

**ICANN**

**Moderator: Brenda Brewer  
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6:00 am CT**

Thomas Rickert: Good morning, good afternoon, good evening. This is Thomas Rickert speaking, the GNSO-appointed cochair to the CCWG. And I would like to welcome you all to this dedicated call to discuss recommendation 11 on Monday, February 8, 2016. And like usual we would like to conduct the roll call by listing the attendees from the AC room so those who are only on the audio bridge please make yourselves heard and we will add you to the list.

Holly Gregory: Hi. This is Holly Gregory. I'm in the process of connecting on Adobe so at the moment I'm only on the phone bridge.

Thomas Rickert: Thanks very much, Holly. We will add you to the list. Anyone else?

Leon Sanchez: Thomas, this is Leon Sanchez. I am also in the process of connecting to the AC room.

Thomas Rickert: Hi, Leon. We will add you to the list. Thanks.

Kavouss Arasteh: Thomas?

Thomas Rickert: Hello, Kavouss.

Kavouss Arasteh: Yes, I will be only available up to three o'clock. If you continue more than three o'clock GNC UTC I have to leave. I have a medical appointment and that is then I continued to listen to you by phone but I cannot intervene after three UTC - 3:00 pm UTC. Thank you.

Thomas Rickert: Thanks very much Kavouss. This call has been scheduled for 90 minutes so I hope that we can come to a conclusion during that time and not need to go into overtime. But thanks for this announcement, we will take note of that. Anyone else? A microphone seems to have been opened there. Okay there don't seem to be any further individuals on the phone bridge only. Are there any updates to Statements of Interest? There don't seem to be any.

And that allows us to move on with the substantive discussion on recommendation 11. And for those who have not been on last Thursday's call let me just remind everyone that we are actually in the very, very last phase of applying finishing touches to our proposal. And the world is looking at us to reach consensus on this remaining point and submit our report, supplemental draft report to the chartering organization for approval allowing then for the board to pass it on to NTIA.

So as we've previously said, the cochairs have taken pride in not having been forced to go to voting so we really do hope that we can avoid this in this very last phase in order to be more inclusive rather than limiting the decision-making to counting noses.

But, having said that, should this group not be able to come to consensus we will proceed to voting or if there be no proposal that gets sufficient traction to qualify for a consensus proposal, we will also be able to - and we will make

use of the option that is enshrined in our charter, i.e. the chair the absence of consensus.

So we hope that this is not needed. We've seen encouraging moments of individuals being willing to compromise and work on innovative ideas to reconcile the differences between the various views of this group. So let's try to take this a step further. Let's continue our discussion in the spirit of compromise and constructive deliberation.

We would like to start by bringing up that proposal as was discussed in last Thursday's call, the proposal that we did the straw poll on where most of you have indicated with green ticks that they are willing to convey this consensus proposal consisting of components suggested by Kavouss and by Becky to their respective groups for further deliberations and for at least non-objection.

So this is the version that we have concluded on during last Thursday's call. There has been some discussion subsequently on the list but we just want to be perfectly clear to ensure that everyone is on the same page that this language that you see up in the remote participation room is the language that we did the straw poll on.

Kavouss's hand is lowered now. I would have given him the opportunity to speak now. But, Kavouss, we...

((Crosstalk))

Kavouss Arasteh: Yes, Thomas. Thank you very much. First thing I put in the chat, please kindly consider that. The second, I think in order to be more efficient everybody has followed the e-mail exchange on the CCWG mailing list and some people on the GAC list. The key point is a legal clarification or

explanation by our lawyers in relation to the two sides of the coin which is on the table. Perhaps as soon as possible you decide to give the microphone or floor to our lawyers to put their clarification after explanation in verbal in the chat box or on the screen. Thank you.

Thomas Rickert: Thanks very much, Kavouss. And this is pretty much in line with what we would suggest doing anyway. So the idea for this call is that, number one, we clarify to everyone what the language that was the outcome of last Thursday's call was. That is what you see on the screen in front of you. We would now move to allow for Holly, Rosemary and her team, to go through the questions raised by Rafael and offer answers to those questions and allow for further questions from your side.

So that after the second phase of the call we are sure that everyone knows exactly what the implications are the proposal on the table are. And then in the third phase of this call we would seek confirmation of the agreement reached last Thursday for this proposal or discuss alternative tweaks or suggestions in case there is no consensus on this very proposal.

So unless there are further questions on the way we would like to approach this I would like to hand over to either Holly or Rosemary to kindly introduce the questions that have been asked as well as speak to the - I should say preliminary answers that you might be willing to offer.

Holly Gregory: Certainly. Good morning everyone. Thank you, Thomas, and good morning everyone. This is Holly Gregory from Sidley. And we have your questions and we're prepared to give our preliminary impressions and then follow up as quickly as possible in writing.

From our perspective the proposal on the table is viable from a legal perspective. As you know, there may be some additional detail that's going to be needed to fully implement it. And I'm going to talk a little bit about that.

We told you before, as you know, that California law gives you a lot of flexibility to order your decision all processes within ICANN in your bylaws the way that you would like. And that certainly can include the proposed carveouts.

We have to note at the outset though that the questions that you've asked us really aren't legal questions, their questions about how the process will work. And again, that in large measure for you to decide using the flexibility that you will have under the California law and specifically the law that applies to unincorporated associations.

