Scope, Powers and Mechanisms Working Paper

Draft 1, 23-Feb-2015

Work Party 2 has been tasked with considering enhancements to existing accountability and new mechanisms that provide for periodic and issue-specific review of ICANN operations and redress for those affected by ICANN's failure to carry out its mission statement in conformance with specified standards to be developed. These mechanisms should permit both individuals/entities harmed by specific actions or inaction and should also permit ICANN stakeholders more generally (e.g., SOs, ACs, Cross Community Groups, others TBD) to hold ICANN accountable for carrying out its mission in compliance with agreed-upon standards. In doing so, Work Party 2 will set out necessary changes (e.g., bylaws changes) to deliver these review and redress mechanisms.

As the division of tasks falling within the remit of the 2 Work Party are likely to overlap, the Work Parties will work collectively on some work streams (e.g., standards, standing issues, remedies, and bylaw provisions implementing them) and will coordinate work on other issues (e.g., details regarding the operation of empowerment and review/redress mechanisms).

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

1. Enhance existing review/redress tools (Reconsideration, Independent Review, Ombudsman);
2. Enhance existing and/or create new periodic review tools such as standing ATRT, Board/SO/AC reviews, others.
3. In each case, develop substantive and procedural requirements, including:
   a. Composition, including number and qualifications;
   b. Selection;
   c. Standing;
   d. Standard against which action/inaction is measured;
   e. Operations/decision-making process and procedures;
   f. Outcome, output, redress;
   g. Accessibility (e.g., cost, cost allocation); and
   h. Implementation (e.g. Bylaws, etc.).

Principles

Limit ICANN actions to issues within its stated mission and require ICANN to act consistent with clearly articulated principles:

- 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];
- Prevent ICANN Board redefining mission/scope in Bylaws without community consensus
- Prohibit scope creep through bylaws changes, policy, policy implementation, or contracts

Review and Redress Mechanisms

Drawing on the previous inventory documents and discussions in the CCWG, below is a table of **existing review and/or redress mechanisms.**

Bylaws and policies relating to transparency and information access	
Office of an Ombudsman (Bylaws Art. V) "To provide an independent internal evaluation of complaints by members of the ICANN community who believe that the ICANN staff, Board or an ICANN constituent body has treated them unfairly."	
Request for Reconsideration (Bylaws Art. IV, Sec. 2) of: • One or more staff actions or inactions that contradict established ICANN policy(ies); or • One or more actions or inactions of the ICANN Board that have been taken or refused to be taken without consideration of material information, except where the party submitting the request could have submitted, but did not submit, the information for the Board's consideration at the time of action or refusal to act; or • One or more actions or inactions of the ICANN Board that are taken as a result of the Board's reliance on false or inaccurate material information.	
Process for "independent third-party review of Board actions alleged by an affected party to be inconsistent with the Articles of Incorporation or Bylaws" (Bylaws Art. IV, Sec. 3) Prior to April 2013, the standard of review was: Requests for such independent review shall be referred to an Independent Review Panel ("IRP"), which shall be charged with comparing contested actions of the Board to the Articles of Incorporation and Bylaws, and with declaring whether the Board has acted consistently with the provisions of those Articles of Incorporation and Bylaws. Effective in April 2013, the Board limited IRP to the following questions: • Did the Board act without conflict of interest in taking its decision? • Did the Board exercise due diligence and care in having a reasonable amount of facts in front of them?; and • Did the Board members exercise independent judgment in taking the decision, believed to be in the best interests of the company?"	
"Periodic review of the performance and operation of each Supporting Organization, each Supporting Organization Council, each Advisory Committee (other than the Governmental Advisory Committee), and the Nominating Committee by an entity or entities independent of the organization under review . . . to determine (i) whether that organization has a continuing purpose in the ICANN structure, and (ii) if so, whether any change in structure or operations is desirable to improve its effectiveness." (Bylaws Art. IV, Sec. 4) MOVE TO WP1	TO WP1

