

French Government Comments on the
**CCWG-Accountability 2nd Draft Proposal on
Work Stream 1 Recommendations (3 August 2015)**

September 10th, 2015

The French government would like to thank the CCWG for its 2nd Draft Proposal and the huge amount of work leading to it. Again, we reiterate our support to the CCWG-accountability and particularly appreciates the dedication of all individual stakeholders, co-chairs, members and participants, to the group.

Regarding the issue of diversity

The French Government appreciates the inclusion of diversity as a core issue into Work Stream 2. Nonetheless, we took note of the tension between stakeholders who “requested more details about the concrete steps, or asked to more explicit support enhancements of diversity within ICANN” and those who “while acknowledging the importance of diversity in the accountability mechanisms, have expressed their view that diversity requirement should not prevail over skills or experience requirements” (part 8.1, p.64).

The French Government remains concerned that any lack of ambition on a series of commitments and concrete steps towards enhancing diversity at ICANN after the IANA transition, would easily be interpreted as a way for insiders to protect their historical positions within the organisation. If ICANN is to be accountable before the global internet community, it has to gain legitimacy from the global internet community by being representative of the global internet community.

The French Government calls 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.

Regarding Core Value 7

The French Government welcomes the deletion of the amendments to the former Core Value 11 that was proposed in the CCWG initial draft proposal, since their rationale and enforceability were, in our view, more than doubtful. Once more, it is our view that the current Core Value 11, now Core Value 7, adequately reflects several other international texts (such as the 2013 NETmundial Statement or the 2005 Tunis Agenda) that set the delicate balance of the multi-stakeholder model of internet governance which ICANN expects to embody. As far as DNS management is concerned among other topics of internet governance, the French government can only reiterate that it is the responsibility of the private sector, so long as the private sector acknowledges, and therefore “duly takes into account”, that internet-related public policies are not theirs but that of public authorities.

Yet secondly, we also note that the CCWG proposes to “amend Article XI of the Bylaws, to provide that each advisory committee should provide a rationale for its advice, with references to relevant applicable national or international law where appropriate”, “*instead*” of “the language that was read by some commenters to remove ICANN’s obligation to consult with the GAC on consensus advice” (part 3, p.25, emphasis added). The French government would perfectly understand that the CCWG expects such a rationale for the sake of better clarity of GAC advice. If, however, the CCWG proposes that a rationale – or absence thereof, or even absence of clarity thereof – replace the obligation to consult with the GAC, the French Government would consider it an attempt to specify new terms of the GAC-Board relationship in contradiction with the very spirit of what is specifically designated as a core value of ICANN. As a consequence, we could not support such an amendment to Article XI.

Regarding Stress Test 18

Contrary to Core Value 7, the French Government cannot but express its deepest disappointment with the CCWG having maintained, in the 2nd draft proposal and as a solution to Stress Test 18 the exact same controversial amendment to Bylaws Article XI.2.1.j., in spite of the serious concerns repeatedly displayed by many GAC members since the publication of the initial proposal. By doing that, the CCWG did not just deliberately refuse to duly take into the concerns of Governments, it chose to annihilate all the efforts made by multiple other stakeholders to find alternative solutions to Stress Test 18, notably during the public comment period, at the ICANN53 meeting in Buenos Aires and at the CCWG F2F meeting in Paris. The French Government considers this as the worst signal that the CCWG could send to the global internet community regarding the risk of capture of ICANN’s multi-stakeholder model.

We will therefore contend ourselves with recalling that :

1/ As stated above, specifying new terms of the GAC-Board relationship is in flagrant contradiction with what is specifically designated by the CCWG as a core value of ICANN. Core Value 7, in line with the 2013 NETmundial Statement and the 2005 Tunis Agenda, clearly establishes the sole responsibility of governments for internet-related public policies, regardless of their decision-making procedures. Therefore, since GAC decision-making procedures are, consistently with ICANN Bylaws, based on agreements between its members States, anything that might permit the Board to amend or even influence those internal decision-making rules would amount to inappropriate limitations on governments’ competencies, without regard nor respect for the delicate balance of the multi-stakeholder model of internet governance which ICANN expects to embody.