The questions that you've posed our not in the nature of legal questions but we've reviewed them, we have some thoughts. I'll start with the first question is the question was who would decide whether the carveouts is applicable to a certain issue to be subject to a community decision.

And I think you're going to need to make a decision around that. There are couple of possibilities that come to mind. You could designate a person or a group that has the responsibility for determining whether or not the carveouts applies to a particular decision that the empowered community is considering. And of course these, we're only talking about decisions where the board has decided to follow GAC advice or to act consistently with GAC advice and now the community wants to challenge it. That's the only time, as I understand the carveout would apply.

So this is a determination that has to be made at the beginning of a community escalation process whether the board is indeed following GAC advice. And you'd need to set that process out in the bylaws. Now, who could that person or group be who makes that decision? It could be a decision of the ICANN Board; it could be a decision of the Board Governance Committee or another committee of the ICANN board.

It could be the Board Governance Committee or another committee of the board working with the ombudsman. It could be the ombudsman. It could be an independent person or group such as one or more members of an IRP panel could be posed this question or some other independent advisor.

It could be the Chairs' Council, meaning the chairs of all of the ACs and SOs who participate in community decisions. Except in this instance you wouldn't have the GAC chair participate in that. And it could also be the ICANN General Counsel. So there are a lot of choices for you to consider about to make that decision. That could be something that we leave for implementation although it may be something that you want to flesh out now.

The second question was according to what standards would that decision be taken, meaning that decision whether or not the carveout applied when the empowered community is wanting to challenge an action that the board has taken or a decision that the board has taken.

And from our perspective, as we understand your proposal, the carveout would apply to challenges to decisions by the board to implement GAC advice. And this is going to require a review of whether the board is following GAC advice or is making a decision consistent with GAC advice. The standard will have to be applied in a reasonable way in light of the materials presented in the board minutes.

The - I do want to note that one of the issues here is what does it mean to act consistently with GAC advice? What if there is some small degree of variation? Again, you're going to need someone who can make that judgment call and that's a process that I think you need to put a little bit more detail into.

What means of redress would be available for any party who doesn't agree with the decision about whether or not the carveout applies? And here I think the determination would be subject to the reconsideration process or to the escalation process and eventually to the IRP. So for example, if the decision was that the carveout applied and the GAC was unhappy with that decision, I would assume that the GAC would have some ability to seek reconsideration or it eventually even need an IRP.

Alternatively, if the decision was that the carveout did not apply and people in the empowered community were unhappy with that decision you have reconsideration, escalation and IRP processes that I assumed would apply. But again this isn't a legal question, this is a detail for you about how you want it to work.

The next question was about with a GAC, according to this wording, be able to participate fully in the decision-making of the community mechanism on - then they give to topics that relate to very specific board decisions on the implementation of delegation and redelegation of ccTLDs and also a second question regarding new gTLDs.

And if I understand this question, there is general sort of GAC policy advice to the board. And now the question is what happens on these very, very specific issues. And I may want to ask Rosemary to weigh in here or even potentially Becky. I think that we are going to have to make sure that the

language is very clear about however it is that you wanted to work but I'm not sure that it's very clear at the moment. But again, the language hasn't been fully fleshed out from a bylaw perspective.

So in summary, it's all a long way of saying that I think there's a little bit more detail that you may -- that you'll need to fully implement this proposal but it's a very viable proposal. We see no legal problems with this proposal.

Rosemary, is there anything that you would like to add?

Rosemary Fei: I think - this is Rosemary. My sense of the -- I don't think that we yet understand enough as outside counsel about all the different variations of GAC advice, GAC principles as opposed to GAC advice, etcetera. And I think we would want to get more information about what you want there. But I think you may, in accordance with what Holly said, you will reach a point where what we should put in bylaws about it will have reached some level of granularity that will not be the final level of granularity and in the process that's Holly described would need to take over to finish -- to get to final decisions essentially.

Thomas Rickert: Thanks for a much, Rosemary and thanks very much, Holly. Is there anything to add from your side?

Holly Gregory: No, I think that's what we have at the moment and we look forward to this discussion this morning. We will use it to further refine when we provide something in writing. I just do want to mention we will use all the efforts to get you something quickly but I want you to know that it's a very short timeframe we are struggling under.



Thomas Rickert: Understood. Thanks very much for coming up with these answers so quickly. This is very helpful. I guess in summary what we can establish is that the questions asked by Rafael that have been supported by some on our list cannot be answered in fixed legal terms but is pretty much up to this group to define how they want this to be implemented.

So it looks like we could likely leave the glorious detail of how things should be worked out to the implementation phase, yet I guess that we should try to get more clarity on what our preference in terms of who ultimately makes the decision whether the carveout is applicable or not today.

And I guess, you know, this is maybe something which we could call a patch or clarification that might be added to the compromise language that we discussed last week. We have always worked on the principle that we should only make changes to the way ICANN works already in areas where it's actually needed. So we do have board reps on this call.

We do have GAC reps on this call. So maybe it would be best for us to give some insight on how these two parties to GAC advice currently deal with GAC advice that has been issued and how the responses to GAC advice are being recorded.

I don't want to put anyone on the spot but if we did have a GAC or a board representative on this call they might wish to inform this group. I see Kavouss's hand is up. Kavouss.

