

3- Proposed Post-Transition Oversight and Accountability Arrangements

3.1 Introduction

In the CWG's discussions a few elements regarding the transition were broadly supported:

- The current operational performance of the IANA Naming Functions is generally satisfactory to its direct customers, and the community generally believes that the current NTIA oversight arrangement has been successful in ensuring the accountability of the IANA Functions Operator in that role. As such, the objective of the CWG is largely to replicate the roles played by the NTIA in the execution and oversight of the IANA Naming Functions as faithfully as possible, while acknowledging that certain changes will be required to contractual terms and arrangements that are particular to contracts entered into with the U.S. government.
- The CWG does not believe that there is a reason to transition the IANA Naming Functions outside of ICANN concurrent with the Stewardship Transition. Maintaining this part of the status quo implies that the new arrangements post-transition should provide the possibility of replacing ICANN as the IANA Functions Operator at a later date, including by means of a Request for Proposal or other tender process.
- The proposed replacement solution should not seek to create another ICANN-like structure with associated costs and complexities.
- The proposal should not seek to replace the role of the ICANN multi-stakeholder community with respect to policy development for the Naming Community, nor to affect existing TLD policies or how they are currently applied by the IANA Functions Operator.
- The existing separation between ICANN as a policy body and ICANN as the IANA Functions Operator needs to be reinforced and strengthened.

It is important to note that many elements of this proposal are interrelated and interdependent with the ICANN Accountability Process and thus are subject to the results of the Accountability Cross Community Working Group ("Accountability CCWG"). It is generally agreed that the transition must not take place until:

- The requisite accountability mechanisms have been identified by the Accountability CCWG,
- Accountability mechanisms and other improvements that the community determines are necessary pre-transition have been put in place,
- Agreements and other guarantees are in place to ensure timely implementation of mechanisms that the Accountability CCWG decides may be implemented post-transition.

The following transition proposal rests on these elements.

TRANSITION PROPOSAL

At a high level, this proposal seeks to create four structures to replace the oversight role played by the NTIA in the execution of the IANA Naming Functions. Certain key aspects of the NTIA's current role, such as its role in approving changes to the Root Zone and its role as a backstop, are still under consideration by this CWG and may result in additions to this proposal.

- **Contract Co.** – This primary function of this entity (likely a non-profit corporation) is to be signatory to the contract with the IANA Functions Operator. This entity should be lightweight and have little or no staff.
- **Multistakeholder Review Team (MRT)** - The MRT would be a multi-stakeholder body with formally selected representatives from all of the relevant communities (exact composition TBD). The operation of the MRT would be based on the concept of maximum public transparency. The responsibilities of the MRT will include:
 - Developing the detailed contract terms for the agreement between Contract Co. and the IANA Functions Operator, based on the key contract terms proposed as part of this proposal and set forth as Annex 3.
 - Making key decisions for Contract Co. (e.g., whether or not to enter into a rebidding process for the operation of the IANA Naming Functions)
 - Conducting the IANA Functions Operator Budget Review
 - Addressing any escalation issues raised by the Customer Standing Committee (CSC) including the possibility of engaging in enforcement
 - Performing certain elements of administration (including periodic performance reviews) currently set forth in the IANA Functions contract and currently being carried out by the NTIA
 - Managing a re-contracting or rebidding process for the operation of the IANA Functions as an enforcement option or as part of a regular rebidding procedure

The CWG is in the process of discussing whether there is an additional enforcement role for the MRT related to policy implementation by the IANA Functions Operator; specifically, whether the MRT should be able to commence a proceeding before the Independent Appeals Panel.

- **Customer Standing Committee (CSC)** - While the exact composition is still to be determined, the CSC would primarily be made up of a number of representatives of registry operators, including ccTLD and gTLD registries. Input from the CSC would feed into and inform the work of the MRT. It is possible that the CSC would also include additional individuals with relevant expertise and/or liaisons (or representatives) from other SO/ACs. The CSC would:
 - Work with the MRT to establish Service Levels and Performance Indicators for the performance of the IANA Naming Functions
 - Receive reports from the IANA Functions operator including regular performance reports.
 - Review these reports against established service levels and escalate any significant issues to the MRT.

