

## **GNSO gTLD Registries Stakeholder Group Statement**

**Issue:** **Proposed Bylaw Changes Regarding Consideration of GAC Advice**

**Date:** 3 October 2014

**Issues Report URL:** <https://www.icann.org/public-comments/bylaws-amend-gac-advice-2014-08-15-en>

These comments received majority support of the eligible voting members of the RySG. One member objected; their minority statement is attached below.

### **Re: Proposed Bylaw Changes Regarding Consideration of GAC Advice**

The Registries Stakeholder Group (RySG) welcomes this opportunity to comment on the proposed Bylaw changes regarding consideration of Government Advisory Committee (“GAC”) Advice (the “Proposed Changes”). The RySG recognizes and appreciates the GAC’s important role in the multi-stakeholder model as the medium through which public policy aspects of ICANN policies are raised and considered. Further, we support the work undertaken to improve the quality of interactions between the GAC and the ICANN Board of Directors (“ICANN Board”), and in particular we support the goal of developing a more formal, transparent, and predictable consultation process for Board-GAC interactions (“Bylaw Consultation”). Such initiatives include the analysis and recommendations provided by the First and Second Accountability and Transparency Review Teams (ATRT1 and ATRT2), as well as the work of the Board-GAC Recommendations Implementation Working Group (BGRI).

### **Bylaw Consultation**

We believe that the ICANN community will benefit from a streamlined and clearly articulated process for the ICANN Board to respond to GAC Advice and to work toward mutually acceptable solutions in a predictable, timely, and efficient manner. Specifically, we support the institution of a recommended six-month time frame for this consultation process. In the past, the lack of clarity regarding the process for weighing GAC Advice, as well as lags in both the provision and consideration of GAC Advice have materially and negatively impacted members of the ICANN community. For instance, the delayed provision of GAC Advice on New Generic Top-Level Domains (“New gTLDs”), which, according to the Applicant Guidebook, was to be provided before the end of the Objection period, as well as the drawn-out interaction between the GAC and the ICANN Board in considering and implementing GAC Advice significantly delayed – and continues to delay – the ability of affected applicants to bring their New gTLDs to market. We hope that the creation of a formalized Bylaw Consultation Process will improve the quality of interactions between the GAC, the ICANN Board, and the rest of the ICANN community by providing greater clarity and transparency into the relationship between the GAC and the ICANN Board and predictability regarding how and on what time frame GAC Advice will be considered.

While the Proposed Changes appear to further these goals, they do not fully address important transparency issues, discussed below. In addition, the RySG opposes the proposal to require a supermajority of the Board to reject GAC advice.

### **Summary**

First, we ask that the Bylaw Consultation process directly address concerns about openness and transparency. At a minimum, it is reasonable to expect the GAC to explain its Advice. This rationale should be visible to the community as well as to the ICANN Board itself, and should directly address the

“public policy” interest the GAC seeks to advance. This would inform and streamline the process for considering, approving, and implementing the GAC Advice, and reduce the need for drawn-out correspondence between the GAC and the Board with respect to GAC Advice. It would also address the community’s questions about whether certain aspects of GAC Advice appropriately address matters of public policy.

Second, we note the BGRI’s additional recommendation that would require agreement of two-thirds of the ICANN Board in order to act against a piece of GAC Advice would be in addition to the existing requirement that the Board provide written justification where it decides to act counter to GAC Advice. This change would for all practical purposes convert the GAC from an advisory body into a policy making body. The RySG opposes this change, which would only increase the existing tension between the Board’s obligation with respect to consensus GNSO recommendations and its obligation with respect to GAC Advice, which must be addressed in this process.

