



Madrid, 3rd June 2015

SPANISH COMMENTS ON THE CCWG-ACCOUNTABILITY INITIAL DRAFT PROPOSAL

The Government of Spain appreciates the opportunity to further contribute to the CCWG-Accountability, through the submission of comments to the initial draft proposal.

First, we would like to thank all participants, members and co-chairs of the CCWG for their hard work and commitment, which has produced a remarkable outcome in a very tight timeframe.

We reckon that the IANA stewardship transition and the accountability process should strengthen ICANN responsiveness to the demands of the global Internet community, enhance mechanisms to keep it accountable to that community and prepare ICANN for its globalization, which should remain as a priority for the organization.

On the actual proposal put forward by the CCWG-Accountability, Spain wishes to make the following remarks:

1. Core value 11 and public interest:

The proposed text (page 27) reads as follows: *“While remaining rooted in the private sector, recognizing that governments and public authorities are responsible for public policy and duly taking into account the public policy advice of governments and public authorities **in accordance with the Bylaws and to the extent consistent with these Fundamental Commitments and Core Values.**”*

At the moment neither the Bylaws nor the Articles of Incorporation limit the ability of governments to issue advice to the ICANN Board. This is because it would be ineffective as governments´ would still be obliged to protect general public interests (paragraphs 68 and 69 of the Tunis Agenda and page 6 of the Net Mundial Statement). Moreover, this is not in the best interest of the global Internet community ICANN pledges to serve as managing the Internet system of unique identifiers in the public interest is the first and foremost mission of ICANN (sections 2 and 3 of the AoC and sections 3 and 4 of the Aol). So, we request the text in red be deleted.

In this respect, acting for the benefit of the global Internet users and ensuring its decisions are made in the public interest should feature higher in the Bylaws, either in the definition of its mission or as one of its first core values.



2. Eliminating the Affirmation of Commitments:

Key elements of the AoC addressing ICANN's commitments to the Community are proposed to be reflected in ICANN's Bylaws and Articles of Incorporation (page 20).

In addition, elimination of the AoC as a separate agreement is foreseen in the near future once the IANA contract between USG and ICANN expires.

We ask for a detailed timescale, requirements and processes that would lead to the termination of the AoC, including steps to be taken by the USG and ICANN. Full privatization of ICANN requires all contractual links with the USG to be finished.

3. ICANN headquarters and jurisdiction:

While the AoC actually states that ICANN should be headquartered in the USA, and the Articles of Incorporation set forth that ICANN is a non-profit public benefit corporation under the California law, we do not believe this should be incorporated into a core or fundamental value of ICANN (page 21), for the reason that the remaining of ICANN subject to Californian Law is not fundamental to the global Internet community.

It is pretty clear that the organization needs a stable and predictable legal and jurisdictional environment and these requirements could certainly be included in the Bylaws as a way to ensure compliance with the accountability measures designed. But prescribing a particular jurisdiction now would preclude other jurisdictions that could perfectly fit and comply with these requirements (in and out the USA) from hosting the organization in the long run.

On the other hand, jurisdiction is already a task of Work Stream 2 (page 90) of the CCWG, and enshrining ICANN's current jurisdiction as a fundamental bylaw would pre-empt the future work of WS2 in this regard. It is essential that when that process begins, the global public interest is taken into account and all relevant stakeholders have their say, including governments.

4. Independent Review Panel (IRP):

We **applaud** the enhancements put forward for the refurbished IRP (and RR), which will contribute to improve the community's power to appeal ICANN's decisions.



Nevertheless, we find there is still some room for improvement in the following areas:

a. Standing

It is stated in the proposal that any person/group/entity “materially affected” by an ICANN action or inaction is entitled to initiate an IRP (pages 31, 32 and 36).

Even if it is foreseen that interim relief will be available in advance of Board/management/staff action under several circumstances, the fact that only already “materially affected” parties have a standing in the IRP could prevent stakeholders from using the IRP (or the RR) in case that damage or harm has not been produced yet (i.e.: approval of new gTLDs in highly regulated sectors without adequate safeguards).