- **Independent Appeals Panel (IAP)** - The CWG recommends that all IANA actions which affect the Root Zone or Root Zone WHOIS database be subject to an independent and binding appeals panel. The Appeals Mechanism should also cover any policy implementation actions that affect the execution of changes to the Root Zone File or Root Zone WHOIS and how relevant policies are applied. This need not be a permanent body, but rather could be handled the same way as commercial disputes are often resolved, through the use of a binding arbitration process using an independent arbitration organization (e.g., ICDR, ICC, AAA) or a standing list of qualified people under rules promulgated by such an organization.

3.2 Summary of current arrangements

The following is a summary of the oversight and accountability arrangements currently in place. These are discussed in more detail in section 2B:

- **NTIA acting as the IANA Functions Contract Administrator.** For the purposes of this section, the arrangements associated with this function are further split into:
 - Contracting functions – This includes contract renewal, issuance of RFPs, defining the contract specifications, and selection of the IANA Functions Operator.
 - Administration functions – This includes all other functions related to administration of the IANA Functions Operator contract such as administering the Service Level Agreements (SLAs) component of the IANA contract.
- **Independent Review of Board Actions** – The ICANN Bylaws provide for a limited Independent Review of Board Actions. This applies to the delegation and re-delegation of ccTLDs, which require ICANN Board approval prior to being submitted to the NTIA. The IRP also applies to Board actions regarding gTLDs such as policy approval and implementation plan approval.
- **NTIA acting as the Root Zone Management Process Administrator** – This role can be described as the “Final Authorization Authority” for changes to the Root Zone File and Root Zone WHOIS for the Top Level Delegations.
- **Applicability of local law for the administration by the IANA Functions Operator of ccTLD’s associated with a specific country or territory** – Section 1.2 of the GAC Principles 2005 describes this quite well: *“The main principle is the principle of subsidiarity. ccTLD policy should be set locally, unless it can be shown that the issue has global impact and needs to be resolved in an international framework. Most of the ccTLD policy issues are local in nature and should therefore be addressed by the local Internet Community, according to national law”*.
- **Additional sources of accountability for a limited number of ccTLDs** - There are additional sources of accountability for the limited number of ccTLDs that have formal Sponsorship Agreements or Frameworks of Accountability with ICANN. These types of agreements have independent dispute resolution clauses referring to the International Chamber of Commerce ("ICC") to settle disagreements between the parties which are applicable to all decisions, actions, or inactions by the IANA Functions Operator with respect to such ccTLDs.

3.3 Continuation of existing arrangements

- Independent Review of Board Actions – the CWG may propose that this becomes binding under certain circumstances directly related to IANA; no other changes proposed.
 - This arrangement is independent of the NTIA functions and can continue without NTIA involvement in IANA Functions. The independent review of Board actions is applicable to all ICANN Board actions which include non-DNS decisions and as such may be beyond the scope of this CWG’s charter. However, in the absence of NTIA oversight and accountability, the CWG is considering whether this review should be binding with regard to delegation/redelegation decisions, and possibly with regard to other decisions directly affecting IANA or the IANA Functions. The CWG will propose arrangements to ensure that all of the IANA Functions Operator’s actions related to TLDs are subject to a similar process.
- Applicability of local law for the administration by the IANA Functions Operator of ccTLD’s associated with a specific country or territory – no changes proposed.
 - This arrangement is independent of the NTIA functions and can continue without NTIA involvement in IANA Functions. It is also beyond the scope of the CWG charter to propose modifications to the policies applied to ccTLDs by the IANA Functions Operator.
- Additional sources of accountability for a limited number of ccTLDs – no changes proposed.
 - This arrangement is independent of the NTIA functions and can continue without NTIA involvement in IANA Functions. These additional sources of accountability are part of formal contractual type arrangements between specific ccTLDs and ICANN and as such are beyond the scope of the CWG charter. As mentioned in the Independent Review of Board Actions the CWG will propose changes to the current arrangements to provide similar arrangements as these additional sources of accountability for all TLDs.