2/ In addition, this is also neglecting, perhaps negating, along with their results, the accountability mechanisms that are already in place at ICANN. Indeed, the French Government cannot help but wonder how the CCWG could not acknowledge that back in 2010, ATRT1 did contemplate recommendations by some stakeholders that GAC advice be consensus in order to trigger Bylaws provisions obligating the Board to response. It nonetheless also reported many concerns that were raised by other stakeholders, before concluding that “this would be automatically taken care of as soon as GAC and the Board agree on what constitutes GAC advice”. Which, in its turn, ATRT2 concluded was satisfactorily addressed and completed in 2013. Interestingly, there was agreement that a communiqué, a letter, an email, etc., constitutes GAC advice. In other words and for its part,

the CCWG chose to ignore that it was naturally considered inappropriate to get involved into how GAC advice is negotiated.

3/ Lastly, the French Government still considers that linking Stress Test 18 to a risk of capture of ICANN by governments and NTIA's requirement that no "government-led or intergovernmental organization solution would be acceptable", makes no sense. We have to reassert that whatever the hypothetical evolution of GAC's internal decision-making rules, GAC, as its name says, will remain in an advisory role to the Board. Logically, the risk of capture of ICANN by governments in the future is as low as it is now and in any case, it cannot lead to a "government-led or intergovernmental organization solution".

The French Government would like to underline that the previous criticisms do not address Stress Test 18 itself, but the amendment to Bylaws Article XI.2.1.j proposed by the CCWG as a solution for Stress Test 18. In fact, it is our view that much stronger responses have already been found to Stress Test 18 by the CCWG:

1/ First, the CCWG expressly stated its rightful intent to narrow ICANN's mission in ICANN Bylaws. Thus, remote as the possibility raised by Stress Test 18 that "a majority of governments could approve GAC advice that restricted free expression" may have been, it is pushed even back further by making clear that ICANN will not deal with internet content issues, for instance. This is clearly one (of the multiple) valid solution(s) to Stress Test 18 that the CCWG nonetheless failed to mention.

2/ Secondly, the CCWG should know that the community empowerment mechanism provides the ICANN community with an oversight on the GAC-Board relationships. Even if the Board was to follow GAC advice that would happen to be unsupported by the community, the *community as a sole member* could challenge the Board's action or inaction against such GAC advice through the proposed accountability mechanisms, which also appear as perfectly valid solutions to Stress Test 18.

To our surprise, in the case of Stress Test 18, the CCWG 2nd proposal does not put forward the effectiveness of the very mechanisms which the CCWG was commissioned to design in order to enhance ICANN accountability, and which actually apply to most other stress tests. It is incomprehensible to us that the CCWG could maintain an unfortunate amendment to Bylaws Article XI.2.1.j as a solution for Stress Test 18 instead. It even seems irresponsible to us that the CCWG could aggravate the risk of delaying the IANA transition, in spite of all warnings that strict consensus will be needed among governments for GAC to approve the CCWG final proposal as a chartering organization.

We therefore thank the CCWG for considering that the French Government shall formally object to any approval by GAC of a final proposal that would not leave Bylaws Article XI.2.1.j unchanged.

Regarding the IRP

The French Government very much appreciates the clarifications provided by the CCWG 2nd draft proposal relating to the new IRP, which reflects many of our comments expressed during the public comment period on the initial draft proposal, at the ICANN53 meeting in Buenos Aires and at the CCWG F2F meeting in Paris.

We do understand that the CCWG 2nd draft proposal “does not establish a new international court or a new body of international law”, that “it is not a Treaty function” and that, contrary to the current IRP, the CCWG intended to make decisions of the new IRP unambiguously binding *on ICANN itself*, a first new feature that we totally support. The French government also takes the opportunity to reassert its support to the second new feature of the IRP, that is the ability to judge on the substance of complaints (notably vis-à-vis ICANN policies) rather than just on the conformity of the procedures followed by the Board (vis-à-vis ICANN Bylaws). /.