NCSG Response to the Proposed Bylaws Changes Regarding Consideration of GAC Advice

For multiple reasons, the NCSG finds that the proposal to amend the ICANN board threshold for rejecting GAC Advice is a terrible idea and in direct conflict with ICANN's principles of building consensus amongst multiple stakeholders in its bottom-up policy development process (PDP).

gTLD policy is developed using consensus-based decision-making amongst all stakeholder groups involved in the process. This process already allows for GAC involvement at multiple stages including participation of GAC members in a PDP's charter drafting as well as participation in a PDP's working group. It also allows the GAC's perspectives to be taken into consideration during multiple rounds of public comment. This already existing (and continuously improving) process provides the GAC with the opportunity to participate in the consensus building of gTLD policy development along with the rest of the ICANN community. There is also an initiative underway between the GAC and the GNSO to encourage early participation of the GAC in the GNSO's PDP, including the recent appointment of a GNSO reverse liaison to the GAC intended to assist the GAC in early identification of PDPs with potential public policy implications. Ratification of this proposed by-laws amendment not only undermines the work of the GNSO in its efforts to develop gTLD policy by empowering a parallel process, but also grants more influence to GAC Advice following the completion of a PDP, undermining the ongoing efforts being made by GAC and GNSO to encourage earlier engagement.

The ATRT recommended urging the GAC to get more involved with and integrated in the GNSO's PDP. It also recommended that ICANN take measures to encourage an increase in participation in GNSO working groups. Instead, the ICANN board is proposing a change to the by-laws that would both discourage the GAC from participating in the GNSO's PDP, and decrease working group volunteers' confidence in the outcomes of working groups that could easily be overruled by GAC Advice to the ICANN board.

Additionally, it is important to note that not all countries in the world are actually members of the GAC, and even those that are members are not always present at ICANN meetings during which GAC Advice is voted upon prior to submission to the ICANN board. There is also the question of GAC being able to, according to its procedures and on its own initiative, change its threshold for advice to the ICANN Board from a consensus based standard to a majority based standard. This potential change in its own operating procedures has already been suggested by at least one of the GAC members, and irrespective of whether it actually takes place or not, remains a very realistic possibility in the future. In effect, should the by-laws change take place, gTLD policy could be developed with consensus amongst the ICANN community, be found to be desirable by a majority of the ICANN board, but not be adopted because a simple majority of the GAC decide to submit Advice against its implementation.

Another aspect of empowering GAC Advice to a level comparable to the GNSO's policy recommendations that the NCSG finds to be problematic is the method by which several governments actually come to power in their countries. Not all countries are governed in a bottom-up manner representative of the will of their

citizens and various local stakeholders. To avoid confusion, the NCSG does not wish for ICANN, or its community, to become entrenched into a position that requires the passing of judgment on or even distinguishing between the nature of political practices amongst different state actors. We do, however, wish for ICANN's by-laws to continue to serve as a deterrent against all forms of top-down processes becoming overwhelmingly influential in gTLD policy development. The NCSG believes that the GAC's current role of providing Advice on public policy implications of gTLD policies at ICANN, and the ICANN Board's current threshold of voting to approve or reject this Advice is adequate enough to serve that purpose. To change this threshold would be, at a time when ICANN is being praised for its institutional maturity and ability to develop consensus policy, a certain step in the wrong direction negatively affecting confidence in ICANN's ability to perform its duties.

Despite the above-mentioned perception of flaws in the GAC's membership and operating procedures, the NCSG is not asking that GAC advice be ignored altogether. However, we do not see any benefit in empowering the GAC over other Advisory Committees (ACs) and Support Organizations (SOs) within ICANN. Had the proposed amendment to the by-laws been geared more towards having the ICANN board treat input from the different ACs/SOs with the same level of consideration while ensuring a requirement of consensus building, the NCSG may have found it to make more sense. As is, this proposal provides greater status to GAC Advice than Advice provided by ALAC, RSSAC or SSAC, in addition to positioning the GAC as an alternative go-to body for lobbying instead of encouraging participation in the GNSO's PDP.

Finally, this proposal to change the ICANN by-laws is very unwise in its timing, considering ICANN's role as the convener of the IANA transition process. The United States National Telecommunications and Information Administration (NTIA) in its announcement on the topic said that *"NTIA will not accept a proposal that replaces the NTIA role with a government-led or an inter-governmental organization solution"*. ICANN, as the convener of this process, deciding to bring itself closer to becoming a government-led organization is ill-advised to say the least.

The NCSG asks that the ICANN board of directors reject the proposed change in its by-laws, and hopes the board will show support to the many comments already submitted in response to the announcement by doing so unanimously.