CCWG Accountability
Mailing List Discussions
Week: 27 February – 5 March 2015

CCWG accountability (**archives**)

- **Legal Counsel**
  - Additional questions for the independent legal counsel were discussed. The importance of jurisdiction, about the legal foundation of the relationship between the IANA Function Manager, and any implications of ICANN falling under antitrust legislation we also mentioned.
  - Comments were circulated in response to a proposed draft of questions
  - The Team was asked to narrow down questions so that the advice would be as cost-effective and concrete as possible.

- **Capture**
  - A reference was made to a US Senate Committee hearing on the Dept of Commerce 2016 Budget where a Senator raised concerns about the possible capture of ICANN by governments in the long term and requested that a key goal of the transition must be protecting ICANN from any possible capture. Noted that the issues of capture by government or any interest falls under the CCWG remit and would need to be addressed as part of Work Stream 1.
  - It was observed that four accountability purposes have been defined: 1) Comply with its own rules and processes; 2) Comply with applicable legislation, in jurisdictions where it operates; 3) Achieve certain levels of performance as well as security; 4) Ensure decisions are for benefit of the public, not just for a particular set of stakeholders and that capture fits in purpose 4.

- **Recalling Board Members Individually**
  - Concerns were raised that allowing segments of the community to recall "their" Board member might move away from the objective of ensuring that Board members primarily focus on the global public interest. This also presented the risk of making the board behave in a political manner rather than focusing on the global public interest. A reference to the Strategy Plan was made.
  - It was observed that the Ombudsman has no jurisdiction on issues in relation to membership of Board, the intent was to protect the Directors from possible political action. The question of Ombudsman investigations related to diversity issues or decisions was raised.

- o It was noted that the Board has the power to remove a director with a ¾ majority vote and that the Board sets clear expectations through the Code of Conduct.
- o The potential of recall was suggested as a means to ensure Board members do not lose touch with their sending organization.
- o While some believe SO/ACs should be able to set their own threshold for recall terms, others called for objective standards, public interest being one. This led to a discussion on who sets standards for public interest.
- o A contributor noted removing a Director should be as difficult as the process of selection and election. Processes should be documented and be made by the same group (current incumbents) making the selection.
- o A supermajority should be required.
- o With respect to NomCom appointed Board members, while there is a belief NomCom should be in a position to remove them, it is also argued that there should be a mechanism that requires the overall community to act instead of NomCom. It was suggested that NomCom secrecy also result in a lack of transparency and that it would create an incentive for NomCom to appoint people who might be more responsive to the community than otherwise.
- o There was some discussion of the merits of Board members being in regular communication with their community to explain/defend their votes.
- o A reference was made to recall elections in the U.S.

- **Other Forms of Accountability**
  - o Based on and article about a recent ICANN security breach failure and ICANN's response, a contributor raised the question: is "accountability" focused on the governance level or on operations? Is a staff level execution failure something the community or customers have accountability tools to deal with? It was noted that the Board should hold staff accountable and if there is a failure to do, some mechanism such as review and redress would help. Another contributor argued that due to the monopolistic (or sole source) environment, leaving these types of issues to the Board without other meaningful redress does not provide adequate accountability, and there is little incentive for the Board to act. The organization might be held accountable for the actions/inactions of staff.

- **Stress Tests**
  - o Additional stress tests were circulated.
  - o In response to stress test #24, a contributor commented that 1) NTIA is ensuring that the IANA technical functions are performed to the standard expected of the community; 2) NTIA does not have any over-ride/veto powers on the strategic plan; 3) the US Government is a stakeholder in the ICANN community in the development of the strategic plan like everyone else. Others believe the abstract "backstop" role that NTIA played is part of what needs to be replaced and that it should not be taken off the table. It

was further argued that US control conferred influence upon ICANN that went far beyond performance of IANA functions and that it is up to the community to determine what is required to replace the constraining effect and to determine which of those new accountability measures must be finalized, accepted, and implemented in advance of the transition being consummated.

