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## INPUT FROM GAC MEMBERS TO MEETING OF CCWG-ACCOUNTABILITY: Paris, 17-18 July 2015

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### Explanatory Note

At the GAC's meeting during ICANN 53 in Buenos Aires it was agreed that members should provide input to the CWG face-to-face meeting scheduled for 17-18 July 2015 by submitting responses to a series of agreed questions. A consolidation of responses received up until midnight 12 July 2015 UTC, prepared by the ACIG GAC Secretariat, is set out below.

### 1. How will public policy issues be dealt with in the enhanced accountability framework?

**ARGENTINA:** Governments are responsible for public policy issues at the national level; therefore any new accountability framework must consider this relevant role. The "Public Interest" concept must be properly defined and included in ICANN Mission, considering a holistic view towards all the Internet community, where all stakeholders have a meaningful participation taking into account the responsibilities of each stakeholder. ICANN has a relevant role in the coordination of the critical Internet resources that are essential for the performance of a secure and stable Internet. ICANN is also becoming an organization of international reference; therefore ICANN activities have an impact in public policy issues. Any new enhanced accountability framework must be built based on a full and balanced participation of all stakeholders, from the entire world, considering the responsibilities of each one and the active and relevant participation of developing economies, geographic and gender balance.

**AUSTRALIA:** As a founding principle, we consider that the framework for ICANN consideration of public policy issues should not be less than at present, whatever the mechanisms eventually agreed. Like Spain, we observe that there are several references to achieving public interest objectives contained within the draft CCWG-Accountability proposal, specifically within the proposed 'Commitments' and 'Core Values' sections of the ICANN Bylaws.

Public policy issues should continue to be addressed by the GAC, through a combination of GAC's existing advisory role (our views expressed below), as well as potentially through the proposed GAC liaison(s) to the Customer Standing Committee, the IFR and the Separation Review Working Group. Public policy issues should also continue to be addressed through existing SO and AC mechanisms, such as the Policy Development Process (PDP).

**BRAZIL (supported by PARAGUAY & VENEZUELA):** The Brazilian Government believes that the activities of ICANN, being the organization responsible for coordinating the global Internet's systems of unique identifiers, may have a significant impact on public policy issues. Since governments bear ultimate responsibility for developing and enforcing public policies, it is essential to ensure for them appropriate participation on an equal footing together with the other legitimate stakeholders that form the ICANN community. Hence, any accountability framework established within ICANN that precludes governments from participating on an equal footing with other stakeholders would lack legitimacy. Furthermore, in case the unique perspective of governments is neglected in the proposed accountability framework, the risk of ICANN's policies and operations being captured by the interests of a limited group of stakeholders would certainly be increased.

**DENMARK (supported by EGYPT):** Any proposal to improve ICANN's accountability should adequately reflect/acknowledge the role of public authorities in ensuring the global public interest and with regard to their responsibilities related to public policy concerns.

**DOMINICAN REPUBLIC:** We agree that the role and responsibility of governments, as well as their experience in public policy should be appropriately reflected and recognized in the new

framework for improved accountability of ICANN finally adopted, reiterating that is the interest in the public good that guides the GAC advice.

We support the two principles proposed by Jorge Cancio from Switzerland. We understand that they reflect the views of most of the governments that have answered these questions.

We believe that the GAC should continue its advisory role in the design, development and implementation of policies during this transitional phase, but we recognize that a way should be sought to reinforce this role so that we can have more impact and participation. In this sense, Denmark suggestions for bullets 3, 4 and 5 seem reasonable.

We understand that the GAC should maintain its advisory role on the board as it is doing so far, at least during this period of transition, but believe that we must find ways and more efficient mechanisms to ensure better results in the advice issued by the GAC and level of acceptance and implementation thereof.

We agree that all stakeholders and communities within ICANN should be more involved. We therefore understand the pronouncement of some governments who say that the GAC should be on equal footing with other actors in the proposed mechanisms of responsibility, but we believe that we must first move towards this new transition in the role we have so far, and leave this discussion for a second phase and consider the relevance and feasibility of a different role of governments through the GAC.

**FRANCE (supported by PORTUGAL):** Inconsistent with the current framework of ICANN, the proposed enhanced accountability framework suggests that due deference given to GAC advice will now be conditional. The amended Bylaws art. I.2 (Core value 11) suggests that ICANN Bylaws should prevail over public policy advice, and that non-governmental stakeholders would now have authority to say that international internet-related public policy issues addressed by governments are inconsistent with ICANN Fundamental Commitments and Core Values. Similarly, stress test #18 and the amended Bylaws XI.2.1.j suggests that the Board should no longer simply take into account GAC advice, including in trying and finding a "mutually acceptable solution" if it is not supported by GAC consensus, but that it should take over the role of governments entirely, in saying whether such public policy advice restrains or supports free online expression, for example, before taking it into account.

The CCWG-Accountability must reflect that the amended Bylaws art. I.2 (Core value 11) and XI.2.1.j (stress test #18) would give ICANN non-governmental stakeholders undue authority to ignore or even take over governments' responsibilities for international internet-related public policy issues. The proposed enhanced accountability framework would actually knock off balance the current framework of ICANN which, in line with the Tunis Agenda and the NETmundial Multi-Stakeholder Statement, recognizes that governments only are responsible for public policy. The CCWG-Accountability may therefore wish to consider leaving Bylaws art. I.2 and XI.2.1.j unchanged, lest GAC consensus cannot be reached on Core value 11 and stress test #18.

**GABON:** Since Governments have rights and responsibilities regarding international and national public policy issues concerning the development of the Internet, as part of strengthening accountability of ICANN, these issues can not be addressed by a stronger consideration of the role conferred on them by current ICANN Bylaws while respecting the multi- character of this organization. To this end , governments should continue to advise the Board of Directors of ICANN which in turn would make every effort to take into account their recommendations for aspects related to public policy.

**GEORGIA:** We support Romania's answer.

**GERMANY:** We agree with the position that GAC should retain its status as an advisory body while stressing that advice on public policy issues will need to be duly taken into account by ICANN,

regardless of the specific organisational measures eventually proposed. In this regard we concur with the remarks pointing out a possible need for advice not just vis-à-vis the ICANN board but also potentially with regard to the community empowerment mechanisms. In this respect we support Denmark's proposal of non-voting liaisons for the community council resp. the community empowerment mechanisms.

**HUNGARY:** Hungary concurs with many GAC members expressing that public policy issues are the primary responsibilities of governments as outlined in the Tunis Agenda and reaffirmed in many fora.

**INDIA:** India commends community empowerment in the enhanced accountability framework, and believes that the GAC may continue playing a useful balancing role in any new framework. It is of particular importance that views of the GAC are taken into account in decisions in the context of public policy issues encompassing sovereign and security concerns.

**ITALY:** The new accountability framework should take into account that first of all Governments are responsible for public policy issues. Moreover, Governments have primary, legal and political accountability for the protection of human rights.

**JAPAN:** One of the most important Japanese positions on Internet governance is to secure the free flow of information across borders to keep the Internet unfragmented and unified global space. The Internet is involved by various stakeholders, who are playing their respective roles. In order to maximize the benefit from the Internet, the public-private partnership and the international cooperation are very important. It is not wise to let the government strictly regulate the Internet.

The post-transition mechanism needs effectively to maintain and evolve the security, stability and resiliency of the Internet as well as its transparency and accountability. We need to consider that new governance does not excessively burden mobility and flexibility on the Internet, and does not become a barrier for the Internet which is hoped to evolve in the future.

**MOROCCO:** Morocco concurs with the remarks by Denmark regarding the guiding principles of the GAC role related to public policies within ICANN. The GAC outcome in the form of advices related to public policy matters shall continue to be duly taken into account within the new enhanced accountability framework. The new framework should take into account the important role of GAC, as an Advisory Committee, and take advantage of views and advices from governments pertaining to public policy and public interest.

**NETHERLANDS:** We concur with the remarks from Denmark nbrs. [Questions] 1 and 2; these should be our guiding principles and the basis for any assessment of our role in new structures.

**NIUE:** Niue concurs with the remarks by Denmark regarding the guiding principles of the GAC role related to public policies within ICANN. The GAC outcome in the form of advices related to public policy matters shall continue to be duly taken into account within the new enhanced accountability framework. The new framework should take into account the important role of GAC, as an Advisory Committee, and take advantage of views and advices from governments pertaining to public policy and public interest.

