Cross Community Working Group on Enhancing ICANN Accountability

Options for CCWG Discussion arising from Public Comments on Second Draft Proposal

Work Party 1 (Community Empowerment)
12 October 2015

This Document

This paper extracts just the Options sections of the more comprehensive CCWG analysis.

The Rapporteur (Jordan Carter) has highlighted options he believes merit the most attention from the CCWG in deciding how to improve the Proposal. They have been selected based on how vital it is to decide them to allow a revised Proposal to be finalised.

> These options are highlighted like this – with lines around the text and a light grey highlight – to draw the reader's eye.

Budget and Strategic Plan Veto

Options for CCWG Consideration

A number of the issues raised above were raised and considered addressed in the CCWG so perhaps more clarity and refinement is required on PTI separation, for example. Some further areas for exploration include:

> 1. **Line Item Veto.** As AFRALO suggests, this might allow the community to more surgically affect the year's operating plan without unduly threatening day to day operations.

2. **Limit Round Trips.** While previously discussed the idea of limiting round trips continues to persist and should perhaps be revisited. A number of proposals were advanced in this areas including:
   a. Adopting a 10% increase from the previous year.
   b. Escalating to alternative accountability measures (arbitration, board reorganization)
   c. Suspending new initiatives

3. **Vote allocation.** There were conflicting issues expressed on the issue of vote allocation, with some suggesting the GNSO should have a larger influence as the source of funds while others fear the "tyranny of the majority" that such allocation could represent. Perhaps the CCWG could discuss different voting allocations for different types of projects or give the GNSO additional influence with an annual budget would involve an increase in fees.

4. **Defined Cause Boundaries for Objection:** The ICANN board suggest that only "New Initiatives that are not in the 5-year Strategic or Operating plan or that are inconsistent with the purpose, mission and role set out in ICANN's Articles and Bylaws should be subject to community objection."

5. **5 Year Plan versus Annual:** The ICANN Board argue that the 5-year plan should be subject to community approval but not the annual budget.

6. **Course Correction.** The ICANN Board suggest they maintain the ability, throughout the Fiscal Year, to approve certain new expenses not planned for in the approved Annual Operating Plan and Budget. This allows the Board to act in cases of unforeseen urgent matters that put ICANN's operation and mission at risk. The Community should maintain the ability to reject items that fall outside the ICANN scope.

7. **PTI Budget Separation.** CyberInvation make a specific recommendation with respect to PTI processes:

   PTI/IANA budget (and relation to CWG requirements); "As per our interventions at the Paris meeting we suggest the following budget process:
   1. PTI Formulates its budget for the next fiscal year using its internal processes
   1.1. These processes will include detailed input from the ICANN staff members who sit on PTIs board and will be privy to the financial status of the parent entity at any given time
   1.2. The independent directors on PTIs board will also be involved in this budget formulation process
   1.3. Community input may be then solicited via the CSC or another PTI level mechanism to ensure that the community and the direct customers of the PTI have no concerns as to cost overruns or unnecessary spending as part of the next fiscal years budget for PTI

2. PTI budget is sent to the parent entity for approval, this approval should be automatic except in the case of extreme unexpected financial crisis in the parent entity in which case the budget may be returned to PTI for an emergency reconsideration process
3. ICANN is compelled via a binding agreement or other legal instrument to honour PTIs budget request
4. This process will be ring fenced and explicitly not subject to the ICANN budget veto and/or reconsideration process as suggested by the CCWG"

Standard Bylaws

Options for CCWG Consideration

- The CCWG may consider further clarifications around the triggers, thresholds and dispute resolution paths, required for, or resulting from, the use of this power.

- The CCWG may consider revising the community empowerment mechanism to rely on consensus among the SOs and ACs, rather than voting.

- The CCWG may consider further explaining how a conflict or deadlock resulting from the use of this power would be resolved.

Fundamental Bylaws

Options for CCWG Consideration

- The CCWG may consider further clarifications in its communications of the process and methods by which fundamental bylaws would be changed or amended.

