

Comment of Brett D. Schaefer and Paul Rosenzweig of The Heritage Foundation on the Cross Community Working Group on Enhancing ICANN Accountability 2nd Draft Report (Work Stream 1)

On August 3, 2015 the Cross-Community Working Group on Accountability published its 2nd Draft Report on Work Stream 1 Recommendations for public comment. The 2nd Draft Proposal is designed to “attain a level of accountability [in the operation of ICANN] to the global multistakeholder community that is satisfactory in the absence of its historical contractual relationship with the U.S. Government.” Draft Proposal ¶12.

This submission reflects the comments of Brett Schaefer and Paul Rosenzweig of The Heritage Foundation (“Heritage”). Heritage is a research and educational institution – a “think tank” – focused on U.S. domestic and international public policy and is a member of the Non-Commercial User Community of the GNSO.

There is much to admire in the 2nd Draft Proposal. Indeed, we strongly support most of what has been presented and particularly call out for commendation the proposal for an Independent Review Process and the proposal for a Fundamental Bylaw restricting the mission of ICANN to its essential functions.

We submit this comment to address a single issue of grave concern, one that, if left unaddressed could prevent a successful transition of the IANA function from occurring: the issue of the role of governments in any revised ICANN governance structure. Resolving that issue is critical to fulfillment of the NTIA’s requirement that the transition proposal not “replace[] the NTIA role with a government-led or intergovernmental organization solution.” *Id.* ¶124. In our judgement the 2nd Draft Proposal does not go far enough in ensuring that governments remain unable to control ICANN.

In particular, we have a significant concern that the Governmental Advisory Committee (GAC) would **both** get 5 votes as part of the new Sole Member (*id.* ¶¶ 319-33) **and** retain its current privileged status as an advisory committee that can oblige the Board to “try, in good faith” to find a mutually acceptable solution in the case of disagreement about GAC advice (*id.* §10.3, ¶¶ 609-26).

In our view, this dual role for governments is unacceptable and would provide them enhanced authority within the post-transition ICANN. We strongly believe that an acceptable proposal must require the GAC to *either* choose to participate in the Sole Member *or* retain their privileged advisory role, but *not* have both opportunities to influence ICANN. In addition, the draft proposed Bylaw revision, *id.* ¶ 619, needs to be clarified to make it certain that the Board controls the definition of the quantum of agreement that constitutes consensus within the GAC that triggers the Board’s good faith negotiation obligation. It is also unacceptable to leave it within the power of the GAC to redefine consensus (which it is free to do for its own internal purposes) in a manner that binds the Board.

We understand, and appreciate, that the members of the GAC have yet to determine a unified position on the question of their continuing role. We also recognize that ambiguity in the development of the 2nd Draft Proposal may aid in moving the process forward. But that ambiguity cannot be sustained as the Draft becomes a “Final” proposal to the Board and the community. It must be resolved.

We are deeply concerned that many governments see the IANA transition as an opportunity to enhance their role in management of the network. As one government representative said during the CCWG-Accountability meeting in Paris: “The thing is that for certain governments the minimum is not the (advisory role). They are unsatisfied with the advisory role - want something more. The minimum for

them would be to have more than that.” This intervention represents the challenges facing the ICANN accountability working group moving forward and is in conflict with the NTIA requirement that the NTIA role not be replaced with a government-led solution. The centrality of this requirement was the reason that Stress Test 18 (*id.* §10.3, ¶ 609-26) has received more attention than most other Stress Tests.

Efforts to delete Stress Test 18 in GAC and CCWG discussions¹ cannot be interpreted as anything other than an attempt to remove an impediment to enhancing the authority of governments in a post-transition ICANN. The role of governments in the governance of the Internet is as contentious as it is vital to get right, and in our view ICANN must find a model by which governments act in an advisory capacity. This will induce responsibility, and allow different territories to weigh in on the governance of the Internet without allowing geopolitics to interfere with the stable, secure, and resilient operation of the online space. The Internet is a non-partisan space, and should remain so.

