

August 5, 2011

**Comments on the Final Report of the ICANN Board of Directors/GAC
Joint Working Group on the Review of the Role of the GAC**

EXECUTIVE SUMMARY

The Final Report of the Joint Working Group on the Review of the Role of the GAC¹ (Final Report) contributes several thoughtful and productive recommendations that would substantially improve the relationship between the ICANN Board of Directors (Board) and the Governmental Advisory Committee (GAC). At the heart of the JWG's analysis lies the problem of integrating the GAC more effectively into ICANN's policy-making processes. That problem comprises several obstacles, including misunderstandings about the GAC as an organization of nation-state representatives, the restriction on GAC advice in ICANN's bylaws and the GAC's Operating Principles, and a lack of equitable support for the GAC. Certain recommendations, if implemented, offer promising means of resolving this problem:

- ♦ Experiment with reverse liaisons, where each SO and AC assigns members from their respective constituencies to liaise with the GAC.
- ♦ Clarify that the GAC liaison is not the only mechanism for informing the GAC of the Board's interest in seeking its views.
- ♦ Create a Board liaison to the GAC.
- ♦ Assign a senior ICANN staff member to coordinate with the GAC liaison.
- ♦ Encourage ICANN policy staff to interact with the GAC and its members more routinely.
- ♦ Consider amendments to the ICANN bylaws and GAC Operating Principles clarifying that the GAC may deliver advice to SOs and ACs as well as the Board.
- ♦ Create a register indicating whether and how particular GAC advice was taken into account by the Board.
- ♦ Institute a process for the Board to regularly notify the GAC of proposals that contain public policy issues.
- ♦ Increase the number of face-to-face meetings between the Board and the GAC.

¹ Internet Corporation for Assigned Names and Numbers (ICANN) Board of Directors/Governmental Advisory Committee (GAC) Joint Working Group (JWG) on the Review of the Role of the GAC, Final Report, June 19, 2011, available at <http://www.icann.org/en/committees/board-gac-2009/board-gac-jwg-final-report-19jun11-en.pdf>.

COMMENTS

These comments are submitted in response to ICANN's request for public comments regarding the Final Report.

Summary of the Final Report

JWG's Final Report approaches its review of the GAC's role in terms of six objectives: (1) "GAC advice to the Board;"² (2) "GAC liaisons to the ICANN Board and Nominating Committee;"³ (3) "GAC liaisons to the ICANN Supporting Organizations and Advisory Committees;"⁴ (4) "Support of GAC activities;"⁵ (5) "Ways for governments to be informed about ICANN;"⁶ (6) "GAC interaction with ICANN Board and community."⁷ Under each of these rubrics the Report describes the current relationship and the sources of some of its challenges and offers recommendations for improvement. The following analysis focuses on certain recommendations, as they inform the problem of integrating the GAC more effectively into ICANN's policy-making processes.

Analysis

The problem of improving the GAC's integration into ICANN's bottom-up policymaking is one of the Final Report's most consequential themes. From one perspective, this challenge comprises several obstacles produced by misunderstandings about the GAC as an organization of nation-state representatives, the restriction on GAC advice in ICANN's bylaws and the GAC's Operating Principles, and a lack of equitable support for the GAC.

1. Misunderstanding the GAC

Misunderstandings about the GAC continue to form (and deform) its interactions with the Board and with the ICANN community at large. An especially significant misunderstanding centers on the GAC's nature as an organization of sovereign states.

[M]any on the Board and in the broader ICANN community appear to value having a government "perspective" on pending issues and seem comfortable with the idea that a representative from one government can provide such a perspective. From the GAC's perspective, the views of a single government cannot be substituted for the views of another government or for the GAC.⁸

This point was considered significant enough to repeat it—twice.⁹

² *Id.* at 1.

³ *Id.* at 5.

⁴ *Id.* at 8.

⁵ *Id.* at 10.

⁶ *Id.* at 14.

⁷ *Id.* at 15.

⁸ *Id.* at 5.