Kavouss Arasteh: Yes, Thomas. I don't want either to be in a spot but I have one, two questions. One question is in particular to what Rosemary said. Does it mean that the Becky's proposal is very, very general and high-level and may not be the final

language that we could put into the bylaw? So I need a clarification on that perhaps from both Rosemary to (unintelligible) what she said and from Becky.

And the second is would any of the board member wish to comment on what is on the table including clarification provided by our lawyers? And the third one is any of those three distinguished colleagues from the GAC, Rafael, Brazil and France, on the call in order to see whether they have any quick reaction to that while we still wait for a written reply. Sorry, I don't want to (unintelligible) spot but that is just a comment. Thank you.

Thomas Rickert: Thanks very much, Kavouss. Any further wishes to speak? Erika. Erika, the floor is yours. Erika, if you're trying to speak please we can't hear you. So it looks like they are is an audio issue with Erika. I can then read out her intervention from the chat which might help inform the group.

“Clarification. GAC advice - if GAC advice is based on the consensus of the GAC it will create a strong presumption that the application should not be approved.” Okay so that is for new gTLD applications I'd say. “If the ICANN board does not act in accordance with this type of advice, it must provide a rationale for doing so. If the GAC advisors are concerned about a particular application the board is expected to answer to dialogue with the GAC to understand the scope of concerns and provide rationale for its decisions. If the GAC advises that an application should not proceed unless remediated.”

“This will create a strong presumption that the application should not proceed unless there is a remediation method available in the Applicant Guidebook such as securing the approval of one or more governments that is implemented by the applicant. If the issue identified by the GAC is not remediated the ICANN Board is expected to provide a rationale for its decision, if not it does not follow GAC advice.”

So that's obviously was reference to new gTLD applications. I guess that's our discussion now is a little bit broader. But it is my understanding that once GAC communiqués are being issued that's the advice bit are that the communiqué would be extracted and put into an inventory published by the ICANN Board. And that the ICANN Board would then add information on what the status of that GAC advice is.

And therefore just practical suggestion, wouldn't it then make sense to use this register of GAC advice or ICANN Board decisions, and to be specific, the rationale therefore, as the (source) of determining whether GAC advice has triggered for the board to decide in a certain way.

Because I guess what we're trying to understand here is to what extent the root cause for a board decision is the GAC advice or whether the board has just responded to more general concerns or requests they've heard from the community in which case I guess the GAC does not want to be limited or ruled out from a decision-making role.

So my suggestion would be to confirm that the source of information for whether GAC advice would adhere to or not should be either the GAC advice register or explicit mentioning of the board and we could include an encouragement or requests to the board to include in their decision information whether or not these decisions were based on GAC advice.

Any views on that? Paul Rosenzweig is asking to check whether it's simpler to just say that we make reference to GAC advice that is on the register. Paul, I think that is -- does not necessarily make things easier because if GAC advice just at those general community concerns with the way the board wants to act then I think you would not be fair to rule out the GAC just because they are

one other part of the ICANN community that took issue with a certain direction that the ICANN Board wanted to take.

So Erika still seems to have audio issues. So, Erika, I suggest that you lower your hand and you raise it again if you want to speak. And the next speaker in the queue is Greg.

Greg Shatan: Thank you. Greg Shatan for the record. I've been following the audio for a while but just got in Adobe a few minutes ago. But in any case I think we can look at the - kind of the three questions - the first three of the (ticked) questions in the - Rafael's email as being specific examples of something more general which is the question of how to resolve any disputes or differences of opinion or positions between participants in the community mechanism and also I think it relates to how matters are initiated in the community mechanism.

And I think we can look back at that process. And I think in the first instance it's up to one SO or AC to start the process of initiating a community power and then getting buy-in through various steps from the other SOs and ACs. So it seems that, you know, as an initial view that if the view of the initiating SO or AC is that board implementation of GAC advice is being challenged or blocked. That should be mentioned are cited in the original documents that initiates the proposal and that would invoke the carveout.

I suppose it could also then be up to any other group to either agree or disagree with that, so it seems that should be, you know, the (initial) matter (from) part of that process, that the - that a determination is made and then, you know, consider how that sort of - you know, whether a - if one of the parties disagree, how that would be resolved.

But that's, you know, an (instance) of the larger issue that, to how we resolve any questions around the implementation of a (power) that does - the first, you know, particular instance that we discussed.

But I'm sure we can think of others that, you know, questions will arise as we go along and I think that just, you know, informs the issue. You know, there may be roles for the board to play and identify whether or not, you know, (that) advice is implicated by the petition to start a community (power).

I think we had (started, you know), as part of the petitioning process, so I think that, you know, and whether GAC would have a vote on that - I see Avri asking - I see the first question is whether this would be even a voting process that would be part of that.

So - and I do think that this is, you know, and implementation question and I don't - you know, I think it's something that we all need to work out together. If we try to solve every implementation question, or even any implementation question (where I would consider would be a follow up) level process, I think that has the - you know, some of the trappings of the filibuster which I think, you know, we should try to avoid.

And - but that's another we were all keeping in good faith and we will, you know, solve the problem as we need to in the time that is needed to do it.

Thanks.

Man: Thanks, Greg. Kavouss. Kavouss, the floor is yours.

