

DNA comment on proposed ICANN Bylaw amendment regarding treatment of GAC advice

Management Summary

Bylaw changes should not be enacted lightly. Risks and different scenarios have not been considered and evaluated for the proposal to alter the ICANN bylaws to require a 2/3 voting threshold for the board to reject GAC advice. We believe that the proposed bylaw change should not be approved at this time, and wish to raise a number of concerns regarding GAC advice that must be accounted for before such a proposal could appropriately be brought forward:

- Additional clarity in the proposed change is required.
- GAC advice cannot be used as a veto for policy development work that has taken place within one of ICANN's Supporting Organizations, nor overstep the prescribed roles of these communities.
- GAC advice must be provided in a transparent fashion including the provision of a clear rationale and explanation of the public policy interest or concern the advice seeks to address.
- Procedural protections should be enacted to ensure that this additional weight is only afforded to GAC advice approved through the existing consensus structure.

I. **Bylaw changes should not be made lightly – effects and ramifications on the multi-stakeholder model must be addressed before the proposed bylaw change is considered.**

The proposed change raises a scenario where GAC advice could conceivably override GNSO or ccNSO Consensus Policy if supported by 1/3 of the Board. We are concerned that this proposed bylaw change would seriously upset the balance of interests at play in the ICANN multi-Stakeholder model. Scenarios can be developed and tested that demonstrate where this proposal can create an unworkable logjam of conflicting votes.

The ICANN Board must recognize that the GNSO and ccNSO are the designated bodies for policy development within the multi-stakeholder model. ICANN cannot allow GAC advice to act as a veto for policies developed by the GNSO or ccNSO or to unwind established policies developed by these communities. To do so puts the multi-stakeholder model at risk.

Further, the Bylaws limit the area of GAC advice for special treatment by the Board to matters of *public policy*. "Policy" is generally a *high-level strategy or guide, often stated in terms of objectives*. Currently, anything the GAC writes can be considered "advice": "GAC members have worked on the basis that *any* explicit advice, in *any* written form, constitutes the kind of advice foreseen in the Bylaws."¹ (Emphasis added.) To the extent accepting such advice requires the development of new policies or operational frameworks, such advice should be referred to the GNSO or ccNSO for the necessary policy development work to take place. The development of policies and operational frameworks affecting members of the ICANN community must continue to take place within these designated policy development bodies.

¹ <https://gacweb.icann.org/display/GACADV/GAC+Advice>

II. Clarity: The proposal is vague in some areas.

It should be made very clear that a super-majority of the ICANN Board is required only *after* the Board-GAC consultation. The ICANN revised proposal should affirm that the initial Board vote on whether the GAC advice is accepted or if additional consultation is necessary remains (and should remain) a simple majority opinion. Voting schemes should encourage dialogue, not prevent debate on contentious issues. In fact, we believe that if ANY plural number of Board members disagrees with GAC advice, that should trigger an additional consultation step as described within the ATRT recommendations. We support the introduction of such a consultation, and would argue that there should be a lower bar to enter into a consultation.

III. Flexibility must be provided for in handling GAC advice.

GAC advice is often of a general nature. Reasons might include that GAC advice is often written into GAC communiqués that are drafted under tight time constraints or that consensus can only be reached on general statements of principle. This lack of clarity can result in the need to make minor alterations to the form of such advice before it can be accepted and implemented. This considered, ICANN, the GNSO, or the CCNSO, as appropriate, must remain able to take reasonable steps to ensure that GAC advice can be operationalized and implemented.

IV. Accountability measures must be included if there is to be a heightened level of deference to GAC advice.

There should be a process for providing GAC advice that includes terms of reference or a statement of issues to be resolved. That way, the community will know which public policy issue the GAC is addressing through its advice and can also make sure any recommendations put forward are appropriate for the public policy issue at hand.

The reasoning for the GAC recommendation must be clear. Therefore, rationale must accompany GAC advice that reflects an understanding of the implications (benefits and risks) of the advice. Presently, the GAC seldom provides substantiation, backup, public record of debate, or justification when providing its advice to the Board. In addition, there should be a transparent record of the GAC discussion leading to the advice given. This would provide a record of public debate, the dissenting opinions, and a demonstration that the debate conclusions are logically linked to the outcome.

We believe that this would improve the quality of the Board-GAC consultation, and the ability of the Board to straightforwardly understand and implement the advice, as well as increase transparency to the community that is ultimately affected by the GAC advice.

V. Procedural protections should be developed or the playing field will be tilted in favor of governments.

The current GAC consensus model should not be disturbed absent some formal, open, public policy development. Currently, the GAC has adopted the United Nations model of consensus. Abandoning this model in favour of a voting model could result in a situation where a minority or highly contested position becomes mandatory. “Close calls” in GAC voting should not require a 2/3 override vote by the ICANN Board. If implemented, the proposed bylaw change should apply only to GAC Consensus advice, as defined under the existing operating principles.