

CCWG-accountability initial draft proposal (4 may 2015)

20 May 2015

The French government would like to commend the CCWG for the huge amount of work that has been done so far in the process of enhancing ICANN accountability. We reiterate our support to the CCWG-accountability and appreciate particularly the dedication of all individual stakeholders, co-chairs, members and participants, to the group in such a constrained timeframe.

1. We take the opportunity of this public comment period to first underline the progress made on appeal mechanisms.

Just as many other stakeholders, the French government have been a long-time advocate of more effective and affordable means of appeal and redress at ICANN, with adequate guarantees of independence. We consider that the proposed overhauling of the IRP in part 4 of the CCWG initial draft proposal definitively addresses such concerns.

Our responsibility as government is nevertheless to stress that the new IRP has to remain an internal mechanism within ICANN and we would particularly insist on:

- 1. Avoiding the creation of a legal arbitration court on the basis of the CCWG-accountability initial draft proposals for the new IRP. On that basis, stakeholders would hardly be supplied with: either the guarantees of independence that, on the one hand, international arbitration usually does provide; or the guarantees of affordability that, on the other hand, international arbitration usually does not provide. In addition, stakeholders would also risk being prevented from going to other courts to have their complaints examined once they submitted them to the new IRP.**
- 2. Having the ICANN community itself, through the “SO/AC Membership Model”, select the IRP panellists, and not only confirm the selection of the IRP panellists by the Board, for better guarantees of independence;**
- 3. Also giving the ICANN community only, through the “SO/AC Membership Model” (and with a very high degree of support e.g. ³/₄), the power of remove an IRP panellist, for even better guarantees of independence.**

- a. *One of the innovations that we deem most important is that the new IRP will no longer be limited in its capacity to judge to judge of the merits of a complaint by an aggrieved party.*

This will greatly expand the standard of review of the current IRP which can only stand against any “Board actions alleged by an affected party to be inconsistent with the Articles of Incorporation or Bylaws” (Draft prop., section 4.1, §133, item 9) and is consequently limited in its capacity to judge on anything but the decision-making procedures followed by the Board.

We therefore support the expansion of the standard of review for the IRP to “ICANN’s Bylaws, Articles of Incorporation, or *Statement of Mission, Commitments, and Core Values* or ICANN policies” (Bylaws, art.III-3-1). Although technically ICANN’s new *Statement of*

Mission, Commitments, and Core values, are to be incorporated in its Bylaws (Draft prop., section 3.1, §50), we would nonetheless approve that the new IRP's ability to judge on the merits just came from the expansion of its standard of review to ICANN policies.

- b. *The issue of enforcement of the new IRP's decisions remains, however, unclear to us.*

It seems that the maximum expansion of the standard of review for the new IRP is intended to remain within ICANN's limited competencies, as stated in, and not beyond, ICANN's Bylaws, Articles of Incorporation, or *Statement of Mission, Commitments, and Core Values* or ICANN policies.

We therefore understand why the power to enforce or bind the Board with the new IRP's decisions would be sought within the ICANN community (Draft prop., section 8.6, stress test #12 envisages the possibility of forcing resignation of ICANN Board member(s) if they "were to ignore binding IRP decisions).

We are unclear, however, why it would also be sought outside of ICANN (Draft prop., section 4.1, §133, item 18.c: "in the court of the US and other countries that accept international arbitration results").

- c. *As far as we are concerned, recognizing the IRP as an international court of arbitration would be a major issue because arbitration is strictly regulated by law.*

In France as in many other countries, two parties can agree on arbitration only after one party feels that the other party fails to respect the terms of an existing contract. Furthermore, the two parties have to waive their right to go before courts of other jurisdictions.

For those stakeholders who do not currently have a contract with ICANN, such as governments, there might be room for an agreement with ICANN on arbitration by the new IRP on the basis of other existing documents, such as ICANN's Bylaws and Articles of Incorporation. In other words, it might be possible for us to consent to arbitration by the new IRP on the decision-making procedures followed by the Board, simply because such procedures already exist and are well-documented.

