

## **Discussion Document on Internal to ICANN Option**

### **For Circulation Prior to Singapore**

#### **Introduction and Summary**

The December 1<sup>st</sup> proposal did not include an ‘Internal to ICANN Proposal’ but two of the written submissions, from ALAC and auDA, urged that such an option be seriously considered. Consequently, the survey included a number of questions relating to this. It found there to be strong support for an ‘ICANN Internal Option’ provided adequate accountability mechanisms are in place, that it should include the possibility of removing the IANA functions from ICANN, and that it include a mechanism where the IANA Functions can be removed from ICANN for “cause” related to the IANA Functions and contracted out to a third party.

On January 22, auDA circulated to the CWG a revised ‘Internal to ICANN Option’ which provided more detail than that it had provided on December 1. As this is the most specific elaboration of an ‘Internal to ICANN Proposal’, the CWG reviewed it and is presenting it in its entirety for the consideration of the broader naming community, but including questions and annotated comments from the CWG.

#### **auDA Proposal for an Internal to ICANN Option**

##### **Introduction**

The following is presented as an alternative to the model presented within the Cross Community Working Group (CWG) on Naming Related Functions’ Draft Transition Proposal.

It is an evolution of the .au Domain Administration’s (auDA’s) December 2014 submission<sup>1</sup> (“the auDA proposal”) to the CWG’s call for comments<sup>2</sup>. As stated in the auDA proposal, this document assumes the need for a minimalist, simple approach to the IANA transition, given, as the CWG has itself acknowledged:

*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.*

Further, this document assumes a narrow definition of the IANA function relating to the organisation’s technical and administrative responsibilities related to naming and also assumes

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<sup>1</sup> <http://forum.icann.org/lists/comments-cwg-naming-transition-01dec14/msg00038.html>

<sup>2</sup> <https://www.icann.org/public-comments/cwg-naming-transition-2014-12-01-en>

policy development functions remain, appropriately, the remit of relevant ICANN Supporting Organisations and Advisory Committees.

This proposal envisages an efficient, effective and minimally burdensome IANA oversight system. Only elements relating to ongoing operational matters (the Customer Service Committee) would convene on a regular basis. The remainder of the “system” would be activated as required.

This proposal outlines mechanisms that facilitate the effective and independent transfer of the IANA function and obligate ICANN to follow community instruction.

It is acknowledged that a number of additional structural changes would be required to ensure the validity and sustainability of the proposed model. The first key area would be to ensure an enhancement of the current levels of functional separation of the IANA function from the rest of ICANN. A number of initiatives could be implemented to facilitate this, including, but not limited to:

- A discrete, reviewable budget for the IANA functions operator;
- Dedicated legal advisors and independent legal advice for the operator.

In summary, this proposal addresses a pair of fundamental issues related to the IANA transition. That is, facilitating for future separability of the IANA functions from ICANN (particularly in cases of non-performance) and defining a trigger mechanism(s) for such a process.

### **Implementation mechanisms – “The IANA Trust”**

It is proposed that the future management and oversight of IANA’s naming functions be placed into a Trust. While supplementary provisions may be appended to ICANN’s bylaws (which are internally-focussed) the principal obligations placed upon ICANN (as Trustee) would be defined in this Declaration of Trust, providing an appropriate degree of separation between ICANN and the IANA function itself.

The transition from the NTIA would require ICANN to make a “Declaration of Trust” that it will perform the names function for the benefit of the relevant stakeholder community – as defined by the mechanisms outlined later in this document.

This community will be the “Guardian” of the trust, and will be the sole entity empowered to make relevant changes to the document and, if appropriate, move the role of trustee to a third party.

#### **CWG Questions:**

Does the trust arrangement allow what is presumably an unincorporated entity, the ‘Guardian’ to specify changes to the trust agreement?

Would the procedures by which the Guardian comes to a decision to make such changes have

to be incorporated into the trust arrangements themselves?

