

01 **Minority Opinion by Olga Cavalli on behalf of the governments of:**

02

03 Argentina

04 Benin

05 Brazil

06 Chile

07 Commonwealth of Dominica

08 France

09 Guinea

10 Mali

11 Nigeria

12 Paraguay

13 Peru

14 Portugal

15 Russian Federation

16 The Democratic Republic of Congo

17 Uruguay

18 Venezuela

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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 advice¹), 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”². On the other hand, a PDP approved by 66% of GNSO can only be rejected by a 2/3 majority of the board³.
- 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.
 - 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 multi-stakeholder 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.

¹ *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.”

² *ICANN Bylaws, Article XI, Section 2*.

³ *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.”

- 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 This statement is supported by the governments of Argentina, Benin, Brazil, Chile, Commonwealth of Dominica, France, Guinea, Mali, Nigeria, Paraguay, Peru, Portugal, Russian Federation, The Democratic Republic of Congo, Uruguay, Venezuela.