

March 17, 2016, Subcommittee on Communications and Technology hearing “Privatizing the Internet Assigned Number Authority”

Responses of David A. Gross to Questions for the Record

The Honorable Greg Walden

1. What were the concerns expressed by the governments in the GAC meetings in Marrakech?

At the ICANN meeting in Marrakech, some governments did express concerns regarding the accountability proposal put forth by the Cross Community Working Group on Enhancing ICANN Accountability (CCWG-Accountability). Among the issues discussed by governments were the appropriate role of governments regarding the ICANN multistakeholder community, as well as certain mechanisms proposed by the CCWG-Accountability that were perceived by some governments as limiting the GAC’s ability to participate in the ICANN community on equal terms with other stakeholders. Appendix A to the CCWG-Accountability report included a Minority Statement by Olga Cavalli, Argentina’s representative on the GAC, who also represented the GAC on the CCWG-Accountability. Her statement was 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, and Venezuela. Some of the concerns raised by governments at Marrakech echo the themes of this statement. For ease of access, her minority statement that was included with the CCWG-Accountability report is appended.

To provide a more complete answer to the question regarding the concerns expressed by governments in the GAC meetings in Marrakech, it is helpful to review the transcripts of each of the GAC meetings from ICANN 55 in Marrakech that are available on ICANN’s website. In particular, on the morning of Sunday, March 5, 2016, the GAC discussed in detail Recommendation 11 of the CCWG-Accountability report, which addresses how the ICANN Board should respond to GAC Recommendations. The transcript of that particular discussion is available at: <https://meetings.icann.org/en/marrakech55/schedule/sun-gac-morning/transcript-gac-morning-06mar16-en>.

In addition, there also were extensive discussions about the IANA Stewardship Transition and the Enhancing ICANN Accountability proposals at a GAC High Level Government Meeting held on Monday, March 7, 2016. The transcript of that meeting can be found at: <https://meetings.icann.org/en/marrakech55/schedule/mon-gac-hlgm/transcript-gac-hlgm-07mar16-en>.

On the afternoon of Tuesday, March 8, the GAC further discussed the Accountability report. The transcript of that meeting can be found at: <https://meetings.icann.org/en/marrakech55/schedule/tue-gac-afternoon/transcript-gac-afternoon-08mar16-en>.

Members of the GAC discussed the IANA Stewardship Transition and the proposal for Enhancing ICANN Accountability at various other GAC meetings as well. Links to the transcripts for each meeting, as well as audio recordings of their proceedings, are available via

the schedule of events from ICANN 55. See:
<https://meetings.icann.org/en/marrakech55/schedule-full>

2. What would have to occur for the governments involved in ICANN to effectuate major changes such as the ICANN mission or the location of its principle place of business?

Under the framework proposed in the CCWG-Accountability report, it would be extraordinarily difficult for governments to force these major changes without the consent and agreement of a substantial portion of ICANN’s multistakeholder community. The CCWG-Accountability proposal necessitates multiple layers of approval, and various checks and balances will be added to prevent one stakeholder group, including governments, from engineering major changes to ICANN’s mission and core activities.

In general, governments can influence Board decisions through the GAC, which can issue “advice” that in some instances is binding on the Board. Should the GAC issue advice to the ICANN Board by consensus (understood to mean the practice of adopting decisions by general agreement in the absence of any formal objection by any government, including by the United States), the advice only can be rejected by a 60 percent vote of the Board. Put differently, in order for governments to dictate Board action, first they would need to obtain consensus (unanimous agreement) through the GAC, an organization in which the United States and other like-minded countries take an active role. Thereafter, any advisory decision still could be rejected by a 60 percent vote of the Board.

After the CCWG-Accountability proposal is implemented, changes to the ICANN mission, and some other major actions, would require alteration to Fundamental Bylaws, which could be accomplished only through cooperation between the ICANN Board and the “Empowered Community.” Here, the threshold of Board approval required is even greater: 75 percent of the Board must approve the change. Moreover, Board activity alone would not be sufficient—changes to Fundamental Bylaws also require approval by the Empowered Community, and a public consultation process. The GAC can participate as one Decisional Participant among many in the Empowered Community. Importantly, however, the GAC is barred from participating in an Empowered Community decision challenging ICANN Board action performed pursuant to a GAC advisory decision.