- The CCWG should consider making an explicit reference to the SIFR in the bylaw referring to the IFR process.

- The CCWG should consider the comments of the ICANN board while discussing the question of the SMCM and any other reference mode that the CCWG may deliberate on.

- The ST-WP may consider a stress test related to a deadlock between the community and the board over changing of fundamental bylaws.

- Given that the CCWG made the decision not to further examine the SCWG it may not require further analysis to respond to the comments of the BC with

regards to the launching body of the SCWG, further clarification should be sought form the BC to assess if the current status of work on the SCWG is sufficient.

- Given the current divergence on the issue of enshrining Article XVII as a fundamental bylaw the CCWG may need to revisit this discussion and provide further rationale for their decision.

- The ALAC noted the following clarification for the CCWG to consider, *"Paragraph 259: The definition of the Board threshold to approve changes to Fundamental Bylaws is unclear. Most Board votes are judged based on the number of Members voting or abstaining, but excluding those members not present. For the approval of Bylaw changes, the threshold is 2/3 of all members of the Board. Accordingly, the threshold for approving Fundamental Bylaws should explicitly be 75% of all members of the Board, since "available votes" could be construed as just those present at the time. This matches the description in Paragraph 236."*

Individual Director removal

Options

1. **Explore combinations of standard vs number of decision makers.** Comments appeared to be bipolar with the CCWG proposal and supporters favoring the lowest barrier to removal, and most on the opposing view supporting both full community and "for cause". It may be worthwhile exploring different combinations of standards for dismissal and the composition of the body making the decision.

2. **Limit the number, and stagger time periods for individual board removal to mitigate "batching".**

Recalling the Entire Board

Options for Consideration by full CCWG

1. **Create Standards for Selection of Interim Board**. Suggestions include:
- Deepest technical and governance abilities above all other criteria,
- High level of independence and professionalism
- Operational core competencies such as in finance, risk, audit and governance.
- Familiarity with the work of ICANN is important, but such directors should not predominate.
- Interim Board must include a predominance of independent Directors.

The Second Draft is silent on selection standards for the Interim Board, except to note that the geographic diversity requirement will be waived. CCWG may wish to consider revising its Proposal to state that standards for the Interim Board will be the same as

those set out in the Bylaws for the ICANN Board (other than the requirements relating to geographic diversity).

2. Clarify Consequences for Failure of Community to Meet Process Requirement. The CCWG should consider and make clear the consequences if the community does not satisfy the goals, principles, and deadlines in the process.

The CCWG should consider what consequences if any, would attach if particular goals, principles or deadlines are not met. The CCWG may wish to note the difference between deadlines, which are part of the process, and goals and principles, which inform the process.

3. Make Time Periods Less Rigid. One commenter expressed concern that the 120 day period for selection of the replacement board, while reasonable, might not be sufficient, and suggested that this be a target rather than a deadline. Another commenter expressed a more general concern that the tight timelines for discussion could open the process to capture.

This is related to the previous item. The CCWG may wish to make some or all of the time periods less rigid, including the replacement director deadline, or make other adjustments to limit possibilities for "capture" based on unequal ability to respond to tight timelines. At the same time, the CCWG should consider how to avoid opening the door to unreasonable delays.

4. Eliminate Potential for Failure to Agree on Interim Directors. The CCWG may wish to review the interim director process to ensure that it will not result in a failure to agree on Interim Directors.

5. Simplify Process. One commenter called the process "labyrinthine and cumbersome."

While this may be partly intentional, in order to make sure that total recall is not too easy, the CCWG should review the process to see if it can be clarified and simplified, without actually making it easier to recall the Board.

6. Establish a Basic Outline of Minimum Standards in WS1.
The CCWG should strongly consider whether to establish at least a basic outline of minimum standards for Board removal as part of WS1, rather than leaving this entirely to WS2.

7. Higher Threshold for Board Recall. The CCWG should consider the suggestion that Board recall should have an even higher threshold of 80%.