⁹ *Id.* at 7 (stating that "the essential challenge for the GAC membership remains: this particular liaison [to the NomCom] cannot represent the views of the GAC membership as a whole"); *id.* at 9 (noting that "no single GAC

JWG went on to explain the GAC's inability to accept representation by any member or group of members. "Each GAC member is responsible for representing their own government's views and each GAC member participates in the GAC and in the broader ICANN community deliberations in their official capacity as the representative of their respective governments."¹⁰ As the Final Report noted, "[t]his representational function appears to differ from other SOs and ACs, whose members often participate in deliberations in their personal capacities."¹¹

National sovereignty prevents the GAC from speaking or acting with authority through individual members. Members of other ACs and SOs may speak or act in their personal capacity, but members of the GAC have authority to speak or act only as representatives of national governments. Opposing this principle for reasons of simplicity, custom, or convenience is pointless. The principle of sovereignty prevents any nation state from delegating its authority to another.

Misunderstanding the GAC's character as an organization of nation-state representatives poses an obstacle to integrating the GAC into ICANN's policy deliberations. Much of ICANN's policy development is performed by working groups and other subsets of ACs and SOs, and those groups comprise members authorized to represent their organizations. Expecting the same capacity from the GAC simply invites frustration. A single GAC member cannot represent the GAC; she can only express the GAC's views to the extent that the GAC has authorized her to do so. That the member in question chairs the GAC makes no difference. It bears repeating that the only opinions that an individual GAC member can offer consist of the position of her own government as she has been authorized to express it, or the GAC's position if one exists and its communication is authorized. No more.

Any effort to improve relations between the GAC, the Board, and the rest of the multi-stakeholder community must start from the premise that the GAC's capacity to interact with the community through its individual members is sharply limited by the principle of national sovereignty.

JWG's recommendation to "[c]onsider experimenting with 'reverse' liaisons, with each SO and AC identifying members of their respective constituencies to liaise with the GAC"¹² holds real promise for integrating the GAC while respecting the principle of national sovereignty. No other SO or AC labors under the restrictions of national sovereignty borne by the GAC; each can delegate liaisons to meet with the GAC, where they can solicit information from the GAC as a whole and inform the GAC of their organizations' policy positions. Given the possibility of markedly improving information flow by reversing the polarity of the liaison assignments, this experiment ought to be tried.

Similar reasons support the JWG's analysis of the GAC liaison to the Board. Especially trenchant are its recommendations to clarify that the GAC liaison is not the only

member can 'represent' the GAC and the risk remains that the SSAC may consider the participation of the 'GAC liaison' as reflecting the views of the broader GAC membership").

¹⁰ *Id.* at 5-6.

¹¹ *Id.* at 6.

¹² *Id.* at 10.

means of informing the GAC of the Board's interest in seeking its views, to "[c]omplement the GAC liaison to the Board with a Board liaison to the GAC," to assign a senior ICANN staff member to coordinate with the GAC liaison, and to encourage ICANN policy staff to "interact more routinely with the GAC."¹³ Each of these ideas would strengthen the relationship between the GAC and the Board while respecting the national sovereignty by which the GAC and its members are bound.

2. Restrictions on GAC Advice

Another obstacle to integrating the GAC into ICANN's policymaking apparatus is the sharp limitation on its authority to deliver advice. Both the ICANN bylaws and the GAC's own Operating Principles authorize the GAC to deliver advice only to the Board.¹⁴ JWG underscores this point,¹⁵ stating that "the Bylaws refer to the GAC advising the Board, without explicitly referring to GAC inputs into broader policy development."¹⁶

This limitation ought to be reconsidered. It fails to account for how ICANN conducts its bottom-up policy development and how the GAC might contribute to that development. That process is iterative, as JWG notes,¹⁷ and the iteration often occurs outside the Board's purview in ACs and SOs. Yet the bylaws and Operating Principles contemplate that GAC advice is delivered to the Board exclusively. That exclusivity frustrates any effort to integrate the GAC into ICANN's iterative policy development. Limiting GAC advice to the Board appears to rest on the principle of respect. Presumably it was thought that the national sovereigns composing the GAC should be obligated to deliver their advice only to ICANN's ruling body. To an extent, the intuition behind that policy is understandable: government representatives should be accorded appropriate respect within ICANN's multi-stakeholder community. But the bylaws and Operating Principles appear to preserve the exclusivity of the GAC's advice-giving relationship with the Board at the expense of its participation as a full and active member of ICANN's stakeholder community.

Even where the bylaws and Operating Principles expressly authorize the GAC to deliver advice, defects in communication between the GAC and the Board detract from its effectiveness. The Board routinely fails to notify the GAC of proposals "raising public policy issues," as required by the bylaws.¹⁸ Also, the Board too often acknowledges the GAC's

¹³ *Id.* at 6-7.

