
ABU DHABI – GAC meeting with the NCUC
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UNIDENTIFIED FEMALE: So thank you, everyone, for being here. We'll be starting in a couple of minutes. Just waiting for Thomas to arrive. And meanwhile, I thought just to bring to your attention that immediately after this meeting, we'll be having the BGRI meeting with the GAC. I just noticed that the agenda has its BGRI meeting and I was just afraid that GAC colleagues will think it's only for working group members. But it's the BGRI meeting with the GAC. We'll be adopting the text describing GAC advice and I hope that many of you will be able to join so that we can adopt the text, agree on the next steps.

And we're also receiving presentation from ICANN staff on the portal day having for the Board, which also includes how to log GAC advice, track it, retrieve it, and so on. So I think it's an important discussion and hope to see as many of you as available. Thank you.

THOMAS SCHNEIDER: Just to say hello as well and sorry for being 2 minutes late. It is Monday morning and my office in Switzerland is busy organizing the IGF and some urgent issues that we are trying to solve and

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organize. So it's a lot of fun to have several full-time jobs at the same time. But so far, we are on track. And I'm very happy to be here with our first ever, I think, public bilateral meeting with the NCUC. And I have heard that Manal has already made introductions. So I was just wanting to say hello.

UNIDENTIFIED FEMALE: Sorry, Thomas. We haven't started the session yet. I was just announcing the BGRI session which is following so please feel free. Thank you.

THOMAS SCHNEIDER: Okay. So then I have now started the session in that case. And yeah, we have some agenda points that we will discuss. But I think there's also a meta – objective is to know and understand each other better and also increase mutual trust and mutual communication, which I think is something that is fundamental for our cooperation at ICANN. I'll leave it there and would invite our colleagues from the NCUC to introduce themselves. Thank you.

FARZANEH BADI: Thank you, Thomas. Hi. My name is Farzaneh Badii. I am the Chair of Noncommercial Users Constituency at ICANN. Should we do a round of introduction or...? Okay.

MILTON MUELLER: Hello. My name is Milton Mueller. I am a Professor at the Georgia Institute of Technology and one of the earliest members of the Noncommercial Stakeholders Group.

ROBIN GROSS: Hi, my name is Robin Gross with IP Justice and I'm also with the Noncommercial Stakeholders Group.

UNIDENTIFIED MALE: Hi, everyone. [In Berlin], I represent the NCUC on the [posting] committee of the Noncommercial Stakeholders Group.

RAFIK DAMMAK: Thanks. Rafik Dammak, I am member of the Noncommercial Stakeholders Group and I am also in the GNSO Council. Thank you.

FARZANEH BADI: So I just wanted to give you a brief explanation of what we do at NCUC and what our values are. At NCUC, we resist national and geopolitical pressure on ICANN and we wanted to remain as a nongovernmental global organization. We advance values such as freedom of expression, and human rights in policy at ICANN and also we care about privacy and generally civil rights. And we

try to infuse these values in policy through GNSO on generic names. We also combat governmental and trademark overreach when it comes to generic names at ICANN.

This was just a brief explanation of what we do because you probably know GNSO but we are a part of GNSO and GNSO has various stakeholder groups that they have different values. So this was just an introduction to know what actually we stand for.

The next agenda, we are going to talk to you about the geographic top-level domain names and the procedure that – Robin is going to cover that. And we are going to give you a viewpoint on where these procedures should go. And also we are going to talk about jurisdiction and a brief statement about privacy. So with that, I'm going to let you chair this meeting.

THOMAS SCHNEIDER:

Thank you. Actually, I hope that we are not playing a massive online multiplayer video game trying to combatting each other but actually trying to work with each other although we're aware that some people in your field may disagree with some people in our field. So I'm really looking forward to a fruitful and constructive exchange and hereby I give the floor back to you to present your views. Thank you very much.

FARZANEH BADI: Thank you. If possible, we start with jurisdiction. I know it's not the first item on the agenda but it's quite important to cover so Milton will cover the jurisdiction part.