Kavouss Arasteh: ...ARP on the (alleged) issue that the board has exceeded its mission, so complainant is that community. Who would be the defendant in that process?

In any legal process before any court or any judgment, there is a complainant and there is a defendant. Who is the defendant?

The defendant would be the board who is alleged that he has not respected the mission or the defendant would be the GAC that his advice is subject to (that) or both.

In a normal case, if we have this case, suppose that another (unintelligible), you have the same situation. That SO and AC, together with ICANN, would be the defendant and that party who invokes the IRP is the complainant.

So, why, in this case, we don't know who is the defendant? The board who has alleged that it has not respected the mission and going out of the mission, exceeding the mission issue because of the advice or would it be the GAC you is the (origin of that).

And my second question is that (you owe these proposals) - is because of the tutor. If we don't have these tutors it would be not such exclusion. Are we clear on that are not? Thank you.

Thomas Rickert: Thanks, Kavouss. I would like to invite others to respond to your question. For the time being, I would really like to get back to the original question that we discussed based on (Holly) and (Rosemary)'s and (unintelligible) who makes the decisions on whether the carveout to be applicable or not and what process should be followed.

And I have made a practical suggestion earlier. I've seen some support for it in the chat. So let me repeat it and maybe that's a way for us to proceed and allow for us to move on with our discussion.

So the suggestion would be to request the board to include information in the rationale for the decision speaking to whether their decision has been triggered by the GAC advice.

So (let those) that are to respond to GAC advice to say whether GAC advice has been the reason for them to (desire) one way or the other. And as far as processes are concerned, I would suggest that, in line with what Greg as suggested, that we ask for lawyers to come up with language flushing out the details to (end) the implementation phase. Paul.

Paul Rosenzweig: Yes, good morning. Sorry I was late. Ask for posting, again, Thomas. I'm sure you did the obligatory welcome and everybody's waiting for (a talk) and I agree, it's time to resolve this.

I think that this is really just an implementation problem. It seems to be really easy, however, the GAC must designate its advice as (insensible) consensus advice in order to trigger a whole host of obligations on the board, including the two-thirds rejection requirement or a 60% rejection requirement (unintelligible) and the obligatory consensus building mandatory reconciliation if they reject the advice.

So whenever the GAC designates advice as whole consensus advice that demands the board's (fielty) in the way that we've been talking about for the last year that would be GAC advice.

They start with the (designee) and I acknowledge the possibility that the rest of the community might also be saying the exact same thing in which case the threat of an adverse community action is nonexistent because, if all the other SOs and ACs agree with the GAC in the first instance, they're not then going

to turn around and attempt to (spill the) board because the board did exactly what they in the GAC wanted.

The (empowered) community is only going to act to respond to the GAC's adoption of - I mean, the board's adoption of GAC advice. In instances in which the GAC advice is not in the (first) consistent with anything that the SOs and ACs want or enough of them to start the (topic).

So from my perspective, this kind of the (no set) question - what insensible there be in which the GAC votes to adopt full consensus advice, mandates that the board go through the process of considering it at a super majority, where the board goes through that?

And if the - and the rest of the community agrees with that advice and then turn around and (sues in the) IRP anyway, so just (goes the) board. It seems like that this is a nonexistence issue that really ought not to disturb us at this point.

I agree with you completely that the board wants to say, you know, in fact, it is GAC advice that will be useful but the GAC is the one who has the power to designate what mandates the consideration in the first place.

Thomas Rickert: Thanks, Paul. I guess the reason why I'm suggesting what I suggested is that we do have GAC advice that is quite broad, and the way I (mean to) communicate on the list is that the board -- I apologize -- the GAC is afraid that there might be this where some say that there was advice speaking to certain board decisions, although that was not specific GAC advice for a specific instance.



But let's just say general principle for new gTLDs, there might be such general advice from the GAC in the future and should have actually (meaning) that the GAC is ruled out the participating and community decision-making for good on any and all questions relating to subsequent (round or) open calls of introductions of new gTLDs.

So it might be a highly theoretical case but since we are trying to not move towards each other, you might think it's not a big deal but for others it might be a big deal.

So why then not clarify that we take, let's say, rationale for board decisions as the basis for making that determination as to when the carveout to be applicable and when not and leave the rest of all those rules to the implementation.

I think that could give some comfort to those who feel that this language is an attempt to remove the GAC from the decision-making areas and it's too broad then. There are more hands raised now. Kavouss, I'm not sure whether that's an old hand or new hand.

Kavouss Arasteh: Yes, it is a new hand that I fully agree with you that the issue will be processed a little bit, but I would like to come back to the (poll) intervention. Yes, the issue is more or less fully theoretical. It may exist, but the degree of existence on our (unintelligible) is very, very, very rare for the reason that you have given.

If the GAC advice is based on the full consensus, what is the reason that the board does not agree with that? It does not agree with that as we get into the negotiations and finally agree on something.

So the probability that any community raised any problems or invoking in ERP is very, very little, so this purely theoretical. It exists but the degree of existence - (not that) - application is almost null. Thank you.

Thomas Rickert: Thanks, Kavouss. Greg.

Greg Shatan: Thanks, Greg Shatan. I think we are inflating the importance of this question, and how often is it unclear whether the board is implementing GAC advice or not when it takes a particular action?