Bringing AoC into ICANN Bylaws

Options for Consideration by full CCWG

Areas where we could present options for CCWG consideration include:

1. Commitment to implement Review recommendations before opening next round of new gTLDs. On p.80 of the 2nd draft report, CCWG retained the AoC commitment regarding expansion of TLD space, which is part of the Competition, Consumer Choice, and Consumer Trust (CCT) review:

> "ICANN will ensure that as it expands the Top-Level Domain (TLD) space, it will adequately address issues of competition, consumer protection, security, stability and resiliency, malicious abuse issues, sovereignty concerns, and rights protection."

And in para 575 CCWG explicitly applies that commitment:

> "Subsequent rounds of new gTLDs should not be opened until the recommendations of the previous Review required by this section have been implemented."

The Board did <u>not</u> support waiting for implementation of CCT Review before next round, saying "the bar of future rounds of introduction of new gTLDs until prior recommendations are implemented poses a risk of a barrier to entry, and the Board is not supportive of that change."

The board subsequently expanded on its comment, in an email from Rinalia Abdul Rahim, including these points:

> *The Board will complete the CCT review along with several other reviews related to the new gTLD program before we decide whether and how to move forward with the next round. (Note: There are a total of nine reviews.)*
> - *The Board will take into account the recommendations from all of these reviews.*
> - *Depending on what the recommendations actually are, the Board will decide which of the CCT review recommendations must be implemented before moving forward with the next round. It may be appropriate to implement some of the recommendations in tandem with moving forward. It all depends on what recommendations emerge from the reviews.*

> *(2) For any future round of new gTLDs, it is important for the ICANN community to agree when ICANN is ready to move forward. The outcomes of the CCT review are expected to be key inputs into the discussion. The outcomes of the CCT review alone, however, should not be the sole determinant for moving into the next round. The GNSO's policy development work on the expansion of the gTLD namespace is*

a key consideration in addition to other reviews.

(3) There are 9 reviews related to the new gTLD Program scheduled for implementation between Q3 2014 and Q2 2017 – one of these reviews is the CCT Review. The Board would not consider initiating the next round of new gTLDs without completing all the reviews to learn what improvements are necessary for the next round.

(4) The scope of the CCT review is not limited to the expansion of the gTLD namespace. It may result in complex recommendations that require a longer period of time for implementation. Placing a specific requirement in the Bylaws to restrain ICANN from moving forward with future rounds of new gTLDs until all CCT review recommendations are implemented does not assure alignment with ICANN's core value of promoting competition in the registration of domain names.

Per Rinalia's latest email, the board proposes that the CCT Review Team include in its report a designation for each of its recommendations, indicating either:

> 1. Accept and implement BEFORE the next round of new gTLDs; or

> 2. Accept and implement in tandem with the next round of new gTLDs

The Board said it would "make its decision based on input from the RT as well as input from the community and staff."

WP1 recommends that the full CCWG consider two options for responding to this comment:

Option A: retain para 575 from the CCWG 2nd draft report, which requires implementation of accepted CCT review team recommendations before opening the next round of gTLD expansion.

Option B: replace para 575 with "For each of its recommendations, this review team should indicate whether the recommendation, if accepted, must be implemented before opening subsequent rounds of gTLD expansion"

2. **Review Team composition.**   CCWG 2nd draft proposal states in para 514 on p.74:

> Review teams are established to include both a fixed number of members and an open number of participants. Each SO and AC participating in the Review may suggest up to 7 prospective members for the Review Team. The group of chairs of the participating SOs and ACs will select a group of up to 21 Review Team members, balanced for diversity and skills, to include up to 3 members from each participating SO and AC . In addition, the ICANN Board may designate one director as a member of the Review Team.

Commenters said the above proposal would represent a drastic reduction in representation from the status quo. Also a suggestion to rethink review team composition to increase presence of affected constituencies. Composition would dilute GNSO influence, and the limit on 3 Members per AC/SO means some GNSO Constituencies will not be represented.

