



The Intellectual Property Constituency (IPC) welcomes this opportunity to provide its comments on the proposed revisions to the ICANN Bylaws that would require two-thirds of the voting members of the Board to vote to act inconsistently with advice of the Governmental Advisory Committee.

The IPC agrees with the recommendations of the second Accountability and Transparency Review Team (ATRT2) aimed at ensuring that GAC deliberations are transparent so that the reasoning, motivation and goal of GAC advice is well-understood by the Board and the ICANN Community. This proposed Bylaws revision falls short, and IPC does not support it.

As a threshold issue, the proposed Bylaws revision has implications for the ICANN accountability review process. Further changes to the Bylaws may be necessary and appropriate depending on the outcome of that process.

Such significant deference to GAC advice by the ICANN Board is warranted only if certain criteria are met. The IPC provides below its suggested criteria:

1. The advice must be GAC consensus advice. It is not acceptable for such deference to be granted to a lower threshold. This criterion is particularly important in light of the reported ongoing discussions within the GAC to move away from a consensus model to a “majority vote” model. Moreover, such a requirement is roughly analogous to the current ICANN Bylaws requirement that more than two-thirds of the ICANN Board must support a decision to not adopt a PDP recommendation that was approved by a GNSO Supermajority Vote. ICANN Bylaws, Annex A, Section 9(a).
2. The GAC consensus advice must be discussed and drafted and consensus reached in sessions open to all ICANN stakeholders, and must be made public. ICANN’s commitment to accountability and transparency dictates nothing less.
3. The GAC must provide a written rationale for its advice, which must be provided to the ICANN Board and made publicly accessible on the ICANN website at least 21 days before the Board acts on such advice. This requirement remedies a deficiency noted recently by the New gTLD Program Committee in its consideration of GAC advice.
4. The GAC must certify that, in the view of the GAC, the GAC advice does not contravene any national or international law or treaty. This simple certification should preclude questions that have arisen regarding some GAC advice. If the GAC is unable to make such a certification, the ICANN Board should not be required to accord its advice the significant deference represented by the proposed two-thirds threshold.

IPC notes that, under its proposal, GAC would remain free to adopt and forward to the Board advice that does not conform to one or more of the preceding criteria; but that advice would not benefit from the 2/3 majority requirement proposed to be introduced in the ICANN Bylaws.

The IPC proposes the following revisions to the Bylaws amendment:

- k. ... A final decision by the ICANN Board to not follow the advice of the Government Advisory Committee must be supported by a two-thirds vote of all members of the Board that are eligible to vote on the matter; **provided, however, that the advice of the Governmental Advisory Committee must meet the following conditions:**
- (i) the Governmental Advisory Committee advice is based on Governmental Advisory Committee consensus (meaning that the advice was the subject of Governmental Advisory Committee consensus as defined in the Governmental Advisory Committee Operating Principles, Section 47, namely, that the advice was adopted by general agreement in the absence of any formal objection);**
  - (ii) the Governmental Advisory Committee advice was discussed and drafted and consensus reached in sessions open to all ICANN stakeholders, and is made public;**
  - (iii) the Governmental Advisory Committee advice is supported by a written rationale that is provided to the ICANN Board and made publicly accessible at least twenty-one (21) days before the ICANN Board acts on such advice; and**
  - (iv) the Governmental Advisory Committee certifies that, in the view of the Governmental Advisory Committee, the Governmental Advisory Committee advice does not contravene any national or international law or treaty.**
- l. Notwithstanding the provisions of section k, the Board shall not be required to follow the advice of the Governmental Advisory Committee if the Board determines that acceptance of such advice would constitute a breach of the fiduciary duties of the Board to the Company or would otherwise violate another provision of these by-laws.

Thank you for your consideration of these IPC comments.