If these Guardian decision-making procedures were to change in the future, would anyone other than the Guardian have input or control over the changes?

Within the trust document, ICANN will commit to implementing the results of regular reviews (say every 5 years) regarding the performance of the IANA functions, as identified by the community. These reviews would address not only operational matters and Service Level Agreements, but also broader issues such as whether due process has been followed and policy guidance from the community has been adhered to.

The trust document will also commit ICANN to take all necessary steps to transfer any rights and obligations it has to the new “trustee” where failings identified by periodic reviews cannot be remedied.

**CWG questions:**

How would the trustee ensure that ICANN would comply with its commitment to make these transfers?

If this required litigation, how would the litigation be financed?

For performance issues outside of that regular review, there would be escalation paths identified to try to remedy those violations. Those escalation paths could also lead - in the most egregious of cases - to the “Guardian” moving the role of trustee to a third party..

In order to facilitate “urgent” reviews or the rebid processes, ICANN would prescribe funding in the Declaration that will be held in escrow, should such circumstances arise.

It should be noted that this proposal relates only to IANA’s naming functions, and is designed to be complementary to ICANN’s role with regard to numbering and protocol functions. That is:

- In relation to the numbers and protocols functions, ICANN will be acting in its own capacity, as a contractor for those services (governed by its by-laws)
- In relation to the names function, ICANN will be performing this task as trustee for that trust (governed by the trust document)

**Guardian**

This proposal envisages the Guardian as a cross-community group. Within the proposed Trust model the Guardian of the Trust is exclusively empowered to make amendments to Trust arrangements, including termination or transfer.

**CWG questions:**

Would the Guardian be a legal corporation?

Would it be created 'inside of ICANN', that is, by way of an ICANN Board bylaw or outside of ICANN.

This mechanism is not intended to address minor performance issues but rather as part of the escalation process for dealing with a limited number of circumstances such as gross incompetence or material breach by IANA. We have previously referred to this as "The Nuclear Option".

The Guardian would comprise IANA customers (TLD registries), a number of members from other SOs and ACs and, possibly, ISOC and other I\* bodies. It would also be empowered to engage technical and legal experts, as required.

**CWG Questions:**

If the Guardian is unincorporated, would there be any potential civil liability exposure for individuals and participating in the Guardian as the SO and AC's are themselves unincorporated?

How would the Guardian pay for its technical and legal experts?

The Guardian's role is to respond to identified catalysts for significant change to the management of the IANA function. These triggers may come in three forms:

- Systemic failings of the IANA operator, as identified by the periodic reviews;
- Out-of-cycle "urgent" failings identified by the CSC; or
- Pre-defined levels of community petitioning such as from 2 SOs or ACs where a 66% vote has been taken

The Guardian will assess whether a failing of IANA is so substantial that it warrants the transfer of the function to another operator. Should the Guardian determine that such a failing has occurred, it would make a recommendation to the community to that effect. That is, the Guardian does not itself take the decision to exercise the Nuclear Option.

As part of the escalation and consultation process, the Guardian would require input from all SOs and ACs, each of which would be required to show that a supermajority (perhaps 66%) of their membership support a re-bidding of the IANA function.<sup>3</sup>

### **Customer Service / Standing Committee**

Ongoing oversight and monitoring of IANA's work would be undertaken by the CSC. This would be a standing committee comprised of representatives from IANA's customers (TLD registries). To broaden representation, members from other parts of the community (notably ALAC, SSAC, RSSAC and GAC) would also be included.

The CSC would perform a strictly operational and administrative role, setting and reviewing metrics for IANA and its performance against them. While ICANN is the Trustee for the IANA naming functions, the CSC will be the active mechanism that represents beneficiaries of this service.

CWG Questions:

What role would the CSC have in the reviews

The CSC would work with the IANA functions operator to agree service levels, receive performance reports from the IANA operator, and conduct regular budget reviews.

