<u>Dissenting Opinion of Individual Member Robin Gross on the Issue of GAC Over-Empowerment, Marginalization of Supporting Organizations</u>

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.

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

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 non-transparent 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.

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.[1] 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.

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

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

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 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.

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.

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.[2] By proposing to increase the influence of governments over ICANN as CCWG-

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[2] 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.*"

Accountability has done, it invites rejection from precisely the parties who must sign-off on it and places the entire transition at risk.

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.