MILTON MUELLER: Yes. Jurisdiction is definitely our goal to engage with GAC and to reach a cooperative position. One would think that many aspects of the jurisdiction issue, the noncommercial users would have a perspective that is congruent with certain members with the GAC because we don't like the dominance of any one government over the Internet.

I don't know if you know my history in ICANN but I have been complaining about the unilateral U.S. control of the roots since WSIS and we were not very popular in the United States for doing that but eventually the rest of the world seems to have come around to that position including the U.S. government and we successfully concluded a transition.

The point as far as [Farzi] said is that we support really strongly the idea of global transnational governance of the Internet. So we're very interested in minimizing the impact of national jurisdiction on the Internet. So we thought that the Jurisdiction Subgroup came up with two very excellent recommendations, one of which was actually spearheaded by Jorge Concio here, this

idea of inserting the choice of law provision into the fundamental registry contracts of ICANN.

And the other one, which was spearheaded actually by my colleague here, the Chair Farzaneh, dealt with the sanctions that the U.S. Government might place on domain name industry participants and consumers in sanctioned countries. So this is a clear case of U.S jurisdiction affecting Internet users. And we thought it's very important, this is something that really affects people particularly in the sanctioned countries of the Middle East and elsewhere.

Then we thought we had reached consensus on this. Brazil came up with actually some very thoughtful concerns, and we understand these concerns so we would like to engage in dialogue with you about the jurisdiction issue. In effect, Brazil is saying that they don't support the report even though they don't oppose the recommendations. We would like you to support the recommendations because there's nothing wrong with them. And Brazil doesn't say that there's anything wrong with the actual recommendations. What Brazil has been saying is that the whole jurisdiction issue should have been taken to a much broader level.

In that regard, we don't necessarily disagree with Brazil. What we would be willing to open long-term discussions of taking it

further, regarding immunities in particular. But we have to be very careful about how we design these immunities. We don't want to undermine accountability. We see a potential tradeoff between accountabilities and immunities. We also don't think that the American International Organizations Immunities Act is a feasible or desirable option for achieving this immunity. It has to be done another way. So it's going to be a long-term option.

And in general, we don't have any principled objection to relying on California law particularly since these new accountability mechanisms, which we consider to be so important, are grounded in California law. So our basic approach to this is stick with California law, minimize any kind of U.S. jurisdictional control as much as we can.

And so as a first step, please let's take this recommendations currently made regarding OFAC and choice of law. Let's initiate conversations about more deep reforms and let's respect the concerns that people have about accountability and not just focus on sort of getting the U.S. out. Currently, accountability resides in these California legal mechanisms so we don't want to get out of that. Should we open it to questions or what?

THOMAS SCHNEIDER: Yes, thank you. Given that we have a short meeting and we would like to get the maximum out of it, I think we should have an

exchange on this because this is fundamental. But let's all try to be brief. Brazil, thank you.

[BRAZIL]:

I thank the committee very much for these comments. I think that indicates that we have been I'll say maybe successfully make our points across. And maybe to differentiate our positions from some other let's say more extreme thinking about this.

One point I'd like just to make is that when we are proposing to further explore the partial immunity or limited immunity, we are not forgetting the needs at the same time simultaneously to address accountability. What we are saying is that simultaneously by agreeing to any partial immunity, we should at the same time establish accountability measures so there would be no tradeoff between one thing and the other. And I fully also understand the different timing that maybe we are in a very mature state to accept those two recommendations as incremental gains today. And maybe also acknowledge at the same time there are some other issues that at least for some participants are important and should be addressed in due time.

The only thing is that we did not have that kind of flexibility when we were working within this subgroup. Actually, the CCW co-Chair made clear that if we accepted the recommendations, if we endorse the recommendations, we would be automatically

endorsing the report itself. So that put us in a very difficult situation because we accepted the recommendation as incremental gains but at the same time, we think they are insufficient. But there was no flexibility for that so we had to oppose the recommendations. Otherwise, we'd be accepting the report.

