Appendix A – Documenting Process of Building Consensus

01   The Supplemental Final Proposal on Work Stream 1 Recommendations was developed in a bottom-up, multistakeholder approach, which included multiple "readings" of each recommendation. Each draft was posted publicly and open to comment by CCWG-Accountability members and participants.

02   To finalize its report, the CCWG-Accountability established a structured process to ensure input was being accurately discussed and reflected, as appropriate. Step 1 consisted in circulating key discussion items to the list based on public comment received. Following a first reading held on a call, the CCWG-Accountability leadership would circulate conclusions of the first reading along with edits to prepare for the second reading. This process would conclude with the distribution of second reading conclusions. Additional readings and discussions were scheduled and continued on the list depending on difficulties in reaching consensus. Documents prepared for readings can be found here.

03   Following the final reading and legal review, finalized recommendations were sent to the CCWG-Accountability for a 48-hour period to note any errors, comments, or statements for the record.

04   The CCWG-Accountability is pleased to provide its Chartering Organizations with the enhancements to ICANN's accountability framework it has identified as essential to happen or be committed to before the IANA Stewardship Transition takes place (Work Stream 1) for consideration and approval as per its Charter.

05   The Supplemental Proposal on Work Stream 1 Recommendations is the result of extensive work by the CCWG-Accountability's 28 members, 172 participants and a team of highly qualified legal advisors over the past year, which included over 221 calls or meetings, three public consultations and more than 13,900 email messages. It represents a carefully crafted balance between key requirements, specific legal advice and significant compromises by all who participated. It also includes diligent attention to the input received through the public comment proceedings.

06   The final proposal has received the consensus support of the CCWG-Accountability. Minority viewpoints were recorded through 17:00 UTC on 18 February 2016. These viewpoints are provided below for Chartering Organization consideration.

07   **Minority statements or objections will be noted below if/when they are received in the order in which they were received.**

Minority Views

08 **Minority Opinion by Eberhard W Lisse**

09 **CCWG-Accountability Member, ccNSO**

10 Dear Co-Chairs

11 I am Managing Director of Namibian Network Information Center (Pty) Ltd, the country code Top Level Domain ("ccTLD") Manager of .NA. I created .NA and have 24 years uninterrupted service and corresponding experience as the ccTLD Manager for .NA.

12 I am appointed by ICANN's country code Names Supporting Organization ("ccNSO") as a Member to the Cross Community Working Group on Enhancing ICANN Accountability ("CCWG Accountability").

13 The CCWG Accountability submits a "Final Proposal on Work Stream 1 Recommendations" ("Final Proposal") which in terms of its Charter must focus on

> [...] mechanisms enhancing ICANN accountability that must be in place or committed to within the time frame of the IANA Stewardship Transition.

14 The Final Proposal does **not** do so.

15 Accordingly I do not agree with and hereby formally record my Objection to the Final Proposal:

1) I still have serious concerns regarding the proposed increase to the powers of Advisory Committees ("AC") and their proposed elevation to similar status and powers as Supporting Organizations ("SO").

2) The Final Proposal is entirely silent on accountability measures for ICANN relating to its dealing with ccTLD managers.

   This omission is fatal.

3) I still have very strong concerns about the way the CCWG Accountability has dealt with ICANN's Accountability to Human Rights.

   The Final Report must state, at a minimum, that:

   > Within its mission and in its operations, ICANN will respect fundamental human rights, inter alia the exercise of free expression, free flow of information, due process and the right to property.

   is unacceptable.

4) The questions

   - under what statutory powers this transfer will occur,

   - what in fact it is that is transferred, and

   - what is not transferred remain unanswered.

   And they **must** be answered in order for any transfer of the functions and/or the root zone to occur.

5) I have previously placed on record my observations regarding the legitimacy of the way in which the CCWG has conducted itself during its deliberations which has been, more often than not, in violation of its own Charter.

I renew my Objection against this exclusionary process[1].

6) The entire proposal has been cobbled together in extreme haste.

We (the representative Members of the CCWG) have been subjected to an arbitrary, self-imposed and entirely unrealistic timetable and deadline.

7) Regrettably, the Final Proposal bears the fruit of this extreme haste. It is overly complex, hard to understand even by many of members and participants of the CCWG-Accountability themselves.

8) The **drastic** shortening of public comment periods is another example of the apparently intentional exclusivity of the process.

Even if the previous fatal flaws did not exist, this would, in itself, be fatal to the legitimacy of the CCWG process and the Final Proposal.

Fortunately the Final Proposal, if any, can still be subjected to a proper public comment period.

