

9) Items for Consideration in Work Stream 2

The CCWG-Accountability Charter states that:

In the discussions around the accountability process, the CCWG-Accountability will proceed with two Work Streams:

- Work Stream 1: focused on mechanisms enhancing ICANN accountability that must be in place or committed to within the time frame of the IANA Stewardship Transition;
- Work Stream 2: focused on addressing accountability topics for which a timeline for developing solutions and full implementation may extend beyond the IANA Stewardship Transition.

While Work Stream 2 is not necessary to be implemented or committed to before the transition takes place, the Charter insists that they should remain firmly within the scope of the CCWG-Accountability. The items listed below should therefore be considered as no less important than the Work Stream 1 items.

9.1 Commitment to Work Stream 2

Concerns were raised within the CCWG-Accountability about the incentives for ICANN to implement Work Stream 2 proposals when they are finalized after the IANA Stewardship Transition has taken place. The CCWG-Accountability recommends an interim Bylaw provision to ensure ICANN's commitment, noting that such provisions have been successfully used in the past.¹

Recommendation: The CCWG-Accountability recommends that the Board adopt a transitional provision in its Bylaws which would commit ICANN to implement the CCWG-Accountability recommendations, and task the group with creating further enhancements to ICANN's accountability including, but not limited to the following list of issues (see below). This transitional provision must be incorporated in the Bylaws as part of Work Stream 1, prior to the IANA Stewardship Transition.

¹ ICANN has, where appropriate, used transitional provisions within its Bylaws to identify issues that are necessary to address on a transitional basis, but will expire upon the occurrence of another event. The broadest use of a transitional provision was in 2002, after the large ICANN Evolution and Reform effort, which made commitments to future occurrences such as a new MoU between ICANN and a group of Regional Internet Registries at the time when new obligations would come into force for the ASO, or obligations that would be taken on by the ccNSO once formed. See <https://www.icann.org/resources/unthemed-pages/Bylaws-2002-12-15-en#XX>. There is also precedent for the use of transitional terms after the GNSO was restructured, and the Board seat selected by the At-Large Community was implemented.

The language of this transitional Bylaw provision should provide to CCWG-Accountability Work Stream 2 recommendations, when supported by Full consensus or consensus as described in the CCWG-Accountability Charter, and endorsed by the Chartering organizations, similar status to recommendations from Affirmation of Commitments Review Teams.² The Board's decision would be subject to challenge through enhanced Reconsideration and Independent Review processes.

9.2 Items for Consideration within Work Stream 2

During the course of its deliberations, the CCWG-Accountability encountered several items that it considered should be resolved as part of Work Stream 2. The list at the date of this report is as follows:

- Refining the **operational details** of Work Stream 1 proposals, including but not limited to:
 - Establishing rules of procedure for the enhanced Independent Review Process.
 - Improving ICANN's budgeting and planning process to guarantee the ability for the community to have input, and for that input to be given due consideration.
 - Defining ICANN Community Assembly practical modalities
 - Clarifying understanding of the fiduciary duties of Board Directors and related expectations concerning Director behavior for the Board
- Further assessing enhancements to **governments participation** in ICANN
- Considering the issue of **jurisdiction** as described in Section 9.3 below
- Enhancing **SO/AC accountability** (see Section 5C)
- Instituting a **culture of accountability** within the ICANN organization:
 - Limiting ICANN's ability to deny transparency and disclosure requests
 - Enhancing the Ombudsman's role and function
 - Enhancing ICANN's whistleblower policy
 - Increasing transparency about Iann interactions with governments
- Defining security **audits** and certification requirements for ICANN's IT systems;
- Considering improvements to **diversity** in all its aspects at all levels of the organization (see Section 5C).
- (ensuring that ICANN does human rights impact analyses, within its mission)

² The transitional Bylaw provisions will require the ICANN Board to consider approval and begin implementation of review team recommendations within 6 months.

9.3 Jurisdiction: a Multi-Layered Issue

Jurisdiction directly influences the way ICANN's accountability processes are structured and operationalized. The fact that ICANN today operates under the legislation of the state of California grants the corporation certain rights and implies the existence of certain accountability mechanisms but also imposes some limits with respect to the accountability mechanisms it can adopt. The topic of jurisdiction is, as a consequence, of relevance for the CCWG-Accountability. In particular, a question one may ask to frame the discussion is, "Can ICANN's accountability be enhanced depending on the laws applicable to its actions?"

Current situation:

ICANN is a public benefit corporation incorporated in California; subject to California state laws applicable U.S. federal laws and both state and federal court jurisdiction. ICANN is also a tax-exempt entity under U.S. federal tax law.

In addition, ICANN is subject to a provision in paragraph 8 of the Affirmation of Commitments signed in 2009 between ICANN and the U.S. Government, through its Commerce Department, as follows:

*8. ICANN affirms its commitments to: (a) 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; (b) **remain a not for profit corporation, headquartered in the United States of America with offices around the world to meet the needs of a global community;** and (c) to operate as a multi-stakeholder, private sector led organization with input from the public, for whose benefit ICANN shall in all events act.*

ICANN's Bylaws also state that its principal offices shall be in California as follows:

ARTICLE XVIII: OFFICES AND SEAL

Section 1. OFFICES

*The principal office for the transaction of the business of ICANN **shall be in the County of Los Angeles, State of California, United States of America.** ICANN may also have an additional office or offices within or outside the United States of America as it may from time to time establish.*

ICANN also has offices in other countries and operates in other regions of the world and is subject to the laws of the jurisdictions in which it has offices and operates.