**ROMANIA:** ICANN's enhanced accountability framework, irrespective of the forms it will take (the "SO/AC membership model", the currently explored "SO/AC empowered model", or anything else), should ensure that governments continue to be able 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" (Article XI, Section 2, point 1.a in the ICANN Bylaws). As stated in

the Tunis Agenda for the Information Society, states “have rights and responsibilities for international Internet-related public policy issues”; governments should therefore continue to exercise these rights and responsibilities within the framework of a more accountable ICANN. In addition, it should be ensured that advice from governments is duly taken into account in the ICANN policy-making processes and decision-making processes that have an impact on the public interest, and that clear mechanisms are put in place in this regard.

**RUSSIAN FEDERATION:** We proceed from the understanding that the public policy issues are the core responsibility of governments; the enhanced accountability framework should not lead the extension of ICANN’s mandate; and ICANN may have a significant impact on public policy issues.

We believe that the enhanced accountability mechanisms should enable equitable participation for all stakeholders in all issues related to security, stability and resiliency of the Internet’s unique identifier systems.

It is important to avoid an unbalanced concentration of decision-making power for limited group of stakeholders and develop the adequate form of accountability that would be able to fill the gap left by the end of the contract with NTIA.

**SENEGAL:** Public policies should take in account government priorities, for developing countries they have to be used to promote Internet adoption for economic development and fighting against illiteracy

**SPAIN:** Public policy issues encompass a broad range of areas as referenced in the Tunis Agenda and Net Mundial Statement, all of which can be affected by ICANN policies and resolutions. They include the protection of human rights, the boosting of multilingualism on the Internet, the enlargement of local contents and the use of ICTs to attain development goals.

Furthering public interests should be ICANN’s primary commitment. There are indeed several references to achieving public interest aims in the proposed Commitments and Core Values of ICANN but not in the Mission of ICANN. We suggest they be included among ICANN Missions. It transpires from the proposal that public interest considerations are going to be used to balance conflicting commitments. We think all policies and resolutions should aim at attaining public interests goals within the boundaries of ICANN mission and scope, and that the rationale of Board resolutions should explain how they comply with this requirement.

In the proposed scheme, the Board is not to engage in a conciliation procedure with the GAC if its advice is not agreed by consensus. As that advice would still be public policy advice, we deem it sensible that the Board state the reasons for not following that advice irrespective of the level of support it within the GAC.<sup>1</sup>

**SWEDEN:** We appreciate and associate with the response from Denmark, particularly bullets 1-5 [Questions 1 through 3].

**SWITZERLAND:** We propose the following guiding principles regarding the role of the GAC in the new framework:

- The GAC will continue to exercise its role and responsibility for public policy within ICANN’s structure. Any newly proposed accountability framework must reflect and not diminish or curtail in any way the role and responsibility of governments and public authorities for public policy and ensure that governments’ and public authorities’ recommendations are duly taken into

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<sup>1</sup> **SPAIN:** Proposals made on the assumption that proposed Bylaw amendment as regards GAC advice (section 7.2 of the draft ccWG proposal) makes its way to the final report does not imply Spain has changed its view on it.

account.

- Any new proposed framework must therefore offer mechanisms and procedures that allow the GAC to exercise its public policy responsibility. These mechanisms and procedures have to correspond, *mutatis mutandis*, to those currently in place between the GAC and the Board of Directors.

**THAILAND:** In principle, Thailand agrees upon enhancing community on an accountability of new structure of CCWG framework. However, we have concerned issues on accountability of GAC who has obligated to provide advice to the Board on public policy matter that was stated clearly in article XI: (j) and (k):

(j) The advice of the Governmental Advisory Committee on public policy matters shall be duly taken into account, both in the formulation and adoption of policies. In the event that the ICANN Board determines to take an action that is not consistent with the Governmental Advisory Committee advice, it shall so inform the Committee and state the reasons why it decided not to follow that advice. The Governmental Advisory Committee and the ICANN Board will then try, in good faith and in a timely and efficient manner, to find a mutually acceptable solution.

(k) If no such solution can be found, the ICANN Board will state in its final decision the reasons why the Governmental Advisory Committee advice was not followed, and such statement will be without prejudice to the rights or obligations of Governmental Advisory Committee members with regard to public policy issues falling within their responsibilities.

According to the CCWG accountability framework, there are five community mechanisms being proposed which are:

- Reconsider/Reject Changes to ICANN Bylaw
- Reconsider/Reject Budget or Strategy Operating Plans
- Approve Changes to Fundamental Bylaws
- Removing individual board directors (SO/AO and NomCom)
- Recalling entire ICANN board

Thailand believes that only the two of proposed community power mechanisms under the CCWG accountability proposal particular reconsider/reject/approve changes to ICANN Bylaw are most affect towards public policy issues. Since line of communication between GAC and community mechanism managed by 29 voters has not been drawn. If there is reconsider/reject changes to ICANN Bylaw mentioned on the Board's responsibility towards GAC advice stated in article (j) and (k), the GAC cannot hold accountability towards public policy matter that aims to implement effectively.

Therefore, Thailand would like to express our concerned on proposed power that community mechanism could exercise particularly reconsider/reject/approve changes ICANN bylaw could hold back our GAC accountability towards public policy that we aims for implementation.

**UNITED KINGDOM:** The UK believes that public policy issues are only legitimately addressed by the ICANN stakeholder communities if there is active engagement with governments who are members of the GAC and that the GAC's advice is fully taken into account before decisions are taken. This is in fundamental recognition of governments' combined responsibility for protecting and promoting the global public interest. There should not be any erosion or diminution of the GAC's role in the enhanced accountability framework.

It will be essential therefore that i) the GAC is consulted on such matters and its advice is formally sought by the community; and ii) the GAC is involved in some way in all accountability processes such as reviews and preparation of recommendations leading to decisions and actions, including those relating to the conduct of the Board and its decisions. The modalities for such involvement may vary such as formal liaisons to reviews or representation on specific working groups or task forces.

The GAC's role will also expected be to *initiate* reviews and consideration of matters of public



interest, initially through process-driven consultations with the ICANN community. This may lead to the GAC providing the ICANN community with formal advice.

**UNITED STATES:** The USG submits that the best way to deal with public policy issues in the enhanced accountability framework is to continue the GAC's advisory role in ICANN, as outlined in ICANN's Bylaws.

## 2. What role does GAC and its members wish to have in the new framework so that it can provide advice on public policy issues?

**ARGENTINA:** Given the fact that the "Community Empowerment Mechanisms" are of a high importance in the new accountability framework, Governments must be involved in these mechanisms. The participation of Governments must be allowed in a way that is viable, independently of the present or future jurisdiction of the new accountability structure. The imbalance of Government participation in the present ICANN structure must not exist in any new structure or mechanism.

**AUSTRALIA:** The GAC has an important role in providing public policy advice and, in addition to providing advice to ICANN's Board, we think it would be useful to reflect on how the GAC could most effectively provide input to the proposed community empowerment mechanism. We consider that the best way for the GAC to participate in the community empowerment mechanism is via a non-voting liaison who would report back on to the GAC on issues for discussion and advice as appropriate.

**BRAZIL (supported by PARAGUAY & VENEZUELA):** Without prejudice to the outcome of discussion on the proper role of governments in ICANN's existing governance bodies, the Brazilian Government is of the view that government representatives should participate actively in the "community empowerment mechanism". Efforts should be made to guarantee that, despite ICANN's present "legal status", the participation of government representatives can be legally viable, otherwise such a mechanism would lack legitimacy. In other words, the prevailing asymmetrical conditions of participation of governments vis-à-vis the other stakeholders in ICANN's "Executive" should not be replicated in the proposed empowerment mechanisms.

**DENMARK (supported by EGYPT):** The role of the Governmental Advisory Committee (GAC) is to consider and provide advice on the activities of ICANN as they relate to concerns of governments and where they may affect public policy issues. The Advice of the GAC on public policy matters shall be duly taken into account by ICANN, in the formulation, adoption and implementation of policies [NETHERLANDS: Agree, but add:" and in any decision that affects public interest." The rationale is that GAC's advice should extend to CEM decisions impacting public interest, without necessary being seen as policy decisions.]

Any new framework should allow the GAC to continue its important role as an advisory committee to ICANN.