9) I submit that the Final Proposal simply adds additional layers of bureaucracy without achieving much, if anything.

10) The IANA transition involves novel and unsettled questions that may implicate the interests of a wide array of entities. This includes both the public and private sector and engages both domestic US and international interests.

The CCWG Accountability should be result driven and provide its considered views on the important issues presented by the transition in a more reasoned and full discussion instead of rushing to produce something to meet a self-imposed deadline for which there is simply no justification.

11) Repeatedly the NTIA found it necessary to advise, and did so in no uncertain terms, that the CCWG was not meeting the terms of reference set by the NTIA.

I submit that the Final Proposal still does not meet these.

16   In the presence of these Objections it follows that the proposal does not have Full Consensus and I submit these minority viewpoints to be added to the Final Proposal as required by the Charter.

17   I urge ccTLD Managers to reject this proposal and the NTIA not to accept it as is.

18   Eberhard W Lisse

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[1] I renew my Objection to the previous "Draft Recommendations" from 2015-06-03, the "Draft Proposal" from 2015-07-30 and the "Third Draft Proposal" from 2015-12-02 and incorporate them by reference herein.

19 Minority Opinion by Olga Cavalli

20 CCWG-Accountability Member, GAC

21 Dear co-chairs,

22 After many months of hard work, CCWG has delivered a final proposal to be accepted by the community and then submitted to the ICANN board and NTIA. The negotiations leading to the delivery of this proposal have been very intense, and sometimes disappointing. More specifically, the attempts of some stakeholders to take advantage of the IANA transition in order to reduce the ability of governments to be part of the – to be enhanced – community, have jeopardized the success of the overall process, and more broadly, have put at risk our trust in what has brought us all here in the first place: the multi-stakeholder approach.

23 The role of governments in the multi-stakeholder community

24 The idea that governments threaten the multi-stakeholder community or benefit from a "special status" in the current ICANN structure is a misconception:

- Governments only have an advisory role in ICANN, through the Governmental Advisory Committee (GAC), whereas other constituencies exercise a decisional role, for instance through the drafting of policy recommendations.

- Governments do not participate in the ICANN Nominating Committee (NomCom) for the selection of ICANN´s leadership positions in the Board, ccNSO, GNSO and ALAC, unlike other AC/SOs within ICANN.

- Governments do not participate to the ICANN board, whereas all other AC/SOs can elect members of the board, directly and through the Nominating Committee. GAC can only appoint a non-voting liaison to the board.

- The ICANN board can easily reject GAC advice, even if the advice was approved without any formal objection. If "the ICANN board determines to take an action that is not consistent with the Governmental Advisory Committee advice" and fails to "find a mutually acceptable solution" (an obligation which does not only apply to GAC advice[2]), then the only obligation of the board is to "state in its final decision the reasons why the Governmental Advisory Committee advice was not followed"[3]. On the other hand, a PDP approved by 66% of GNSO can only be rejected by a 2/3 majority of the board[4].

25 On the contrary, we believe that governments are an essential part of the community:

- GAC is the most geographically diverse entity in the community. This element should not be underestimated, given that the internationalization of ICANN has been a recurring issue since its inception in 1998.

- Governments bring a unique perspective on public policy issues and remain the most legitimate stakeholders when it comes to protecting public interest.

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[2] *ICANN Bylaws, Annex B, Section 15.b:* "The Board shall adopt the ccNSO Recommendation unless by a vote of more than 66% the Board determines that such policy is not in the best interest of the ICANN community or of ICANN. (…).The Council shall discuss the Board Statement with the Board within thirty days after the Board Statement is submitted to the Council. The Board shall determine the method (e.g., by teleconference, e-mail, or otherwise) by which the Council and Board shall discuss the Board Statement. The discussions shall be held in good faith and in a timely and efficient manner, to find a mutually acceptable solution."

[3] *ICANN Bylaws, Article XI, Section 2.*

[4] *ICANN Bylaws, Annex A, Section 9:* "Any PDP Recommendations approved by a GNSO Supermajority Vote shall be adopted by the Board unless, by a vote of more than two-thirds (2/3) of the Board, the Board determines that such policy is not in the best interests of the ICANN community or ICANN."

- An ICANN with no or very little governmental involvement would be even more subject to a risk of capture by special interests or narrow corporate interests.

26 **Proposed solutions to the so-called Stress-Test 18 leading to changes in Recommendation 1, 2 and 11**

27 In particular, we are extremely disappointed by and object to the latest "compromise" solution regarding Stress Test 18-related issues, which led to changes in Recommendations 1, 2 and 11.

