



Madrid, 11th September 2015

SPANISH COMMENTS ON THE SECOND CCWG-ACCOUNTABILITY DRAFT PROPOSAL (3th August 2015)

The Government of Spain appreciates the opportunity to further contribute to the CCWG-Accountability, through the submission of comments to the second draft proposal.

First, we would like to thank all participants, members and co-chairs of the CCWG for their hard work and commitment, which has produced an improved outcome in a very tight timeframe.

Second, as regards the nature and scope of the subject under scrutiny, Spain wishes to remark that it should be born in mind that, alike the IANA transition process, the main goal remains the global public interest and not private objectives. Once the USG oversight is withdrawn, ICANN will have to be ready for the scrutiny of the global community, not only its own.

Third, on the actual proposal put forward by the CCWG-Accountability, Spain wishes to make the following remarks:

1. GAC's involvement in the new “Community Mechanism”

Spain wishes to underscore the need to preserve the GAC's role in providing public policy advice to ICANN.

This advisory role should be maintained in the new refurbished ICANN and the GAC should continue to bring the public policy perspective to the new created community mechanism.

It should be noted that even if the GAC does not have a role in the day-to-day technical and operational matters, that should not prevent governments in the fulfilment of their role as public authorities, in particular as technical norms may, in certain situations, have impact on public policy issues.

In any case, the ICANN Board must continue to duly take into account and ensure that due deference is made to GAC advice.

2. Core value 7



Spain is satisfied with the new text provided for CV 7 as it no longer sets limits to the public policy advice that the GAC may give to the ICANN Board.

3. Commitment 5

The GAC should be recognised and its role of protection of the public interest in ICANN's multistakeholder environment should be guaranteed.

In Commitment 5, the text "private sector lead" and a thorough description of what comprises that private sector have been included. Spain does not oppose to those additions, but since the proposed Commitments do not even once mention the governments' role, out of fairness, respect for every actor's role and avoid inconsistencies with the multistakeholder model, it is essential that the governments' role is added as well in this Commitment.

Hence, we put forward this text for Commitment 5 (additions in **bold blue**):

*5. Employ open, transparent and bottom-up, multistakeholder policy development processes, led by the private sector, including business stakeholders, civil society, the technical community, and academia, that (i) seek input from the public, for whose benefit ICANN shall in all events act, (ii) promote well-informed decisions based on expert advice, and (iii) ensure that those entities most affected can assist in the policy development process, **while duly taking into account the public policy advice of governments and public authorities, whenever public interest is affected.***

4. Independent Review Panel (IRP)

We applaud the enhancements put forward for the refurbished IRP, which will contribute to improve the community's power to appeal ICANN's decisions, including the provisions on geographic, legal and cultural diversity, translation services, independency of panellists (term limits and post-term prohibitions), and initial nomination of panellists by the community.

In particular, Spain welcomes the explicit statement that "*The proposal does not establish a new international court or a new body of international law: it is not a Treaty function, and is internal to ICANN*" and that "*The decisions of the IRP will be binding on the ICANN Board.*"

We regret though, that our request to expand the standard to be a party of an IRP has not been taken into account. The "materially affected" clause actually prevents governments as well as other entities from participating in an IRP as



decisions that may affect them might have not been implemented yet and thus, have not caused any material harm at the time of filing the complaint.

5. AoC reviews

Spain welcomes the addition stating that “*The draft report of the Review Team should describe the degree of consensus reached by the Review Team.*”

That is a good exercise of transparency, since this provision will oblige the Review Team to describe the level of support of the RT membership for the different proposals received.

Nonetheless, for the sake of transparency, the review teams should describe how they have considered community inputs explaining why they embraced the ones that made their way to the final report and why they rejected the other ones.

In addition, we are still missing a provision that lets the community know the level of support of the community itself to the proposals. This double-scale disclosure of the level of support of a proposal, both in the RT and in the community, should be displayed to maximize the transparency, avoid capture and ensure that the community input is duly and fairly taken into account.

6. Stress Test 18

We cannot agree with this stress test being included in the final report.

ICANN Bylaws state clearly that the Board shall duly take into account Governments' advice "on public policy issues" (Article I Section 2.11, Article III Section 6.1.c and Article XI Section 2.j). This is the key point: the GAC brings the public policy perspective into ICANN.

Let us not forget that the GAC advice to the Board is entitled to be “duly taken into account”, but is not anything further than an advice, since the GAC only has advisory powers. If the Board turns down a particular piece of GAC advice, then it has to enter into a process with the GAC to try and find a "mutually acceptable solution". Again, if this cannot be found, the Board is still free to do whatever feels appropriate, including simply not follow that GAC advice. Spain is against the idea of capture of ICANN by Governments or by any other stakeholder group, but we fail to see where the contingency or the risk of government capture lays in this case.



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One of the conditions put forward by the NTIA is that no other single country or intergovernmental body should take over the IANA stewardship role, but the assumption stated in the draft proposal that this ST 18 addresses that NTIA requirement is both unfounded and incorrect. It is extremely difficult to see why the GAC's operating principles or how the GAC makes decisions should have an effect on the IANA stewardship function, being only an advisory body that does not develop policies, unlike the GNSO.

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