



COMMENTS OF THE INTELLECTUAL PROPERTY CONSTITUENCY ON THE THIRD DRAFT PROPOSAL OF THE CCWG ON ENHANCING ICANN'S ACCOUNTABILITY

The Intellectual Property Constituency (IPC) of the GNSO appreciates the opportunity to provide comments on the Third Draft Proposal (the "Proposal") of the CCWG on Enhancing ICANN's Accountability. These comments are consistent with the IPC's input to date in the GNSO's process to determine whether to approve the Proposal as a Chartering Organization of the CCWG.

Timing Concerns

As an initial matter, the IPC is deeply concerned about the truncated period for public comments and Chartering Organization review regarding the Proposal. This short period, coupled with the rush to publish the Third Draft Proposal, the large number of recommended actions in the Proposal and the significance of the Proposal in ICANN's future, creates an untenable situation. There is simply not enough time to exercise the level of care and detailed review that a proposal of this nature requires, especially when its drafting and internal review have been rushed. The chances of unintended consequences – or worse, consequences intended by some stakeholders but generally unrevealed to others – are simply too great.

The IPC specifically notes that, in many cases, the Proposal is only a summary of the CCWG's recommendations and the actual "nuts and bolts" are found only in the Annexes. This adds to the difficulty of reviewing the CCWG's actual proposal and the likelihood that significant aspects of the CCWG's recommendations will be overlooked.

Further, it is to be noted that the language proposed in recommendations for ICANN Bylaw revisions are conceptual in nature and that the CCWG-Accountability's external legal counsel and the ICANN legal team will draft final language for these revisions. Inevitably, the actual language used in revised Bylaws and Articles of Incorporation will be of critical importance, and the effect could vary significantly depending on implementation decisions made. Thus, IPC's comments can only relate to the concepts as we understand them at this point. There must be further opportunity for comment once revisions to the Bylaws have been drafted.

While the IPC and its members have moved forward and prepared these comments and provided input to the GNSO, it is impossible to feel confident that we adequately identified, considered and commented on all of the significant issues raised by the Third Draft Proposal. As such, any support that the IPC gives to the Draft Proposal must be qualified by concerns about the externally-imposed limitations on the timing for this process and ultimately, concerns about the work product of both the IPC and CCWG. Given these limitations, these comments should not be considered exhaustive, and any support given for a particular recommendation should not be considered an unreserved endorsement of every aspect of that recommendation. At best, we hope that we have captured the most significant concerns, flaws and wrong turns embodied in the Proposal – in particular, those that, unless adequately addressed, would cause the IPC to recommend the rejection of a Recommendation.

Recommendation #1: Establishing an Empowered Community for Enforcing Community Powers

The IPC is likely to support the Single Designator model at the core of Recommendation 1. The IPC does have continuing concerns regarding the basis of the Community Powers under the Single Designator

model, i.e., that these rights (other than those related to appointment and removal of directors) are granted under the Bylaws rather than by statute, as was the case in the “Single Member” model. It is critical that implementation of the Single Designator model make the non-statutory Community Powers as binding and enforceable as possible.

Recommendation #2: *Empowering the Community through Consensus: Engage, Escalate, Enforce*

The IPC is likely to support the “Engage, Escalate, Enforce” model at the core of Recommendation 2. However, the IPC is concerned about the concept that each SO and AC that is a “decisional participant” (i.e., GNSO, ccNSO, ASO, ALAC and GAC) in the “Empowered Community” will have equal weight. This blurs the distinctions between SOs and ACs, and also fails to recognize that not every SO and AC has an equal interest in the outcome of matters under consideration by the Single Designator.

Recommendation #3: *Redefining ICANN’s Bylaws as ‘Standard Bylaws’ and ‘Fundamental Bylaws’*

The IPC supports the introduction of “Standard Bylaws” and “Fundamental Bylaws” in the ICANN Bylaws, if the following change is made:

The Proposal apparently fails to discuss the Community’s role in approving (or rejecting) changes to the Articles of Incorporation, and whether the Articles would be treated like Fundamental Bylaws or Standard Bylaws for such purposes. The IPC believes that ICANN’s Articles of Incorporation must be given the same treatment as Fundamental Bylaws, as Articles of Incorporation, by their nature, are even more “fundamental” than Bylaws. In Annex 3, paras 19-21, describe requirements to change Articles of Incorporation. Besides Board approval for any change, para 21 states “Under the proposal for the Community Mechanism as Sole Member, the Member would need to approve any change to ICANN’s present status as a California nonprofit public benefit corporation.” This appears to be an editing error, since the CMSM has been superseded by the Sole Designator. We assume, but seek to confirm, that this approval right is given to the Empowered Community as Sole Designator.

