

CCWG Accountability – Problem definition – Strawman proposal

5 January 2015

“When I have one week to solve a seemingly impossible problem, I spend six days defining the problem. Then the solution becomes obvious.”

Albert Einstein

1. Problem statement

General Comments of Editorial

a) In the updated version of the document, all Acronyms/ Abbreviations need to be fully spelled out when appeared for the first time as a customary and traditional method

b) whenever, an action mentioned in the document which has been further elaborated in subsequent parts of the document, in order to assist the reader, it is suggested to make reference to the area in which the action is further explained or elaborated

c) In the documents, at many instances, reference is made to term “certain actions” or “appropriate actions” but these certain or appropriate actions have never been defined or described in the document thus use of such vague terms seem to cause difficulties for the reader as to what actions it refers or what are those certain actions

The Charter of the CCWG-Accountability defines the following problem statement:

The National Telecommunications and Information Administration (NTIA) has requested that ICANN “convene a multistakeholder process to develop a plan to transition the U.S. government stewardship role” with regard to the IANA Functions and related root zone management. In making its announcement, the NTIA specified that the transition proposal must have broad community support and meet the following principles:

- Support and enhance the multistakeholder model
- What is Multistakeholder Model? Are we talking about the terms used in a vague and undefined manner in ICANN Jorgen or it has been defined elsewhere, in the latter case please identify where it has been defined
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- Maintain the security, stability, and resiliency of the Internet DNS, Please provide references in which, at least the security of the internet is described

- In fact since 2013, there are a lot of doubt about the security of the internet as it is not clear whether we are talking about SECURITY OF DNS or Network Security or dat security or what? Should the security is limited to DNS then we need to either describe or define what is it or cross reference areas in which the DNS SECURITY HAS BEEN ELABORATED
- Meet the needs and expectation of the global(DO WE MEAN WORLDWIDE CUSTOMER ?)Also are we talking about existing and future needs or only existing needs? customers and partners of the IANA services
- What is the difference between IANA customrS and IANA partnerS?
- Maintain the openness of the Internet.
- What do we mean by openness? Transparency, open architecture, or what?

NTIA also specified that " *it would not accept a proposal that replaces the NTIA role with a government-led or an intergovernmental organization solution.* "

Put that sentence in *italic* and between inverted commas

During discussions around the transition process, the community raised the broader topic of the impact of the change on ICANN's accountability given its historical contractual relationship with the United States and NTIA. Accountability in this context may be defined, , as the existence of mechanisms for independent checks and balances as well as for review and redress.

Reasons

NeMundial output was a non binding document and thus it is better to avoid direct cross reference to that statement

The concerns raised during these discussions around the transition process indicate that the existing ICANN accountability mechanisms do not yet meet stakeholder expectations.(in what sense) what is the stakeholder expectations.? Who is the stakeholder or its constituencies? Are we talking about what currently understood by existing ICANN community or we need to look into the matter more deeply and more democratically? Recent statements made by various stakeholders suggest that current accountability mechanisms need to be reviewed and, , improved, amended, replaced, or supplemented with new mechanisms, when required (see for instance ATRT recommendations). Considering that the NTIA has stressed that "*it is expecting community consensus regarding the transition*", a failure to meet stakeholder expectations with regards to accountability may create a situation where NTIA does not accept the IANA transition proposal as meeting its conditions. Thus reviewing ICANN's accountability mechanisms was considered to be crucial for the transition process.

FURTHER COMMENTS

Throughout this document reference is made only to transition action whereas the scope of accountability is more general and goes beyond the transition action .

The CCWG-Accountability reviewed these guidelines as well as took into consideration inputs from the session organized during ICANN 50 in London, on 26 June 2014, titled “Enhancing ICANN Accountability”¹. Of particular interest were some questions raised²,

Reason for deletion

With all due respect to the professor JAN Aart Scholte ,in a public document usually reference is not made to individual

- **Accountability to whom?*
- *What is accountability?*
- *Accountability for what purpose? “*
- *Who is accountable to whom*

The purpose of this section is to provide the preliminary views of the CCWG-Accountability on these fundamental questions, clarifying the issues at stake, in order to guide the work of the group going forward.

2. To whom should ICANN be accountable?

The CCWG-Accountability provides the following clarification (emphasis added), as well as a definition of stakeholders:

The CCWG-Accountability is expected to deliver proposals that would enhance ICANN’s accountability towards **all stakeholders**.

