

## **Issue analysis of public comments received on the role of the GAC**

The public comments recognize the important role that the GAC plays within ICANN with regard to public policy advice but most do not think that the GAC is the sole source of advice on what constitutes the 'public interest' regarding DNS co-ordination.

Some comments note an improvement in the GAC's role and the quality of the advice it offers.

Some comments indicate that it is not clear whether GAC advice is adequately paid attention to, some seeing the Board at fault in this regard, others that there are no oversight mechanisms to track how the Board deals with GAC advice. There is also a concern that for GAC advice to be effective it needs to be timely and not at the end of a PDP.

On what needs to be done to address shortcomings in the GAC's advice to ICANN, suggestions range from:

- Co-ordination within the current advisory process should be improved but no fundamental change to the role and structure of the GAC should be made.
- ICANN needs to formally respond to GAC advice even if it is not adopted.
- An oversight mechanism is needed to ensure ICANN effectively considers GAC advice.
- The Board should make its deliberations public, so that its treatment of GAC advice can be transparent.
- Enhanced dialogue between the GAC, the business community and other stakeholders would help facilitate greater collaboration.
- SOs should have GAC input on public policy as part of their prioritized agenda items.

No specific examples for case studies were suggested in the public comments.

## Issue Analysis on the meeting between the ATRT and the GAC

Brussels, June 2010

GAC members indicated that there was no uniform definition of public policy among governments but the Board has the legal obligation to consult the GAC on public policy in terms of the Bylaws. In this the Board has a responsibility to determine what constitutes public policy. There is also the issue that public policy issues like cyber crime or child protection are global public policy issues at the top level but will find different approaches at the national level.

In addition the Board's question of whether there is a distinction between formal and informal advice is not clear as the GAC view is that advice is advice is advice.

To the ATRT question of whether there are examples of where the GAC should have been consulted but weren't, there were a number of responses:

- Board resolutions provide sufficient notice to the GAC of the Board's views or intentions on an issue and the establishment of a Board-GAC working group four years ago has resulted in better understanding and communications between the Board and the GAC.
- When the Board endorsed the GNSO recommendations on the introduction of new gTLDs it would have been good for the Board to get the GAC's advice on issues of public order and morality, trademarks and sensitive strings before embracing the GNSO recommendations in June 2008.
- Another example is the EoI decision made on the last day of the ICANN Seoul meeting in 2009 where the GAC was completely bypassed.
- The GAC communiqué at the ICANN Los Angeles meeting in 2007 specifically commented that the new gTLD process did not reflect public policy principles.

To the question of whether GAC members think there is a shared understanding between the GAC and the Board, the answer was 'no'.

Another problem lies in the way the GAC participates in the PDP as the major challenge is in the way policy gets to the Board through many iterations in SO's, with the result that the GAC input is not easily incorporated.

There is also a problem of overload in PDP's, for example the vertical integration process where the volume of some 1,600 emails was hard to process.

The GAC is now making input in the Public Comment processes but is not sure due weight is being given to government inputs. It would be useful to do a quantitative review of the number of comments received and their diversity. There is also an overload problem with the Public Comment processes where many consultations are taking place in parallel. One can't make a comment on a comment which raises the issue of how interactive such Public Comment processes are. It would be useful in the mailing lists of PDPs to have regular stocktaking

moments which indicate where the process is with regard to what is agreed and what is still to be done. There are also problems of the deadlines for Public Comments because if the Public Comment happens between meetings the GAC can't comment.

There is also a threshold question – SO's have no obligation to take GAC advice in terms of the Bylaws. It would be useful to amend the bylaws to enable GAC advice to be given to SO's during PDPs.

To the question of whether the GAC has liaisons to SO's and AC's, the response was that the GAC has one formal liaison to the SSAC. Instead of liaisons to other SO's and AC's the GAC decided to increase meetings with other SO/ACs during ICANN meetings. This coincided with an open door policy of the GAC.

To the question of whether the GAC would like a recommendation on changing to Bylaws to carve out a special role for the GAC with regard to SO's similar to the GAC's role with the Board, the answer was in the affirmative because of the nature of the multi-stakeholder model being different to the intergovernmental model such as is being discussed at the ITU Plenipotentiary this year.

