



6 October 2014

### **Proposed Bylaw Change Regarding Consideration of GAC Advice**

We welcome the opportunity to comment on the proposed changes to the ICANN Bylaws which would raise the voting threshold from a simple majority to two-thirds of the voting members in order for the Board to decide not to follow the advice of the Governmental Advisory Committee (GAC). We are opposed to the proposed change for the reasons set out below.

We do not consider this to be an appropriate time at which to be making such a change to the Bylaws. ICANN is currently undergoing a review and enhancement of its accountability processes in tandem with the work on transitioning the IANA stewardship. Since the purpose of the Enhancing ICANN Accountability process is to develop effective and appropriate controls and safeguards on the exercise by the ICANN Board of its decision-making powers, and this work is ongoing, any proposal to change the Bylaws should be addressed in that context rather than in isolation.

Further, whilst we are supportive of efforts to increase the accountability and transparency of the Board, the proposed change to the Bylaws is not necessary in order to do this. Even with a simple majority voting level there is a strong presumption that GAC advice will be followed and a detailed procedure should the Board not intend to do so. Under the ICANN Bylaws, where the ICANN Board proposes to take an action that is not consistent with GAC advice, the Board is obliged to inform the GAC and explain its reasons. The Bylaws then provide for a period of good faith discussion by the Board and the GAC to attempt to find a mutually acceptable solution, before the Board could proceed to making any final decision which might reject the GAC advice.

Following recommendations from the Accountability and Transparency Review Team (ATRT1) a more formalised consultation process for attempting to find a mutually acceptable solution between the Board and GAC has already been developed, intended to run for up to 6 months, but with scope for extension. Greater certainty of process is to be welcomed. If, however, at the end of that long consultation process the Board and the GAC have not been able to find a solution then any decision by the Board to reject the GAC advice is not being taken lightly and, assuming the Board has properly consulted, the reasons for that decision should have been fully aired with the GAC. Raising the voting threshold therefore is not warranted for transparency purposes and would effectively mean that the Board would rarely, if ever, be able to reject GAC advice regardless of the timing or nature of that advice. This would afford the GAC a far more influential role in ICANN policy-making than any other advisory committee, tantamount to a veto on any issue.

We note that the second Accountability and Transparency Review Team (ATRT2) made a number of recommendations for the improvement of the accountability and transparency of the GAC's own decision making, including actions to make its deliberations more transparent, including that where deliberating on matters affecting particular entities those entities should be given an opportunity,

where practical, to present to the GAC as a whole prior to its deliberations; greater openness of GAC meetings; and, crucially, that the GAC should develop and publish rationales for its advice at the time of that advice. No change to the ICANN Bylaws should even be considered until the GAC has itself taken the necessary steps to improve its accountability and transparency in accordance with ATRT2.

Finally, whilst we strongly oppose the proposed amendment to the Bylaws, if such a change were to be made then we support the following additional criteria recommended by the Intellectual Property Constituency, which we consider to be essential:

1. That the advice must be GAC consensus advice. There has been talk of the GAC considering a move to a majority-vote model. Advice reached through such a voting model should not be afforded the same weight as consensus advice;
2. The consensus advice must be discussed and drafted and consensus reached in sessions open to all ICANN stakeholders, and must be made public;
3. The GAC must certify that its advice does not contravene any national or international law or treaty; and
4. 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 company or would otherwise violate another provision of the Bylaws.

Thank you for considering these points.

Yours sincerely,

/s/

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