Who are those stakeholders ? More importantly how and with which means such accountability towards so-called **all stakeholders** is accomplished / ensured?

The term stakeholder should be considered for the CCWG-Accountability in its wider acceptance, e.g. a person, group or organization entity, institution, party that has a direct or indirect stake or interest in the organization(which organization ?ICANN or else ?) because it can either affect the organization(which organization ?ICANN or else ?) or be affected by it(by what) . This includes but is not limited to all existing ICANN SOs and ACs.

¹ <https://london50.icann.org/en/schedule/thu-enhancing-accountability>

² Professor Scholte has since then been appointed by the Public Experts Group as an Advisor to the CCWG-Accountability

The view of the group is that , in the absence of any other definition, this definition could be useful, at this stage of the work and needs to be further clarified by illustrating which stakeholders can affect existing ICANN or its future form/ structure of ICANN be affected by existing ICANN or its future form / structure of ICANN, either directly or indirectly. These definitions may be referenced at further stages to clarify which parties (existing and future) could/ would / might have standing ground (what do we mean by standing ground to certain (what are those accountabilities referenced as *certain accountabilities*) accountability mechanisms, should participate at /in certain(what are those groups referred to as *certain groups*) groups to provide appropriate checks (what do we mean by *appropriate checks* and who decides what is appropriate and what is not appropriate and how . It is necessary to refer to those elements to be checked or at least raise the flag that those checks would be further described) and balances (balances to what ? the vague term taken from NetMundial does not help at all , or assess the level of independence of certain existing or contemplated mechanisms.(These need to be cross referenced and if yet to be defined needs to be flagged)

- a. Affected parties(we have to clear of the use of the term party) What it covers ,whose are covered by that term?

Affected parties are individuals or entities upon which the decisions made by ICANN have an impact.

i. Directly-affected parties

The group classifies directly-affected parties as parties affected by ICANN's decisions through contracts or individual decisions. They would therefore include but not limited ?to the following :

- gTLD registries
- ICANN-accredited registrars
- ccTLD managers as far as IANA decisions are processed (and only through that aspect)
- RIRs
- IETF
- Dispute Resolution Providers, e.g. for UDRP and URS
- ICANN contractors such as the TMCH operator

ii. Indirectly-affected parties

Other parties are affected indirectly by ICANN's decisions, mainly through its policies:

- Internet users (if a domain name is taken down for instance)
- gTLD registrants (through UDRP or WHOIS verification policies for instance)
- ccTLD registrants (through potential IANA performance issues if they affected security, resiliency ? and stability of the DNS)
- Governments (including law enforcement agencies) What are those agencies ? within a given government constituencies or outside that?
- Right holders (ex: UDRP, URS, TMCH...)
- ISPs (through numbering allocation policies for instance)
- Specific industries or sectors of the economy (through the introduction of new gTLDs)
- Registry service providers

- Domain name resellers? Do we have any conditions and terms for reselling or it is a speculator process ?
- Root zone maintainer (through IANA Functions existing or future Contract)

b. Parties that affect ICANN

Parties affecting ICANN are parties that have impact on ICANN's decisions or actions, either directly or indirectly, or shape the environment in which ICANN operates.

i. Parties affecting ICANN directly

The group classifies as parties affecting ICANN directly the individuals or entities that participate directly in ICANN's decision processes. They would therefore include but not limited ? :

- Registry Stakeholder Group (RySG) and Registrar Stakeholder Group (RrSG)
- Commercial Business users (BC), Intellectual Property Constituency (IPC), Internet Service Provider and Connectivity Providers Constituency (ISPCP)
- Non-Commercial Users Constituency (NCUC), Not for Profit Operational Concerns Constituency (NPOC)
- Governments in the GAC
- Security experts (SSAC)
- Internet users (through ALAC)
- RIRs (through ASO)
- ccTLD managers who are ccNSO members, as well as ccTLD regional organizations such as CENTR or APTLD
- NomCom nominees to the various groups
- Root server operators (RSSAC)
- The NTIA (currently) through the AOC why we need to refer to NTIA ?
- ICANN Board
- ICANN staff and contractors
- Community members participating in public comment fora or corresponding with ICANN

ii. Parties affecting ICANN indirectly

Other parties affect ICANN or shape its environment, although indirectly, such as:

- The US Congress (through various audits and legislations that affect ICANN as a US-based organization and an organization in contract with the US government through NTIA)
- Governments that are not GAC members
- ccTLDs that are not ccNSO members
- Other entities working on communication policy such as the IGF, UN family of organization (CSTD, ITU), Internet Society, etc.