The IPC also has concerns about the designation of certain bylaws as Standard Bylaws, rather than Fundamental Bylaws. See Recommendation 9 below.

Recommendation #4: *Ensuring Community Involvement in ICANN Decision-Making: Seven New Community Powers*

The IPC supports this recommendation, provided that the concerns below are addressed.

The IPC is concerned that the Proposal does not consider issues relating to potential liability stemming from exercise of the power to remove directors. The Single Designator and the participants in the Single Designator (the SOs and ACs, the GNSO Stakeholder Groups and Constituencies, and the officers and members of the SOs, ACs, Stakeholder Groups and Constituencies) could be exposed to claims from removed directors. Regardless of the likelihood of a claim, the heightened responsibilities of these community structures should be recognized as creating some potential for exposure. These structures, and many of their members, are not equipped to deal with litigation or even the threat of litigation, baseless or otherwise. This vulnerability heightens the IPC’s concerns. This potential for liability could have a “chilling effect” on the Community’s desire to use the Community Powers to remove Board members, simply because some community members may be unwilling to take even a perceived risk. As such, the Proposal should be revised to shield participants from liability arising from claims by removed directors and to provide for the defense of any such claims. Further, a removed director should not have the ability to frustrate the Community’s exercise of the statutory power to remove directors by

resorting to injunctive relief or other legal remedies (e.g., declaratory relief) while the process is ongoing.

The IPC is also concerned about unrealistically short and rigid timeframes in the exercise of Community Powers. For example, the provision on director removal provision requires the petitioning SO/AC to convene a conference call within seven days after a petition is accepted. As drafted, any failure to meet a deadline results in the termination of a process, with no capacity to get the process back on track. This is overly harsh and unworkable.

Therefore, IPC supports this recommendation, provided that

(1) When taking office, Directors are required to enter into a “pre-service” letter or similar document, agreeing in writing not to sue any SO or AC, or the Sole Designator (or any officers or members of the Empowered Community) based on a removal action. This includes agreement by Directors to forego any injunctive and/or declaratory relief during Community processes leading up to possible removal.

(2) The time frames for the exercise of Community Powers are adjusted to longer periods in order to more realistically reflect the timing needed to walk through the process of Consensus, Engagement, Escalation, and Enforcement, or more flexibility is built into the deadlines.

Recommendation #5: *Changing Aspects of ICANN’s Mission, Commitments and Core Values*

This recommendation is actually a series of recommendations for significant changes to ICANN’s Bylaws. As such, simple support for the recommendation as a whole is essentially meaningless. In this truncated review period, IPC has not had the opportunity to discuss each specific recommendation in detail. Our comments below relate to specific provisions of particular interest to our stakeholders and should not be taken as dispositive of the IPC’s overall position on Recommendation 5.

1. IPC cautiously supports the revised statement of ICANN’s mission. IPC is pleased that CCWG-ACCT recommends that bylaws be drafted that reaffirm and enshrine ICANN’s “ability” to enter into and enforce contracts within the scope of its mission. However, this language should be strengthened to make it clear that ICANN has a “responsibility” to enforce such contracts, and not merely an “ability” to do so. Otherwise there is a serious risk that the changes recommended by CCWG-ACCT will be used to undermine enforcement of existing obligations on which many stakeholders depend.
 - IPC notes that this revised statement was particularly heavily negotiated, and is subject to several drafting notes, the meaning of which is still being debated in the CCWG. As such, the drafting of this provision is likely to be particularly complex and fraught with differing views.
 - There is a particular concern regarding the ambiguous word “services,” where there was no real agreement within the CCWG on the meaning of that term. IPC members and many other participants held that “services” referred solely to the technical “services” (e.g., web services or email services) that use the Internet for communication with endpoints such as browsers or email clients. However, some participants stated that “services” referred to any type of business services (and even non-business services) using the Internet.

