provide an update, I'm sure. Some notes of the session, not just on jurisdiction but on all of the accountability issues, were circulated by Argentina, by Olga, a couple of days ago.

The second issue, as Thomas has noted, is that there is a Cross Community session later in the week. The GAC member who is most directly involved with preparation for that session has been Brazil. It is a Cross Community session, so quite a number of participants across the community will be engaged with the

discussion, which I understand will address not just the specific issues in the jurisdiction subgroup of the accountability work but also broader public policy issues relating to ICANN jurisdiction as well.

So those are two issues this session has been designed to accommodate, and it is up to members I guess how much they want to allocate to each. Thank you, Thomas.

THOMAS SCHNEIDER: Thank you, Tom. So the floor is yours. What is most relevant with regard to jurisdiction issues in your views? Thank you. Brazil?

BRAZIL: Thank you, Thomas and Tom, for introducing this topic. Well, as it has been stated, we have taken a very strong interest in that discussion. Actually, we considered that this particular topic was the one that actually, without diminishing the importance of other topics included in Work Stream 2, but that was the particular topic that prompted and indicated the need for Work Stream 2 for discussions around transition, some aspects that were not adequately addressed in the first phase of transition to be continued beyond the transition period.

So we have been engaged in this discussion I would say from day one even in the first face of the transition since we identified the

issue around jurisdiction as one to be of essential importance from the perspective of our government as we see it. And we were there to say from the perspective of government as a whole because, as you are aware and certainly been following this discussion, our assessment is that at this point in time, we are in a state of ICANN has clearly changed the way it operates in regards to the pre-transition period, of course. The unilateral link with the government of the United States has been changed, and its accountability now is in regard to the community as a whole.

However, the legal attachment, the legal nature has not been changed. And from the perspective of my government and a number of governments as well, we understand and share the same view. It is rather problematic for a government to be working in an environment in which by the end of the day there is one single government that has that kind of larger influence from the perspective or that its jurisdiction would be applied. Its courts, its tribunals by the end of the day will have the last word in case some issue should be taken to justice.

If its regulating agencies can impact on the working of the organization to the extent that as an entity that is incorporated under the U.S. law it is subject and should respect the U.S. legislation, so in case there is no immunity which is the case as of now, ICANN as a U.S. based company has to fully comply with the U.S. legislation.

We understand that in the course of the years there has been I would say maybe some benign treatment in relation to ICANN, however the framework is one that raises concern. So what we are saying is that in line with what was decided in the first phase of the transition, we consider that some of the legacy aspect should be considered and respected. So we have agreed that ICANN should remain based, its headquarters should be in the U.S, it should be subject to the California jurisdiction for its main day-to-day operations.

However, we think it would be very important to carve out some particular roles to be agreed by the community at large that would govern jurisdictional aspects, immunizing the organization against undesirable and unilateral application that would be a consequence of the U.S. jurisdiction.

So we have been engaged in this subgroup. Some options have been explored. That kind of approach we have suggested with other colleagues and also from other parts of the community did not get enough traction for discussion within the subgroup. So our position remains as a kind of minority opinion or dissenting opinion.

The group has come up on a consensus based consensus. We are not adhering to that consensus, but according to this strange concept of consensus that we face in ICANN, it is considered as

consensus although it is objected by many parts. But there is a consensus report, including two sets of recommendations which we think are incremental gains. We are not against it, but we oppose the recommendations to the extent that they do not touch on the main aspect or the main issue to be addressed in our view and also the main issues that were identified previously and that in our view were the main reason for launching Work Stream 2.

It's not to say we do not see any value in the recommendations, but if those are the recommendations that are to be provided by the sub working group as responding to the mandate that was given, we don't think it is enough therefore we have opposed. We have a dissenting opinion that is being attached to the report, and this will be circulated to the wider community, to the chartering organizations for their assessment. So this is in regard to this discussion within this sub working group.

In regard to the Cross Community session we had, as you may recall, initially proposed that we should discuss this. Going beyond let's say without of course we should take into account the work that has been done within the subgroup. Of course it's something that should be considered, but we should not be restrained by the kind of and the limits that were followed by the sub working group. We think it would be an opportunity to receive input and to have a very open transparent discussion with the

wider community to have some fresh air in regard to aspects that for us are important. We would like to see the extent to which these can be found important as well to others. So that's the idea of these Cross Community working sessions.