Or to look at it differently, how often what a challenge to board actions take place where it's not clear that a challenge that would result in the board been prohibited from following the GAC advice or prohibited from implementing something based on GAC advice?

I haven't read board resolutions closely but it seems to me that when they are implementing GAC advice, they do tend to say so. We certainly request that the board make it more clear when they're doing so, but I think it's kind of like having somebody (unintelligible) that they're walking when they're walking.

I think the only people who do that are guys in the White House when they're walking backwards. Maybe that's just in the movies, but I think we're trying to turn something that's painfully obvious into something that's somehow a question that it, you know, has deep and mysterious answers.

So I think that, you know, this is just a little bit silly but certainly I want to - everyone to feel comfortable that when the board is implementing the GAC advice, it's obvious that they are doing that. I'm just not sure, you know, is that lack of obviousness is really much of a case. Thanks.

Thomas Rickert: Thanks, Greg. Steve.

Steve DelBianco: Thanks. Steve DelBianco with the CSG. I'd like to propose a rather simple way of implementing this that builds upon what we've already done in recommendation two.

Recommendation two describes how the empowered community escalates decisions to the point of determining whether it's going to challenge a board's decision on IRP, for example, a (block of bylaws).

A decision, everyone, begins with a petition that one of the participating ACs and SOs begins. We could easily add to recommendation two I note that the petition should include the petitioner should describe whether they believe that the action they're challenging was based upon GAC advice to the extent that they would include in their petition an appeal to exclude the GAC from being able to object to the exercise of that power.

And that would have to be part of the petition which would then be subject to the review of all - of the other ACs and SOs for part of the empowered community.

And if that is not supported by the rest of the ACs and SOs, could we have determined thresholds to determine whether the petition moved to the next step for the community forum.

So is already designed a process. All we need to do is ensure that the petition includes necessary elements such as whether they believe a particular advisory committee who has extraordinary bylaw power, in the case of the GAC,

should be excluded because they're challenging a decision which is based - I wouldn't say solely, but based mainly upon GAC advice. Thank you.

Thomas Rickert: Thanks very much, Steve. Paul.

Paul Rosenzweig: Yes, hi. I agree with Steve. I agree with Greg and they certainly agree with you that all of these are suitable procedural ameliorations and implementations that would ease this problem or eliminate but I think is a (unintelligible) problem (in this instance).

I would also add that the IRP or - if we're going to have a challenge of that sort, is almost certainly going to view the GAC decision in a (narrow) - the (LED) GAC advice in a narrow context (because) the hypothetical (new) positive comments, the challenge would be to the adoption of the general principle relating to gTLDs which the board adopted pursuant to GAC advice.

And if that - if the time for challenging GAC had lacked, you can go back and challenge that and (assert) is as the basis for (some substantive) collateral decisions that indirectly relied on (those decisions).

I just think that that I like to certain (unintelligible). So - by be happy to make that clear as part of the IRP, you know, that you're not - that the procedures have previously been subject to some form of board adoption, and that is the time to challenge it and not two years later (unintelligible).

But all of this is a long way of saying this whole process and implementation, and I would think (unintelligible) and not - and move it along. It's time to wrap this thing up, at least on this issue.

Thomas Rickert: That's an excellent suggestion, Paul. We should wrap this up and move on shortly but before we (stop) on this topic, let's hear Holly.

Holly Gregory: Thank you. So I heard some suggestions here that are very helpful to us thinking through implementation. I think if you put three things together, we did go a fair way - the notion that the GAC must say when it's providing consensus advice.

In addition, that the board must say when it is following GAC consensus advice, and thirdly, Steve suggesting that a party must describe when it's petitioning whether, in its belief, the action they're challenging rests on GAC advice subject to the review of all of the other ACs and SOs. Thank you.

Thomas Rickert: Thanks very much, Holly. Now, in order to move forward, I think we should try to reach agreement, or at these be sure that there's a substantial objection to the following.

Some interventions have been made. What we're trying to describe your goes without saying that, therefore, no further clarifications are - or no for the processes are needed at all.

So certainly it's not in our - it's not our intention to make things more complicated than necessary. So let's say we just capture that this - that the carveout will only apply to GAC consensus advice.

So I guess that will take away the concern that the GAC might be ruled out from decision-making for non-consensus advice. Secondly, it - general principle issues by the GAC will not be a sufficient reason for a - for the application of the carveout, according to my understanding.

And that means that the carveout for the application of the carveout is actually quite limited. So I would suggest that we do not tweak Kavouss's (backing) consensus proposal after what we've heard but that we keep note of the points that I just recapped.

And we can have the procedural aspect as guidance for the - for those that are going to implement it. But we would not make them a requirement, that there will be implementation oversight anyway.

So I guess the request would be to find suitable ways to capture the third of our discussions so that we could then regard to that, but we would not make it a strict requirement. I would really like to move on. Holly and Kavouss, if you could keep it brief, that would be appreciated. Holly, if you are speaking, at least, we can't hear you.

Holly Gregory: I've lowered my hand.

Thomas Rickert: Thank you. Kavouss.

Kavouss Arasteh: (Unintelligible) what I put in the chat that (unintelligible), Holly and (this team) getting together and put a language which covers the case as you have mentioned.

And my second request would be would be possible that if you change tomorrow's meeting to the devoted are dedicated meeting for you provide another opportunity that we first receive the legal advice from the advisors and relating to (Rafeal)'s question?