Further, to help clarify and resolve this tension, the RySG believes that the following must be accounted for in any revision of the Bylaws related to GAC Advice:

- GAC advice is currently issued when the GAC reaches a consensus position, which is currently defined as general agreement among members absent any formal objection. In the event that the GAC changes the method under which it issues advice, ie. by majority vote rather than consensus, this will be to the detriment of the multi-stakeholder model. The Board and affected parties must be able to reject or challenge GAC Advice that is not issued via the GAC’s consensus-based model as currently defined by the GAC’s operating principles or an affirmative supermajority (consistent with the requirements for GNSO policy development).
- GAC Advice must be developed and considered through open and transparent processes with open consultation with different stakeholders.
- The Board must retain flexibility with respect to how it operationalizes and implements GAC Advice, which is often of a general nature, including to refer such advice to the appropriate Supporting Organization for development of necessary policies.
- The Board cannot adopt GAC Advice that is inconsistent with the ICANN Bylaws, including its Core Values and there should remain an absolute prohibition in allowing the GAC to advise the ICANN Board to apply ICANN’s standards, policies, procedures, or practices inequitably or allow the GAC to single out any particular party for disparate treatment unless justified by substantial and reasonable cause.
- The Board cannot allow GAC Advice to act as a veto on community-developed policies or to undo such policies; GAC Advice should only affect implementation of such policies provided it did not significantly change the policies or provided a compromise solution was agreed to by the GAC and the GNSO.
- The Board may not act upon GAC Advice that would require it to exceed the scope of ICANN’s Mission Statement or to impose obligations that fall outside of the scope of Consensus Policies, as defined by Specification 1, Section 1.2 of the Registry Agreement (the “RA”).
- The Board may not act upon GAC Advice when that Advice is in conflict with Consensus Policy;
- The Board must not act on GAC Advice that would require it to impose obligations on contracted parties that are outside of the “picket fence” articulated in ICANN’s Consensus Policies and Temporary Policies Specification and contained in Registry and Registrar agreements with ICANN.

While many of these clarifications are self-explanatory, we address some of them in more detail below.

### ***The Board's Handling of GAC Advice Must Not Circumvent the Policy Development Process***

The ICANN Bylaws establish the GNSO and the Country Code Names Supporting Organization (ccNSO) as the bodies through which ICANN policy is developed. The Board does not have the authority to create new policy by adopting GAC Advice. Nor should GAC Advice serve as a *de facto* veto over GNSO or ccNSO policies or a tool to unwind established Consensus Policies developed by these communities in accordance with the Bylaws.

We understand that the GAC will, inevitably, address matters that affect parties within the GNSO and that GNSO policies may, indeed, have public policy implications. In recognition of this legitimate and inevitable intersection, the Bylaws should – as they do now – recognize the GAC's role in identifying public policy issues and providing associated recommendations. But the Bylaws provisions that govern the Board's response to GAC Advice should also affirmatively allocate responsibility for developing policy with respect to issues identified by the GAC to the appropriate policy making body, whether the GNSO or the ccNSO. This delineation is consistent with the requirements set forth in the ICANN Bylaws that bind ICANN “to the extent feasible and appropriate, [delegate] coordination functions to or recognizing the policy role of other responsible entities that reflect the interests of affected parties” and “while remaining rooted in the private sector, [recognize] that governments and public authorities are responsible for public policy and duly taking into account governments' or public authorities' recommendations.”

The Proposed Changes could constrain the willingness of the ICANN Board to push back on GAC Advice that did not take into account the role and responsibilities accorded to each of ICANN's Supporting Organizations and Advisory Committees within the ICANN Bylaws. Accordingly, we ask that approval of the Proposed Bylaw Change be tied to a requirement that in responding to such GAC Advice, the Board may not (i) supersede the purview of another ICANN Supporting Organization or other Advisory Committee, (ii) undo policy development work that has taken place within an affected community; or (iii) impose obligations that exceed the limitations on Consensus Policy set forth in Specification 1 of the RA.

