



The Internet Corporation for Assigned Names and Numbers

3 November 2014

Thomas Schneider
Chair, ICANN Governmental Advisory Committee

Re: Bylaws Issue in London Communiqué

Dear Mr. Schneider:

The ICANN Board New gTLD Program Committee (NGPC) continues to make progress to consider and address the remaining open items of advice from the Governmental Advisory Committee (GAC) related to the New gTLD Program. As part of its recent deliberations on the GAC's advice, the NGPC identified a matter that concerns the ICANN Bylaws, which will be considered by the full Board in due course. Specifically, in Section 6 of its [London Communiqué](#) (25 June 2014), the GAC advised the Board that the GAC believes some subjects are not appropriate for a GNSO policy development process.¹

The advice from the GAC directly concerns the framework established in the Bylaws defining the supporting organizations and advisory committees. [Article X, Section 1](#) of the Bylaws provides that “[t]here shall be a policy-development body known as the Generic Names Supporting Organization (GNSO), which shall be responsible for developing and recommending to the ICANN Board substantive policies relating to generic top-level domains.”

While the GAC may participate in the policy development process, and has a [role](#) to “provide advice on the activities of ICANN as they relate to concerns of governments, particularly matters where there may be an interaction between ICANN’s policies and various laws and international agreements or where they may affect public policy issues,” the GNSO has the authority to recommend substantive policies on topics that are within the scope of ICANN’s mission statement, has potentially broad applicability to multiple situations or organizations, is likely to have lasting value or applicability, and will establish a guide or framework for future decision-making.

The Board has concerns about the advice in the London Communiqué because it appears to be inconsistent with the framework established in the Bylaws granting the GNSO authority to recommend consensus policies to the Board, and the Board to appropriately act upon policies developed through the bottom-up consensus policy developed by the GNSO.

As required by the Bylaws, in the event that the ICANN Board determines to take an action that is not consistent with the GAC advice, it must inform the GAC and state the reasons why it decided not to follow that advice. The GAC and the ICANN Board will then try, in good faith and in a timely and efficient manner, to find a mutually acceptable solution. The ICANN Board-GAC Recommendation

¹ See GAC Register of Advice (<https://gacweb.icann.org/display/GACADV/2014-06-25+RCRC>)



Implementation Working Group (BGRI-WG) developed a procedure (the “Consultation Procedure”) for any consultations that might be needed if the Board determines to take an action that is not consistent with GAC advice. (A copy of the Consultation Procedure is included as Attachment A.) The first step in the Consultation Procedure is for the Board to provide a written response to the GAC indicating (1) whether it has questions or concerns regarding the advice, (2) whether it would benefit from additional information regarding the basis of the GAC’s advice, and (3) a preliminary indication of whether the Board intends to take the advice into account. This letter serves as the first step of the Consultation Procedure. As the Board considers how to address this item of the GAC’s advice, it would be helpful to understand the basis for the GAC’s advice in light of the framework established in Bylaws.

Additionally, the Consultation Procedure requires that the Board’s response be the subject of an exchange between the Board and the GAC. The Board requests that the GAC provide guidance on the best way to move forward with scheduling an exchange between the Board and the GAC.

We look forward to your response as we move forward with this process.

Best regards,

A handwritten signature in black ink, appearing to read "Stephen D. Crocker".

Stephen D. Crocker
Chair, ICANN Board of Directors

Process for Consultations between the ICANN Board of Directors (“Board”) and the Governmental Advisory Committee (“GAC”), including those required pursuant to Article XI Section 2.1.j of the ICANN Bylaws

Process:

Step 1: Upon receipt of GAC advice (and prior to communicating its final decision), the Board will provide a written response to the GAC indicating:

- whether it has any questions or concerns regarding such advice;
- whether it would benefit from additional information regarding the basis for the GAC's advice;
- and a preliminary indication of whether the Board intends to take such advice into account.

The Board's response will be subject of an exchange between the Board and the GAC.

Step 2: In the event that the Board determines, through a preliminary or interim recommendation or decision, to take an action that is not consistent with GAC advice, the ensuing consultations will be considered “Bylaws Consultations”. The Board will provide written notice to the GAC (the “Board Notice”) stating, in reasonable detail, the GAC advice the Board determines not to follow, and the reasons why such GAC advice may not be followed. The GAC will be afforded a reasonable period of time to review the Board’s Notice and explanation, and to assess whether there are additional elements of GAC advice that it believes have been rejected by the Board.

Step 3: As soon as possible after the Board Notice is issued (or within such time as otherwise agreed), the Chair of the GAC and the Chair of the Board will confer as to an appropriate time and agenda for a meeting between the GAC and the Board (the “Bylaws Consultation”). It is intended that all issues related to the meeting are identified and agreed upon between the GAC and Board prior to the consultation.

Step 4: Within a timeline agreed to by the GAC Chair and Board Chair, the GAC and/or the Board may prepare written documents setting forth their respective positions on the intended Board action for presentation at the Bylaws Consultation. Subject to the agreement to publish documents, such documents should be communicated and will be published at least two (2) weeks prior to the Bylaws Consultation meeting. Where practicable, all communications and notices provided by the Board or GAC shall be posted to ICANN's website. In addition, a written transcript of the Bylaws Consultation meeting shall be posted to ICANN's website.

Step 5: During the Bylaws Consultation meeting, the GAC and the Board will each seek, in good faith and in a timely and efficient manner, to find a mutually acceptable solution to the conflict between the possible Board action and the GAC advice, including by proposing compromise positions with respect to the intended Board action, if feasible and appropriate.

Step 6: After the conclusion of the Bylaws Consultation, the Board will determine whether to reaffirm or reverse the intended Board action, or take mitigating action.

If the Board determines to reverse the intended Board action or take mitigating action based on GAC advice and the outcome of the Bylaws Consultation, the Board may as appropriate: (i) implement any compromise action proposed by or agreed with the GAC during the Bylaws Consultation, in either case

without further GAC consultation; or (ii) formally reverse the Board's preliminary or interim decision. The Board's final determination will be communicated to the GAC, providing the GAC an opportunity to comment and/or to raise other issues raised anew by the Board's decision and therefore not addressed in the consultation.

As a general rule, the Bylaws Consultation process should conclude within six months. The GAC and the Board can agree to a different time limit when necessary, taking into account the complexity of the issue and the scope of difference between the GAC and the Board's positions. Either the GAC or Board may initiate a request for expansion of the six-month time limit by providing a written request that sets out a new time-frame for completion and indicating the basis for the request.

Step 7: If the Board determines to take final action in contravention of GAC advice, then the Board will issue a final decision, stating the reasons why the GAC advice was not followed, as required in Article XI section 2.1.k of the ICANN Bylaws. The Board's final decision and explanation will be posted on ICANN's site.