And second, possibly there is a good way, we could proceed with the combined suggestions from Steve, Holly and others today and that would be

something that I think we're moving forward. It is promising that we're getting out of (stuck). Thank you.

Thomas Rickert: Thanks, Kavouss. I'm not sure whether we need more language on this because the way I hear (unintelligible) it is suggested that we don't tweak the consensus proposal any further but that we would capture some of the outcomes of our discussion, i.e., the carveout would only be applicable to consensus GAC advice.

And that those were (who are going) to draft this, should take into account some of the points we discussed for the implementation, i.e., to ensure that things are sufficiently clear. Greg's hand is up. Greg, you will be the last to this.

Greg Shatan: Thanks. I just think that we need to think about the context in which this would (arrive) for a second. It seems to be the contacts would be as follows - one, SO or AC seeks to initiate the community mechanism to exercise a (community) power and states that this is the challenge to the board implementation of GAC advice.

And that, therefore, the GAC is - while it participates in every other aspect of the process, does not take part in the decision-making parts of the process. That is - does not cast a vote but participates in the discussion and all that good stuff.

Then the GAC would have to put its hand up and say, "No, the board is not implementing GAC advice because this has nothing to do with GAC advice. Some other thing."

So it would basically mean the GAC would need to, you know, make that kind of a determination itself that it does not - the board is not implementing GAC advice and, you know, GAC advice is not implicated by the board's actions and such that if the board's action is blocked, that GAC - the implementation of GAC advice is the being blocked or thwarted.

This seems to me, again, you know, relatively unlikely but I think that those, to my mind, you know, that's what required to raise the question. And then we can take it from there to decide who and how resolution is made to the GAC saying that the board is not implementing GAC advice. Thank you.

Thomas Rickert: Thanks very much, Greg. Kavouss.

Kavouss Arasteh: Yes, could you please repeat your last statement? You said that we don't need to have another statement here (and we have to choose) a meeting. We have to do it here. We have to (finish this call) with this.

Could you please put your (final) statement of the land which proposed by Holly and Steve and others in the chat or (somewhere) that what is the final situation and what would be the last options here? Do we take the concerns - no concerns today. Either compromise or not. Thank you.

Thomas Rickert: Thanks very much Kavouss. I will confirm in a moment but let's hear Brett first.

Brett Schaefer: Thank you Thomas. I - we just wanted to comment on your point about general principle advice from the GAC. I think - excuse me. I think that that's unnecessary.



If the GAC consensus advice is general or bland or has no real impact on ICANN community it's not going to be challenged. But if GAC consensus advice does have an impact on the community that's what we're talking about here and that's where the challenge is likely to lie.

And I think if we have a carveout here for general principles you're inviting then a debate over whether something is an advice on general principles rather than a specific advice, which is sort of inviting argument that's unnecessary here.

By definition if someone's going to challenge this it's going to be something of some specificity or the community wouldn't be raising issue with this. So I think the standard should be just consensus GAC advice should be the triggering motion here, not general principles. Thanks.

Thomas Rickert: Thanks very much Brett. So there don't seem to be any further interventions on that so let's just try to wrap up. Again we will not change the language of the compromise Becky/Kavouss proposal.

This discussion have shown that the carveout would only be applicable to GAC consensus advice. The carveout would not be applicable to non-consensus GAC advice or just very broad statements of principles from the GAC.

We will ask the lawyers when implementing this to take care of - to further this conversation, i.e., to find language to ensure that we don't run the risk of having the confusion about when and when not the carveout should be applicable.

But I don't see any further need for additional language to be put into this compromise language. So with that Thomas Schneider has raised his hand.  
Thomas?

Thomas Schneider: Yes hello. Can you hear me?

Thomas Rickert: Yes we can hear you all right.

Thomas Schneider: Hi. Just seeking clarification on an issue. For instance I put the example in the chat. There are GAC principles on new gTLDs from 2007. They are fairly general.

They cover a range of public policy issues relevant for all new gTLDs and they are standing. They are not - we won't withdraw this advice because this is a fundamental list of public policy issues that - governing on a consensus basis think are relevant and should be taken into account.

They cover things like protection of the different interests and legal issues and so on and so forth. So if at any time in the future there's a community action against the decision that the Board takes which is in line with these principles, that means that there would be a carveout of the GAC because of these principles forever because they deal with fundamental public policy issues in - on new gTLDs.

So that would be for instance the question that I would like you to answer.  
Thank you.

Thomas Rickert: Thanks Thomas. So you're referring to the general principles. I think the general principles were a concern to you. Brett did what Thomas mentioned help to remove your concerns with this?

Brett Schaefer: I'm not quite sure that I understood exactly what he was proposing to resolve it. As I mentioned if there's a general statement of principles from the GAC either it's going to elicit a specific Board action in response to it or it's not.

And second, if the Board does take a specific action in response to it that is either going to be a - sort of a general broad thing that has no real impact or resentment or objection in the community or it will.

And if it does then yes I think the community should act all - on these powers and if there's sufficient community objection to it then they should be able to push back without GAC and intervention in the community.

That's what we're talking about here. If the GAC advice has broad support then there won't be any push back. If the GAC advice has support from a - at least two other SO/ACs then it won't get any push back.