### ***The Board Must Not Accept GAC Advice That Singles out Parties for Inequitable and/or Disparate Treatment***

The ICANN Bylaws establish fundamental principles to guide the decisions and actions of ICANN in performance of its mission. These principles are central to ICANN's multi-stakeholder model, and the source of ICANN's legitimacy. While the GAC asserts the right to provide Advice on any issue in its sole discretion, the ICANN Board must be equally free to reject GAC Advice that would require ICANN to act in a manner that is inconsistent with its Bylaws, especially its Mission Statement, Core Values, and prohibition on inequitable and/or disparate treatment of similarly situated parties. The ability of the GAC to establish its own procedures and the ICANN Board's interactions with the GAC are specifically governed by ICANN's Bylaws and Articles of Incorporation.

Some such principles include:

- Delegating coordination functions to or recognizing the policy role of entities representing affected parties;
- Commitment to a narrow mandate, where global coordination is reasonably required;
- Respect for creativity, innovation, and free flow of information online;
- Promotion of competition, where practicable;
- Support for broad, informed participation;
- Fairness and objectivity in decision-making; and

- Accountability to the multi-stakeholder community.

Moreover, the ICANN Bylaws prohibit ICANN from applying its standards, policies, procedures, or practices inequitably or singling out any particular party for disparate treatment unless justified by substantial and reasonable cause.

While it should be obvious that ICANN cannot accept GAC Advice that would violate the Core Values and/or the prohibition on inequitable and/or disparate treatment as mandated by the Bylaws, we believe that this principle should be clearly articulated in the context of GAC Advice.

The need for this clarification is amply demonstrated in the context of GAC Advice on New gTLDs. The GAC has interpreted the “strong presumption” afforded to its Advice in the New gTLD Applicant Guidebook as an effective override of Consensus Policy and ICANN’s obligations under its bylaws. For example, there can be little argument that the GAC Advice to reject the .AMAZON application, and the related Internationalized Domain Names (“Amazon Applications”), resulted in inequitable and disparate treatment. The fact that Amazon prevailed in the objection procedures that were established in the Applicant Guidebook – including the Independent Objector – provides significant evidence that there was an absence of substantial and reasonable cause to reject the aforementioned applications. This was reinforced by the findings of Jerome Passa, ICANN’s independent expert, who, “did not believe that the assignment of the New gTLD ‘.amazon’ to the Amazon company could be rejected on the basis of international or even local law on geographical indications.” This is not the only example. Other applications, including .wine, .vin, and .spa have been subject to extraordinary delay as a result of GAC objections that are not supported by international law and which cannot be reconciled with basic notions of fair play and due process.

### ***Retain Flexibility in Implementing GAC Advice***

We note that GAC Advice is often of a general nature, requiring either the development of policies or operational frameworks by the GNSO or interpretive action by the ICANN Board before it can move from approval to implementation. We believe that amendments to the Bylaws addressing Board/GAC consultation should specify that when GAC Advice is accepted, ICANN may take steps reasonably necessary to ensure that such advice is implementable.

The need for this clarification is demonstrated by the drawn out back and forth regarding the GAC Safeguard Advice, which prevented over five hundred New gTLD applications from moving forward. This prolonged process hinged primarily upon matters of implementation. Whereas the ICANN Board was prepared to accept and take steps to address the public policy concerns raised in the GAC Beijing Communiqué, the GAC has insisted on playing a prolonged role in implementation and operational matters has resulted in further unreasonable delays for all concerned. Accordingly, we believe that any changes to the Bylaws with respect to GAC Advice should clarify the respective roles of ICANN and the GAC with respect to policy implementation. This clarification would have the added benefit of supporting the ATRT1 Recommendation “to have GAC advice provided and considered on a more timely basis.”

### ***Requirement to Act by Consensus***

Currently, GAC Advice to the ICANN Board is predicated upon the GAC’s ability to reach consensus. As established in Principle 47 of the GAC’s Operating Principles:

*“The GAC works on the basis of seeking consensus among its membership. Consistent with United Nations practice, consensus is understood to mean the practice of adopting decisions by general agreement in the absence of any formal objection. Where consensus is not possible, the Chair shall convey the full range of views expressed by members to the ICANN Board.”*

The RySG fully supports this operational principle. Commitment to consensus is a fundamental element of the ICANN multi-stakeholder model. As for the GAC, the principle of consensus underlies the development of policies and recommendations by the GNSO and the ccNSO.