¹⁴ See Bylaws for Internet Corporation for Assigned Names and Numbers art. XI, § 2.1(i) (as amended June 24, 2011) (Bylaws) ("The Governmental Advisory Committee may put issues to the Board directly, either by way of comment or prior advice, or by way of specifically recommending action or new policy development or revision to existing policies."); Internet Corporation for Assigned Names and Numbers, Governmental Advisory Committee (GAC) Operating Principles, Principle 2 (rev. Mar. 2010), available at http://gac.icann.org/system/files/GAC_Operating_Principles_1.pdf ("The GAC shall provide advice and communicate issues and views to the ICANN Board.").

¹⁵ See Final Report at 2 ("It is also worth noting that the Bylaws call for GAC advice to go solely to the Board, rather than to the other Supporting Organizations and Advisory Committees.").

¹⁶ *Id.* at 15.

¹⁷ *Id.* ("Policy development at ICANN is an iterative process.").

¹⁸ Bylaws art. XI, § 2.1(h).

advice when disagreeing with it or seeking clarification; the GAC is often left in the dark about how the bulk of its advice is used—if at all.¹⁹

Amendments to the bylaws and GAC Operating Principles should be considered, clarifying that the GAC may deliver advice to SOs and ACs as well as the Board. Although this measure was not recommended by the JWG, it is intimated by the Final Report's acknowledgment of restrictions on the GAC's authority to communicate its advice.

JWG's recommendation to create "a transparent register or consistent record to make apparent whether/when/how the Board has taken into account and/or responded to particular advice from the GAC"²⁰ deserves to be implemented. It would improve communications between the Board and the GAC by informing the GAC of how its advice contributes to the Board's decisions on matters affecting public policy. Devising a process "for formally notifying the GAC of pending issues and policy development processes of potential interest to the GAC"²¹ seems long overdue, given the Board's obligation under the bylaws to so inform the GAC. Face-to-face meetings between the Board and the GAC proved to be effective during the final stages of refining the procedures for new gTLDs. JWG's recommendation to increase their frequency would take advantage of this hard-won experience.²²

3. Equal Support for the GAC

As part of integrating the GAC more effectively into ICANN's multi-stakeholder community, the JWG recommends that "ICANN provide the GAC with support comparable to that provided to other SOs and ACs."²³ In particular, it has requested "translation of pertinent GAC documents into the five UN official languages, and interpretation in 2012 of GAC meetings into French, Spanish, Portuguese, plus the language of the host country, with a long term goal of interpretation into all five UN official languages."²⁴ The GAC has also asked for ICANN to "provide funding in fiscal year 2012 for up to 20 members per meeting per fiscal year."²⁵ These recommendations for parity in funding and support should be adopted enthusiastically. They are essential to ICANN's identity as a multi-stakeholder organization whose impact is global.

Conclusion and Recommendations

JWG should be complimented for a Final Report containing several thoughtful and productive recommendations and intimating still others. Among them the following, once

¹⁹ Final Report at 3 ("If the Board only acknowledges GAC advice when disagreeing, seeking clarification or revision to GAC advice, it is not possible for the GAC to know what the Board intends to do with all the advice received.").

²⁰ *Id.* at 4.

²¹ *Id.*

²² *See id.* (recommending that "the Board and the GAC schedule more routine face-to-face exchanges on pending substantive matters that raise public policy issues").

²³ *Id.* at 14.

²⁴ *Id.* at 11.

²⁵ *Id.*

implemented, appear to promise the greatest impact in resolving the problem of integrating the GAC more effectively into ICANN's policy-making processes:

1. Experiment with reverse liaisons, where each SO and AC assigns members from their respective constituencies to liaise with the GAC.
2. Clarify that the GAC liaison is not the only mechanism for informing the GAC of the Board's interest in seeking its views.
3. Create a Board liaison to the GAC.
4. Assign a senior ICANN staff member to coordinate with the GAC liaison.
5. Encourage ICANN policy staff to interact with the GAC and its members more routinely.
6. Consider amendments to the ICANN bylaws and GAC Operating Principles clarifying that the GAC may deliver advice to SOs and ACs as well as the Board.
7. Create a register indicating whether and how particular GAC advice was taken into account by the Board.
8. Institute a process for the Board to regularly notify the GAC of proposals that contain public policy issues.
9. Increase the number of face-to-face meetings between the Board and the GAC.

Implementing these recommendations would improve the relationship between the Board and the GAC, a relationship essential to the success of the multi-stakeholder model of DNS governance.