

Report of Public Comments

Proposed Bylaws Changes Regarding Consideration of GAC Advice																							
Publication Date:	2 August 2016																						
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Section I: General Overview and Next Steps																							
<p>ICANN opened a 21-day comment period on 14 August 2014 on the proposed Bylaws revisions that would incorporate a higher voting threshold for the Board to determine not to follow the advice of the Governmental Advisory Committee (GAC).</p> <p>Currently, the Bylaws require a simple majority of the Board (50% + 1) to vote to not follow a piece of advice from the GAC. The proposed amendments to the Bylaws would require 2/3 of the voting members of the Board to act inconsistently with a piece of GAC advice.</p> <p>The ICANN Bylaws require formal determination by the Board that it is taking action inconsistent with GAC advice, if that were to ever occur. Pursuant to the Bylaws, a simple majority of the Board (50%+1) is required to make this determination. The Bylaws also specify that the Board and the GAC must have a consultation regarding the Board's intention to act inconsistently with GAC advice.</p> <p>The first ICANN Accountability and Transparency Review Team (ATRT1) recommended the formalization of that consultation process. Members of the ICANN Board, together with the GAC, formed a Board-GAC Recommendations Implementation Working Group (BGRI), which developed a formalized process that included the raising of the voting threshold to 2/3 of the voting members. The second Accountability and Review Team (ATRT2) recommended for the completion of the Bylaws revision process. At its meeting in June 2014, the BGRI determined that it was timely to send these proposed revisions to the Board for consideration, and on 30 July 2014 the Board approved this public comment posting.</p> <p>The public comment period was opened on 15 August 2014. The period for public comments closed on 14 September 2014.</p> <p>Next Steps</p> <p>The issue is on hold; to be revisited in the future in the broader context of other changes across ICANN community.</p>																							
Section II: Contributors																							

At the time this report was prepared, a total of 56 community submissions had been posted to the Forum. The contributors, both individuals and organizations/groups, are listed below in chronological order by posting date with initials noted. To the extent that quotations are used in the foregoing narrative (Section III), such citations will reference the contributor's initials.

Organizations and Groups:

Name	Submitted by	Initials
ANA	Dan Jaffe	
ALAC	ICANN Policy Staff in support of ALAC	
Internet Infrastructure Coalition	Christian Dawson	
ISPCP	Christian Dawson	
Google	Aparna Sridhar	
Tucows	Graeme Bunton	
Registry Stakeholder Group	Paul Diaz	
Business Constituency	Steve DelBianco	
MARQUES	Caroline Perriard	
SIIA	Carl Schonander	
DNA	Kurt Pritz	
CDT	Matthew Shears	
GE	Sean Merrill	
NCSG		
ISOC	Sally Wentworth Konstantinos Komaitis	
IPC	Kristina Rosette	
Valideus	Susan Payne	
DotConnect Africa	gideon.rop	
Internet Business Council for Africa	The Secretariat	
Blacknight	Michelle Neylon	
ICA	Phil Corwin	

Individuals:

Name	Affiliation (if provided)	Initials
Brenn Hill		
Dennis Ritchie		
John Kramer		
Danny Younger		
Milton L Mueller		
Tamer Rizk		
Rory McGreal		
Amr Elsadr		
Jean Guillon		
Robin Gross		
Edward Morris		
Phil Corwin		
Daniel Karrenberg		

Roger Gerstenfeld		
Burgi		
John Savage		
Avri Doria		
Bruce Hamilton		
John Stetson		
Layne Morales		
Brett Schaefer		
Jothan Frakes		
info		
James Weber		
Ruth Swart		
Cgkfitch		
Wima Navarette		
Wisdom Donkor		
Anthony Niiganii		
James Rutherford		
Ted Nevius		
Gordon Graham		
Shopovec		
Dennis Hammerl		
Melva Gifford		
Rafik Dammak		

Section III: Summary of Comments

General Disclaimer: This section is intended to broadly and comprehensively summarize the comments submitted to this Forum, but not to address every specific position stated by each contributor. Staff recommends that readers interested in specific aspects of any of the summarized comments, or the full context of others, refer directly to the specific contributions at the link referenced above (View Comments Submitted).