However, as a party that might be aggrieved by future ICANN policies, we would have a legal problem consenting to arbitration by the new IRP on the merits of a complaint. As a matter of fact, law would not allow us to already consent to arbitration with ICANN, and waive our right to go before other courts than the new IRP, on the basis of non-existing, or yet-to-be documented policies.

- d. *We want the new IRP to judge on the merits of future complaints but we cannot legally have only the new IRP do that in the future.*

This is the "fork in the road" clause permitted by law on international arbitration, which stipulates that an aggrieved party must have the opportunity to choose to go before other competent courts in order to have their complaints examined, before losing that opportunity by agreeing to go to arbitration.

In the case of the new IRP, this clause would give way to the possibility, for those stakeholders who could feel aggrieved by ICANN policies in the future, to go before other

competent courts in order to have the merits of their complaints examined. It would also imply that ICANN should be ready to recognize the competency of alternative courts for merits of complaints by stakeholders aggrieved by its future policies.

- e. *This legal entanglement makes the solution to stress test #12 (forcing resignation of ICANN Board member(s) if they were to ignore binding IRP decisions) all the more important to us.*

The “fork in the road” clause has consequences in terms of enforcement of decisions taken on the merits of complaints with respect to future ICANN policies. Its very existence implies that stakeholders cannot be provided with legal certainty of enforcement of such decisions through the new IRP alone. Legal certainty of enforcement would come only with additional guarantees for decisions by other competent courts. In other words, since ICANN is based in the US, the US authorities themselves should give stakeholders guarantees on the exequatur for decisions taken by alternative courts regarding future ICANN policies.

Should legal certainty of enforcement not be obtained through the new IRP alone, we would recommend stakeholders to content themselves with practical certainty of enforcement of decisions taken on the merits of future complaints. This seems achievable indeed, if (and almost only if) the Board were automatically spilled after ignoring a binding decision of the new IRP. An interim Board would have to be chosen and charged with enforcing the IRP decision which was ignored by the former Board.

- f. *We finally feel compelled to point out gaps between common legal practices with regard to choosing international arbitrators and the new IRP.*

It should be pointed out that it is not common legal practice to decide what party should support the costs of international arbitration, which are usually rather high, before it even takes place. Although we understand that ICANN’s financial support would provide stakeholders with more affordable appeal mechanisms, the affordability of the new IRP should certainly not come at the expense of the independence of the panellists.

The idea of a standing panel for the new IRP therefore needs to be clarified (Draft prop., section 4.1, §133, item 17). In the case of a 3-member panel, it is indeed common practice that each party, the defending party and the aggrieved party, freely chooses an arbitrator and that the two selected arbitrators choose the third, which gives both parties adequate guarantees of independence of the arbitrators. Yet in the case of the new IRP, ICANN and the party aggrieved by a decision of its Board would have to draw the panellists from a standing panel of arbitrators, who would not only be financially supported by the defending party (ICANN, Draft prop., section 4.1, §133, item 13), but who would also have been selected by the defending party (the Board, Draft prop., section 4.1, §133, item 14b), which seems to give fewer guarantees of independence of the panel.

- g. *The French government is confident that the CCWG-accountability will take into account the previous comments and consider the following questions in its final proposal.*

- **Since ICANN’s new Statement of Mission, Commitments, and Core values, are to be incorporated in its Bylaws (Draft prop., section 3.1, §50), are we right in considering that the new IRP’s ability to judge on the merits, rather than on procedures, only lies in the expansion of its standard of review to ICANN policies?**