**DOMINICAN REPUBLIC:** See response to Question 1.

**FRANCE (supported by PORTUGAL):** GAC and its members should keep their advisory role to the Board and to the community as a whole. In this regard, the GAC should be able to provide advice on public policy issues to all future empowered entities within ICANN, in the same way as it currently does with ACs and SOs in the context of their respective policy development processes.

**GABON:** These two issues are closely linked to the previous one. It would be desirable as pointed out by several GAC members who actively contribute to this debate that this body can at least play a full role not only Advisory Committee of ICANN without alteration or reduction in the value of

the recommendations sent to it, but also as an adviser of community bodies whose activities extended into the new structure inevitably may have an impact on public policy.

**GEORGIA:** GAC should keep its current role.

**GERMANY:** See response to Question 1, above.

**HUNGARY:** It is our opinion that GAC should continue to play its existing role in the new framework in compliance with the relevant Bylaws.

**INDIA:** GAC should have a role that enables it to be engaged early in the policy development processes, as well as to provide advice on public policy issues, and express its reservations (if any) on issues pertaining to sovereign and security concerns. The endeavour should be to present consensus based advice, and use its powers judiciously. In this context, it is further recommended that the GAC Operating Principles should be reviewed with due regard to the overall role of GAC and its members in future.

**ITALY:** It's our opinion that In the new framework the GAC should have not less power than now. As per ICANN Bylaws Section 2, point 1.j: " The advice of the Governmental Advisory Committee on public policy matters shall be duly taken into account, both in the formulation and adoption of policies".

And that principle should be valid regardless of the internal decision-making of the GAC.

**JAPAN:** At this stage, keeping the current status of GAC seems the best choice of "membership", "designator" or "unincorporated associations". While we recognize that it is important to have focus on legal structures and mechanisms where trust and confidence have already seriously broken down, we would like to see more focus on building confidence and trust itself.

**MOROCCO:** Any change within the new framework should not diminish the current status and role of the GAC.

**NIUE:** Any change within the new framework should not diminish the current status and role of the GAC.

**ROMANIA:** As underlined above, governments, through the GAC, should continue to provide advice on public policy issues, in the context of a new accountability framework for ICANN and the changes that have been proposed or that are currently being explored with regards to empowering the ICANN community. As such, governmental advice should be provided not only to the Board of Directors, but also to the "community group" that would be created for the SOs/ACs to collectively exercise the so-called "community powers", whenever this group discusses matters that may affect the public interest (such as changes to ICANN fundamental bylaws). And, as it is the case with the Board now, this "community group" would have to duly take into account GAC advice when exercising its powers. Therefore, clear procedures and mechanisms would have to be put in place in order to ensure that governments are able to exercise their roles and responsibilities in relation to the "empowered community", in line with the mandate outlined in the ICANN Bylaws with regards to governments providing "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". Such mechanisms and procedures would need to be developed drawing on similarities with the current provisions in article XI, section 2 of the current ICANN Bylaws concerning GAC advice to the Board of Directors:

- the GAC would appoint one non-voting liaison to the "community group" created for the community to exercise its new powers;
- the advice from the GAC on public policy matters shall be duly taken into account by the "community group" when exercising its powers;

- if the “community group” determines to take an action that is not consistent with GAC advice, it shall inform the community and state the reasons for not following the advice. A procedure will be defined and put in place for the GAC and the “community group” to enter into discussions, with the aim to find a mutually acceptable solution.
- if no such solution can be found, the “community group” will states in its final decision the reasons why the GAC advice was not followed.

It should also be explored whether it would be suitable for the GAC to put issues to the “community group” directly, either by way of comments or prior advice, or by way of specifically recommending action, in line with the powers and mandate of that “community group”. This would mean that the GAC would not only react in relation to the activities of the “community group”, but would also be able to be proactive, when this proactive attitude would be imposed by public interest considerations.

**RUSSIAN FEDERATION:** ICANN should maintain the possibility of equitable participation for the GAC in the development of policies and in all matters affecting public policy. New framework should assure mutual confidence and equitable distribution of unique Internet resources among countries.

In this respect we support the opinion expressed by a number of GAC members and cannot support the changes to Core value 11 and Stress test 18, as of proposed in the CCWG-Accountability Initial Draft Proposal.

The arguments provided in para 392 for these changes as to comply with the specific requirements of NTIA is not valid, as the NTIA requirement is not “to avoid significant expansion of the role of government in ICANN decision-making”. Moreover, the proposal to amend ICANN Bylaws, Article XI, Section 2, clause j (as shown in para 387) limits the ability of GAC to adopt its advice according to its Operating Principles and to expect the Board to duly consider GAC advice.

**SENEGAL:** GAC members should have monitoring and advisory mission on public policies accomplishment through countries.

The new framework should take into account the important role of GAC, as an Advisory Committee, and take advantage of views and advices form governments pertaining to public policy and public interest.

**SPAIN:** We regard the role of the GAC as “advisory plus”. That means not only preserving due deference to GAC advice, as this is how the role and unique responsibility of Governments with regard to public interests is carried out in ICANN, but expanding opportunities to provide it to the community itself. As a result of the empowerment mechanisms, the role of stakeholders in ICANN is strengthened vis-à-vis that of the Board and Staff. They will have effective tools to control ICANN management and ultimately to decide on crucial issues, like Fundamental Bylaws. So, it should be possible for the GAC to advise the community panel or the SOs triggering the mechanisms<sup>2</sup> on public policy implications of the action at hand. Recommendations to the community can be made on GAC’s own initiative or at the request of them, just as it works with the Board.

If the current setup with multiple working groups on an array of issues revealing public interests demands GAC members active involvement in policy development processes, this is intensified in the proposed structure with the community having the power to steer the day-to-day operation of ICANN and the approval and enforcement of its rules of procedure. GAC input should be diversified: along with communiqués and Chair’s letters to the Board, the GAC should join the community panel –and the Customer Standing Committee and the IANA Function Review Team, as far as IANA functions are concerned- at least to follow discussions and identify public policy issues; participate as much as possible in policy development processes and bring the public policy perspective to the selection of Board members appointed by the NomCom. That would require

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<sup>2</sup> For instance, to the ccNSO and the GNSO when recommending initiation of a Special Review of IANA Functions Operator that can lead to the transfer of this function to another organization.



more commitment to the GAC by national Administrations and more capacity building for new comers and representatives of underserved regions to afford all members equal opportunities to help the GAC face these challenges.

In the end, Governments are accountable for the protection of human rights and public interests alike. Like in the current Bylaw provision (Article XI.2.1 k): "...without prejudice to the rights or obligations of Governmental Advisory Committee members with regard to public policy issues falling within their responsibilities."), Governments should be able to pursue public interest goals through whichever means they deem appropriate, including using internal or external appeal mechanisms, should they think public interests have not been duly served.

**SWEDEN:** We appreciate and associate with the response from Denmark, particularly bullets 1-5 [Questions 1 through 3].

**SWITZERLAND:** See response to Question 1.

**THAILAND:** Thailand is confident that current GAC positioning in an existing system has value added to the Board. Therefore, GAC should continue play this role into the new framework. However, our value added by providing advice will be carried on in case of having a clear line of communication on what would happen when GAC gives advice to the new framework in terms of implementation.

**UNITED KINGDOM:** As the primary stakeholder entity within the ICANN community with responsibility for reviewing and providing formal advice on aspects of ICANN policy development which impact on issues of public interest, the GAC should continue in the new framework to have a leading role with a formal advisory remit serving the entire ICANN community.

This broader remit to the community would need to be underpinned by clearly defined procedures for community representatives to request advice, for the GAC to submit it, and for the preparation of responses to such advice, before final decisions are taken which either will impact on the global public interest, or have been considered may potentially do so.

**UNITED STATES:** In addition to maintaining the model of providing consensus advice to the Board pursuant to the Bylaws, the GAC should consider acting in an advisory role through non-voting liaisons to any cross-community empowerment body or mechanism that may be proposed by the CCWG. To the extent that a new framework may involve the allocation of votes across different Supporting Organizations (SOs) and Advisory Committees (ACs), the USG believes that would shift the GAC into a decision-making or more operational role.

### **3. Does GAC want to continue to have an advisory role (as of today) with respect to the ICANN Board?**

**ARGENTINA:** Governments must participate in a more active role than just advisory. Involvement of Governments in public policy deliberations and decisions made within ICANN new structure is essential fundamentally in regard to sovereignty issues.

