



21 December 2015

**CCWG-Accountability Draft Proposal on Work Stream 1 Recommendations;
Recommendation # 11: Stress Test 18**

Valideus provides new gTLD consultancy and registry management services to prospective and existing new gTLD registry operators, and co-ordinated over 120 applications for new gTLDs, on behalf of a number of applicants, all of whom are owners of global brands. We welcome the opportunity to comment on the CCWG-Accountability's Draft Proposal on the Work Stream 1 Recommendations, and specifically on Recommendation # 11 dealing with Board obligations with regard to Governmental Advisory Committee (GAC) Advice.

Whilst we very much appreciate the hard work of all members of the CCWG-Accountability, we do have concerns about the current language of Recommendation #11, which can be summarised as follows:

- We believe that the change to allow the Board to reject GAC advice only by a 2/3 vote was added too late in the process and should be moved to Work Stream 2. This issue was thoroughly considered and rejected by the community in 2014 and, we believe, requires more stress tests before such a change could be implemented.
- The new language defines GAC consensus as the absence of a "formal objection", but leaves the definition of "formal objection" open to definition (and change) through the GAC operating principles. Changing the definition of "formal objection" could have the effect of changing the level of governmental support that GAC consensus advice must receive. Although the example used in Recommendation #11 is of disallowing a single country to continue an objection on the same issue if no other countries will join that objection, this is not a limitation on the GAC autonomy. It is conceivable that the GAC might in future change its operating procedures to exclude even the views of more than a single country. By doing so, therefore, there could be "consensus advice" (thus afforded the 2/3 voting threshold) which is not supported by a minority of countries, but where those countries' objections are no longer deemed to be "formal objections" under the GAC operating principles and thus are discounted.
- Although there is a note in the draft regarding the provision of clear advice supported by a rationale for all Advisory Committees including the GAC, we believe that this note falls far short of being an obligation to this effect and, currently, has no impact on the deference to be afforded to such advice.

Our preference at this time would be not to introduce a 2/3 threshold for the Board to reject GAC consensus advice, but to retain the current standard.

If a consensus emerges which supports this alteration, however, then we strongly urge that the following additional criteria be enshrined in the ICANN Bylaws, as being essential for any such advice which is subject to the 2/3 threshold:

1. That the advice must be GAC consensus advice, meaning general agreement in the absence of any formal objection **as this term “formal objection” is currently understood** based on the operating procedures in effect as at 21 December 2015. The note regarding the refinement of operating procedures should be deleted;
2. The advice must be clear and must be supported by a **properly reasoned, written rationale which the Board understands**;
3. The GAC **certifies that it is not aware** of any national or international law or treaty which the advice would contravene;
4. The higher threshold would only apply where **the GAC advice truly involves a matter of “public policy”**;
5. That the Board would not be required to follow any GAC advice where the Board determines that to accept it would be a **breach of the fiduciary duties of the Board to the corporation or would otherwise violate another provision of the Bylaws** and;
6. Where GAC advice is contrary to GNSO or ccNSO advice and where such advice is also properly under the jurisdiction and scope of the GNSO and/or ccNSO, such **GAC advice cannot override other provisions of the ICANN Bylaws requiring consultation** with the applicable Supporting Organizations.

Whilst we acknowledge that the GAC has autonomy over its own operating procedures, there should be greater responsibility attached to the giving of GAC advice if it is to be afforded the higher degree of deference by the Board arising from a required 2/3 threshold to reject. Advice which does not meet these criteria should not be afforded the same level of deference by the Board.

Thank you for considering these points.

Yours sincerely,

/s/

Susan Payne
Head of Legal Policy
Valideus Ltd