3.4 Changes to existing arrangements

The CWG’s proposed changes to existing oversight and accountability arrangements performed by the NTIA are based on the concept that the individual arrangements do not all have to be carried out by a single entity that would act as a wholesale replacement of the NTIA in these matters. Rather, we envision that a different group or entity would carry out each individual arrangement, replacing the NTIA. These groups or entities would each have a limited and clearly defined mandate and would be interrelated at the functional level where the overall objective is to ensure effective replacement of the NTIA, while limiting the likelihood of capture or of duplication of the roles of the existing ICANN-multi-stakeholder model. The IANA Functions Contract between ICANN and the NTIA would be replaced by a contract between ICANN and an independent entity.

- 3.4.1 NTIA acting as the IANA Functions Contract Administrator – contracting functions

- The CWG suggests replication of the existing arrangement, with a formal contract between the IANA Functions Operator (currently ICANN) and an independent entity (currently the U.S. Department of Commerce/NTIA). Because the NTIA will no longer be the IANA Functions Contract Administrator, it will be replaced by another entity as party to a contract with the IANA Functions Operator. The CWG is proposing that this entity would likely be a newly formed non-profit corporation (“Contract Co.”). The primary function of this new corporation would be to enter into a contract with the IANA Functions Operator for the IANA Functions. As such, Contract Co. needs to be a legal entity capable of entering into contracts. Contract Co. could also be used as a vehicle to enforce the provisions of its contract with the IANA Functions Operator if advised to do so by the Periodic Review Team (see below). This entity would be lightweight, with little or no staff, and would take its direction in all matters exclusively from the Multistakeholder Review Team, which is described in the next section. The role of such staff (if any) would be limited to taking care of clerical functions and carrying out instructions of the MRT. The organizational documents for Contract Co. (e.g., articles of incorporation, bylaws) would carefully circumscribe and limit the purpose and scope of the company and the powers of the directors, in order to minimize the possibility of “capture” of Contract Co or actions by Contract Co. beyond its defined scope.
- 3.4.2 NTIA acting as the IANA Functions Contract Administrator – administration functions. This arrangement will be further split into two parts, carried out by the Customer Standing Committee (CSC) and the Multistakeholder Review Team (MRT).
 - 3.4.2.1 Customer Standing Committee - The CWG is proposing that the CSC take on the NTIA’s responsibilities with respect to managing the IANA Functions Operator’s reports on performance. The CSC would take on certain duties currently performed by the Contracting Officer (CO) or Contracting Officer's Representative (COR) per the NTIA Contract with the IANA Functions Operator. The CSC would be primarily made up of a number of representatives of registry operators; it is possible that liaisons or representatives from other SO/ACs, as well as other individuals with relevant expertise, will also form part of the CSC (exact composition and manner of selection TBD). Input from the CSC would feed into and inform the work of the MRT. The CSC would receive and review IANA Operator reports and escalate any significant issues to the MRT. Specifically, the CSC would take on the duties currently performed by the CO or COR for the following items currently required by the NTIA Contract and expected to be required by the post-transition IANA contract:
 - C.2.9.2.c (receive and review) Delegation and Redelegation of a Country Code Top Level-Domain (ccTLD) reports
 - C.2.9.2.d (receive and review) Delegation and Redelegation of a Generic Top Level Domain (gTLD)) reports
 - C.4.2 (receive and review) Monthly Performance Progress Report