**AUSTRALIA:** We consider that the GAC should remain an advisory body to the ICANN Board, with its consensus-based public policy advice given due consideration by the Board. In the event that consensus advice is not accepted, consistent with existing practice, the Board should provide its rationale to the GAC and seek a mutually agreeable solution.

**BRAZIL (supported by PARAGUAY & VENEZUELA):** The Brazilian Government considers that the advisory role that the GAC currently holds is insufficient to factor in the perspective of governments in regard to public policy issues in a relevant way within ICANN's decision-making processes. Since

the GAC only appoints a non-voting liaison to the ICANN Board, the capacity of governments to influence Board decisions is considerably limited. Although ICANN's Board should take GAC advice duly into account, it may ultimately take actions that may not be consistent with that same advice. By not having any voting members at the ICANN Board, the participation of governments in the organization's power structure is therefore significantly reduced in comparison to that of other stakeholder groups. It is important to highlight, however, that in the Brazilian government's view, governments, by eventually holding any seats at the Board, should not play, however, a more prominent role than other stakeholders nor exercise a veto power.

Although Brazil is aware that those issues should not be part of the present effort – which should focus on the elaboration of a proposal for transition of the IANA functions - we would like to reiterate the call for broader discussion on governance and jurisdiction to be further pursued in the post-transition period. In the Brazilian government's view, the call that emanated from NETmundial towards transforming ICANN in a "truly international and global organization..." should remain as an ultimate goal for all of us. For that purpose, the global community's effort must not be called to a halt after completion of "work stream 1", which will clearly not address in adequate depth all aspects required to make out of ICANN "a truly international and global organization".

In this regard, the Brazilian government is of the view that the GAC should have a more significant role within the ICANN power structure in comparison to the one that it currently performs, on equal footing with other stakeholders. As explained above, we consider, however, this is a topic to be further discussed in the post-transition period, in conjunction with the discussion of the governance of existing structures and jurisdiction.

**DENMARK (supported by EGYPT):** As such, the advice of GAC should continue to have the same degree of leverage in ICANN's new set up as it has today – towards the ICANN Board and in any new decision making structures. In this regard it should be explored how the GAC most effectively could provide **advice** to the new community empowerment mechanism. Non-voting liaisons would be an important element to this end. It would give governments a way to provide advice on the important issues discussed/decided upon by the community empowerment mechanism/council. This would also include a procedure like the one described in ICANN Bylaws, Article XI Section 2 clause j, requiring ICANN to duly taking into account GAC's advice and to find a mutually acceptable solution if a consensus advice is not followed. In addition, it must be ensured that the relevant bylaws regarding ICANN's obligation to duly taking into account GAC advice and the above mentioned procedure cannot be changed without agreement from the GAC.

**DOMINICAN REPUBLIC:** See response to Question 1.

**FRANCE (supported by PORTUGAL):** Yes, GAC should retain its advisory role with respect to the ICANN Board. We nonetheless support concrete improvements in the dialogue between GAC and the Board on implementation of public policy advice.

**GABON:** See response to Question 2.

**GEORGIA:** Yes.

**GERMANY:** See response to Question 1, above.

**HUNGARY:** We think that GAC should continue an advisory role with respect to the ICANN Board in the future framework.

**INDIA:** GAC should continue to have an advisory role and a liaison to the ICANN Board, which will ensure room to raise the concerns of the GAC. However, in cases when GAC advice is not acceded to, the GAC should receive information from the Board on the threshold and its rationale for such decision.

**ITALY:** Whatever voting member or advisory committee, GAC advice shall be duly taken into account, both in the formulation and adoption of policies. In the event that the ICANN Board determines to take an action that is not consistent with the Governmental Advisory Committee advice, it shall so inform the Committee and state the reasons why it decided not to follow that advice. The Governmental Advisory Committee and the ICANN Board will then try, in good faith and in a timely and efficient manner, to find a mutual acceptable solution.

**MOROCCO:** Yes.

**NETHERLANDS:** Yes.

**NIUE:** Yes.

**ROMANIA:** Yes, the GAC should continue to exercise its advisory role with respect to the ICANN Board, as currently provided for in the ICANN bylaws. Additionally, a mechanism for the GAC to be able to act in an advisory role with respect to the “community group” (created for the SOs/ACs to collectively exercise the “community powers”) would also have to be put in place, as explained at question 2 above.

**RUSSIAN FEDERATION:** Governments should participate in more meaningful role than an advisory role providing its responsibilities in the decision-making process in all matters affecting public policy. On the other hand, we fully agree with the views explained by other representatives that this topic needs to be further examined in the post-transition period in conjunction with the discussion of the governance of existing structure and jurisdiction.

**SENEGAL:** Yes.

**SPAIN:** Yes. It will still be the body making most decisions in ICANN and approving policies submitted by the Supporting Organizations.

However, the GAC should make its best efforts to ensure proper understanding of its advice so as to avoid different interpretations by the Board even when it endorses GAC advice, and by ICANN Staff. Most of GAC recommendations are accepted by the Board, but in practice, many of them turned out implemented in a way that is not consistent with GAC advice. The new gTLD programme is a good example of this situation. The GAC should be entitled to demand rectification or else, initiate the Bylaws consultation procedure when implementation of GAC accepted advice is not consistent with it.

**SWEDEN:** Yes.

**SWITZERLAND:** See response to Question 1.

**THAILAND:** Yes, Thailand still agrees on having a current mechanism for government who serves as GAC representative to share country perspectives, concerned issues regarding public policy related internet issues is critical and needed.

**UNITED KINGDOM:** The UK believes therefore that the GAC should continue to undertake its current advisory role with respect to the ICANN Board and that this role remains endorsed and given due weight by the ICANN Bylaws so that in instances when advice is not deemed acceptable by the Board, a process is triggered for determining a mutually acceptable solution.

The UK notes that it is not intended that the current ICANN architecture and reporting structures of supporting organisations and advisory committees will change as a result of the CCWG's proposals. Thanks to the improvements recommended by the independent ATRT 1 and 2 (including instituting the GAC's early involvement in GNSO PDPs), we believe that the ICANN structure generally works well, that operational modalities are broadly effective in achieving results, and that all processes,

policy development processes and final decisions, are fully informed and are therefore have legitimacy while supported by appropriate appeal, review and redress mechanisms. These should continue to be subject to periodic independent scrutiny and we welcome translating the ATRT independent review mechanism into the new accountability framework.

**UNITED STATES (supported by JAPAN):** In continuing to perform its advisory role on public policy issues to the Board, it is critical that the GAC continue to operate on a consensus basis. Anything less than a consensus approach to the development of GAC public policy advice would diminish the value of GAC advice as a contribution to the policy development processes in ICANN.

In this regard, the USG believes that stress test 18 proposed by the CCWG, which recommends an amendment to ICANN's Bylaws to make clear that only consensus advice triggers a Bylaw consultation, is fully consistent with the first Accountability and Transparency Review Team's (ATRT) Recommendations pertaining to the GAC. We do not see this stress test as in any way interfering with the GAC's internal working methods.

We also interpret stress test 18 as both appropriate and necessary to meet the requirement that the IANA transition should not yield a government-led or an intergovernmental replacement for NTIA's current stewardship role. While the GAC may not be directly involved in the IANA functions, its role within ICANN as a source of public policy advice that is taken into account by the ICANN Board is relevant to the interrelated process of improving ICANN's accountability.

**VENEZUELA:** Venezuela supports the proposal made by Brasil in its document, in particular, we fully agree and endorse the view expressed in question 3, regarding the more active role that GAC should have in regard to its performance within the ICANN Board. The current status of the GAC within the ICANN Board of Directors, being our Chairman a Liaison with a non-vote condition, make the representation of governments in the current Multistakeholder Model a restricted and bounded one. This status should be modified in view of a better and more complete participation of governments after transition.

#### 4. Does the GAC want to participate in a membership-based community empowerment mechanism?

**ARGENTINA:** As stated in point 2, "Community Empowerment Mechanisms" are of a high importance in the new accountability framework. Governments must be involved in these mechanisms. The participation of Governments must be allowed in a way that is viable, independently of the present or future jurisdiction of the new accountability structure. Achieving this may be challenging considering the present legal situation of ICANN. Many efforts should be made to solve this situation in the evolution of the new accountability structure.

**AUSTRALIA:** We consider that the GAC's advisory role is an important one, and that participating in a membership-based community empowerment mechanism may significantly change this role. We would not support changes to the GAC's advisory role.