A Multi-Layered Issue:

The CCWG-Accountability has acknowledged that jurisdiction is a multi-layered issue and has identified the following "layers":

1) **Place and jurisdiction of incorporation & operations, including governance of internal affairs, tax system, human resources, etc.**

Associated requirements:

- a) Strong corporate governance legislation, providing efficient accountability,
- b) At the same time enabling flexibility so that the multistakeholder model can be translated into this legal framework.

2) **Jurisdiction of places of physical presence**

Associated requirements:

- a) Places of physical presence need to provide stable labor legal frameworks (to hire staff)
- b) Some level of flexibility for visas (to accommodate international staff and travel by community members)
- c) Physical presence should also take into account security concerns, both for the sake of staff as well as for operations.

3) **Governing law for contracts with registrars and registries and ability to sue and be sued in a specific jurisdiction about contractual relationships**

Associated requirements:

- a) Stable and predictable legal regime
- b) Affordability of legal actions for parties other than ICANN (both in terms of costs and in terms of understanding the legal system)
- c) Balancing the need for level playing field amongst contracted parties across the globe and the necessity of each contracted party to comply with national legislation

4) **Ability to sue and be sued in a specific jurisdiction for action & inaction of staff, and for redress and review of Board Decisions, IRP, and other Accountability and Transparency issues, including the Affirmation of Commitments**

Associated requirements:

- a) On the one hand, some stakeholders consider that the ability to enforce the accountability mechanisms in front of a court are essential.
- b) On the other hand, other stakeholders do not find acceptable that the legal system of a single country would play such a role in ICANN's accountability

framework. Their requirement would be to avoid as much as possible the use of any single country's legal system.

5) Relationships with the national jurisdictions for particular domestic issues (ccTLDs managers, protected names either for international institutions or country and other geographic names, national security, etc.), privacy, freedom of expression

Associated requirements:

- a) No specific jurisdiction should be in a position to over-rule domestic jurisdictions when dealing with particular domestic issues (for example jurisdiction of incorporation interfering with a decision regarding a specific ccTLD policy).
- b) Some commenters have touched upon the possibility of tailor-made host country agreements.

6) Meeting NTIA requirements

An overarching requirement of the CCWG-Accountability is represented by the criteria set by the NTIA at the outset of the IANA Stewardship Transition.

Associated requirements:

- a) Support and enhance the multistakeholder model
- b) Maintain the security, stability, and resiliency of the Internet DNS
- c) Meet the needs and expectation of the global customers and partners of the IANA services
- d) Maintain the openness of the Internet
- e) The proposal cannot replace the NTIA role with a government-led or an inter-governmental organization solution.

Initial gap assessment based on current CCWG-Accountability proposals:

At this point of the work of the CCWG-Accountability, taking into account the comments received, the following issues have been identified for further investigation:

- **Requirement 4** (ability to sue and be sued to enforce Bylaws or accountability mechanisms): while some consider this requirement to be necessary, others would avoid as much as possible the use of any single country's legal system.
- **Trade-off between CCWG-Accountability requirements and options under California law**, particularly when discussing the community empowerment model.
- **Whether IRP decisions against ICANN would be binding despite local jurisdiction decisions.**
Requirement 3 on governing law for contracts with registrars and registries may require further investigation.

While these issues require further investigation, the CCWG-Accountability has not yet conducted a substantive examination of alternative jurisdictions that would better fit its requirements. While some commenters suggest that incorporation of ICANN under other legal systems, such as Swiss not-for-profit, would be beneficial (yet the basis for their assumption remains uncertain), further analysis and deliberation is needed on a fact-based approach to be entertained during Work Stream 2.

Next steps

Consideration of jurisdiction in Work Stream 2 will include:

- Confirming and assessing the gap analysis, clarifying all concerns regarding the multi-layer jurisdiction issue
- Identifying potential alternatives and benchmarking their ability to match all CCWG-Accountability requirements them with the current framework
- Consider potential Work Stream 2 recommendations based on the conclusions of this analysis

The timeline considered for this work is consistent with the overall approach for Work Stream 2. A specific subgroup of the CCWG-Accountability will be formed and, while reporting to the CCWG-Accountability as a whole, tasked to undertake the steps described above. Two periods of public comments are envisaged, around ICANN55 and ICANN56. Recommendations will be submitted by ICANN57.

9.4 Work Plan for CCWG-Accountability Work Stream 2

The CCWG-Accountability has already undertaken a significant amount of work to define the scope of the various Work Stream 2 items. However, it is apparent that Work Stream 2 items are, in substance as well as timing, dependent upon the completion of Work Stream 1 items. As a consequence, the adoption of a work plan for Work Stream 2 cannot be completed until the ICANN54 Dublin meeting.

The initial plan, however, includes the following key milestones:

- **October 2015 (ICANN54):** Definition of scope of work and organization into subgroups.
- **October 2015 to end of January 2016:** Drafting of proposals by subgroup, under supervision by CCWG-Accountability.
- **End of January 2016 till early March 2016:** 40-day Public Comment period, including discussions during ICANN55 in Marrakech.
- **March till mid-May 2016:** Refinement of proposals by subgroups, under supervision by CCWG-Accountability.
- **Mid-May till end of June 2016:** Second 40-day Public Comment period, including discussions during ICANN56 in Latin America.
- **By end of July 2016:** Finalize proposals and deliver to Chartering Organizations. Obtain approval and deliver proposals to ICANN Board at ICANN57.