

MEMORANDUM

TO: Legal Sub-team of the Cross-Community Working Group on Enhancing
ICANN Accountability

FROM: Sidley Austin LLP and Adler & Colvin

RE: Legal Assessment: Proposed Accountability Mechanisms
Preliminary Response to Legal Sub-team Templates (WP2)

DATE: April 20, 2015

Overview

You have asked that we review templates developed by CCWG Work Party 2 that describe mechanisms and powers under consideration by the CCWG regarding efforts to enhance ICANN's accountability, and advise on the legal viability of those mechanisms and powers under "current conditions," which we understand to mean the current structure of ICANN as a nonprofit public benefit corporation organized under California law.

We have included our summary analysis of the viability of the mechanisms and powers posed at the end of each of the templates in sections entitled "Legal Analysis and Viability," except for the template titled, "Recommendations of the Cross Community Working Group on Accountability: ICANN's Mission, Commitments, and Core Values." This template has our comments inserted in blue text and italics following certain section breaks. One final note on the templates—the insertions and deletion of text in the body of each templates reflect the work of CCWG WP2 participants. To avoid confusion, we have not interlineated direct word edits in the text.

In addition to the template analysis, we have prepared a memorandum that provides a broader overview and analysis of options and alternatives for a new, updated Independent Review Panel (IRP) process. This memorandum is attached as Annex A (the "IRP Memo"). The IRP Memo addresses two paths for the IRP process: an advisory IRP, wholly created by the bylaws and/or member/designator agreements but whose decisions are ultimately subject to board agreement, and an external IRP arbitration based on binding arbitration standards and externally enforceable through court order if necessary. Additionally, the IRP Memo addresses the availability of external independent judicial review for litigants able to meet jurisdictional requirements. The IRP Memo should be considered in conjunction with the analysis of the templates as well as the analysis contained in our memorandum of April 17, 2015 regarding the governance powers chart developed by the CCWG.

The Work Party 2 templates with our legal analysis included are attached to this memo as Annex B.

Qualifications

Please note that our legal analysis is based on our understanding of the facts and the goals and priorities of CCWG , and is provided on a general level in keeping with the progress of the discussions to date. Our legal analysis is tailored to the questions posed by the Legal Sub-team, and is provided for the benefit of the Legal Sub-team, to help facilitate its consideration of the mechanisms described in the templates, and should not be relied upon by any other persons or for any other purpose. These draft responses reflect Sidley's and Adler & Colvin's preliminary reactions regarding the questions and have not been reviewed by any outside third parties.

Unless otherwise stated, the legal analysis contained below is based on California law, and in particular, the laws governing California nonprofit corporations (*California Corporations Code, Title 1, Division 2*). In our effort to prepare these responses for the Legal Sub-team in a limited time frame, we have not completely and fully explored or researched all of the potential options and nuances posed by each of the templates and the IRP process. Also, with respect to the templates, please note that where we were uncertain as to underlying concerns reflected in a particular template, we have made certain assumptions about the template or inserted clarifying questions and comments.

ANNEX A

IRP MEMO

Legal Analysis and Viability of Independent Review Panel Mechanisms

Note: The “Legal Analysis and Viability” section of template “Independent Review Panel” included in Annex B contains a summary of the issues highlighted in this memorandum.

I. Intro

There are two basic legally viable types of options for the creation of a new Independent Review Panel (“IRP”) process:

(1) an enforceable IRP based on binding arbitration standards for all but material matters, which arbitral decisions are externally enforceable through court order if necessary; and

(2) an advisory IRP, wholly created by the bylaws and/or member/designator agreements but ultimately subject to board ratification due to the materiality of the subject matter.

ICANN could use either or both or use one or the other for certain disputes without the need for two different IRPs; one IRP would exist, but the effect of its rulings would vary based on the subject matter of the dispute. Additionally, external independent review will always be available through US and international courts for litigants able to meet jurisdictional hurdles.

II. Advisory IRP

ICANN already has an Independent Review Process Panel provided for under Article IV, Section 3 of the ICANN bylaws. This existing, and familiar, mechanism could be strengthened and expanded for CCWG’s accountability goals.

Under an advisory IRP process, the selection of mechanisms and ultimate enforceability of the internal Independent Review Panel decision would be limited only by fiduciary duties under corporate law. Given that the results of these IRP decisions would ultimately need to be ratified as an action of the board, the board’s actions in approving them would need to be consistent with their fiduciary duties to ICANN.

As a result, an advisory IRP would be essentially unlimited in its potential jurisdiction. It could opine as to any topic. Nevertheless, the mechanisms to make IRP decisions binding upon the board are necessarily indirect under this model. In particular, the board could not, consistent with their fiduciary duties, delegate to a panel the ability to overrule their decisions as to core matters. Rather, the board must remain ultimately responsible for accepting (or rejecting) the decisions of the IRP (for those matters not reserved to members).

<u>Designator Model</u>			
Type of Decision	Examples	IRP Process	Judicial Authority In Disputes Between ICANN and Designators
Core Board powers	Formulation of Budget and Strategy Changes to Bylaws / Mission	Advisory IRP Process subject to board ratification or rejection.	None.
Other Board powers	Providing oversight and direction to management on all non-core board issues, e.g. how much to pay officers.	Externally enforceable IRP process	Judicial enforcement of arbitral award with review limited to scope of arbitration in disputes between parties to the IRP process.

<u>Membership Model</u>			
Type of Decision	Examples	IRP Process	Judicial Authority In Disputes Between ICANN and Members
Decisions reserved to members	Approval or rejection of Budget, Strategy, Bylaws, Mission	Advisory IRP Process subject to board and/or member ratification or rejection.	Judicial review of whether board was acting without right (<i>ultra vires</i>) or in violation of its duties under the bylaws, e.g. overriding member rejection, or in violation of reasonable business judgment
Core Board powers	Formulation of Budget and Strategy Changes to Bylaws / Mission		
Other Board powers	Providing oversight and direction to management on all non-core board issues, e.g. how much to pay officers.	Externally enforceable IRP process	Judicial enforcement of arbitral award with review limited to scope of arbitration in disputes between parties to the IRP process.

The risk that the board would reject even advisory IRP decisions can be minimized through other accountability mechanisms. The threat of board recall is present in either member or designator models. Indeed, the board would have strong incentives not to lightly reject decisions of the IRP, just as members/designators would have strong incentives not to lightly recall the board.

An advisory IRP process could validly be implemented through memorialization in/revisions to the bylaws or through member/designator agreements. Accordingly, ICANN would have the flexibility to design nearly all elements of the IRP mechanisms. This includes conditions and eligibility of standing as well as the standard of review. The flexibility to determine whether the standard of review is a procedural standard (as it is now), the application of the Business Judgment Rule, a de novo substantive review based on another standard, for

example, consistency with the bylaws, Mission & Core Values, and AoC principles, would allow for the creation of a specialized body of law that may further aid accountability.

There is flexibility in the options for the decision making processes, including majority thresholds, consensus or vote procedures, and mandated or personal assessment decision processes. ICANN also would have flexibility in the design of the composition of the panel, including appointment and recall.

Fiduciary duties may influence designations of panelists, as well as the panelists' decision making process. In particular, the law likely may impute a fiduciary duty upon the IRP panelists, as they may be in a relationship of trust and confidence with ICANN. Moreover, the ICANN bylaws make clear that it must apply policies consistently, neutrally, objectively and fairly, without singling any party out for discriminatory treatment; which would require transparent fairness in its dispute resolution processes. Accordingly, any standard for the decision process (i.e., mandated or personal assessment) as well as the election of the panel members would be affected. For example, panelists with fiduciary duties towards ICANN would be required to exercise loyalty and care, i.e., not have a conflict of interest in executing their duties as a panelist on a particular case. While these fiduciary duties may seem to cut against the independence of the IRP, such duties may in fact support the integrity of the IRP process.

III. Enforceable IRP Arbitration

Alternatively or in addition, ICANN could implement an even more independent mechanism to utilize arbitration for independent review of disputes. The enhanced enforceability of such an IRP process would be limited by the scope and procedural rules for arbitration.

Importantly, the scope of this process and arbitral review would be limited to those areas that are outside of the core powers reserved to the board or members. This limitation is necessary so that Board continues to exercise its fiduciary responsibilities to manage ICANN and its discretion is not wholly abandoned in favor of the view of another entity. Section 5210 of the California Corporations Code provides that “the activities and affairs of a corporation shall be conducted and all corporate powers shall be exercised by or under the direction of the board.” (emphasis added). If the IRP had plenary review of *any and all* board actions, then the board would lose its ability to exercise its fiduciary duties. The board's ability to delegate power is thus constrained because any and “all corporate powers [delegated] shall be exercised under the ultimate direction of the board” under California corporate law. Accordingly, for example, while the ability to develop bylaws may not be disputed, it would be valid to submit to arbitration a dispute arising out of conflicting interpretations of the bylaws.

Procedurally, arbitral mechanisms are defined in the United States by the U.S. Federal Arbitration Act. Given the international composition of ICANN, it would also be important for the mechanism to be consistent with the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the “New York Convention”). These serve to ensure that the agreement to arbitrate will be judicially enforceable and that the resulting arbitration award will also be judicially enforceable in almost every country in the world.

Under this process, the successful party (whose legal personhood or status is recognized in the U.S. courts) may petition a U.S. court to confirm the arbitration award and thereby turn it into a U.S. federal judgment that could be enforced against ICANN just as any judicial judgment could be enforced, including the contempt powers of a court.