This loophole should be filled. Hence, we propose to expand the scope of legitimacy to file an IRP to a “prospectively affected” party which demonstrates that severe harm will likely be done to the interests it defends, although this damage is not suffered yet.

The aforementioned rule can prevent governments from filing an IRP or RR as well. In circumstances where an action or inaction by ICANN affects compliance with local laws, governments should be able to challenge ICANN decisions through an IRP or RR, notwithstanding the right of the stakeholders directly affected to use the appeal mechanisms too. The government as such is not materially harmed and will never be, but they have a duty to preserve the applicability of their national laws and should have the chance of doing so through ICANN accountability mechanisms.

b. Composition of Panel

The proposal envisages turning to external experts to advise the panellists when they don't possess enough expertise. Although the rule should be to appoint panellists from the standing panel, there may be situations where the complexity, local impact of the decision or specialized nature of the conflict require more than technical advisory and would warrant the appointment of a panellist that does not belong to the standing panel. The procedure should provide for this appointment to be made as an exception to the rule.

c. Language and diversity

The selection of English as primary working language (page 33) may hamper the implementation of the diversity principle that drives the IRP. The provision of translations services (free of charge) is not enough since the need



to master English and most likely, legal English may reduce the pool of panellists.

More flexibility should be allowed in the selection of the language to be used. Rules of procedure for organizations like WIPO (<http://www.wipo.int/amc/en/arbitration/rules/newrules.html>) or the International Chamber of Commerce (<http://www.iccwbo.org/Products-and-Services/Arbitration-and-ADR/Arbitration/ICC-Rules-of-Arbitration/>), that allow the parties to choose the working language, could be taken into account in this regard.

In addition, the selection of panellists coming from the affected area and with a better understanding of the issue should be foreseen.

d. Selection of panellists (page 33).

The selection of panellists plays a key role in ensuring both impartiality and competence to review ICANN resolutions.

The appointment process outlined in the CCWG proposal, in which the ICANN Board would select panellists for the standing panel, subject to community confirmation, affords little community involvement and control over this process.

We suggest the Board open a public consultation before selecting the panellists and take into account views expressed. Alternatively, the community group could make the selection to be confirmed later on by the Board.

e. Accessibility and cost

The proposal states that ICANN should seek to establish access to pro bono representation for community, non-profit complainants (page 35). That provision should be extended to governments and IGOs. Other ways to make this sort of complainants up for the cost of hiring lawyers should be envisioned (i.e: reimbursement up to a certain amount and varying depending on the income per capita in the country) with adequate safeguards to avoid vexatious appeals.

f. Timeline (page 39)

A deadline for lodging challenges should be set in the rules of procedure. In the current IRP, it is 1 month. We propose that it is fixed at a minimum of 2 months in general, and no deadline in cases of inaction of the Board. The same periods could be set as well for the Reconsideration Request process.



5. Core values and local law in the Bylaws:

It is proposed to add in the Bylaws a mention borrowed from the Articles of Incorporation (page 23): *“Commitments. In performing its Mission, the following core values should guide the decisions and actions of ICANN: ICANN must operate for the benefit of the Internet community as a whole, carrying out its activities in conformity with relevant principles of international law and applicable law and international conventions [...]”*.

The original Article of Incorporation states: *“4. The Corporation shall operate for the benefit of the Internet community as a whole, carrying out its activities in conformity with relevant principles of international law and applicable international conventions and local law.”*

There is no justification to strike out the explicit mention to local law when reflecting this provision of the AoI into the Bylaws. Local law plays an essential role in ICANN’s legal environment, as for instance data retention period or Whois accuracy issues easily prove.

Therefore we find it imperative that the mention to local law be explicitly reinstated in the proposed Bylaws amendment.

6. AoC reviews:

Text for a new bylaw setting out a governance system that would apply to all periodic reviews is proposed in page 56. When dealing with the public comment on the draft output, it is stated that the review team will consider such comment and amend the review as it deems appropriate before issuing its final report and forwarding the recommendations to the Board.