At present there are different approaches to government participation in working groups. The IDN ccTLD working group was a good example of a WG where everyone worked collegially and the GAC could participate at every step in a real cross-community exercise. On the other hand there are WGs in which it is difficult for the GAC to participate actively such as the PDP Reform WG and the Vertical Integration WG where GAC participation was largely as observers because of the intensity of the GNSO PDPs, but in the case of vertical integration it may have been useful to get public policy advice from competition authorities not necessarily GAC representatives. This raises the question of whether PDP reform should be seen as a subset of the GNSO or rather that PDP reform should be viewed as a high level review of community wide policy processes. Perhaps a mechanism should be introduced at the community level when there is a major policy issue on the table.

Bill Dee from the European Commission made some useful observations about the issue of public policy, which are worth quoting in full:

The comments that I'd like to make is that there are essentially two perspectives on what constitutes public policy, first of all there's a GAC perspective, in our opinion. And there each governmental or public administration has to decide for itself, if something raises public policy concerns. This is a principle of national sovereignty but this is also the real world, actually, different governments place different emphasis on different aspects of, in this case, internet policy.

So there isn't a uniform, universal definition, that we can offer, its nature of national governments and parliaments, they will decide over a period to attribute importance of policy attention to issues, and that will vary over time. The other perspective, in our opinion or in my opinion, I think shared by the colleagues, is the Board perspective and that's different in the sense that the Board have a legal obligation under the bylaws to consult the GAC on any proposal that raises public policy issues.

And therefore its different, they have a legal obligation to determine how they are going to decide if something raises public policy issues, and there it seems to us that, in retrospect, it may have been useful at some point if the Board had perhaps consulted, or maybe they have consulted and we're unaware of it, with their legal counsel about how they're supposed to fulfill this legal obligation under the bylaws. And that's difficult for GAC members to comment any more on, I think that you'd have to ask the Board on that, but that's a particularly important aspect of this issue of how you define public policy issues.

During our discussions, I think we decided as well that it's important to recall that the GAC didn't draft the bylaws, and therefore in the terms of the references to public policy and the bylaws, we are very much at the mercy of the Board actually who are responsible for reviewing them and updating them. A public policy from our perspective, will vary from government to government and we'll have to actually deal with issues on ad hoc basis and determine for ourselves if we feel it raises public policy issues for our administration which is significant to warrant our intervention in a particular issue and policy making process.

But we'd stress that we also think that its important to pay attention to the fact that the board have a responsibility for making a determination on what constitutes public policy because that's what the bylaws say, the bylaws don't require us, I think, to make that determination, they have the legal obligation. But this isn't to be negative, I think, it's an observation that we made and we think it's important in the interpretation of this particular issue.

Particularly in light of the fact the bylaws, they only refer to public policies in the same way they refer to us giving advice, which is something we will come to in a moment, there is no definition provided in the bylaws, and there is also no limitation given, as to how they might be interpreted and I think that's probably part of the problem.

## **Issue analysis of the meeting between the ATRT and the Board-GAC Joint Working Group (JWG)**

Brussels, June 2010

The JWG explained its deliberations on the issue of GAC advice to the Board, which are contained in their draft report, which was made available to the ATRT. The JWG input to the meeting was a summary of its work to date on GAC advice to the Board which is contained in objective 1 of its draft report.

The JWG is considering the following options regarding the issue of GAC advice to the Board:

- create a transparent register or consistent record to make apparent whether/when/how the Board has taken into account or responded to particular advice from the GAC.
- Board could consider submitting written, regular requests for advice to the GAC, clearly identified as such. This approach could also be a useful component of the proposed register.
- in the event that the GAC decides to form a working group to review the *Operating Principles*, draw on the work of the JWG.
- identify consistent methods of notating written GAC advice.

The GAC established an ad hoc working group to review its Operating Principles at the Brussels meeting. It is due to report at the ICANN meeting in Carthage.

To the ATRT question of what constitutes advice in a GAC communiqué, the response was 'advice is advice is advice'.

To the question of to what extent is the JWG looking at changing the Bylaws to improve the quality of decision-making, the response was that the GAC is concerned that its advice be considered earlier in a PDP and the Bylaws specify that advice is to the Board and not other SO's. The IDN fast track process is another example of where the Bylaws do not provide any guidelines for engagement with constituencies as is now happening in practice as part of the GAC's evolution within ICANN.