The intention to use international arbitration must be implemented through an agreement binding on all parties. Accordingly, the IRP process through arbitration could also be implemented through memorialization in the bylaws and/or Member/Designator agreements. These clauses may also address several other key matters:

- **Structure:** While certain mechanisms of the arbitration would necessarily be predetermined based on the selection of the arbitration structure (e.g., the International Chamber of Commerce), ICANN would still have the flexibility to specify or at least greatly influence many critical mechanisms of the IRP, including standing and the standard of review.
- **Rule of Decision:** In particular, the arbitration clause (embedded in the bylaws or member/designator agreements) can contractually specify the rule of decision. This is normally a selection of governing law (e.g., ICANN may select California law to include the Business Judgment Rule), but could validly be used to create a substantive standard for the arbitrator. For example, ICANN could select a rule of decision to be “compatibility with the mission statement and core values” or “compatible with the Affirmation of Commitments.” This could result in the development of an international Law of the Internet similar to the way in which the UDRP has created a private international common law for domain name ownership.
- **Arbitrators:** ICANN could also validly contractually define the qualifications of the arbitrators. Accordingly, specifications for composition of the panel is permitted.
- **Standing:** While the rules of arbitration do include rules on standing, ICANN could also contractually agree to make itself available for external arbitration even against claimants that do not qualify as legal entities. For example, ICANN could expressly waive a lack of standing defense vis-à-vis certain organization, and accordingly recognize their standing in arbitration even though they might otherwise not be able to seek redress through litigation. Further, it may be possible to expressly recognize third party beneficiaries of the membership/designator agreements to grant standing to others in the community that may be materially affected by board, management or staff actions, although entities that are not legal persons may encounter challenges in seeking to enforce an arbitration award in the courts.
- **Cost:** Submission of a claim to an IRP arbitration would involve costs to the claimant that would generally be borne according to the procedures of the selected arbitration structure. If ICANN wishes to lower the cost barriers to the IRP, it would also need to memorialize this cost shifting in the arbitration provision of the bylaws or agreements.

Arbitration law includes jurisprudence on the international, federal and state level. California arbitration law has a unique feature that provides courts with the authority to cease

arbitration in favor of litigation. Accordingly, to most robustly preserve the structure of the preferred IRP process, the arbitration provisions in the bylaws and/or agreements should clearly state that California arbitration law does not apply under the bylaws, under the contracts, or with respect to the Members/Designators for these purposes.

IV. US Litigation

Another means for parties to seek relief and resolve disputes is through the United States legal system. No statute comprehensively governs the Internet, nor is there a designated agency that resolves such disputes. Instead, parties have brought suit directly against ICANN and ICANN-accredited registry operators. However, there are limitations inherent to the American legal system that limit the utilization of American courts to resolve such disputes.

The United States legal system has been used to bring a variety of claims, such as:

- Registries have brought actions against ICANN alleging interference with their business practices and antitrust claims. In *Verisign, Inc. v. Internet Corp.*, Verisign brought an action against ICANN alleging that ICANN “(1) prohibit[s] or otherwise restrict[s] VeriSign from offering services valuable to Internet users, (2) impose[s] improper conditions on the offering of such services by VeriSign, (3) regulate[s] and set[s] the prices at which such services may be offered, and/or (4) delay[s] the introduction of new services.” No. 04-cv-1292 (C.D. Cal. May 18, 2004).
- Parties have challenged the relationship between ICANN and registries. In *Coalition for ICANN Transparency Inc. v. Verisign, Inc.*, the nonprofit membership organization Coalition for ICANN Transparency, Inc. alleged that ICANN’s agreement with Verisign was a restraint of trade, was a conspiracy to monopolize, and was an unfair practice. 771 F. Supp. 2d 1195 (N.D. Cal. 2011). Parties challenged the bidding process for naming registries or renewing them.
- Suit also has been brought challenging new service offerings. In another action by Coalition for ICANN Transparency, Inc., the plaintiff alleged that ICANN and Verisign had violated antitrust laws by agreeing to auction expiring domain names. *Coalition for Icann Transparency Inc. v. Verisign, Inc.*, 464 F. Supp. 2d 948 (N.D. Cal. 2006).

Such actions, however, face a number of hurdles. First, only legal entities (such as corporations, unincorporated associations, or individual persons) can bring claims in state or federal courts. Without such status, an entity does not have the capacity to sue and be sued, and would not be able to assert a claim against ICANN in state or federal court.

Second, in order to bring an action in U.S. courts, a party must allege standing. To bring an action in federal court, a party must allege that it has suffered an injury in fact (1) that is concrete and particularized and actual or imminent, (2) that is fairly traceable to the alleged action by defendant, and (3) that would be redressed by a favorable decision. Thus, parties cannot bring claims on behalf of others or general grievances that have not or will not result in

concrete harms, normally, that is, financial harms, to that particular entity. For example, a U.S. court would lack jurisdiction to hear a claim that something is “unsatisfactory to the Internet community,” without a specific pleading that complied with the jurisdictional requirements.

In some limited cases, however, claims may be brought on behalf of others. If an action is brought by an organization on behalf of its members, the organization can bring such an action so long as it satisfies “associational standing,” which requires a showing that (1) one or more of its members would have standing; (2) the interests it seeks to protect are germane to the organization’s purpose; and (3) the claims asserted and the relief requested do not require the participation of the members. Moreover, under California statute, the members of a corporation can bring representative suits nominally on behalf of ICANN alleging a breach of fiduciary duties or violation of the governance documents by its directors. Such so-called derivative/representative suits, however, are not a right available to designators.

Third, U.S. courts only recognize a limited number of claims. The actions alleged to be unlawful must have violated federal or state statute, a constitutional provision, or common law tort. Some actions against ICANN have faltered on such grounds. For instance, in *Verisign, Inc. v. Internet Corp.*, Verisign alleged that ICANN caused it injury by delaying and blocking services. 452 F. Supp. 2d 924. The court held that Verisign, however, failed to establish that the harms caused by such actions were remedied by antitrust law. To establish an antitrust violation, the plaintiff must show harm to competition, not just to the individual entity. In addition to having to plead a specific violation of law, plaintiffs are required to do so by alleging specific facts that establish a plausible claim for relief. Many claims are dismissed for failure to plead such specific facts. For instance, in *Verisign, Inc. v. ICANN*, the court granted ICANN’s motion to dismiss because Verisign failed to establish that ICANN was controlled by competitors that conspired against plaintiff. No. 04-cv-1292 (C.D. Cal. Aug. 26, 2004). All that Verisign alleged was that ICANN considered advice from advisory groups that were controlled by plaintiff’s competitors. Though perhaps objectionable, it was insufficient to allege a claim of conspiracy.

Fourth, depending upon the claim asserted, there may be more stringent requirements that have to be overcome. When suing the directors of a corporation, for example, a plaintiff must allege a violation of fiduciary duties of good faith, loyalty or due care. Absent such a showing, the directors are presumed to have acted in the interests of the corporation. The business judgment rule establishes that a court will not review the decisions of a corporation’s directors that are performed in good faith, exercised with ordinary care, and in a manner reasonably believed to be in the best interests of the company. Thus, any actions against ICANN’s directors would have to overcome such a presumption.

Although the U.S. legal system provides an opportunity to resolve disputes, only certain parties are permitted to bring claims, only certain forms of harms are recognized, and defenses and hurdles must be overcome for parties to attain relief. Such restrictions on resolving disputes may not be present in the context of arbitration, which may provide a more fruitful method of airing grievances, not to mention the financial and efficiency benefits associated with alternative processes. That being said, the U.S. legal system provides an important method to ensure a baseline of fair competition and dealings.

V. Litigation Outside of the United States

ICANN also may be subject to litigation in foreign jurisdictions. ICANN may select a foreign venue by a selections clause in its bylaws or in its agreements with members/designators. While we are offering advice based on U.S. in this context, ICANN would most likely be subject to suit in jurisdictions where it has a foreign office—namely, Turkey, Singapore, China, Belgium, Switzerland, Uruguay, and Korea. By use of ICANN’s bylaws or agreements with ,members/designators, ICANN could avail itself of additional countries. So long as a plaintiff satisfies standing in such foreign jurisdictions and so long as the claim is not otherwise precluded (e.g., an arbitration clause), it may be able to bring a claim against ICANN. Thus, ICANN may wish to consider the process of resolving disputes in foreign jurisdictions. Indeed, one of the benefits of international arbitration is that section of a neutral forum for resolving all disputes in order to minimize national court litigation