WP1 asked ICANN staff for data on composition of prior AoC Review Teams:

ATRT1 (15 people):	**ATRT2** (16 people):
• 1 ALAC • 2 GAC • 1 ASO • 3 ccNSO • 5 GNSO • Chair of the GAC or designee • ICANN Board Chair or designee • Assistant Secretary for NTIA	• 2 ALAC • 3 GAC • 1 SSAC • 1 ASO • 2 ccNSO • 2 GNSO • 2 Experts • Chair of the GAC or designee • ICANN Board Chairman or designee • Assistant Secretary for NTIA
SSR (16 people):	**WHOIS** (15 people):
• 1 ALAC • 1 GAC • 2 SSAC • 1 RSSAC • 2 ASO • 3 ccNSO • 2 GNSO • 2 Independent Experts • Chair of the GAC or designee • ICANN CEO or designee	• 2 ALAC • 1 GAC • 1 SSAC • 1 ASO • 1 ccNSO • 3 GNSO • 3 Independent Experts / Law Enforcement • Chair of the GAC or designee • ICANN CEO or designated nominee

WP1 recommends that the full CCWG consider two options for responding to this comment:

Option A: retain para 514 from the CCWG 2nd draft report, which limits each AC and SO to 3 representatives on a review team.

Option B: change para 514 to allow AC/SO chairs to select more than 3 from an AC or SO, if any of the 21 member slots are not allocated to other ACs/SOs. The revised para 514 would be:

Review teams are established to include both a fixed number of members and an open number of participants. Each SO and AC participating in the Review may suggest up to 7 prospective members for the Review Team. The group of chairs of the participating SOs and ACs will select a group of up to 21 Review Team members, balanced for diversity and skills, allocating at least 3 members from each participating SO and AC that suggests 3 or more prospective members. In addition, the ICANN Board may designate one director as a member of the Review Team.

3. AoC 8b/Article XVIII as a Fundamental Bylaw? There is a split in the comments on whether ICANN's Article XVIII should be a Fundamental Bylaw. We discuss this in the AoC group since this question originated in our earlier consideration of AoC commitment 8b: "ICANN affirms its commitments to 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..."

The 2nd draft report covers this question on p.36, where CCWG said Article XVIII did <u>not</u> need to be a Fundamental Bylaw, for three reasons:

> CMSM must approve with 2/3 vote any change to ICANN's Articles of Incorporation, which already states that ICANN is a California Nonprofit Public Benefit Corporation.

> CMSM could block any proposed change to ICANN Bylaws Article XVIII, which states "The principal office for the transaction of the business of ICANN shall be in the County of Los Angeles, State of California."

> On first report, 3 commenters (IPC, BC, CoA) wanted Art XVII to be Fundamental, 3 did not.

Five commenters on 2nd draft report said Article XVIII should be fundamental (BC, COA, IPC, Ping, USCIB). 4 commenters said Article XVIII should not be Fundamental. (Centre for Internet and Society, India, Brazil, New Zealand)

WP1 believes this should be considered by the full CCWG, since it is also a matter being discussed in WP2 and in the Fundamental Bylaws group in WP1. The full CCWG could consider two options for responding to this comment:

> *Option A: retain the CCWG 2nd draft recommendation to designate ICANN Bylaws Article XVIII as a regular bylaw.*

> *Option B: designate ICANN Bylaws Article XVIII as a Fundamental Bylaw.*

4. The Commitments contained in AoC reviews of gTLD expansion and WHOIS would go into the bylaws as part of the reviews. But some want these commitments to go into Mission/Core Values. Here is how these commitments were described in the 2nd draft report:

ATRT: The Board shall cause a periodic review of ICANN's execution of its commitment to maintain and improve robust mechanisms for public input, accountability, and transparency so as to ensure that the outcomes of its decision-making will reflect the public interest and be accountable to all stakeholders.	The commitment to do a Review now becomes part of ICANN Bylaws. The second part of this sentence ("its commitment to maintain...") clarifies an ICANN commitment that would also become part of the Bylaws.