**BRAZIL (supported by PARAGUAY & VENEZUELA):** As stated above, the Government of Brazil considers that the GAC should participate in the proposed "community empowerment mechanism" on an equal footing with other stakeholder groups. However, government representatives may find themselves unable to participate in the membership-model currently being proposed by the CCWG-Accountability, due to ICANN's present legal status.

A proper legal solution should however be attempted in order to ensure the early involvement of governments in the proposed mechanism. A permanent solution for this would entail, in our view, however, as stated above, redefinition of ICANN's present legal status (i.e. international statute agreed upon by all stakeholders x pre-determined condition as a private entity established under

the California law). Full participation in any community empowerment mechanism should therefore be seen as a two-phased objective.

**DENMARK (supported by EGYPT):** Participating in a form of membership-based community empowerment mechanism would change the role of governments in ICANN from being advisory to taking part in decisions carried out by voting, which we would not support. However as mentioned above, the GAC would have non-voting liaisons to the community mechanism/council. Moreover, we are also flexible with regard to a model that would allow the GAC to opt-in at a later stage [EGYPT: At such time, would this be subject to community approval/rejection, not only GAC deciding to opt in?].

**DOMINICAN REPUBLIC:** We believe this is an issue on which we cannot comment extensively right now, it is a complex and sensitive issue for governments to work under a scheme membership, and in our case, this decision would require further study and discussion within our government. However, we believe that we must find a way to make the GAC is not left outside this mechanism of empowerment; it should participate with other parties, but maybe for now should continue its advisory role only.

**FRANCE (supported by PORTUGAL):** The membership-based community empowerment mechanism should take into account the particular role of the GAC within ICANN. Rather than of participating through the voting process, however, the GAC should have the opportunity to formulate advice, on an early stage – that is, before the vote – on specific issues such as the budget and the operating/strategic plan.

**GABON:** The GAC to date is an advisory body without the right to vote to the ICANN Board because he seems, in legal terms, governments cannot provide advice on issues data to the Board Directors and simultaneously vote related decisions at that instance. To both questions the GAC should at this stage while retaining these prerogatives, also have a possibility of action in the organs of those communities as suggested, several representatives of Governments that offer GAC GAC participation by appointing a level liaison officer "community group". This would enable the GAC to provide advice to both the ICANN Board and that of "community group". In other words the GAC, for now, would not part with the right to vote in the community to exercise its powers. But it would have the ability to advise what "community group" when the decisions made affect the public interest. Mechanisms should be put in place to ensure that its advice is taken into account. The further examination of these complexities in legal terms could be subsequent.

**GEORGIA:** Yes.

**GERMANY:** At this time Germany does not support GAC participation in a membership-based community empowerment mechanism that exceeds a non-voting or advisory role. However we do hope that a future re-assessment of GAC participation within an empowered community would not be precluded. In this regard, we expressly support the Danish comment remarking that it must be ensured that the relevant bylaws regarding ICANN's obligation to duly taking into account GAC advice and the above mentioned procedure cannot be changed without agreement from the GAC.

**HUNGARY:** The issue needs further consideration.

**INDIA:** Creation of representational structures, in the membership-based model, is likely to lead to complexities. In case of GAC, formation of an unincorporated association may lead to an intergovernmental structure under the law of one country. This may be the cause of ambiguities and apprehensions. At the same time, the GAC's unique issues in this respect should not lead to a situation where the GAC's role is prejudiced vis-à-vis the other SOs/ACs. At this point of time, the GAC needs to have further discussions and clarity on these issues.

**ITALY:** Due to the complexity of the issue, the GAC should therefore reserve the right to express a



specific opinion at a later date, when further details will be available.

**JAPAN:** The conventional building blocks of ICANN accountability and transparency mechanisms is the result of the continuous trial and error of ICANN to improve its accountability and transparency since established in 1999. It is important to make sure that the output of CCWG does not destabilize the delicate balance that we have built together today for the last 16 years. When we think of Multistakeholder process, which is working under the delicate balance, it is important to take into account that balance of power. From this point of view, GAC is well functioning in the current Multistakeholder balance. When we consider changing the role of GAC in the Paris meeting, the above point of view is desirable to be taken into account. From these points of view, we should be cautious about our participation in the membership-based community empowerment mechanisms and our exertion of the proposed community powers.

**MOROCCO:** Morocco considers that objective difficulties may prevent governments to participate, in a representative manner, in such mechanism

Any decision as to whether government representatives shall have seats and right to vote in the new mechanism should be discussed among governments themselves, taking into account that the GAC is an important stakeholder group with specific concerns and focus.

**NETHERLANDS:** We concur with Denmark nbrs. 3-7 [Questions 3-5].

**NIUE:** Niue considers that objective difficulties may prevent governments to participate, in a representative manner, in such mechanism.

Any decision as to whether government representatives shall have seats and right to vote in the new mechanism should be discussed among governments themselves, taking into account that the GAC is an important stakeholder group with specific concerns and focus.

**ROMANIA:** Having the GAC participate in a membership-based community empowered mechanism would raise legal questions that are still being analysed, especially in the context of the initial proposal related to the GAC creating an "unincorporated association", but also in the context of the newly proposed "empowered SO/AC model" that is currently being explored by the CCWG. While the details of this model are not yet clear, and based on the information available at the moment, it seems to be more suitable for the GAC to continue to participate in ICANN in an advisory role (as it is the case now), without taking up a membership position as such and participating as a voting member in decision-making processes specific to an "empowered community". This does not mean, however, that the GAC would not participate in the community empowerment mechanism, and it is detailed at point 2 above how this participation could take place: the GAC appointing a liaison to the "community group", while also being able to provide advice to both the ICANN Board and to the "community group" (or any other mechanism that would be created for the community to exercise its powers). At a later stage, the GAC could analyse whether exercising this advisory role has been effective or whether a different role would be deemed as necessary.

**RUSSIAN FEDERATION:** Yes, the GAC should fully participate in community empowerment mechanisms in the relevant way suitable for governments.

We fully agree with the views explained by Brazil that ICANN's present legal status creates certain limitations for participation for governments in membership-model being proposed by the CCWG-Accountability.

We expect the CCWG-Accountability to provide several models of community-empowerment mechanism taking into account the specific status of members of SOs and ACs, especially GAC members, based in different countries and subordinate to different legislations.

**SENEGAL:** We considers that objective difficulties may prevent governments to participate, in a representative manner, in such mechanism

Any decision as to whether government representatives shall have seats and right to vote in the new mechanism should be discussed among governments themselves, taking into account that the GAC is an important stakeholder group with specific concerns and focus.

**SPAIN:** We would be reluctant to participate in the establishment of an organization ruled by US or any other national laws. Besides, public interests may not be at stake in certain situations where the community mechanism can be set off. Where they are, we don't think casting votes will give the GAC more leverage than issuing advice since it would not have the majority of votes. Therefore, we deem it worth participating as observers in such structures and being heard on issues pertaining to public interests.

As regards ccTLDs, we reckon the GAC should appoint a liaison to the Customer Standing Committee and participate on equal footing in the IANA Function Review Team since governments have a particular stake in ccTLDs as they hold ultimate authority on public policy issues relating to them. This is not withstanding the provision of GAC advice in the matter and due deference to it.

**SWEDEN:** See bullets 6-7 in the Danish comments [Question 4]. In addition, the Community Empowerment Mechanism (CEM) need not be a standing mechanism but can be a dormant option that is awakened by a suitable mechanism when there is cause to do so.

**SWITZERLAND:** In relation to the currently discussed empowered SO/AC Model the following measures would need to be implemented:

- The GAC would have to be enabled to exercise an equivalent advisory role as it currently enjoys vis-à-vis the Board towards the SOs/ACs when they come together to collectively exercise the proposed community powers.
- To this end, the GAC would have to be represented by non-voting liaisons in any new governance mechanism that may be created for the collective exercise of rights by the community.
- This extended advisory role will be exercised within the current mandate of the GAC that mandates it 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 (Article XI of the current Bylaws).
- In principle, these matters may be affected by any of the proposed new community powers.
- A procedure would have to be put in place in case the GAC advice on public policy issues to SOs/ACs collectively exercising the proposed community powers was not followed. This procedure would facilitate a mutually acceptable solution, equivalent to the mechanism currently in place between the GAC and the Board of Directors.
- Should no mutually acceptable solution between the GAC and the SOs/ACs collectively exercising the proposed community powers be found, the SOs/ACs collectively exercising the proposed community powers would be required to provide a detailed rationale for not following GAC advice.
- The GAC would review the effectiveness of this extended advice role in the new enhanced accountability framework and may consider a change in its form of participation in the proposed community powers, e.g. through taking part as a voting AC in a manner which would appropriately reflect its role and responsibility for public policy issues.

