



SECRETARIAT D'ETAT CHARGE DU NUMERIQUE

LA SECRETAIRE D'ETAT

Paris, le 15 JUIL. 2015

Dear Thomas,

As we are entering the final stage of negotiations on the IANA transition, I would like to commend the cross-community working group for the huge amount of work that has been done so far in the process of enhancing ICANN accountability. I especially want to reiterate our appreciation of the personal dedication of all individual stakeholders, members and participants, and your own, in such a constrained timeframe. Please convey my warmest thanks to the group.

I also want to emphasise the quality of the work of the CCWG. You are now seeking an agreement on improvements which France has consistently called for: The implementation of effective and affordable appeal, review and redress mechanisms against ICANN Board's decisions, with adequate guarantees of independence; the establishment of a representative council of ICANN stakeholders, which would be empowered to reconsider or reject ICANN budget and strategy put forward by the Board, to approve changes to ICANN Bylaws, and to recall individual Board members or the entire Board.

In addition, France also asked for the strictest conflict of interest policy, as well as the principle of diversity, to be implemented and promoted at all levels within ICANN. This is why we suggested provisions for non-cumulative holding of offices, successively or simultaneously, and the establishment of an independent commission in charge of controlling the conflict of interest statements issued by the Board members. I know that our concerns have also been taken into account by the working group and I am looking forward to reading your proposals on these issues.

Monsieur Thomas RICKERT  
Managing Partner  
Schollmeyer & Rickert  
Rickert Rechtsanwaltsgesellschaft m.b.H  
Kaiserplatz 7 – 9  
53113 BONN  
ALLEMAGNE

I would, however, like to draw your attention on some of the proposals which were included in your initial draft report released at the beginning of May 2015. One of my main concerns is an apparent effort to limit in an irreversible way the role of the GAC, which would have serious consequences for the balance of the multi-stakeholder model embodied by ICANN, which is in line with the Tunis Agenda and the NETmundial Multi-Stakeholder Statement.

Inconsistent with the current framework of ICANN, the proposed enhanced accountability framework recommends that due deference given to GAC advice now be conditional.

As far as governments are concerned, ICANN's multi-stakeholder model is based on the advisory role of GAC. Yet your working group seems to believe that amendments to Bylaws (art. I.2 and XI.2.1.j) are necessary because any change in GAC decision-making procedures would be tantamount to an attempt of capture of ICANN by governments. This is forgetting that the advisory nature of the role of GAC is the ultimate protection against capture of ICANN by governments. And this is neglecting that any attempt to restrain the GAC capacity to formulate advice will provide a very strong argument to opponents of ICANN's multi-stakeholder model. I should finally add that decision-making within GAC is already based on strict consensus. By design, this gives each member of GAC, a chartering organisation of the CCWG-Accountability, a veto. The French government cannot support such amendments so that your working group should consider leaving Bylaws art. I.2 and XI.2.1.j unchanged, lest consensus cannot be reached on Core value 11 and stress test #18 among governments.

I should add that the discussion about GAC advices already occurred in the Accountability & Transparent Review processes (ATRT1 in 2010 and ATRT2 in 2014) and the CCWG-accountability ought to follow ATRT1 and ATRT2.

My other concern is the overhauling of the appeals mechanisms against ICANN Board's decisions, which could lead to establishing the IRP as fully-fledged arbitration court.

I need to underline the progress made on appeals mechanisms, in particular the two most important features added to the new IRP: binding decisions; and ability to judge on the substance of complaints vis-à-vis ICANN policies rather than just on the conformity of the procedures followed by the Board vis-à-vis ICANN Bylaws. I want to reaffirm our full support to the implementation of those two features.

We do not have the liberty, however, to support a solution for implementation that would establish the IRP as an international court of arbitration. The reasons for this are detailed by our response to the GAC questionnaire on accountability.

It is for me an absolute necessity that the new IRP remain an internal mechanism within ICANN. For France, establishing an arbitration court is a disproportionate and unacceptable interpretation of what is necessary to enhance ICANN accountability and we could not support the implementation of such proposal before the IANA transition.

As far as the independence of the IRP panellists is concerned, I finally take the opportunity to suggest that the panellists should be paid by the community – not by ICANN – through a Trust Fund, in which case the “donator” would be ICANN (part of the revenue of the public auctions could be allocated to this fund for instance) and the “beneficiary” would be anyone filling an IRP procedure.

I wish you all success in concluding the work of the CCWG on enhancing ICANN accountability. I must insist, however, that your final proposal should not go beyond enhancing ICANN accountability. France, among others, would object to any provision altering the current advisory role of GAC, or the technical nature of ICANN policies by means of recourse to international arbitration.