3. What is accountability?

The CCWG-Accountability Charter once again provides a helpful starting point to this key question.

Accountability in this context could be defined, as the existence of mechanisms for independent checks and balances as well as for review and redress. See my remarks above for scope of checks and the scope and meaning of balance (what are those elements that we balance and what is criteria of balancing?)

The definition is intended to y how accountability could be achieved: by providing the appropriate mix of mechanisms(what do we mean by *mix of mechanism* ? .Do we realx want to mix mechanism???) The goal of the group is to enhance ICANN's accountability by elaborating proposals for enhancements or new mechanisms. The focus on this definition is therefore absolutely critical to the CCWG. However further clarity regarding the definition's various components is needed.

a. Checks and balances

The group defines "checks and balances mechanisms" as a series of mechanisms put in place to adequately address the concerns from the various interested parties in the discussion and decision process, as well as to ensure that certain key impacts are safely managed without risk for the incumbent and future parties. These mechanisms may be triggered(what do we mean by triggered by.....) by one or more parties and may also be specific to a certain party and exclusive of third parties.

Examples include:

- Constitution(do we mean establishment) of balanced groups of stakeholders to shape or define policy decisions (e.g. the composition of the GNSO Council and the ICANN Board of Directors)What are the criteria of such balancing . Who decides on the establishment of criteria
- Ability to provide advice before a decision is made (e.g. Advisory Committees such as GAC, SSAC)If advise is rejected ??in particular by a simple majority?

b. Review mechanisms

The group considers review mechanisms to be mechanisms that assess the performance and relevance of processes or structures, and provide recommendations () for improvement. Review is review whether is taken or not is another subject. If the outcome of the review mechanism is not taken in redress mechanism there should be clear justification and

Examples include:

- Periodic structural reviews of SOs and ACs (as currently mandated in the ICANN Bylaws)
- AoC-mandated ICANN organizational reviews for Accountability and Transparency; Security, Stability, and Resiliency; WHOIS; and Competition and Consumer Trust.

c. Redress mechanisms

The group defines redress mechanisms as mechanisms that focus on assessing the compliance or relevance of a certain decision, and can conclude to its confirmation, cancellation or amendment. The output of such mechanism shall be binding.

Examples include:

- Independent Review (if it is considered to be binding)
- State of California or jurisdictions where ICANN has a presence Court decisions

Please see my earlier message indicating that these two mechanisms are complementary and not alternative and one (review mechanism) is pre requisite of other mechanism (redress mechanism)

d. Independence

The above process relies on the existence of “independent” mechanisms. It is well known that independence is extremely difficult to define and assess as the demarcation of having no interest, having an interest and being conflicted is often unclear. And so what?

Notably, the group investigated two different views (non exclusive) in order to assess independence: independence of persons participating in the decision process, and independence of a specific accountability mechanism with regards to other mechanisms.

i. Independence of persons participating in the decision process

The notion of independence is well researched in corporate governance through the notion of independent Director, which appears in many countries corporate governance codes of conduct. One definition is provided as such³ : a possible example

“For the purpose of this clause the expression 'independent directors' means directors who apart from receiving director's remuneration, do not have any other material pecuniary relationship or transactions with the company(add directly or indirectly) , its promoters, its management or its subsidiaries, which in judgment of the board may affect independence of judgment of the directors.”

Please add the need for declaration statement or taking oaths

For the benefit of this CCWG, independence of a mechanism could be assessed through the independence of the persons involved in making or validating the decision along these lines:

The persons involved in making or validating the decision, apart from participating to this mechanism, do not have any other direct or indirect material relationship, transaction or professional aspiration with ICANN which may affect their independence of judgment.

It should be noted that such a definition has triggered an ongoing debate regarding the loss of the qualification of “independent” after a certain number of years of service as Board member in a company.