So maybe there is some way out if we can think of some way to address it and to allow for this situation to be very clear. But I fully agree with you. I think we are on the same page. Maybe we have different approaches but I think as we see too the only things again, there was no flexibility. We had reluctantly to oppose because I think those could be incremental gains but if we did that, we would accept the report as an adequate response to the mandate that was given the group. And as we have explained in our opinion, as it stands, it would be insufficient at this point. Thank you.

FARZANEH BADI:

Thank you very much. Just that the opposition of governments to some of the governments to the recommendations kind of signals that they do not want – I don't want to use the word discredit but it kind of minimizes or people look at it with suspicion at why you're opposing them. And these recommendations are instrumental for Internet users' access in sanctioned countries

and they should be advanced. So it is unfortunate that you have to oppose the whole recommendations.

So with that we have to move on to another agenda item but is there any other comment?

THOMAS SCHNEIDER: Maybe just to say that we have some time to discuss this issue in more detail on the Cross-Community Session on Jurisdiction. I'm just checking when that is taking place. Thursday in the early afternoon. Yes, I found it. So we're all invited and I think as I've heard there is a lot of common ground and maybe if we get the right formalities, we can actually express that common ground in the flexible formality. So thank you all for this and let's move to the next slide.

ROBIN GROSS: I just wanted to talk very briefly on the issue of geographic names, and in particular the perspective that we come from on this issue has primarily to do with freedom of expression rights and people's rights to use words that refer to geographic regions and such. As you all probably know, Article 19 in the Universal Declaration of Human Rights guarantees freedom of expression to people in any media and regardless of frontiers. So clearly this applies to domain names as well. So people have freedom of

expression, rights to use words in domain names. Words that refer to geographic regions.

So our concern has to do with trying to prevent or control other people's use of words that refer to these regions. People have a right to discuss, to debate, to criticize, and if those words get blocked in domain names, then that's an infringement on those kinds of rights.

I also think there's practicalities with trying to control people's use of words with respect to geographic names. We have to remember that words have different meanings in different languages and different parts of the world. And so we're really trying to manage that and regulate what kinds of words people can use in domain names. It's not really workable from a practical standpoint as well.

We're also concerned about the impact on innovation that restrictions on using geographic words has. One of the great things about the Internet is that you haven't needed permission to do innovation. You've been able to – that's been able to flourish and grow specifically because it's been a permission-less innovation environment. And so if we flip that and then start creating restrictions on people's use of words, maybe they have to get permission from governments or just banned entirely, we're going to have a stifling impact on innovation as well.

That's not to say that we're not sensitive or somewhat sympathetic to government concerns on these issues. It's just that ICANN really isn't the place to go to to try to create new kinds of rights to using geographic words. One should go to a legitimate legal institution, perhaps WIPO, perhaps the WTO, and get those rights created there. And then you can come back to ICANN and have them enforced. But simply trying to create those kinds of restrictions here isn't the right forum for doing that. So thank you.

THOMAS SCHNEIDER: Thank you, Robin. Any comments on this from the GAC? Or from others? Please go ahead.

[NIGERIA]: Sorry, I keep moving around. It's Nigeria. So I think the comment or – how do I say it – proposal, or presentation just made just kind of seems to negate what we just had in the previous presentation when you say that ICANN is not a place for those conversations to be had. And then the first presentation, we are talking about jurisdiction and that we are moving forward. So I see these two things are antithetical.

If ICANN is the organization that oversees the Internet and make determination about its usage and all of that, then everything pertinent to that needs to be addressed here. While we

appreciate the fact that development and growth of the Internet was based on freedom in allowing people to innovate and all of that, it doesn't mean that it will now encroach on people's regions and people's cultures and people's rights.