- Are we correct in understanding that standard international courts of arbitration, such as the ICC, were not considered as adequate for the new IRP mechanism because of the expansion of its standard of review from ICANN's Bylaws and Articles of Incorporation to ICANN policies?
- Must we then understand that all stakeholders, including governments, are expected to legally recognize the IRP as an international court of arbitration whenever they want to file a complaint against any action or inaction of the ICANN Board?
- If so, does ICANN understand that it has to acknowledge the competency of alternative courts for merits of complaints by stakeholders aggrieved by its future policies? And since ICANN is based in the US, would the US authorities themselves give stakeholders guarantees on the exequatur for decisions taken by alternative courts regarding future ICANN policies?
- Would it therefore not be sufficient that the power to enforce the new IRP's decisions would lie only within ICANN community's power to recall the entire Board, and not "in the court of the US and other countries that accept international arbitration results"? In other words, that the new IRP remains an internal mechanism within ICANN and does not become a legal arbitration court?
- Could the CCWG-accountability therefore elaborate more on the independence of the new IRP standing panel?

2. **The French government also awaits further details on how the principle of cultural diversity and a strict conflict of interest policy will be implemented in order to mitigate the risk of capture of the new institutional framework of ICANN by individuals or groups of individuals.**

While the risk of capture by governments has clearly been a cornerstone of the proposed new institutional framework of ICANN, it seems to us that the proposed internal checks and balances mechanisms insufficiently addresses the risk of capture by individuals or groups of individuals of the new empowered entities within ICANN: "SO/AC Membership Model" and IRP, in addition to the Board.

- a. For example, we do not think that any SO or AC should be constrained by the other SOs and ACs in the process of designating its representatives. Yet failures in the processes of designating the SOs' and ACs' representatives could well expose the new "SO/AC Membership Model" to a *risk of capture by a group of individuals*.

In order to mitigate the risk of capture of the new "SO/AC Membership Model", or even that of the Board, by a group of individuals, we would therefore expect all stakeholders within SOs and ACs to respect the principle of cultural diversity as identified in the NETmundial "Roadmap for the future evolution of internet governance" among "issues that deserve attention of all stakeholders in the future evolution of internet governance" (NETmundial Multi-stakeholder Statement, 2.I.5): "There should be meaningful participation by all interested parties in Internet governance discussions and decision-making, with attention to geographic, stakeholder and gender balance in order to avoid asymmetries".

- b. The new institutional framework of ICANN also remains exposed to the *risk of capture by individuals* who could take advantage of a weak conflict of interest policy.

Similarly, while we also understand that an empowered community would provide stakeholders with ex-post oversight over the Board, we do not think that ICANN can afford the luxury of a crisis resulting from having no ex-ante thorough conflict of interest policy providing some oversight over the selection of individual Board members, and leading to the exclusion of one or several of them.

We therefore call for the strictest conflict of interest policy to be implemented at Board, IRP and “SO/AC Membership Model” levels. We also naturally believe that the implementation of the principle of non-cumulative holding of offices, successively or simultaneously, is an absolute necessity to mitigate the risk of capture of the new institutional framework of ICANN by individuals. We finally encourage the establishment of an independent commission in charge of controlling the conflict of interest statements issued by the Board members.

3. **We finally have concerns with the expectations that the CCWG-accountability placed upon governments.**

NTIA made it clear that the IANA transition is a resumption of the process of privatisation of the DNS and that they will not accept a transition proposal that replaces the NTIA role with a government-led or intergovernmental organisation solution. We therefore understand that, consistent with the US approach to the IANA transition, the solution designed by the CCWG-accountability cannot be but a private sector-led organisation. We also find it perfectly understandable that the solution designed by the CCWG-accountability would focus on mechanisms to mitigate the risk of capture of the future organisation by governments.

a. *The French government considers that jurisdiction of ICANN was rightly identified as an issue for Work Stream 2.*

We do not think that the CCWG-accountability final proposal should be dependent on California Law.

Arguably, such dependencies would mean that the US authorities, albeit maybe not NTIA, would retain a particular position in the management of the DNS, which we assumed was not NTIA’s intention when they announced their readiness to transition their stewardship of the IANA functions to the global multi-stakeholder community.

