

Cross-Community Working Group on Enhancing ICANN Accountability

Work Area 2: Review Input from Public Comment and Categorize into Work Streams 1 & 2

Draft 5.3, 15-Jan-2015

Proposed rationale for designating Work Streams: (updated to reflect discussion thru 12-Jan)

Work Stream 1 is designated for accountability enhancement mechanisms that must be in place or committed to, *before* IANA transition occurs.

WS1 mechanisms are those that, when in place or committed to, would provide the community with confidence that any accountability mechanism that would further enhance Icann's accountability 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.

All other consensus items could be in Work Stream 2, provided the mechanisms in WS1 are adequate to force implementation of WS2 items despite resistance from ICANN management and board.

Accountability Suggestions from public comments and posts	Supported by, and [opposition noted]	WS	ATRT Ref[2]
<i>1. Mechanisms giving the ICANN community ultimate authority over the ICANN corporation. Most of these are initially designated as WS1, since community Members need the leverage of IANA transition to obtain these Bylaws changes.</i>			
Community Members as ultimate authority[1]. Amend ICANN bylaws to recognize permanent cross-community Members (ALAC, ccNSO, GAC, SSAC, NRO, RSSAC, IETF, ASO, and each Constituency) with authority only in these specific areas:	GNSO Joint Statement, BC, ITIC, B.Carpenter, CNNIC, Siva, TPI, Verizon, NCSG, Just Net, E.Morris, Izumi	WS1	-
Appoint members of <i>Affirmation</i> review teams	BC, Spain, Avri Doria	WS1	
Review any board decision. Non-approval would send decision back to bottom-up policy development process. (Members could not revise bottom-up recommendations)	BC, ITIC, Heritage, SIIA, EC, C. Gutiérrez	WS1	-
[Alt:] Refer any board decision to an <u>independent</u> review panel. IRP decision should be binding	BC, ITIC, Heritage, SIIA, EC, Mueller, CWG , Gross	WS1	ATRT2 9.2
Approve changes to ICANN bylaws or Articles, with supermajority. (Members could not revise changes)	BC, ITIC, SIIA, Hutty, Robin Gross	WS1	-
Approve annual proposed ICANN budget [vote threshold?] (members could not make line-item changes)	BC, ITIC, USCIB	WS1	-
Recall one or all ICANN Board members [vote threshold?]	BC, Avri Doria, NCSG	WS1	-
Bring the <i>Affirmation of Commitments</i> (incl the Reviews) into the ICANN bylaws, with these amendments:	BC, USCIB, SIIA, Verizon, Morris	WS1	-
<i>Affirmation</i> Review Teams get access to all internal documents	Doria, MPAA, CIS, Morris	WS2	
<i>Affirmation</i> Accountability & Transparency Review Team could recommend sunset of original reviews and create new reviews	BC, USCIB	WS2	
Change <i>Affirmation</i> reviews from “in the public interest” to “for protection and advance of human rights and internet freedoms”	NCSG, Robin Gross [Opposition noted]	WS2	-
Change bylaws for Reconsideration Process: trigger when board acts arbitrarily or capriciously; decisions subject to Independent Review	Google	WS1	-
IRP’s decisions should be binding and publish reasoning. IRP should account for errors or ethical lapses.	NCSG	WS1	
Reduce IRP standard of review and reduce the cost to prosecute an IRP	Robin Gross	WS2	
Create an Accountability Contract between ICANN and Registries, Registrars, and Registrants. Contract lets ICANN impose rules on others only when supported by consensus of affected parties and necessary to protect operation of the DNS. Disputes go to independent arbitration	David Johnson	WS1	-

