

## 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.<sup>1</sup>

**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.

The language of this transitional Bylaw provision should provide to CCWG-Accountability Work Stream 2 recommendations, when supported by Full consensus or consensus as

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<sup>1</sup> 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.

described in the CCWG-Accountability Charter, and endorsed by the Chartering organisations, similar status to recommendations from AoC Review Teams.<sup>2</sup> The Board's decision would be subject to challenge through enhanced Reconsideration and Independent Review processes.

## 9.2 Distinction between Work Stream 1 Implementation and Work Stream 2

Refinement and implementation of the operational details of Work Stream 1 proposals should not be confused with work stream 2 items. WS1 refinements are operational in nature and will be finalized within implementation projects, under supervision from the CCWG-Accountability.

On the other hand, Work stream 2 items consideration by the CCWG-Accountability will include deliberations about appropriate recommendations, which will be subject to further public comment periods and consensus assessments.

Work stream 2 items identified for further work are focused on key aspects of the mutual accountability framework :

- a. Transparency (DIDP enhancements, ~~icann interactions with Governments,~~ Whistleblower policy)
- b. SO/AC accountability
- c. Diversity
- d. Jurisdiction (see below)
- e. ~~Placeholder human rights~~
- f. e.

## 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 and 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.

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

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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, the main concern to be investigated within work stream 2 relates to the influence that ICANN's existing jurisdiction may have on the actual operation of policies and accountability mechanisms being proposed. This refers primarily to the process for the settlement of disputes within the ICANN model. This discussion involves the choice of venue and of the applicable laws but not necessarily the location where ICANN is incorporated.

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.

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#### Next steps

Consideration of jurisdiction in Work Stream 2 will focus on the above concern (settlement of dispute jurisdiction issues) and 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:

- **March 2016 (ICANN55):** Definition of scope of work and organization into subgroups.

- **March 2016 to end of June 2016:** Drafting of proposals by subgroup, under supervision by CCWG-Accountability.
- **June 2016 till early October 2016:** 40-day Public Comment period, including discussions during ICANN56 and/or ICANN 57.
- **October till mid-January 2017:** Refinement of proposals by subgroups, under supervision by CCWG-Accountability.
- **Mid-January till March 2017:** Second 40-day Public Comment period, including discussions during ICANN58.
- **By end of June 2017:** Finalize proposals and deliver to Chartering Organizations. Obtain approval and deliver proposals to ICANN Board at ICANN58.