Axelle LEMAIRE



**French Government Responses to  
CCWG-Accountability Questions for GAC**

8 July 2015

**1. How will public policy issues be dealt with in the enhanced accountability framework?**

Inconsistent with the current framework of ICANN, the proposed enhanced accountability framework suggests that due deference given to GAC advice will now be conditional. The amended Bylaws art. I.2 (Core value 11) suggests that ICANN Bylaws should prevail over public policy advice, and that non-governmental stakeholders would now have authority to say that international internet-related public policy issues addressed by governments are inconsistent with ICANN Fundamental Commitments and Core Values. Similarly, stress test #18 and the amended Bylaws XI.2.1.j suggests that the Board should no longer simply take into account GAC advice, including in trying and finding a “mutually acceptable solution” if it is not supported by GAC consensus, but that it should take over the role of governments entirely, in saying whether such public policy advice restrains or supports free online expression, for example, before taking it into account.

The CCWG-Accountability must reflect that the amended Bylaws art. I.2 (Core value 11) and XI.2.1.j (stress test #18) would give ICANN non-governmental stakeholders undue authority to ignore or even take over governments’ responsibilities for international internet-related public policy issues. The proposed enhanced accountability framework would actually knock off balance the current framework of ICANN which, in line with the Tunis Agenda and the NETmundial Multi-Stakeholder Statement, recognizes that governments only are responsible for public policy. The CCWG-Accountability may therefore wish to consider leaving Bylaws art. I.2 and XI.2.1.j unchanged, lest GAC consensus cannot be reached on Core value 11 and stress test #18.

**2. What role does GAC and its members wish to have in the new framework so that it can provide advice on public policy issues?**

GAC and its members should keep their advisory role to the Board and to the community as a whole. In this regard, the GAC should be able to provide advice on public policy issues to all future empowered entities within ICANN, in the same way as it currently does with ACs and SOs in the context of their respective policy development processes.

**3. Does GAC want to continue to have an advisory role (as of today) with respect to the ICANN Board?**

Yes, GAC should retain its advisory role with respect to the ICANN Board. We nonetheless support concrete improvements in the dialogue between GAC and the Board on implementation of public policy advice.

**4. Does the GAC want to participate in a membership-based community empowerment mechanism?**

The membership-based community empowerment mechanism should take into account the particular role of the GAC within ICANN. Rather than of participating through the voting

process, however, the GAC should have the opportunity to formulate advice, on an early stage – that is, before the vote –, on specific issues such as the budget and the operating/strategic plan.

**5. Does GAC wish to exercise any of the proposed community powers with regard to ICANN, and if so which ones; and how to participate?**

a. Reconsider/Reject Budget, or Strategic/Operating Plans

GAC could provide advice, to the ICANN board, based on the drafts of the budget, strategic and operation plans, whereupon they could enter in a validation phase through the voting system described in the CCWG report.

b. Reconsider/Reject Changes to ICANN Bylaws

The process of reconsideration of ICANN Bylaws could be initiated by the Board but should be conducted by a cross community working group. GAC would engage in the process as a chartering organization. Changes to Bylaws would finally be approved through the formal voting procedure described in the CCWG report.

c. Approve Changes to Fundamental Bylaws

The process of reconsideration of ICANN Fundamental Bylaws could be initiated by the Board but should be conducted by a cross community working group. GAC would engage in the process as a chartering organization. Changes to Bylaws would finally be approved through the formal voting procedure described in the CCWG report.

d. Removing Individual Board Directors (SO/AC)

The GAC should have the opportunity to formulate advice to the community on this issue.

e. Removing Individual Board Directors (NomCom)

The GAC should have the opportunity to formulate advice to the community on this issue.

f. Recalling the Entire ICANN Board

The GAC should have the opportunity to formulate advice to the community on this issue.

**6. In what ways would the proposed improvements to IRP be satisfactory for public policy and Governments' needs, e.g. in terms of increasing transparency, increasing focus on process and/or substance, binding/non-binding nature, etc.?**

The French Government does not have the liberty to recognize the IRP as an international court of arbitration for dispute on future ICANN policies, mainly because:

- a. Fundamentally, law on arbitration requires a pre-existing contract between the two parties. We do not see how ICANN Bylaws, even less ICANN policies, could be considered as an existing contract that ICANN and all individual stakeholders



worldwide would have agreed upon.

- b. We have identified a potential problem of “accountability of the accountability mechanism”. The fact that the IRP arbitrators would be paid by ICANN is incompatible with international arbitration practices, which commonly aim at providing both parties with guarantees of independence before they waive their rights to go before others courts in order to solve their dispute.
- c. The IRP decisions, as those of any international arbitration court, would fall into international private Law. As a consequence, since the IRP would be able to judge on the substance of complaints vis-à-vis ICANN policies, it would grant ICANN policies a legal status that is outside ICANN’s technical mandate.

**It is thus an absolute necessity that the new IRP remain an internal mechanism within ICANN.** Enforceability of IRP decisions can easily be found within the ICANN community (in the possibility of forcing resignation of ICANN Board member(s) “if they were to ignore binding IRP decisions”). It is not necessary at all to seek it outside of ICANN (“in the court of the US and other countries that accept international arbitration results”) and suffer the potentially dire consequences of resorting to international arbitration.

**In order to improve the independence of the panellists** we suggest that the panellists be paid by the community (not by ICANN) through a Trust Fund. The donator will be ICANN (the board could decide to allocate a part of the revenue of the public auctions to this fund) and the beneficiary will be anyone who is filling an IRP procedure.