

Scope, Powers and Mechanisms Working Paper

Draft 2, 7-Feb-2015

Note: the first version of this paper was called “Scope, Measures and Mechanisms” and circulated on 5 February 2015.

Scope of this Working Party

Work Party 1 has been tasked to consider proposed **powers** for the community to hold ICANN to account, and to develop a consensus on the most appropriate **mechanisms** (or structures) that would allow the community to exercise these powers. In doing so it will set out the necessary changes that would be required (e.g. bylaws changes) to deliver these.

From the meeting of the CCWG at Frankfurt in January, there was agreement on the requirements that fall into the category of Community Empowerment and are the subject of this Working Party’s work:

Approval of key decisions: (Work Stream 1)

- Changes to ICANN Bylaws and Articles of Incorporation
- Board or management action in conflict with Bylaws or Articles of Incorporation
- Budget and Strategic Plan

Build on AoC (Affirmation of Commitments) Reviews:

- Merge AoC into the ICANN Bylaws (Work Stream 1)
- Ability to sunset review teams and launch new ones
- Community appoints Affirmation review team members
- Enforcement of recommendations from Affirmation reviews

Direct the Board w/r/t governance & accountability changes:

- Ensure that Work Stream 2 accountability enhancements are implemented
- “Transition the ATRT”

Enhance the way Board and SO/AC are working

Prevent ICANN from acting outside its mission: (Work Stream 1)

- Clarify ICANN’s limited technical mission
- Prevent ICANN from imposing obligations on others unless needed to continue operation of DNS

Community to appoint the Ombudsman (Work Stream 2)

Remove ICANN board director(s) (Work Stream 1)

Powers for the Community

Drawing on the previous inventory document and discussions in the CCWG, below is a table of possible powers that the community would have, organized as per the summary above. A threshold question is how the 'community' could be represented and empowered to override decisions of the ICANN board - that is the discussion in the next section.

Community Powers for consideration	WS1/2
Approval of key decisions: (Work Stream 1) <i>The ability to block the ICANN Board or management on specific topics as listed.</i>	WS1
Changes to ICANN Bylaws and Articles of Incorporation In Bylaws or Articles, add new power for community representatives (Members, CCWG, etc.) to block the ICANN board from adopting a proposed change to ICANN Bylaws or Articles of Incorporation. By supermajority or simple majority vote?	WS1
Board or management action in conflict with Bylaws or Articles of Incorporation In Bylaws or Articles, add new power for community representatives (Members, CCWG, etc.) to challenge a board for management decision that would be conflict with ICANN Bylaws or Articles of Incorporation. By supermajority or simple majority vote? Should this vote trigger an Independent Review Panel?	WS1
Budget and Strategic Plan In Bylaws or Articles, add new power for community representatives (Members, CCWG, etc.) to block the ICANN board from adopting a proposed budget or strategic plan. By supermajority or simple majority vote?	WS1
Build on AoC (Affirmation of Commitments) Reviews: <i>Transferring the AoC approach into ICANN (including ATRT processes) on a durable basis.</i>	
Merge AoC into the ICANN Bylaws In Bylaws or Articles, incorporate commitments and review teams currently required in the AoC	WS1
Ability to sunset review teams and launch new ones In Bylaws or Articles, empower community representatives (Members, CCWG, etc.) to sunset required reviews and create new reviews.	WS2
Community appoints Affirmation review team members In Bylaws or Articles, require that when formal reviews are initiated, empower community representatives (Members, CCWG, etc.) to designate members of the review teams. This is presently controlled by the ICANN CEO and GAC Chair.	WS2
Implementation of recommendations from Affirmation reviews In Bylaws or Articles, empower the community (members, AC/SOs etc. as per the mechanisms) to require the Board to implement, and amend or accelerate implementation of, a previously approved recommendation from an ATRT.	
In Bylaws or Articles, give Review Teams access to all ICANN internal documents	
Direct the Board w/r/t governance & accountability changes:	
Ensure that Work Stream 2 accountability enhancements are implemented	