ANNEX B
TEMPLATES

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ACCOUNTABILITY MECHANISMS

Description	Name of Mechanism	Independent Review Panel
	Description	A standing body tasked with enforcing commitments made in By-laws/Articles of Incorporation/Statement of Mission & Core Values (draft to be reviewed in Istanbul) regarding proper decision-making processes and permissible scope of corporate action
	Category (check & balance, review, redress)	Review [Possibly falls also into redress <u>and</u> check & balance categories, insofar as (a) the IRP would be empowered to overturn Board action, giving redress to a claimant, and (b) the overall purpose is to serve as a check on Board power]
	Is the mechanism triggered or non-triggered?	Triggered (by filing of a complaint by aggrieved party) [alleging action or inaction that is not within ICANN's Mission or that is undertaken in manner that violates Core Values]
	Possible outcomes (approval, re-do, amendment of decision, etc.)	Approval of Board/management/staff action or an order rescinding Board/management/staff action [There is apparent consensus that the outcome must be "binding" on ICANN. Additional input needed from independent counsel regarding the manner in which/extent to which this is possible.]
Standing	Conditions of standing (ie « last resort », type of decision being challenged,)	Proceedings before the IRP would be "last resort" in that no appeals process will be provided; [possible provision for Board to refuse to enforce an order to rescind a prior action upon super-majority or unanimous vote]; [note also that this mechanism may be used for additional purposes, perhaps using different but specific standards. E.g., IANA "appeals panel" etc.]
	Who has standing (directly or indirectly affected party, thresholds...)	Any person/entity "materially affected" by Board/management/staff action. [Need to consider how material affect on community generally would be measured, as affect could be indirect, non-financial, social, etc.]
Standard of review	Which standards is the decision examined against (process, principles, other standards...)	Challenging party has burden to demonstrate that Board/management/staff action violates either (a) decision-making procedures or (b) substantive limitations on the permissible scope of ICANN's actions, set forth in ICANN's By-laws, Articles of Incorporation, or Statement of Mission and Core Values (to be discussed in Istanbul)
	Which purpose(s) of accountability does the mechanism contribute to?	Enforcing compliance with stated procedures, due process and Core Values; avoiding ICANN "mission creep" into areas not involving DNS security, stability, or reliability
Composition	Required skillset	Legal plus expertise in regard to DNS/IANA technical matters [to what extent is technical expertise required? General knowledge of how DNS works, or something more?]
	Diversity requirements (geography, stakeholder interests, gender, other...)	Geographic diversity [how defined? will this involve mandatory requirements, e.g. no more than X members from any one Region? Alternatively, no less than 1 member from each region?] [Other diversity, e.g., gender?]

ACCOUNTABILITY MECHANISMS

CCWG Accountability

Template

	Number of persons (approximate or interval)	5 or 7
	Independence requirements	Members must be independent of ICANN [including participation/position within specified segments of the community? If so, which community segments, if any, are okay?]; Members should be compensated (at a rate that cannot decline during their fixed term); no removal except for specified cause (corruption, misuse of position for personal use, etc.) [Who decides whether that has occurred? Will Board have a role?]. Term limits and prohibition on post-term appointment to Board, Nomcom, other positions within ICANN.
	Election / appointment by whom?	Members to be nominated by the Board in consultation with the CEO, approved [how?] by community; [possible alternatives involving a reversal of the above (i.e. community nomination and Board approval)] [Also consider external vetting or rating schemes for nominees, i.e., third party organization such as ICDR could appoint/nominate subject to confirmation.]
	Recall or other accountability mechanism	Any appointments would need to be made for a fixed term with no removal except for specified cause (corruption, misuse of position for personal use, etc.). Process for recall/removal needs to be defined. Perhaps WP1 work will be relevant here.
Decision making	Is the decision mandated or based on personal assessment	Based on each IRP panellist's assessment of the merits of the claimant's case
	Decision made by consensus or vote?	Vote [Though this may fall into the category of procedures that the IRP itself should be empowered to set]
	Majority threshold (if applicable)	None
Accessibility	Cost requirements	ICANN to bear administrative costs of maintaining the system (including Panellist salaries); Panel to determine filing fees for claimants; [provision for "loser pays" fee-shifting? Only in the case of a "frivolous" challenge or defense?]
	Timeframe requirements	Panel should complete work expeditiously [3 month/6 month decision requirement?] Provision for complex cases, such as monthly reports?
	Language requirements	English as primary working language with provision of translation services?
Implementation	Potential means to implement	Requires coordination with By-Laws [or Articles of Incorporation?] change [to specify scope and decision-making procedures more precisely], and revision of Article IV (regarding IRP process) to reflect mechanism and Statement of Mission and Core Values. [via contract for contracted parties and other contractual documents, e.g., new gTLD application agreement?]

ACCOUNTABILITY MECHANISMS

<p>Legal Analysis and Viability</p>	<p>This would be a quasi-judicial mechanism to support the integrity of ICANN. Please see also the “IRP Memo” attached as Annex A to this memorandum dated April 20, 2015, for more detailed discussion.</p> <p>The legally viable options for the creation of a new Independent Review Process (“IRP”) panel divide along two paths, which are not necessarily mutually exclusive:</p> <ul style="list-style-type: none"> • an advisory IRP, wholly created by the bylaws and/or member/designator agreements but whose decisions are ultimately subject to board agreement, • an enforceable IRP based on binding arbitration for matters properly within its jurisdiction (e.g., challenges to the ICANN board’s adherence to procedural requirements set forth in the bylaws). The enforceable IRP is reserved for matters outside the core powers reserved to the ICANN board (or members, if applicable). <p>In either case, external independent judicial review could be available for litigants able to meet jurisdictional requirements and other limits imposed by the courts, although the standard of review would be limited.</p> <p>ICANN already has an IRP panel provided for under Article IV, Section 3 of the ICANN bylaws. This existing, and familiar, mechanism could be strengthened and expanded for CCWG’s accountability goals.</p> <p>The current IRP bylaws contemplate an ultimately nonbinding, advisory process. The current IRP panel has power to declare “whether an action or inaction of the Board was inconsistent with the Articles of Incorporation or Bylaws; and recommend that the Board stay any action or decision, or that the Board take any interim action, until such time as the Board reviews and acts upon the opinion of the IRP.” But the current IRP lacks the power to enforce its decisions or make them binding on the ICANN board.</p> <p>The role of the future IRP would be defined by the nature of the dispute it is addressing. Functioning as a special, quasi- judicial body, it could review and make a finding as to whether the board or other parties within the corporate structure (members, designators, officers) had met or violated standards established in the articles, bylaws, inter-party contracts, or corporate statutes.</p> <p>Under the advisory IRP process, ultimate enforceability, certain qualifications of the panelists, and the panelist’s standard for decisions making (i.e., mandated or personal assessment) would be limited by the bylaws <i>and</i> the board’s exercise of its fiduciary duties generally. Nevertheless, the ability to recall the board would indirectly provide great incentives for IRP decisions to be honored and ratified.</p>
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ACCOUNTABILITY MECHANISMS

		<p>The enforceable IRP, though binding, could not substitute its judgment for the fiduciary discretion of the board nor could it usurp member (or designator) powers to make (or approve) amendments to the bylaws or articles, or to invade the members’ reserved powers. As to such core subjects, the decisions of the IRP would ultimately be advisory.</p> <p>The contemplated variations for IRP structure are legally viable for either IRP, and could be implemented through memorialization in the bylaws and/or Member/Designator agreements. Neither the advisory nor the enforceable IRP would have authority to change the bylaws or the contracts among the corporate constituents.</p> <p>Under the enforceable IRP process, successful parties could petition a court to convert the award into a judgment, if necessary, provided the party seeking court enforcement is a legal person.</p> <p>Certain mechanisms of the arbitration would necessarily need to be predetermined based on the selection of the arbitration structure and specifically memorialized in the bylaws or agreements, particularly a waiver of standing defense for parties that are not traditional legal entities, such as the GAC or IETF.</p> <p>Another key issue is the selection of a procedural or substantive rule of decision; either or both are legally viable. Arbitration provides flexibility to rely upon an existing body of law, such as the “Business Judgment Rule” in reviewing board actions, or to select a new standard of review, such as Consistency with the ICANN Mission and Core Values or AoC. The current IRP process for review “must apply a defined standard of review to the IRP request, focusing on:</p> <ul style="list-style-type: none"> • did the Board act without conflict of interest in taking its decision?; • did the Board exercise due diligence and care in having a reasonable amount of facts in front of them?; and • did the Board members exercise independent judgment in taking the decision, believed to be in the best interests of the company? “ <p>Finally, just as it is today, disputes may still be brought before a court in the US or any other jurisdiction for which ICANN is subject under the rules of that court, and for which the aggrieved party is able to establish standing under the rules of that court.</p> <p>Indeed, parties will continue to be able to file a claim in the courts for dispute resolution even where ICANN establishes an enforceable IRP unless they have waived their rights to do so by a binding contractual provision (e.g., in a Membership/Designator agreement with an arbitration clause), and of course parties could challenge the arbitration clause itself in court, although the scope of judicial review is generally very limited under the Federal Arbitration Act</p>
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ACCOUNTABILITY MECHANISMS

CCWG Accountability

Template

		<p>and well-established judicial policies that favor arbitration.</p> <p>A key to an effective dispute resolution process is that the process should have robust and binding powers within its realm of authority, its jurisdiction. But the jurisdiction of the IRP, that is, its power to decide disputes, must also have some limit, lest the dispute resolution process create accountability concerns. An IRP without jurisdictional limits would simply move accountability concerns from the Board-level to the level of IRP.</p>
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Template of Reconsideration Request Reforms v. 3*

1. STANDING

Last week: Amend "who" has proper standing to file a Reconsideration Request to widen its scope to include any party impacted by the ICANN decision / inaction.

