The ICANN GNSO "Business Constituency"

Comment on proposed bylaws change for board consideration of GAC advice

Status: FINAL

Version: 1

5-Oct-2014

Business Constituency Submission

GNSO//CSG//BC

Background

This document is the response of the ICANN Business Constituency (BC), from the perspective of business users and registrants, as defined in our Charter:

> The mission of the Business Constituency is to ensure that ICANN policy positions are consistent with the development of an Internet that:
> 1. promotes end-user confidence because it is a safe place to conduct business
> 2. is competitive in the supply of registry and registrar and related services
> 3. is technically stable, secure and reliable.

ICANN Business Constituency Comment on Proposed Bylaw Revision

The ICANN Business Constituency (BC) welcomes this opportunity to comment on the proposed revision to the ICANN Bylaws to require two-thirds of the voting members of the ICANN Board to vote to act in contravention of advice formally provided by the Government Advisory Committee (GAC).

The BC has two main concerns regarding adoption of the proposed revision at this time.

First, because ICANN is currently conducting a review of its accountability processes as part of the U.S. Government's transition of their stewardship role over the Internet Assigned Numbers Authority (IANA) and subsequent organizational and accountability review in conjunction with this transition, the community should not be considering changes to the Bylaws, and the proposed amendment should not be adopted at this time.

Given this issue regarding timing, ICANN should, at this juncture, focus on how the GAC or governmental stakeholders writ large can be more involved earlier in the Policy Development Process (PDP).

Background

Generally, the GAC advises ICANN on activities that are of concern to governments, particularly on matters that relate to international agreements or public policy issues. Current ICANN Bylaws require a simple majority (50% + 1 vote) of the Board to take action inconsistent with GAC advice.

Following a recommendation of the first Accountability and Transparency Review Team (ATRT), the ICANN Board and GAC formed the Board-GAC Recommendations Implementation Working Group (BGRI). The BGRI developed a process for addressing GAC Advice, which included raising the bar for ICANN to reject GAC advice by requiring two-thirds of the voting members of the Board. The BGRI agreed to this process change on April 7, 2013. A second ATRT reviewed the BGRI's work in 2013 and recommended that ICANN adopt the proposed Bylaws revision to codify and formalize this process change. In June 2014, the BGRI sent these proposed Bylaws revisions to the Board for consideration, and on July 30, 2014, the Board approved the opening of a public comment period to adjudicate these revisions.

ICANN has just begun the Enhancing ICANN Accountability Process, so now is not the time for this bylaws change.

On August 14, 2014, ICANN announced the Enhancing ICANN Accountability process. This process calls for

"an examination, from an organizational perspective, of how ICANN's broader accountability mechanisms should be strengthened to address the absence of its historical contractual relationship with the [United States Government], including looking at strengthening existing accountability mechanisms."

The accountability process sets up two community groups on accountability and governance:

1) An ICANN Accountability and Governance Cross Community Group (CCG); and

2) An ICANN Accountability and Governance Coordination Group (CG).

The proposed CCG would identify issues for discussion or improvement, appoint participants to the CG, and provide input. The CG is a smaller group that would prioritize issues identified by the CCG, build solution requirements for those issues, and issue final recommendations.[1]

Given that this accountability process has only recently begun and its final recommendations have the potential to impact ICANN in a broad range of ways, the BC feels strongly that any subsequent changes to the Bylaws should wait until after the adoption of the improved accountability mechanisms, and we therefore oppose adoption of the proposed amendment at this time. This approach ensures that the two groups are not working at cross-purposes and rather a coordinated approach to enhancing ICANN accountability across the entire organization is taken.

The stated goals of the CCG and the CG are to operate in an open, transparent, and inclusive process with stakeholders to ensure that ICANN remains accountable and to identify new mechanisms for ICANN accountability. ICANN should allow these groups (or whatever process is ultimately decided on by the community) to consider ICANN's current accountability mechanisms and issue recommendations before ICANN adopts this new revision to the Bylaws, which will fundamentally alter interactions between GAC and the Board.

Furthermore, we note that the BC proposal for Enhancing ICANN Accountability (link) proposed a number of "stress tests" for analyzing ICANN's accountability mechanisms. One such "stress test" in our proposal was based upon the GAC changing its procedures from the "UN consensus" model to a simple majority voting system. The proposed Bylaws change should not be instituted until the manner in which GAC voting procedures can be modified is fully considered as part of the larger accountability review.

Instead of making changes to the procedure for overruling advice of GAC, ICANN should focus on how the GAC can be involved earlier in the Policy Development Process.

The proposed revision to the Bylaws addresses the process for when the GAC has an objection toward the end of the Policy Development Process (PDP). However, ICANN should instead be focusing on how to get government stakeholders involved earlier in the PDP.

ICANN has begun addressing this issue by establishing the GAC-GNSO Consultation Group on GAC Early Engagement in Policy Development Processes (Consultation Group). The GAC has already agreed to several proposals of the Consultation Group, including appointing a GNSO liaison to the GAC, providing liaison support through existing GNSO PDP liaisons, surveying GAC members for early awareness of policy issues that may interest GAC, and further analysis of how GAC involvement could be managed.

---

[1] The appropriateness of this process formulation is currently the subject of a separate public comment period and will not be the focus of this comment.

At the Consultation Group's meeting on September 9, 2014, the GNSO Council appointed Mason Cole as the GNSO liaison to the GAC until June, 30, 2015, at which point the liaison role will be reviewed and assessed.

This effort to incorporate government stakeholders into the PDP process earlier should be continued and improved upon instead of concentrating on changing voting processes to adjudicate advice issued at the end of the PDP. It is important to see how the GAC's earlier participation in the PDP works before knowing whether this revision to the Bylaws is necessary. If GAC participation in the PDP is increased earlier in the process, then the proposed revision to the Bylaws may become unnecessary or inappropriate.

Thank you for your consideration of these comments.

--

These comments were drafted by Brian Huseman with help from Aparna Sridhar, Phil Corwin, David Fares, and J Scott Evans. John Berard and Marilyn Cade also provided input.

 It was approved in accordance with the BC charter.