- IPC is also concerned by the vague reference to “grandfathering” of existing agreements relating to this change to ICANN’s Mission statements. IPC believes that grandfathering should cover all agreements signed by participants in the New gTLD Program regardless of when they are signed, and all renewals and extensions of these agreements. It would be unfair and anticompetitive if an applicant is unable to sign the same agreement as its competitors, merely because it is signing after this Bylaw goes into effect.
- The Proposal also needs to clarify that the IRP may be invoked for “inaction” as well as “actions” that contravene ICANN’s Bylaws, e.g., ICANN’s failure to enforce its agreements and to assure the community that ICANN’s counterparties are abiding by these agreements.

In sum, IPC can support these recommendations subject to the following:

- (1) The Bylaw clarifies that ICANN has a responsibility to enforce its agreements;
 - (2) Satisfactory drafting of actual bylaws text, particularly with regard to clarifying the nature of “services” and ensuring that compliance with and enforcement of existing obligations (e.g., PICs and Section 3.18 of RAA) are not weakened; and
 - (3) IRP may be invoked for failure to act (e.g., failure to enforce contracts).
2. IPC is disappointed that the misleading Stress Tests 29 and 30, which treated contract enforcement as a threat to ICANN rather than as an essential way in which ICANN fulfils its mission, have not been eliminated from the document. While revisions have improved these Stress Tests somewhat, they are still misleading and should be removed.

Stress Test 29 (at para 314) contains a reference to “registry agreements” that is not referred to in the subsequent test; this should be removed even if the Stress Test as a whole is not removed.

IPC also notes that the Stress Tests 29 and 30 do not take into account all of the changes in the proposed Bylaws revision. As such, if these are not removed, the analysis (paras. 321 and 331) and/or conclusions (paras. 323 and 333) sections should also make reference to the new Bylaws provisions explicitly endorsing ICANN contractual authority.

IPC notes the observation in the revised Stress Tests that it is “unlikely” that the IRP can successfully be used to block contract enforcement, but are at a loss to know what significance can be attributed to this “conclusion.” If these Stress Tests are not eliminated, the text should be further revised to make explicit reference to the proposed new Bylaw provisions regarding contract enforcement, hopefully strengthened in the manner discussed above.

Recommendation #6: Reaffirming ICANN’s Commitment to Respect Internationally Recognized Human Rights as it Carries out its Mission

IPC supports this recommendation; however, the development and implementation of the Framework of Implementation is critical. Although we are sympathetic with the desire to enact a Human Rights Bylaw as soon as possible, it is in many ways premature to do so until the Framework of Interpretation is developed and implemented. As such, it is possible that interpretations of the Bylaw will be put into action before the Framework of Interpretation is completed. IPC would advise extreme caution in applying the Bylaw during this transitional phase. In particular, ICANN should not design or implement

new processes, impact reviews or policies under the Bylaw before the overarching Framework of Interpretation is complete.

There are several specific issues that need to be addressed in the Framework of Interpretation:

- IPC encourages those preparing the Framework to strongly consider the Universal Declaration of Human Rights as the foundational document for application of the Bylaw.
- It is critical that all internationally recognized human rights are considered in any analysis, rather than concentrating on certain human rights (e.g., freedom of expression and privacy) to the exclusion or minimization of others (e.g., rights of authors and creators in their intellectual property as enshrined in the Universal Declaration of Human Rights).
- The process should not be used to broaden the scope of the definition of “applicable law” as contained in the draft Bylaw. IPC understands “applicable law” to mean California state and U.S. federal law applicable to ICANN as a California corporation.

Recommendation #7: *Strengthening ICANN’s Independent Review Process*

The IPC supports this Recommendation.

Recommendation #8: *Improving ICANN’s Request for Reconsideration Process*

The IPC supports this Recommendation.