We therefore agree with one of the co-chairs who said, in Paris: “I think it would be a good signal to the outside world that the governments are acknowledging they're keeping their advisory role to the GAC.” We view this – the *advisory* role – as an essential diplomatic component of ICANN’s accountability structure. It puts parameters in place in terms of ICANN’s conduct, but also does not allow governments to overstep their boundaries and push the Board in one political direction over another.

The sad truth is that there are countries that censor their citizens and monitor their online activity to frightening degrees. Preventing those countries from having a greater role in Internet governance is essential. This transition is an opportunity to maintain the historical openness of the Internet, and to implement an accountability mechanism that will allow for governmental input that will advise the Board of Directors without giving governments additional power.

Accordingly, we recommend the following:

- The Sole Member reference model should be revised to make clear that the GAC is entitled to join and participate and exercise its 5 votes if, and only if, the Bylaws are amended to delete the current final sentence of Article XI, section 2, clause j, *viz.* “[t]he 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.”
- In addition, and assuming that the GAC chooses not to join the Sole Member but rather seeks to retain its current advisory role, the proposed Bylaw revision (2nd Draft Proposal ¶ 619) should be further amended as follows (with the 2nd Draft proposal in **bold** and further proposed amendments in *underlined italics*):
 - 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. **With respect to Governmental Advisory Committee advice that is supported by consensus** (*a decision adopted by general agreement in the absence of any formal objection*), the Governmental Advisory

¹ Most recently during the CCWG meeting of August 18. See Transcript of Meeting at 5-7 (remarks of representatives of Iran and Argentina), <https://community.icann.org/pages/viewpage.action?pageId=54693841>.

Committee and the ICANN Board will then try, in good faith and in a timely and efficient manner, to find a mutually acceptable solution.

This change would incorporate the current definition of consensus under GAC Operating Principle 47² into the Bylaws for the purposes of Article XI, Section 2, clause j. The GAC would remain free to redefine consensus as it sees fit or to provide non-consensus advice to the Board, but the Board would only be obligated to duly take into account and find a mutually acceptable solution when GAC advice is adopted by general agreement without objection as is currently the case under GAC principles.

- Retain Stress Test 18 in the CCWG-Accountability Proposal on Work Stream 1 Recommendations.
- Finally, the community must resist with all of its power any effort to find an “enhanced” role for governments in ICANN’s governance. Since no formal proposal for such a role is presented in the 2nd Draft Proposal, we make no recommendation for a change or modification of the report. In light, however, of the publicly stated view of some nations that a greater role is desirable, it is imperative for the community to reaffirm its opposition to that idea in the strongest possible terms.

In our view, unless these changes are made, the proposal would provide governments an enhanced authority within the post-transition ICANN and violate the NTIA’s requirement that the transition proposal not “replace[] the NTIA role with a government-led or intergovernmental organization solution.”

—*Brett D. Schaefer is Jay Kingham Fellow in International Regulatory Affairs in the Margaret Thatcher Center for Freedom, of the Kathryn and Shelby Cullom Davis Institute for National Security and Foreign Policy, at The Heritage Foundation and editor of ConUNdrum: The Limits of the United Nations and the Search for Alternatives (Rowman and Littlefield, 2009). Paul Rosenzweig is a Visiting Fellow in the Edwin Meese III Center for Legal and Judicial Studies and the Allison Center.*

² “Consistent with United Nations practice, consensus is understood to mean the practice of adopting decisions by general agreement in the absence of any formal objection. Where consensus is not possible, the Chair shall convey the full range of views expressed by members to the ICANN Board.” GAC Operating Principles, Principle 47, <https://gacweb.icann.org/display/gacweb/GAC+Operating+Principles#GACOperatingPrinciples-X> (footnote omitted).