The comments received in response to this posting focused on identifying issues in relation to the proposed Bylaws changes regarding consideration of GAC advice. This public comment summary and analysis addresses these issues and their proposed solutions.

Summary of Comments

There were a total of 54 substantive comments provided on the proposed Bylaws language. Of those, 53 were opposed to the change and one was neutral. There was also one placeholder comment and one spam.

The public comments focused on a variety of issues, with most of the comments focusing on the following issues:

- Concerns that the proposal would decrease ICANN’s independence from governments, and would shift the balance of power within ICANN;
- Concerns of the impact on other recommendations, including the need to involve the GAC earlier in policy development processes, and how giving this preferred threshold to the GAC would obviate that work;

- Concerns that this could restructure the balance of the multistakeholder process and create differential power among SOs and ACs within ICANN;
- Concerns that the GAC’s internal processes, including the transparency of how it reaches its advice, whether it provides any rationale for its advice, and the ability for the GAC to re-define the thresholds to provide advice, are not sufficient to support giving this level of deference to GAC advice; and
- Concerns that though the recommendations from the ATRT2 need to be addressed, this is the wrong time to address those changes given the forthcoming accountability work.

A chart summarizing the comments received is attached to this Report.

Section IV: Analysis of Comments

General Disclaimer: This section is intended to provide an analysis and evaluation of the comments received along with explanations regarding the basis for any recommendations provided within the analysis.

The comments received indicate a lack of support for taking the changes to provide a higher threshold of Board support to act inconsistently with GAC consensus advice. As some commenters note, the accountability work underway might be a place to address some of the concerns raised within the comment forum, and allow for additional conversation within the community. Ultimately, however the ICANN community will need to reach a conclusion on how to balance concerns raised in the comment forum with the community-supported nature of the recommendation coming out of the ATRT2 that lead to the proposed Bylaws text.

UPDATE as of May 2016: The Enhancing ICANN Accountability Process resulted in recommendations that overtake this proposal; the Board will be required to achieve a 60% threshold or above to act inconsistently with GAC advice, so long as that GAC advice was reached by a defined level of consensus.

Public Comments on Proposed GAC Bylaws Changes

Commenter	Position?	Rationale
Brenn Hill	No	Governments wield too much power; simple majority is enough
Dennis Ritchie	No	Allows a "virtually anonymous group of governments" to give a veto over items that the populace paid for; suggests a 40%, not 51% threshold
John Kramer	No	ICANN should retain independence from governments - amendment would do away with that independence; governments spy and censor on citizens
Danny Younger	No	Worst idea ever
Milton Mueller	No	Gives GAC the wrong incentives for participation, when ATRT has been urging GAC to become more involved in policy development, this tells them they don't have to consult at all (or very little) and will change sphere of influence to requiring lobbying of the GAC. ICANN is "corroding" multistakeholder model with this process. It's part of a push for governmental control over the Internet, but with none of the procedural safeguards of the ITU.
Tamer Rizk	neutral	Need to be concerned about making sure the power is neutrally given and metered over a system that all rely upon for innovation
Rory McGreal	No	Governments should be required to reach a 2/3 majority to overrule an ICANN decision; governments have too much power over the Internet
Amr Elsadr	No	This would undermine the GNSO PDP; the GAC can provide input at multiple stages of policy development. Conflicts with the efforts to encourage early input and involvement. There will be little incentive to participate in PDP work if this goes through.
Jean Guillon	No	"Almost ridiculous actions of the GAC on WINE and VIN" demonstrate that no more power should be given to them
Robin Gross	No	"Draconian proposal" that transforms ICANN from a bottom-up multistakeholder organization to a governmental regulatory agency; would mark a change in the power structure at ICANN. It "undermines" the hope of a bottom-up multistakeholder process at ICANN. Accepting this proposal would be relinquishing ICANN's responsibility for oversight of its operations. There is nothing preventing the GAC from becoming a voting body that would impose its will onto the entire Internet via the Board. Following from a recent reconsideration request determination where ICANN said the GAC is not ICANN, why would ICANN cede decision-making to them. This is a dangerous proposal. The ICANN Board has an obligation to promote democracy.