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		TO WP1
Affirmation of Commitments (AoC) requires multiple reviews to be undertaken, specifically the Accountability and Transparency Reviews (ATRT)		

Drawing on the previous inventory documents and discussions in the CCWG, below is a table of **possible new/revised review and/or redress mechanisms.**

Accountability Suggestions from public comments and posts	WS 1/2	ID	T/ NT
Changes to Bylaws and Articles of Incorporation: add powers for community representatives			T
Mechanism for review of Board or management action in conflict with ICANN Bylaws or Articles of Incorporation			T
~~Permanent ATRT Committee and mechanism to ensure ATRT recommendations are timely implemented~~ MOVE to WP1	WS1		NT
Mechanism to require community (members, AC/SOs, etc.) to require Board to act on, implement, amend, accelerate implementation of, a previously approved ATRT recommendation			T
Permanent cross-community working group, Members, or Delegates (ALAC, ccNSO, GAC, SSAC, NRO, RSSAC, IETF, ASO, and each Constituency) with authority to: • • Refer any board decision to a [binding] independent review panel. • Approve changes to ICANN bylaws or Articles, with supermajority. (Members could not revise changes) • ***** items ~~struck through~~ are contained in WP1 work stream	WS1		T
Change bylaws for Reconsideration Process: trigger when board acts arbitrarily or capriciously; decisions subject to Independent Review	WS1		T
Enhance IRP • Standing, independent panel • Expand scope of IRP review • Reduce IRP standard of review • Ensure IRP is accessible (cost) • Make IRP's decisions binding	WS1		T
	WS1		NT

~~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.~~ TO WP1		
TO WP1	WS1	NT
Independent Appeals Panel for contested delegations, transfers, revocations, root zone changes & WHOIS	WS1	T
Broadly expand grounds on which ICANN decisions and operations can be challenged; lower threshold to succeed in a challenge	WS2	T
TO WP 1	WS2	NT
	WS2	NT
		?
~~Mechanisms that limit ICANN's ability to change registry or registrar fees~~ TO WP 1	WS1	NT
~~Create channels for inquiry/complaint/suggestions~~ TO WP 1	WS2	NT
Recall mechanism for any board member (All, those selected by an AC/SO and NomCom? By supermajority or simple majority? Expected standard of behavior?	WS2	T
Reform Ombudsman function: • Strengthen powers of the Ombudsman by granting it powers to set Board's decisions or policies aside and have authority to investigate any accountability-related complaint brought by an employee (with confidentiality) • Give Ombudsman ability to refer a matter to external body (WP1 Descrition: "In Bylaws or Articles, give the Ombudsman the ability to refer a matter to an Independent Review Panel") • In Bylaws or Articles, add new power for community representatives (Members, CCWG, etc.) to select the ICANN Ombudsman. By supermajority or simple majority vote? • In Bylaws or Articles, allow NomCom to select and retain the Ombudsman • Allow NomCom to select and retain Ombudsman	WS2	T
~~Enhance transparency protections/mechanisms:~~ • ~~Have Transparency International conduct audit of all SOs and ACs~~ • ~~Severely limit ICANN ability to deny disclosure/transparency requests~~ • ~~ICANN subject to annual audit of transparency and achievement of goals~~ • ~~Make all board deliberations transparent (with minimal redaction)~~ • ~~Require more advance notice and detail re: upcoming board meetings~~	WS2	NT

~~• Improve mechanism to obtain transparency of ICANN documents (e.g. FOIA)~~ ~~• Establish an Open Data Policy and develop an Open Data action plan, where ICANN documents are open by default.~~ <mark>To WP 1</mark>		
MOVE TO WP1	WS2	NT
Community Veto. 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).		T
Amend Articles or Bylaws to create a permanent standing Independent Review Panel that could make binding decisions on any Board Decision (as per ATRT recommendations).		T

Possible Implementation Approaches

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):