- C.4.3 (monitor and review performance of) Root Zone Management Dashboard
 - C.5.1 Audit Data – (receive and review annual report)
 - C.5.2 (receive and review) Root Zone Management Audit Data
 - C.5.3 External Auditor (ensure performance of, receive and review results)
- 3.4.2.2 Multistakeholder Review Team (MRT) - The CWG is proposing that the MRT take on a number of the NTIA's responsibilities identified in the IANA Functions Contract which are not covered by the CSC, as well as several additional responsibilities. The MRT would be a multi-stakeholder body with seats allocated to all relevant communities (exact composition TBD). Representatives would be formally selected by their communities. Representatives to the MRT would not be paid. It is expected that the PRT would likely meet in conjunction with ICANN meetings to minimize costs and that remote participation options would be provided. The MRT would meet annually to review overall IANA operator performance and other concerns. It would also be convened on an ad hoc basis to address issues as they are escalated by the CSC. The operation of the MRT would be based on the concept of maximum public transparency. The responsibilities of the MRT will include:
 - Making decisions for Contract Co. which would include:
 - Contracting decisions, including:
 - Identifying terms for the agreement with the IANA Functions Operator for the execution of the naming-related functions;
 - Managing a rebidding process in the case of performance deficiencies or at regular rebidding intervals;
 - Selection of the IANA Functions Operator for naming-related Functions pursuant to any rebidding process;
 - Renewal or termination of the IANA Functions contract for naming-related functions and;
 - Selection of professional advisors to draft / modify contract language
 - Budget Review
 - The MRT would meet annually with ICANN staff during the course of the development of ICANN's annual budget to review and discuss ICANN's proposed budget for the IANA Naming Functions and to discuss funding for improvements to the IANA Naming Functions and the introduction of new services, as deemed necessary by the MRT.
 - Addressing any escalation issues raised by the CSC.

- Communicating with the IANA Functions Operator and/or directly affected parties to address such issues; and
 - Engaging in other enforcement behavior up to and including initiating a termination for breach and/or rebidding procedure.
- Performing certain elements of administration currently set forth in the IANA Functions contract and currently being carried out by the NTIA.
 - C.2.12.a Program Manager (evaluation of).
 - C.3.2 Secure Systems Notification (evaluation of).
 - C.4.1 Meetings – (perform) Program reviews and site visits shall occur annually.
 - C.4.5 (participate in the development of, receive and review) Customer Service Survey (CSS)
 - C.4.4 (receive and review) Performance Standards Reports
 - C.4.6 (receive and review) Final Report
 - C.4.7 (provide) Inspection and Acceptance
 - C.5.1 Audit Data – (receive and review annual report)
 - C.5.2 (receive and review) Root Zone Management Audit Data
 - C.5.3 External Auditor (ensure performance of, receive and review results)
 - C. 6 Conflict of interest requirements (annual validation that the contractor is meeting stated requirements)
 - C. 7 Continuity of Operations (annual validation that the contractor is meeting stated requirements)
- 3.4.3 NTIA acting as the Root Zone Management Process Administrator – Currently IANA must submit a request for all changes to the Root Zone or Root Zone WHOIS database¹ to the NTIA. NTIA verifies the request and then authorizes the Root Zone Maintainer to make the change. The CWG is considering whether to replace this process with the following:
 - 3.4.3.1 Public posting of all IANA change requests
 - IANA will be required to publicly post all requests for changes to the Root Zone File or the Root Zone WHOIS database as a notification that a change is being made. IANA will also continue to be required to produce and publish Delegation and Redelegation Reports.
 - 3.4.3.2 Independent certification for delegation and re-delegation requests
 - The CWG is considering replacing the authorization role, at least with regard to ccTLDs, with a written opinion from counsel (independent of