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Edward Morris	No	Would "put a stake in the heart of the Bottom-up multi-stakeholder process" and imperil the IANA stewardship transition. This would nullify the hundreds of hours of volunteer time. There is a lack of transparency in the GAC work, though this can also be said of other groups across ICANN. No single group should be able to control of outcomes/command any single aspect of the policy processes. The continued empowerment of the governments goes against the principles for transition, and could be in violation of ICANN's bylaws which require the Board to hold the ultimate control over decisions over the affairs of the organization.
DCA Trust	No	GAC's advice has sometimes gone beyond its mandate to give voice to individual members; there is no quorum requirement for reaching GAC advice. Proposed changes would give GAC enormous power over ICANN without procedures in place to make sure the advice is delivered through a sound process.
ICA	No	It is an inappropriate time to consider the proposal, and it undermines efforts to better integrate the GAC into engagement in the GNSO PDP. There could be undesirable changes to the GAC's operating procedures that would impact how the GAC renders advice. This could make ICANN indistinguishable from an IGO. Could potentially elevate GAC advice above PDP recommendations; could undermine efforts to develop engagement efforts with the GAC; language is poorly drafted and would lead to inconsistencies; consideration should be deferred until the transition discussions have concluded;
Daniel Karrenberg	No	Language is ineffective and bad governance - no board should need a supermajority to reject a proposal. Requests an evaluation of the effect if the Board simply chooses not to do something but doesn't inform the GAC, because it wishes not to upset the GAC. It appears that this does not materially change the Board's decision making authority, but there should be evaluation as to whether it is line with California law.
Roger Gerstenfeld	No	"Control of the Internet should be under US control"
Walberga Gerstenfeld	No	[no reason stated]
John Savage	No	Proposal changes character of ICANN to more of an intergovernmental organization; while more substantial government oversight could enhance ICANN's legitimacy, it should only occur after lengthy public discussions on the type of oversight; There is no formal definition of the term "advice" or the method for reaching advice, and the GAC operating principles can be modified.

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Avri Doria	No	Though in favor of advice from ACs being treated with the same degree and thresholds as recommendations from the SOs, opposed to this change. The GAC can change its procedures and threshold for giving advice; we need a bylaws requirement on how this is reached. Also, this is singling out the GAC for change, and similar proposals should be considered for other ACs. There is no reason for such disparity going into the future.
Bruce Hamilton	No	This would transform ICANN to a place where there is a governmental veto on key organizational conditions. Adopted some of Robin Gross' language.
John Stetson	No	"stop trying to ruin the internet by giving control to totalitarian governments."
Layne Morales	No	"I strongly oppose any governmental incursion into ICANN's activities"
The Heritage Foundation	No	Wrongly equates GAC advice with policy development; risks GAC control of ICANN Board activities; and is inconsistent with the NTIA principles on transition. The GAC advice does not have the bottom-up legitimacy that the advice out of PDPs do; it is instead about top down direction, an effort to have a last word. Government advice is critical, but as one voice in the process. There should be stress tests against unlikely outcomes that disproportionately elevate the authority of governments within ICANN. There are concerns about the consensus requirement and the ability for the GAC to change that at any time.
Jothan Frakes	No	This challenges the ability of the Board to balance the multistakeholder model; while GAC advice can be helpful, there has been some that has been obtuse or not clear and introduces tremendous burden.
Internet Business Council for Africa	No	Would give GAC undue power in the ICANN board in making decisions that are supposed to be approached through the bottom-up multistakeholder model; GAC operating principles do not call for transparency, conflict of interest; this would give the GAC power over the board
James Weber	No	It would be a huge mistake to give the GAC more power in this organization
Ruth Swart	No	No benefit to providing the GAC decision making power over the Internet
cjkfitch	No	putting the Internet back into the dark ages
Wima Navarette	No	Please keep the Internet free of government control
Wisdom Donkor	No	I oppose the proposed Bylaws