The French government comprehend that temporary US jurisdiction over ICANN is necessary for purposes of stress testing the CCWG-accountability final proposal over a limited period of time. Yet the CCWG-accountability final proposal should be transposable on an international legal framework, which we ultimately consider to be the only neutral legal framework suited for ICANN.

b. *We are nevertheless preoccupied that governments are expected to willingly consent to subject the GAC to California Law.*

In light of the above, we expect that the “SO/AC Membership Model” will need a legal vehicle for initial implementation.

We understand, that flexible as it may seem, California Law offers only but a few options for implementation of the “SO/AC Membership Model”. Moreover, it appears that all of them require stakeholders to give SOs and ACs legal status under California Law (Draft prop., section 5.1.1, §180, item 1).

Legal recognition of the GAC is an issue for France because States are subjects of international law only. This is why France does not recognize the GAC as a legal entity today. Like most States, only on the basis of an international treaty has France legally recognized – under international law – organisations that it has participated in.

Requiring France, or any other State, to legally recognize – under foreign law and in the absence of an international treaty – an intergovernmental body that it participates in like the GAC, is in fact unprecedented.

c. *Those are very serious concerns that currently under investigation in by our legal Department.*

We are notably investigating, like in the case of any international treaty, that the participation of France in the GAC would not engage every State’s sovereignty to an extent that could be unconstitutional.

But more importantly, should one – and only one – State among GAC members not be able to subject the GAC to California Law for national legal reasons, it seems that the whole “SO/AC Membership proposal” could be compromised.

Has the CCWG-accountability considered that requiring legal recognition of the GAC by individual States could lead to a situation where one single State might, willingly or unwillingly, prevent the GAC to be empowered in the “SO/AC Membership Model”? Or worse: where some States might not even be able to be GAC members (anymore or in the future) if the GAC was empowered in the “SO/AC Membership Model”?

d. *Not only might the proposed implementation of the “SO/AC Membership Model” under US Law give lower chances to empowerment of the GAC, it also might leave governments lower chances to respect their international agreements through an empowered GAC.*

NETmundial recalled that:

1. “The implementation of the Tunis Agenda has demonstrated the value of the multistakeholder model in Internet governance. The valuable contribution of all stakeholders to Internet governance should be recognized” (NETmundial Multi-stakeholder Statement, 2); and that
2. “Internet governance decisions are sometimes taken without the meaningful participation of all stakeholders. It is important that multistakeholder decision-making and policy formulation are improved in order to ensure the full participation of all interested parties, recognizing the different roles played by different stakeholders in different issues” (NETmundial Multi-stakeholder Statement, 2.I.1).

Paragraph 35 of the Tunis Agenda quotes in particular that: “we reaffirm that the management of the Internet encompasses both technical and public policy issues and should involve all stakeholders and relevant intergovernmental and international organizations. In this respect it is recognized that:

- Policy authority for Internet-related public policy issues is the sovereign right of States. They have rights and responsibilities for international Internet-related public policy issues.
- The private sector has had, and should continue to have, an important role in the development of the Internet, both in the technical and economic fields.
- Civil society has also played an important role on Internet matters, especially at community level, and should continue to play such a role.
- Intergovernmental organizations have had, and should continue to have, a facilitating role in the coordination of Internet-related public policy issues.
- International organizations have also had and should continue to have an important role in the development of Internet-related technical standards and relevant policies.”

Accordingly, the current Bylaws encompass many aspects of internet governance that relate directly or indirectly to all stakeholders in ICANN. However, not all stakeholders relate in the same way to each of those aspects. We all have different roles to play in ICANN.

Governments thus participate in ICANN, through the GAC, in order 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” (Bylaws art. XI.2.1.a).

However, according to the “SO/AC Membership Model”, it seems that the entire empowered community will be able either to reconsider/reject future changes to ICANN “standard” Bylaws (with a ¾ level of support, Draft prop., section 5.3, §213), or to approve future changes to “fundamental” Bylaws (“with a very high degree of community assent”, Draft prop., section 5.4, §221).

