

WA2: Review Input from Public Comment and Categorize into Work Streams 1 & 2 + ATRT ref

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Cross-Community Working Group on Enhancing ICANN Accountability

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

Proposed rationale for designating Work Streams: (updated to reflect chairs' proposal on 5-Jan-2015)

WS1 mechanisms are those that, when in place or committed to, would provide the community with confidence that any accountability mechanism that would further enhance Icann's accountability would be implemented if it had consensus support from the community, even if it were to encounter Icann management resistance or if it were against the interest of Icann as a corporate entity.

~~Work Stream 1 is designated for accountability enhancement mechanisms that must be in place [or firmly committed] before IANA transition occurs.~~

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

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

Accountability Suggestions from public comments and posts	Supported by	WS	ATRT Ref.
<i>1. Mechanisms giving the ICANN community ultimate authority over the ICANN corporation. Most of these are initially designated as WS1, since community Members need the leverage of IANA transition to obtain these Bylaws changes.</i>			
Community Members as ultimate authority[1]. Amend ICANN bylaws to recognize permanent cross-community Members (ALAC, ccNSO, GAC, SSAC, NRO, RSSAC, IETF, ASO, and each Constituency) with authority in these specific areas:	GNSO Joint Statement, BC, ITIC, B.Carpenter, CNNIC, Siva, TPI, Verizon, NCSG, Just Net, E.Morris, Izumi	WS1	-
Appoint members of <i>Affirmation</i> review teams	BC, Spain, Avri Doria	WS1	
Review any board decision. Non-approval would send decision back to bottom-up policy development process.	BC, ITIC, Heritage, SIIA, EC, C. Gutiérrez	WS1	-
[Alt:] Refer any board decision to an <u>independent</u> review panel. The CWG believes this should be binding for IANA functions.	BC, ITIC, Heritage, SIIA, EC, Mueller, CWG	WS1	(ATRT2 9.2)

Approve changes to ICANN bylaws or Articles, with 2/3 majority	BC, ITIC, SIIA, Huttly	WS1	-
Approve annual proposed ICANN budget [vote threshold?]	BC, ITIC, USCIB	WS1	-
Recall one or all ICANN Board members [vote threshold?]	BC, Avri Doria, NCSG	WS1	-
Bring the <i>Affirmation of Commitments</i> (incl the Reviews) into the ICANN bylaws, with these amendments:	BC, USCIB, SIIA, Verizon, Morris	WS1	-
<i>Affirmation</i> Review Teams get access to all internal documents	Doria, MPAA, CIS, Morris	WS2	
<i>Affirmation</i> Accountability & Transparency Review Team could recommend sunset of original reviews and create new reviews	BC, USCIB	WS2	
Change <i>Affirmation</i> reviews from “in the public interest” to “for protection and advance of human rights and internet freedoms”	NCSG, Robin Gross [Opposition noted]	WS2	-
Change bylaws for Reconsideration Process: trigger when board acts arbitrarily or capriciously; make decisions subject to Independent Review	Google	WS1	-
Create a contract between ICANN and Registries & Registrars, with Registrants as 3rd party beneficiaries. Contract lets ICANN impose rules on others only when supported by consensus of affected parties. Disputes go to independent arbitration panel that could issue binding decisions.	David Johnson	WS1	-
Replace <i>Affirmation</i> with accountability contract between ICANN and ‘Contract Co.’	Guru Acharya	WS1	-
Independent certification for delegation & re-delegation requests	CWG	WS1	-
Independent Appeals Panel for contested root zone changes & WHOIS	CWG	WS1	-

Accountability Suggestions from public comments and posts	Supported by	WS	ATRT Ref.
<i>2. Mechanisms to restrict actions of the board and management of the ICANN corporation. Most of these are initially designated as WS2, since the Members could reverse board or management decisions if Members are empowered in WS1 (above).</i>			
Require supermajority for Board to approve action despite advice to the contrary from ACs or significant subsets of SOs. Izumi believes this will take time, so should be in WS2	ISPCP, ITIC, Izumi	WS1	-
Ensure that the ICANN Board can be held to its Bylaws, with effective remedy if breach found by independent adjudicator [Alt: found by the community].	Malcolm Huttly, Seun Ojedeji	WS1	

