



17 July 2018

NTIA Notice of Inquiry: International Internet Policy Priorities

Com Laude is a corporate registrar which provides domain name management and online brand management services to businesses. Com Laude's sister company, Valideus, provides new gTLD consultancy and registry management services to prospective and existing new gTLD registry operators. We have offices in the US, Japan and Spain, in addition to the UK. We participate within ICANN as members of the Generic Names Supporting Organisation.

We appreciate the opportunity to respond to the NTIA's request for comments from all interested stakeholders on its international internet policy priorities for 2018 and beyond, and specifically on the following questions regarding the multistakeholder approach to internet governance:

C. Are the existing accountability structures within multistakeholder internet governance sufficient? If not, why not? What improvements can be made?

In the context of the IANA stewardship transition, the multistakeholder community within ICANN worked together to develop enhancements with a view to keeping ICANN accountable once the perceived oversight of the US Government had ceased. A number of these proposed enhancements fell within what was termed "Workstream 2", dealing with recommendations on the following aspects:

- Diversity;
- Standards of good faith conduct in the context of the removal of individual Board Directors;
- Framework of interpretation for human rights;
- Jurisdiction;
- The office of the Ombudsman;
- Supporting Organisation and Advisory Committee accountability;
- Staff accountability; and
- Transparency.

The Workstream 2 Final Report was published on 24 June 2018 and must now be formally accepted by the chartering organisations of ICANN, and the recommendations implemented. Various recommendations have therefore been made for the improvement of ICANN's accountability. It is important that these are implemented in a timely manner.

In addition, recommendations from Workstream 1 relating to the development of revised procedures for the Independent Review Process (IRP) are still to be implemented, being dealt with by Implementation Oversight Team (IRP-IOT). This IRP-IOT has been working now for more than 2 years. In November 2016 draft Supplementary Procedures for the IRP were issued for public comment. A further comment period is currently open specifically on the question of the time limit to bring an IRP. An important task which is yet to be addressed is that of appointing a standing panel who will consider IRP cases. Since the enhanced IRP is one of the key accountability improvements developed in support of the IANA stewardship transition, it is crucial that this implementation work is finalised as swiftly as practicable, and we believe that the ICANN Board should make this a priority.

ICANN is currently the defendant to an action in the California court¹, where allegations are that ICANN committed fraud or caused wilful injury to the claimant in its handling of the claimant's application for the dotAfrica new gTLD. In the event that the claimant is successful, it will be important to review the findings of the court in the light of ICANN's accountability enhancements, in order to determine whether further changes are required.

D. Should the IANA Stewardship Transition be unwound?

We support the multistakeholder model of internet governance that ICANN stands for. Improvements to ICANN's accountability are currently in progress, as referred to above, and these must be implemented in a timely manner. At present there is nothing to suggest that the IANA stewardship transition has been a failure, so as to justify seeking to unwind it.

E. What should be NTIA's priorities within ICANN and the GAC?

ICANN's Governmental Advisory Committee (GAC) is afforded a unique position under ICANN's Bylaws, in that GAC advice which is approved by a full GAC consensus, understood to mean the practice of adopting decisions by general agreement in the absence of any formal objection (GAC Consensus Advice), may only be rejected by a vote of no less than 60% of the Board. As such, the GAC plays a very important role.

With additional countries joining the GAC, and changes to the representatives of existing GAC members, at any time there can be a large number of representatives within the GAC who are relatively new to the organisation. For example, in advance of the ICANN57 meeting in October 2017, it was reported that there were 50 new GAC representatives since the previous meeting. All experienced GAC participants have a role in providing guidance and leadership to the newer members to ensure that they understand their role and responsibilities within ICANN, and the NTIA is no exception to this.

In addition, the NTIA can play a crucial role in helping to ensure that advice which is presented as GAC Consensus Advice does genuinely fulfil that function. There has been a tendency in some recent GAC Communiqués to present recommendations and requests for information or engagement as being GAC Consensus Advice when, arguably, they do not qualify as such, either because the request is not advice, or because it is in fact a request of a small group of GAC members which is presented as Consensus Advice. By way of example:

- Annex 1 to the GAC Hyderabad Communiqué² consists of a series of questions seeking to elicit information from the ICANN Board, which the board was "advised" to respond to no-later than five weeks before the following ICANN meeting. Such requests for information are perfectly valid, but they are not GAC Consensus Advice under the Bylaws and should not be presented as such;
- GAC Copenhagen Communiqué, advice with respect to 2 character country/territory codes at the second level³, in which the GAC advised the ICANN Board to, inter alia:
 - (i) Take into account the serious concerns expressed by some GAC Members as contained in previous GAC Advice
 - (ii) Engage with concerned governments by the next ICANN meeting to resolve those concerns.
 - (iii) Immediately explore measures to find a satisfactory solution of the matter to meet the concerns of these countries before being further aggravated.

Such advice demonstrably relates only to the concerns of some governments, rather than concerns which the GAC, as a whole, shares.

Finally, NTIA can continue to play a crucial role in ensuring that some governments do not seek to bring into ICANN discussions and debates which more appropriately sit in other international fora, and do not seek to achieve outcomes within ICANN which they have not been able to achieve elsewhere. An example of this would be with respect to the ongoing debate over the treatment of geographic names at the top level, where some governments and others are arguing for restrictions which are not

¹ <https://www.icann.org/resources/pages/dca-v-icann-2016-01-26-en>

² <https://gac.icann.org/contentMigrated/icann57-hyderabad-communication>

³ <https://gac.icann.org/contentMigrated/icann58-copenhagen-communication>

supported by international law. We appreciate that representatives of NTIA and the USPTO have been actively engaged in this debate to date and hope such engagement will continue.

In saying this, we would like to emphasise the value to our clients, mostly international businesses with a strong US presence, of the work of the NTIA within the ICANN environment. We think it is essential that the US representatives continue to speak out in support of transparent and predictable solutions and in support of norms of international law.

Thank you for considering these points.

Yours sincerely,

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