28 According to the "CCWG-Accountability Supplemental Final Proposal on Work Stream 1 Recommendations", Stress Test 18 "considers a scenario where ICANN's GAC would amend its operating procedures to change from consensus decisions (no objections) to majority voting for advice to the ICANN Board". In this scenario, GAC would therefore align its decision-making process to what is already the rule for ALAC, GNSO and CCNSO. However, some CCWG participants seem to believe that preventing GAC from adopting the decision making process used by other stakeholders is necessary to make ICANN more accountable.

29 Many rationales were circulated to justify Stress Test 18-related measures, including ones that involved NTIA. However, the proposed solutions to the issues raised by Stress Test 18 were never part of the initial conditions required for the acceptance of the IANA transition by NTIA. In March 2014, when NTIA announced the transition, four principles were singled out:

- Support and enhance the multistakeholder model;

- Maintain the security, stability, and resiliency of the Internet DNS;

- Meet the needs and expectation of the global customers and partners of the IANA services;

- Maintain the openness of the Internet.

30 In its press release, NTIA also stated it would "not accept a proposal that replaces the NTIA role with a government-led or an inter-governmental organization solution". To our knowledge, the current ICANN structure does not qualify as a government-led organization, especially since the governments only have an advisory role, through the Governmental Advisory Committee. Therefore, status quo would meet the NTIA requirements.

31 Despite the strong concerns of many governments regarding the proposed solutions to Stress Test 18, and their doubts about the impact of such solutions on ICANN's accountability, **GAC has agreed to a consensus package** during the Dublin meeting, as reflected in the Dublin GAC Communiqué, **showing its willingness to reach a compromise** in order to achieve the IANA transition. This compromise was based, inter alia, on a 2/3 threshold for the ICANN board to reject GAC advice and on the preservation of GAC's autonomy in defining consensus.

32 Recommendation 11 of the 3rd CCWG report proposed a very narrow definition of consensus, as "general agreement in the absence of any formal objection", which represented a major shift from the principles agreed in the GAC Dublin communiqué, therefore triggering the rejection of Recommendation 11 by some GAC members. However, the 3rd draft report proposed a 2/3 threshold for the board to reject GAC consensus advice, aligned with the GAC Dublin Communiqué.

33 The "compromise" solution proposed in the "CCWG-Accountability Supplemental Final Proposal on Work Stream 1 Recommendations" published in February is as follows:

- Maintain a very narrow definition of consensus as "the absence of any formal objection";

- Set the threshold for board rejection of GAC full consensus advice at 60% instead of 2/3;

- Limit the ability of GAC to participate in the empowered community mechanisms if they aim at challenging the board's implementation of GAC advice – this proposal has never been discussed in CCWG before, and hardly relates to the initial issues raised by Stress Test 18.

34 We fail to understand how these new proposals address the concerns expressed by many GAC members in the public comment period, for instance relatively to the ability of one government to block a draft advice approved by an overwhelming majority of governments. Even though consensus should remain the GAC´s ultimate objective, the requirement to reach full consensus for each and every issue considered might lead, in some cases, to paralysis. Any hypothetical advice reflecting less than full consensus (including 100% minus one - which in our view would be basically as representative as full consensus) could indeed be dismissed by a simple majority vote of the board. As a result, the ability of GAC to participate to a discussion considered as relevant by most of its members would be very limited and decisions could theoretically be made without any significant GAC input. To prevent this, we believe governments shall not be bound by one single rule of decision-making, particularly if potentially controversial topics are to be considered

35 We note that GAC is once again asked to lower its ability to be involved in the post-IANA transition ICANN. Regarding the ability of GAC to participate in the empowered community mechanisms, we believe such a decision should be carefully reviewed and should not be imposed under pressure in a very short timeframe. More specifically:

- We do not understand why the "two bites at the apple" problem should only apply to GAC, and not to all SO/ACs which could participate in a community power challenging the board's implementation of their advice or policy recommendation.

- It is GAC's sole responsibility to determine if it wishes to participate in a decisional capacity to the community mechanisms.

- It would be contradictory to limit GAC's ability to participate to the community powers only to those cases involving public policy / legal aspects, while preventing GAC to participate to community powers involving the board's implementation of its advice.

36 Governments have shown impressive flexibility and tried to reach a compromise in many ways, as reflected in the Dublin GAC communiqué. However, only the demands of part of the community representatives were met, at the expense of GAC; therefore, rather than "compromise", "winner takes all" would actually be a more accurate description of what is proposed in the CCWG-Accountability Supplemental Final Proposal on Work Stream 1 Recommendations.