**THAILAND: Yes,** Thailand believes that engaging by being as a membership based community empowerment mechanism could balance government and community perspectives towards ICANN accountability issues.

**Under Condition that:**

GAC membership representative shall:

1. Geo-Graphical distribution in 5 seat

## 2. Vote were follow consensus of GAC from F2F meeting

However, the threshold of voting mentioned on the new framework is 75%. GAC has 5 from 29 seats which is only 17% of total. If GAC would have a consensus objection, it is clear that GAC does not have veto right on this stage. Therefore, if GAC would like to have veto right in order to maintain our accountability towards advice we provide, reconsider of voting threshold should be **85%** instance of 75% in current proposed.

**UNITED KINGDOM:** The UK supports the maintenance of the primarily advisory “first among equals” role for the GAC as underpinned by the ICANN Bylaws. We believe that this governance model has generally worked well in ensuring the public interest has been properly taken into account since ICANN was established.

There is justifiable concern in our view that moving to a participatory membership approach will likely create a risk of the GAC’s role being subordinated to other prevailing community interests or even of the GAC needing to engage in negotiations over final decisions with the result that the GAC’s initial advice reached by consensus may be vulnerable to subsequent change.

Furthermore, the GAC will need to consider carefully the legal implications for individual government representation on the Committee if the CCWG decides in favour of membership-based community empowerment mechanisms. Furthermore, these legal implications (including questions of personal liability of individual representatives) are likely to vary across the currently 152 administrations on the GAC. (The UK is taking legal advice and is also reviewing if there are any precedents for representatives of the UK government to participate in decision-taking processes, possibly involving voting procedures, as members of a non-governmental organisation.)

**UNITED STATES:** The USG does not support participation by the GAC in a membership-based community empowerment mechanism and does not support having the GAC exercise any of the proposed community powers. To do so would convert the GAC from an expert body providing public policy advice to the Board into an operational role for which the GAC is not organized and in which the GAC likely could not be effective. Moreover, the USG sees the two roles as incompatible with each other. Specifically, the GAC can continue to provide public policy advice under the current Bylaws arrangement or it can re-organize itself to participate on a more direct and operational basis in ICANN, but it cannot do both.

## 5. Does GAC wish to exercise any of the proposed community powers with regard to ICANN, and if so which ones; and how to participate?

**ARGENTINA:** Governments are fundamental stakeholders that must participate, considering its responsibilities, in this sense the GAC must become part of the “Community Empowerment Mechanisms” and exercise the proposed community powers. As stated in point 4, the participation of Governments must be allowed in a way that is viable, independently of the present or future jurisdiction of the new accountability structure. Many efforts should be made to solve this situation in the evolution of the new accountability structure.

**AUSTRALIA:** We support the proposed community powers and consider that the GAC should provide advice within the community empowerment mechanism on any changes to the bylaws. It is less clear that the GAC should be involved in decisions related to ICANN’s budget or the removal of individual directors. Any proposal for the GAC to be involved in such decisions would need to be subject to rigorous analysis.

**BRAZIL (supported by PARAGUAY & VENEZUELA):** As previously stated, given that governments are and should be regarded as legitimate stakeholders within the ICANN community, it is essential that they participate on an equal footing with the sectors that take part in the proposed accountability

mechanisms. Whereas the participation of government officials in strictly technical issues related to ICANN's day-to-day operations may not be considered relevant, it is important to guarantee that governments have adequate involvement in matters with direct and indirect impact on public policies, including ICANN's accountability mechanisms and procedures.

In this regard, the Government of Brazil considers that if the GAC is to become part of the "community empowerment mechanism" proposed by the CCWG-Accountability, it should be able to exercise all the powers granted to this body, on an equal participation with the other stakeholder groups.

**DENMARK (supported by EGYPT):** See response to Question 4.

**DOMINICAN REPUBLIC:** We understand that this issue merits further study. We find that the proposal by Jorge Cancio [Switzerland] and suggestions from the Danish government can be the basis for an expanded discussion of the GAC. However; we understand that the role of the GAC should be enhanced as a strong advisor at the different competences that the new model has identified for the community empowerment.

**FRANCE (supported by PORTUGAL):**

a. Reconsider/Reject Budget, or Strategic/Operating Plans

GAC could provide advice, to the ICANN board, based on the drafts of the budget, strategic and operation plans, whereupon they could enter in a validation phase through the voting system described in the CCWG report.

b. Reconsider/Reject Changes to ICANN Bylaws

The process of reconsideration of ICANN Bylaws could be initiated by the Board but should be conducted by a cross community working group. GAC would engage in the process as a chartering organization. Changes to Bylaws would finally be approved through the formal voting procedure described in the CCWG report.

c. Approve Changes to Fundamental Bylaws

The process of reconsideration of ICANN Fundamental Bylaws could be initiated by the Board but should be conducted by a cross community working group. GAC would engage in the process as a chartering organization. Changes to Bylaws would finally be approved through the formal voting procedure described in the CCWG report.

d. Removing Individual Board Directors (SO/AC)

The GAC should have the opportunity to formulate advice to the community on this issue.

e. Removing Individual Board Directors (NomCom)

The GAC should have the opportunity to formulate advice to the community on this issue.

f. Recalling the Entire ICANN Board

The GAC should have the opportunity to formulate advice to the community on this issue.

**GABON:** See response to Question 4, above.

**GEORGIA:** Yes.

**GERMANY:** See response to Question 4, above.

**HUNGARY:** The issue needs further consideration.

**INDIA:** As part of the community, like other supporting organizations (SOs) and advisory committees (ACs) of ICANN, GAC should ideally be entitled to the proposed community powers viz. power to reconsider/reject budget or strategy; power to reconsider/reject operating plans; power to approve changes to fundamental bylaws; power of removing individual board directors and power of recalling the entire ICANN board. At this juncture, however, it is acknowledged that the GAC may face unique challenges in exercising such powers. On the question of how to participate, India believes that to decide on any escalated issue, the GAC should not have lesser voting power than other SOs or ACs.

**ITALY:** See response to Question 4.

**MOROCCO:** Morocco is open to examine a model that would allow the GAC in the future to exercise any of the proposed community powers

**NETHERLANDS:** In this aspect we concur with Sweden's remarks [above]. CEM decisions can have a significant impact on the direct operation of ICANN, potentially endangering the stability and continuity of the DNS. Requiring a second vote will urge stakeholders to have a thorough examination of the consequences of the decision on the basis of GAC's advice, if diverging from the CEM proposed decision. Another option to consider is that GAC's advice is decisive in case of a 'tie ballot'.

**NIUE:** Niue is open to examine a model that would allow the GAC in the future to exercise any of the proposed community powers.

**ROMANIA:** As outlined above, and in the context of a new and more accountable ICANN framework, the GAC would continue to exercise an advisory role in relation to the community empowerment mechanism. This would mean that the GAC would not be a formal part of the voting mechanism to be put in place for the community to exercise its powers. But it would have the ability to advise this "community group" when decisions are made that impact the public interest, and mechanisms would need to be put in place to ensure that this advice is duly taken into account.

**RUSSIAN FEDERATION:** The combination of ICANN's international mission and its non-international legal status brings complexity to this topic; therefore, we believe that the issue needs further considerations.

**SENEGAL:** We are flexible to examine a model that would allow the GAC in the future to exercise any of the proposed community powers.

**SPAIN:** We would like the GAC reserves the right to issue advice on any of the decisions the community panel may take. At first glance, the amendment of fundamental Bylaws is likely to affect public policy interests since they define core tenets of ICANN. Other community powers like the ones over the amendment of non-fundamental Bylaws and the recalling of Board members may not be so important from the public policy point of view. But, this has to be asserted or denied after an assessment on a case-by-case basis.

In the event the GAC considers public policy matters are impacted by discussions at the community panel, it should produce public policy advice and convey it to the community panel. They should ponder the advice, accept it and act accordingly or reject it explaining the reasons why. If GAC advice has been agreed by consensus, the community panel should then try to find a mutually acceptable solution with the GAC. All of this should happen before any decision is made.