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panel that could issue binding decisions.			
Replace <i>Affirmation</i> with accountability contract between ICANN and 'Contract Co.'	Guru Acharya	WS1	-
Independent certification for delegation & re-delegation requests	CWG	WS1	-
Independent Appeals Panel for contested root zone changes & WHOIS	CWG	WS1	-
Strengthen powers of the Ombudsman by granting it powers to set Board's decisions or policies aside.	NCSG	WS1	
Ombudsman should have authority to investigate any accountability-related complaint brought by an employee (with confidentiality)	NCSG	WS1	
<i>2. Mechanisms to restrict actions of the board and management of the ICANN corporation. Most of these are initially designated as WS2, since the Members could reverse board or management decisions if Members are empowered in WS1 (above).</i>			
Require supermajority for Board to approve action despite advice to the contrary from ACs or significant subsets of SOs	ISPCP, ITIC, Izumi	WS2	-
Ensure that the ICANN Board can be held to its Bylaws, with effective remedy if breach found by independent adjudicator [Alt: found by the community].	Malcolm Hutty, Seun Ojedeji	WS1	
Prevent ICANN Board redefining mission/scope in Bylaws without community consensus	Malcolm Hutty	WS1	-
Ensure ICANN Board does not act "ultra vires", and stays within assigned mission and scope. e.g., prevent scope creep in policies imposed via RAA.	Malcolm Hutty, BC, TPI	WS1	
Prohibit ICANN from entering agreements that impose obligations unrelated to DNS management	Heritage [opposition noted]	WS2	-
Require supermajority of both board and community to change ICANN not-for-profit status or change ICANN's state of incorporation	USCIB, Verizon, SIIA [opposition noted]	WS2	-
Before leaving California, ICANN must show benefits exceed costs	SIIA, USCIB	WS2	-
Broadly expand grounds on which ICANN decisions and operations can be challenged; lower threshold to succeed in a challenge	Spain, Heritage	WS2	
<i>3. Mechanisms to prescribe actions of the ICANN corporation. Most of these are initially designated as WS2, since the Members could reverse board or management decisions if Members are empowered in WS1 (above). For example, a bottom-up consensus process to change ICANN bylaws might be rejected by ICANN board, but the Members could then reverse that decision and force the change.</i>			
Require a defined notion of consensus for any GAC advice that would need to be given deference by the ICANN board	Heritage, Izumi, BC Stress Test #6	WS2	
Let local courts hear complaints on free expression, security, and privacy	NCSG [opposition noted]	WS2	-
Establish an independent inspector general for ICANN	SIIA	WS2	-
Bylaws should commit ICANN to maintain freedom of expression	Heritage, NCSG	WS2	-
Require registry and registrar agreements be equitable and non-discriminatory	ITIC, Heritage	WS1	-
Require supermajority of board to [increase] change registry or registrar fees [Members could reverse]	Heritage	WS1	-
Create channels for inquiry/complaint/suggestions	ISOC of China	WS2	ATRT2 9.3
Recall mechanism for any board member selected by an AC/SO	Avri Doria	WS2	-
Recall mechanism for SO Council and ALAC member selected by NomCom	Avri Doria	WS2	-
ICANN to engage with all governments as equal community stakeholders	Fiona Asonga	WS2	-

Accountability Suggestions from public comments and posts	Supported by, and [opposition noted]	WS	ATRT Ref[2]
Allow GAC to select 2-4 voting ICANN board members	Spain [opposition noted]	WS2	-
Give Ombudsman ability to refer a matter to external body	NCSG [opposition noted]	WS2	
Change bylaws to establish term limits for ICANN senior officers	Heritage	WS2	-
Change bylaws to require that ICANN remain subject to US Law	Heritage, IPC [opposition noted]	WS2	-
Explore incorporation as international org under international law	NRO [opposition noted]	WS2	-
Limit ICANN executive function to implementation of policies	ITIC, Siva	WS1	
Require ICANN to operate under rule of law in jurisdictions that support effective redress	MPAA, CoA [opposition noted]	WS1	
Require one-third of board members to devote full time to ICANN	Spain	WS2	-
<u>Structurally</u> separate policy functions from root zone management functions	Heritage, Google, USCIB, Mueller, Verizon	WS1	-
Allow NomCom to select and retain Ombudsman	Morris	WS2	-
Have Transparency International conduct audit of all SOs and ACs	Morris [opposition noted]	WS2	-
Severely limit ICANN ability to deny disclosure/transparency requests	SIIA, Siva, R. Gross	WS2	ATRT1 7.1-2, ATRT2 5
ICANN subject to annual audit of transparency and achievement of goals	ITIC, Heritage, Google, Spain	WS2	Berkman 2010
Make all board deliberations transparent (with minimal redaction)	Siva, R. Gross, Internet Society of China, BC	WS2	ATRT2 9.4
Require more advance notice and detail re: upcoming board meetings	Robin Gross	WS2	
Require all Advisory Committees (incl GAC) and Supporting Organizations (incl Number and Protocol entities) to have accountability and transparency mechanisms aligned to those of ICANN	Morris, Fiona Asonga, Carlos Gutiérrez, R. Gross	WS2	-
Improve mechanism to obtain transparency of ICANN documents (e.g. FOIA)	USCIB, CIS, Verizon, R. Gross	WS2	ATRT2 9.4
Establish an Open Data Policy and develop an Open Data action plan, where ICANN documents are open by default.	ITIF, W. Donkor, R. Gross	WS2	ATRT2 9.4
<u>Equal footing of stakeholders</u> : rethink the separation of SOs and ACs. At least Users (if represented in ALAC) and Governments (GAC) deserve equal footing with commercial interests in policy making.	Carlos Gutiérrez [opposition noted]	WS2	-
<u>Equal footing in policymaking</u> : differences between contracted and non-contracted parties are blurred with new gTLDs. The representativeness of non-commercial Stakeholders, vis a vis ALAC and GAC remains a question. Academic accreditation does not seem related to the issues discussed in the IANA Stewardship transition and some of the newer PDPs. If there is equal footing, the GNSO houses have to be rebalanced as per above	Carlos Gutiérrez [opposition noted]	WS2	-
<u>Structural and/or Organizational separation</u> between a) Policy Making, b) Operations and c) Compliance functions.	Carlos Gutiérrez	WS2	-
Implement recommendations from ATRT1 and ATRT2	NCSG, Robin Gross	WS1	
Proposed ICANN policies and decisions should be evaluated to ensure they do not circumvent basic human rights of Internet users. ICANN must be required to provide at least the same level of protection to citizen's fundamental rights that are enshrined in the Universal Declaration of Human Rights and numerous national laws.	Robin Gross	WS2	