As we understand as of now, the session will be divided into two parts, one that will look into the work of the sub working group. This will be led by the rapporteur of the subgroup Greg Shatan and myself. I should lead the second part that would look into other aspects related to jurisdiction that were not addressed by the working group. So this is basically what we have at hand.

We are a bit concerned because initially we thought we are concerned about the time management for the session because think we have an hour or an hour and a half to address so many issues. There are so many participants. We do not want to dilute too much the session, but we think it's important to have a very open transparent discussion on those topics.

That for us is maybe the single most important topic to be yet addressed within ICANN in order to make sure we have an organization in which all of us can work in conditions that will give us comfort and to be fully accountability also in regard to our governments. We understand we work in a unique [ambiance], a very [inaudible] generous organization. As governments, we have accepted to be working in this environment, and it is okay. But we

think to address some aspects with regards to jurisdiction is essential to make sure that we have in place a framework that can be accepted and can be in line with the call and we'll say the general outline that is provided for us by the Tunis Agenda.

Basically, this is what I have to say at this point. I would invite colleagues to consider the output of the working group together also [with] our dissenting opinion which we think provide a very good understanding of what are the issues at hand and raises some questions and some issues that I think would be very beneficial for all of us if that could be done in anticipation of the Cross Community working session. Thank you.

THOMAS SCHNEIDER: Thank you, Brazil. Russia?

RUSSIA: Thank you, Chair, for giving us the floor. I will speak in Russian. First of all, I would like to thank you for the opportunity to discuss this issue. From our point of view, this is of extreme importance and this lays the foundations for the entire system, talking in part of the operations of a large organization which essentially performs international functions, of course within its own mandate and mission.

We believe that its affiliation with a particular country creates potential risks for the DNS system internationally. The fact that we need to adhere to all laws and regulations applicable in the U.S., including trade sanctions and similar things. Looking at the [inaudible] recommendations on lowering the risks, we believe these measures do not meet the challenges and cannot protect Internet players in the countries which are vulnerable to sanctions from the U.S. We're not talking about international sanctions, those imposed by the United Nations organization, but one-sided sanctions that can be motivated by a wide variety of political motivations.

A similar discussion is of extreme importance. It is important for us to discuss the issue of potential immunity, but discussion alone is not enough, and we cannot limit ourselves to one alternative only to remain in the U.S. jurisdictions. We need to address the possibility of finding other solutions.

We would like to support Brazil. We believe that their position deserves attention and deserves Cross Community discussion. We hope that our voice will be heard. We fully realize that the situation is extremely difficult and does not have any easy solutions. However, deep analysis of the situation and multisided discussion is important.

We have presented a few guiding principles which we think can lay the foundation for discussion of [a new] approach. It's included in our email list and anyone can familiarize themselves with it and we believe that in the public interests, which is very important for the ICANN mission, are very important aspect of this discussion. Thank you.

THOMAS SCHNEIDER: Next is China.

CHINA: Thank you, Chair. On this issue, we had some discussion and exchanges in the mailing list before this meeting. And as well, I have heard the points made by representative of Brazil and Russia. To China, I think I share the points made by those GAC members. We share the same concerns. From what we heard from our GAC member of Brazil, we see the proceedings in the subgroup of jurisdiction is problematic. And from the view of China, we also see the jurisdiction, the issue itself is problematic and also attracts a lot of attention from the stakeholders in China.

Back in March this year, we had the discussion about the jurisdiction issue among the stakeholders within China. Some stakeholders expressed that they're facing challenges under the current status of the jurisdiction. We also have gathered those

opinions, those views in a written paper to provide feedback to the questionnaire of the subgroup of jurisdiction. You can see the stakeholders from China expressed the challenges coming from the business level as well as some speakers who were talking about the sovereignty issue.

So as for the [inaudible] of the community session on jurisdiction, I would like to support Brazil as the moderator of one part of the Cross Community session. I would also like to [inaudible] that I agree with the representative from Russia that we not to remain ourselves the only choice of the current status. We can talk about different kind of options in regard to this issue. Thank you.