This week – significantly narrowing the proposed standing:

ICANN's Bylaws could be revised (as in red below):

1. ICANN shall have in place a process by which any person or entity materially affected by an action of ICANN may request review or reconsideration of that action by the Board.
2. Any person or entity may submit a request for reconsideration or review of an ICANN action or inaction ("Reconsideration Request") to the extent that he, she, or it have been adversely affected by:
 - a. one or more staff actions or inactions that contradict established ICANN policy(ies), **its mission, core values**; or
 - b. one or more actions or inactions of the ICANN Board that have been taken or refused to be taken without consideration of ~~material~~ **relevant** information, except where the party submitting the request could have submitted, but did not submit, the information for the Board's consideration at the time of action or refusal to act; or
 - c. one or more actions or inactions of the ICANN Board that are taken as a result of the Board's reliance on false or inaccurate material information.

2. STANDARD OF REVIEW

~~Amend the standard of reviewing a Reconsideration Request to include a re-examination of the underlying merits of arguments and decisions.~~

Broaden the types of decisions which can be re-examined to include staff action against ICANN's mission or core values (as stated in bylaws / Articles).

Propose amend Paragraph 9 on BGC summary dismissal as follows:

ICANN Bylaws Reconsideration Request Process (Article IV, Section 2):

<https://www.icann.org/resources/pages/governance/bylaws-en>

9. The Board Governance Committee shall review each Reconsideration Request upon its receipt to determine if it is sufficiently stated. The Board Governance Committee may summarily dismiss a Reconsideration Request if: (i) the requestor fails to meet the requirements for bringing a Reconsideration Request; (ii) it is frivolous, ~~querulous or vexatious~~; or ~~(iii) the requestor had notice and opportunity to, but did not, participate in the public comment period relating to the contested action, if applicable~~. The Board Governance Committee's summary dismissal of a Reconsideration Request shall be **documented and promptly** posted on the Website.

3. COMPOSITION

Need less reliance on the legal dept to guide the BGC on its recommendations and more board member engagement in decisions.

Requests should no longer go to ICANN's lawyers (in-house or out-house) for the first substantive evaluation. Instead, the Requests could go to ICANN's Ombudsman for a first look, who could make the initial recommendation to the BGC. Note the bylaws charges the BGC with these duties, but they would utilize the ombudsman instead of ICANN's lawyers to aid it in its evaluation.

All final determinations of requests are made by the entire board (not only requests about board actions).

Amend Paragraph 3:

3. The Board has designated the Board Governance Committee to review and consider any such Reconsideration Requests. The Board Governance Committee shall have the authority to:
 - d. evaluate requests for review or reconsideration;
 - e. summarily dismiss insufficient requests;
 - f. evaluate requests for urgent consideration;
 - g. conduct whatever factual investigation is deemed appropriate;
 - h. request additional written submissions from the affected party, or from other parties;
 - i. ~~make a final determination on Reconsideration Requests regarding staff action or inaction, without reference to the Board of Directors; and~~

- j. make a recommendation to the Board of Directors on the merits of the request, as necessary.

And delete Paragraph 15 since this BGC will make final decisions regarding requests related to staff action/inaction:

~~15. For all Reconsideration Requests brought regarding staff action or inaction, the Board Governance Committee shall be delegated the authority by the Board of Directors to make a final determination and recommendation on the matter. Board consideration of the recommendation is not required. As the Board Governance Committee deems necessary, it may make recommendation to the Board for consideration and action. The Board Governance Committee's determination on staff action or inaction shall be posted on the Website. The Board Governance Committee's determination is final and establishes precedential value.~~

4. SELECTION

N/A

5. DECISION-MAKING

Transparency improvements are needed regarding the information that make up the decision-making process. Recordings / transcripts should be posted of the substantive board discussions on the request.

Provide a rebuttal opportunity to the BGC's final recommendation (can't raise new issues).

Adding hard deadlines to the process including final determination within 120 days from request.

Propose to amend reconsideration rules as follows (in red):

- 16. The Board Governance Committee shall make a final ~~determination or a~~ recommendation to the Board with respect to a Reconsideration Request within thirty days following its receipt of the request, unless impractical, in which case it shall report to the Board the circumstances that prevented it from making a final recommendation and its best estimate of the time required to produce such a final ~~determination or~~ recommendation. **In any event, the final recommendation to the board shall be made within 90 days of receipt of the Request. The final recommendation shall be promptly posted on ICANN's website and shall address each of the arguments raised in the Request. The Requestor may file a rebuttal to the recommendation of the BGC within 15**

days of receipt of the recommendation, which shall be promptly posted to ICANN's website and provided to the entire Board for its evaluation.

17. The Board shall not be bound to follow the recommendations of the Board Governance Committee. The final decision of the Board **and its rationale** shall be made public as part of the preliminary report and minutes of the Board meeting at which action is taken. The Board shall issue its decision on the recommendation of the Board Governance Committee within 60 days of receipt of the Reconsideration Request or as soon thereafter as feasible. Any circumstances that delay the Board from acting within this timeframe must be identified and posted on ICANN's website. **In any event, the Board's final decision shall be made within 120 days of receipt of the Request. The final recommendation shall be promptly posted on ICANN's website and shall address each of the arguments raised in the request.** The Board's decision on the recommendation is final.

6. ACCESSIBILITY

Extend the time deadline for filing a Reconsideration Request from 15 to 30 days from when Requester learns of the decision/inaction.

Amend paragraph 5 as follows:

5. All Reconsideration Requests must be submitted to an e-mail address designated by the Board Governance Committee within ~~fifteen~~ 30 days after:
 - a. for requests challenging Board actions, the date on which information about the challenged Board action is first published in a resolution, unless the posting of the resolution is not accompanied by a rationale. In that instance, the request must be submitted within 30 days from the initial posting of the rationale; or
 - b. for requests challenging staff actions, the date on which the party submitting the request became aware of, or reasonably should have become aware of, the challenged staff action; or
 - c. for requests challenging either Board or staff inaction, the date on which the affected person reasonably concluded, or reasonably should have concluded, that action would not be taken in a timely manner.

7. IMPLEMENTATION

n/a

8. DUE PROCESS

Provide all briefing materials supplied to the board to the Requester so that they may know the arguments against them and have an opportunity to respond (subject to legitimate and documented confidentiality requirements).

Final decisions should be issued sooner – hard deadline of 120 days.

Legal Analysis and Viability

Article IV of the bylaws provides for accountability and review, including the process for “Request for Reconsideration” of an ICANN action or inaction. The proposed edits serve to improve the process in terms of expediency, development and transparency of the factual record and reasoning of determinations, increased opportunities for response, and taking away certain gatekeeper determinations from the Board Governance Committee (BGC) to ensure that more reconsideration determinations are made by the full board. While this puts more items on the agenda of the full board as opposed to the BGC, the board can certainly choose to structure its work in this manner if desired.

We do not see any material concerns with the legality of this approach. The proposed changes all serve fundamental notions of due process, and are legally viable, as nothing would undermine the ultimate authority of the board. As a general concept of U.S. corporate law, including the state corporate laws of California, the board of directors is the body with the authority and responsibility for managing and directing the affairs of the entity in compliance with its articles of incorporation and bylaws, subject to any powers reserved to members. As formulated, Requests for Reconsideration ultimately would continue to be determined by the board, although this would not preclude reservation of issues to members. If certain issues are reserved to members, it would be clearer to exclude such issues from this more general reconsideration process.

Please also see the analysis of a reconsideration right with a forced re-vote at a higher board approval threshold in Part 5 of the governance chart attached as Annex B to the Sidley Austin/Adler & Colvin memo of April 17, 2015.

Specification 1: **COMBINED TO SHOW BOTH REGISTRY AND REGISTRAR VERSIONS**

CONSENSUS POLICIES AND TEMPORARY POLICIES SPECIFICATION

1. **Consensus Policies.**

- 1.1. “**Consensus Policies**” are those policies established (1) pursuant to the procedure set forth in ICANN’s Bylaws and due process, and (2) covering those topics listed in Section 1.2 of this Specification. The Consensus Policy development process and procedure set forth in ICANN’s Bylaws may be revised from time to time in accordance with the process set forth therein.
- 1.2. Consensus Policies and the procedures by which they are developed shall be designed to produce, to the extent possible, a consensus of Internet stakeholders, including [registrars and](#) the operators of gTLDs. Consensus Policies shall relate to one or more of the following:
 - 1.2.1 issues for which uniform or coordinated resolution is reasonably necessary to facilitate interoperability, security and/or stability of [Registry Services, Registrar Services, and](#) the Internet or Domain Name System (“DNS”);
 - 1.2.2 functional and performance specifications for the provision of [Registrar and](#) Registry Services;
 - 1.2.3 Security and Stability of the registry database for the TLD;
 - 1.2.4 registry [and registrar](#) policies reasonably necessary to implement Consensus Policies relating to registry operations or registrars;
 - 1.2.5 resolution of disputes regarding the registration of domain names (as opposed to the use of such domain names [\[but including where such policies take into account use of the domain names\]](#)); or
 - 1.2.6 restrictions on cross-ownership of registry operators and registrars or registrar resellers and regulations and restrictions with respect to registry operations and the use of registry and registrar data in the event that a registry operator and a registrar or registrar reseller are affiliated.
- 1.3. Such categories of issues referred to in Section 1.2 of this Specification shall include, without limitation:
 - 1.3.1 principles for allocation of registered names in the TLD (e.g., first-come/first-served, timely renewal, holding period after expiration);
 - 1.3.2 prohibitions on warehousing of or speculation in domain names by registries or registrars;
 - 1.3.3 reservation of registered names in the TLD that may not be registered initially or that may not be renewed due to reasons reasonably related to (i) avoidance of confusion among or misleading of users, (ii) intellectual property, or (iii) the technical management of the DNS or the Internet (e.g., establishment of reservations of names from registration); ~~and~~
 - [1.3.4 maintenance of and access to accurate and up-to-date information concerning domain name registrations; and](#)
 - [1.3.5 procedures to avoid disruptions of domain name registrations due to suspension or termination of operations by a registry operator or a registrar, including procedures for allocation of responsibility among continuing registrars of the Registered Names sponsored in a TLD by a registrar losing accreditation and for serving registered domain names in a TLD affected by such a suspension or termination; and](#)
 - ~~1.3.4~~ [1.3.6](#) [The transfer of registration data upon a change in registrar sponsoring one or more Registered Names.](#)
- 1.4. In addition to the other limitations on Consensus Policies, they shall not:
 - 1.4.1 prescribe or limit the price of Registry Services;
 - 1.4.2 modify the terms or conditions for the renewal or termination of the Registry Agreement;
 - 1.4.3 modify the limitations on Temporary Policies (defined below) or Consensus Policies;
 - 1.4.4 modify the provisions in the [registrar agreement and the](#) registry agreement regarding [terms or conditions for the renewal, termination, or amendment of the Registrar Accreditation Agreement or](#) fees paid by [Registrars or](#) Registry Operators to ICANN; or

