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 17 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.**

Minority Views

08 Minority Opinion by Eberhard W Lisse

09 Member, ccNSO

Dear Co-Chairs

10 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.

11 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").

12 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.

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

14 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.

15 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.

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

17 Eberhard W Lisse

---

[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.

18 Minority Opinion by Olga Cavalli

19 Member, GAC

20 Dear co-chairs,

21 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.

22 The role of governments in the multi-stakeholder community

23 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].

24 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.

---

[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."

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

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

26 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.

27 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.

28 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.

29 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.

30 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.

31 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.

32 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.

33 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

34 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.

35 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.

36 Olga Cavelli

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