So people have been living in locations and places where those names were known to the world before them or not. Maybe advancement and development now make people to become aware that some people were already somewhere. It doesn't mean they didn't have the right to those names that they've been using from – before you knew those places existed. So if we now have to start going to WTO to reserve names and then come back to ICANN, then the issue of the jurisdiction as said you're establishing in ICANN, I think there's some issue around that.

In the earlier presentation, I wanted to speak to the fact that despite the transition that we experienced, which we are agree that they're incremental progress which we're living with, we've seen situations for instance like when the issue of North Africa came onboard and ICANN decided to go one way, and someone else went to the courts in United States, and determination was made by ICANN not to go back. The current conversation that we had yesterday around Amazon is a similar issue. So ICANN has gone one way and then a panel said something else and ICANN is going back to review it. So then why are we saying that jurisdiction issue is already resolved, and we have made progress.

So this is exactly the same kind of information. And I don't see how people insisting that this is their name or this is their region, I don't see how that stops innovation. I don't see how that improves development in the Internet space. I'll stop there for now.

ROBIN GROSS:

If I could just very briefly respond. I actually don't agree that using a word is an encroachment on somebody's culture or I think that we have the right to discuss cultures and governments and regions and such. And so that's not to say that people are going to like the discussion, but that's called freedom of expression where we allow robust debate and a free flow of information.

Even if it means using words that are going to offend some people, we still have freedom of expression rights to do that. And it's something that almost all the governments have agreed to in the Universal Declaration of Human Rights. So we just like to see that actually implemented here at ICANN. Thanks.

THOMAS SCHNEIDER:

Thank you. And just to add a comment to this I think very important discussion, the rights on names is one issue. The other public interest that are related to names as you say and freedom of expression is one of them which I think at least many or most

governments support, the problem is in particular exclusive uses for domain names as TLDs are problematic because – and you’re right. The risk is that it prevents people from using a name in a certain space.

To give you the example, I live in Zurich. We have an insurance that has that name of the city. The Trademark Clearinghouse rules, they have a figurative trademark not on the word because the word is public. You can’t trademark a word in my country. They have a figurative trademark in my country in the industry business. But that would have allowed them according to ICANN rules to go for an exclusive brand TLD and [exclude] everybody else whether they live in Zurich in Switzerland or in the five Zurich’s that exist in the U.S. or elsewhere to use that word as part of their TLD space.

And so I think it’s absolutely right. We should discuss about rights and limits to rights because if you have a right somewhere in this world in one area, doesn’t mean that necessarily you can deviate the right to use a domain name or also maybe to prohibit somebody else from also not exclusively but also using a domain name. But the problem is that ICANN is creating rights to some in some extent.

And if you don’t want to create rights, sometimes you may need to say, “Okay, if you are giving this exclusively to that stakeholder

or to the other one, then we create new rights. We may not be able to delegate a name before the right situation or the public interest situation is discussed and the acceptable solution to all is found.” But many people think that they have rights to do something or to prohibit others to do something and it’s not necessarily God-given that existing rights or the claims of interests would allow give a right to a domain name or not.

So I think we need to be very careful on this and I’m hoping that we have a substantive and constructive and fact-based debate with the new gTLD in the next round of gTLDs on how to deal with names where different types of rights, different types of interest, different types of stakes are there. And in my personal view, an intelligent way to deal with this is to create a space where you can flag your interest, whether it’s based on a local right, on a national right, on an international right, or just on historical, cultural tradition in something like a repository that everybody can identify these people, these stakes, and then somehow create a mechanism that doesn’t give rights to whoever puts something in a repository but who creates an incentive that these people get together and discuss how to somehow share or use a domain name that none of these interests are ruled out or over – whatever the word that you used.

So I think we need to find a process to mediate and find acceptable solutions that should not necessarily create new

rights or take away rights but find acceptable solutions in a very pragmatic way. I could go on for quite a long time. I'll stop here.

MILTON MUELLER:

Could I just visit this [inaudible] have to be so the exclusivity is created by the domain name system. That's a technical fact. If you register a name, it's globally unique and therefore possession of it is exclusive. There's no way around that. And there's an unfortunate – some people would say connection between technical exclusivity and semantic meaning in the domain name space.