**SWEDEN:** As is clear from the Danish comments, it is reasonable that the GAC participate as non-voting liaison in the CEM. Of the proposed community powers, changes to ICANN Bylaws ("standard" and/or "fundamental") would be of particular relevance to the GAC as they pertain to public policy issues. Such issues would be an area where it would be relevant for the GAC to provide advice to inform a CEM vote. If a CEM vote goes against GAC advice, CEM should seek a mutually agreeable solution with the GAC and hold a second voting. If that vote also goes against the GAC advice, CEM should provide detailed rationale for going against the GAC advice.

**SWITZERLAND:** See response to Question 4.

**THAILAND: YES :** By membership-based (Refer to condition user answer to question 3)

- Reconsider/Reject Changes to ICANN Bylaw
- Approve Changes to Fundamental Bylaws

**NO:**

- Reconsider/Reject Budget or Strategy Operating Plans
- Removing individual board directors (SO/AO and NomCom)
- Recalling entire ICANN Board

**UNITED KINGDOM:** The UK does not yet have firm positions on these questions pending consideration of internal legal advice and finalisation of the draft CCWG proposal for the second public comment period.

However, the UK believes as a matter of principle consistent with the global community empowerment concept now envisaged, that the full range of stakeholder constituencies should be *invited* to participate in the exercise of all the community powers currently proposed by the CCWG. This should primarily be through initial consultation with the participating SOs and ACs.

While mindful of its paramount advisory roles to the Board and potentially to the entire ICANN community in the new global framework of accountability, the GAC may nonetheless wish to consider exercising an *opt-in* approach to joining in the processes for the exercise of such powers, including the reaching of final decisions. However, such an opt-in decision should not preclude the GAC being able, in parallel or subsequently, to provide formal advice on the issue concerned, to the ICANN community and/or the Board.

A GAC decision in favour of opting-in to the exercise of such a power may conceivably be dependent on the significance, or criticality of, any directly related public policy aspect(s). It would be our expectation that proposals for bylaw changes *would require all SOs and ACs to be actively engaged and in full consensus agreement* in such decisions given that they are fundamental to the constitution and governance of ICANN. There can be no risk entertained that bylaws that are specific to the GAC could be changed without the GAC's approval.

Similarly long term strategic decisions by the Board relating to the evolution of the DNS root zone should in our view require full stakeholder scrutiny. In contrast, relatively short term budget decisions and individual Board membership issues (as opposed to spilling or capture issues) would seem to be less relevant to the GAC's mandate and therefore the GAC may prefer to opt out of such community decision-taking processes.

An alternative, less resource-intensive, option is for the GAC to consider the establishment of non-voting, formal liaisons to the councils responsible for the exercise of community powers. These would facilitate effective communication with the GAC and if necessary the escalation of issues to be signalled for the GAC's early consideration and possibly subsequent formal advice to the community.

## 6. In what ways would the proposed improvements to IRP be satisfactory for public policy and Governments' needs, e.g. in terms of increasing transparency, increasing focus on process and/or substance, binding/non-binding nature, etc.?

### **AFRICAN UNION COMMISSION:**

- Review processes should have time limits for each stage, while allowing for some level of flexibility in specified circumstances. Standard time frames for decisions issued by a panel should be set to a maximum six months
- Any proposal for ICANN to be bound by an arbitration process needs to be considered carefully and subject to rigorous appraisal.
- Any interim measures of protection by an Independent Review Panel, should be issued and implemented only where there is a definite, concrete, real definitive substantive controversy open to specific relief.
- Mechanisms should be put in place for redress in the event that the Independent Review panel and/or dispute resolution provider goes off-track.
- Mechanisms should be put in place to hold the panel accountable to avoid having legitimate public policy, commercial and/or technical objectives, for example from new gTLD applicants in undeserved regions, being frustrated by lengthy procedural delays in addition especially when they potentially undermine the ICANN statutory obligations and fiduciary roles and
- The Independent Review panelists should be familiar with ICANN and its processes ensuring diversity.

**ARGENTINA:** IRP should be able to make reviews under the "Public Interest", considering it from a holistic view towards all the Internet community, where all stakeholders have a meaningful participation taking into account the responsibilities of each one. In this sense it is important to mention that ICANN, in its role of an international policy body, is creating new challenges for the present rules. As the new gTLD program has shown, there are several challenges to be addressed for any review panel. IRP composition should reflect proper geographic and gender diversity.

**AUSTRALIA:** We consider that the ability for individual Board members or an entire Board to be removed would be strong incentive for any Board to work with the community to achieve a satisfactory outcome. It is not clear how/whether the binding IRP would significantly add to those incentives and/or be balanced by some of the potential risks. We also note that there have been inconsistencies with panel decisions in regards to the new gTLD process, and we agree with the African Union Commission that any proposal for the ICANN Board to be bound by an arbitration process needs to be carefully considered and subject to rigorous appraisal.

**BRAZIL (supported by PARAGUAY & VENEZUELA):** The Government of Brazil welcomes the suggestion of enhancing ICANN's appeal mechanism and supports that decisions that emanate from this body must be of a binding nature. Brazil also concurs with the proposal of extending the capacity of the appeal mechanism in order to allow it to focus on process and substance.

Furthermore, the Government of Brazil considers that decisions of the appeal mechanism should be both independent from the ICANN power structure and from the specificities of national legislations. It is our understanding that the autonomy of the mechanism - and its ability to reach truly independent, impartial decisions - would be seriously at risk if this condition cannot be met. In line with what the Government of Brazil has expressed in regard to ICANN's existing legal status, any proposed accountability mechanism - including the appeal's mechanism - would be ineffective if ICANN's jurisdiction is ultimately able to restrict its power.

**DENMARK (supported by EGYPT):** New and improved appeal mechanisms, including the independent review panel and reconsideration process are central elements in improving ICANN's accountability. In particular we would like to underline the importance of making the system affordable, accessible, with a broadened scope. The new mechanisms must ensure that **the Board** is bound to follow the ruling of the IRP. Moreover, the selection of panel members should be carried

out by the community in cooperation with the Board. Another important element is to make sure that the panel has an adequate level of independency.

**DOMINICAN REPUBLIC:** We understand that as the proposal suggests concrete mechanisms should be sought to ensure equal opportunities in access to and use of these mechanisms, both from the point of view of human capacities of States, as the costs, including coping mechanisms for the language challenge that these processes entail. Moreover, as others have mentioned, mechanisms that are effective, accessible, neutral and independent. We support these criteria.

**FRANCE (supported by PORTUGAL) :** The French Government does not have the liberty to recognize the IRP as an international court of arbitration for dispute on future ICANN policies, mainly because:

- Fundamentally, law on arbitration requires a pre-existing contract between the two parties. We do not see how ICANN Bylaws, even less ICANN policies, could be considered as an existing contract that ICANN and all individual stakeholders 3/3 worldwide would have agreed upon.
- We have identified a potential problem of "accountability of the accountability mechanism". The fact that the IRP arbitrators would be paid by ICANN is incompatible with international arbitration practices, which commonly aim at providing both parties with guarantees of independence before they waive their rights to go before others courts in order to solve their dispute.
- The IRP decisions, as those of any international arbitration court, would fall into international private Law. As a consequence, since the IRP would be able to judge on the substance of complaints vis-à-vis ICANN policies, it would grant ICANN policies a legal status that is outside ICANN's technical mandate.

It is thus an absolute necessity that the new IRP remain an internal mechanism within ICANN. Enforceability of IRP decisions can easily be found within the ICANN community (in the possibility of forcing resignation of ICANN Board member(s) "if they were to ignore binding IRP decisions"). It is not necessary at all to seek it outside of ICANN ("in the court of the US and other countries that accept international arbitration results") and suffer the potentially dire consequences of resorting to international arbitration.

In order to improve the independence of the panellists we suggest that the panellists be paid by the community (not by ICANN) through a Trust Fund. The donator will be ICANN (the board could decide to allocate a part of the revenue of the public auctions to this fund) and the beneficiary will be anyone who is filing an IRP procedure.

**GABON:** The examination of this very delicate and complex issue requires more time for reflection and knowledge of all the transition documents and specific legal expertise. It is therefore important that governments can decide on this issue responsibly.

**GEORGIA:** We absolutely support Thailand's answer.

**GERMANY:** For the time being Germany has no additional remarks on the IRP to those made in our comment on the CCWG's Initial Draft Proposal.