Specification 1: **COMBINED TO SHOW BOTH REGISTRY AND REGISTRAR VERSIONS**

- 1.4.5 modify ICANN’s obligations [\[not to apply standards, policies, procedures or practices arbitrarily, unjustifiably, or inequitably and to not single out Registrars for disparate treatment\] and](#) to ensure equitable treatment of registry operators and act in an open and transparent manner.
2. **Temporary Policies.** [Registrar and Registry Operators](#) shall comply with and implement all specifications or policies established by the Board on a temporary basis, if adopted by the Board by a vote of at least two-thirds of its members, so long as the Board reasonably determines that such modifications or amendments are justified and that immediate temporary establishment of a specification or policy on the subject is necessary to maintain the stability or security of [Registrar Services](#), Registry Services or the [\[Internet\] and the DNS \(“Temporary Policies”\)](#).
 - 2.1. Such proposed specification or policy shall be as narrowly tailored as feasible to achieve those objectives. In establishing any Temporary Policy, the Board shall state the period of time for which the Temporary Policy is adopted and shall immediately implement the Consensus Policy development process set forth in ICANN’s Bylaws.
 - 2.1.1 ICANN shall also issue an advisory statement containing a detailed explanation of its reasons for adopting the Temporary Policy and why the Board believes such Temporary Policy should receive the consensus support of Internet stakeholders.
 - 2.1.2 If the period of time for which the Temporary Policy is adopted exceeds ninety (90) calendar days, the Board shall reaffirm its temporary adoption every ninety (90) calendar days for a total period not to exceed one (1) year, in order to maintain such Temporary Policy in effect until such time as it becomes a Consensus Policy. If the one (1) year period expires or, if during such one (1) year period, the Temporary Policy does not become a Consensus Policy and is not reaffirmed by the Board, [Registrar and Registry Operators](#) shall no longer be required to comply with or implement such Temporary Policy.
3. **Notice and Conflicts.** [Registrar and Registry Operators](#) shall be afforded a reasonable period of time following notice of the establishment of a Consensus Policy or Temporary Policy in which to comply with such policy or specification, taking into account any urgency involved. In the event of a conflict between Registry Services and Consensus Policies or any Temporary Policy, the Consensus Policies or Temporary Policy shall control, but only with respect to subject matter in conflict. [For the avoidance of doubt, Consensus Policies that meet the requirements of this Specification may supplement or supersede provisions of the agreements between Registrar and ICANN, but only to the extent that such Consensus Policies relate to the matters set forth in Section 1.2 and 1.3 of this Specification.](#)

Specification 1: **COMBINED TO SHOW BOTH REGISTRY AND REGISTRAR VERSIONS**

Legal Analysis and Viability

The GNSO policy development process, currently reflected in Annex A of the ICANN bylaws, provides a detailed method for the development of consensus policies relating to generic top-level domains, which are ultimately recommended to the ICANN board for approval. The Specification provides further substantive detail on the subject matters for consensus policy development, as well as the process for temporary policy implementation (where action is necessary to maintain stability and security during the consensus policy process). Registrars and Registry Operators agree through contract (Registrar Accreditation Agreements and Registry Agreements, respectively) to comply and implement the consensus policies and temporary policies developed in accordance with the bylaws and the Specification.

In effect, the Specification binds Registrars and Registry Operators to implement policies that have yet to be formulated, regarding a defined set of topics. Some may argue that such flexibility is tantamount to permitting one party (ICANN) the ability to unilaterally change the terms of the contract, but the limitations on the types of policies at issue, even without a specification of the details of future policies, does not make this contract illusory under California contract law. (If the Agreements are silent about choice of law or select another jurisdiction's governing law, there is some chance this result may differ.) In particular, the material terms of the contract are set, the specification provides notice, in great detail, about the possible policies, and the consensus process includes critical participation by constituencies representing the Registrars and Registry Operators.

Parties to a contract are largely free to structure their agreements for any lawful purpose. Provided the formation of the agreements are otherwise valid (e.g., parties have indeed consented to the contract, are legally capable to contract), and we have no reason to believe the Registrar Accreditation Agreements and Registry Agreements are deficient in any way, the Specification should be binding upon those entities that accept these terms.

Fundamental Commitments and Core Values: 13 April 2015 Discussion Draft

Current Bylaws Language	Working Draft (new/changed text appears in red or strike-out text)	Notes, Comments, Questions
<p>Bylaws re reconciling competing Core Values</p> <p>In performing its mission, the following core values should guide the decisions and actions of ICANN: [Core Values Listed]</p> <p>These core values are deliberately expressed in very general terms, so that they may provide useful and relevant guidance in the broadest possible range of circumstances. Because they are not narrowly prescriptive, the specific way in which they apply, individually and collectively, to each new situation will necessarily depend on many factors that cannot be fully anticipated or enumerated; and because they are statements of principle rather than practice, situations will inevitably arise in which perfect fidelity to all eleven core values simultaneously is not possible. Any ICANN body making a recommendation or decision shall exercise its judgment to determine which core values are most relevant and how they apply to the specific circumstances of the case at hand, and to determine, if necessary, an appropriate and defensible balance among competing values.</p>	<p>Fundamental Commitments and Core Values</p> <p>In performing carrying out its mission, the following core values should guide the decisions and actions of ICANN will act in a manner that complies with and reflects ICANN’s Commitments and respects ICANN’s Core Values, both described below.</p> <p>These Fundamental Commitments and Core Values are deliberately expressed in very general terms, so that they may intended to apply provide useful and relevant guidance in the broadest possible range of circumstances. Because they are not narrowly prescriptive, the The specific way in which they apply, individually and collectively, to each new situation will necessarily may depend on many factors that cannot be fully anticipated or enumerated. and because they are statements of principle rather than practice, Situations may will inevitably arise in which perfect fidelity to all eleven Fundamental Commitments and Core Values simultaneously is not possible.</p> <p>To the extent a Commitment must be reconciled with other Commitments and/or one or more Core Values in any particular situation, such reconciliation must be:</p> <ol style="list-style-type: none"> a. Justified by an important, specific, and articulated public interest goal that is within ICANN's Mission and consistent with a balanced application of ICANN's other Commitments and Core Values (a “Substantial and Compelling Reason in the Public Interest”); b. Likely to promote that interest, taking into account competing public and private interests that are likely to be affected by the balancing; c. Narrowly tailored using the least restrictive means reasonably available; and d. No broader than reasonably necessary to address the specified Substantial and Compelling Reason in the Public Interest. <p>In any situation where one Core Value must be reconciled with another, potentially competing Core Value, the balancing must further an <i>important</i> public interest in a way that is substantially related to that interest.</p>	<p><i>ICANN’s Mission Statement articulates WHAT is in scope and out of scope for ICANN. ICANN’s “Core Values” articulate HOW ICANN is to carry out its Mission. The Working Party acknowledges that in some situations the Core Values may be in tension with one another, requiring a decision maker to reconcile the competing values to achieve ICANN’s Mission. ICANN’s current Bylaws describe this process and permit the decision maker to exercise its judgment in order to achieve “an appropriate and defensible balance among competing values.”</i></p> <p><i>While some degree of flexibility is needed, the language in the current Bylaws provides no principled basis for reconciling the principles in any particular situation. The proposed language articulates the standard to be applied when an ICANN decision maker is required to reconcile competing values. To facilitate this process and to limit opportunities for abuse, the CCWG proposes to create a two-tiered values statement consisting of fundamental ICANN “Commitments” and “Core Values.”</i></p> <p><i>To the extent that this kind of reconciliation would impinge on one or more of the fundamental Commitments, the proposed language would require the decision maker would be required to meet a high bar, demonstrating that any balancing is necessary and likely to achieve an important public interest goal, and narrowly tailored to achieve that goal. The bar is set to be somewhat more flexible with respect to reconciliation of Core Values.</i></p> <p><i>Note, the proposed reconciliation language reflects language included in Section 7.6 of the 2014 Registry Agreement and Section 6 of the 2013 Registrar Accreditation Agreement</i></p>