Recommendation #9: *Incorporating the Affirmation of Commitments in ICANN’s Bylaws*

The IPC would support this Recommendation if the following changes are made:

- The Affirmation of Commitments (AoC) obligation for ICANN to remain a US-based not-for-profit should be made a Fundamental Bylaw, which the board cannot change without community approval.¹ This is the only AoC commitment not being made a Fundamental Bylaw. Allowing the board to unilaterally move ICANN to a new legal regime and jurisdiction would threaten contractual stability and likely raise a huge red flag for the U.S. Congress.
- The Review Team selection process should be modified to ensure adequate representation of GNSO stakeholders on Review Teams with disproportionate impact on gTLD concerns (e.g., Whois/RDS review).
- The provision providing review membership for “at least 3 members from each participating SO and AC” is an improvement over prior drafts, where it was “up to 3.” However, this still provides no guarantee that the Commercial Stakeholder Group (one of 4 SGs) will be represented, let alone IPC, which is one of three diverse constituencies that are classified within the CSG for administrative purposes. Further changes should be made to ensure that on issues of greatest concern to a particular Constituency, that Constituency is able to participate directly on the review team.

¹ Similarly, it should be clarified that the same or greater level of community approval would be required to change the Articles of Incorporation, which already state that ICANN is a California non-profit. See discussion in IPC response to Recommendation 3.

Recommendation #10: *Enhancing the Accountability of Supporting Organizations and Advisory Committees*

The IPC supports this recommendation.

Recommendation #11: *Board Obligations with regards to Governmental Advisory Committee Advice (Stress Test 18)*

The IPC has significant concerns with the current Recommendation #11 and cannot support it in its current form.

Originally, this Bylaw change was designed to protect against increased government influence over ICANN and to avoid the possibility that ICANN would be forced to arbitrate among sovereign governments. As Stress Test 18 demonstrates, these would be made possible if the GAC were to lower its decisional threshold from full consensus (with the absence of any formal objection) to a lower threshold, such as rough consensus (where several members formally object) or even majority vote.

Under the current Bylaw, the GAC and the Board must “try, in good faith and in a timely and efficient manner, to find a mutually acceptable solution” if the Board “determines to take an action that is not consistent with” GAC Advice. The proposed Bylaw appears to limit this “mutually acceptable solution” process to GAC Advice “approved by a full Governmental Advisory Committee consensus, understood to mean the practice of adopting decisions by general agreement in the absence of any formal objection.”

At first blush, the proposed Bylaw change appears to resolve the concern raised by Stress Test 18.

However, the proposed Bylaw (intentionally or not) also makes several other significant changes in the Board’s handling of GAC advice, with troubling consequences – requiring a mandatory vote and creating the impression that any GAC advice that is not rejected by the Board is binding on ICANN . At the same time, the Proposal appears to leave ample room for the GAC to work around the limitation to “full consensus advice” and the requirement for a clear written rationale.

Other reforms related to GAC advice that were proposed by IPC and others advice are diluted or absent entirely. On the whole, the Proposal appears to have delivered greater power to the GAC. This raises serious concerns about consistency with the NTIA’s criterion that it will not accept “a proposal that replaces the NTIA role with a government-led or an inter-governmental organization solution.”

For the reasons stated below, IPC recommends that the proposed Bylaw be revised as follows:

The advice of the Governmental Advisory Committee on public policy matters shall be duly taken into account, both in the formulation and adoption of policies. In the event that the ICANN Board determines to take an action that is not consistent with the Governmental Advisory Committee advice, it shall so inform the Committee and state the reasons why it decided not to follow that advice. **If the Board determines to take an action that is not consistent with** Any Governmental Advisory Committee advice approved by a full Governmental Advisory Committee consensus, understood to mean the practice of adopting decisions by general agreement in the absence of any formal objection, ~~may only be rejected by a two-thirds vote of the Board, and~~ the Governmental Advisory Committee and the ICANN Board will then try, in good faith and in a timely and efficient manner, to find a mutually acceptable solution.

1. Concerns with the Proposed Draft Bylaw

a. Requirement that two-thirds of the Board vote to reject GAC Consensus advice

The Third Draft Proposal introduces, for the first time in the CCWG-Accountability process, a requirement that GAC Consensus Advice “may only be rejected by a vote of two-thirds of the Board.” In 2014, the Board put forth a similar proposal, which was roundly rejected by the ICANN community.