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ANA	No	Reject; this is premature, no analysis or rationale of effects of this decision. This would be a radical change of the structure. ANA has urged ICANN to makes it processes broader and more inclusive; this proposal works against that and would increase the authority for one group, giving the GAC the inappropriate potential to have an inordinate voice in overturning multistakeholder policies. GAC internal procedures are difficult to discern. Would give GAC the ability to overturn policies; ICANN should work to strengthen greater participation.
ALAC	No	Thanks Board for considering the ATRT recommendations, but there are concerns that this treats GAC differently from other ACs; there is a trend towards pushing increased power to governments that is concerning in the Internet Governance realm; given that there's a process already formed, we should turn efforts to looking towards placing ACs on equal footing; should implement alongside 9.1 the call for recognition of advice from all ACs; work with a focus of balance among participants
Anthony Niigani	No	Appears to diminish public trust; could impact the Board's independent decision making abilities - questions on what happens if the 2/3 threshold isn't reached; supports the ALAC position
James Rutherford	No	Hands power to autocratic government; will increase costs
Internet Infrastructure Coalition	No	Not time to enact changes that will be seen as governments taking disproportionate role in the multistakeholder ecosystem; we should deal with this as an issue to all AC groups - how can the board be more accountable to them for the advice coming out, and we should bring into the accountability discussion - governments deserve a seat at the table, but should be on equal footing
Ted Nevius	No	No changes to give any more power to undemocratic governments
ISPCP	No	Understand the need of the GAC for the Board to be more responsive to advice, but this should be part of the broader accountability discussion, an issue looked at for all stakeholders; Bylaws change could create the perception that the concerns of governments were heard without according due weight to other stakeholder voices. Provides proposal that gives opportunity for board to heed advice from SOs or ACs across ICANN.
Blacknight	No	Support comments of Internet Infrastructure Coalition; supports scenarios set forth in ICA's submission; ICANN and the GAC are evolving - it is not the time to consider this. The Board has been continually providing more detailed rationale for its serious considerations of GAC advice.

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Google	No	Support idea of more formal and transparent dialogue between the Board and GAC, but proposal will not increase accountability or transparency - the board already has to provide a detailed rationale; Does not encourage government involvement in policy development, which is what we should be working towards; not limited to GAC consensus advice
Tucows	No	Antithetical to the ideals of ICANN - puts power in the hands of the few; it would undermine the policy development process instead of encouraging participation - why would we give such power to the least engaged part of ICANN?; there is no justification for the granting of this type of power; this is an ICANN that would be ruled by the GAC and a minority of the Board.
Gordon Graham	No	Proposal is ICANN giving control over to government entities
Shopovec	SPAM	
Dennis Hammerl	No	Opposed to surrendering control of the Internet to any foreign country who does not respect freedom of speech
Melva Gifford	No	We should not give other governments control and remove our own
Registry Stakeholder Group	No	There is a benefit to the community to having a well-defined timeframe for Board/GAC consultations, and support the six month time frame; but proposal does not address transparency issues that should be incorporated into the process - the GAC should provide rationale, including the public policy it is seeking to advance. Proposes some principles for following - process should only be for GAC consensus advice, with other processes available for community and board rejection of non-consensus advice; advice to be developed in open and transparent fashion in consultation with other stakeholders; Board should have flexibility in how advice is implemented; no advice that is in violation of Bylaws, or core value or mission; no advice as a veto on community-developed policy; no acting on advice in conflict with consensus policy, or that would impose obligations on contracted parties that is outside of the "picket fence". UPU minority statement - We should not tell another group how to develop its own advice (consensus issue)
Business Constituency	No	Should not consider at this time given the issues surrounding the transition - not the time to consider this type of Bylaws change; should be focusing on how to involve governments earlier into the PDP - improve that, and maybe this revision won't be necessary

