



## Minutes BC Closed Meeting – ICANN 47 Durban

Monday 15 July 2013 at 12:00 local time

### BC Attendees:

Phil Corwin  
Elisa Cooper  
Steve DelBianco  
Ron Andruff  
John Berard  
Stéphane Van Gelder  
Sarah Deutsch  
Marie Pattullo  
Anjali Hansen  
Martin Sutton

Frederick Felman  
Aparna Sridhar  
J. Scott Evans  
Ayesha Hassan  
Stephanie Duchesneau  
Nao Matsukata  
Elizabeth Sweezey

### Remotely:

Benedetta Rossi, BC Secretariat

### Elisa Cooper:

- Elisa introduced the meeting by noting that the purpose of this closed BC Session was to focus on ICANN’s Strategic Plan. However, other top priorities have risen in the last few days in regards to policy, so Elisa will turn it over to Steve DelBianco to discuss these issues. All right. Well, thank you to everyone for joining today. This is a closed session but it will be recorded, so please do use the microphone.

### Steve DelBianco:

- Steve introduced the topics of discussion:
  - A. a potential item on GAC Advice, including a proposed BC position proposed this morning in Durban and circulated on the BC Private mailing list.
  - B. Jeff Neuman, Registry Constituency, proposed a motion that will be voted on the GNSO Council meeting on Wednesday and it’s a motion which BC officers and many BC members have concerns about and needs to be discussed.
  - C. Ayesha Hassan asked to discuss Fadi Chehade’s five panels.



## **1. Proposed BC Position Submitted by J. Scott Evans, Yahoo, Inc and Fred Felman, MarkMonitor**

### Steve DelBianco:

- J. Scott Evans and Fred Felman proposed for the BC to submit a position during the CSG Meeting which took place in Durban on Sunday, July 14<sup>th</sup>.
- Steve gave J. Scott and Fred the opportunity to walk members through their rationale for the position. Once this has been done the BC will have a discussion period, and Steve, as BC Policy Coordinator will submit background information on the subject.

### J. Scott Evans:

- J. Scott presented the proposed BC position noting that the problem the BC has is that some of the geographics are registered trademarks, but the countries that have brought up complaints about them have actually granted numerous registrations for these, also on the second level domains and the country code top level domain.
- Under international law since the signing of the Paris Convention in the 1890s, there has been an argument internationally in trademark about geographic indications.
- J. Scott noted his concern regarding the fact that if the GAC allows certain countries to obtain through the ICANN process things that they cannot get in international treaty negotiations on trade and intellectual property or through their own government, a dangerous precedent would be set.
- Today it may be geographic indications, but it could be register or accreditation or other issues tomorrow.
- J. Scott believes these countries are circumnavigating their own political process.
- J. Scott noted that the BC needs to tell the board that this advice violates international law and that they should reject it based on that factual basis.
- INTA’s position has generally been that if a trademark was there first, the trademark was registered and there are trademark rights you can’t subsequently claim geographic rights in it.
- For you to assert geographic indication, you have to tie it to a particular product or service. You can’t just say, it’s our geographic indication and we own it.
- In the case of the current debates about geographics, J. Scott noted that you have to say, we are at Amazon, we sell a special wool from the Amazon region and it’s known as Amazon wool and for that reason we get this appellation of origin. That has not been stated as one of the reasons for this. It has basically been an emotional argument.

### Steve DelBianco:

- Steve asked J. Scott and Fred to explain to BC members the context of why they feel it’s critical to discuss this issue immediately in Durban, rather than going through the regular 14 day period.

# The ICANN GNSO “Business Constituency”



## J. Scott Evans:

- J. Scott explained that he believes that the face-to-face opportunities that members get whilst at ICANN meetings are the most effective, and BC members should maximize them.
- According to J. Scott, the impact of Steve taking the microphone directly in front of the Board will be more effective and will engage more board members. The board will also be able to watch the room to see other people’s reactions to Steve’s words which is equally important.