Fundamental Commitments and Core Values: 13 April 2015 Discussion Draft

Current Bylaws	Proposed - Working Draft	NOTES
<p>Section 2. CORE VALUES. In performing its mission, the following core values should guide the decisions and actions of ICANN:</p> <p>1. Preserving and enhancing the operational stability, reliability, security, and global interoperability of the Internet.</p> <p>2. Respecting the creativity, innovation, and flow of information made possible by the Internet by limiting ICANN's activities to those matters within ICANN's mission requiring or significantly benefiting from global coordination.</p> <p>7. Employing open and transparent policy development mechanisms that (i) promote well-informed decisions based on expert advice, and (ii) ensure that those entities most affected can assist in the policy development process.</p> <p>8. Making decisions by applying documented policies neutrally and objectively, with integrity and fairness.</p> <p>Bylaws Section 3: ICANN shall not apply its standards, policies, procedures, or practices inequitably or single out any particular party for disparate treatment unless justified by substantial and reasonable cause, such as the promotion of effective competition.</p>	<p>Fundamental 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 and through open and transparent processes that enable competition and open entry in Internet-related markets, and the Fundamental Rights set forth below. Specifically, ICANN's action must:</p> <p>1. Preserveing and enhanceing the operational stability, reliability, security, global interoperability, resilience, and openness of the DNS and the Internet;</p> <p>2. Respecting the creativity, innovation, and flow of information made possible by the Internet by limiting ICANN's activities to matters that are within ICANN's mission and requireing or significantly benefit from global coordination;</p> <p>3. Employing open, transparent and bottom-up, multistakeholder policy development mechanisms processes that (i) promote well-informed decisions based on expert advice, and (ii) ensure that those entities most affected can assist in the policy development process.</p> <p>4. Makeing decisions by applying documented policies consistently, neutrally, objectively, and fairly, with integrity and fairness without singling out any particular party for disparate discriminatory treatment unless justified by substantial and reasonable cause, such as the promotion of effective competition;</p>	<p>This additional language is derived from ICANN's current Articles of Incorporation. This language also supports Affirmation of Commitments language, including Section 3, in which ICANN "commits to: (a) ensure that decisions made related to the global technical coordination of the DNS are made in the public interest and are accountable and transparent; (b) preserve the security, stability and resiliency of the DNS; (c) promote competition, consumer trust, and consumer choice in the DNS marketplace; and (d) facilitate international participation in DNS technical coordination."</p> <p>In <i>AoC Section 8</i>, ICANN commits to maintain the capacity and ability to coordinate the Internet DNS at the overall level and to work to maintain a single, interoperable Internet. In <i>AoC Section 9.2</i>, ICANN commits to preserve the security, stability and resiliency of the DNS.</p> <p>In <i>AoC Section 8</i>, ICANN commits to "operate as a multi-stakeholder, private sector led organization with input from the public, for whose benefit ICANN shall in all events act."</p> <p>The changes in the current Bylaws for Core Value #8 reflect and incorporate current Bylaws Section 3. On NON-DISCRIMINATORY TREATMENT. The OED defines "disparate" as "Essentially different in kind; not able to be compared." "Discriminatory" is defined as "making or showing an unfair or prejudicial distinction between different categories of people or things." This change was suggested by one of the CCWG's independent experts.</p>

Fundamental Commitments and Core Values: 13 April 2015 Discussion Draft

<p>10. Remaining accountable to the Internet community through mechanisms that enhance ICANN's effectiveness.</p>	<p>5. Remaining accountable to the Internet Community through mechanisms defined in the Bylaws that enhance ICANN's effectiveness.</p>	<p>In <i>AoC Section 9.1</i>, ICANN commits to maintain and improve robust mechanisms for public input, accountability, and transparency.”</p>
<p>Core Values: In performing its mission, the following core values should guide the decisions and actions of ICANN:</p> <p>4. Seeking and supporting broad, informed participation reflecting the functional, geographic, and cultural diversity of the Internet at all levels of policy development and decision-making.</p> <p>3. To the extent feasible and appropriate, delegating coordination functions to or recognizing the policy role of other responsible entities that reflect the interests of affected parties.</p> <p>5. Where feasible and appropriate, depending on market mechanisms to promote and sustain a competitive environment.</p> <p>6. Introducing and promoting competition in the registration of domain names where practicable and beneficial in the public interest.</p> <p>9. Acting with a speed that is responsive to the needs of the Internet while, as part of the decision-making process, obtaining informed input from those entities most affected.</p> <p>11. While remaining rooted in the private sector, recognizing that governments and public authorities are responsible for public policy and duly taking into account governments' or public authorities' recommendations.</p>	<p>Core Values: In performing its mission, the following core values should also guide the decisions and actions of ICANN:</p> <p>1. Seeking and supporting broad, informed participation reflecting the functional, geographic, and cultural diversity of the Internet at all levels of policy development and decision-making.</p> <p>2. To the extent feasible and appropriate, delegating coordination functions to or recognizing the policy role of other responsible entities that reflect the interests of affected parties and the roles of both ICANN's internal bodies and external expert bodies;</p> <p>3. Where feasible and appropriate, depending on market mechanisms to promote and sustain a healthy competitive environment in the DNS market</p> <p>4. Introducing and promoting competition in the registration of domain names where practicable and beneficial in the public interest.</p> <p>5. Operate with efficiency and excellence, acting in a fiscally responsible and accountable manner and at a speed that is responsive to the needs of the Internet.</p> <p>6. 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.</p> <p>7. [Not advance] [Refrain from advancing] the interests of one or more interest groups at the expense of others</p>	<p>In <i>AoC Section 7</i>, ICANN commits to “fact-based policy development, cross-community deliberations, and responsive consultation procedures that provide detailed explanations of the basis for decisions, including how comments have influenced the development of policy consideration.”</p> <p>In <i>AoC Section 9.3</i>, ICANN commits to promote “competition, consumer trust, and consumer choice.”</p> <p>In <i>AoC Section 9.3</i>, ICANN commits to promote “competition, consumer trust, and consumer choice.”</p> <p>In <i>AoC Section 7</i>, ICANN “commits to adhere to transparent and accountable budgeting processes.”</p> <p>In <i>AoC Section 8</i>, ICANN commits to “operate as a multi-stakeholder, private sector led organization.”</p>

Legal Analysis and Viability:

With the caveat that, as requested by the Legal Subteam, we have conducted this initial review at a high level, we do not see fundamental legal problems with the current proposed draft amendments to Article II, Section 2, of the bylaws, which would designate a set of higher core values as “fundamental commitments” and provide more specific direction to decision-making bodies on how fundamental commitments and the other core values are to be balanced. We would, however, like to call your attention to some general observations:

(1) While ICANN is an international organization serving a worldwide community, it is also a California nonprofit public benefit corporation exempt from income taxes in the U.S. under Section 501(c)(3) of the Internal Revenue Code as a “public charity.” As such, it is subject to U.S. federal and California laws concerning tax-exempt charitable organizations, which inform and restrict ICANN’s permissible purposes and activities. We have not seen anything in the Fundamental Commitments and Core Values statements that obviously contradicts those laws, but to maintain its tax-exempt status, in the event any non-obvious conflict were to arise, those laws should inform interpretation of the Fundamental Commitments and Core Values. We therefore recommend that the international drafting party consider revisions to explicitly refer to these laws, as part of the context in which the Fundamental Commitments and Core Values must be understood. For example, we would recommend adjusting the preamble to the Fundamental Commitments and Core Values section as follows:

In carrying out its charitable mission, ICANN will act in a manner that complies with and reflects ICANN’s Commitments and respects ICANN’s Core Values, both described below, which shall be construed so as to be fully consistent with ICANN’s status as a tax-exempt organization under Section 501(c)(3) of the U.S. Internal Revenue Code.

(2) In a similar vein, we note that ICANN, as a charity regulated in the United States, is still answerable to public authorities such as the U.S. Internal Revenue Service and the California Attorney General. (We assume that the desire to minimize deference to public authorities, as explained in the memorandum from April 13 and implemented by Core Value #6, concerns input from governments as part of the worldwide stakeholder community, rather than guidance from charity regulators in the United States. Nonetheless, we did want to clarify this matter.)

(3) We recognize that the paragraph at the end of Article II, Section 2, in the current bylaws is seen as giving too much leeway to decision-making bodies to interpret and weigh core values as they see fit, and we understand the desire to impose greater clarity and direction here. At the same time, making values binding can be problematic in practice. Although we have been directed not to address mechanisms in this review, the mechanism through which a principle or directive in Article II is implemented may have direct bearing on how that principle or directive is formulated. To this end, we would recommend giving consideration to *how* the directives for balancing competing core values or commitments would be applied in practice at the same time as these directives are being formulated. For example, what would it mean in practical terms for the board of directors to “narrowly tailor” a reconciliation of two competing core values? (Under U.S. law, “narrowly tailor” typically refers to drafting a law as narrowly as possible so that it accomplishes a specific purpose while infringing as little as necessary on a broader civil liberty. In the context of Fundamental Commitments and Core Values, how would the decision-maker decide which competing Fundamental Commitment should be narrowly tailored relative to the other?) Does the proposed four-prong balancing process for Fundamental Commitments apply only to very significant, strategic decisions, or does it encompass every action the board or another ICANN decision-making body take? If the latter, it might be advisable to introduce some flexibility into the process, so that the board is not unduly burdened in governing the organization.

(4) At a later time, we may recommend that some of the provisions currently in the bylaws and discussed here be moved into the articles of incorporation instead. (For considerations in such a recommendation, see the “Legal Analysis and Viability” section of the ICANN Mission Statement template on page 20). Such a move would not affect the comments made above.