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MARQUES	No	Appreciate the responsiveness to ATRT recommendations, but this would give the GAC greater powers to influence the policy making process than other ACs - undermines the multistakeholder model; with the detailed and formalized process already created, there should be no need to come to the need for this voting threshold in any event; need to improve the accountability and transparency of the GAC as suggested in ATRT2; untimely for consideration given the transition discussions
SIIA	No	Identifies pre-conditions for consideration of these Bylaws amendments, including the conclusion of the Enhancing ICANN Accountability processes; assurances with respect to GAC transparency; should be a discussion of whether there are only certain types of advice that are appropriate for the higher threshold, such as full consensus advice only
DNA	No	Requests additional clarity on proposed changes - must consider the effect on the ICANN community as a whole before making change; Cannot be used a veto to policy development processes; GAC advice must be reached in a transparent fashion, with clear rationale and identification of the public policy issue the advice is advancing; procedural protections should be developed to make sure that this is only for consensus advice as currently defined.
CDT	No	Unclear purpose and rationale for making a change - formalizing existing practice is not enough; need to provide full and credible accounting for the change; inconsistent with ATRT recommendations on bringing the GAC into earlier engagement in the policy development processes; inopportune time given the state of discussions on Internet governance
GE	No	Change would undercut the integrity of the multistakeholder system; Board is a check on the interests of the GAC - the threshold will reduce the effectiveness of the Board to reject GAC advice; there is no compelling policy rationale for why this threshold serves the various stakeholder needs more than the current threshold; The proposed change to the NomCom structure is further exacerbation of issue of influence of the GAC; there are areas where it could be appropriate for the government to have additional say, but we need justification and rationale before taking this step.

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NCSG	No	<p>In direct conflict to bottom-up principles of policy development - GAC involvement is already allowed in multiple ways in the PDP - a change such as this would reduce the participants' belief in the effectiveness of the PDP process; there is potential for the GAC operating rules to change, which could allow for simple majority of the GAC to block recommendations; Not all governments are elected with the bottom-up process that we find within ICANN, and the ICANN bylaws should continue to be a deterrent against all forms of top down processes influencing policy development. NOT asking for governmental advice to be ignored all together, but we shouldn't be positioning the GAC as more influential than any of the other ACs/encourages GAC lobbying as opposed to PDP participation; the timing of this change is not well taken, with the stewardship transition going on</p>
ISOC	No	<p>Important to consider the impact of this change on the entire Internet ecosystem; any changes to ICANN Bylaws should be part of the larger accountability review; changing the threshold could have the effect of moving the GAC to a policy making as opposed to an advisory role; unclear if there are safeguards within the GAC to protect against GAC lowering the bar for internal consensus; won't further the ATRT recommendations, as it doesn't encourage GAC engagement in PDP work and transparent exchange of information; has a risk to overturn cross community consensus deliberations.</p>
IPC	No	<p>The recommendations of the ATRT2 focused on GAC transparency are supported, but this bylaws change does not advance that. There are criteria that must be considered for something like this to be enacted, including a requirement that this be for GAC consensus advice, and not be subject to the majority vote suggestion that is being put forward; consensus advice must be drafted in open forums; GAC must provide a written rationale for advice with 21 day availability before ICANN Board acts; GAC must certify that law does not violate any individual law or treaty; recommend proposals to Bylaws to enact those changes</p>
Valideus	No	<p>Not an appropriate time to consider - allow the accountability work to move forward; this Bylaws change is not necessary to increase the transparency of the Board - a formalized consultation process has already been developed and raising the voting threshold is not warranted; no change to the Bylaws should be made until GAC transparency is enhanced; recommend principles similar to other groups for consideration (GAC consensus definition, public definitions, not in contravention to a treaty) and also certification that it won't require violation of ICANN fiduciary duties</p>

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Registry Stakeholder	
Group	Placeholder