The importance of the GAC continuing to adhere to the principle of consensus as defined by the GAC's current Operating Procedures is all the more important were the Proposed Bylaw Amendment to be approved by ICANN, given the increased weight a lower voting threshold would accord the GAC Advice.

We note that the Bylaws very clearly limit the Board's obligations to act on policy matters without GNSO consensus, as demonstrated by an affirmative super-majority vote across the GNSO houses and stakeholder groups. At minimum, the Proposed Bylaw Change should be tied to upholding this operational principle.

### ***Requirement to Act Transparently***

We welcome the considerable strides taken by the GAC to increase its openness and transparency, for example by opening up to the public the GAC sessions held during the ICANN public. However, the GAC continues to close its public meetings on contentious issues (as was done during the .amazon discussions) and continues to draft its Communiqués behind closed doors. These Communiqués frequently leave questions within the community as to how and why certain recommendations are put forward as well as determining which specific governments are raising concerns or objections and on what grounds. Further, the GAC currently has no obligation to explain its Advice, demonstrate the public policy interest to be served by its Advice, or justify any disparate treatment that would flow from ICANN's implementation of that Advice. The RySG recognizes that standards for government-to-government discussions may not align perfectly with ICANN norms, but, at the very least, GAC Advice should be explained and justified on substantive public policy grounds.

The ICANN Board should, likewise, conduct itself transparently in its consideration of and response to GAC Advice. For example, in May 2014 ICANN placed a hold on health-related applications that had previously been invited by ICANN to commence contracting. This hold was not communicated proactively to affected applicants and when, upon inquiry, applicants were told of the freeze, no explanation was provided for how and why it was initiated, or of its timeline for resolving the matter.

### ***Conclusion***

The RySG welcomes and supports efforts to clarify, streamline, and formalize the manner in which the ICANN Board considers and responds to GAC Advice. At the same time, GAC Advice must be received and processed by the Board consistent with ICANN's governing documents. The RySG believes that requiring a supermajority of the Board to reject GAC Advice would undermine that principle, and accordingly opposes that aspect of the Proposed Bylaw Change.

### ***Minority Statement of the Universal Postal Union***

A proposal aimed at changing how ANOTHER group reaches its own decisions (particularly within the often sensitive context of governments) is not appropriate, as it may once more give the impression that the multi-stakeholder model prioritizes certain groups of stakeholders over others. In other words, whether GAC advice is reached through a simple majority, qualified majority or full consensus decision is absolutely irrelevant to the RySG, in the same way that the RySG (or many other ICANN policy groups) continues to be free to adopt advice without reaching that same level of full consensus currently required within the GAC - otherwise, this kind of advice may as well play against the interests of the RySG in the future (if/when another group wishes to interfere against the way the RySG reaches its own conclusions);

Regardless of the time taken by supporting organizations to reach policy advice (which, as we all know, is not always a truly “consensual” conclusion), the Board already has the necessary autonomy to delve into divergent opinions and make its decisions under the ICANN Bylaws – therefore, in our view it is simply not fitting for the RySG to require from the GAC a more stringent decision-making process that is not applied elsewhere within the ICANN environment. In the absence of higher-level provisions applicable to ALL ICANN groups, this is a matter of principle that should be respected across the board within the organization (i.e., the freedom for each different group to reach its conclusions the way it sees fit, in accordance with its own internal charter); otherwise, we will once again be making value judgments on which groups are more “valuable” or “trustworthy” than others;

The existence of varying opinions in the GAC is similar to the variety of opinions in any other group – in our view, the RySG should be careful when proposing such amendments, since a “formal GAC advice to the Board” is exactly that: their own formal advice.