The Honorable Renee Ellmers

- 1. ICANN is a global organization to provide policy and protection for all citizens throughout the world. As threats to our nation's cybersecurity increasingly grow more frequent and more complex, without accountability to the United States, how can we ensure that the leadership inside ICANN would not be unduly influenced or implement policy that could negatively impact every company and individual in the United States who rely upon fair and open access of the Internet each and every day? For example, the staff of ICANN make decisions every day impacting companies and their very business models such as how to implement policy relating to the new gTLD program or enforcing requirements that protect people from bad actors using domain names or web sites to cause harm to others.**

The CCWG-Accountability process took account of such concerns. In essence, the framework established by the CCWG-Accountability is intended to prevent any stakeholder group or individual from taking unilateral action that could compromise the security, stability, and reliability of the Internet. Even after the IANA Stewardship Transition, the United States government is expected to participate actively in the GAC. Moreover, the interests of U.S. businesses, the technical community, civil society, and others are well-represented through various organizations and committees making up ICANN's Empowered Community, which retains the ability to challenge ICANN Board decisions and even demand the recall of the entire Board.

- 2. The transition plan asks for the U.S. government to place trust in an organization governed by volunteers who self-select leaders rather than elect or appoint leaders. In some cases leaders may or may not be qualified, and in some cases may clearly have financial or other interests influencing their decision making and approach to developing policy for everyone. When the Internet is so central to how our people and companies live and thrive, can we really simply trust that this will be done fairly and appropriately, particularly given the political volatility in today's climate? What safeguards can we instill to insure fair decisions for all?**

Probably the best safeguard is robust participation in and support for the multistakeholder community. The framework established in the CCWG-Accountability report provides various mechanisms to ensure that the decisions of ICANN's leadership should reflect the will of the ICANN community and are consistent with ICANN's bylaws and mission.

- 3. Why the need to transition from the United States before the Accountability workstream 2 is completed? With so much at stake and so many potential threats to the US economy, safety and security driven by potential bad actors on the Internet ranging from the North Koreans, Chinese, Russians and ISIS/ISIL, why risk this to a group of volunteers without accountability back to the United States?**

The Cross Community Working Group on Enhancing ICANN Accountability (CCWG-Accountability) divided its recommendations into two categories. Work Stream 1 mechanisms were defined as those that, when in place or committed to, would provide the community with confidence that any accountability mechanisms necessary to enhance ICANN's accountability

within the timeframe of the IANA Stewardship Transition would be implemented if it had consensus support from the community, even if it were to encounter ICANN management resistance or if it were against the interest of ICANN as a corporate entity. Work Stream 2 is focused on addressing those accountability topics for which a timeline for developing solutions may extend beyond the IANA Stewardship Transition. Some of the enhancements considered for Work Stream 2 are of the nature of continuing improvements that may be worked on iteratively (*e.g.*, improving ICANN's standards for diversity at all levels), and therefore it would be impractical to wait until they are "completed" to perform the IANA stewardship transition. Others, while important, may not be essential to an orderly, secure, and stable IANA transition (*e.g.*, considering enhancements to the Ombudsman's role and function).

Work Stream 1 is comprised of those items that were deemed by the CCWG-Accountability as essential to be resolved prior to the IANA stewardship transition. This includes enhancements to the community's ability to review ICANN's activities, to reject unfavorable changes to ICANN's bylaws, and to remove Board members or reject certain Board decisions. Changes of this sort were necessary in order for the community to feel confident in ICANN's continued ability to perform its critical role in an independent and representative way. By comparison, the remaining Work Stream 2 items were not seen by the CCWG as essential to a successful IANA transition, but rather as further improvements to ICANN's processes.

19 **Minority Statement 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 advice⁶), 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”⁷. On the other hand, a PDP approved by 66% of GNSO can only be rejected by a 2/3 majority of the board⁸.

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.

⁶ *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.”

⁷ *ICANN Bylaws, Article XI, Section 2*.

⁸ *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 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.

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