Should minor matters or incidents arise with IANA's operations (an issue not warranting a full appeals process), the CSC would assist with or monitor resolution / mediation.<sup>4</sup>

In the case of a more serious complaint or failure regarding IANA, any individual stakeholder (registry) or group (such as the ccNSO or GAC) would raise their concerns with the CSC in the first instance.

The complaint would be assessed by the CSC and, if deemed appropriate, the group would send it to the Guardian. This would be the first step in a structured and transparent escalation process.

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<sup>3</sup> Noting that not all ccTLDs are ccNSO members. This requires further consideration: for example, the ccNSO could be tasked with coordinating engagement and consultation with all ccTLD managers.

<sup>4</sup> Note that these would be minor performance issues such as those that regularly arise between IANA and a client. In the vast majority of cases, these are resolved between the parties.

## Independent Appeals Process

As many stakeholders have noted in their comments to the CWG, a mechanism to deal with disputes that arise from the operations of IANA is absolutely essential.

This should be a binding arbitration mechanism, utilising the services of an independent arbitration organisation. However, under the terms of ICANN's Declaration of Trust, such appeals will not apply to the actions of the Guardian or CSC.

## Input from Community and Survey Results – ICANN Internal option

Original text – this option was not part of the draft proposal for public consultation and as such there is no original text.

- Statistical analysis of the Results of the public consultation on the CWG draft proposal with respect to an ICANN Internal option – this option was not part of the draft proposal for public consultation and therefore there are no results.

### Analysis of the CWG Internal Survey Results\*

#### Points of Major Agreement

- If adequate accountability mechanisms are in place, an “ICANN Internal” option should be adopted (Agree 77%, Disagree 623% - MAJOR AGREEMENT).
- Adequate accountability mechanisms in an “ICANN Internal” option should include the possibility of removing the IANA functions from ICANN (Agree 93%, Disagree 7% - MAJOR AGREEMENT).
- An ICANN Internal solution would be cheaper to implement and operate than the Contract Co. option (Agree 87%, Disagree 13% - MAJOR AGREEMENT).
- An ICANN Internal solution should include a mechanism where the IANA Functions can be removed from ICANN for “cause” related to the IANA Functions and contracted out to a third party (Agree 90%, Disagree 10% - MAJOPR AGREEMENT).
- An ICANN Internal solution should provide that Contract Co. can be created if necessary (in order to contract out the IANA Functions (Agree 83%, Disagree 17% - MAJOR AGREEMENT).
- An ICANN Internal solution should include a mechanism where the mutlistakeholder community may remove ICAN directors, or the entire Board, for “cause” under specific circumstances related to the IANA Functions (i.e. serious and persistent issues of non-performance relating to the IANA Functions, such as a failure to execute against established Service Level Agreements or non-adherence to the contract terms” and failure to follow applicable policy) (Agree 77%, Disagree 23% - MAJOR AGREEMENT).

\*a complete list of CWG internal survey results applicable to this section can be found at the end of this section

\*\*Major agreements - using 75% or more as the standard)

### Summary of Other Comments

- There are not enough details with respect to this option to properly comment on it.
- Survey questions were unclear.
- The MRT, CSC and IAP sections should be fairly similar in a Contract Co. and ICANN Internal solution.
- ICANN Internal solution may appear simpler at the onset but will represent significant additional complexities if there is a need to separate the IANA functions downstream.
- It is unclear how one could ensure that the IANA Functions could be separated from ICANN at a later date if ICANN is holding the authority for allocating the IANA function.
- Significant risks would be associated with providing the MRT with the power to spill the Board.
- An ICANN Internal solution is predicated on having adequate accountability mechanisms. Such mechanisms are, at least in part, linked to the work of the CCWG on Accountability which is not scheduled to complete its work until after the CWG should provide its proposal. This represents a significant and risky dependency for an ICANN Internal option which should be addressed by the CWG by adjusting its schedule or including requirements in an ICANN Internal option that it can only be valid if the proper accountability mechanisms have been proposed by the CCWG on Accountability and implemented by ICANN prior to the transition.