**HUNGARY:** We share the opinion expressed in the French contribution on this matter.

**INDIA:** The proposed Independent Review Process (IRP) is marked by positives such as accessibility; affordability; binding decisions, and review for both substantive and procedural compliance. However, as per the current proposal, members of the IRP will be chosen by the ICANN Board, and draw funding exclusively from ICANN. This might lead to vested interests, capture and biases, and affect true independence of the panel. An IRP, in order to satisfy public policy needs, has to be truly independent. Accordingly, in respect of selection and funding of the panel, the proposal could be further refined.

**ITALY:** In our opinion, it's crucial that Governments can file an IRP, even if they are not "materially affected parties" since they are responsible for public policy issues.

**MOROCCO:** The new IRP mechanism should be improved in order to ensure that the appeal mechanism will be faster, more affordable and binding.

The IRP panel decisions should be guided by ICANN's Mission and Core Values.

Morocco considers that geographic, cultural and gender diversity is a key element and criterion in the selection of IRP panelists. All communities should have a say in the selection process.

**NETHERLANDS:** Netherlands will examine IRP proposals in due course.

**NIUE:** The new IRP mechanism should be improved in order to ensure that the appeal mechanism will be faster, more affordable and binding. The IRP panel decisions should be guided by ICANN's Mission and Core Values. Niue considers that geographic, cultural and gender diversity is a key element and criterion in the selection of IRP panelists. All communities should have a say in the selection process.

**ROMANIA:** An enforced IRP would be an essential characteristic of a more accountable ICANN and the efforts made by CCWG to design an improved mechanism are appreciated. Given the current CCWG proposal, as well as various legal memos provided by the CCWG legal counsellors, there are several issues that would require additional consideration:

- Status of the new IRP. If the intent of the CCWG is to design the new IRP in such a way that its judgments would be accepted as the outcome of an international arbitration, this needs to be carefully considered, in terms of implications, advantages and disadvantages for all parties concerned. Some of the aspects that would need to be more carefully looked at in this regards include: the (in)ability of stakeholders to challenge decisions in front of local jurisdictions; the (in)ability of stakeholders to choose an "arbitration" court other than the IRP; enforceability of IRP decisions in national courts; etc.
- Binding the ICANN Board to the IRP decisions. Clear mechanisms would need to be designed to ensure a proper implementation of the CCWG proposed measure of empowering the community to force resignation of ICANN Board members in case of not complying with IRP decisions.
- Independence of the IRP. In order to increase the independence of the IRP, the IRP panellists would need to be selected by the entire community, and not only by the Board. A clear and transparent process would need to be designed in this regard. Similarly, recalling a panellist should also be a responsibility for the community to exercise, in accordance with clear and transparent procedures set in advance.
- Time frame for the IRP panel to make a decision. The current CCWG proposal does not seem to provide clarity in this regard, but establishing some time frames for the IRP panel to review a case and come to a decision would contribute to giving some degree of predictability for the parties involved.
- "Materially affected" parties. According to the CCWG proposal, "any person/group/entity materially affected by an ICANN action or inaction [...]" would have standing in the new IRP. While it does not seem to be clear what "materially affected" means, this raises the question of whether a government can invoke the IRP processes with regards to, for example, an ICANN decision that is seen as affecting the public interest at large (would the respective government, in such a case, be seen as a "materially affected" party?). Some clarity in this regard would be welcome.

**RUSSIAN FEDERATION:** We share the opinion expressed in the French contribution on this matter.

**SENEGAL:** The new IRP mechanism should be improved in order to ensure that the appeal mechanism will be faster, more affordable and binding.

However, the selection of panel members should be carried out by the community in cooperation with the Board. Another important element is to make sure that the panel has an adequate level of independency.

**SPAIN:** The reference to transparency is not altogether clear for us.

Expanding standard of review to cover substantive issues will no doubt increase accountability and opportunities for redress. Public policy interests and governments' stance on them will hence benefit from it.

We judge the decision to hand over Reconsiderations Requests to the Ombudsman for a first look instead of to the ICANN legal counsel quite prudent since, as the proposal states, he may have more of an eye for fairness. As a matter of fact, ICANN policies and resolutions touch upon issues that are not regulated elsewhere, even less in International Law. One outstanding example is the use of geographical names in the domain name space. Although some interests are not supported by universally accepted written law they deserve consideration as they reflect legitimate aspirations of people. Like in the Reconsideration Request Process Cooperative Engagement or other settlement efforts and Independent Review Process should incorporate avenues to assess fairness in the decision. One possible way to achieve it could be to allow the panel to decide "ex aequo et bono" or on "equitable criteria" (normally this requires assent by both parties) or to mandate it to take them into account when ruling in accordance to applicable laws.

We are quite confident in our view that decisions made by an appeal mechanism on ccTLD delegation and re-delegation should not be binding on States outside court or international arbitration rulings.

On all other issues, we are not so sure that IRP decisions should not be subject to appeal or that they could be enforced in US or other national courts. IRPs rulings should be binding on ICANN and the community can use their powers to force compliance with them.

The application of "equitable criteria" for the resolution of appeals looks even more adequate where decisions are based on GAC advice or have been taken against GAC advice since not all public policy concerns the GAC raises arise from Public International Law, but from interaction with national laws and public policy interests.

ICANN should definitely have an internal appeal mechanism and should strive to build it as equitable, independent, affordable and effective as possible. We have made several suggestions to improve standing, diversity, panel selection and accessibility of the IRP.<sup>3</sup> It should also be clear in the Bylaws that aggrieved parties are free to go to national courts or should ICANN accept it, before international arbitration courts, instead of using the appeal mechanisms envisaged in the new accountability framework.

In the case of governments, preventing them from filing lawsuits elsewhere would hinder them from fulfilling their role and responsibility as guardians of public interests that Article XI.2.1 k) of the Bylaws recognize "in fine".

**SWEDEN:** Noting the several well motivated questions and hesitations that was put forth during the public comment period, among others from several countries, and the comments for the purpose of this question made by Denmark and AUC, Sweden refrain from taking a position on this aspect of the CCWG proposal and looks forward an opportunity to comment on the next CCWG report iteration.

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<sup>3</sup> <http://forum.icann.org/lists/comments-ccwg-accountability-draft-proposal-04may15/msg00021.html>



**SWITZERLAND:** We still are considering the implications of the proposed improvements to the IRP. Nonetheless, we would like to recall the GAC input to the Istanbul meeting of the CCWG where the following suggestions were made: *“ICANN’s mechanisms for review, reconsideration and redress should be continuously improved, taking into account considerations of timeliness, effectiveness, affordability, neutrality and independence to more effectively meet ICANN’s commitment to accountability. ”*

**THAILAND:** As mentioned, Thailand agrees upon on the having independent review panel which demonstrates increasing more transparency as the panel member selection process engage both third party arbitral body and community to confirm appointments. The characteristic of IRP Panel also reflect more diversity and competency.

**What needs to be improved:**

*Reach in a timely fashion* may be subjective. To ensure the process should the TIME require in each process of IRP shall specify as indicative reference and to limit the materially harm. In the case that complex and process might take longer than the indicative time should the IRP have the PROVISIONAL MEASURE before IRP Decision that also binding on ICANN.

**UNITED KINGDOM:** The UK will review this question and take further legal advice as the CCWG reaches agreement on the final proposal for the IRP which would equate to a significant constitutional safeguard which will need to be thoroughly road-tested. Our provisional expectation is that in order to become binding on the Board and thus on all members of the community, decisions of the IRP should demonstrate that they have taken full account of consensus-based GAC positions on all directly-related public policy issues in the substance of the IRP.

**UNITED STATES:** The USG welcomes the CCWG’s intention to improve the existing mechanisms for review, reconsideration and redress. However, given the current shortcomings that exist with these mechanisms, it is essential that the CCWG provide an assessment of the current deficiencies and a clear and convincing explanation as to how its proposed improvements mitigate these deficiencies. We also believe the CCWG should consider a trial period, or test phase, for whatever changes are proposed in order to clearly test the effectiveness of those changes before these changes are memorialized into fundamental Bylaws that may be difficult, if not impossible, to fix in the future. We believe it would be a mistake to prematurely agree to make decisions of Independent Review Process (IRP) panels binding without the opportunity to test whether all of the proposed improvements to the IRP have had the desired results.