THOMAS SCHNEIDER: Thank you, China. Portugal?

PORTUGAL: Thank you very much. I am going to speak in Portuguese. I'm going to be brief because my colleagues' comments fully reflect Portugal's position regarding this topic. Brazil, Russia, China already made their comments, and Portugal is cognizant of this Cross Community debate and we are cognizant of the fact that most participants are American.

So we do need a fair debate on the cross nationality community group because at the moment the Cross Community is made up

of American participants. Because clearly it is very hard to discuss this topic with people from that country. If ICANN were based in Portugal, for instance, clearly any Portuguese person from any group would stand up for what this group is advocating right now. So in my view we are lacking some kind of cross nationality. Thank you.

THOMAS SCHNEIDER: Thank you, Portugal. Before giving the floor to Iran and France, we have a question from a GAC member that is participating remotely. It's Gloria Katuuku from Uganda, and she would like to hear from people that have referred to sanctions. "How are countries with sanctions affected in regard to ICANN licensing applications with regard to jurisdiction?" If those who referred to sanctions could maybe reply to that question, that would be useful.

Having said this, let me give the floor to Iran and then to France. Thank you.

IRAN: Thank you, Chair. The jurisdiction is one of the most important elements of the accountability. From the very beginning, we have been actively participating in all of the meetings. And we ask the question in the middle of the process to the Chair of the group

where we are. Are we at the beginning of the end or at the end of the beginning. Still we don't know where we are. Jurisdiction has not replied and removed the problem, the difficulty that we have. The unilateral impositions of the jurisdictions of the given country continues to be applied for all other countries.

In order to save time, we don't want to repeat what was said by the distinguished delegate of Brazil, Russia, China, and Portugal. The question has not been answered. There has been some steps, but the issue's still open. In particular, we support fully what was said by Russia in relation with the sanctions and with the other problems caused to the countries which was designed for the political issues but now enter into the technical and administrative matters of the DNS.

We believe that we need to work together. We need to continue and follow of these actions with the coming months if not years and find a solution in a way that, as was mentioned by the distinguished delegate of Brazil, we could have a comfortable situation in regard to this important issue.

Many elements which have been said in the group output of the group, such as choice of law and choice of venue [are total theory]. They have something that may not work at all. They may not be the solution. We think that it has been worked out like to be some sort of the [inaudible] for the very deep problems that

we have. It may give a few seconds some tranquilizing situation, but the problem exists and will continue to exist. And some of the countries like us suffering from the sanction will have been more affected, and this situation has not removed anything.

All of those things that ICANN asks license [is a theory] and we don't believe that will be. We were looking to have some immunity if not full immunity, but it was said that it will be difficult to go along with that. And [it was said some people] that the current administration would not allow to proceed to that and if we proceed to that, there would be another problem with that. So we are not convinced that we should rely on the existing or future or current situations.

We should have something which works for us to resolve this issue which existed from the very beginning inception of ICANN. This has been very important. For us, the transition was a technical issue if the main important issue [like jurisdiction] is not [inaudible] that means for us the transition has not been properly taken place.

So we join at the meeting with Brazil, and we did not agree with the recommendation and now we found that other colleagues like China and Russia have joined the group. So I hope that other GAC members will fully review the reports of the jurisdiction and the accountability and during the public comment, they

comment on that and put together their ideas and views. We are looking to work together. We've got to find the solution for these problems. We are not opposing anything but are looking for a satisfactory solution for everybody, but not for one or a few countries only. Thank you.

THOMAS SCHNEIDER: Thank you, Iran. I have France and then Brazil, and then we will have to close the meeting more or less. Thank you.

FRANCE: Thank you, Chair. I would like first to thank Ambassador Benedicto and Brazil for their constant involvement and leadership on the matter of jurisdiction. I think it's very valuable. The French government fully agrees with Brazil on the analysis regarding ICANN's autonomy from regional matter. It is one thing to not have anymore the contract that in the past linked the U.S. administration and ICANN, but it's another thing to have full independence from national U.S. laws and courts that might in the end impact in one way or another the way ICANN conducts business.