There should be a process to avoid that?

ii. Independence of a specific accountability mechanism

³ [Are we making a mockery of independent directors?](#) Dr. Madhav Mehra, President, World Council for Corporate Governance (circa 2004)

Considering the special nature of the multistakeholder model, (See my remarks/ comments about multistakeholder model mentioned above ,) which by definition empowers interested parties to participate and make decisions(how ?) and why? That interested party should be directly involved in decision making. Say an individual which claims has been affected and triggers that notion would be allowed to participate in decision making ? so simply ? , the group considers that independence could also be considered as independence between the various accountability mechanisms. (what do we mean by *independence between the various accountability mechanisms?*

Independence of two accountability mechanisms can be assessed through:

- Examining whether the persons making decisions in one of the mechanism are similar to the other mechanism(this should be avoided through a procedure)
- Examining whether the persons making decisions in one of the mechanism are appointed by the persons in charge of the other mechanism(this should also be avoided through a procedure)
- Examining whether the persons making decisions in one of the mechanism have material relationships with the other mechanism that may affect their independence of judgment. (this situation should be avoided too through a procedure)
- Examining whether the persons making decisions in one of the mechanisms have conflicted interests in any of the mechanisms they take part. (this situation should be avoided too through a procedure)

4. What is the purpose of ICANN's accountability ?

This question raised a healthy and thorough discussion on the CCWG mailing list. Different perspectives were expressed, exposing clearly how different the views could be in the community about the ultimate goals and priorities of ICANN. However, the discussion was useful in enabling identification of two types of purpose that are relevant:

- a. ICANN should be accountable to to whom ? complying with its own rules and processes ("due process")

One of the key purposes of ICANN's accountability is to ensure that ICANN, when elaborating policies(who adopt those policies ? does ICANN adopt policies and implement those policies ????, implementing or enforcing them, follows the specific rules and processes that were set, either by its Bylaws or through the policies themselves what about Aoc terms, Articles of incorporation .and who approve those policies and who ensure that the policies made are properly implemented and if not apart from redress mechanism to redress the defficiency. What would be the following up action such as sanctioning those who failed that a given policy was not properly and timely implemented Stakeholders) who are those stakeholders, if they are those mentioned earlier in the document please cross reference that section or paragraph) expect ICANN to abide to these rules since ICANN is empowered to affect their operations or environment through its actions.

This implies that accountability mechanisms must be put in place to address for example:

- Disregard of established procedures (such as binding advice(what are those binding advice ? are GAC AND Sac ?s advices are binding ?? not being followed, or the absence of PDP...)

- Decisions being taken outside of remit (a group or staff member taking a decision that extends beyond its mission)
- Violations of policy or process, such as decisions without material information

b. ICANN should be accountable to achieving certain(what are those levels referred to as certain) levels of performance as well as security

Aside from compliance, ICANN is also expected to deliver certain(what are those services referred to as certain services to certain stakeholders. These services are, among other things, related to the IANA function, but not only. The Global Domains Division within ICANN serves gTLD registries and registrars. ICANN also operates the L-root.

Like any professional organization, ICANN should be held accountable to provide these services at the appropriate(what are those levels , who decides on their appropriateness?) level of performance. This performance is expressed in terms of the following (but not limited) :

- Service levels (through, for instance, a Service Level Agreement), expressed for instance in terms of delay to service a request;
- Security level (especially for key infrastructure such as DNSSEC facilities) or data collected by ICANN;
- Cost to achieve the given levels of performance.

In addition to these two main types of purposes for its accountability, ICANN, like any organization, is accountable to comply with applicable legislation, in jurisdictions where it operates. Please note that there are conflict of terms and conditions here as ,on the one hand ICANN, like any organization, is accountable to comply with applicable legislation, in jurisdictions where it operates and on the other hand ICANN needs to comply with the interest of the community .These two might have conflicting points as currently under discussion

It should be noted that the CCWG-Accountability debated the question of ICANN's accountability to acting in the public's interest. The differences of approach regarding the definition of this notion, as well as the various views regarding ICANN's scope and remit, led the group to assess that the level of support for considering that ICANN should be accountable to acting in the public's interest was, at this stage, lower than for the two purposed described above. The statement is vague ?

To what extent the public interest is lower than those mentioned above and why?

Clarifying ICANN's notion of public interest would however most certainly be highly beneficial to the organization by setting clear expectations with all stakeholders on what it can and cannot be held accountable to. (who decides on that ?) The CCWG-Accountability took note that this action was alluded to in ICANN's Strategic Plan.?

CCWG is an independent entity and should not be subordinated by strategic plan of ICANN that a) established by Board and b) has a short lifetime as it is a living documents and its contents could be changed by time, requiremnets circumstances