## Steve DelBianco:

- In the note that Steve circulated to BC members with J. Scott’s and Fred’s proposal, Steve indicated quotes from the guidebook about GAC. The guidebook entitles the GAC to give advice on anything they want, on any application for whatever reason.
- Furthermore, the board might cite legal concerns when they reply to and I understand that. But, the GAC is not constrained by it.
- Steve noted that J. Scott’s point appears to indicate that this is a special case, a special concern because trademark rights are at issue here.
- Steve indicated that the BC has a 14 day review period dictated by the charter. During Steve’s tenure this review period has been shortened by the Executive Committee as little as seven days. To Steve’s knowledge this has never been done in two days, like J. Scott and Fred are proposing, so Steve would like to be very cautious about this especially in regards to full participation of members who are not physically in Durban.
- The scorecard on GAC advice Steve sent out two weeks ago to BC members is particularly useful in this discussion because it delineates the fact that the GAC advice coming out of Beijing had two components. It has safeguards that were sort of in the middle section.
- And then above the safeguards they had their consensus against halal and Islam. And below the safeguard, different topics like the objections to Amazon, Patagonia and Zulu, and that singulars and plurals ought to be reconsidered.
- When the ICANN board put the GAC advice out for public comment, members might notice they did not ask for a public comment on anything other than the safeguard section.
- So that means there has not been any public comment at all on the actual advice against Patagonia, Amazon, and Zulu. There’s not been any public comment on actual advice on reconsidering plurals and singulars.
- The board has accepted the advice on Zulu, Amazon, and Patagonia, and said we’re not going to sign those contracts pending a discussion and dispute resolution. So they’re on hold right now.
- Patagonia withdrew their application on Friday July 12<sup>th</sup>.
- Steve opened up the discussion to BC members.

## J. Scott Evans:

- J. Scott made an example about geographic trademarks: in the United States champagne is considered generic. In France, however, INTA would take the position that the French government can claim champagne as a geographic indication and prevent others from registering it as a

# The ICANN GNSO “Business Constituency”



trademark because champagne is an appellation of origin for a product, a sparkling alcoholic wine product.

- J. Scott’s position would be that they were there first. When it came to the United States unfortunately, there was no Champagne region. The US took the government position that one cannot come to the United States and claim it as appellation of origin here, it’s a generic term like you would see in the dictionary.
- Amazon has registrations all over the world. They have 15 registrations issued by the government of Argentina. They’ve been down there for 20 years and have a multimillion dollar business in Argentina. So you can’t come in now and claim it as something it was never been before. And that’s Yahoo’s position.

## Ron Andruff:

- Ron noted that the GAC’s interest with the new gTLD committee is the public interest and that they have to protect the citizens and the aspects of their nation and population.
- The BC’s interest is protecting user interest.
- Ron noted that what he is hearing now is an argument for trademark rights, which in Ron’s view should be taking place in the IPC, not the BC.
- Ron noted that he appreciates J. Scott’s point of view, but that in the examples he drew Ron did not see an interest or support of business users.
- He also noted that this discussion could put the BC’s relationship with the GAC on a slippery slope after years of working collegially and consistently to develop and work closely with ICANN.
- Finally Ron noted that he is not comfortably with attempting to fast track this position when there is only about 20% of the BC membership present.

## Marie Pattullo:

- Marie did not state her support or lack of support to the proposed BC position, and will need to consult with AIM’s members to do so. In the meantime she noted that the example brought forward regarding champagne should not be used since Champagne is a geographical region in France.
- Marie noted that they are talking about two separate issues: the GAC seems to be suggesting that the local town council of Champagne should prevent somebody using the word champagne but it has nothing to do with the geographical indication on the European rule.

## Elisa Cooper:

- Elisa noted that it is not the BC’s role to be blindly supportive of the GAC. The BC, historically, has been very supportive of the GAC, and Elisa would like this to continue. However in an instance where the BC sees an issue, they should speak up in a way that will not anger the GAC.
- The BC has its concerns, and they should be voiced.
- Elisa noted that someone asked whether this issue was even in the BC’s mission or in the Charter; part of the BC’s mission is to make sure that the Internet is a safe place for users and for consumers



to engage with businesses. Elisa noted that Amazon is one of the top 10 most highly trafficked websites in the world. For Amazon to have their own top level domain where a consumer could engage with them and know for certain that they are engaging with a legitimate Amazon, would provide a lot of potential security and safety for consumers.