### Key Issues and Open Questions

- Separability of the IANA Functions – Although an ICANN Internal option does present many benefits vs the Contract Company option it is certainly more of a challenge with respect to developing a realistic plan to separate the IANA function from ICANN should there be a need to do so. In an ICANN Internal option one would expect that the NTIA would transition the responsibility for the IANA function from itself to ICANN (i.e. the responsibility for assigning the IANA Functions contract – what exactly this entails needs to be clarified). In the event a transfer would become necessary this would require that the following concerns and questions be addressed:

- Would a contract be required?
  - If ICANN has the responsibility for assigning the IANA Functions contract and that the community requests that ICANN assign this contract to another operator (for cause and per the rules put in place for this) what recourse would be available to the community to deal with a refusal by ICANN to do so?
  - Would ICANN be the party signing this contract with the new operator for the community? If not this would imply that the authority for assigning the IANA Functions contract would have to be transferred from ICANN to another party (Contract Company?). What recourse would the community have to deal with a refusal by ICANN to do so? Would this be required even if ICANN was willing to reassign the IANA functions contract?
  - It is uncertain that a new operator, in either scenario, would provide the service for free as in the current situation. Who would pay for this new service?
  - Who would pay to establish and operate Contract Company if it becomes necessary to do so?
- Accountability – Separability, and options for avoiding having to resort to separation are directly dependent on the availability of adequate accountability mechanisms. As stated in the CWG charter this can be a shared responsibility between the CWG and the CCWG. The current schedules of the CWG and the CCWG are essentially misaligned to allow the CWG to produce a proposal for transition that is in step with the results of the CCWG. The CSG needs to identify the minimum accountability mechanisms that are required for an ICANN Internal option and insure, if required, proper coordination with the CCWG

### **Results of the Internal Surveys Regarding The ICANN Internal Option**

(these should not interpreted as consensus positions)

- **If adequate accountability mechanisms are in place, an “ICANN Internal” option should be adopted (Agree 77%, Disagree 623% - MAJOR AGREEMENT).**
- **Adequate accountability mechanisms in an “ICANN Internal” option should include the possibility of removing the IANA functions from ICANN (Agree 93%, Disagree 7% - MAJOR AGREEMENT).**
- An ICANN Internal solution would be much less complex than the Contract Co. option (Agree 71%, Disagree 29%).
- An ICANN Internal solution would pose less risk to security and operational stability than the Contract Co. option (Agree 68%, Disagree 32%).
- **An ICANN Internal solution would be cheaper to implement and operate than the Contract Co. option (Agree 87%, Disagree 13% - MAJOR AGREEMENT).**



- **An ICANN Internal solution should include a mechanism where the IANA Functions can be removed from ICANN for “cause” related to the IANA Functions and contracted out to a third party (Agree 90%, Disagree 10% - MAJOPR AGREEMENT).**
- **An ICANN Internal solution should provide that Contract Co. can be created if necessary (in order to contract out the IANA Functions (Agree 83%, Disagree 17% - MAJOR AGREEMENT).**
- An ICANN Internal solution SHOULD INCLUDE A SUPERVISORY Board (overseeing the ICANN Board) to which the community can appeal (Agree 69%, Disagree 31%).
- **An ICANN Internal solution should include a mechanism where the multistakeholder community may remove ICANN directors, or the entire Board, for “cause” under specific circumstances related to the IANA Functions (i.e. serious and persistent issues of non-performance relating to the IANA Functions, such as a failure to execute against established Service Level Agreements or non-adherence to the contract terms” and failure to follow applicable policy) (Agree 77%, Disagree 23% - MAJOR AGREEMENT).**