**Comments on Proposed Bylaws Changes Regarding Consideration of GAC Advice**

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We write in response to the request for comments to the [Proposed Bylaws Changes Regarding Consideration of Governmental Advisory Committee (GAC) Advice](https://www.icann.org/public-comments/bylaws-amend-gac-advice-2014-08-15-en) that would institutionalize an obligation for the Internet Corporation for Assigned Names and Numbers (ICANN) Board of Directors to adopt advice from the GAC unless two-thirds of the Board votes to disapprove the advice. The underlying principle guiding Board consideration of this proposal should be opposition to any change that would erode the independence of ICANN and empower governments within the decision-making process. In our judgment, the proposed bylaw amendment is fundamentally misconceived in that it (a) wrongly equates GAC advice to that of the Generic Names Supporting Organization (GNSO); (b) risks GAC control of Board functionality; and (c) is inconsistent with the requirements that the U.S. government has placed on the Internet Assigned Numbers Authority (IANA) transition. The bylaw proposal should be rejected.

**Current Status and the Proposal**

Under current arrangements, national governments use the GAC as a forum to discuss concerns about ICANN policy and issue advisory recommendations and advice to the ICANN Board. The [ICANN bylaws](https://www.icann.org/resources/pages/bylaws-2012-02-25-en) empower the GAC to “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.” GAC advice can take many forms, including by way of a letter from the GAC Chair on behalf of the GAC, communiques or submissions endorsed by the GAC, or formal documents.

The Board takes GAC advice seriously and has rarely (if ever) rejected it unless a substantial majority of the Board is in opposition. Officially, however, GAC advice is not privileged aside from the fact that the Board must take it into account and may reject it by majority vote. Specifically, as stated in the bylaws, if the Board “determines to take an action that is not consistent with the Governmental Advisory Committee advice, it shall so inform the Committee and state the reasons why it decided not to follow that advice. The Governmental Advisory Committee and the ICANN Board will then try, in good faith and in a timely and efficient manner, to find a mutually acceptable solution.” If a compromise cannot be reached, “the ICANN Board will state in its final decision the reasons why the Governmental Advisory Committee advice was not followed.”

The proposed amendment to the ICANN bylaws would enhance the GAC’s formal authority. Under the proposed bylaw amendment, the threshold for the Board to reject advice from the GAC would be increased from a simple majority to two-thirds of the Board’s voting members. Thus, if the bylaws are amended, binding internal ICANN rules would oblige the Board to accept the recommendation of national governments unless a supermajority votes to reject that advice.

**The Proposal Is Flawed**

In our judgment, the proposed bylaw amendment is fundamentally flawed for three reasons:

***Wrongful Equation of GAC Advice to GNSO Recommendations:***One argument for the bylaw change is that the ICANN bylaws currently give favored status to supermajority recommendations from the GNSO Council. The bylaws state that a policy recommendation from the GNSO Council, approved by a GNSO supermajority vote, “shall be adopted by the Board unless, by a vote of more than two-thirds (2/3) of the Board, the Board determines that such policy is not in the best interests of the ICANN community or ICANN. If the GNSO Council recommendation was approved by less than a GNSO Supermajority Vote, a majority vote of the Board will be sufficient to determine that such policy is not in the best interests of the ICANN community or ICANN.”

The GAC asserts that its advice should be no less privileged than that of the GNSOs, but that assertion rests on a false equivalence. The advice of the GNSO Council is the product of bottom-up development from multiple stakeholders and therefore carries the presumption of legitimacy that comes from the vetting that attends that process. By contrast, GAC advice is the product of hierarchical top-down direction from sovereigns, a process that is inconsistent with ICANN’s commitment to a multi-stakeholder model.

To be sure, governments are also constituents of ICANN, and if they were to participate in the development of policy through the GNSO structure, their input would have the imprimatur of the multi-stakeholder process. But standing alone, outside the process, GAC advice does not have such an imprimatur of legitimacy. To the contrary, it is, in effect, an effort to have a last-word veto and is fundamentally counter to ICANN’s commitment to a multi-stakeholder decision-making process.

***Risk of GAC Control of Board Functionality:***By raising the threshold for rejecting GAC advice, the proposed bylaw change inappropriately enhances the authority of the GAC vis-à-vis the Board. Since the establishment of ICANN, the U.S. federal government has expressed its intent to make governance of the Domain Name System (DNS) fully private. Government advice is critically important, as is the advice of other constituents, but the power of governments is such that care must be taken that they not swamp input from other constituencies.

Any proposed bylaw change ought to pass a “stress test” for unlikely outcomes that threaten to disproportionately elevate the authority of governments within ICANN. The bylaw proposal fails that test. In particular, the bylaw proposal is premised on the unjustified assumption that the current GAC internal procedure requiring it to operate by consensus will continue. Currently, the GAC can provide advice and recommendations only if there is “consensus” among governments, which is defined under Article XII of the GAC [Operating Principles](https://gacweb.icann.org/display/gacweb/GAC%2BOperating%2BPrinciples) as “the practice of adopting decisions by general agreement in the absence of any formal objection.” If consensus is not possible but the GAC still wishes to convey advice, the GAC Chair “shall convey the full range of views expressed by members to the ICANN Board.”

Were the consensus requirement to continue to be observed, it would act as a check on advice from the GAC that was not in the interest of the broader community. However, under Article XIV of the GAC [Operating Principles](https://gacweb.icann.org/display/gacweb/GAC%2BOperating%2BPrinciples), the GAC can revise its Operating Principles at any time by a simple majority of the GAC members present at the meeting at which the vote takes place. Some governments have already proposed that the consensus requirement be changed so that GAC decisions can be adopted by majority vote. It is possible, perhaps likely, that in the near future a majority of countries will modify the current operating procedures and then, under the new procedures, push through advice from the GAC that is contrary to the broader interests of the community. In such circumstances, increasing the threshold for the Board to reject GAC advice would prove to have been ill-advised. Moreover, the prospect of securing a blocking minority of Board members to support their efforts would serve to further politicize the process for selecting the ICANN Board of Directors.

***Inconsistency with the IANA Transition:*** ICANN and the multi-stakeholder community are currently grappling with a transition that will lead over the next year or so to the devolution of the IANA contract from the U.S. government to ICANN. As a condition for that transition, the National Telecommunications and Information Administration (NTIA) has set forth a number of principles, the clearest of which is its requirement that ICANN be insulated from government capture. As NTIA put it, the U.S. will “not accept a proposal that replaces the NTIA role with a government-led or an inter-governmental organization solution.” The reason for NTIA guidance on this issue is clear: Enhancing the power of governments, many of which are hostile to an open and free Internet, within ICANN poses a threat to the multi-stakeholder model, the security and stability of the DNS, the global customers and partners of the IANA services, and the openness of the Internet.

The bylaw proposal is at least in tension with, and arguably in conflict with, this requirement. Instead of moving *away* from governmental control as the U.S. government has requested, the proposed bylaw change would enhance the authority of governments within ICANN by making it more difficult for the Board to reject GAC advice.

**Proposed Solution**

The bylaw proposal is flawed and should not be adopted. Instead, the Board should (1) endorse the original U.S. federal government intent to make governance of the DNS private, (2) reaffirm its commitment to the bottom-up multi-stakeholder process, (3) reiterate that the GAC remains an advisory body, and (4) express its intention to maintain the formal authority under the bylaws to reject GAC advice on a majority vote.

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