- o In response to stress tests #1 and #2 about change and redelegation authority for the rootzone, it was noted that separation or resort to a backup provider should be seen to be last resort /nuclear options.
- o In response to stress #15, a contributor called for caution about proposed measures and believes the community should be given the ability to decide, in the future, which jurisdiction better serves the purpose of ICANN.

- **Impact of Accountability Measures**
  - o It was commented that the different accountability mechanism proposals should be presented with an assessment of their impact on the "power structures" within ICANN and on the appropriate balance between parts of the community, most conductive to serve the global public interest.

- **Timeline**
  - o Given the absence of legal advice the feasibility of having a draft ready for public comment by 6 April was questioned.

- **Independent Review Panel – case and implications**
  - o The final declaration in the independent review proceeding filed by Booking.com was circulated.
  - o A contributor noted that it is a good example of the bounds of the current system. The panel shared a lot of the concerns expressed by the challenging party but was powerless to do anything due to the limited mandate of the IRP.
  - o These accountability mechanisms provide no way to force a reversal of a decision and ICANN's accountability processes are only capable of looking at process rather than the correctness of decision.
  - o There is wide belief that the current reconsideration process tends to focus on whether the ICANN policies and guidebook (New gTLDs) were followed and does not allow examination on the merits of the case.
  - o Would it be beneficial to set up a quasi-judicial system within ICANN with a level of review or appeal? Or would harmonizing all of the existing review systems so that there is a common procedure and a review/appeal level?
  - o There was a call for a dispute resolution system that values each case based on its individual parameters and a suggestion to 'copy' the WTO dispute settlement procedure. WTO caveats were shared.
  - o It was suggested that an useful exercise for the CCWG may be to examine the Booking.com IPR and to consider what recourse mechanisms the CCWG

believes should have been available to any of the relevant parties and at what times during the process. This may help clarify the difference between (and community desire for) recourse mechanisms that test policy decisions, decisions of independent panels, decisions of the Board, etc.

- **Jurisdiction**
    - It was observed that the choice of jurisdiction is important to create a stable and predictable legal regime for contracted parties. If the legal context changes, accountability measures may not fit properly.
    - References were made to Fadi Chehadé's statement on jurisdiction at a recent Senate hearing.
    - Reference was made to ICANN analysis establishing a new entity in certain European countries.
    - The AoC sets an expectation that ICANN will be incorporated in the U.S., and it has been expected that the CCWG may suggest moving the AoC obligations into the Bylaws.

- **Other Links**
    - CWG draft - http://mm.icann.org/pipermail/accountability-cross-community/2015-March/001443.html
    - Problem Statement & definitions - http://mm.icann.org/pipermail/accountability-cross-community/2015-March/001467.html
    - Article "US election could triggle battle over Internet governance" - http://mm.icann.org/pipermail/accountability-cross-community/2015-March/001472.html

WP2 – Review & Redress (**archives**)

- A contributor encouraged the WP to review work of the Accountability Structures Expert Panel.
- A list of work items and principles was circulated.
- A list of questions was put forward to kick off independent review discussion.

WP1 – Community Empowerment (**archives**)

- An initial draft on mechanisms for the removal of ICANN Board Members was circulated. 1) a high level threshold for a recall need to be defined, using 4 accountability purposes; 2) Election/appointment is for replacement of the recalled director should be done by who appointed the recalled director; 3) The replacement should be done as soon as the recall is decided to avoid empty chairs. A contributor suggested that the entire community recall NomCom appointees. Examples of how

other organizations go about spilling boards was introduced. It was observed that the supermajority for removal of all Board would be a safety net.

- A work status document was shared on the link.
- A document on important AoC reviews into Bylaws was circulated.

Legal Subteam (archives)

- A contributor objected to international organization privileges and immunities and noted that ICANN is subject to jurisdiction of countries where it does business.
- It was observed that privileges and immunities can be restricted in various levels.