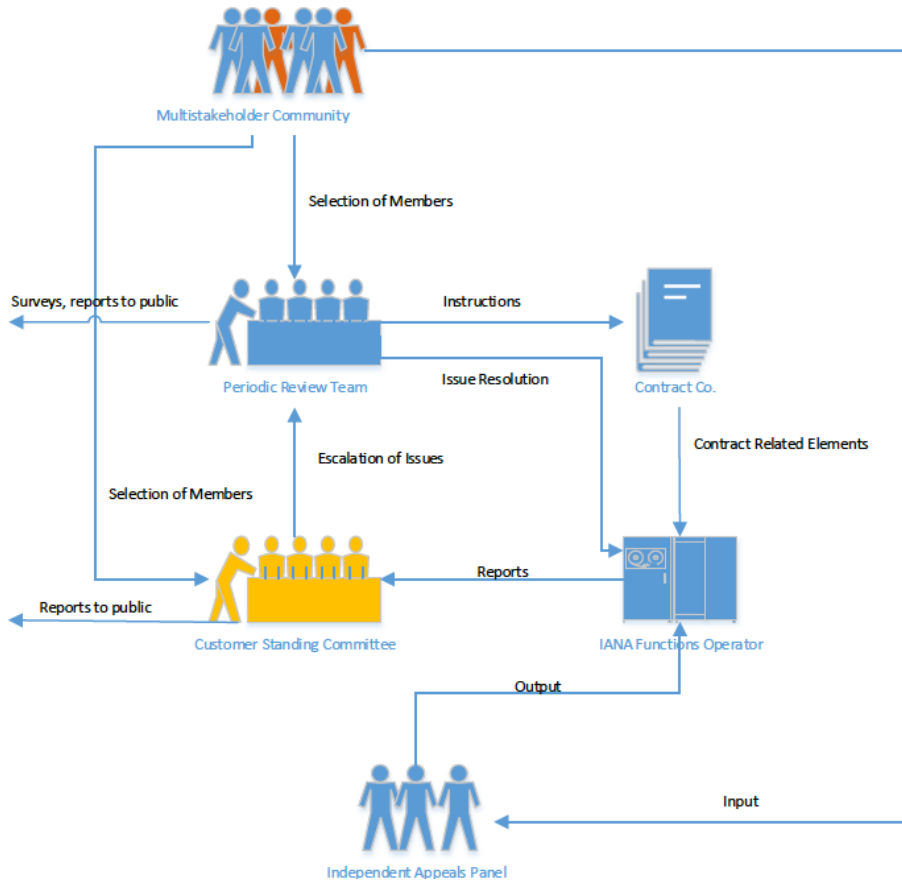
¹ From the Operator Technical Proposal Volume 1 (<https://www.icann.org/en/system/files/files/contract-i-1-31may12-en.pdf>)

ICANN) that each delegation and re-delegation request meets the policy requirements cited in the publicly posted reports. The CWG is still in the process of discussing whether and how to replace the authorization role currently played by the NTIA with respect to delegation and redelegation requests, especially those for gTLDs.

- Independent Appeals Panel. The CWG recommends that all decisions and actions (including deliberate inaction) of the IANA Functions Operator that affect the Root Zone or Root Zone WHOIS database be subject to an independent and binding appeals panel. The Appeals Mechanism should also cover any policy implementation actions that affect the execution of changes to the Root Zone File or Root Zone WHOIS and how relevant policies are applied. Where disputes arise as to the implementation of “IANA related policies.” By way of example, this mechanism could be used in disputes over the consistency of ccTLD delegation or re-delegation decisions with accepted policy and would provide the affected parties recourse to an Independent Appeals Panel. Appeals would be available to customers of IANA, and likely to other parties who feel that they were affected by an IANA action or decision. The CWG generally believes that this panel need not be a permanent body, but rather could be handled the same way as commercial disputes are often resolved, through the use of a binding arbitration process, an independent arbitration organization, such as the ICC, ICDR or AAA, or a standing list of qualified panelists under established rules promulgated by such an organization. In any case, the CWG recommends that a three person panel would be used, with each party to a dispute choosing one of the three panelists, with these two panelists choosing the third panelist.

Functionally and conceptually these are represented in the following diagram, and in the Flow Charts attached as Annex 4:

Commentaire [GS1]: BERNIE: Note reference to put the Flow Chart into Annex 4.



- 3.4.4 IANA Functions Contract between ICANN and the NTIA
 - The IANA Functions Contract between ICANN and the NTIA would be replaced by a contract between ICANN and Contract Co. As a general matter, the provisions of the agreement setting forth the performance requirements of ICANN and IANA would be retained. (A number of these continuing provisions have been referred to above.) In contrast, provisions unique to contracting with the United States Government would not be retained. The CWG will create a term sheet with key provisions required to be in the first contract between ICANN and Contract Co. A high level summary of many key provisions under consideration can be found in Annex 3 to this document. The CWG or the MRT will be responsible for drafting and entering into the first post-transition IANA Contract

based on these key provisions. Future (post-transition) revisions to and evolution of the contract, when and where appropriate, will be the responsibility of the MRT.