This proposal has been reintroduced here, with no meaningful rationale. The only explanation offered in Annex 11 is “As a corollary to the importance of consensus Governmental Advisory Committee advice, the proposal includes a requirement that the Board would need a two-thirds majority to decide not to follow the consensus Governmental Advisory Committee advice.” This “explanation” ignores the fact that GAC has offered “consensus” advice to the Board since the inception of ICANN, and the Board has never before been required to have a two-thirds vote to reject this advice.

Has GAC advice suddenly become more important? If not, why is it being treated as if it is more important? While there is no further explanation in the Proposal, a further explanation of “changed circumstances” has been offered in Webinars and emails. However, IPC does not see any significant changed circumstances that would support this move. It appears that proponents of the idea are attempting to use the IANA transition process to override the community in order to revive this idea. Not only is the idea one which weakens the multi-stakeholder model, the method of reintroduction of the idea weakens the multi-stakeholder model.

The IANA stewardship transition is clearly a changed circumstance, but one that would seem to dictate the opposite reaction. It seems that the only truly “changed circumstance” is that a new opportunity presented itself to reintroduce the two-thirds proposal at a time of great change and at a time when the rest of the community was seeking to make a change that would affect GAC advice.

The IPC sees no independent rationale for the two-thirds majority, and the recommendation in its current form does not offer in return sufficient advantages for the community, for ICANN accountability or for the IANA transition. Instead, the two-thirds majority would make it more difficult for the Board to “reject” or “take an action inconsistent with” GAC advice.

The gravity of this change goes beyond the mere requirement for two more votes.² It signifies that there is a presumption that GAC advice should be adopted, and it signifies that GAC advice is of greater significance than matters where a mere majority vote applies. This creates an atmosphere where GAC advice is likely to be given greater deference and where the Board is less likely to consider challenging GAC advice. This is inconsistent with the NTIA’s requirements and inconsistent with the underlying concerns that spawned Stress Test 18 in the first place.

For these reasons, the IPC cannot at this time support the introduction of the requirement for a two-thirds vote to reject GAC consensus advice. We discuss below some further changes which, if adopted, could justify reconsideration of this position.

² On the ICANN Board of 16 voting members, a simple majority requires 9 votes, while a 2/3 majority requires 11 votes.

b. Mandatory Voting Requirement

Under the existing Bylaw “In the event that the ICANN Board determines to take an action that is not consistent with the Governmental Advisory Committee Advice, it shall so inform the Committee and state the reasons why it decided not to follow that Advice.” The proposed Bylaw instead states “Any Governmental Advisory Committee Advice approved by a full Governmental Advisory Committee consensus, understood to mean the practice of adopting decisions by general agreement in the absence of any formal objection, may only be rejected by a vote of two-thirds of the Board”. Consequently it would appear that an obligation for the Board to vote on all GAC advice has now been enshrined in the Bylaws.

The current language of the Bylaw makes no reference to voting, only to the far more ambiguous “determines to take an action.” As such, adding new language requiring a vote is a significant change. If the existing Bylaws required a vote before entering into the “mutually acceptable solution” process, the Bylaws would say so. Instead, a more flexible term was chosen -- “determines to take an action.” We must assume that these language choices are meaningful and deliberate. The Bylaws are not shy about stating when voting is required (some variation of the word “vote” is used ~200 times in the ICANN Bylaws). “Determines to take an action” is a unique phrase in the Bylaws – used only this one time. As such, it is clear that something less formal than a vote was intended by choosing this unique phrase.

It is our understanding that the Board has used the flexibility offered by the current language. As presently drafted, the Board is able to identify a situation where an action inconsistent with GAC Advice appears imminent. At that point, the Board can approach the GAC, provide the requisite notice and enter into the “mutually acceptable solution” process -- without requiring a formal vote of the Board, much less a formal “rejection” of the GAC advice.

This gives the Board more flexibility and leeway to work with the GAC. The CCWG proposal takes away that flexibility and mandates a formal vote of the Board, requiring the Board to take an adversarial stance with the GAC. The Proposal goes one step further and substitutes the flatly negative word “reject” for the more nuanced phrase “take an action that is not consistent with.” Not every inconsistent action is a clear rejection.

c. Non-Rejection Appears to Create Binding Acceptance of GAC Advice

Another concern raised by the Proposal is the handling of GAC advice that is not “rejected.” The statement that GAC Advice can only be rejected by a vote of the Board can be read to mean that if no such vote is taken (or if such vote is taken and fails) then the GAC advice is “accepted” by ICANN and is binding on ICANN as presented by the GAC.