## **RySG Level of Support**

1. Level of Support of Active Members:	Majority
1.1 # of Members in Favor:	22
1.2 # of Members Opposed:	1
1.3 # of Members that Abstained:	0
1.4 # of Members that did not vote:	16

## **2. Minority Position(s):**

- Level of Support – Active Members:
- Total # of eligible Voting RySG Members<sup>1</sup>: 40
- Total # of Voting and Non-voting RySG Members: 47
- Total # of Active Voting RySG Members<sup>2</sup>: 39
- Minimum requirement for supermajority of Active Voting Members: 26
- Minimum requirement for majority of Active Voting Members: 20
- Names of Members that participated in this process:
  1. Afilias, Ltd.
  2. Charleston Road Registry (non-voting member)
  3. .CLUB Domains LLC
  4. China Organization Name Administration Center (CONAC)
  5. CORE (non-voting member)
  6. DNS Belgium vzw
  7. Donuts Inc.
  8. DotAsia Organisation
  9. dotBERLIN GmbH & Co. KG
  10. dotCooperation
  11. Dot Kiwi Ltd.
  12. Dot Latin, LLC
  13. DotShabaka Registry
  14. dotStrategy Co.
  15. Employ Media LLC

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<sup>1</sup> All top-level domain sponsors or registry operators that have agreements with ICANN to provide Registry Services in support of one or more gTLDs are eligible for membership upon the “effective date” set forth in the operator’s or sponsor’s agreement (Article III, Membership, ¶ 1). The RySG Articles of Operations can be found at [http://gtldregistries.org/sites/gtldregistries.org/files/Charter\\_of\\_the\\_gTLD\\_Registries\\_Stakeholder\\_Group.pdf](http://gtldregistries.org/sites/gtldregistries.org/files/Charter_of_the_gTLD_Registries_Stakeholder_Group.pdf)

<sup>2</sup> Per the RySG Articles of Operations, Article III, Membership, ¶ 4: Members shall be classified as “Active” or “Inactive”. A member shall be classified as “Active” unless it is classified as “Inactive” pursuant to the provisions of this paragraph. Members become Inactive by failing to participate in a Constituency meeting or voting process for a total of three consecutive meetings or voting processes or both, or by failing to participate in meetings or voting processes, or both, for six weeks, whichever is shorter. An Inactive member shall have all rights and duties of membership other than being counted as present or absent in the determination of a quorum. An Inactive member may resume Active status at any time by participating in a Constituency meeting or by voting.

16. European Broadcasting Union (EBU)
17. Famous Four Media
18. Foundation for Assistance for Internet Technologies and Infrastructure Development (FAITID) (non-voting member)
19. Fundació puntCAT (inactive)
20. GMO Registry, Inc. (non-voting member)
21. ICM Registry LLC
22. InterNetX Corp. (non-voting member)
23. Minds + Machines
24. Museum Domain Management Association – MuseDoma
25. National Association of Boards of Pharmacy (NABP)
26. Neustar, Inc.
27. Plan Bee LLC
28. Public Interest Registry - PIR
29. Punkt.wien GmbH
30. Punkt Tirol GmbH
31. Punto 2012 S.A. de C.V.
32. Radix FZC
33. Region D Alsace
34. Richemont DNS
35. Rightside Registry (non-voting member)
36. Societe Internationale de Telecommunication Aeronautiques – SITA
37. Sky IP International Ltd.
38. Starting Dot Limited
39. Telnic Limited
40. The Foundation for Network Initiatives “The Smart Internet”
41. Top Level Design LLC
42. Tralliance Registry Management Company (TRMC)
43. Uniregistry Corp. (non-voting member)
44. Universal Postal Union (UPU)
45. VeriSign
46. XYZ.COM LLC
47. Zodiac

- Names & email addresses for points of contact
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Regarding the issue(s) noted above, the following position(s) represent(s) the views of the ICANN GNSO gTLD Registry Constituency (RySG) as indicated. Unless stated otherwise, the RySG position(s) was (were) arrived at through a combination of RySG email list discussion and RySG meetings (including teleconference meetings).