But what if the suggested Bylaw change primarily concerns “governments, particularly or 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” (as stated in Bylaws art. XI.1.2.1.a)? Are we correct in understanding that the “SO/AC Membership Model” would nonetheless give members of other SOs and ACs the opportunity to vote and defeat an empowered GAC, in spite of governments’ “rights and responsibilities for international Internet-related public policy issues” (as stated in Paragraph 35 of the Tunis Agenda and recalled in NETmundial Multi-stakeholder Statement, 2.I.1)?

- e. *If so, additional mechanisms specifically designed to mitigate the risk of capture of ICANN by governments, such as the proposed changes to Bylaws art. I.2 (Core value 11) and XI.2.1.j deriving from stress test #18, are redundant and just cause confusion.*

Stress test#18 suggests that majority voting in the GAC could lead to a threatening situation where ICANN would have to consider and respond to GAC advice restricting free online expression (Draft prop., section 8.6, §629). This is why it is suggested that Bylaws art. XI.2.j be modified in order to “duly take into account” only GAC advice that is supported by strict consensus (Draft prop., section 8.6, §633).

In our opinion, such propositions reflect a tendency among ICANN stakeholders to question the responsibility of governments and public authorities with regard to public policy. What it says: “only when governments reach consensus can we duly take into account GAC advice as

public policy advice”, actually translates: “governments are not responsible for public policy for so long as they cannot reach strict consensus on GAC advice”, which is obviously a false statement. Governments are always responsible for public policy (hence paragraph 35 of the Tunis Agenda, section 2.I.1 of the NETmundial Multi-Stakeholder Statement, or the current Core Value 11 of ICANN).

We know that ICANN stakeholders would like to mitigate the risk of capture of ICANN by governments. We would therefore understand that non-governmental stakeholders have their say in telling *how ICANN will duly take into account GAC advice*. However, we would not understand that non-governmental stakeholders have their say in telling *what is due GAC advice*. Due diligence to GAC public policy advice at ICANN has always derived from *whom* it was received: governments and public authorities who are responsible for public policy. Stakeholders should not be misled into considering that due diligence to GAC public policy advice should now derive from *how* the advice is given.

Remote as this possibility may seem, we agree that majority voting in the GAC could lead to a situation where ICANN would have to consider and respond to GAC advice restricting free online expression. With strict consensus within the GAC, however, much less remote seems the possibility that one single government deprives ICANN from GAC advice on privacy protection, for example. We do believe that ICANN would be placed in a far more threatening situation if it could not consider the second type of GAC (would-be) advice, than if it just had to respond to the first type of GAC advice.

The same tendency is reflected in the proposed amendment to Core Value 11. It is suggested that in order to incorporate the AoC into ICANN Bylaws, Bylaws art. I.2 be amended as follows: “While remaining rooted in the private sector, recognizing that governments and public authorities are responsible for public policy and duly taking into account [~~government’s or public authorities recommendations~~] [the public policy advice of governments and public authorities in accordance with the Bylaws and to the extent consistent with these Fundamental Commitments and Core Values]. (Draft prop., section 3.1, §110)

The French government wonders who in ICANN will be in capacity to judge whether or not “the public policy advice of governments and public authorities [is] in accordance with the Bylaws and to the extent consistent with [ICANN’s] Fundamental Commitments and Core Values”. The new Core Value 11 seems to imply that at least the Board, and maybe the empowered community, will now also be tasked to judge on the *merits* of any GAC advice (*what* the GAC duly advises), instead of contenting itself with the current *procedure* of responding to any recommendation of the GAC (*how* duly take into account GAC advice).

Only governments, not ICANN stakeholders, can tell what public policy advice is and how to provide such advice. With regard to future Bylaws changes, are we correct in considering that the proposed “SO/AC Membership Model” will always expose the GAC to attempts by members of other SOs and ACs to change Bylaws art. XI.2 in order to not even duly take into account GAC advice in the future? Has the CCWG-accountability also considered that the new Core Value 11 might in fact create paradoxical situations by recognising that GAC advice is always public policy advice which the Board or the empowered community could nonetheless disregard as non-public policy advice?