37 Olga Cavalli

38 and on behalf of the governments of Argentina, Benin, Brazil, Chile, France, Mali, Paraguay, Peru, Portugal, Uruguay, Venezuela

39 Minority Opinion by Tijani Ben Jemaa

40 CCWG-Accountability Member, ALAC

41 As a CCWG-Accountability member, I would like to make this minority statement regarding **Recommendation 2** (Reduction of the threshold of support to exercise the community powers):

42 Para 51.

43 I would like to express my strong opposition to removing the entire board by a decision taken by only 3 SO/ACs under any circumstance for the following reasons:

- Recalling the whole directors of the board would be a very serious and dangerous decision. We need it as the final recourse in case a disaster will occur if we don't do. Its consequences may be destructive to ICANN, and would affect drastically the stability of Internet. We should make it very difficult to happen, and a unanimity in my opinion is not a bad thing since it means the entire community feels it is necessary to change the entire board
- The principle of avoiding the unanimity in exercising the community powers is not in our charter; The fact that spilling the board is too serious makes it a special decision, and for a special decision, we may make an exception to the above mentioned principle.

44 Para 52.

45 With 5 SO/ACs composing the empowered community, we are told that we don't represent the whole Internet community. With less, our representativeness will be seriously affected. So, reducing the threshold in case of the community becomes composed of less then 5 SO/ACs is not acceptable, not only because of the representativeness, but also because we will exercise the community powers with only 2 SO/ACs supporting the decision for most of them.

46 Less than 5 SO/ACs will make the whole accountability process to be reviewed.

47 As a CCWG-Accountability member, I would like to make this minority statement regarding **Recommendation 6** (Human Rights):

48 I express my opposition to replacing "within its mission" in the beginning of the proposed text by "within its core value" for the following reason:

- The respect of internationally recognized Human rights should be within ICANN mission only and not be expended to cover other aspects such as the content. If we remove "within its mission", the commitment could concern other things not included in the ICANN mission.

49 I can live with "within its mission and core values", but can't accept the removal of the ICANN mission as the borders of the scope of this bylaw provision.

50 **Minority Opinion by Izumi Okutani**

51 **CCWG-Accountability Member, ASO**

52 Minority Statement on Appendix H: Bylaws Drafting Process & Implementation Timeline

53 The ASO notes that the Internet Numbering Community is not relying on the CCWG-ACCT WS1 proposal to fulfill our expectations of ICANN accountability. Instead we will rely primarily on a contractual agreement (or "SLA") between the RIRs and ICANN, as defined within the CRISP and ICG proposals, to provide the required accountability mechanisms.

54 In order to serve this purpose, the proposed SLA must be in place at the time of the IANA Transition. However, the agreement contains "condition precedent" language such that, even if it is signed immediately, it will only come into effect when ICANN is actually released from its related duties under the NTIA contract.

55 Negotiation of the Numbers Community SLA is nearly complete, and we expect to reach agreement in the near future. We propose to then immediately execute the agreed SLA with ICANN, before we as a designated Chartering Organisation provide our approval of the CCWG-ACCT WS1 proposal, by 8 March. By having both components in place at that time, we will be satisfied that all ICANN accountability matters are properly resolved."

56 Best Regards,

57 Izumi on behalf of the ASO

58 **Minority Opinion by Robin Gross**

59 **CCWG-Accountability Member, GNSO**

60 Dissenting Opinion of Individual Member Robin Gross on the Issue of GAC Over-Empowerment, Marginalization of Supporting Organizations

61 While the majority of recommendations included in the CCWG-Accountability Report for Work Stream 1 mark significant and laudable improvements for ICANN's accountability processes, the proposal remains flawed in one important respect: it would allow for fundamental changes to the nature of ICANN's Governmental Advisory Committee (GAC) by endorsing its inclusion in the Empowered Community as a Decisional Participant. If the GAC chooses to become a Decisional Participant, it would transform its traditional function in ICANN from an "advisory" role to a "decisional" role over ICANN's policies, operations, and corporate governance matters. Additionally, the proposal raises the threshold in ICANN's bylaws for its Board to refuse to follow GAC consensus advice, in a separate concession to the GAC that has enhanced its power in ICANN's corporate structure relative to the other Advisory Committees and Supporting Organizations.

62 The proposal to elevate the GAC is a mistake for a number of different reasons.

63 The first concern is the opaque nature of the GAC. GAC is under no obligation to be transparent or bottom-up in its deliberations nor its operation. It has no obligation nor practice of upholding ICANN's legal duty under its bylaws and articles to act openly, transparently, and in a bottom-up multi-stakeholder manner. Empowering a nontransparent constituent body in such a way risks conflicting with other provisions in ICANN's articles and bylaws which promise open, transparent, equitable, and bottom-up decision making and operations as ICANN carries out its duty and mission.