And so I think this is a debate that's probably healthy for the - ICANN to have moving forward. At least it's going to force a vetting and a discussion about a proposal before it fully gets implemented, and if it is satisfactory then it's going to go through.

If not then we'll have to revisit it and the GAC always has the opportunity to send consensus advice forward on any matter it wants to, which is much broader ability than any other SO/AC.

So we're talking about - I think it's just a prudent vetting of ICANN decision-making process here. Thank you.

Thomas Rickert: Thanks Brett and before we move to Paul the - I guess there are two dimensions to our question now that we should try to get solved around. First, it looks like some in this group do want to get the process more formalized rather than the way I suggested.

So Steve DelBianco has made a proposal in the chat on the three-step approach to the - to GAC advice. So that can help capture the process, i.e., we would get clarity on when the carveout would be applicable or not.

And just to recap what Steve has said, first step would be that the GAC advice should indicate - indicate what advice that is, i.e., whether it's consensus advice or not.

Then there's a second step. The Board should include information and the rationale as to whether their action is based on GAC consensus advice. And then as a third element we would have an SO/AC petition to start the communities.

He said it should indicate whether the petitioner wants to carveout the GAC as a potential objector. So I would like to hear more views on whether Steve's suggestion can help on substance with the procedural aspect, and as soon as we pick up this we should discuss the time to look for GAC advice, i.e., Thomas Schneider's point whether the 2007 GAC principles would still be - form a basis of potential exclusion for decision making.

So I hope that you will speak to those two points and the queue's forming now. First one to speak will be Paul.

Paul Rosenzweig: Yes hi. I agree with Becky that this is kind of a frivolous argument. The time for - the object of an EC action will be a specific decision of the Board. There'll be a timeframe when it - within which we have to object.

The 2007 gTLD principles are now nine years in the past. They're not the object of the decision. The object of the decision will be the Board's decision to for example award the Dot Africa gTLD, right, and that will be something that the community may or may not choose to act upon.

And if the Board does so based - does its action based upon GAC consensus advice and so designates it as Steve has said and if an SO says, "We want to still the Board because it has followed the GAC advice on Dot Africa," it will have to say so and then the process will work.

I can't imagine, you know, any of that being difficult in the implementation to actually happen. If the Board does not follow a - does not take a specific decision that is the subject of an IRP or a Board still or a Board removal or any of the other powers, then we won't have this problem. I think that it's kind of a frivolous argument really.

Thomas Rickert: Thanks Paul. Some hands have been lowered in the meantime but Becky's hand is still up. Becky please.

Becky Burr: Thank you. I don't usually take the floor to do this but I'm going to try to be as clear as I can. I find that some of these objections, the notion that because the GAC issued principles in 2007 on new gTLDs that someone could argue under the language that propose that the Board is or that I - the GAC is precluded from participating in a decision making way on new gTLDs forever - it's frankly - that - there's nothing in the language that supports that.

We - there is no - there has never been an implication in our conversation that supports that reach. And frankly if I were as cynical as I feel at this moment I would say that the suggestions are just designed to blow up emerging consensus in this discussion.

The fact is that what I have been talking about and what we have been talking about is specific GAC advice that the Board accepts and then implements in a way that the community wants to challenge.

So there are principles in the 2007 GAC principles that say, "ICANN should develop procedures for evaluating applications based on the bottom up procedure."

There's no way that that could form the basis for any kind of challenge. On the other hand there's a provision that says, you know, "Protect all second, you know, second level registrations of intergovernmental organizations."

If there was a specific challenge based on, "We are going to prohibit second level registrations of the following names because the GAC told us to do that," then that would be challenged but that's the only preclusion that would apply.

And we have talked about procedures to be - to receive clarity about what the GAC - what the Board is doing and what is motivating its actions. And we've talked about procedures that create an obligation on the party trying to challenge us to the - to raise the issue of a GAC preclusion in that instance.

But I have to say we could spend the rest of our natural lives fighting about really ridiculous interpretations of this language if we want to, and if we do that we will simply not reach closure on this issue.

Thomas Rickert: Thanks Becky. Steve?

Steve DelBianco: Thank you. It's Steve DelBianco. I think we already have a general solution to the problem that Thomas Schneider brought up. In Recommendation 2, Paragraph 10 we already have a 21 day shot clock or window that indicates that the beginning of a petition and the approval at least of the first step of a petition to exercise a community power 21 days after the Board takes an action.

And please understand it has nothing to do with when the GAC had issued its advice. That's irrelevant here. All that's relevant is the timing that begins once the Board takes an action.

We are not limiting the GAC. We are limiting our Board. So if our Board took a decision based on advice that was ten years old, that decision of the Board is what triggers that 21-day period for an AC or SO to start the empowered community process with a petition.

So I don't think we need to worry about the corner case that Thomas brought up since it's all based on contemporary Board actions.

Thomas Rickert: Thanks very much Steve. Any further voices to speak? So that doesn't seem to be the case at this stage. It is my impression that Steve's original three-step proposal gets some traction so we could add that to the list or to the report as a requirement.

I also think that or would assume that Thomas will appreciate Becky's comments where we look back to the broad-brush principles of 2007 and their implications for today.

And so Becky would it be possible for you to maybe craft two or three sentences along the lines of what your - of your earlier statement now so that we can add that as - clarifying that which - to our report.