Prevent ICANN Board redefining mission/scope in Bylaws without community consensus	Malcolm Hutton	WS1	-
Ensure ICANN Board does not act "ultra vires", and stays within assigned mission and scope. e.g., prevent scope creep in policies imposed via RAA.	Malcolm Hutton, BC, TPI	WS1	
Prohibit ICANN from entering agreements that impose obligations unrelated to DNS management	Heritage	WS2	-
Require supermajority board vote and 2/3 community vote to change ICANN not-for-profit status or change ICANN's state of incorporation	USCIB, Verizon, SIIA [opposition noted]	WS2	-
Before leaving California, ICANN must show benefits exceed costs	SIIA, USCIB	WS2	-
Broadly expand grounds on which ICANN decisions and operations can be challenged; lower threshold to succeed in a challenge	Spain, Heritage	WS2	
<p><i>3. Mechanisms to prescribe actions of the ICANN corporation. Most of these are initially designated as WS2, since the Members could reverse board or management decisions if Members are empowered in WS1 (above). For example, a bottom-up consensus process to change ICANN bylaws might be rejected by ICANN board, but the Members could then reverse that decision and force the change.</i></p>			
Accountability Suggestions from public comments and posts	Supported by	WS	
Require a defined notion of consensus for any GAC advice that would need to be given deference by the ICANN board. Izumi believes this will take time, so should be in WS2	Heritage, Izumi, BC Stress Test #6	WS1	
Let local courts hear complaints on free expression, security, and privacy	NCSG [opposition noted]	WS2	-
Establish an independent inspector general for ICANN	SIIA	WS2	-
Commit the ICANN organization to maintain freedom of expression	Heritage, NCSG	WS2	-
Require registry and registrar agreements be equitable and non-discriminatory	ITIC, Heritage	WS1	-
Require supermajority of board to [increase] change registry or registrar fees [Members could reverse]	Heritage	WS1	-
Create channels for inquiry/complaint/suggestions	Internet Society of China	WS2	(ATRT2 9.3)
Recall mechanism for any board member selected by an AC/SO	Avri Doria	WS2	-
Recall mechanism for SO Council and AI AC member selected	Avri Doria	WS2	-

Recall mechanism for SO Council and ALAC member selected by NomCom	Amit Doria	WS2	-
ICANN to engage with all governments as equal community stakeholders	Fiona Asonga	WS2	-
Allow GAC to select 2-4 voting ICANN board members	Spain [opposition noted]	WS2	-
Give Ombudsman ability to refer a matter to external body	NCSG [opposition noted]	WS2	-
Change bylaws to establish term limits for ICANN senior officers	Heritage	WS2	-
Change bylaws to require that ICANN remain subject to US Law. Izumi notes this should be WS2	Heritage [opposition noted]	WS1	-
Explore incorporation as international org under international law	NRO [opposition noted]	WS2	-
Limit ICANN executive function to implementation of policies	ITIC, Siva	WS1	-

Accountability Suggestions from public comments and posts	Supported by	WS	ATRT Ref.
Require ICANN to operate under rule of law in jurisdictions that support effective redress	MPAA [opposition noted]	WS1	
Require one-third of board members to devote full time to ICANN	Spain	WS2	-
Separate policy functions from root zone management functions	Heritage, Google, USCIB, Mueller, Verizon	WS1	-
Allow NomCom to select and retain Ombudsman	Morris	WS2	-
Have Transparency International conduct audit of all SOs and ACs	Morris [opposition noted]	WS2	-
Severely limit ICANN ability to deny disclosure/transparency requests	SIIA, Siva	WS2	(ATRT1 7.1, 7.2, ATRT2 5)
ICANN to undergo annual audit for transparency and achievement of goals	ITIC, Heritage, Google, Spain	WS2	Berkman 2010
Make all board deliberations transparent (with minimal redaction)	Siva	WS2	(ATRT2

make all board deliberations transparent (with minimal redaction)	Siva, Robin Gross, Internet Society of China, BC	WS2	(ATRT2 9.4)
Require all Supporting Organizations, including Numbers and Protocol entities, to have accountability and transparency mechanisms aligned to those of ICANN	Morris, Fiona Asonga, Carlos Gutiérrez	WS2	-
Improve mechanism to obtain transparency of ICANN documents (e.g. FOIA)	USCIB, CIS, Verizon	WS2	(ATRT2 9.4)
Establish an Open Data Policy and develop an Open Data action plan, where ICANN documents are open by default.	ITIF, W. Donkor	WS2	(ATRT2 9.4)
<u>Equal footing of stakeholders</u> : rethink the separation of SOs and ACs. At least Users (if represented in ALAC) and Governments (GAC) deserve equal footing with commercial interests in policy making.	Carlos Gutiérrez	WS2	-
<u>Equal footing in policymaking</u> : differences between contracted and non-contracted parties are blurred with new gTLDs. The representativeness of non-commercial Stakeholders, vis a vis ALAC and GAC remains a question. Academic accreditation does not seem related to the issues discussed in the IANA Stewardship transition and some of the newer PDPs. If there is equal footing, the GNSO houses have to be rebalanced as per above	Carlos Gutiérrez	WS2	-
<u>Structural and/or Organizational separation</u> between a) Policy Making, b) Operations and c) Compliance functions.	Carlos Gutiérrez	WS2	-

Links to sources cited in the table:

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

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

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

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

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

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

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

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

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

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

CDT Endorsement of ITIC principles, 4-Aug-2014

ISPCP comments on proposed Bylaws change 14-Sep-2014

Malcolm Hutty, comments at ICANN51, Enhancing ICANN Accountability session 13-Sep-2014

Op-Ed from ITIF regarding permanent cross-community group as ultimate authority, 17-Dec-2014

Blog by David Johnson, 19-Dec-2014

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

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