64 The second concern is that empowering the GAC goes against the express wishes of the majority of the ICANN community. Specifically, when previously proposed in 2014, the community overwhelmingly rejected increasing the Board threshold required to reject GAC advice, yet that is exactly what this proposal does.[5] Similar objections were voiced in public comments to the various CCWG-Accountability proposals, which raised significant concerns about the threshold for Board rejection of GAC advice. For many concerned commentators, the distinction between a Board threshold of 50%-60%-66% is a "distinction without a difference", because it is the underlying principle at stake of limiting governmental control over the Internet via ICANN. A positive element of the CCWG-Accountability proposal is that it provides greater certainty and clarity regarding the definition of GAC's deferential "consensus advice". However the community should not be forced to concede greater power to GAC over ICANN's governance in exchange for that needed clarity and certainty over the kind of GAC advice requiring deferential Board treatment. It is a "trade-off" the community should not have to make for ICANN accountability improvements and a timely IANA transition to be able to go forward.

65 Third, GAC participation in the Empowered Community is controversial in the ICANN community and within the GAC itself. Providing the GAC an equal vote to the Supporting Organizations and the At Large Advisory Committee over ICANN's governance would grant the GAC new, greatly enhanced authority in ICANN's decision-making process and governance structure. While the "GAC carve-out" which disallows GAC from voting on board decisions taken as a result of GAC consensus advice, is an improvement in a narrow and specific instance, it does not address the underlying problem of providing national governments with a decisional role over ICANN's governance. Nor would it limit the ability of GAC to participate in decisions to remove board

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[5] https://www.icann.org/public-comments/bylaws-amend-gac-advice-2014-08-15-en

members, reject budgets and strategic plans, decide IANA separation questions, or any of the other new community powers granted to the Empowered Community under this proposal.

66   Importantly, GAC has not stated that it wants this fundamental change in its role or that it wants this increase in power over ICANN's Board. On the contrary, GAC stated it could not come to consensus on those controversial recommendations in the CCWG proposal. Unfortunately, a small minority of vocal GAC representatives participating in the CCWG-Accountability discussions took advantage of the community's desire for a speedy IANA transition and were able to hold the accountability reform process hostage in order to obtain greater power over ICANN's governance than what GAC has under ICANN's existing corporate structure.

67   Finally, enhancing the power of governments in ICANN puts U.S. support for the transition in jeopardy. If the U.S. Congress or NTIA objects to this proposal, it is dead on arrival. The U.S. Congress and NTIA have sent a number of clear signals that governmental influence should not be expanded in the IANA transition process.[6] By proposing to increase the influence of governments over ICANN as CCWG-Accountability has done, it invites rejection from precisely the parties who must sign-off on it and places the entire transition at risk.

68   The CCWG-Accountability proposal includes a number of important and long over-due accountability reforms including improvements to ICANN's Independent Review Process (IRP), Reconsideration Request process, board removal rights, and a noteworthy bylaws commitment to respect human rights in ICANN's operation, among other truly laudable accountability reform measures. However, the long-term harm to a free and open Internet from the proposal's shifting the traditional balance of power over ICANN in favor of governments and away from the Supporting Organizations and the private sector is a monumental mistake.

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[6] At ICANN #51 in Los Angeles 2014, U.S. Secretary of Commerce Penny Pritzker stated that the U.S. would oppose at every turn "proposals to put governments in charge of Internet governance". Also, U.S. Senator John Thune and U.S. Senator Marco Rubio, letter to Dr. Stephen Crocker, Chairman ICANN Board of Directors, July 31, 2014, https://www.icann.org/en/system/files/correspondence/thune-rubio-to-crocker-31jul14-en.pdf (emphasis added):

> "First, ICANN must prevent governments from exercising undue influence over Internet governance. In April we led 33 Senators in a letter to NTIA regarding the IANA transition. We wrote that "[r]eplacing NTIA's role with another governmental organization would be disastrous and we would vigorously oppose such a plan. ICANN should reduce the chances of governments inappropriately inserting themselves into apolitical governance matters. Some ideas to accomplish this include: not permitting representatives of governments to sit on ICANN's Board, limiting government participation to advisory roles, such as through the Government Advisory Committee (GAC), and amending ICANN's bylaws to only allow receipt of GAC advice if that advice is proffered by consensus. *The IANA transition should not provide an opportunity for governments to increase their influence.*"