That provision is insufficient to ensure that the community input is duly and fairly taken into account. We miss some language regarding the decision making procedures that the review team should follow and how their deliberations are reflected in their final recommendation report.

In this vein, we would suggest that the recommendations issued by the review team should explicitly indicate whether they were reached at by consensus, qualified majority or simple majority in the team. For the sake of transparency, the review teams should describe how they have considered community inputs explaining why they embraced the ones that made their way to the final report and why they rejected the other ones. In addition, a table displaying the suggestions received and their authors ranked by their level of support among community members contributing to the comment periods should be publicly available, as a reflection of the community’s preferences.



7. Stress Tests:

a. ST 21 (page 74)

We oppose to this stress test. It is based on contentious policy (RFC 1591) and thus, should not be used to test the robustness of new accountability mechanisms. Furthermore, appeal mechanisms to delegation and re-delegation of ccTLDs have been left aside of the accountability enhancements proposed by the CCWG.

In this vein, we underscore that the latest Singapore GAC Communiqué states the following regarding the Frame of Interpretation WG outcome: "The GAC notes the work of the ccNSO FOIWG, and its efforts to provide interpretive clarity to RFC1591. The GAC welcomes the FOIWG's recognition that, consistent with the GAC's 2005 Principles, the ultimate authority on public policy issues relating to ccTLDs is the relevant government. As such, nothing in the FOIWG report should be read to limit or constrain applicable law and governmental decisions, or the IANA operator's ability to act in line with a request made by the relevant government."

b. ST 4 (page 76)

We fail to see how accountability mechanisms can be used to defy a decision not taken by ICANN, but by a third party, i.e., a Government. Thus, we recommend doing without this stress test.

c. ST 12 (page 80)

It grabs our attention that a stress test named "Capture by one or several groups of stakeholders" is so focused on governments and the GAC. Even in the case of the other SO/ACs, it is stated that they need accountability and transparency rules to prevent capture from outside each community, but little is said about ICANN's capture by an internal community other than the GAC.

Measures to prevent capture by other groups should be proposed. Otherwise, this stress test overlaps with stress test 18.

d. ST 18 (page 83)

We cannot agree with this stress test being included in the final report.

ICANN Bylaws state that the Board shall duly take into account Governments' advice "on public policy issues" (Article I Section 2.11, Article III Section 6.1.c and Article XI Section 2.j). This is the key point: the GAC brings the public policy perspective into ICANN.



The GAC advice to the Board is not anything further than an advice that is not binding on ICANN. If the Board doesn't agree with a particular piece of GAC advice, it has to enter into a process with the GAC to try and find a "mutually acceptable solution". Again, if this cannot be found, the Board is still free to do what it feels appropriate, including simply not following GAC advice. We fail to see where the contingency or the risk of government capture lays.

Advice adopted by a majority of GAC members would still qualify as "public policy advice" which ICANN should afford to ignore.

We note the proposal lacks consistency in all that concerns the GAC. On the one hand, it dislike vetoes since they prevent "all other stakeholders from advancing their interests" (page 67) but it is all right to use them in the GAC. On the other hand, it is flexible as to the definition of "consensus" (pages 100-101) which SOs are free to establish and which can mean a position where only a small minority disagrees but most agree (current Bylaws set majority thresholds for adopting decisions in the GNSO and ccNSO), but consensus in the GAC can only mean unanimity provided the GAC wants its advice to trigger the Bylaws consultation procedure.

In short, we call on the CCWG to respect GAC's ability to approve its own working methods (Article XI.Section 2.1 c) of the Bylaws) and require the Board to fully consider advice agreed according to GAC internal procedures.

e. ST 14 (page 87)

We find it is pointless to keep this particular stress test at this moment in time, when the community is actually dealing with the termination of the AoC.

f. ST 15 (page 88)

See point 3 above, "ICANN headquarters and jurisdiction".

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