But I think the point Robin was making is that when you talk about these conflicting rights, is that we see people in GAC claiming rights, which simply do not exist in international law. I think that was very clear. And you can't just make these things up.

THOMAS SCHNEIDER:

Okay, we have to stop the discussion now but we will continue it in the next forum that will deal with this. Thank you.

FARZANEH BADI:

So we will move to privacy. [Aidan] would just like to make a brief statement.

[AIDAN]:

Thanks for that, Farzaneh. And I know we're up against the clock so I will keep my remarks very brief. We understand as the Noncommercial Users Constituency that public safety is a concern for all GAC members and so [do] constitutional protections and the protections of fundamental rights such as the right to privacy. We have seen in the past that the GAC has consulted widely with law enforcement bodies for the GAC's Public Safety Working Group. But we're unsure as to how GAC members consult with their justice departments in order to find the right balance between maintaining public safety while respecting fundamental rights such as the right to privacy which can be found in the constitutions of over 100 countries.

We just have one ask for you. There was a resolution at the International Conference of Data Protection and Privacy Commissioners in 2009 in which the data protection authorities of over 60 countries sought to investigate sending an observer to ICANN meetings along several other fora. ICANN has not invited the data protection authorities to participate in any capacity. But the GAC, you could invite them to join [inaudible].

So we would like to encourage you to invite the data protection authorities in your jurisdiction to participate in ICANN processes as observers and to enable their participation perhaps through the establishment of the GAC Data Protection Working Group. Thank you.

THOMAS SCHNEIDER: Thank you. Just a brief response to this. It is true that also in the beginning, law enforcement agencies were not part of the GAC. We've integrated them and then the next step is that also more and more Data Protection Agencies are integrated into the Public Safety Working Group are in contact with GAC members.

The Council of Europe has facilitated a meeting with DPAs in Copenhagen and there has been follow-up since then. So I think you're running in open doors. And things are catching up as we speak. Thank you very much.

Thank you, so Brazil for one last statement and then we have to continue the discussion in other sessions.

[BRAZIL]: Thank you, Chair. Actually, I had raised my hand before. Can I make one very brief comment in regard to the discussion we just had? Thank you.

I think it's a very good principle that is being followed within ICANN that what is enshrined in international law is acknowledged and respected. The only thing is that international law is not static. It's being development. Actually at WIPO, there are ongoing discussion on geographic names, what are the limits, what are the scope and definitions, so on and so forth. So two

approaches would be taken within ICANN. Either you can take a very libertarian approach and say what is not prohibited is allowed, or you can take a very restrictive approach and say let's prohibit as before.

And so I think what was achieved in the first Applicant Guidebook was some kind of balance in recognition that there are different concerns that are not in black law, but that have different approach. So in regards to geographic name, we see that kind of balance. It was not what the GAC had requested. It was not exactly what the GNSO had preferred. It was some kind of balance that was achieved. Thank you.

THOMAS SCHNEIDER: Thank you, Brazil. And thanks, everybody, for joining us. See you next time.

FARZANEH BADI: Thank you very much. Bye.

THOMAS SCHNEIDER: Thank you. As you see on our timetable on our agenda, we have now a lunch with the BGRI so this is the Board's GAC so-called Recommendation Implementation group probably nobody knows apart from those that were there, what recommendation

should be implemented. It's another very nice acronym in the ICANN environment. It is a group between the Board and the GAC that is trying to for the time being look at effectiveness of GAC advice and how can we improve the communication around GAC advice between the GAC and the board. That is what the group is currently working on and we have a so called lunch meeting that concretely means that there in the back you see lunch bags for GAC members. The board may also take these lunch breaks but we have a nicer lunch area above us. But of course they are free to come down to our level and enjoy our lunch breaks they are cordially invited so let us eat while we speak but not while what others say. This is what I learned at home and this is what I'm trying to okay.

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