ICANN MISSION STATEMENT (Draft of 13 April 2015)

Current Bylaws Language	Working Draft (new/changed text appears in red or strike-out text)	Notes, Comments, Questions
<p>The mission of The Internet Corporation for Assigned Names and Numbers ("ICANN") is to coordinate, at the overall level, the global Internet's systems of unique identifiers, and in particular to ensure the stable and secure operation of the Internet's unique identifier systems. In particular, ICANN:</p> <ol style="list-style-type: none"> Coordinates the allocation and assignment of the three sets of unique identifiers for the Internet, which are Domain names (forming a system referred to as "DNS"); Internet protocol ("IP") addresses and autonomous system ("AS") numbers; and Protocol port and parameter numbers. Coordinates the operation and evolution of the DNS root name server system Coordinates policy development reasonably and appropriately related to these technical functions. 	<p>The mission of The Internet Corporation for Assigned Names and Numbers ("ICANN") is to coordinate, at the overall level, the global Internet's systems of unique identifiers, and in particular to ensure the stable and secure operation of the Internet's unique identifier systems. In particular, ICANN:</p> <ol style="list-style-type: none"> Coordinates the allocation and assignment of the three sets of unique identifiers for the Internet, which are Domain names (forming a system referred to as "DNS"); Internet protocol ("IP") addresses and autonomous system ("AS") numbers; and Protocol port and parameter numbers. Coordinates the operation and evolution of the DNS root name server system Coordinates policy development reasonably and appropriately related to these technical functions. <ol style="list-style-type: none"> <i>In this role, with respect to domain names, ICANN's mission is to coordinate the development and implementation of Consensus Policies (as defined in Specification 1) that (a) ensure the stable and secure operation of the Internet's unique names systems and (b) for which uniform or coordinated resolution is reasonably necessary to facilitate the openness, interoperability, resilience, security and/or stability of the DNS.</i> <i>In this role, with respect to IP addresses and AS numbers, ICANN's mission is to [INSERT]</i> <i>In this role, with respect to protocol port and parameter numbers, ICANN's mission is to [INSERT]</i> <i>In this role, with respect to the DNS root server system, ICANN's mission is to [INSERT]</i> <p><i>ICANN's Mission does not include the regulation of services that use the Internet's unique identifiers, or the content that they carry or provide. Nor shall ICANN undertake any other mission not specifically authorized in these Bylaws.</i></p> 	<p><i>The additional language is intended clarify, but not to either diminish or expand ICANN's current Mission. The proposed mission statement also reflects ICANN's obligation under the Affirmation of Commitments (AoC) to:</i></p> <ul style="list-style-type: none"> <i>Maintain the capacity and ability to coordinate the Internet DNS at the overall level and to work for the maintenance of a single, interoperable Internet. (AoC Section 8.a.)</i> <i>Implement measures to maintain timely, unrestricted and public access to accurate and complete WHOIS information, including registrant, technical, billing, and administrative contact information. (AoC Section 9.3.1)</i> <p><i>In addition to (a) and (b) in the proposed language, Specification 1 in the Registry Agreement and Registrar Accreditation Agreement provides greater detail on the scope of "Consensus Policy" are related to:</i></p> <ul style="list-style-type: none"> <i>Functional and performance specifications for the provision of Registry and Registrar services;</i> <i>Security and Stability of the registry database for the TLD;</i> <i>Policies reasonably necessary to implement Consensus Policies relating to registry operations or registrars;</i> <i>Resolution of disputes regarding the registration of domain names (as opposed to the use of such domain names); or</i> <i>Restrictions on cross-ownership of registry operators and registrars or registrar resellers and regulations and restrictions with respect to registry operations and the use of registry and registrar data in the event that a registry operator and a registrar or registrar reseller are affiliated.</i> <p><i>And include, without limitation:</i></p> <ul style="list-style-type: none"> <i>Principles for allocation of registered names in the TLD (e.g., first-come/first-served, timely renewal, holding period after expiration);</i> <i>Prohibitions on warehousing of or speculation in domain names by registries or registrars;</i> <i>Reservation of registered names in the TLD that may not be registered initially or that may not be renewed due to reasons reasonably related to (i) avoidance of confusion among or misleading of users, (ii) intellectual property, or (iii) the technical management of the DNS or the Internet (e.g., establishment of reservations of names from registration); and</i> <i>Maintenance of and access to accurate and up-to-date information concerning domain name registrations; and procedures to avoid disruptions of domain name registrations due to suspension or termination of operations by a registry operator or a registrar, including procedures for allocation of responsibility for serving registered domain names in a TLD affected by such a suspension or termination.</i> <p><i>The full text of Specification 1 is attached.</i></p>

ICANN MISSION STATEMENT (Draft of 13 April 2015)

Legal Analysis and Viability:

(1) An important legal restriction on ICANN's activities is that, both as a matter of California corporate law and as a matter of California charitable trust law (since ICANN is recognized as a charity in the U.S.), the activities must be limited to furthering at least one of the purposes set forth in the purposes statements in ICANN's governing documents, that is, its articles of incorporation and also its bylaws (provided that any purposes stated in the bylaws must fall entirely within those in the articles). These purposes legally restrict the uses of ICANN's assets. The fiduciary duties of ICANN's directors include the duty to adhere to these purposes and prevent any misuse of ICANN's assets. Thus, developing a clearer and narrower purpose/mission statement, such as proposed, can be very effective in ensuring that ICANN does not pursue undesired purposes or engage in undesired activities. On the other hand, care should be taken to make sure the purpose statement is broad enough to cover the purposes ICANN in fact wishes to pursue. For more elaboration on these concepts, please also see our comments on the April 13, 2015 discussion draft of the "Recommendations of the Cross Community Working Group on Accountability: ICANN's Mission, Commitment, and Core Values beginning on page 21).

(2) Since the articles of incorporation govern the bylaws and are legally the superior document in the event of any inconsistency between articles and bylaws, and the articles are required to state the purposes of the corporation, some of the bylaws provisions discussed in WP2 templates, and especially the refined mission statement, could instead be incorporated into the articles of incorporation, which must then be filed with the Secretary of State of California to make them effective. Putting essential provisions for corporate governance in the articles, without being overly restrictive, also provides greater procedural protections from those provisions being changed, both under corporate law and due to this filing requirement. Note that the scope of the purposes set forth in the bylaws should not exceed the scope set forth in articles. Also, the articles must strike a proper balance in describing the corporate purpose while still enabling and supporting a dynamic and evolving internet and stakeholder community.

(3) Given the importance of embodying the mission statement in the governing documents to provide a clear and overarching limit on the permissible activities of ICANN, we recommend carefully considering cross-references to defined terms or other language in external documents (such as "Specification 1"), especially if there might be any lack of clarity as to which document is being referred to, or to which version of that document. We would recommend avoiding such external references entirely. The Secretary of State may refuse to file revised articles with such external document references; where such a filing is accepted, the referenced document may become subject to the same rules for amendment as the articles themselves. Similarly, if provisions in other documents are incorporated by reference into the bylaws, they are subject to treatment as bylaws for all purposes, including amendment procedures. Ideally, all relevant language would appear in the purpose/mission statement itself, possibly with use of an appendix to the articles or bylaws.

(4) We see the language is still being developed. We can comment on the specific language and help to make it legally precise at the right time. We can also recommend which provisions should reside in the articles rather than the bylaws.

Recommendations of the Cross Community Working Group on Accountability:
ICANN's Mission, Commitments, and Core Values

Outside Counsel Comment: *In the United States, two documents generally comprise a nonprofit corporation's governing documents: (1) articles of incorporation and (2) bylaws. Articles are initially filed with a state government agency to create the corporation; thereafter, any amendments must also be filed, accompanied by a certificate of officers, signed under penalty of perjury, affirming that all consents to the amendment required by law and the governing documents have been obtained, to be effective. Modern nonprofit articles are usually short, reciting only name, purposes, and provisions required for exemption from U.S. income taxes. Bylaws are an internal governance document; while they are attached to certain informational filings, neither the initial bylaws nor any amendments need be filed with any government agency in order for them to go into effect, so they are easier to change. Bylaws are typically much longer than articles of incorporation, discussing in detail the corporation's internal management: its governance structures, actors, roles, and processes, including how the Board of Directors is selected and operates, roles of officers and committees, and rights of any members or designators. Articles of incorporation are legally superior. Bylaws may fill in where the articles are silent, but if the articles and bylaws conflict on any point, the articles govern. For example, if bylaws state corporate purposes more broadly than the articles, or provide for processes or rights prohibited by the articles, the broader purposes or prohibited processes or rights are invalid, and corporation may not act in furtherance of such purposes, follow such processes, or grant such rights.*

Like most of the United States, California has a law of "charitable trust" which applies not only to entities organized as "trusts," but also to nonprofit corporate entities. As applied to nonprofit public benefit corporations, it means their assets must be used for the purposes in their articles of incorporation and, to some lesser extent, in bylaws (if narrower). Although the purposes set forth in the governing documents may be expanded in the future if the appropriate parties consent, only assets received after this expansion may be used for the expanded purposes.