SSR: The Board shall cause a periodic Review of ICANN's execution of its commitment to enhance the operational stability, reliability, resiliency, security, and global interoperability of the DNS.	The commitment to "operational stability, reliability, resiliency, and global interoperability of the DNS" will also be part of Bylaws Core Values (see Section 3 for further detail).
CCT: ICANN will ensure that as it expands the Top-Level Domain (TLD) space, it will adequately address issues of competition, consumer protection, security, stability and resiliency, malicious abuse issues, sovereignty concerns, and rights protection.	This Review includes a commitment that becomes part of ICANN Bylaws, regarding future expansions of the TLD space.
WHOIS/Directory Services: ICANN commits to enforcing its existing policy relating to WHOIS/Directory Services, subject to applicable laws. Such existing policy requires that ICANN implement measures to maintain timely, unrestricted and public access to accurate and complete WHOIS information, including registrant, technical, billing, and administrative contact information.	This Review includes a commitment that becomes part of ICANN Bylaws, regarding enforcement of existing policy WHOIS requirements.

> *WP1 believes this should be considered by the full CCWG, since it is also a matter being discussed in WP2.*

Community Forum

Options for CCWG Consideration

Given the overall support for the Community Forum and its role as outlined in the CCWG proposal, the WP does not believe that there are options that require further consideration by the CCWG.

However, while the proposal notes that work on establishing the Community Forum will occur during the implementation phase of WS1, there remain, as identified, areas for further refinement that might warrant being addressed prior the finalization of the proposal. These could include but are not limited to how the Community Forum is formed once triggered, the composition of the Community Forum, whether there would need to be moderation, and what timescales are appropriate for the discussion of the various powers.

Community Mechanism as Sole Member

Options for CCWG Consideration

1. Continue to evolve SMM to address specific points of concern raised in public comment, while maintaining "membership" model.

2. Explore how maximum legal enforcement can be achieved for desired community powers under an empowered designator model for comparison.

Sub-Issues within the Models:

1. Single Member and Single Designator Models
   a. Voting or consensus basis;
      i. Move away from "voting" and towards "consensus" for decision-making purposes within the community mechanism.
      ii. Consider community powers only may be exercised by the community as a whole, based on consensus or near consensus of the whole of it.
      iii. Consider option of consensus definition depending on absence of recommendations or advice against when using community powers.
      iv. Consider option of consensus definition depending on absence of recommendations or advice against.
   b. Reconsider role of the ACs in the Model's community forum. Should some ACs be non-voting / decisional and rather, advisory only?
   c. Reconsider voting allocations between SOs-ACs to be more in-line with balance of appointments to ICANN board.
   d. Consideration of advice from those SOs and ACs opting out of the decision-making mechanism;
   e. Maintaining balance of power to prevent capture of/by those opting-in to the decision-making mechanism;
   f. Factoring in conflicts of interest and fiduciary or other responsibilities (such as public interest) into the decision-making design;
   g. Ensuring accountability of the new structure to the broader community and the global public interest.

2. **MEM based issues**:
   a. Decide which powers, if any, can be enforced in a MEM based model, and if they are sufficient to meet community powers and other requirements.
   b. Ascertain whether community can enter binding arbitration without personhood.
   c. Ascertain whether community has standing in court without personhood.
   d. Ascertain whether ICANN can be bound by a binding arbitration if it declines to enter into it or otherwise attempts to frustrate the process.
   e. Ascertain the level of personal or other risk community members must undertake to exercise or enforce any of the community powers.
   f. Ascertain whether the MEM meets CWG-Stewardship, NTIA, and other external requirements.
   g. Ascertain whether the MEM meets all required stress tests.
   h. How does the community make decisions within this model

3. **Issues pertinent to either model**: decision-making process has to be absolutely capture-proof and require that any exercise of community powers is backed by a consensus or near consensus of the whole community

4. Consider determining a "fixed understanding" of who will vote or otherwise make decisions in the mechanism before decisions are made by CCWG about which Model to finally propose.