It is not clear whether this is the case. If the Board takes a vote, but the rejection fails to pass, is the GAC advice now “accepted” (possibly by as few as 6 out of 16 Directors) and binding on ICANN? What about GAC advice where no vote has been taken -- is that advice “accepted” and binding on ICANN and, if so, when?³

Can the Board, at some later date, decide to take an action inconsistent with GAC advice it did not vote on earlier? The existing Bylaw focuses on a potential action by the Board inconsistent with GAC advice – if there is no planned Board action, there is no need to consider the GAC

³ Compare this to the Community's right to reject a standard Bylaws change—if the Community does not elect to take a rejection vote, or attempts to do so and fails, that Bylaw clearly become binding upon ICANN.

advice or the binding nature of “dormant” GAC advice. The Proposal shifts the focus to the advice itself, with the Board required to vote to reject the advice (whether or not there is an inconsistent action that the Board has determined to take).

This is another unacceptable ambiguity in the proposed Bylaw. The IPC recognizes that these “draft Bylaws” are “conceptual” in nature. However, these concerns are “conceptual” in nature as well. As such, these concepts need to be clarified or implementation is going to be a battleground for unresolved ambiguities.

When one considers the possible ramifications of “binding” GAC advice in the absence of an explicit rejection vote by the Board, concerns multiply. Is it clear that the Board can act in a manner inconsistent with GAC advice where the Advice has not been formally “rejected” (but has not been affirmatively adopted by a majority of the Board)? There are numerous possible instances of tension between “non-rejected” GAC advice and other obligations of the Board. If it is not clear that the Board’s other obligations can supersede such GAC advice, then there could be difficult and anomalous situations, such as:

- a. What if “non-rejected” GAC Advice requires the ICANN Board to breach existing contracts?
- b. What if “non-rejected” GAC advice excuses or prohibits ICANN from exercising its duties to enforce contracts with contracted parties?
- c. What if “non-rejected” GAC advice is inconsistent with the Bylaws or requires a change in the Bylaws? Can all Bylaws (including Fundamental Bylaws and the IRP designed to enforce the Community’s rights under the Bylaws) be changed by unilateral GAC advice?
- d. What if GAC advice arrives late in the process (e.g., well after the Board adopts a new consensus gTLD Policy and ICANN is already well into implementation) and is not rejected? Can GAC advice override adopted Consensus Policy? If so, the entire Community (including but not limited to Contracted Parties) will have been relying on that Policy only to be forced into a mid-stream change in course -- resulting in additional expense, abandoned business models, and lost opportunities. This would render the concept of Consensus Policy meaningless, if it can be changed by GAC advice – potentially GAC Advice that has the support of scarcely more than 1/3 of the ICANN Board and none of the Community.

The combination of a 2/3 threshold, a mandatory vote, the posture of “rejection” (as opposed to “acting inconsistent with”) and the spectre of anything other than rejection being construed as acceptance combine to create an atmosphere and presumption that GAC advice will be accepted as is, rather than being steered through the “mutually acceptable solution” process. This presumption is novel and clearly elevates GAC Advice to a new level of deference within the ICANN process. The combination of these elements, and the concerns expressed below, create an overall environment that makes it particularly difficult to consider supporting the change to a 2/3 voting threshold.

2. Possibility for the definition of Formal Objection, and thus effectively the definition of Consensus, to be changed by a change in GAC Operating Procedures

The existing Bylaws language talks of GAC advice, without defining the threshold by which that advice is reached. Thus, although the GAC currently operates by means of consensus (general agreement with no formal objection) there was concern that, should the GAC change the basis on

which they give their advice, the Board's obligations of giving deference to that advice and to entering into a negotiation period would remain.

With a view to addressing this concern, the proposed Bylaw language now talks of "Advice which is approved by a full Governmental Advisory Committee consensus, understood to mean the practice of adopting decisions by general agreement in the absence of any formal objection". Advice which is not consensus advice must still be duly taken into account, and the Board must still give its reasons why it decided not to follow the advice, but the 2/3 threshold and the subsequent negotiation does not apply.