Notes

[1] California Nonprofit Corporation Law expressly authorizes non-profit organizations to have Members with ultimate authority to control the organization. Under Cal. Corp. Code § 5310 “A corporation may admit persons to Membership, as provided in its Articles or Bylaws”. California law recognizes that Members may reserve the right to approve nonprofit actions and oversee the Board of Directors. (§ 5210) A Board of Directors’ authority to conduct the affairs of a nonprofit may be limited by the rights of the Members specified in the law or in the nonprofit corporation’s Articles or Bylaws.

Although ICANN does not currently have Members under Article XVII of its Bylaws, ICANN’s Articles of Incorporation expressly anticipate that ICANN may have Members: “These Articles may be amended by the affirmative of at least two-thirds of the directors of the Corporation. When the Corporation has Members, amendments must be ratified by a two-thirds (2/3) majority of the Members voting on any proposed amendment.” (Section 9)

[2] *Re the ATRT reference column. Very few of the specific recommendations in this list have a corresponding entry in ATRT1 or ATRT2 documentation. In some cases the topic was discussed but with different outcome. Also ATRT Recommendation 5 and 9 recommended several ongoing activities related to improving the appeals, transparency and ombudsman activities, that did not mention specific remedies, but rather recommended that a community wide process be convened to discuss those issues in detail. The Staff summary of previous comments was more general and this on that table it was easier to indicate the related area of the ATRT that dealt with that kind of issue. It is recommended that both this table and [Issues Identified During Public Comment](#) be consulted for a fuller picture.*

Links to sources cited in the table:

[GNSO Joint Statement](#), London, 26-Jun-2014

[Staff summary of accountability proposals taken from public comments](#), 15-Oct-2014

[ITIF post of Key Principles](#), 26-Jul-2014

[Public comments on enhancing ICANN Accountability](#), 7-May thru 30-Jul, 2014

[BC \(Business Constituency\) comments and Stress Tests](#), 27-May-2014

[Google comments](#), 28-May-2014

[SIIA comments](#), 30-May-2014

[Heritage Foundation comments](#), 20-Jun-2014

[Public comments on enhancing ICANN Accountability](#), 6-Sep thru 13-Oct, 2014

[ITIC Principles](#), 27-Sep-2014

[CDT Endorsement of ITIC principles](#), 4-Aug-2014

[ISPCP comments on proposed Bylaws change](#) 14-Sep-2014

[Malcolm Hutto](#), comments at ICANN51, [Enhancing ICANN Accountability session](#) 13-Sep-2014

[Op-Ed from ITIF regarding permanent cross-community group as ultimate authority](#), 17-Dec-2014

[Blog by David Johnson](#), 19-Dec-2014

[Staff Summary of Proposed Solutions from Public Comment](#), 14-Aug-2014

[Robin Gross Public Comments](#), 6-May-2014

[Milton Mueller's Public Comments](#), 6-May-2014