To date, the CCWG's work has focused on changes to the bylaws. It is important to note that ICANN's articles of incorporation are superior to the bylaws and that, in the case of conflict, the articles of incorporation govern. Therefore, to the extent that modifications relate to ICANN's fundamental mission and purpose, it would be desirable to put such statements in the articles of incorporation, rather than in the bylaws. The bylaws are appropriately utilized for further detail, if desired, as to how ICANN's fundamental purposes will be carried out, such as expressed in some of the statements that have been drafted as to ICANN's "core values."

Problem Statement

ICANN's current Bylaws contain (a) a Mission statement; (b) a statement of Core Values; and (c) a provision prohibiting policies and practices that are inequitable or single out any party for disparate treatment. These three sections are at the heart of ICANN's accountability: they obligate ICANN to act only within the scope of its limited mission, and to conduct its activities in accordance with certain fundamental principles. As such, these three sections also provide a standard against which ICANN's conduct can be measured and held accountable.

The relevant language in the current Bylaws was adopted in 2003. Based on community input and our discussions since January, the Cross Community Working Group on Accountability (CCWG-ACCT) concluded that these provisions should be strengthened and enhanced to provide greater assurances that ICANN will remain accountable to its stakeholders and the global Internet community. In particular, the CCWG-ACCT found that:

- ICANN’s Mission statement needs clarification with respect to the scope of ICANN’s policy authority;
- The language in the Bylaws describing how ICANN should apply its Core Values is weak and permits ICANN decision makers to exercise excessive discretion;
- The current Bylaws do not reflect key elements of the Affirmation of Commitments; and
- The Board should have only a limited ability to change these key accountability provisions of ICANN’s Bylaws.

Summary of Recommended Changes

Outside Counsel Comment—Related Documents: Our legal commentary on specific recommendations in templates concerning ICANN’s Mission Statement and Fundamental Commitments/Core Values are not repeated in this document.

The Cross Community Working Group is seeking input on a number of recommended changes to the ICANN Bylaws to address the deficiencies described above. We have deliberately attempted to minimize language changes, and in the annotated language (attached), we have (i) included the existing language; (ii) provided a redline showing proposed changes; and (iii) identified the source or justification for the proposed changes. Below we provide a summary of the proposed changes.

1. *ICANN Mission Statement.* CCWG-ACCT recommends the following changes to ICANN’s “Mission Statement,” (Bylaws, Article I, Section 1):

- Clarify that ICANN’s mission is limited to coordinating and implementing policies that are designed to ensure the stable and secure operation of the DNS and are reasonably necessary to facilitate the openness, interoperability, resilience, and/or stability of the DNS. The specific language is consistent with the current statement of ICANN’s mission, but spells it out in greater detail than the current Bylaws. The recommended language has been included in registry and registrar agreements from the start, and is now reflected in Specification 1 to both agreements. For information, we have provided a summary of Specification 1 in the Notes, and a full copy of the Specification as well.
- Clarify that ICANN’s mission does not include the regulation of services that use the DNS or the content these services carry or provide. Services or content regulation is the role of a sovereign, and is inconsistent with ICANN’s limited technical mission.

- Clarify that ICANN’s powers are “enumerated” – meaning that anything not articulated in the Bylaws are outside the scope of ICANN’s authority.

Outside Counsel Comment: *As a preliminary matter, we would recommend that all critical aspects of ICANN’s mission be included in its articles of incorporation rather than its bylaws, as discussed above.*

We understand that CCWG wishes to “enumerate” ICANN’s powers, such that anything not stated is outside ICANN’s authority. This approach, in combination with other mechanisms, could be very effective in limiting what ICANN may do. There are possible disadvantages, however, that should be considered and understood before taking this approach:

- *If the list of enumerated powers is at all incomplete, this may require an amendment to the governing documents (which would be made difficult by design, but not, of course, immutable);*
- *Because of charitable trust law (discussed at the beginning of this document), any assets acquired by ICANN while such enumerated powers are in place would be irrevocably dedicated to those purposes and not available for any new powers. (An amendment is effective only for later-acquired assets, so only assets acquired after the amendment would be usable for the new activity.)*

For more detail, please see our comments to the template entitled “ICANN Mission Statement” (Draft of 13 April 2015).

2. **Core Values.** CCWG-ACCT recommends the following changes to ICANN’s “Core Values” (Bylaws, Article I, Section 2 and Article II, Section 3):

- Divide the Core Values into “Fundamental Commitments” and “Core Values.”
 - Incorporate into the Bylaws ICANN’s obligation to operate for the benefit of the Internet community as a whole, carry out its activities in accordance with applicable law and international law and conventions through open and transparent processes that enable competition. These commitments are now contained in ICANN’s Articles of Incorporation.

Outside Counsel Comment: *We would suggest amending the phrase “applicable law and international law and conventions” (a variation of which we understand is currently in ICANN’s articles of incorporation) to instead refer to “applicable law, and, to the extent not conflicting, international norms and conventions . . .” We would not advise including a reference to “international laws” having some controlling effect over ICANN without specifying exactly which international legal regimes must be adhered to by ICANN.*

- Designate certain core values as “Fundamental Commitments.” These values are so fundamental to ICANN’s operation that they should rarely need to be balanced against each other. Those Fundamental Commitments include ICANN’s obligations to:

- Preserve and enhance the stability, reliability, security, global interoperability, resilience, and openness of the DNS and the Internet;
 - Limit its activities to those within ICANN’s mission and require or significantly benefit from global coordination;
 - Employ open, transparent, bottom-up, multistakeholder processes; and
 - Apply policies consistently, neutrally, objectively and fairly, without singling any party out for discriminatory treatment.
- Slightly modify the remaining Core Values to:
 - Reflect various provisions in the Affirmation of Commitments, e.g., efficiency, operational excellence, and fiscal responsibility;
 - Clarify that any decision to defer to input from public authorities must be consistent with ICANN’s Fundamental Commitments and Core Values. We believe that this is inherent in the current Bylaws, but felt that it was appropriate to call it out clearly for purposes of accountability. This does not interfere with the ability of the GAC to provide input or advice on any topic; rather, it clarifies that ICANN must always act in compliance with its Bylaws obligations.
 - Add an obligation to avoid capture.

Outside Counsel Comment: We see no legal impediment to the changes described. As discussed above, we recommend moving any critical purposes or statements affecting use of assets to the articles of incorporation with elaboration and detail, if desired, in the bylaws. For more detail, please see our comments to “Fundamental Commitments and Core Values” (13 April 2015 Discussion Draft).

3. *Balancing or Reconciliation Test*

- Modify the “balancing” language in the Bylaws to clarify the manner in which this balancing or reconciliation takes place. Specifically:
 - In any situation in which one Commitment must be reconciled with another Commitment or with a Core Value, the proposed language requires ICANN to ensure that its interpretation is (i) justified by an important, specific, and articulated public interest goal within its Mission; (ii) likely to promote that public interest goal; (iii) narrowly tailored to achieve that goal; and (iv) no broader than necessary to do so; and

- In any situation where one Core Value must be reconciled with another, potentially competing Core Value, the balancing must further an *important* public interest in a way that is substantially related to that interest.

Outside Counsel Comment: *We do think that it may be helpful to direct or clarify in the bylaws how the values are to be balanced against one another and implemented; for more detail, please see our comments to “Fundamental Commitments and Core Values” (13 April 2015 Discussion Draft).*

4. *Durable or Enduring Bylaws Provisions.* The CCWG-ACCT recommends that the revised Mission Statement, Fundamental Commitments, and Core Values be adopted as “durable” or “enduring” elements of the ICANN Bylaws. Any modification to these Bylaws provisions would be subject to heightened standards including, for example, community ratification or subject to community veto.

Outside Counsel Comment: *Whether kept in the bylaws, moved to the articles, or a combination of the two, any of these provision may be treated as a “durable” or “enduring” provision, which we interpret to mean as requiring broad community support to change. For a more detailed discussion, please see: our [comments and analysis regarding CCWG Accountability Mechanism WP-1A](#), discussing power of community representatives to block changes to ICANN articles or bylaws proposed by the Board; [comments and analysis regarding WP-1-5B-2](#), on preventing ICANN from imposing obligations via “Golden” Bylaws; and Section 3 and 4 of the [Revised Governance Chart sent to CCWG on Friday, April 17, 2015](#). While these analyses focus on bylaws, the same analyses would apply to provisions in the articles as well.*

Discussion

To whom is ICANN accountable? For what is it accountable? Those questions were a necessary starting point for the work of the CCWG, and the answers inform all of our recommendations. Our work on Independent Review attempts to answer the first question. The Bylaws changes recommended here are designed to answer the second. Most important, ICANN has a limited mission, and it must be accountable for actions that exceed the scope of its mission. In undertaking its mission, ICANN is also obligated to adhere to an agreed-upon standard of behavior, articulated through its Fundamental Commitments and Core Values. Taken together, the proposed Mission, Fundamental Commitments, and Core Values statement articulate the standard against which ICANN’s behavior can be measured and to which it can be held accountable. Because these Bylaws provisions are fundamental to ICANN’s accountability, we propose that they be adopted as “durable” or “enduring” Bylaws that can only be changed with the demonstrated support of the community subject to procedural and substantive safeguards.

Outside Counsel Comment: *We understand the desire of the community to limit ICANN’s powers in its quest for accountability. As noted above, we believe that fundamental purposes (including limits thereon) should be stated in the articles. At the same time, care should be taken to fully consider the disadvantages listed above to limiting ICANN’s activity to only those that are specifically enumerated. We can provide more specific recommendations when final language is agreed upon.*