Although, on the face of it, the new proposed Bylaws language enshrines the current definition of GAC consensus advice, the Proposal clearly acknowledges that the GAC may refine its Operating Procedures to specify how objections are raised and considered. The example used is of disallowing a single country to continue an objection on the same issue if no other countries will join in an objection. The GAC's autonomy is not limited to discounting the objections of a single country. It is possible therefore that the GAC could change its Operating Procedures to exclude the views of more than a single country, or creating other hurdles to "formal objection." By doing so, it is possible that the GAC might re-define what is considered to be "lack of formal objection" and consequently it is conceivable that there could be consensus advice (thus afforded the 2/3 voting threshold) that does not have the support of a number of countries, but where those countries' objections no longer amount to a "formal objection".

Clearly, the GAC should have reasonable autonomy to amend its Operating Procedures as it sees fit, and the IPC would not seek to constrain the GAC. It is not acceptable, however, for the exercise of such autonomy to result in advice that is "consensus advice" in name only, yet afforded the same degree of deference as true consensus advice. That is exactly the problem that this entire exercise was supposed to guard against.

In order to avoid this anomalous result, the note regarding the refinement of Operating Procedures should be deleted, and the IPC proposes one or more of the following:

- a. For the purposes of how advice is treated by the Board, the definition of "formal objection" is specified in the revised Bylaw as it is currently understood, i.e. GAC consensus advice is "understood to mean the practice of adopting decisions by general agreement in the absence of any formal objection, as this term "formal objection" is currently understood based on the operating procedures in effect as at 21 December 2015;
- b. Some reasonable boundaries be put on the GAC's ability to change its definition of "full consensus";
- c. If GAC operating procedures change, the Board have reasonable discretion to determine if GAC advice is still consensus advice;
- d. If GAC Operating Procedures change, the Community should revisit the Bylaw and determine whether advice offered under a new procedure is entitled to the same deference as current "full consensus" advice; or
- e. GAC must specify all levels of objection, including any objections which they have disallowed, and why, which the Board shall duly take into account when considering the GAC advice.

Options (c) and (e) are less preferable, since they put the Board into the position of having to arbitrate amongst sovereign governments, a situation Stress Test 18 was developed in order to avoid.

The IPC also recommends a requirement that GAC “full Consensus” Advice must have been discussed and drafted and consensus reached in sessions open to all ICANN stakeholders, and must be made public. If this is not adopted at this point, this should clearly be part of the Work Stream 2 work mandated by Recommendations 10 and 12.

3. A Clear Rationale must be Required

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 decision making including, crucially, that the GAC should develop and publish rationales for its advice at the time of that advice. This has not been implemented. The GAC’s continued failure to provide rationales for its advice was comprehensively criticised by the IRP panel on dotAfrica, as was the Board for following such advice.

Under recommendation #11, all ACs will now be subject to the following: “The Advisory Committee will make every effort to ensure that the advice provided is clear and supported by a rationale.” Whilst this is welcome, there is clearly no obligation imposed by this wording, and deference to the GAC advice must be afforded by the Board irrespective of whether a rationale is provided or not.

This is inadequate. In order for GAC advice to be afforded deference at any voting threshold it must be supported by a written rationale. This rationale should, at a minimum, include a statement that the GAC is not aware of any national or international law or treaty that would be contravened by the GAC advice. This simple certification should preclude questions that have arisen regarding some GAC advice. If the GAC is unable to make such a statement, the ICANN Board should not be required to accord this advice the deference contemplated by the Bylaw.

Where the advice does not meet these criteria, it will be the responsibility of the Board to ask the GAC whether it is able to do so. It is of course open to the GAC to determine the basis on which it gives advice, and we do not seek to impose these obligations on it – however if these criteria cannot be met the advice should not be afforded any measure of deference.

The IPC recommends that the language above be revised as follows:

The Advisory Committee will ~~make every effort to~~ ensure that the advice provided is clear and supported by a **written** rationale.”

Recommendation #12: *Committing to Further Accountability Work in Work Stream 2*

The IPC supports this recommendation. In particular, Work Stream 2 must be fully supported by ICANN, including the continued retention of outside counsel. Work Stream 2 cannot be replaced by ICANN’s “business as usual” procedures.

Respectfully submitted,

Intellectual Property Constituency