Community Powers for consideration	WS1/2
Enhance the way Board and SO/AC are working	
<i>Summary</i>	
[not sure about this one]	
Prevent ICANN from acting outside its mission: (Work Stream 1)	
Clarify ICANN's limited technical mission	
Prevent ICANN from imposing obligations on others unless needed to operate DNS Create an Accountability Contract between ICANN and Registries, Registrars, and Registrants. Contract lets ICANN impose rules on others only when supported by consensus of affected parties and necessary to protect operation of the DNS. Disputes go to independent arbitration panel that could issue binding decisions. -or- Describe this limitation in a 'golden' Bylaw or Article that cannot be amended by any means. -or- Using enhanced review and redress mechanisms, the community can override any board or management decision that the community believes exceeds ICANN bylaws.	WS1
Reform the function of the Ombudsman (Work Stream 2)	
In Bylaws or Articles, add new power for community representatives (Members, CCWG, etc.) to select the ICANN Ombudsman. By supermajority or simple majority vote?	WS2
In Bylaws or Articles, allow NomCom to select and retain the Ombudsman.	WS2
In Bylaws or Articles, give the Ombudsman the ability to refer a matter to an Independent Review Panel.	WS2
Remove ICANN board director(s) (Work Stream 1)	
In Bylaws or Articles, add new power for community representatives (Members, CCWG, etc.) to terminate one or all ICANN directors. By supermajority or simple majority vote?	WS1

Community Powers for consideration	WS1/2
<p>Review and Redress Mechanisms</p> <p>Note: the following matters came up in discussion and are noted here to be referred to by Working Party 2: Review and Redress Mechanisms.</p>	
<p>Community Veto</p> <p>Amend the existing corporate bylaws (and /or articles of incorporation) to create a new mechanism that empowers the Community to overturn board decisions on a limited number of specific, enumerated issues and also to recall nonperforming board members. This community veto process would be fashioned such that a decision to over-rule the board is determined via aggregation of decisions of the existing ICANN community structures. Each individual component of the relevant Community (for example, GAC, GNSO, At-Large, CCNSO, etc.) would have a proportional share in the over-all Decision of the Community (to veto or not to veto the board). Each of these individual structures already has internal mechanisms to make decisions through which the larger Decision of the Community could ultimately be determined. We must scope what specific enumerated decisions can trigger such a community veto process (ex: the list developed in Frankfurt) and also a specific mechanism for triggering the veto process (ex: complaint supported by relevant 2 community components).</p> <p>The ombudsman (or neutral 3rd-party) could act as the facilitator of this community veto process in a purely administrative role: accept the matter for review, call the question to community vote, and collect the decisions of the individual components to reach the overall Decision of the Community (to veto or not to veto). The board would then be required to adopt this Decision of the Community unless it voted (unanimous or super-majority) to reject the Decision of the Community that was reached via this process and which would be stipulated to in bylaws and/or articles of incorporation.</p>	
<p>Refer any Board Decision to an Independent Review Panel</p>	
<p>Amend Articles or Bylaws to create a permanent standing Independent Review Panel which could make binding decisions on any Board Decision (as per ATRT recommendations).</p>	

Mechanisms

The following mechanisms (or structures) would allow the powers set out above to be used by the community. Different powers might require different mechanisms or structures. These are listed in order from most light-weight to more substantive changes.

Existing SO/AC Structure

Powers would be exercised by use of existing SO/AC structures, following the process noted in the table above and further set out by the proposer (see blog post at http://www.circleid.com/posts/20150203_proposal_for_creation_of_community_veto_for_key_icann_decisions/ for details)

Permanent Cross Community Working Group (CCWG)

Each AC/SO/SG would designate its representative to a permanent CCWG that stands ready to vote on challenges or initiatives filed by any AC/SO/SG.

Statutory Delegates

California non-profit law states that a non-profit corporation may have delegates, who would have some or all of the powers of members. Such delegates would not be "statutory" members of the organization (and that the organization would not be a "membership" non-profit). Here is the statutory language, from Cal. Corp. Code §5152: *A corporation may provide in its bylaws for delegates having some or all of the authority of members.*

Statutory Members

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)

Each AC/SO/SG would designate its Member representative. The Members stand ready to vote on challenges or initiatives filed by any Member

Supervisory Board

Create a two-tier board structure for ICANN as is common in some European companies, where the community's representatives sit in the Supervisory Board and have specific enumerated powers, and the general governance of ICANN remains the role of the ICANN Board

[get details from Roelof Meijer]

Appendix

Background for this work

CCWG Work Team 2 developed an inventory of accountability suggestions gathered from previous public comments and WG input. This inventory was last updated 15-Jan and published [here](#).

At its Frankfurt meetings, the CCWG used that inventory to develop high-level requirements for accountability measures, portrayed in the 'mind map' shown below (1/2 designate Work Stream):