## Marilyn Cade:

- Marilyn noted that there have been many times when the BC disagreed with the government and there will be many times when the BC will disagree in the future when they have a broadly agreed position that is taken after due consideration by all of BC members.
- Marilyn is strongly opposed to making a shortened decision on this for several reasons.
- There are a number of differences of view within the Business Constituency both about the priority of this issue, its implications and steps to take to fully understand it and rise to the level of calling for a vote and calling for a discussion.
- Marilyn does not support a shortened vote on this, but does not object to a statement which states that the BC urges ICANN to put GAC advice after public comment and that the BC appreciated the unique breakthrough where much of the previous GAC advice was put out for public comment and we would like to see the communiqué in the future for public comment.
- Another issue that Marilyn noted is that some BC members have interests regarding this topic. When it comes to the ICANN Board, when one of the members has a conflict they cannot be in the room to discuss the topic. The BC does not have this requirement and Marilyn did not suggest adding it. However she noted that there is a lack of clarity within ICANN about how conflicts of interest are dealt with. And within the BC Marilyn believes they could run into tense discussions about differences of views on this particular topic.

## Elisa Cooper:

- Elisa added to her previous statement by noting that she has a conflict on the matter since Amazon is a MarkMonitor client. However, she noted that she would have made the same statements even if it wasn't the case.

## Fred Felman:

- Fred responded to Ron Andruff's questions and concerns regarding this issue.
- He noted that MarkMonitor has a conflict of interests since they represent Amazon as a registrar. They do not represent Amazon with respect to their extension and derive minimal income from that. Therefore MarkMonitor does not have a conflict with respect to their application.
- Fred noted that he sees this issue as a business user issue and does not want this issue to set a bad precedent, as J. Scott previously mentioned.
- In regards to showing respect and collegiality with the GAC, Fred believes that responding to the GAC's advice, even when disagreeing, does actually show respect for the GAC.

# The ICANN GNSO “Business Constituency”



- This is an opportunity to actually help the GAC understand business’s point of view, which Fred sees as the role of the BC within the GNSO.
- Fred noted he understands that the full BC membership is not represented in Durban and there’s a small percentage of the membership present. As J. Scott noted, it would be a good idea for the BC to say that they would like an opportunity to comment on this and some of the other issues that are of importance to the business community. This would be a good compromise.

## Steve DelBianco:

- Steve asked BC members to express their opinion on J. Scott’s new proposal which is to simply ask the board at the public forum to post for public comment, understanding that the BC would give examples which would include the singular plural issue, and the notion of GAC advice against trademark terms that have geographical significance.

## Marilyn Cade:

- Agreed with this proposal, noting that it would make sense for the BC to work on a potential position with the normal 14 day period.

## Ron Andruff:

- Agreed with this approach on the basis that the wording of the statement shows that the BC will not fight the GAC on this issue.

## Steve DelBianco:

- Steve mentioned to J. Scott that the BC will not start the 14 day period, and will not restart the proposal until J. Scott provides members with a package of materials on this issue on the BC list.
- Steve is confused about whether this issue would actually create a precedent or not, and this is the point he is asking J. Scott to address in particular with some background.

## Ayesha Hassan:

- Thanks Steve. Just to be very clear, I will not be able to go back to my membership and build consensus to give BC input. So this is not about what ICC might come in with or take a position on this because we just won’t take positions.

*For more information regarding this discussion please refer to the transcript.*



## 2. Fadi Chehade’s Five Panels – Ayesha Hassan

### Ayesha Hassan:

- Ayesha noted that Fadi Chehade mentioned the five panels the day before the meeting, and it is clear that some leadership roles have been assigned for the panel.
- Besides that there was not a lot of information detailed about how the community will fill the seats on those panels.
- Ayesha thinks it is an interesting initiative, but is curious to know if informally this week they can get more information about how the panels will work or what the thought process is for them.
- Ayesha also wanted to bring this up to see what other BC members think about this approach in general so that as these topics are addressed during the week in Durban, everyone can have BC perspectives in mind.

### J. Scott Evans:

- J. Scott suggested to Ayesha that if this is a question she would like answered, a letter should be drafted to make sure a response is given in writing.
- Once a written answer is received, the BC can fully understand the functioning of this, and decide how they are going to contribute or if they want to have comment on it.

### Marilyn Cade:

- Marilyn noted that she too does not know enough about this topic to know whether she has concerns or not, as Ayesha Hassan and Ron Andruff mentioned.
- Marilyn added that this is a good example though of the idea that the community needs to hit the slow button on a few initiatives that are not so critical.

### Ron Andruff:

- Ron noted that he heard there will be seven people on each of the committees.
- He does not know how these members will be selected, on what criteria, but it seems like a small number. Unless they will be selected to represent each Stakeholder Group, in which case Ron is supportive.

**ACTION ITEM:** Ayesha Hassan and Ron Andruff will draft a letter addressing this question.

The meeting was adjourned.