So now regarding the work of the CCWG subgroup on jurisdiction, well, I think the recommendations we have so far are going in the right direction, however they're not sufficient. So we would like

to join Brazil and other countries to support the statement that was made by Brazil. And we would like to call the subgroup to work further in [examining], for instance, the matter of partial immunity to the extent feasible. We think that could be an option to move forward on this issue. Thank you very much, Mr. Chairman.

THOMAS SCHNEIDER: Thank you. Brazil?

BRAZIL:

Thank you, Mr. Chair, for giving me the floor once again on this topic, and I promise to be very brief. One thing I would like to mention is I said before that ICANN is a unique environment, and we value the model that is being adopted within ICANN. We want to strengthen it, to provide it with more legitimacy. But however unique, we also want to make a point that it is not dissociated from the wider ecosystem, either the Internet governance ecosystem or the international environment as a whole.

So we are very much careful about what we do here to be consistent and to be aligned with what we are doing elsewhere. I'm saying this because it might be misinterpreted, our position when we talk about jurisdiction. Many nongovernmental

stakeholders may think we are talking about giving governments a larger role to the detriment of [others]. That's not the case.

The point we are making is that within ICANN, within the multi-stakeholder model, we want to make sure that governments among themselves are operating on equal footing vis-à-vis other governments. It has nothing to do with governments and nongovernmental stakeholders within the model. I think this should be addressed through the jurisdiction discussion.

It is very important because previously until last year when the transition was implemented, we were working in an environment that was imposed on us. We were not asked to validate or to endorse anything. We were operating in good faith under conditions that were pre-established. But from now on, we are being requested to jointly craft a new regime and by doing this to endorse the rules. So from now on, we are asked to work in a framework that we are validating, that we are endorsing.

In that context, we are very much concerned that to create a bad precedent that again we are working in a unique environment but not dissociated from the rest of the world, a bad precedent in which we can as government agree to work under rules in which one single country – now is the U.S. or Portugal had said it could be Portugal or it could be any other country. That's not a

particular issue about the U.S. It's about the principle that among governments there should be equal participation.

That's something that would give us comfort as government to participate and to validate and to strengthen the model in which we have been fully engaged and in which we believe. That's in our, I would say, in our DNA as Brazil to participate with a lot of comfort in this environment but to do it in a way that we can endorse and validate the framework. We would look for solutions that would go beyond the ones that are being presently proposed by the sub working group.

And just to conclude, sometimes there have been some comments that it's not realistic, it's not politically viable, it would be something totally new, a new paradigm. But again, I would say we are working with the Internet, we are in the frontier of knowledge, we are in an environment in which things are happening in a dynamic way in which frontiers are being covered.

I would say the Internet governance maybe is the most appropriate environment in which new and innovative solutions can come up in which we can make sure the multi-stakeholder model is truly adopted in a way that is innovate [inaudible]. So I wouldn't think that should refrain us from exploring new models, new ideas that would go beyond the existing frameworks. I think

this is part of what we are being asked to do in this particular organization. Thank you.

THOMAS SCHNEIDER: Thank you, Brazil. We have used the time, so we need to wrap up. First of all, I think this is definitely not the end of this discussion as we will have the Cross Community session on Thursday. And of course the work of Work Stream 2 of the accountability track will continue, and we will have the opportunity to comment on the report that will come from that. And of course everybody including GAC members will be invited to prepare comments to that, so this is not the end of the discussion, but it's the end of this session. So have a nice lunch and let's meet again here at 2:00 I think, right? 1:30. Okay. So it's a short lunch.

IRAN: Excuse me.

THOMAS SCHNEIDER: Iran?

IRAN: Very short, Chairman. I would like what you said in the last part of your intervention be put into the report or communicate that work continues and GAC members are invited or encouraged to

carefully review the output and comment on that. So this is something important for the communique. Thank you.

THOMAS SCHNEIDER: Thank you. We'll take note. Nigeria, did I miss you?

NIGERIA: Yes, thank you. I waited until the end. Not on the current topic. I would like to [curry] the indulgence of the Chair. I want every African rep in the [hallway behind]. There's an AfriNIC upcoming meeting I would like to discuss on this issue. Thank you.

THOMAS SCHNEIDER: Thank you for informing us. So this is the end of this session. Thank you. See you at 1:30 again here.

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