And thirdly, we can make reference to what we have in our report in Recommendation 2 already and that's what Steve has just described. So we would basically have three components to our last Thursday compromise language, and I would like to confirm with you that we can proceed on that basis.

So firstly, we're going to leave the compromise language, the so-called Becky/Kavouss proposal, as is as you saw in the AC room earlier during this call.

We will then add Steve DelBianco's suggested three-step approach to our recommendation. We will further include the explanation offered by Becky with respect to the - in response to Thomas Schneider's question on the right time of GAC advice, and we would add a reference in our report to Recommendation Number 2 with the timelines that Steve has refreshed our memories on.

So that would be what we have on the table now so I guess the important part for us is that the compromise language as endorsed by a wide - by a big portion of this group to stand.

We would just add clarifications and additional information as I just summarized. Can I ask whether this is fully understood or whether there are any further clarifying questions with this? That - Kavouss?



Kavouss Arasteh: Yes. No objection to what you said but still for the benefit of those people who comment but they are not on the call, is it possible that what you said you put it in a more clear, precise language? Thank you.

Thomas Rickert: Thanks Kavouss. I have - that's exactly the plan. We will have a revised Recommendation 11 based on our discussion and that will include the components that I just outlined.

I guess today the question for this dedicated call would be the same as for last Thursday's call, and that is whether our compromise stands, you know, whether your willingness to convey or propose the compromise language that we discussed earlier still stands.

And I would like to proceed by asking you whether there is any opposition or any changed views from your side. And in the absence of any objection to that we would deem our compromise of last Thursday confirmed with the qualifications that we've discussed today, and we will then take the full language to the plenary for tomorrow's call.

Klaus Stoll: Thomas?

Thomas Rickert: Was that the new hand? Kavouss go ahead.

Kavouss Arasteh: Yes. Just - Mark Carvell made a very good statement in saying that irrespective what we decide GAC would not be excluded to provide any advice on the matter.

It is a good suggestion that - but everybody agree that we put it in appropriate place that excluding of GAC in some decision making in regard so on so forth

that we have discussed. I don't want to repeat but still GAC is allowed to provide advice. Thank you.

Thomas Rickert: Thanks Kavouss. I guess it's a good suggestion to include that. Again I think we have that clarification mentioned somewhere during previous communications already.

But just to be perfectly clear, yes the GAC can issue consensus advice, non-consensus advice at every instance during every segment of the community powers.

We're just talking about how the response to GAC advice shall be and whether the GAC can be a decisional participant of the empowered community.

But that's helpful so Mark we can include a clarification on that as well. Sebastian?

Sebastian Bachollet: Yes thank you very much. Hope that you can hear me. And just one point. I really think that the question - we need to be careful with the word. ACs are advisor to the Board.

They can participate the discussion of the community. They can come with any arguments but they are not - even if they are not participating, in this case the GAC, the final decision they can participate to any discussion.

And it's not - they are not providing any advice. They're participating. They are participants. I would like very much that we leave the advice to the Board and we find other words to talk about what is happening within the community discussion. Thank you.

Thomas Rickert: Thanks Sebastian. Any further interventions? Okay I think with that we can close this call. Holly?

Holly Gregory: Yes. I just want to say in light of the progress that's been made I just want to confirm whether or not you still need our responses to those questions in writing.

My sense is in a way that we've moved on and you've addressed the implementation issues and our confirmation that the questions you posed are not really legal issues.

I just want to not undertake the writing of a response if it turns out that you no longer really need that. I see on the chat that people are saying yes they would like the responses in writing so we will go forward I take it Thomas.

Thomas Rickert: Thanks Holly. I was just pausing for a second to see more responses on the chat bar. I guess it's important for the governmental representatives in particular, so I suggest that you proceed with offering written responses for their information. So thanks...

((Crosstalk))

Holly Gregory: Okay. What we will focus on is that these are not really legal questions, that there is flexibility, that these are issues for the community to decide. And that will be the focus of our response.

Thomas Rickert: Yes and I would ask you to keep it brief.

Holly Gregory: We will.

Thomas Rickert: As someone has mentioned, you know, these are not really legal questions but I guess that for consultations by participants of this group with their respective governments or groups it would be valuable to get some independent view on what the options are, and maybe more importantly that all the options can be legally agreed upon or enshrined in the bylaws. So thanks for that Holly.

Holly Gregory: Okay.

Thomas Rickert: So I think we do have a way forward. We have concluded today that our agreement from last Thursday still stands. There is no objection to keeping that compromise language and relaying it to the respective groups.

We have added some qualifications to that compromise language, which I have repeated a few minutes back. We will put that into one document for everyone's review.

And we will then take this language to the group tomorrow to hopefully be able to confirm our consensus on this as a group, while you go to your respective groups and seek an answer to the question whether there is objection to this updated recommendation or not so that we see clearer.

I would like to thank all of you for this fruitful discussion in a very collaborative spirit. I think we or I do hope sincerely that we've been able to clarify and respond to some of the concerns that have been raised particularly by government representatives.

And I hope that you share my view that this is helpful and helping to convey what the essence of this compromise is so that we can hopefully confirm it for our new report.

Thanks everyone. Have a great day. Have a great afternoon or evening  
wherever you might live - might be living. Take care and bye for now.

END